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

IN THE APPEALS CHAMBER

Before:	Justice George Gelaga King, Presiding Judge Justice Emmanuel Ayoola Justice Renate Winter Justice Raja Fernando Justice Jon M. Kamanda
Registrar:	Herman von Hebel
Date:	28 May 2008

PROSECUTOR Against MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-A)

JUDGMENT

Office of the Prosecutor:
Stephen Rapp
Christopher Staker
Karim Agha
Joseph Kamara
Régine Gachoud
Elisabeth Baumgartner
Bridget Osho
Francis Banks-Kamara

Defence Counsel for Moinina Fofana:
Wilfred Davidson Bola-Carrol
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Defence Counsel for Allieu Kondewa:
Yada Williams
Osman Jalloh

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The **APPEALS CHAMBER** of the Special Court for Sierra Leone ("Appeals Chamber") comprised of Hon. Justice George Gelaga King, Presiding, Hon. Justice Emmanuel Ayoola, Hon. Justice Renate Winter, Hon. Justice Raja Fernando, and Hon. Justice Jon Moadeh Kamanda;

SEISED of appeals from the Judgment rendered by Trial Chamber I ("Trial Chamber") on 2 August 2007, in the case of *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T ("CDF Trial Judgment" or "Trial Judgment");[1]

HAVING CONSIDERED the written and oral submissions of both Parties and the Record on Appeal;

HEREBY RENDERS its Judgment.

[1] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Special Court for Sierra Leone, Judgment, Trial Chamber I, 2 August 2007 [CDF Trial Judgment].

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I. INTRODUCTION

A. The Special Court for Sierra Leone

1. In 2000, following a request from the Government of Sierra Leone, the United Nations Security Council authorised the United Nations Secretary-General to negotiate an agreement with the Government of Sierra Leone to establish a Special Court to prosecute persons responsible for the commission of crimes against humanity, war crimes, other serious violations of international humanitarian law and violations of Sierra Leonean law during the armed conflict in Sierra Leone.[2]

2. As a result, the Special Court for Sierra Leone was established in 2000 by an agreement between the United Nations and the Government of Sierra Leone ("Special Court Agreement")[3] with a mandate to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[4]

3. The Statute of the Special Court ("Statute") empowers the Special Court to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, other serious violations of international humanitarian law and specified crimes under Sierra Leonean law.[5]

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[2] SC Res. 1315, UN SCOR, 4186th Mtg., UN Doc. S/RES/1315, 14 August 2000, paras 1-2.
[3] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and the Government of Sierra Leone, 16 January 2002, 2178 U.N.T.S. 138 [Special Court Agreement]. The Agreement entered into force on 12 April 2002.
[4] *See* Special Court Agreement, Article 1; Statute of the Special Court for Sierra Leone, annexed to the Special Court Agreement, Article 1.1 [Statute].
[5] Articles 2-5 of the Statute.

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B. Procedural and Factual Background

1. The Armed Conflict in Sierra Leone: The Kamajors and the Civil Defence Forces

(a) The Kamajors

4. When the civil conflict in Sierra Leone began in 1991, the military decided to enlist Kamajors as vigilantes to scout the terrain.[6] Because the Kamajors were limited in number, the community leaders and their chiefs made arrangements to encourage the Kamajors to expand their defence by increasing their manpower through initiation.[7] The Kamajors were then placed by their paramount chiefs at the disposal of government soldiers and they acted as allies in the defence of their areas against the rebels.[8] After each deployment, the Kamajors would be returned to their respective communities.[9] In 1996 after the death of Chief Lebbie Lagbeyor, the head of the Kamajors in the Southern Region, the paramount chiefs of the Southern Region appointed Regent Chief Samuel Hinga Norman as Chairman of the Kamajors for the region.[10]

5. The term "Kamajor" originally referred to a "Mende" male who possessed specialized knowledge of the forest and the use of medicines associated with the bush.[11] Kamajors not only procured meat but also protected communities from "natural and supernatural threats said to reside beyond the village boundaries."[12] While referred to as Kamajors by the Mende, other ethnic groups refer to them by different names.[13]

6. The emergence of the Kamajor Society may be traced back to the Eastern Region Defence Committee ("ERECOM"), of which Dr. Alpha Lavalie was Chairman and Dr. Albert Joe Demby was Treasurer.[14] The Kamajor Society was formed at the local level in 1991, and was structured by

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[6] CDF Trial Judgment, para. 62.
[7] *Ibid.*
[8] *Ibid* at para. 63.
[9] *Ibid.*
[10] *Ibid* at para. 64.
[11] *Ibid* at para. 60. Mende is an ethnic group in Sierra Leone and these traditional hunters are called "Kamajoisia" the plural of Kamajors in Mende.
[12] *Ibid* at para. 60.
[13] *Ibid. See also* fn. 51. The Trial Chamber found that the Konos call them Donsos; the Korankos, Yalunkas and Madingos call them Tamoboros; the inland Temnes call them Kapras and the river Temnes call them Gbethis. They were called the Organised Body of Hunting Societies (OBHS) in Freetown, and this body included companies of Ojeh Ogugu hunting society, or Padul Ojeh. The latter are confined to the Western Area which includes Freetown, Waterloo and Lumpa, and are called Western Area hunters. This organization in the Western Area pre-dated the war.
[14] *Ibid* at para. 61.

Dr. Lavalie in 1992, immediately after the military coup by President Strasser's National Provisional Ruling Council.[15]

7. On 30 November 1996, the Government of Sierra Leone and the Revolutionary United Front ("RUF") signed the Abidjan Peace Accord, but the war resumed less than two months later.[16] At this time there was general dissatisfaction among soldiers in the military, primarily due to complaints about their welfare, particularly their rations of rice.[17] After President Ahmad Tejan Kabbah was overthrown in a military coup on 25 May 1997, the Kamajors went underground in the bush.[18] However, following an announcement on the BBC rallying the Kamajors, Kapras, Gbethis, Tamaboros and Donsos, they assembled again in Pujehun District and took up arms to fight against the Armed Forces Revolutionary Council ("AFRC").[19]

(b) The Civil Defence Forces

8. Upon President Kabbah's arrival in exile in Conakry after the coup, the Organisation of African Unity ("OAU") designated the Economic Community of West African States ("ECOWAS") to restore President Kabbah's government to power. ECOWAS in turn mandated its Monitoring Group ("ECOMOG") to carry out the task.[20] In a bid to re-establish his government, President Kabbah created the Civil Defense Forces ("CDF") to coordinate the activities within the various militia groups and with ECOMOG.[21] The CDF was a security force comprised mainly of Kamajors who fought in the conflict in Sierra Leone between November 1996 and December 1999.[22] The CDF supported the elected government of Sierra Leone in its fight against the RUF and the AFRC.[23] President Kabbah appointed the Vice-President Albert Joe Demby as Chairman of the CDF, and Sam Hinga Norman ("Norman") as the National Coordinator. In his capacity as National Coordinator, Norman was responsible for coordinating the activities of the CDF/Kamajors

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[15] *Ibid.*
[16] *Ibid* at para. 65.
[17] *Ibid* at paras 65, 67.
[18] *Ibid* at paras 72, 73.
[19] *Ibid* at para. 74.
[20] *Ibid* at para. 82.
[21] *Ibid* at para. 80.
[22] *Ibid* at para. 2
[23] *Ibid.*

in supporting the military operations of ECOMOG to reinstate President Kabbah's government.[24] Norman was also responsible for obtaining assistance and logistics from ECOMOG in Liberia.[25]

9. ECOMOG collaborated with the CDF operationally, particularly in the Bo-Kenema axis.[26] In addition, the Nigerian contingent of ECOMOG supplied the CDF with logistics such as arms, ammunition, fuel, food, money, intelligence and medical care.[27]

10. Alleging that Norman, Moinina Fofana ("Fofana") and Allieu Kondewa ("Kondewa") were individually responsible pursuant to Article 6(1) and/or Article 6(3) of the Statue for alleged crimes committed by the Kamajors, the Prosecution charged Norman, Fofana and Kondewa under Article 15 of the Statute in an 8-Count Indictment with crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law in violation of Articles 2, 3 and 4 of the Statute.

2. The Indictment

11. The original Indictments against Fofana and Kondewa, approved on 24 June 2003,[28] were later consolidated with the Indictment against Norman, on 5 February 2004.[29]

12. The Consolidated Indictment ("Indictment")[30] charged the three persons pursuant to Article 2 of the Statute with crimes against humanity, namely: murder and "other inhumane acts" in Counts 1 and 3, respectively, pursuant to Article 3 of the Statute; violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, namely: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, pillage, acts of terrorism and collective punishments in Counts 2, 4, 5, 6 and 7, respectively; and, pursuant to Article 4 of the Statute, with a serious violation of international humanitarian law, namely: enlisting children under

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[24] *Ibid* at paras 80-81.
[25] *Ibid* at para. 81.
[26] *Ibid* at para. 86.
[27] *Ibid* at para. 86.
[28] *Prosecutor v. Fofana*, SCSL-03-11-I, Indictment, 24 June 2003; *Prosecutor v. Kondewa*, SCSL-03-12-I, Indictment, 24 June 2003.
[29] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-03-14-I, Indictment, 5 February 2004, dated 4 February 2004 [Indictment]. The original Indictment against Norman was approved on 7 March 2003. *Prosecutor v. Norman,* SCSL-03-08-I, Indictment, 7 March 2003.
[30] The case number for the joined cases is SCSL-04-14. The Indictment originally charged Samuel Hinga Norman, but following Norman's death on 22 February 2007, the Trial Chamber decided to legally terminate the proceedings against Norman and to strike his name from the case name.

the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities in Count 8.

13. Upon Norman's death on 22 February 2007, after the completion of the trial but before pronouncement of Judgment, the Trial Chamber on 21 May 2007 ruled that the trial proceedings were terminated against him and that the Judgment in relation to the remaining two Accused would be based on the evidence adduced on the record by all of the parties.[31]

3. The Charges

14. The allegations that formed the basis of the charges against Fofana and Kondewa, as contained in the Indictment, were that:

> "The CDF, largely Kamajors, engaged the combined RUF/AFRC forces in armed conflict in various parts of Sierra Leone – to include the towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas and the Districts of Moyamba and Bonthe. Civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were termed '**Collaborators**' and specifically targeted by the CDF. Once so identified, these '**Collaborators**' and captured enemy combatants were unlawfully killed. Victims were often shot, hacked to death, or burnt to death. Other practices included human sacrifices and cannibalism."[32]
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> "These actions by the CDF, largely Kamajors, which also included looting, destruction of private property, personal injury and the extorting of money from civilians, were intended to threaten and terrorize the civilian population. Many civilians saw these crimes committed; others returned to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property. Typical CDF actions and the resulting crimes included:
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> a. *Between 1 November 1997 and about 1 April 1998,* multiple attacks on Tongo Field and surrounding areas and towns during which Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors screened the civilians and those identified as '**Collaborators,**' along with any captured enemy combatants, were unlawfully killed.
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> b. *On or about 15 February 1998* Kamajors attacked and took control of the town of Kenema. In conjunction with the attack and following the attack, both at and near Kenema and at a nearby location known as SS Camp, Kamajors continued to identify suspected '**Collaborators,**' unlawfully killing or inflicting serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors also entered the police barracks in

[31] CDF Trial Judgment, para. 5.
[32] Indictment, para. 23.

Kenema and unlawfully killed an unknown number of Sierra Leone Police Officers.

c. *In or about January and February 1998,* the Kamajors attacked and took control of the towns of Bo, Koribondo, and the surrounding areas. Thereafter, the practice of killing captured enemy combatants and suspected **'Collaborators'** continued and as a result, Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and enemy combatants. Also, as of these attacks in and around Bo and Koribondo, Kamajors unlawfully destroyed and looted an unknown number of civilian owned and occupied houses, buildings and businesses.

d. *Between about October 1997 and December 1999,* Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembehun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected '**Collaborators**' and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.

e. *Between October 1997 and December 1999,* Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bembay, and the island town of Bonthe. As a result of these actions Kamajors identified suspected '**Collaborators**' and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property.

f. *In an operation called "Black December,"* the CDF blocked all major highways and roads leading to and from major towns mainly in the southern and eastern Provinces. As a result of these actions, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants."[33]

15. It was alleged that all acts or omissions charged in the Indictment as crimes against humanity were committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone,[34] stated as referring to "persons who took no active part in the hostilities, or were no longer taking an active part in the hostilities."[35]

16. In regard to the status, standing and functions of Norman, Fofana and Kondewa within the CDF structure, and the individual criminal responsibility of Fofana and Kondewa, it was stated in the Indictment, that, at all times relevant to this Indictment:

[33] *Ibid* at para. 24 (emphasis added).
[34] *Ibid* at para. 10.
[35] *Ibid* at para. 11.

(i) ". . . Norman was the National Coordinator of the CDF. As such he was the principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF. He was also the leader and Commander of the Kamajors and as such had *de jure* and *de facto* command and control over the activities and operations of the Kamajors."[36]

(ii) ". . . Fofana was the National Director of War of the CDF and Kondewa was the High Priest of the CDF. As such, together with Norman, Fofana and Kondewa were seen and known as the top leaders of the CDF. Fofana and Kondewa took directions from and were directly answerable to Norman. They took part in policy, planning and operational decisions of the CDF."[37]

(iii) ". . . Fofana acted as leader of the CDF in the absence of Norman and was regarded as the second in command. As National Director of War, he had direct responsibility for implementing policy and strategy for prosecuting the war. He liaised with field commanders, supervised and monitored operations. He gave orders to and received reports about operations from subordinate commanders, and he provided them with logistics including supply of arms and ammunition. In addition to the duties listed above at the national CDF level, Fofana commanded one battalion of Kamajors."[38]

(iv) ". . . Kondewa, as High Priest had supervision and control over all initiators within the CDF and was responsible for all initiations within the CDF, including the initiation of children under the age of 15 years. Furthermore, he frequently led or directed operations and had direct command authority over units within the CDF responsible for carrying out special missions."[39]

(v) ". . . Norman, as National Coordinator of the CDF and Commander of the Kamajors knew and approved the recruiting, enlisting, conscription, initiation, and training of Kamajors, including children below the age of 15 years. . . . Norman, . . . Fofana, as the National Director of War of the CDF; and . . . Kondewa as the High Priest of the CDF, knew and approved the use of children to participate actively in hostilities."[40]

(vi) "In the positions referred to in the aforementioned paragraphs, . . . Norman, . . . Fofana and . . . Kondewa, individually or in concert, exercised authority, command and control over all subordinate members of the CDF."[41]

(vii) "The plan, purpose or design of . . . [these three] and subordinate members of the CDF was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the

[36] *Ibid* at para. 13.
[37] *Ibid* at para. 14.
[38] *Ibid* at para. 15.
[39] *Ibid* at para. 16.
[40] *Ibid* at para. 17.
[41] *Ibid* at para. 18.

> RUF/AFRC occupation of Sierra Leone. Each Accused acted individually and in concert with subordinates, to carry out the said plan, purpose or design."[42]
>
> (viii) " . . [The three] by their acts or omissions are individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this indictment, which crimes each of them planned, instigated, ordered, committed, or in whose planning, preparation or execution each Accused otherwise aided and abetted, or which crimes were within a common purpose, plan or design in which each Accused participated or were a reasonably foreseeable consequence of the common purpose, plan or design in which each Accused participated."[43]

In addition, or alternatively, pursuant to Article 6(3) of the Statute, . . .[each of them] while holding positions of superior responsibility and exercising command and control over their subordinates, . . . [is] individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. Each Accused is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[44]

4. Summary of the Judgment

17. The Trial Chamber found that Fofana and Kondewa were not guilty of crimes against humanity (murder and 'other inhumane acts' under Counts 1 and 3, respectively) because it was not proved beyond reasonable doubt that the civilian population was the primary object of the attack, although the requirement of a widespread attack was established.[45] It, however, found that the general requirements for war crimes and other serious violations of international humanitarian law were satisfied because an armed conflict occurred in Sierra Leone from March 1991 to January 2002, the alleged crimes were closely related to the armed conflict and the perpetrators were aware of the protected status of the victims who were either civilians or captured enemy combatants.[46]

18. The Appeals Chamber will consider the findings that led to the verdicts when it deals with the several grounds of appeal. It suffices to state that Fofana was found individually criminally responsible not as direct perpetrator but either as a secondary participant or as a person bearing

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[42] *Ibid* at para. 19 (emphasis omitted).
[43] *Ibid* at para. 20.
[44] *Ibid* at para. 21 (emphasis omitted).
[45] CDF Trial Judgment, paras 692-694.
[46] *Ibid* at paras 696-697, 699-700.

superior responsibility, while the same can be said of Kondewa, except in respect of Count 8 where he was found guilty of enlisting child soldiers and in respect of Count 2 where he was found guilty of unlawful killing of a town commander in Talia (Base Zero).

5. The Verdict and Sentences

19. On 2 August 2007, a majority of the Trial Chamber, Justice Thompson dissenting, found Fofana and Kondewa guilty under Counts 2 and 4 and convicted them of: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment respectively, charged in Counts 2 and 4, respectively; and pillage and collective punishments charged in Counts 5 and 7, respectively.[47] Fofana and Kondewa were found not guilty of the crimes against humanity of murder and "other inhumane acts" charged in Counts 1 and 3, respectively; and, of acts of terrorism charged in Count 6.[48] A majority of the Trial Chamber, Justice Thompson dissenting, found Kondewa guilty of enlisting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities as charged in Count 8 and convicted him accordingly.[49] The majority of the Trial Chamber, Justice Itoe dissenting, found Fofana not guilty of the same charge (Count 8).[50]

20. On 9 October 2007, the Trial Chamber sentenced Fofana and Kondewa to terms of imprisonment for all of the crimes for which they were convicted.[51]

21. Fofana was sentenced to six (6) years imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 2); six (6) years imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 4); three (3) years imprisonment for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5) and four (4) years imprisonment for collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional

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[47] CDF Trial Judgment, Disposition, pp. 290-292.
[48] *Ibid* at pp. 290-292.
[49] *Ibid* at pp. 290-292.
[50] *Ibid* at pp. 290-292.
[51] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007 [CDF Sentencing Judgment].

Protocol II (Count 7).[52] The Trial Chamber ordered that the sentences shall be served concurrently[53] and shall take effect as from 29 May 2003, when Fofana was arrested and taken into the custody of the Special Court.[54]

22. Kondewa was sentenced to eight (8) years imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 2); eight (8) years imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 4); five (5) years imprisonment for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5); six (6) years imprisonment for collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7); seven (7) years imprisonment for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities, an other serious violation of international humanitarian law (Count 8).[55] The Trial Chamber ordered that the sentences shall be served concurrently[56] and shall take effect as from 29 May 2003, when Kondewa was arrested and taken into the custody of the Special Court.[57]

C. The Appeal

1. Notices of Appeal

23. The Prosecution and Kondewa appealed and filed their respective Notices of Appeal on 23 October 2007.[58] There was no appeal by Fofana.

24. In its Notice of Appeal, the Prosecution filed ten (10) Grounds of Appeal. Kondewa filed six (6) Grounds of Appeal.[59]

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[52] CDF Sentencing Judgment, Disposition, p. 33.
[53] *Ibid* at p. 34.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Kondewa Notice of Appeal Against Judgement Pursuant to Rule 108, 23 October 2007; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Prosecution's Notice of Appeal, 23 October 2007.
[59] *Ibid.*

2. The Grounds of Appeal

25. Kondewa complained in Grounds 1, 2, 3 and 5 of his Grounds of Appeal, respectively, that the majority of the Trial Chamber erred both in law and in fact in finding that the Prosecution had proved beyond reasonable doubt: first, that he was individually criminally responsible as a superior, pursuant to Article 6(3) for the crimes committed in Bonthe Town and the surrounding areas under Counts 2, 4, 5 and 7; second, that he was individually criminally responsible pursuant to Article 6(1) for committing murder as a war crime as charged under Count 2 of the Indictment in Talia/Base Zero; third, that he was individually criminally responsible as a superior pursuant to Article 6(3) for pillage under Count 5 in the Moyamba District; and fourth, that he was individually criminally responsible pursuant to Article 6(1) for committing the crime of enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities.

26. In Ground 4 of his Grounds of Appeal, Kondewa complained 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 and in Ground 6 that the Majority of the Trial Chamber erred in law in entering cumulative convictions under Count 7 as well as under Counts 2 to 5.

27. The Prosecution by its Grounds of Appeal complained that the Trial Chamber erred in law and in fact in holding as follows: first, that "the evidence adduced does not prove beyond a reasonable doubt that the civilian population was the primary object of the attack" (Ground 1); second, that the evidence adduced did not establish beyond reasonable doubt: (i) that Fofana and Kondewa bear individual criminal responsibility under Article 6(1) of the Statute for the planning, instigating or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Trial Chamber found were committed in Kenema District (Ground 3), and in the towns of Tongo Field, Koribondo and Bo District (Ground 4) during the timeframe charged in the Indictment; (ii) that Fofana and Kondewa bear individual criminal responsibility under Article 6(3) of the Statute for those crimes committed in Kenema District (Ground 3); and (iii) that Fofana planned, ordered or committed the crime of enlisting children under 15 years of age into armed forces or groups, or their active use in hostilities and his individual criminal responsibility pursuant to Article 6(3) of the Statute as a superior for the enlistment or use of child soldiers to participate actively in hostilities (Ground 5).

28. The Prosecution further alleged a number of errors of law and of fact: (i) in relation to the Trial Chamber's acquittal of Fofana and Kondewa (on Count 6) of terrorism as a war crime (Ground 6) and (ii) in refusing to consider acts of burning for the purposes of the war crime of pillage as charged under Count 5 of the Indictment (Ground 7).

29. In Grounds 8 and 9 the Prosecution alleged mixed errors of law and fact and of procedure, respectively, in that the Trial Chamber denied leave for the Prosecution to amend the Indictment in order to add four new counts of sexual violence (Ground 8) and in preventing the Prosecution from "leading, eliciting or adducing" evidence of sexual violence (Ground 9).

30. Finally, in its Ground 10, the Prosecution, in respect of its appeal against sentence, complained that the Trial Chamber erred in law and in fact and committed a procedural error, "in that there has been a discernible error in the exercise of the Trial Chamber's sentencing discretion" in the sentencing of Fofana and Kondewa.

D. Some Guiding Principles on Appellate Review

31. Before the Appeals Chamber embarks on a detailed consideration of the Parties' Grounds of Appeal, it is expedient to state at the threshold, albeit in general terms, some of the principles of appellate review that will guide it.

32. **In regard to errors of law**: On appeal, pursuant to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence ("Rules"),[60] only arguments relating to errors in law that invalidate the decision of the Trial Chamber would merit consideration. Some International Criminal Tribunals hold the view that in exceptional circumstances, the Appeals Chamber may consider legal issues raised by a party or *proprio motu* although such may not lead to the invalidation of the judgment if it is nevertheless of general significance to the Tribunal's jurisprudence.[61]

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[60] Rules of Procedure and Evidence, Special Court for Sierra Leone, 12 April 2002 (as amended 19 November 2007), Rule 106 [Rules].

[61] *See e.g., Prosecutor v. Galić*, IT-98-29-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 30 November 2006, para. 6 [*Galić* Appeal Judgement]; *Prosecutor v. Stakić*, IT-97-24-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 22 March 2006, para. 7 [*Stakić* Appeal Judgement]; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 23 October 2001, para. 22 [*Kupreškić* Appeal Judgement]; *Prosecutor v.*

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33. **In regard to errors of fact**: On appeal where errors of fact are alleged also pursuant to Article 20 of the Statute and Rule 106 of the Rules, the Appeals Chamber will not lightly overturn findings of fact reached by a Trial Chamber. Where it is alleged that the Trial Chamber committed an error of fact, the Appeals Chamber will give a margin of deference to the Trial Chamber that received the evidence at trial. This is because it is the Trial Chamber that is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[62] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[63]

34. The Appeals Chamber adopts the statement of general principle contained in the ICTY Appeals Chamber decision in *Kupreškić*, as follows:

> ". . . 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."[64]

35. **In regard to procedural errors**: Although not expressly so stated in Article 20 of the Statute, not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be corrected or waived or ignored (as immaterial or inconsequential) without injustice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice.

Tadić, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 15 July 1999, para. 247 [*Tadić* Appeal Judgement].

[62] *Kupreškić* Appeal Judgement, para. 30. *Prosecutor v. Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 13 December 2004, para. 12 [*Ntakirutimana* Appeal Judgement].

[63] *See Galić* Appeal Judgement, para. 9, fn. 21; *Stakić* Appeal Judgement, para. 219; *Prosecutor v. Delalić et al.*, IT-96-21-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 20 February 2001, para. 458 [*Čelebići* Appeal Judgement]. Similarly, the standard of proof at trial is the same regardless of the type of evidence, direct or circumstantial.

[64] *Kupreškić* Appeal Judgement, para. 30.

36. **In regard to appellate review of the exercise of discretionary powers by the Trial Chamber**: The guiding principles can be succinctly stated. The Trial Chamber's exercise of discretion will be overturned if the challenged decision was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The scope of appellate review of discretion is, thus, much limited: even if the Appeals Chamber does not agree with the impugned decision, it will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously [65] Where the issue on appeal is whether the Trial Chamber correctly exercised its discretion in reaching its decision the Appeals Chamber will only disturb the decision if an appellant has demonstrated that the Trial Chamber made a discernible error in the exercise of discretion.[66] A Trial Chamber would have made a discernible error if it misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.[67]

II. ISSUES ARISING IN BOTH APPEALS

A. Prosecution's Third and Fourth Grounds of Appeal and Kondewa's Fourth Ground of Appeal: Individual Criminal Responsibility Pursuant to Article 6(1) of the Statute

1. Introduction

37. The Prosecution's Third and Fourth Grounds of Appeal and Kondewa's Fourth Ground of Appeal concern the individual criminal responsibility of Fofana and Kondewa pursuant to Article 6(1) of the Statute for crimes in Tongo Town, Koribondo, Bo District and Kenema District in

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[65] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Special Court for Sierra Leone, Appeals Chamber, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, para. 5 [Norman Subpoena Decision], *referring* to *Prosecutor v. Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4 [*Milošević* Decision on Appeal from Refusal to Order Joinder], and *citing Prosecutor v. Karemera*, ICTR-98-44-AR73, International Criminal Tribunal for Rwanda, Appeals Chamber, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 9.

[66] Norman Subpoena Decision, para. 5, *referring* to *Milošević* Decision on Appeal from Refusal to Order Joinder, para. 4.

[67] Norman Subpoena Decision, para. 6, *referring* to *Milošević* Decision on Appeal from Refusal to Order Joinder, para. 5.

January and February 1998. As these grounds of appeal are interrelated, the Appeals Chamber will consider them together with more detailed accounts of the respective submissions in the following subsections.

38. In relation to the second attack in early January 1998 and the third attack on 14 February 1998 on Tongo Town, the majority of the Trial Chamber, Justice Thompson dissenting, found Fofana and Kondewa guilty pursuant to Article 6(1) of the Statute of aiding and abetting violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, punishable under Article 3.a. of the Statute (Counts 2 and 4, respectively) as well as collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute (Count 7).[68]

39. In Kondewa's Fourth Ground of Appeal, he submits that the majority of the Trial Chamber erred in finding him responsible for aiding and abetting the crimes committed during the second and third attacks on Tongo Town.[69] The Prosecution, on the other hand, argues in its Fourth Ground of Appeal that, with regard to the crimes committed in Tongo, the Trial Chamber erred in not finding Kondewa responsible for instigating[70] and in not finding Fofana responsible for instigating and planning.[71]

40. In relation to the attacks on Koribondo on 13 February 1998, and on Bo District on 15 February 1998, the Trial Chamber found that the Kamajors had committed violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, punishable under Article 3.a. of the Statute (Counts 2 and 4, respectively) as well as collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute (Count 7).[72] The Trial Chamber additionally found the commission of pillage (Count 5) by the Kamajors during the attack on Bo District.[73] The majority of the Trial Chamber, Justice Thompson dissenting, found Fofana responsible as a superior pursuant to Article 6(3) in relation to the attacks in Koribondo and Bo

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[68] CDF Trial Judgment, paras 721-764.
[69] Kondewa Appeal Brief, paras 122-159. The Appeals Chamber granted Kondewa's request to amend his notice of appeal to include arguments relating to the *mens rea* standard of aiding and abetting and not only to the *actus reus* standard as originally submitted. Transcript, CDF Appeal Hearings, 12 March 2008, pp. 4-7.
[70] Prosecution Appeal Brief, paras 3.90-3.93.
[71] *Ibid* at para. 3.49.
[72] *Ibid* at paras 784-798, 828-846.
[73] *Ibid* at paras 838-841.

District.[74] The Trial Chamber, however, acquitted Kondewa under Article 6(1) and Article 6(3) in relation to the attacks on Koribondo and Bo District.[75] In relation to the attack on Kenema District on 15 February 1998, the Trial Chamber found that criminal acts had been committed by the Kamajors without specifying which crimes these acts constituted[76] and acquitted Fofana and Kondewa.[77]

41. In its Third and Fourth Grounds of Appeal, the Prosecution submits that, subsequent to the attacks on Tongo, the attacks on Koribondo, Bo District and Kenema District in mid-February 1998 were all part of the same planned "all-out offensive."[78] The Prosecution, therefore, submits that the Trial Chamber erred in not finding Fofana liable for planning the crimes committed in Koribondo, Bo District and Kenema District,[79] or, in the alternative, for aiding and abetting the crimes committed in those locations.[80]

2. Preliminary Issue: Scope of the Prosecution's Appeal

42. The Appeals Chamber notes that the Prosecution argues that the attacks in Bonthe District were part of the same "all-out offensive," but does not submit that the Trial Chamber erred in not finding Fofana liable for planning the crimes committed in Bonthe District.[81] The Prosecution only generally states that "the only conclusion open to any reasonable trier of fact is that the attacks on Koribondo, Bo District, Kenema District and Bonthe District, which all occurred around the same time . . . were all part of the same 'all-out offensive' announced by Norman at the January 1998 Passing Out Parade."[82] The Prosecution also stated that "the only conclusion open to any reasonable trier of fact is that it was part of the plan that crimes would be committed during the

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[74] *Ibid* at paras 766-798, 810-846.
[75] *Ibid* at paras 799-808, 847-855.
[76] *Ibid* at para. 919. The Trial Chamber found that the Kamajors committed criminal acts during the time frame relevant to the Indictment, but because these acts were either not charged in the Indictment or fell outside of the time frame of the Indictment, the Trial Chamber did not examine these acts to determine whether they met the elements of any Statutory crime.
[77] *Ibid* at paras 905-911 (Fofana), 912-918 (Kondewa).
[78] *Ibid* at paras 3.38-3.46.
[79] *Ibid* at paras 3.63-3.77.
[80] *Ibid* at paras 3.78-3.89. The Appeals Chamber notes that the Prosecution in paragraphs 3.88 and 3.89 refers only to Bo District. However, the Prosecution does make arguments relating to aiding and abetting in Koribondo and Kenema District (para. 3.82), and has included Koribondo and Kenema District in its concluding submissions for this Ground of Appeal (para. 3.103). The Appeals Chamber will therefore consider these arguments in relation to Koribondo, Bo District and Kenema District. However, because the Prosecution makes no arguments relating to Bonthe District, the Appeals Chamber will not consider these arguments in relation to Bonthe District.
[81] *Ibid* at paras 3.75-3.77.
[82] *Ibid* at para. 3.40 (emphasis omitted).

attacks on Kenema and Bonthe" and that "no reasonable trier of fact could conclude that commission of crimes was planned in the case of Koribondo and Bo District, but somehow spontaneous and unplanned in the case of Kenema and Bonthe District."[83] Because the Prosecution's concluding arguments include no mention of Bonthe District, the Appeals Chamber finds that the Prosecution has not met its burden of advancing the reasons for the alleged error and the Appeals Chamber will therefore not examine whether the Trial Chamber erred in relation to Bonthe District.[84]

3. Liability for Crimes Committed in Tongo Town

(a) The Findings of the Trial Chamber

43. The Trial Chamber found that the Kamajors launched three attacks on Tongo Town.[85] The first attack was in late November or early December 1997.[86] Between 10-12 December 1997, a passing out parade was held at Base Zero, the headquarters of the CDF High Command ("First Passing Out Parade").[87] Norman, who was the National Coordinator for the CDF, spoke to the Kamajors and commanders,[88] and both Fofana and Kondewa attended this parade.[89] Norman said that "the attack on Tongo will determine who the winner or the looser of the war would be"[90] and that "there is no place to keep captured or war prisoners like the juntas, let alone their collaborators."[91] Norman further said that "'[if] the international community is condemning human rights abuses [...] then I take care of the human left abuses,'"[92] which he clarified to mean that "'[...] any junta you capture, instead of wasting your bullet, chop off his left [hand] as an indelible mark [...] to be a signal to any group that will want to seize power through the barrels [*sic*] of the gun and not the ballot paper [;] [w]e are in Africa, we want to practice democracy.'"[93] The Trial

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[83] *Ibid* at para. 3.46.
[84] *Ibid* at para. 3.103.
[85] CDF Trial Judgment, para. 376.
[86] *Ibid* at para. 380.
[87] *Ibid* at para. 320. *See also* para. 381.
[88] *Ibid* at paras 722, 735.
[89] *Ibid* at para. 721(x).
[90] *Ibid* at para. 321.
[91] *Ibid*.
[92] *Ibid*.
[93] *Ibid*.

Chamber found that he instructed and encouraged the Kamajors to kill captured enemy combatants and "collaborators," to inflict physical suffering or injury upon them and to destroy their houses.[94]

44. After Norman instructed the Kamajors to commit unlawful acts, Fofana, as Director of War, addressed the fighters, saying "[n]ow, you've heard the National Coordinator . . . any commander failing to perform accordingly and losing your own ground, just decide to kill yourself there and don't come to report to us."[95]

45. Further, following the speeches of Norman and Fofana, Kondewa spoke to the Kamajors and said "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."[96]

46. Following the First Passing Out Parade, Norman held a commanders' meeting in the same month at which plans to attack Tongo Town were discussed and at which Norman provided further instructions for the Tongo and Black December operations.[97] Those present at this meeting included Fofana, Kondewa, Mohamed Orinco Moosa (the National Deputy Director of War), Albert J. Nallo (Deputy National Director of Operations and Director of Operations, Southern Region), KG Samai, Ngobeh (the district grand Kamajor commander), and some commanders from the Tongo area, such as Musa Junisa, Witness TF2-079, Vandi Songo and some members of the War Council.[98] At the meeting, Norman further reiterated and clarified his orders and expanded upon them to include looting.[99] He repeated that whoever took Tongo would win the war and that it should be taken at all costs. Norman told them not to spare anyone working with or mining for the juntas. Norman also said that all collaborators should forfeit their properties and be killed.[100] Everyone in the meeting contributed to the discussion, including Fofana and Kondewa.[101] Norman then ordered Fofana to provide logistics for the operation.[102]

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[94] *Ibid* at paras 722, 735.
[95] *Ibid* at paras 321, 722.
[96] *Ibid* at paras 321, 735.
[97] *Ibid* at paras 322, 725.
[98] *Ibid* at para. 322.
[99] *Ibid* at para. 725.
[100] *Ibid* at para. 322.
[101] *Ibid* at paras 322, 725.
[102] *Ibid* at paras 322, 726.

(b) Fofana

(i) The Prosecution's Fourth Ground of Appeal: Instigation

a. Submissions of the Parties

47. The Prosecution submits that the Trial Chamber erred in finding that the elements of instigating were not satisfied on the part of Fofana for the crimes committed during the second and third attacks on Tongo Town, and that the full responsibility of Fofana was therefore not reflected.[103] The Prosecution submits that in finding that Fofana's speech had a substantial effect on the commission of the crimes, the Trial Chamber effectively found that the *actus reus* for instigating was satisfied.[104] Further, the Prosecution submits that in the context of Fofana's seniority at Base Zero as part of what was referred to as the "Holy Trinity," his statement that any commander failing to perform according to Norman's instructions should kill himself and not report to Base Zero,[105] could only be understood as a direct threat to the Kamajors that they would face death or other serious consequences if they failed to carry out Norman's orders.[106]

48. With regard to the *mens rea* required for instigating, the Prosecution submits that Fofana's intent or knowledge that crimes would likely be committed may be inferred from his substantial contribution to the planning, which was done with knowledge of the crimes which Norman had ordered in the execution of their plan.[107] The Prosecution further argues that based on Fofana's speech at the December 1997 Passing Out Parade, which the Trial Chamber found to have encouraged the killing of civilians by the Kamajors, it may be inferred that Fofana acted with direct intent.[108]

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[103] Prosecution Appeal Brief, para. 3.49.
[104] *Ibid* at para. 3.52.
[105] *Ibid*, *referring* to CDF Trial Judgment, para. 723.
[106] Prosecution Appeal Brief, para. 3.52. In support of this argument, the Prosecution refers to the Trial Chamber's finding that Nallo, who was a subordinate to Fofana, testified that "if the Kamajors did not follow orders they would cut off your ears or kill you." *Ibid*, *referring* to CDF Trial Judgment, para. 336.
[107] *Ibid* at paras 3.54, 3.74.
[108] *Ibid*.

49. Fofana submits that the *actus reus* required for aiding and abetting is different from that of instigation and that the Prosecution's arguments are therefore misleading.[109] He further submits that the Trial Chamber found that in order to prove the *actus reus* of instigation "a causal relationship between the instigation and the perpetration must be demonstrated."[110] Thus, for an aider and abetter to be convicted of instigation, his instigation must lead to the perpetration of the crime, and may not merely have a substantial effect on its outcome.[111]

50. Fofana, therefore, asserts that none of the factual findings referred to by the Prosecution establishes a direct causal link between Fofana's conduct and the crimes found by the Trial Chamber to have been perpetrated in Tongo Town.[112] Nothing in Fofana's speech at the First Passing Out Parade in December 1997 could have demonstrated his intent to provoke or induce the commission of the crimes outlined by the Prosecution,[113] or could have been understood by the Kamajors as a direct threat that they would face death or other serious consequences if they failed to carry out Norman's orders.[114] Thus, Fofana submits that "it is not the case that the only inference that can be drawn from the circumstances is that Fofana induced or provoked the Kamajors to commit crimes."[115] The more probable inference is that he encouraged the Kamajors to fight and capture Tongo Town.[116]

b. Discussion

51. The Trial Chamber held that the *actus reus* of instigating requires "an act or omission, covering both express and implied conduct of the Accused, which is shown to be a factor substantially contributing to the conduct of another person committing the crime,"[117] and that there must be a "causal relationship between the instigation and the perpetration of the crime . . . although it is not necessary to prove that the crime would not have occurred without the Accused's

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[109] Fofana Response Brief, paras 23-25, *referring* to the Trial Chamber's finding at paragraph 223 that "proof of a cause-effect relationship between the conduct of the aider and abetter 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."
[110] *Ibid* at para. 24.
[111] *Ibid* at para. 25.
[112] *Ibid* at paras 26, 29.
[113] *Ibid* at para. 29.
[114] *Ibid* at para. 26.
[115] *Ibid* at para. 30.
[116] *Ibid* at para. 30.
[117] CDF Trial Judgment, para. 223.

involvement."[118] The Trial Chamber also held that the *mens rea* of instigating is an intention "to provoke or induce the commission of the crime," or a "reasonable knowledge that a crime would likely be committed as a result of that instigation."[119] Neither of the parties takes issue with the Trial Chamber's definition of instigation.

52. The Trial Chamber found that Fofana's speech at the First Passing Out Parade substantially contributed to the commission of crimes by the Kamajors in Tongo Town and thereby satisfied the *actus reus* of aiding and abetting. The parties have not challenged this finding. Both aiding and abetting and instigating require the *actus reus* to have a substantial effect on the perpetration of the crime.

53. The Trial Chamber concluded that Fofana's actions had a substantial effect on the perpetration of these crimes.[120] The Trial Chamber found that "Fofana's speech at the [first] passing out parade constitutes aiding and abetting only of the *preparation* [*sic*][121] of those criminal acts which were explicitly ordered by Norman, namely, killing of captured enemy combatants and 'collaborators', infliction of physical suffering or injury upon them and destruction of their houses."[122]

54. The Prosecution argues that because the *actus reus* of aiding and abetting is satisfied, the *actus reus* is also satisfied for instigating. However, the Trial Chamber found, relying on ICTY Appeals Chamber jurisprudence, that unlike the *actus reus* of instigating, the *actus reus* of aiding and abetting does not require a causal link between the act of aiding and abetting and the commission of the crime.[123] The Appeals Chamber holds that the *actus reus* of instigating requires a causal link which aiding and abetting does not and accordingly disagrees with the Prosecution's proposition.

55. Fofana's speech at the First Passing Out Parade at Base Zero was removed both temporally and geographically from the unlawful acts committed by the Kamajors in Tongo Town in January 1998. This alone would not be enough to deny a causal link between the speech and the crimes

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[118] *Ibid.*
[119] *Ibid.*
[120] *See ibid* at paras 723, 724.
[121] Apparent mistyping for "perpetration." *See also* Fofana Response Brief and Kondewa Response Brief.
[122] *See* CDF Trial Judgment, para. 727 (emphasis added).
[123] *See ibid* at para. 229, *referring* to *Blaškić* Appeal Judgement, para. 48.

alleged. However, in this case the Appeals Chamber is of the view that there is insufficient evidence to show how Fofana's words influenced the perpetration of crimes which took place at a significantly different place and time. Fofana's speech may have substantially contributed to the military effort, but not to the crimes as such. Therefore, the Appeals Chamber is satisfied that the Trial Chamber was not in error in finding that Fofana's speech did not have a substantial effect on the perpetration of the crimes or that a causal relationship did not exist and that the *actus reus* for instigating was, consequently, not satisfied.

56. With regard to the *mens rea* required for "instigating," the Prosecution submits that Fofana's intent or knowledge that crimes would likely be committed may be inferred from his substantial contribution to the planning, which was done with knowledge of the crimes which Norman had ordered in the execution of the plan. Fofana's words "[n]ow you've heard the National Coordinator [. . .] any commander failing to perform accordingly and losing your own ground, just decide to kill yourself there and don't come to report to us" are ambiguous and may be interpreted not as approving Norman's unlawful orders, but rather as an appeal to each of the commanders to fight hard and not loose his ground. Further, Fofana's call "to destroy the soldiers finally from where they were [. . .] settled"[124] was directed at the military campaign and does not include any incitement to perpetrate unlawful acts. This leads the Appeals Chamber to conclude that there were other possible interpretations of the evidence than the one suggested by the Prosecution. The Appeals Chamber, therefore, finds that a reasonable trier of fact could have found that Fofana did not have the requisite *mens rea*.

57. Consequently, the Appeals Chamber finds that the Trial Chamber did not err in failing to convict Fofana for instigating the commission of crimes in Tongo Town. The Prosecution's Fourth Ground of Appeal, therefore, fails in this respect.

(ii) The Prosecution's Fourth Ground of Appeal: Planning

a. Submissions of the Parties

58. The Prosecution does not take issue with the Trial Chamber's pronouncement on the law on planning, and submits that because planning may be undertaken by one or more persons, an accused

[124] *See ibid* at para. 325.

does not have to have been responsible for all of the planning.[125] The Prosecution notes that the Trial Chamber found that "in the absence of any evidence showing how Fofana contributed to the discussion and decision at th[e] meeting [. . .] there is no evidence to prove beyond reasonable doubt"[126] that Fofana planned the commission of the crimes.[127] The Prosecution submits that the Trial Chamber erroneously suggested that an accused can only be convicted of planning where there is direct evidence of the specific contribution that the accused made to the plan in question.[128] The Prosecution argues that even if the details of an accused's specific contribution to planning is unknown, the accused may still satisfy the *actus reus* for planning if the evidence shows that the accused participated substantially in the planning of the crimes, and that the planning substantially contributed to the criminal conduct.[129]

59. In this case, the Prosecution submits that given Fofana's "seniority as one of the top three figures at Base Zero, and given his express responsibility as Director of War for the planning of operations, no reasonable trier of fact could have concluded that Fofana may have been only a 'passive' participant at all of these meetings."[130] The Prosecution also asserts that no reasonable trier of fact could have failed to infer that Fofana possessed the requisite *mens rea* for instigating and that he made a substantial contribution to planning "in the very clear knowledge" that the crimes which Norman had ordered were to be committed in the execution of the plan.[131]

60. Fofana submits that throughout the trial the Prosecution adduced no evidence to prove beyond reasonable doubt that he planned the crimes.[132] Fofana claims that on appeal the Prosecution now seeks to prove that he planned these crimes by circumstantial evidence.[133] However, he argues that there is no evidence showing the specifics of what was discussed at the meetings or of whether the planning of the attacks was part of the agenda of the meetings, especially given that the Trial Chamber held that there was no evidence to show, what, if any, contribution Fofana made at these meetings.[134] Fofana argues that his role as a key element of the

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[125] Prosecution Appeal Brief, para. 3.56.
[126] CDF Trial Judgment, para. 725.
[127] Prosecution Appeal Brief, paras 3.58-3.59, *referring* to CDF Trial Judgment, para. 725.
[128] *Ibid.*
[129] *Ibid* at para. 3.60.
[130] *Ibid* at para. 3.70.
[131] *Ibid* at para. 3.74.
[132] Fofana Response Brief, paras 32-34.
[133] *Ibid* at para. 34.
[134] *Ibid* at para. 36, *referring* to CDF Trial Judgment, para. 725.

CDF leadership structure does not necessarily indicate that he was involved in the planning or execution of criminal activities.[135] In addition, Fofana argues that "knowledge of crimes committed later by the Kamajors cannot be imputed to [him] by reference."[136]

b. Discussion

61. Regarding the requisite *actus reus*, given the absence of factual findings by the Trial Chamber concerning the nature of Fofana's participation in the commanders' meetings in December 1997, the Appeals Chamber finds that it was open to a reasonable trier of fact to conclude that evidence of Fofana's presence did not by itself amount to planning. Although Fofana participated in these commanders' meetings and held a position of responsibility as Director of War, it was open to a reasonable trier of fact to conclude that this evidence alone did not prove beyond reasonable doubt that he participated in the planning of the criminal conduct which took place in Tongo Town.

62. Regarding the requisite *mens rea*, the Trial Chamber found that Fofana participated in the commanders' meetings. However, the Appeals Chamber notes that the findings did not indicate that he participated at those meetings in the planning of unlawful acts rather than in the successful completion of military operations.

63. The Appeals Chamber therefore, concludes that the evidence did not disclose beyond reasonable doubt that Fofana possessed the requisite *mens rea* for planning violence to life, health and physical or mental well-being of persons, in particular murder, punishable under Article 3.a. of the Statute, violence to life, health and physical or mental well-being of persons, in particular cruel treatment, punishable under Article 3.a. of the Statute as well as collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute.

64. The Appeals Chamber finds that in this respect, the Prosecution's Fourth Ground of Appeal must fail.

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[135] *Ibid* at para. 45.
[136] *Ibid* at para. 36.

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(c) Kondewa

(i) Kondewa's Fourth Ground of Appeal: Aiding and Abetting

a. Submissions of the Parties

65. In Kondewa's Fourth Ground of Appeal, he submits that the majority of the Trial Chamber, Justice Thompson dissenting, erred in law in finding that the evidence fulfilled the *mens rea* and *actus reus* for aiding and abetting the crimes of violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, punishable under Article 3.a. of the Statute (Counts 2 and 4, respectively) as well as collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute (Count 7) in Tongo Town.[137] Regarding the requisite *actus reus,* Kondewa argues that his statement at the First Passing Out Parade that "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" did not have a 'substantial effect' on the perpetration of crimes, as required by the legal standard set forth by the Trial Chamber.[138] Kondewa does not take issue with the legal standard,[139] but instead submits that according to the jurisprudence of the ICTY and the ICTR, his words fell short of the "substantial effect standard" under which acts of aiding and abetting must have a substantial effect upon the perpetration of a crime.[140] Kondewa submits that it is unreasonable to suggest that his "words alone had a substantial effect on the perpetration of crimes that took place more than one month later in another geographic area."[141]

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[137] Kondewa Appeal Brief, para. 134; Transcript, CDF Appeal Hearings, 12 March 2008, pp. 5-7; Kondewa Notice of Appeal, para. 6; *see also* Prosecution Response, paras 5.8-5.9.
[138] Kondewa Appeal Brief, paras 129-131.
[139] *Ibid* at para. 128; CDF Trial Judgment, para. 321.
[140] Kondewa Appeal Brief, paras 142-143. Kondewa notes that of the five ICTR cases in which individuals were found guilty of aiding and abetting for having spoken words of encouragement, the words "were either spoken in conjunction with the individual carrying out another act or were sufficient such that the tribunal considered their effect to be 'substantial.'" *Ibid* at para.148, *referring* to *Prosecutor v. Akayesu*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement, 2 September 1998 [*Akayesu* Trial Judgement]; *Prosecutor v. Kambanda*, ICTR-97-23-S, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 4 September 1998; *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement, 21 May 1999 [*Kayishema* Trial Judgement]; *Prosecutor v. Nahimana*, ICTR-99-52-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 3 December 2003; *Prosecutor v. Ndindabahizi*, ICTR-2001-71-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 15 July 2004 [*Ndindabahizi* Judgement and Sentence].
[141] Kondewa Appeal Brief, para. 155.

66. Regarding the requisite *mens rea*, Kondewa argues that the Trial Chamber erred in finding that he was aware that his words would assist in the commission of subsequent crimes in Tongo and that he knew of previous criminal activity by the Kamajors in Tongo.[142] Kondewa argues that the Trial Chamber adopted an approach to requisite standards relating to knowledge which is less strict than that of the other *ad hoc* Tribunals.[143] Kondewa further argues that in establishing the requisite *mens rea*, the Trial Chamber erroneously found that Kondewa knew of the Kamajors' previous criminal conduct based on a report sent to Base Zero, even though the Trial Chamber had found elsewhere in the Trial Judgment that this report was only given to Norman and Fofana and not to Kondewa.[144] Kondewa submits that he never received this report and there was no other evidence demonstrating his knowledge of previous criminal activity by the Kamajors in Tongo.[145] Therefore, Kondewa submits that no reasonable trier of fact could have found that the *mens rea* was established.[146]

67. In its response brief, the Prosecution submits that the Trial Chamber's finding regarding Kondewa's *actus reus* was based not on his words alone, but on the facts and circumstances of the case as a whole.[147] The Prosecution argues that the Trial Chamber's finding was based on its evaluation of the effect of those words on the perpetrators in the context of Kondewa's influence over the Kamajors, particularly given his position as one in what was referred to as the "Holy Trinity."[148]

68. It further submits that the case law of the Appeals Chambers of ICTY and ICTR provides legal precedent for finding that words of encouragement made by an accused before the commission of a crime and at a place remote from the crimes, may have a "substantial effect."[149] Further, the ICTR cases referred to by Kondewa are not helpful because they are primarily Trial Chamber judgments relating to direct and public incitement to commit genocide and complicity in genocide, which are modes of liability distinct from aiding and abetting.[150]

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[142] *Ibid* at paras 136-137, 141.
[143] *Ibid* at paras 138-139.
[144] *Ibid* at paras 140-141, *referring* to CDF Trial Judgment, para. 721(ix).
[145] *Ibid* at para. 141.
[146] *Ibid*.
[147] Prosecution Response Brief, para. 5.35.
[148] *Ibid*.
[149] *Ibid* at paras 5.38-5.39, 5.44-5.47.
[150] *Ibid* at paras 5.44-5.45.

69. Finally, the Prosecution argues that Kondewa's *mens rea* can be deduced not only from his knowledge of crimes previously committed by the Kamajors, but also from Norman's unlawful instructions at the First Passing Out Parade.[151] It argues that on the basis of the knowledge of Norman's instructions alone, a reasonable trier of fact could conclude that Kondewa knew that the Kamajors would probably commit crimes during their attacks on Tongo Town.[152]

b. Discussion

70. Kondewa submits that the Trial Chamber committed an error of law. However, he states that he agrees with the legal requirements of aiding and abetting found by the Trial Chamber. Further, he agrees that the applicable standard for *actus reus* is that of "substantial effect." His challenge is therefore not directed at the legal standard as such but rather at the Trial Chamber's application of the facts.[153] The Appeals Chamber, therefore, is of the view that Kondewa raises an error of fact rather than law, and his arguments will be considered in this context.

71. Although not specifically raised in this appeal, the Appeals Chamber is of the view that it is necessary to determine whether, as a matter of law, words of encouragement and support may have a "substantial effect" even though they were spoken at a time and place that are temporally and geographically removed from the commission of the crimes. The Trial Chamber held that the *actus reus* of aiding and abetting may occur before, during, or after the perpetration of the crime and at a location geographically removed from the place where the crime is committed, if the act of the aider and abetter has a substantial effect on the perpetration of the crime.[154] In this regard, the Trial Chamber relied on the ICTY Appeals Chamber decision in *Blaškić* which found that the acts of aiding and abetting "may occur before, during, or after the principal crime has been perpetrated, and that the location at which the *actus reus* takes place may be removed from the location of the principal crime."[155] Further, it is recognized in the jurisprudence of other *ad hoc* Tribunals that

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[151] *Ibid* at para. 5.14.
[152] *Ibid* at paras 5.16, 5.19.
[153] *See* Kondewa Appeal Brief, paras 142-143.
[154] CDF Trial Chamber, para. 229, *referring* to *Prosecutor v. Blaškić*, IT-95-14-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 29 July 2004, paras 47-48 [*Blaškić* Appeal Judgement].
[155] *Blaškić* Appeal Judgement, para. 48.

"encouragement" and "moral support" are two forms of conduct which may lead to criminal responsibility for aiding and abetting a crime.[156]

72. The Appeals Chamber agrees that "encouragement" and "moral support" may constitute the *actus reus* and that acts of aiding and abetting can be made at a time and place removed from the actual crime.

73. In regard to the *actus reus* for aiding and abetting, the Trial Chamber found that Kondewa's speech at the First Passing Out Parade had a substantial effect on the perpetration of the crimes in Tongo.[157] The Appeals Chamber recalls that the Trial Chamber found that at the First Passing Out Parade Norman instructed the Kamajors "to kill captured enemy combatants and 'collaborators' to inflict physical suffering or injury upon them and to destroy their houses."[158] After Norman and Fofana spoke "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 surrender of the rebels had long been exhausted and that they did not need any surrendered rebels."[159] The Trial Chamber then found that in uttering these words Kondewa effectively supported Norman's instructions and encouraged the Kamajors to execute Norman's unlawful orders.[160] The Trial Chamber also noted that no fighter would go to war without Kondewa's blessing because they believed that Kondewa transferred his mystical powers to commit such acts.[161]

74. In addition to his spiritual responsibilities, Kondewa was, together with Norman and Fofana, the three people regarded as what was referred to as the "Holy Trinity" at Base Zero; the three of them were the key and essential components of the leadership structure[162] and were the three people

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[156] *Tadić* Appeal Judgement, para. 229; *Prosecutor v. Aleksovski*, IT-95-14/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 24 March 2000, para. 162 [*Aleksovski* Appeal Judgement]; *Prosecutor v. Vasiljević*, IT-98-32-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 25 February 2004, para. 102 [*Vasiljević* Appeal Judgement]; *Blaškić* Appeal Judgement, para. 48; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 28 February 2005, para. 89 [*Kvočka* Appeal Judgement]; *Prosecutor v. Simić*, IT-95-9-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 28 November 2006, para. 85 [*Simić* Appeal Judgement]; *Prosecutor v. Brđanin,* IT-99-36-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 3 April 2007, para. 277 [*Brđanin* Appeal Judgement]; *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 1 June 2001, paras 201-202.

[157] CDF Trial Judgment, para. 736.

[158] *Ibid* at para. 737.

[159] *Ibid* at para. 735.

[160] *Ibid.*

[161] *Ibid.*

[162] *Ibid* at para. 337.

who according to the Trial Chamber actually made the decisions and nobody could make a decision in their absence.[163]

75. Even though the First Passing Out Parade in December 1997 was temporally and geographically removed from the second and third attacks on Tongo Town, the Appeals Chamber observes that one of the purposes of the Passing Out Parade was for Norman to give instructions to the Kamajors for the second and third attacks on Tongo Town,[164] not just instructions concerning unlawful acts. For this reason temporal and geographic remoteness is not of significance to the question of whether Kondewa's speech substantially contributed to the perpetration of the crimes. Thus, in the light of all the circumstances of this case, a reasonable trier of fact could have concluded that the only inference available on the evidence was that through his blessings and speech at the First Passing Out Parade Kondewa substantially contributed to the perpetration of the crimes in Tongo Town.

76. Regarding the requisite *mens rea*, the Appeals Chamber agrees with Kondewa that the Trial Chamber erroneously relied on the fact that he had received the report to Base Zero of the Kamajors' previous crimes in Tongo. On the contrary, the Trial Chamber found that Norman and Fofana received this report, not Kondewa.[165] Thus, the Appeals Chamber finds that the Trial Chamber erred in fact in relying on this report.[166]

77. It is the unchallenged finding of the Trial Chamber, that Norman at the Passing Out Parade ordered the Kamajors to commit criminal acts in Tongo, and that Kondewa who spoke after Norman, knew of the orders of Norman when he said: "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 ... I give you my blessings; go my boys, go."[167] The Trial Chamber further found that "no fighter would go to war without Kondewa's blessings because they

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[163] *Ibid.*
[164] *Ibid* at para. 721(x).
[165] Kondewa Appeal Brief, para. 141; CDF Trial Judgment, para. 721(ix) ("TF2-079 prepared a situation report on events occurring between 19 September and 13 November 1997 in Zone II Operational Frontline which included Lower Bambara and Dodo Chiefdoms [...]. It [...] narrated crimes which were committed by Kamajors in that area [...]. At Base Zero they gave the report first to Fofana and then to Norman.").
[166] CDF Trial Judgment, para. 737.
[167] *Ibid* at para. 321.

believed that Kondewa transferred his mystical powers to them and made them immune to bullets."[168]

78. On these findings the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to conclude that Kondewa by his words of encouragement aided and abetted the commission of criminal acts ordered by Norman in Tongo.

79. The Appeals Chamber therefore concludes, Justice King dissenting, that the Trial Chamber did not err in finding Kondewa responsible for aiding and abetting the commission of crimes in Tongo Town. The Appeals Chamber accordingly finds, Justice King dissenting, that Kondewa's Fourth Ground of Appeal must fail and upholds his conviction in relation to violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment punishable under Article 3.a. of the Statute (Counts 2 and 4, respectively).

(ii) Prosecution's Fourth Ground of Appeal: Instigation

a. Submissions of the Parties

80. The Prosecution submits that in finding that the elements of instigating were not satisfied, the Trial Chamber erred in fact and in law in its approach to the evaluation of the evidence concerning Kondewa's involvement in the crimes committed in Tongo Town.[169] The Prosecution argues that the *actus reus* of instigating has effectively been satisfied due to the Trial Chamber's finding that the *actus reus* of aiding abetting was satisfied because "Kondewa's words had a substantial effect on the perpetration of those criminal acts."[170]

81. Regarding the requisite *mens rea*, the Prosecution asserts that based on evidence accepted by the Trial Chamber, the only conclusion open to any reasonable trier of fact is that Kondewa had the necessary *mens rea* for instigating.[171] The Prosecution specifically points to the Trial

[168] *Ibid* at para. 735.
[169] Prosecution Appeal Brief, para. 3.91.
[170] *Ibid* at para. 3.92, *referring* to CDF Trial Judgment, para. 736.
[171] *Ibid* at para. 3.93.

Chamber's finding that Kondewa expressly encouraged the crimes,[172] and argues that on occasions prior to the First Passing Out Parade, Kondewa threatened others, including members of the War Council, who accused the Kamajors of committing crimes.[173] In addition, while at Base Zero, Kondewa personally killed a civilian and ordered the killing of another civilian.[174] The Prosecution submits that although this evidence is not directly related to Tongo, it shows that Kondewa supported or advocated the crimes committed by the Kamajors in Tongo.[175]

82. Kondewa responds that he is not liable for instigating because a causal connection has not been shown between his speech at the First Passing Out Parade and the crimes committed in Tongo.[176] He submits that the Prosecution incorrectly stated: that the *actus reus* of instigating and aiding and abetting is the same;[177] that the *actus reus* of these forms of liability is different because proof of a cause-effect relationship is necessary for instigating but not for aiding and abetting;[178] that there is no evidence that the Kamajors who were present at the First Passing Out Parade were the same Kamajors who subsequently committed crimes in Tongo Town;[179] and finally that there is no evidence that any Kamajor was prompted to commit any crime on the basis of his ambiguously phrased words, which he uttered six weeks earlier.[180]

b. Discussion

83. The Trial Chamber's statement of the elements of the *actus reus* and the *mens rea* of instigating has already been noted in paragraph 51.

84. The Trial Chamber found Kondewa's speech at the First Passing Out Parade to have had a substantial effect on the perpetration of crimes in Tongo Town and thereby satisfied the *actus reus* of aiding and abetting. Both aiding and abetting and instigating require the *actus reus* to have a

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[172] *Ibid.*
[173] *Ibid, referring* to CDF Trial Judgment, paras 306, 308.
[174] *Ibid, referring* to CDF Trial Judgment, paras 921(iii) (v), 934. In footnote 238 it is submitted that "In relation to the incident in which Kondewa was found to have ordered a civilian killed, the Trial Chamber was not satisfied that it occurred within the timeframe pleaded in the Indictment ([CDF Trial Judgment], para. 923). It is submitted that while this mean that Kondewa could not be convicted of this crime, the finding that it occurred and that Kondewa ordered it can be taken into account in determining Kondewa's intent at the time of the attacks on Koribondo, Bo and Kenema."
[175] Prosecution Appeal Brief, para. 3.93.
[176] Kondewa Response Brief, para. 2.2.
[177] *Ibid* at para. 2.4.
[178] *Ibid.*
[179] *Ibid* at para. 2.9.
[180] *Ibid.*

substantial effect on the perpetration of the crime. A finding that an accused's conduct had a "substantial effect" for the purpose of aiding and abetting will therefore normally also satisfy the "substantial effect" requirement for the purpose of instigating.

85. In this case, in order to show a causal link between Kondewa's speech and the crimes committed in Tongo Town, the Prosecution must lead evidence to show that the Kamajors who were present at the First Passing Out Parade at which Kondewa's speech was made were the same Kamajors who subsequently committed the crimes in Tongo Town. There was no such evidence before the Trial Chamber. For this reason the Appeals Chamber finds that "instigation" for the crimes charged in Tongo Town was not proved.

86. Consequently, the Prosecution's Fourth Ground of Appeal fails in this respect.

4. Liability for Crimes in Koribondo, Bo District and Kenema District

(a) The Findings of the Trial Chamber

87. The Trial Chamber found that Norman, Fofana and Kondewa also addressed the Kamajors at a Second Passing Out Parade in early January 1998 regarding an "all-out offensive."[181] After thanking the Kamajors for the training they had undergone, and talking about the prior and pending operations, Norman said that he had given instructions for the pending operations which the Kamajors should follow.[182] Norman also said that "whoever knows that he is used to fighting with the cutlass, it is time for him to take up the cutlass [; w]hoever knows that he's used to fighting with a gun, it is time for him to take up the gun [; w]however knows that he's used to fight with a stick, it is time to him to take up his stick."[183]

88. Fofana also gave a speech at this meeting, saying that:

> "[T]the advice that Pa Norman had given to us, that the training that we underwent for a long time, the time has come for us to implement what we've learned. Now that we have received the order that we shall attack the various areas where the juntas are located, they have done a lot for the trainees. They've spent a lot on them. So any commander, if you

[181] CDF Trial Judgment, paras 323-337.
[182] *Ibid* at para. 323.
[183] *Ibid*.

> are given an area to launch an attack and you fail to accomplish that mission, do not return to Base Zero."[184]

Fofana further told the fighters "to attack the villages where the juntas were located and 'to destroy the soldiers finally from where they were . . . settled.'"[185] Fofana also said that "the failure to take Koribondo was a 'disgrace to the Kamajors that [*sic*] were [*sic*] close to Base Zero because . . . medicine that is given to Kamajors comes from there [and] [t]hat's where they come from to attack Koribondo [*sic*] many [times].'"[186] Finally, he said that ". . . this time around, he wants them to go and capture Koribondo."[187]

89. At the same meeting Kondewa spoke, saying "I am going to give you my blessings [... and] the medicines, which would make you to be fearless if you didn't spoil the law."[188] Kondewa also said that "all of his powers had been transferred to them to protect them, so that no cutlass would strike them and that they should not be afraid."[189] After this passing out parade, Norman said that a commanders' meeting would be held where he would reveal which operations were going to be undertaken.[190]

90. In the evening of the same day as the passing out parade, Norman held a commanders' meeting regarding Koribondo at which Fofana, Kondewa, Joe Tamidey and Bobor Tucker were present.[191] At this meeting Norman said that "they should take Koribondo 'at all costs' because they had already spent a lot on Koribondo" and that "Koribondo had been attacked three or four times before without the CDF taking it."[192] Norman told the commanders that "when they got to Koribondo not to 'leave any house or living thing there, except mosque, church, the *barri* and the school.'"[193] He also said that "this time they should destroy or burn everything in the town and that anyone left in Koribondo should be termed an enemy or a rebel and killed since they had been forewarned of such consequences."[194]

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[184] *Ibid* at para. 324.
[185] *Ibid* at para. 325.
[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid* at para. 326.
[189] *Ibid.*
[190] *Ibid* at para. 327.
[191] *Ibid* at paras 328-329.
[192] *Ibid* at para. 329.
[193] *Ibid.*
[194] *Ibid.*

91. On the same day as the Second Passing Out Parade and the commanders' meeting regarding Koribondo, Norman held a second commanders' meeting concerning Bo District.[195] The meeting was attended by Fofana, Kondewa, the War Council and commanders such as James Kaillie, Battalion Commander from Bumpeh and Joseph Lappia, Deputy Battalion Commander from Bumpeh.[196] In assigning the commander for the attack on Bo Town, Norman told the commanders to kill enemy combatants and people who had connections with or supported the rebels, otherwise known as "collaborators," and to burn down houses and loot big shops.[197] In preparation for the attack on Bo Town, Norman told the commanders to attack Kebi Town[198] and "to bring something back to prove that they had attacked Kebi Town." Fofana provided the commanders with arms, ammunitions and a vehicle.[199]

92. Norman also met with Nallo, who had done all of the planning for the Koribondo attack and had submitted it to Fofana, the Director of War, who submitted it to Norman. Norman stated that when Nallo goes to Koribondo anyone he met there should be killed because they were all spies and collaborators and "nothing should be left 'not even a farm' or 'fowl.'" Nallo was given petrol for the job.[200] The Trial Chamber found that "[s]ome specific names were mentioned: Shekou Gbao, the driver, should be killed and his compound burnt because he was giving his vehicle to the juntas."[201] In addition, Norman told Nallo that "the house of Mike Lamin's father was also to be burnt because Mike Lamin was RUF."[202] "Mr Biyo, a driver, should also have his compound burnt."[203]

93. Regarding Bo District, the Trial Chamber found that:

> "Norman told Nallo that he should loot the Southern Pharmacy and bring the medicines to Norman. He also told Nallo to kill Paramount Chief Veronica Bagni of Valunia chiefdom, because she was against the Kamajor movement; JK (Kpundoh) Boima III, Paramount Chief of Bo Kakua; Madam Tuma Alias, chairlady of Bo Town Council, because she used 'to collect [. . .] market dues'; Provincial Secretary Lansana Koroma; MB Sesay because he gave money to the juntas and prepared the *ronko* which the juntas wore so that they could not be differentiated from the Kamajors. MB Sesay should also

[195] *Ibid* at para. 332.
[196] *Ibid.*
[197] *Ibid.*
[198] *Ibid.*
[199] *Ibid* at para. 333.
[200] *Ibid* at para. 335.
[201] *Ibid.*
[202] *Ibid.*
[203] *Ibid.*

> have his house looted and burnt. Nallo was to kill Ali Fataba and burn his house because he was a collaborator who supplied fuel to the juntas. He should kill Cecil Hanciles for liaising between the juntas and the civilians. He was to kill Brima Tolli, if he saw him, and to burn his house and loot his property because the juntas ate and spent time at the house. Norman ordered Nallo to kill the police officers who used to work under the AFRC junta. Nallo carried out the orders as far as burning and looting but did not see most of the people. He would have killed them had he seen them because the law given by the National Coordinator was that if Kamajors did not follow their orders they would cut off your ear or kill you."[204]

(b) Fofana

(i) The Prosecution's Third and Fourth Grounds of Appeal: Planning

a. Submissions of the Parties

94. The Prosecution submits that the Trial Chamber erred in finding Fofana not liable for planning the unlawful acts committed during the attacks on Koribondo, Bo District and Kenema District.[205] The Prosecution submits that

> "the only conclusion open to any reasonable trier of fact on the findings of the Trial Chamber and the evidence accepted, is that the attacks on Koribondo, Bo District and Kenema District were part of the plan for the 'all-out offensive' announced at the January 1998 passing out parade, and that it was part of that plan that crimes would be committed in the course of that offensive (in particular, the killing of civilians considered or suspected of being 'collaborators' and the burning of their houses), and that the crimes were in fact perpetrated pursuant to that plan."[206]

95. The Prosecution argues that considering Fofana's position of seniority at Base Zero and his express responsibility as Director of War for planning operations, no reasonable trier of fact could conclude that Fofana was only a passive participant at the commanders' meetings.[207] The Prosecution argues that given that Nallo, who initially did the planning, submitted the plan to Fofana who then submitted it to Norman, the only conclusion open to any reasonable trier of fact is that Fofana was an active participant at the commanders' meetings.[208] Thus, the Prosecution argues

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[204] *Ibid* at para. 336 (footnotes omitted).
[205] Prosecution Appeal Brief, paras 3.62-3.89.
[206] *Ibid* at para. 3.64.
[207] *Ibid* at para. 3.70.
[208] *Ibid*.

that "even if Fofana did not expressly plan the details of crimes to be committed in these attacks, he participated in the planning of attacks that he knew were to involve the commission of crimes."[209]

96. Fofana responds that his presence at the January 1998 commanders' meetings did not constitute planning or aiding and abetting because there was no evidence of what took place at these meetings.[210] In addition, evidence of his role and responsibilities within the CDF leadership does not establish his involvement in planning or aiding and abetting criminal activities.[211] Fofana also responds that his provision of ammunition did not constitute aiding and abetting because the evidence does not demonstrate that the Kamajors used "exactly the same logistics that were supplied or provided" by him to attack Kebi Town.[212]

b. Discussion

97. Given the absence of factual findings by the Trial Chamber concerning the nature of Fofana's participation in the January 1998 commanders' meetings, the Appeals Chamber finds that it was open to a reasonable trier of fact to conclude that evidence of Fofana's presence at these meetings does not amount to planning.[213] Although Fofana attended these meetings and held a position of responsibility as Director of War, it was reasonable for the Trial Chamber to conclude that this evidence alone does not prove beyond reasonable doubt that Fofana designed the criminal conduct which took place in Koribondo, Bo District and Kenema District, or that his involvement in the planning process substantially contributed to the criminal conduct which occurred. Furthermore, despite the Trial Chamber's finding that Fofana provided commanders with arms, ammunition and a vehicle which were used by the Kamajors during their attack on Kebi Town, the Appeals Chamber finds that it was open to the Trial Chamber to conclude that Fofana's provision of logistics for attacks in Bo District did not substantially contribute to the commission of criminal acts in Bo District.[214]

98. Thus, the Appeals Chamber finds that the Trial Chamber did not err in finding Fofana not liable for planning the commission of crimes in Koribondo, Bo District and Kenema District.

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[209] *Ibid* at para. 3.71.
[210] Fofana Response Brief, paras 41, 50-52.
[211] *Ibid* at paras 44-45, 50-52.
[212] *Ibid* at paras 54-55.
[213] CDF Trial Judgment, paras 765, 809, 904.

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Therefore, the Appeals Chamber finds that in this respect, the Prosecution's Third and Fourth Grounds of Appeal must fail.

(ii) The Prosecution's Third and Fourth Grounds of Appeal: Aiding and Abetting

a. Submissions of the Parties

99. The Prosecution submits that Fofana is liable for aiding and abetting because it may be inferred from his seniority and attendance at meetings that he "must also have encouraged or lent moral support to the planners and executors of the crimes committed in the attacks on Koribondo, Bo District and Kenema District."[215] The Prosecution further contends that no reasonable trier of fact could conclude that Fofana's provision of logistics to launch military attacks on Kebi and Bo Towns did not have a substantial effect upon the perpetration of crimes.[216]

100. Fofana responds in regard to his presence at the January 1998 commanders' meeting as he had done to the allegation of planning.[217]

b. Discussion

101. In view of the Trial Chamber's findings that Fofana's speech at the January 1998 passing out parade did not amount to urging, encouraging or prompting the Kamajors to commit criminal acts, the Appeals Chamber holds that Fofana's speech did not constitute aiding and abetting the commission of crimes in Koribondo, Bo District and Kenema District.[218]

102. Furthermore, although Fofana was present at the January 1998 commanders' meeting the Trial Chamber did not make any factual findings as to the nature of Fofana's participation during these meetings. The Appeals Chamber opines that Fofana's mere presence at these meetings did not amount to aiding and abetting the criminal conduct which took place in Koribondo, Bo District and Kenema District. Furthermore, in regard to the Trial Chamber's finding that Fofana provided commanders with arms, ammunition and a vehicle prior to their attack on Kebi Town, the Appeals

[214] *Ibid* at paras 333, 813. *See also* Transcript, TF2-017, 19 November 2004, pp. 95-97.
[215] Prosecution Appeal Brief, para. 3.82.
[216] *Ibid* at para. 3.87.
[217] *Supra* para. 96
[218] CDF Trial Judgment, paras 323-324.

Chamber holds that Fofana's provision of logistics is not sufficient to establish beyond reasonable doubt that he contributed as an aider and abetter to the commission of specific criminal acts in Bo District.[219]

103. Thus, The Appeals Chamber concludes that the Trial Chamber was correct in finding Fofana not liable for aiding and abetting the commission of crimes in Koribondo, Bo District and Kenema District. Consequently, the Prosecution's Third and Fourth Grounds of Appeal must fail.

(c) Kondewa

(i) The Prosecution's Third and Fourth Grounds of Appeal: Aiding and Abetting

a. Submissions of the Parties

104. The Prosecution submits that given the Trial Chamber's findings and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Kondewa aided and abetted the crimes committed in the attacks on Koribondo, Bo District and Kenema District.

105. The Prosecution submits that considering Kondewa's senior position within the CDF command structure, he together with Norman and Fofana was responsible for all of the planning and execution of the military operations.[220] It was further submitted that by attending the first and second January 1998 commanders' meetings where the attacks on Koribondo and Bo District were discussed and unlawful instructions were given by Norman, considering Kondewa's senior position within the CDF command structure,[221] Kondewa gave encouragement and moral support to the planners of the attacks and the crimes, thereby aiding and abetting in the planning of the crimes in Koribondo and Bo District.[222] The Prosecution submits that Kondewa, as High Priest, by initiating the Kamajors and giving them his blessing when they went into battle also gave encouragement and moral support to the Kamajors who committed crimes in Koribondo and Bo District.[223]

106. Further, the Prosecution argues that Kondewa similarly provided encouragement and support to the planners of the Kenema attack, as well as to the Kamajors who committed the attack,

[219] *Ibid* at paras 333, 813. *See also* Transcript, TF2-017, 19 November 2004, pp. 95-97.
[220] Prosecution Appeal Brief, para. 3.98.
[221] *Ibid.*
[222] *Ibid*; CDF Trial Judgment, paras 326, 332, 344-347.

even though there were no express findings that Kondewa participated in meetings to plan the attack on Kenema.[224] In support of this argument, the Prosecution points to the fact that Kondewa held a position of seniority at Base Zero, and that the attacks on Koribondo, Bo, Bonthe and Kenema were all part of a single "all-out offensive."[225]

107. The Prosecution submits that the only conclusion open to any reasonable trier of fact is that Kondewa provided encouragement and support to the planners of the Kenema attack, and to the Kamajors who committed crimes in the Kenema attack.[226]

108. Kondewa submits that in view of the evidence accepted by the Trial Chamber and relied upon by the Prosecution in its appeal, "no reasonable trier of fact could conclude beyond reasonable doubt that Kondewa aided and abetted in the planning."[227] Kondewa argues that no reasonable trier of fact could conclude that his presence at the two January 1998 commanders' meetings concerning the attacks on Koribondo and Bo District amounts to a substantial effect on the commission of the crimes.[228] Kondewa argues that his mere presence at the December 1997 and January 1998 commanders' meetings, in the absence of evidence that he did anything other than fulfil his role as High Priest by blessing the Kamajors, does not meet the evidential standard required to demonstrate aiding and abetting. Kondewa submits that his senior position is irrelevant in the absence of any evidence demonstrating that he committed an act that had a substantial effect upon the commission of crimes.[229]

b Discussion

109. The Trial Chamber found that Kondewa's speech at the Second Passing Out Parade did not amount to urging, encouraging or prompting the Kamajors to commit criminal acts.[230] In addition, there was an absence of a finding by the Trial Chamber concerning the nature of Kondewa's participation in the January 1998 commanders' meetings at which Norman gave orders for the

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[223] Prosecution Appeal Brief, para. 3.99.
[224] *Ibid* at para. 3.100.
[225] *Ibid.*
[226] *Ibid.*
[227] Kondewa Response Brief, para. 2.21.
[228] Kondewa Response Brief, para. 2.20.
[229] Kondewa Response Brief, para. 2.21
[230] CDF Trial Judgment, paras 323-324.

commission of unlawful acts during the "all-out offensive."[231] The fact that Kondewa held a position of responsibility as High Priest and that he spoke at the Second Passing Out Parade and attended Commanders' meetings is not sufficient to conclude that this evidence alone does prove beyond reasonable doubt that Kondewa encouraged or supported the criminal conduct which took place in Koribondo, Bo District and Kenema District.

110. The Appeals Chamber agrees with the findings of the Trial Chamber that giving "words of moral support and encouragement to the Kamajor fighters who were about to conduct military operations on the junta-held territories"[232] or blessings, as well as providing medicine which the Kamajors believed would protect them against the bullets does not constitute aiding and abetting in the planning, preparation or execution of the criminal acts in Bo District.[233]

111. The Appeals Chamber finds that the Trial Chamber was correct in finding Kondewa not liable for aiding and abetting the commission of crimes in Koribondo, Bo District and Kenema District. Consequently, the Prosecution's Third and Fourth Grounds of Appeal fail in this respect.

5. Summary of Findings

112. In relation to the attacks on Tongo, the Appeals Chamber, Justice King dissenting, upholds the Trial Chamber's convictions of Kondewa and Fofana, pursuant to Article 6(1), of aiding and abetting violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment punishable under Article 3.a. of the Statute (Counts 2 and 4 respectively).

113. In relation to the attacks on Koribondo, Bo District and Kenema District, the Appeals Chamber upholds the Trial Chamber's acquittals of Kondewa and Fofana, pursuant to Article 6(1), of violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, punishable under Article 3.a. of the Statute (Counts 2 and 4, respectively) as well as pillage, a violation of Article 3.a. common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute (Count 5).

114. The Appeals Chamber dismisses the Prosecution's Third and Fourth Grounds of Appeal and dismisses, Justice King dissenting, Kondewa's Fourth Ground of Appeal.

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[231] *Ibid* at paras 765, 809, 904.
[232] *Ibid* at para. 799.
[233] *Ibid* at paras 799-800.

B. Prosecution's Fifth Ground of Appeal and Kondewa's Fifth Ground of Appeal: Enlisting Children Under the Age of 15 Years into an Armed Force or Group and/or Using Them to Participate Actively in Hostilities

1. Introduction

115. Kondewa, in his Fifth Ground of Appeal, contends that the majority of the Trial Chamber, Justice Thompson dissenting, erred in law and fact in finding him criminally responsible for "enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities," an other serious violation of international humanitarian law punishable under Articles 4.c. and 6(1) of the Statute.[234]

116. On the other hand, the Prosecution, in its Fifth Ground of Appeal, submits that the Trial Chamber erred in failing to describe clearly the full extent of Kondewa's responsibility,[235] because its finding related to Kondewa's liability for enlistment only in respect of one child, namely Witness TF2-021.[236] The Prosecution submits that Kondewa should be held responsible for committing, or alternatively aiding and abetting recruitment, by the enlistment and/or use, of children other than Witness TF2-021.[237] With regard to Fofana the Prosecution submits that the Trial Chamber erred in acquitting him and avers that he should be held liable under Article 6(1) for aiding and abetting child recruitment.[238]

117. Although the Grounds of Appeal raised by Kondewa and the Prosecution advance different arguments, they raise similar issues regarding the criminal responsibility of Fofana and Kondewa under Article 6(1) for child enlistment or the use of children to participate actively in hostilities. Therefore, the Appeals Chamber will consider these Grounds together in this part of the Judgment.

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[234] The Appeals Chamber notes that Kondewa's Sixth Ground of Appeal in his Appeal Brief corresponds to his Fifth Ground of Appeal in his Notice of Appeal. The Appeals Chamber will follow the numbering set forth in Kondewa's Notice of Appeal. Accordingly, the Appeals Chamber will refer to this ground as Kondewa's Fifth Ground of Appeal although Kondewa Appeal Brief refers to it as his Sixth Ground of Appeal. In addition, the Appeals Chamber notes that the Prosecution Response Brief refers to the Grounds of Appeal in accordance with the numbering in Kondewa Appeal Brief. *See* Prosecution Response Brief, para. 7.2; Kondewa Appeal Brief, para. 177.
[235] Prosecution Appeal Brief, para. 4.31.
[236] *Ibid.*
[237] *Ibid* at paras 4.32-4.47.
[238] *Ibid* at para. 4.2.

2. The Findings of the Trial Chamber

118. Concerning Fofana's criminal responsibility under Article 6(1), the Trial Chamber found that the evidence adduced by the Prosecution did not establish beyond reasonable doubt that Fofana planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of child enlistment or use of children to participate actively in hostilities.[239] The Trial Chamber's reasoning was two fold. First, Fofana's mere presence at commanders' meetings does not demonstrate that he encouraged anyone to make use of child soldiers or that he aided and abetted in the planning, preparation or execution of the crime.[240] Second, Fofana's presence at Base Zero, where child soldiers were present, is not sufficient by itself to establish that Fofana had any involvement in the commission of the crime.[241] The Trial Chamber further held that evidence that the CDF as an organisation was involved in the recruitment of children and the use of them to participate actively in hostilities did not demonstrate that Fofana was personally involved in such crimes.[242]

119. In finding Kondewa responsible under Article 6(1) of the Statute, the Trial Chamber relied on the evidence of Witness TF2-021 who testified that he and approximately 20 other young boys were initiated into the CDF, that they were given military training and that soon afterwards, initiates were sent into battle.[243] The Trial Chamber found that the evidence is "absolutely clear" that on this occasion the initiates had taken the first step in becoming fighters.[244] Consequently, the Trial Chamber found that when Kondewa was initiating the boys, he was also "performing an act analogous to enlisting them for active military service."[245] The Trial Chamber also found that Witness TF2-021 was eleven years old when Kondewa enlisted him and that Kondewa knew or had reasons to know that the boy was under fifteen years of age.[246] The Trial Chamber further held that "[a]lthough the Chamber found this evidence entirely sufficient to establish enlistment beyond a

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[239] CDF Trial Judgment, paras 959, 963.
[240] *Ibid* at para. 960.
[241] *Ibid* at para. 961.
[242] *Ibid* at para. 962.
[243] *Ibid* at paras 968-970.
[244] *Ibid* at para. 970.
[245] *Ibid*.
[246] *Ibid*.

reasonable doubt, [Witness] TF2-021 was given a second initiation, into the Avondo Society, headed by Kondewa himself, when he was thirteen years old."[247]

120. The Trial Chamber decided not to consider evidence relating to Kondewa's criminal liability for use of child soldiers because the Indictment charged use of child soldiers as an alternative to enlistment.[248]

3. Kondewa's Liability

(a) The Prosecution's Fifth Ground of Appeal: Whether the Trial Chamber's Findings Reflect the Full Extent of Kondewa's Liability

(i) Submissions of the Parties

121. In support of its submission, in respect to its Fifth Ground of Appeal, the Prosecution refers to the evidence of Witness TF2-021 that he was initiated into the CDF along with approximately 20 other young boys who were of the same age group as him.[249] The Prosecution submits that based on the evidence of Witness TF2-021 the only reasonable inference which a reasonable trier of fact could make was that "at least some, if not all, of these other 20 boys . . . were under the age of 15."[250] The Prosecution supports its argument that no reasonable trier of fact could have concluded that Kondewa enlisted only one child by pointing to evidence that other children under 15 years were present at Base Zero and that they performed several roles there.[251]

122. First, the Prosecution argues that the evidence clearly showed that the provision of initiation by Kondewa to under-aged children present at Base Zero was directly assisting the commission of the crime. Kondewa specifically assisted, encouraged and supported the initiation of children, with the knowledge that his conduct would assist the enlistment and/or use of children.[252] The Prosecution refers to the opinion of its Expert Witness TF2-EW2 that initiation was a stepping stone to recruitment as a soldier and the evidence of Witness TF2-014 that Kamajors went to war at an

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[247] *Ibid.*
[248] *Ibid* at para. 972.
[249] Prosecution Appeal Brief, paras 4.32-4.33.
[250] *Ibid* at para. 4.33.
[251] *Ibid* at paras 4.34-4.44. *See also* CDF Trial Judgment, paras 347 688, 670, 958(ii).
[252] Prosecution Appeal Brief, para. 4.41.

early age provided that they had been initiated.[253] Second, the Prosecution argues that Kondewa encouraged the commission of enlistment by his speeches at the passing out parades in December 1997 and January 1998.[254] The Prosecution submits that Kondewa's encouragement is evident from the Trial Chamber's finding that no Kamajor would go to war without Kondewa's blessing.[255] According to the Prosecution, Kondewa's awareness that his conduct aided and abetted the commission of enlistment may be inferred from the Trial Chamber's various findings, including Kondewa's presence at commanders' meetings at which Norman praised junior Kamajors.[256]

123. Kondewa responds that the evidence on which he was found to be individually criminally responsible for the enlistment of one child was so flawed that it is impossible from that evidence to reach the further conclusion that he enlisted or aided and abetted the enlistment of more than one child.[257] Kondewa submits that it is unclear how the evidence of Witnesses TF2-EW2 and TF2-014 demonstrates that initiations were a substantial contribution to the crime of enlistment.[258] Kondewa further submits that the Prosecution's argument concerning his liability for aiding and abetting child enlistment "fails primarily on the ambiguity of the testimony of Witness TF2-021 and the Trial Chamber's own confusion as to its interpretation."[259]

(ii) Discussion

124. The Prosecution submits that although the Trial Chamber found Kondewa responsible for enlisting Witness TF2-021, it was in error in not finding him responsible for enlisting and/or using other children.

125. The Appeals Chamber is of the view that the crime of enlisting children under the age of 15 years into armed forces or groups and of using them to participate actively in hostilities may be committed irrespective of the number of children enlisted by the accused person.

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[253] *Ibid* at para. 4.41.
[254] *Ibid* at paras 4.42-4.43.
[255] *Ibid* at para. 4.43.
[256] *Ibid* at para. 4.44.
[257] Kondewa Response Brief, para. 3-4.3.
[258] *Ibid* at para. 3-4.5.
[259] *Ibid* at para. 3-4.4.

a. Whether Kondewa Committed or Aided and Abetted the Recruitment by Enlisting More Than one Child

126. The Appeals Chamber will now determine whether the Trial Chamber erred in failing to find Kondewa responsible for committing and/or aiding and abetting the enlistment of children other than Witness TF2-021.

127. The Trial Chamber accepted and considered evidence of several witnesses including three former child soldiers in determining Kondewa's responsibility for child enlistment;[260] but relied solely on the evidence of Witness TF2-021 in arriving at its conclusion. The Trial Chamber found that the evidence of Witness TF2-021 was "pivotal in making its factual findings,"[261] and noted that "the events in question occurred when he was very young and [that] his testimony comes many years after the events in question."[262] Nevertheless, the Trial Chamber found the testimony of Witness TF2-021 "highly credible and largely reliable."[263]

128. The Appeals Chamber notes the Trial Chamber's finding that at the age of 11 years,[264] Witness TF2-021 was initiated by Kondewa, his "sowe" or initiator, into the Kamajor society at Base Zero.[265] According to the Witness there were approximately 400 initiates, 20 of whom the Witness estimated to be almost the same age group as him.[266] The Trial Chamber found that these other young boys were also initiated by Kondewa.[267] As part of the initiation ceremony, the boys "were told that they would be made powerful for fighting and were given a potion to rub on their bodies as protection . . . before going [into] war."[268]

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[260] CDF Trial Judgment, paras 667-673, 674-681, 683-687, 958, 964, 968.
[261] *Ibid* at para. 282.
[262] *Ibid* at para. 282.
[263] *Ibid* at para. 282.
[264] *Ibid* at para. 970.
[265] *Ibid* at para. 675. Witness TF2-021, testified that he was nine years old when he was abducted by rebels in Pendembu in Kailahun District. The witness stated that he was taken by the rebels to their base in Ngiehun until 1997 when he together with seven other little boys and three women were captured by the Kamajors. The other little boys were the same age as the witness except for one boy who was 15 years old. *See ibid* at paras 674-675; Transcript, 2 November 2004, TF2-021, pp. 39-40.
[266] Transcript, 2 November 2004, TF2-021, pp. 38-40.
[267] CDF Trial Judgment, para. 675.
[268] *Ibid*.

129. In the absence of evidence concerning the ages of the other boys, the Appeals Chamber finds that no reasonable trier of fact could have found that the testimony of Witness TF2-021 sufficiently establishes the age of the 20 young boys who were initiated with him.

130. The Trial Chamber accepted the evidence provided by two other former child soldiers who underwent initiation.[269] The Trial Chamber found that Witness TF2-140 was initiated into the Kamajor society at the age of 14 years along with adults as well as other children who were 10 or 11 years old.[270] Initiation fees were paid to the district initiator who then sent the fees to Kondewa, the High Priest of the Kamajors.[271] The Trial Chamber also found that Witness TF2-004 was initiated at Liya by Muniro Sherif along with many others, including children as young as 10 years old.[272]

131. The Trial Chamber reached its conclusion about Kondewa's responsibility for the enlistment of children by relying solely on the evidence of Witness TF2-021.[273] The Trial Chamber did not find that Kondewa was involved in the initiation process of Witnesses TF2-140 and TF2-004.

132. In view of the lack of evidence of the ages of the boys who were initiated along with Witness TF2-021, as well as the absence of evidence indicating that Kondewa was involved in the initiations of Witness TF2-140 and Witness TF2-004, the Appeals Chamber finds, Justice Winter dissenting, that the Trial Chamber was correct in not finding Kondewa liable for committing or aiding and abetting the crime of enlistment of children other than Witness TF2-021. The Prosecution's Fifth Ground of Appeal therefore fails in this respect.

b. Whether Kondewa Committed or Aided and Abetted the Use of Child Soldiers

133. Although the Prosecution has charged Kondewa in Count 8 with the use of children below the age of 15 years in hostilities, as an alternative to the charge of enlisting them as child soldiers,

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[269] *Ibid* at paras 667, 673, 683-687, 958, 964, 968.
[270] *Ibid* at para. 668.
[271] *Ibid*.
[272] *Ibid* at para. 685.
[273] *Ibid* at para. 282. While the Trial Chamber acknowledged that the events in question occurred when Witness TF2-021 was very young and his testimony came many years after the events in question, the Trial Chamber nevertheless found the testimony of Witness TF2-021 to be "highly credible and largely reliable." *Ibid.*

the Trial Chamber held that having found him individually criminally responsible for enlisting children as child soldiers, it did not need to consider the evidence in relation to the alternative charge. The Appeals Chamber holds, in the circumstances, that it cannot consider any evidence or pronounce a verdict on the alternative charge.[274] Even if the Appeals Chamber were to consider the evidence, it would still have come to the conclusion as it earlier did[275] that there was absence of evidence concerning the ages of the alleged children.

134. The Appeals Chamber opines that the Trial Chamber should have considered any evidence on the alternative charged and made findings upon such evidence even though, at the end, a verdict would be pronounced on only one of the alternative charges.

135. The Prosecution's Fifth Ground of Appeal therefore fails in this respect.

(b) Kondewa's Fifth Ground of Appeal: Committing the Crime of Enlistment of Children

(i) Submissions of the Parties

136. In his Fifth Ground of Appeal, Kondewa contends that the majority of the Trial Chamber, Justice Thompson dissenting, erred in law and in fact in finding him criminally responsible under Article 6(1) for committing the crime of enlisting a child under the age of 15 years into an armed force or group.[276] Specifically, Kondewa submits that the Trial Chamber's evaluation of the evidence was wholly erroneous, and, he advances three main arguments in support of this contention. First, Kondewa argues that the Trial Chamber's conclusion that initiation is analogous to enlistment for active military service amounts to an error because it conflates initiation and enlistment.[277] Second, Kondewa submits that the Trial Chamber erred in its findings regarding the second initiation of Witness TF2-021 into the Avondo Society, in that it suggested that enlistment is a crime that may recur numerous times in relation to the same child within the same fighting group.[278] Third, Kondewa submits that the Trial Chamber based its findings on 'unclear' witness testimony and contradictory conclusions on the meaning of this testimony.[279]

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[274] *Ibid* at paras 971-972.
[275] *Supra*, para. 129
[276] Kondewa Appeal Brief, para. 177.
[277] *Ibid* at para. 187(i).
[278] *Ibid* at para. 187(ii).
[279] *Ibid* at paras 187(iii), 200.

137. The Prosecution concedes that initiation is not *necessarily* military recruitment and that it was originally meant to serve other purposes. However, the Prosecution argues that the Trial Chamber was correct to consider evidence of initiation in determining whether the crime of child enlistment was committed because initiation was the means by which children were accepted as fighters into the CDF.[280]

138. The Prosecution's response to Kondewa's second argument is three fold: first, that the Trial Chamber did not expressly find that Witness TF2-021's second initiation into the Avondo Society was an actual act of enlistment,[281] second, that even if it was the case that the Trial Chamber erred in law by finding that Witness TF2-021 was initiated a second time, Kondewa has failed to demonstrate how this error invalidates the Trial Chamber's decision,[282] and third, that on the basis of the foregoing submissions, the Appeals Chamber need not consider whether enlistment is a recurring crime, that is, whether a person who has already been enlisted into an armed group and is a member of the group may be enlisted again.[283] The Prosecution, however, submits that it does not concede that any subsequent acts of enlistment would not amount to a crime under international law.[284] Regarding Kondewa's third argument, the Prosecution submits that the evidence relied on by the Trial Chamber was not unreliable or contradictory. The Prosecution asserts that any reasonable trier of fact would have reached the same conclusion as the Trial Chamber based on the evidence adduced.[285]

(ii) Discussion

a. Alleged Error in Finding that Initiation was Enlistment

139. The Appeals Chamber affirms that the crime of recruitment by way of conscripting or enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities constitutes a crime under customary international law entailing

[280] Prosecution Response Brief, paras 7.17, 7.20-7.22.
[281] *Ibid* at para. 7.28.
[282] *Ibid* at para. 7.29.
[283] *Ibid* at para. 7.30.
[284] *Ibid* at para. 7.30.
[285] *Ibid* at para. 7.40.

individual criminal responsibility.[286] Pursuant to Article 4.c. of the Statute, the crime of conscripting or enlisting children or using them to participate actively in hostilities, constitutes an other serious violation of international humanitarian law.[287] The *actus reus* requires that the accused recruited children by way of conscripting or enlisting them or that the accused used children to participate actively in hostilities.[288] These modes of recruiting children are distinct from each other and liability for one form does not necessarily preclude liability for the other.

140. According to the Trial Chamber in the AFRC Trial Judgment, enlistment means "accepting and enrolling individuals when they volunteer to join an armed force or group."[289] The act of enlisting presupposes that the individual in question voluntarily consented to be part of the armed force or group. However, where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence.[290]

141. It is apparent to the Appeals Chamber that there is a paucity of jurisprudence on the question of how direct an act must be to constitute "enlistment" under Article 4.c., as well as the possible modes of enlistment. The Appeals Chamber holds that for enlistment there must be a nexus between the act of the accused and the child joining the armed force or group. There must also be knowledge on the part of the accused that the child is under the age of 15 years and that he or she may be trained for combat.[291] Whether such a nexus exists is a question of fact which must be determined on a case-by-case basis.

142. On the particular facts of this case, it is clear that the enlistment of Witness TF2-021 had taken place before he was initiated by Kondewa. The evidence shows that the Witness had first been captured by the rebels in 1995 and was later captured by the CDF in 1997.[292] Upon his capture by the CDF, Witness TF2-021 was forced to carry looted property by the CDF.[293] This act, in the opinion of the Appeals Chamber constituted enlistment. For this conclusion, the Appeals

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[286] *Prosecutor v. Norman*, SCSL-04-14-AR72(E), Special Court for Sierra Leone, Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004 [Child Recruitment Decision].
[287] Article 4.c. of the Statute.
[288] Child Recruitment Decision, Dissenting Opinion of Justice Robertson, para. 5; AFRC Trial Judgment, para. 733.
[289] AFRC Trial Judgment, para. 735; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, International Criminal Court, Decision on the Confirmation of Charges, 29 January 2007, para. 247; *see also*, Child Recruitment Decision, Dissenting Opinion of Justice Robertson, para. 5(b).
[290] *Ibid*
[291] *See for example*, Child Recruitment Decision, Dissenting Opinion of Justice Robertson, para. 46.
[292] CDF Trial Judgment, paras 674, 968 (i).
[293] *Ibid* at paras 675, 968 (i).

Chamber draws support from paragraph 4557 of the ICRC Commentary to Article 4(3)(c) of Additional Protocol II referred to by the Trial Chamber itself.[294]

143. Paragraph 4557 of the Commentary states:

> "The principle of non-recruitment also prohibits accepting voluntary enlistment. Not only can a child not be recruited, or enlist himself, but furthermore he will not be 'allowed to take part in hostilities', *i.e.* to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage."[295]

144. In the context of this case, in which the armed group is not a conventional military organisation, "enlistment" cannot narrowly be defined as a formal process. The Appeals Chamber regards "enlistment" in the broad sense as including any conduct accepting the child as a part of the militia. Such conduct would include making him participate in military operations.

145. In these circumstances, the Appeals Chamber, Justice Winter dissenting, holds the view that Witness TF2-021 had already been enlisted before Kondewa initiated him into the Kamajors.

(iii) Conclusion

146. For the above reasons, the Appeals Chamber, Justice Winter dissenting, grants Kondewa's Fifth Ground of Appeal and reverses the verdict of guilt and substitutes a verdict of not guilty on Count 8.

4. Fofana's Liability

(a) Prosecution's Fifth Ground of Appeal: Fofana's Liability for Aiding and Abetting Enlistment and Use

(i) Submissions of the Parties

147. In its Fifth Ground of Appeal, the Prosecution contends that the majority of the Trial Chamber erred in acquitting Fofana of child enlistment and/or the use of children to participate actively in hostilities.[296] The Prosecution argues that Fofana is criminally responsible under Article

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[294] *See ibid* at para. 191.
[295] ICRC Commentary on Additional Protocol II, para. 4457.
[296] Prosecution Appeal Brief, para. 4.2.

6(1) for aiding and abetting child enlistment and/or use of children to participate actively in hostilities.[297]

148. According to the Prosecution, Fofana provided practical assistance to the CDF/Kamajors which had a substantial effect on the military enlistment or active use of children under the age of 15 years in hostilities.[298] In support of its contention, the Prosecution relies on the Trial Chamber's findings that Fofana played a central role in the organisational life, operations, decision-making and the activities of the CDF which engaged in massive enlistment of children and also used them in active hostilities.[299] In addition, Fofana provided logistical support in the form of weapons and ammunitions for major attacks in which children were used.[300] The Prosecution submits that the only reasonable inference to draw from the foregoing evidence and findings of the Trial Chamber is that the logistical support provided by Fofana also supplied the children involved in combat activities and that Fofana thereby assisted in the commission of the crime.[301]

149. Furthermore, the Prosecution submits that Fofana encouraged the military enlistment of children and/or their active use in hostilities "in ways that had substantial effect on the commission of those crimes."[302] The Prosecution submits that Fofana's presence and speech at a passing out parade during which Norman praised junior Kamajor fighters, coupled with his position as a superior in the CDF, constitutes encouragement for the purpose of aiding and abetting.[303]

150. Regarding Fofana's *mens rea*, the Prosecution relies on the following evidence in arguing that the only reasonable conclusion which could be reached was that Fofana knew or ought to have known that he assisted and encouraged child enlistment and/or use:[304] first, Fofana's presence at commanders' meeting during which Norman praised junior Kamajor fighters;[305] second, Fofana's presence at Base Zero where child soldiers were also seen;[306] third, the testimony of Witness TF2-

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[297] *Ibid.*
[298] *Ibid* at paras 4.9-4.19.
[299] *Ibid* at para. 4.10-4.11.
[300] *Ibid* at paras 4.12-4.13.
[301] *Ibid* at para. 4.14.
[302] *Ibid* at para. 4.15.
[303] *Ibid* at paras 4.15-4.19.
[304] *Ibid* at para. 4.21.
[305] *Ibid* at para. 4.22.
[306] *Ibid* at para. 4.23. The Prosecution submits that although Fofana's liability for aiding and abetting may not be established exclusively on this piece of evidence (as found by the Trial Chamber), it is wholly unreasonable to suggest that it is nevertheless insufficient to prove his *mens rea* for the purposes of aiding and abetting.

140 that he acted as part of the security team for Fofana's household;[307] fourth, Fofana's close association with Kondewa whom the Trial Chamber found to have enlisted a child;[308] and finally, Fofana's role of authority in the CDF.[309]

151. Fofana responds that the Prosecution failed to demonstrate how the Trial Chamber's decision to acquit him amounts to an error.[310] Fofana acknowledges that the CDF as an organisation enlisted child soldiers, but submits that this is insufficient proof that he was personally involved in the crime of enlistment. Fofana submits that his mere presence at events and his position of authority in the CDF do not amount to encouragement or assistance for the purpose of aiding and abetting.[311] Furthermore, Fofana submits that the Prosecution failed to establish that he possesses the requisite *mens rea* for aiding and abetting child enlistment.[312]

(ii) Discussion

152. The Appeals Chamber notes that the Trial Chamber accepted and considered the foregoing evidence in determining Fofana's criminal responsibility, but found that it did not establish beyond reasonable doubt that Fofana is responsible for child enlistment or use pursuant to any of the modes of liability under Article 6(1), including aiding and abetting.[313] The Prosecution merely proffers arguments based on evidence which the Trial Chamber considered and rejected, but does not point to any error in the reasoning of the Trial Chamber. The Appeals Chamber emphasises that on appeal, a party cannot merely repeat arguments which did not succeed at trial in the hope that the Appeals Chamber will consider them afresh, unless that party can demonstrate that rejecting them constituted an error which warrants the intervention of the Appeals Chamber.[314]

153. The Appeals Chamber finds, Justice Winter dissenting, that the Prosecution has failed to demonstrate that no reasonable trier of fact could have found that Fofana was not responsible for aiding and abetting child enlistment and their use to participate actively in hostilities.

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[307] *Ibid* at para. 4.24.
[308] *Ibid* at para. 4.25.
[309] *Ibid* at para. 4.26.
[310] Fofana Response Brief, paras 60, 76.
[311] *Ibid* at paras 62, 64, 65, 67, 69, 73.
[312] *Ibid* at paras 64, 73.
[313] CDF Trial Judgment, paras 959-963.
[314] *Prosecutor v. Semanza,* ICTR-97-20-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 20 May 2005, para. 9 [*Semanza* Appeal Judgement]; *Prosecutor v. Kajelijeli,* ICTR-98-44A-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 23 May 2005, para. 6 [*Kajelijeli* Appeal Judgement].

5. Conclusion

154. For the reasons stated, the Appeals Chamber, Justice Winter dissenting, dismisses the Prosecution's Fifth Ground of Appeal in its entirety, grants Kondewa's Fifth Ground of Appeal, reverses the verdict of guilt on Count 8 and substitutes the verdict of not guilty.

III. KONDEWA'S APPEAL

A. Kondewa's First Ground of Appeal: Superior Responsibility Pursuant to Article 6(3) of the Statute in Relation to Bonthe District.

1. Introduction

155. The Trial Chamber found that the Kamajors committed the following crimes during the attack on Bonthe on 15 February 1998:

> (i) violence to life, health and physical or mental well-being of persons a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, namely: murder and cruel treatment, punishable under Article 3.a of the Statute, charged in Counts 2 and 4, respectively;
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> (ii) violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, namely:
>
> > (a) pillage, punishable under Article 3.f. of the Statute;
> >
> > (b) collective punishments, punishable under Article 3.b. of the Statute, charged in Counts 5 and 7 respectively.[315]

The Trial Chamber found Kondewa responsible for these crimes as a superior pursuant to Article 6(3) of the Statute.[316] However, he was not found responsible pursuant to Article 6(1).[317]

156. Kondewa alleges an error in law and in fact by the majority of the Trial Chamber, Justice Thompson dissenting, in finding that the Prosecution had proven beyond reasonable doubt that he

[315] CDF Trial Judgment, paras 881-903.
[316] *Ibid* at paras 867-903.

was individually criminally responsible as a superior, pursuant to Article 6(3), for crimes committed during the attack on Bonthe District on 15 February 1998.[318] The issue raised by Kondewa in his First Ground of Appeal specifically concerns the application of the "effective control" test in determining whether a superior-subordinate relationship existed between him and the alleged perpetrators of the criminal acts.[319]

2. The Findings of the Trial Chamber

157. The Trial Chamber found that there was a superior-subordinate relationship between Kondewa and three Kamajor commanders in Bonthe, namely, Morie Jusu Kamara (District Battalion Commander and overall commander for the Bonthe attack), Julius Squire (Kamara's second in command) and Kamajor Baigeh (Battalion commander of the Kassilla battalion).[320] The Trial Chamber stated that Kondewa exercised effective control over these Kamajors and the Kamajors under their immediate command, and had the legal and material ability to issue orders to Kamara both by virtue of his *de jure* status as High Priest and his *de facto* status as a superior in Bonthe District.[321] Kondewa exercised effective control over Kamajors in Bonthe District as early as August 1997, even before Base Zero was established.[322]

158. The Trial Chamber found that Kamara was the overall commander for the Bonthe attack and that he in turn exercised effective control over Squire, Baigeh, Rambo Conteh, Lamina Gbokambama as well as the other Kamajors under their immediate command. Furthermore, Kamara and Squire refused to recognise the authority of the Attorney General and to accept any instructions that did not come from Norman or Kondewa.[323] The Trial Chamber also found that the evidence adduced did not establish beyond reasonable doubt that Kondewa exercised the same

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[317] *Ibid* at para. 866.
[318] Kondewa Appeal Brief, para. 7.
[319] *Ibid* at para. 12.
[320] CDF Trial Judgment, para. 868. The Kassilla battalion consisted of Kamajors of the Sherbro tribe who operated in Bonthe. *Ibid* at para. 536.
[321] *Ibid* at para. 868. "Kondewa had the legal and material ability to issue orders to Kamara, both by reason of his leadership role at Base Zero, being part of the CDF High Command, and the authority he enjoyed in his position as High Priest in Sierra Leone and particularly so in Bonthe District."
[322] *Ibid* at para. 869. The Trial Chamber stated that Kondewa was considered the "supreme head of Kamajors" and that a "delegation from Bonthe chose to plead with him in order to cease hostilities between the Kamajors and soldiers, stop the Kamajors from harassing civilians and from attacking Bonthe Town."
[323] *Ibid* at paras 871-872.

degree of control over other Kamajor commanders and fighters who operated in the surrounding areas of Bonthe Town prior to the attack or subsequently.[324]

159. Having found that murder, cruel treatment and pillage, as charged in Counts 2, 4, and 5, respectively, were committed in Bonthe, the Trial Chamber found that "all of the perpetrators were Kamajors under the effective control of Kondewa."[325] The Trial Chamber also found that the acts described in Counts 2, 4 and 5 were perpetrated with the specific intent to punish the civilian population in Bonthe District,[326] and that Kondewa was responsible as a superior for collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute in Bonthe District under Count 7.[327]

160. On this basis the Trial Chamber found that Kondewa was individually criminally responsible as a superior under Article 6(3) of the Statute for all the crimes charged in Counts 2, 4, 5 and 7 in regard to Bonthe District.

3. Submissions of the Parties

161. Kondewa does not challenge the Trial Chamber's articulation of the legal requirements of individual criminal responsibility under Article 6(3), including the statement that the effective control test is applicable for a determination of whether a superior-subordinate relationship exists.[328] He submits, however, that the Trial Chamber failed to apply correctly the test of effective control necessary to establish the existence of a superior-subordinate relationship between him and Kamajor commanders Kamara, Squire and Baigeh in Bonthe District.[329] He argues, in particular, that the evidence did not establish any form of a relationship between him and these Kamajor commanders; that he had authority and control over them; that he issued orders to them; that he had the ability to prevent them from committing criminal acts or to punish them; or that his *de jure* status as High Priest or *de facto* status as a superior gave him effective control over them.[330]

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[324] *Ibid* at para. 873.
[325] *Ibid* at paras 884, 891, 897.
[326] *Ibid* at para. 901.
[327] *Ibid* at para. 903.
[328] Kondewa Appeal Brief, paras 8, 9.
[329] *Ibid* at para. 12.
[330] *Ibid* at paras 36-62.

162. Kondewa submits that in finding a superior-subordinate relationship, the Trial Chamber has significantly and unacceptably lowered the bench-mark that has been well-established in international case law. He submits that the jurisprudence of the *ad hoc* tribunals indicates that a finding of effective control requires a high level and rigorous analysis of evidence to show that an accused had effective control over subordinates and actual possession of powers of control over the actions of the subordinates.[331] He also argues that mere possession of *de jure* powers or substantial influence is insufficient and that superior responsibility is more difficult to establish for civilian superiors usually due to the lack of formal powers of control in their case.[332] Finally, he submits that in almost every case in which an accused person has been convicted on the basis of command or superior responsibility, the accused's position fell within "a hierarchy or chain of command."[333]

163. Furthermore, he submits that the Trial Chamber "unjustifiably disregarded the evidence of Albert Nallo who testified that [he] did not at any time during the war 'command any troops'" even though in the Trial Chamber's view Nallo "was . . . the single most important witness in the Prosecution evidence on the alleged superior responsibility of the Accused. . . "[334]

164. Kondewa also submits that evidence relied on by the Trial Chamber consisted of events occurring outside the timeframe of the Indictment.[335] In short, Kondewa submits that effective control must be established at the time when the alleged crimes in question were committed and that this requirement was not met in the present case. He accordingly requests that the Appeals Chamber expunge this evidence which was irrelevant and highly prejudicial.

165. Kondewa submits that because the Trial Chamber found that his *de jure* status as High Priest did not give him effective control in locations other than Bonthe, it was "unclear how the Trial Chamber determined that [this] status as High Priest gave him any higher degree of authority in Bonthe."[336] He, therefore, requests the Appeals Chamber to reverse the Trial Chamber's finding that he was individually criminally responsible as a superior under Counts 2, 4, 5 and 7 for crimes committed during the attack on Bonthe Town.

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[331] *Ibid* at paras 13-14.
[332] *Ibid* at paras 15-17.
[333] *Ibid* at para. 29. Kondewa cites examples of several cases in the *ad hoc* tribunals which he submits support his arguments, *see ibid* at paras 22-32.
[334] *Ibid* at para. 21.
[335] *Ibid* at paras 44-45. The Trial Chamber relied on an incident that occurred in August 1997 in Bonthe prior to the setting up of Base Zero.
[336] Kondewa Appeal Brief, para. 47.

166. The Prosecution also concurs with the Trial Chamber's articulation of the legal requirements for a finding of superior responsibility under Article 6(3), and that the test for the establishment of a superior-subordinate relationship is that of effective control.[337] The Prosecution submits, however, that contrary to Kondewa's submission, the Trial Chamber did not adopt a lower evidentiary standard in applying the test of effective control. In particular, the Prosecution argues that there are no fixed categories or types of evidence that may be relied upon by a Trial Chamber to establish the existence of a superior-subordinate relationship.[338] The Prosecution submits that "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 . . . "[339]

167. Furthermore, the superior need not be a commander of the subordinate[340] and there need not be a hierarchy, subordination and chains of command, nor proof of direct or formal subordination. Nor is it necessary to establish that the accused gave direct instructions or actual and repeated orders to alleged subordinates, or that the accused actually punished them.[341] What needs to be established is that the superior had the "material ability to prevent or punish criminal conduct," however that control is exercised.[342] Furthermore, case law does not draw any distinction between the legal standard required for proof of a superior-subordinate relationship in the case of "civilian" as opposed to "military" superiors.[343]

168. In response to Kondewa's argument that the Trial Chamber considered evidence of acts occurring outside the timeframe of the Indictment, the Prosecution submits that such evidence "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 [I]ndictment,"[344]

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[337] Prosecution Response, paras 2.5-2.13.
[338] *Ibid* at para. 2.31.
[339] *Ibid* at para. 2.26
[340] The Prosecution submits therefore at para. 2.29, *referring* to Kondewa's submission regarding evidence of Albert Nallo, that it is immaterial "[. . .]that Kondewa may not have commanded any troops in battle."
[341] *Ibid* at paras 2.5-2.13.
[342] *Ibid* at paras 2.7-2.8.
[343] *Ibid* at para. 2.28.
[344] *Ibid* at para. 2.39 (emphasis omitted).

and that consequently it was open to a reasonable trier of fact to conclude that Kondewa exercised effective control in August 1997 and that this effective control continued to, at least, March 1998.[345]

169. The Prosecution also submits that in any event, the Trial Chamber did not base its findings regarding the existence of a superior-subordinate relationship on Kondewa's *de jure* status as High Priest alone, but on the totality of the evidence in the case.[346] The Prosecution therefore submits that based on the findings of fact relied upon by the Trial Chamber, a reasonable trier of fact could find that Kondewa had effective control over his alleged subordinates in Bonthe District.

170. In reply, Kondewa also relies on his submissions under his First Ground.[347]

4. Preliminary Issues

(a) Whether the Alleged Error is an Error of Law or an Error of Fact

171. Kondewa alleges that the Trial Chamber erred in both law and fact in finding that he was responsible as a superior pursuant to Article 6(3) for the crimes committed in Bonthe District. It is evident, however, from the submissions that he does not challenge the Trial Chamber's articulation of the legal requirements for the establishment of superior responsibility under Article 6(3) of the Statute. Kondewa, therefore, does not allege an error of law, but is instead concerned with the way in which the Trial Chamber applied the law to the particular facts of his case. The Appeals Chamber is of the view that this submission, in essence, questions the inferences drawn from facts found by the Trial Chamber and is therefore factual in nature. Kondewa must therefore satisfy the standard of review for alleged errors of fact.

(b) Scope of Kondewa's Arguments

172. Kondewa's arguments concern the Trial Chamber's application of the effective control test in determining a superior-subordinate relationship between him and the perpetrators of certain criminal acts during the attack on Bonthe. Even though Kondewa disputes the totality of the Trial Chamber's findings regarding his role as a superior, he does not proffer any argument in support of

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[345] *Ibid* at para. 2.40.
[346] *Ibid* at para. 2.41.
[347] Kondewa Reply Brief. In addition, Kondewa submits at para. 1.6, that the Defence disputes the totality of the Trial Chamber's findings regarding his role as a superior and not just its finding of the existence of a superior-subordinate relationship.

other aspects of his ground of appeal.[348] Kondewa's arguments are specifically limited to the finding of the existence of a superior-subordinate relationship. Although Kondewa challenges the finding that he had both the legal and material ability to prevent the commission of criminal acts by his subordinate Morie Jusu Kamara and other subordinates and to punish them for those crimes, the Trial Chamber's finding that he knew or had reason to know that certain crimes were being committed or that he failed to prevent their commission or to punish the alleged perpetrators was not challenged as such.[349]

173. In order for the Appeals Chamber to assess a party's arguments on appeal, the party must set out its grounds of appeal clearly, logically and exhaustively and must support allegations of error with precise references to the trial judgment or other material that supports his appeal. The Appeals Chamber will not consider submissions which are obscure, contradictory, vague or suffer from formal or other deficiencies.[350] The Appeals Chamber will, therefore, only consider the Trial Chamber's application of the effective control test, and determine whether based on the findings of fact, a reasonable trier of fact could have concluded that a superior subordinate relationship existed between Kondewa and these Kamajors.

5. Discussion

174. Both parties concur with the Trial Chamber's articulation of the legal requirements for the establishment of superior responsibility under Article 6(3). They differ, however, in the application of the effective control test to civilian as opposed to military superiors. Both parties agree that a superior-subordinate relationship may be of a military or civilian character and that individuals in positions of authority whether within civilian or military structures may incur criminal responsibility on the basis of their *de facto* and/or *de jure* positions as superiors.[351] Kondewa

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[348] *Ibid* at para. 1.6.

[349] In other words, Kondewa challenges the finding of the Trial Chamber that he exercised effective control over his alleged subordinates in Bonthe District.

[350] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-A, Special Court for Sierra Leone, Appeals Chamber, Judgment, 3 March 2008, para. 34 [AFRC Appeal Judgment]; *Vasiljević* Appeal Judgement, para. 12; *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 12 June 2002, para. 47 [*Kunarac* Appeal Judgement]; *Kajelijeli* Appeal Judgement, para. 7.

[351] AFRC Appeal Judgment, para. 257, *citing Čelebići* Appeal Judgement, para. 195. On the issue of *de jure* and *de facto* superiors, the Appeals Chamber in *Čelebici* stated that: "The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only de facto, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or

argues that for a civilian superior to be found to have effective control pursuant to Article 6(3), the superior must either exercise powers of control similar to or analogous to that of a military commander, or must be part of a formalized structure of command.[352] According to Kondewa, liability under Article 6(3) is more difficult to establish for civilian superiors because there is usually an absence of formal powers of control in such a case.[353]

175. As has been noted, the position taken by the Prosecution is that there is no distinction between the legal standards required for proof of a superior-subordinate relationship in the case of "civilian" as opposed to "military" superior. The Appeals Chamber holds that the test for establishing the existence of a superior-subordinate relationship is effective control for both military and civilian superiors.[354]

176. The Appeals Chamber will now determine whether it was reasonable for the Trial Chamber to conclude that Kondewa exercised the requisite degree of "effective control" over his alleged subordinates.

6. Application of the Effective Control Test

177. The Trial Chamber relied on the following facts to conclude that as of 15 February 1998, Kondewa exercised effective control over Kamara, Squire and Baigeh: (a) the *de jure* status of Kondewa as a High Priest; (b) an incident which occurred in August 1997, (c) events which occurred during the 15 February 1998 attack on Bonthe, and (d) a letter sent from the Attorney-General to Kamajors in Bonthe in March 1998.[355] These facts are discussed in detail below.

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other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander." *Čelebici* Appeal Judgement, paras 192-193; *see also Prosecutor v. Delalić et al.*, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 16 November 1998, paras 735-736 [*Čelebići* Trial Judgement]; *Kayishema* Trial Judgement, paras 214-216; *Aleksovski* Appeal Judgement, para. 76.; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 3 July 2002, paras 50-51 [*Bagilishema* Appeal Judgement].

[352] Kondewa Appeal Brief, paras 23-29.

[353] *Ibid* at para. 16.

[354] AFRC Appeal Judgment, para. 257, *referring* to *Bagilishema* Appeal Judgement, para. 50, *citing Aleksovski* Appeal Judgement, para. 76.

[355] At paragraph 856 of the CDF Trial Judgment, the Trial Chamber outlined the facts it had relied on to reach its legal findings on the individual criminal responsibility of the accused pursuant to Articles 6(1) and 6(3) in Bonthe District. These facts include facts found in paras 721(i)-(viii); 765(i)-(iii) as well as in Sections V.2.2, V.2.6.2 and V.2.6.3 of the

(a) The *de jure* Status of Kondewa

178. In finding that a superior-subordinate relationship existed between Kondewa and the Kamajor commanders responsible for the Bonthe attack, the Trial Chamber relied on what it describes as his *de jure* status as High Priest of Kamajors in Sierra Leone and particularly so in Bonthe District.[356] Kondewa submits that because the Trial Chamber found elsewhere in the Judgment that the command he had over the Kamajors by virtue of his position as High Priest did not amount to a relationship of effective control, it was "unclear how the Trial Chamber determined that [his] status as High Priest gave him any higher degree of authority in Bonthe."[357] The Appeals Chamber notes that the Trial Chamber indeed found that Kondewa's status as High Priest did not amount to effective control over the Kamajors.[358]

179. The Appeals Chamber notes, however, that the Trial Chamber did not base its findings on the existence of a superior-subordinate relationship for Bonthe District on Kondewa's *de jure* position as High Priest alone. In addition to Kondewa's *de jure* status, the Trial Chamber relied on his *de facto* status as a superior to his alleged subordinates, as disclosed by evidence of his actual exercise of effective control over Kamajors who committed crimes in Bonthe District.[359] Although his position as High Priest was one of several factors considered by the Trial Chamber in determining the existence of a superior-subordinate relationship, the Appeals Chamber is of the view that this is not a material factor in view of the overwhelming evidence of his actual exercise of effective control. Such include evidence of the relationship with his alleged subordinates in Bonthe, including an incident occurring in August 1997, events occurring during the 15 February 1998 attack on Bonthe, and a reaction to a letter sent from the Attorney-General to Kamajors in Bonthe in March 1998.

Trial Judgment. These facts relate to factual findings on the structure and organisation of the CDF in Talia, Base Zero, events at Talia prior to the setting up of Base Zero and factual findings during the attack on Bonthe.

[356] *Ibid* at para. 868.

[357] Kondewa Appeal Brief, para. 47.

[358] *See* CDF Trial Judgment on the responsibility of the Accused pursuant to Article 6(3) in these other locations: Towns of Tongo Field, paras 745-746; Koribondo, paras 805-807; Bo District, paras 852-854; Kenema District, paras 916-917; Talia, Base Zero, paras 931-937. The Trial Chamber found that it was not established that Kondewa had a superior-subordinate relationship with any of the Kamajors who operated in the Towns of Tongo Fields, Koribondo, Bo District and Kenema District. Regarding Base Zero, the Trial Chamber found that the presence of Kondewa at Base Zero when certain incidents took place was not in and of itself sufficient to establish beyond reasonable doubt that he had any involvement in the commission of criminal acts under any of the modes of liability charged in the Indictment.

[359] *Ibid* at paras 868-872.

(b) The August 1997 Incident

180. The Trial Chamber also relied on an incident occurring in Bonthe in August 1997, prior to the setting up of Base Zero, which involved a delegation sent to Kondewa as "the supreme head of the Kamajors."[360] Kondewa submits that the evidence falls outside the time frame of the Indictment, and that such evidence may not be relied upon to find that he exercised effective control six months later.[361]

181. The Appeals Chamber concurs that effective control must be established at the time of commission of the alleged crimes.[362] The Appeals Chamber is of the view, however, that even though an accused cannot be convicted for criminal acts falling outside the period of the Indictment, evidence of matters occurring outside the timeframe of the Indictment may be taken into account where relevant and probative of the accused's responsibility as a superior.[363] The evidence was relied upon by the Trial Chamber to establish that at a time before the commission of the crimes, Kondewa had effective control and that he had authority and power to issue oral and written directives to the Kamajors in the area. He had the power to order investigations for misconduct, and to hold court hearings and to threaten the imposition of sanctions of "a terrible death" on the Kamajors if they lied to him.[364] The evidence also establishes Kondewa's pre-existing relationship with Squire.[365]

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[360] *Ibid* at paras 297-301. The delegation pleaded with Kondewa to cease hostilities between the Kamajors and soldiers, to stop the Kamajors from harassing civilians and to stop the Kamajors from attacking Bonthe. Kondewa called a meeting at the court barri that was attended by all the elders of the region, the paramount chiefs and the Kamajor commanders. He said at the meeting that he was not going to give any of the areas under his control to a military government but to the democratically elected government of President Kabbah. He also agreed to the cessation of hostilities between the Kamajors and the Soldiers, the stopping of the harassment of civilians and the free movement of boats. He wrote a letter to this effect to all Kamajor commanders around Bonthe.

[361] Kondewa Appeal Brief, paras 43-45.

[362] *Prosecutor v. Semanza,* ICTR-97-20-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 15 May 2003, para. 402 [*Semanza* Judgement and Sentence]; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, International Criminal Tribunal for Rwanda,Trial Chamber, Judgement and Sentence, 25 February 2004, para. 628 [*Ntagerura* Judgement and Sentence]; *Prosecutor v. Halilović*, IT-01-48-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 16 November 2005, para. 61; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 22 February 2001, para. 399.

[363] *See* Rule 89(C) of the Rules; *Stakić* Appeal Judgement, paras 122-132.

[364] CDF Trial Judgment, para. 869. At paras 300-301 of the CDF Trial Judgment, the Trial Chamber found that when the delegation left to return to Bonthe, it was stopped in Tihun by a Kamajor who presented a letter which he demanded to be read in Kondewa's presence. The letter written by a Kamajor commander from Gambia alleged that the delegation was responsible for bringing the Soldiers to Bonthe. Kondewa declared that if this information was true, all of the delegation would be killed, but if it was not true, those responsible for the lie would experience a terrible death.

182. Taken together with the events of February and March 1998, the evidence shows that a reasonable trier of fact could conclude that this effective control continued until at least 15 February 1998.

(c) Events Occurring during the 15 February 1998 Attack on Bonthe

183. The Trial Chamber also relied on events that occurred during the 15 February 1998 attack itself.[366] Kamara, as the overall commander of the Bonthe attack,[367] sent several reports to Kondewa at Base Zero about the situation in Bonthe.[368] Based on these reports, three delegations came to Bonthe from Base Zero to investigate the situation. The first two delegations acted under Kondewa's instructions and Kondewa himself was the leader of the third delegation that arrived in Bonthe on 1 March 1998.[369] Witness Father Garrick testified that Kondewa came to Bonthe on the request of Kamara who had been complaining about the attitude of the Kamajors towards the civilians, and especially regarding the plight of the chiefdom speaker, Lahai Ndokoi Koroma, who was being targeted by the Kamajors for allegedly being a "junta."[370] Only Kondewa had authority to release Lahai Koroma and Kondewa left with him to Talia and later to Bo.

184. This evidence shows that Kamara reported to Kondewa about events in Bonthe not in the latter's capacity as High Priest, but in his capacity as *de facto* commander of the Kamajors who carried out the attack. Furthermore, Kondewa said at a public meeting in Bonthe 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. He apologised on their behalf and told the gathering that the Kamajors and not ECOMOG were responsible for security in the area.[371]

(d) Letter from the Attorney General in March 1998.

185. In March 1998, a delegation came to Freetown from Bonthe to complain to the President and the Attorney-General about the looting and killing carried out by the Kamajors in Bonthe. A

He later ordered a court sitting in Gambia to investigate the matter. Those responsible for the letter pleaded guilty and were supposed to be killed. The delegation pleaded with Kondewa on their behalf and he agreed to spare them.

[365] *Ibid* at para. 301. The delegation proceeded to Gambia in the company of Kondewa, Squire and Bombowai.

[366] *Ibid* at Section 2.6, Factual Findings Bonthe District.

[367] *Ibid* at para. 871.

[368] Transcript of 10 November 2004, Father Garrick, p. 55.

[369] CDF Trial Judgment, paras 552-553.

[370] Transcript of 10 November 2004, Father Garrick, p. 57.

[371] CDF Trial Judgment, para. 553.

letter written by the Attorney-General was given to Kamara, who passed it on to Squire. The latter declared that he refused to recognise the authority of the Attorney-General, or to accept any instructions unless they came from Norman or Kondewa.[372]

7. Disposition

186. The Trial Chamber's findings on the existence of a superior-subordinate relationship in each location was based on the totality of the evidence in the case with regard to such location. In the case of Bonthe, Kondewa's position as High Priest, which gave him a certain status, was just one of several factors considered by the Trial Chamber. The Trial Chamber also found that Kondewa had authority and power to issue oral and written directives; that he could order investigations for misconduct and hold court hearings; and that he had the legal and material ability to issue orders to Kamara.[373] Furthermore, Kondewa himself acknowledged his authority and control over Bonthe by stating publicly that he refused "to give any areas under his control to a military government but to the democratically elected Government of President Ahmad Tejan Kabbah."[374]

187. The Appeals Chamber finds that it was open to a reasonable trier of fact, based on all the evidence adduced, to conclude that Kondewa's *de facto* status as superior resulted in the exercise of effective control over the Kamajors who committed crimes in Bonthe. The fact that the Trial Chamber found that Kondewa did not exercise the same degree of control over Kamajors in other locations does not render the Trial Chamber's findings in relation to Bonthe inconsistent or illogical.

188. The Appeals Chamber therefore finds that Kondewa has failed to show that no reasonable trier of fact could have reached the conclusion that a superior-subordinate relationship existed between him and his alleged subordinates in Bonthe District.

189. For the foregoing reasons, the Appeals Chamber, Justice King dissenting, dismisses Kondewa's First Ground of Appeal.

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[372] *Ibid* at para. 872.
[373] *Ibid* at paras 869, 870.
[374] *Ibid* at para. 869.

B. Kondewa's Second Ground of Appeal: Alleged error in finding Kondewa responsible for committing murder at Talia/Base Zero

1. Introduction

190. Kondewa submits that the Trial Chamber erred in finding him guilty for committing the crime of murder as charged in Count 2, which is prohibited by common Article 3(1)(a) of the Geneva Conventions and punishable under Articles 3.a. and 6(1) of the Statute.[375] He asks the Appeals Chamber to overturn this conviction under Count 2.

191. The Trial Chamber found that:

> "Sometime towards the end of 1997, two 'Town Commanders' were brought to Talia. Kondewa took a gun from Kamoh Bonnie, Kondewa's priest, shot and killed one of the town commanders. The next morning [the] witness saw two graves where the bodies of the two town commanders were buried."[376]

192. The Trial Chamber found that this incident constitutes an "intentional killing perpetrated by Kondewa" and further found that these men were killed because they were considered to be "collaborators" and finally it was held that "it has been proven beyond a reasonable doubt that Kondewa is individually criminally responsible pursuant to Article 6(1) for committing murder as a war crime as charged under Count 2 of the Indictment."[377]

2. Submissions of the Parties

193. Kondewa's principal submission is that the Prosecution did not prove beyond reasonable doubt that he is guilty of committing the murder of two town commanders in Talia/Base Zero. Specifically, he argues that (i) the incident involving the town commanders occurred outside the timeframe of the Indictment; (ii) the identification of Kondewa as the perpetrator was not

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[375] The Appeals Chamber notes that Kondewa's Third Ground of Appeal in his appeal brief corresponds to his Second Ground of Appeal in his Notice of Appeal. The Appeals Chamber will follow the numbering set forth in Kondewa's Notice of Appeal. Accordingly, the Appeals Chamber will refer to this ground as Kondewa's Second Ground of Appeal, although Kondewa Appeal Brief refers to it as his Third Ground of Appeal. In addition, the Appeals Chamber notes that the Prosecution Response Brief refers to the grounds of appeal in accordance with the numbering in Kondewa Appeal Brief. *See* Prosecution Response Brief, para. 1.6.

[376] CDF Trial Judgment, para. 921(iii).

[377] *Ibid* at paras 934, 937.

established; (iii) the Trial Chamber erred in relying solely on hearsay evidence and on circumstantial evidence in finding Kondewa responsible for murder.[378]

194. The Prosecution asserts that the whole of the evidence of Witness TF2-096 on which the Trial Chamber relied has to be evaluated in light of all of the evidence. The Prosecution argues that it was open to a reasonable Trial Chamber to conclude that the Witness TF2-096 identified Kondewa[379] based on her direct evidence that she saw him shoot one of the town commanders, who then fell. On the basis of all the evidence a reasonable trier of fact could have found Kondewa responsible beyond reasonable doubt.

3. Discussion

(a) Alleged Error in Relying on Uncorroborated Hearsay Testimony of one Witness and Inference of Guilt Drawn from Circumstantial Evidence

195. The main issue under this ground of appeal concerns the Trial Chamber's evaluation of Witness TF2-096's testimony. The Trial Chamber found that Witness TF2-096 saw Kondewa shoot one of the town commanders.[380] The next morning, Witness TF2-096 also saw two graves and was told that the town commanders were buried in them.[381] In response to the Prosecution's question, "do you know what eventually happened to this man you saw being shot?" Witness TF2-096 responded that the next day she was told by the Kamajors that "the two people dancing yesterday were in those graves."[382]

196. First, Kondewa submits that the evidence relied on by the Trial Chamber in finding that the Town Commander actually died was "skeletal at best" and did not establish that the Town Commander was dead.[383] Second, Kondewa argues that the Trial Chamber erred in relying solely on this uncorroborated hearsay evidence of Witness TF2-096 in finding Kondewa guilty for committing the murder of the town commander,[384] as the Trial Chamber failed to exercise the

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[378] Kondewa Appeal Brief, paras 93-121.
[379] Prosecution Response Brief, paras 4.17, 4.18.
[380] CDF Trial Judgment, para. 623.
[381] *Ibid.*
[382] CDF Transcript, 8 November 2004, p. 27.
[383] Kondewa Appeal Brief, para. 102(i).
[384] *Ibid* at paras 110, 114.

appropriate caution in reviewing the hearsay evidence.[385] Third, Kondewa submits that the Trial Chamber erred in its reliance on circumstantial evidence to convict him of murder because "inferences reasonably to be drawn from the evidence must not only be consistent with Kondewa's guilt but inconsistent with every reasonable hypothesis of Kondewa's innocence."[386] He asserts that a number of alternative explanations exist, such as that the Town Commander could have been murdered by someone else.[387]

197. In response, the Prosecution argues that the Trial Chamber took into account the hearsay evidence only as corroborating the eyewitness testimony of Witness TF2-096.[388] Therefore, the Prosecution submits that this evidence and 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 were inconsistent with any reasonable hypothesis of Kondewa's innocence.[389] The Prosecution argues that Witness TF2-096's testimony that the Town Commander "fell" should naturally be understood as a statement that the victim was shot dead.[390] The Prosecution argues that this was the understanding of everyone in the courtroom including the Defence Counsel, as there was no objection to the Prosecution's subsequent question about how the witness knew the person who killed the town commander.[391]

198. Before assessing whether the Trial Chamber erred in its application of the law to the facts, the Appeals Chamber considers it necessary to set out the applicable law. The Appeals Chamber considers that as a matter of law it is permissible to base a conviction on circumstantial evidence and/or hearsay evidence.[392] Because hearsay evidence is admissible as substantive evidence in order to prove the truth of its contents, the Appeals Chamber considers that establishing the reliability of hearsay evidence is of paramount importance.[393]

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[385] *Ibid* at para. 114.
[386] *Ibid* at para. 118.
[387] *Ibid.*
[388] Prosecution Response Brief, paras 4.21-4.22.
[389] *Ibid* at para. 4.25.
[390] *Ibid* at para. 4.21.
[391] *Ibid.*
[392] *Gacumbitsi v. Prosecutor,* ICTR-01-64-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 7 July 2006, para. 115 [*Gacumbitsi* Appeal Judgement]; *Prosecutor v. Kamuhanda*, ICTR-99-54-A-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 19 September 2005, para. 241; *Kupreškić* Appeal Judgement, para. 303.
[393] *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 17 December 2004, para. 281 [*Kordić* Appeal Judgement], *citing Prosecutor v. Aleksovski*, IT-

199. Kondewa's reliance on ICTY and ICTR case law for the proposition that the *ad hoc* Tribunals "have disregarded uncorroborated hearsay evidence related to an accused's participation in murder because such evidence is seen as unreliable"[394] is noted. However, although the jurisprudence from other Courts is of great assistance in determining a question of law, whether a particular Trial Chamber erred in its application of the law to the facts, should be determined on the facts of each case. Further, the Appeals Chamber notes that, as a matter of law, a Trial Chamber may convict an accused on the basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness.[395] Corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to the evidence.[396] Any appeal based on the absence of corroboration must be against the weight which a Trial Chamber attaches to the evidence in question.[397]

200. It is common place that a criminal tribunal may convict on circumstantial evidence provided that the only reasonable inference to be drawn from such evidence leads only to the guilt of the accused. When such evidence is capable of any other reasonable inference it is not reliable for the purposes of convicting an accused.

201. Witness TF2-096 testified that she saw Kondewa shoot one of the town commanders and that he fell. Immediately after witnessing this incident, the witness ran away. The Appeals Chamber finds that the fact that she did not herself witness that the town commander was dead, leaves the possibility open that someone else may have killed the town commander. The Trial Record does not contain any evidence corroborating the veracity of Witness TF2-096's testimony that the Kamajors identified the graves of the two people dancing. Furthermore, no evidence indicates the identity of the Kamajors or whether they were present during the incident during which Witness TF2-096 saw Kondewa shoot the town commander. In addition, no further evidence concerned whether the town commander died. No nexus exists between Kondewa's act and the death of the town commander. The evidence that the town commander died is insufficient and, therefore, the offence of murder has not been proved.

95-14/1, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

[394] Kondewa Appeal Brief, para. 116.

[395] *Kordić* Appeal Judgement, para. 274.

202. Therefore, because Witness TF2-096's testimony did not establish that the town commander died, no reasonable trier of fact could have found that the only reasonable inference was that Kondewa killed the town commander. Further, even if it had been established that the Town Commander died, someone else could have killed the town commander after Witness TF2-096 ran away, given that it has not been established that the town commander died because of Kondewa's shot.

4. Conclusion

203. Having found that the death of the Town Commander was not proved beyond reasonable doubt, the Appeals Chamber comes to the conclusion that the Trial Chamber was in error in finding that the Town Commander was killed by the Kamajors as alleged in the Indictment.

204. The Appeals Chamber grants Kondewa's Second Ground of Appeal.

C. Kondewa's Third Ground of Appeal: Superior Responsibility Pursuant to Article 6(3) of the Statute in Relation to Moyamba District

1. Introduction and Findings of the Trial Chamber

205. Kondewa alleges an error in law and in fact by the majority of the Trial Chamber, Justice Thompson dissenting, in finding that the Prosecution has proved beyond reasonable doubt that he was individually criminally responsible as a superior pursuant to Article 6(3) for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II punishable under Article 3.f. of the Statute (Count 5), in Moyamba District.[398] Similar to his First Ground of Appeal, Kondewa in essence challenges the Trial Chamber's application of the "effective control" test to establish that a superior-subordinate relationship existed between him and his alleged subordinates.

206. The Trial Chamber found that even though evidence of Kondewa's *de jure* status as High Priest was inconclusive to establish beyond reasonable doubt that he had effective control over

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[396] *Ibid.*
[397] *Ibid.*
[398] The Appeals Chamber notes that Kondewa's Second Ground of Appeal in Kondewa Appeal Brief corresponds to his Third Ground of Appeal in his Notice of Appeal. The Appeals Chamber will follow the numbering set forth in Kondewa's Notice of Appeal. Accordingly, the Appeals Chamber will refer to this ground as Kondewa Third Ground of Appeal, although Kondewa Appeal Brief refers to it as his Second Ground of Appeal. In addition, the Appeals

Kamajors in Moyamba District, he was nevertheless responsible as a superior for one particular incident of pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II punishable under Article 3.f. of the Statute, committed in Moyamba District.[399] The incident involved the looting of a Mercedes Benz car, a generator, car tires and other gadgets by Kondewa's alleged subordinates ("Moyamba looting incident").[400]

207. The Trial Chamber found that:

> "[i]n November 1997, Kamajors under the control of Kondewa took TF2-073's Mercedes Benz from his home in Sembehun. The Kamajors said that they were Kondewa's Kamajors and that they had come from Talia, Tihun, Gbangbatoke and other surrounding villages. Three of them introduced themselves as Steven Sowa, Moses Mbalacolor and Mohamed Sankoh. Mohamed Sankoh said he was Deputy Director of War under Norman. The car was eventually given to Kondewa, who kept the car and used it without permission.
>
> On the same occasion these Kamajors also took a generator, car tires and other gadgets from TF2-073."[401]

208. The Trial Chamber found that both the general requirements of war crimes and the specific elements of pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II punishable under Article 3.f. of the Statute, had been met, and that the incident demonstrated that the looting was done by Kamajors who operated under the direct orders of Kondewa.[402] Furthermore, Kondewa's knowledge that his subordinates committed this crime was established on the basis that the looted car was then given to him to drive around.[403] The Trial Chamber further found that Kondewa not only failed in the exercise of his duties to punish his subordinates, but chose instead to support their actions by using the looted vehicle himself.[404]

2. Submissions of the Parties

209. Kondewa submits that the only evidence relied on by the Trial Chamber to find that a superior-subordinate relationship existed between him and these Kamajors was his acceptance of

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Chamber notes that the Prosecution Response Brief refers to the Grounds of Appeal in accordance with the numbering in Kondewa Appeal Brief, *see* Prosecution Response Brief, para. 1.6.

[399] CDF Trial Judgment, paras 951-955.

[400] *Ibid* at para. 951. *See also* paras 645-648 of the factual findings of the Trial Chamber.

[401] *Ibid* at para. 951.

[402] *Ibid* at paras 953, 954.

[403] *Ibid* at para. 954.

[404] *Ibid*.

the looted car after the offence had been committed and after the car had been used by Norman himself.[405] He argues that the Trial Chamber erred in relying on this single piece of evidence, and that the evidence could not be relied on to establish the existence of a superior-subordinate relationship at the time the offence was committed.[406] Kondewa therefore requests that the Appeals Chamber reverse the Trial Chamber's finding that he was responsible as a superior for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II punishable under Article 3.f. of the Statute (Count 5) in Moyamba District.

210. The Prosecution relies on its submissions in response to Ground One of Kondewa's appeal. In particular, the Prosecution reiterates that the Trial Chamber did not base its findings on the existence of a superior-subordinate relationship on Kondewa's *de jure* position as High Priest alone, nor on any single piece of evidence as alleged by the Defence, but on the evidence in the case as a whole.[407] Furthermore, the Prosecution submits that evidence relied on by the Trial Chamber to establish effective control also included the fact that at the time of the alleged incident, the Kamajors stated that they were "Kondewa's Kamajors."[408] According to the Prosecution it is "clearly possible and consistent with logic and principle" for Kondewa to have had effective control over some but not all Kamajors.[409]

211. The Prosecution submits therefore that on the basis of the evidence in the case as a whole, it was open to a reasonable trier of fact to conclude that Kondewa had effective control over the perpetrators of the Moyamba looting incident.[410]

3. Discussion

212. The issue raised in this ground is whether, based on the evidence as a whole, a reasonable tribunal of fact could conclude that a superior-subordinate relationship existed between Kondewa and his alleged subordinates. In reaching its findings on the superior responsibility of Kondewa in respect of this incident, the Trial Chamber relied on the following evidence:

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[405] Kondewa Appeal Brief, para. 83.
[406] *Ibid* at paras 85-88.
[407] Prosecution Response Brief, paras 3.8, 3.13.
[408] *Ibid* at para. 3.15. Kondewa argues that this evidence is insufficient to find that the Kamajors were indeed "Kondewa's Kamajors." *See* Kondewa Reply Brief, para. 2.7.
[409] Prosecution Response Brief, para. 3.14.
[410] *Ibid* at para. 3.15.

"(i) that at the time the crime was committed, the Kamajors said they were "Kondewa's Kamajors";

(ii) that they also said they had come from villages including Talia and Tihun both of which are in Bonthe District;

(iii) that the vehicle was taken to Talia and given to Norman then to Kondewa; and

(iv) that Kondewa was subsequently seen driving the car around in Bo."[411]

213. Based on this evidence the Trial Chamber concluded that this particular crime in Moyamba District was carried out by Kamajors operating under the direct orders of Kondewa.[412]

214. It is evident that apart from Kondewa's *de jure* status as High Priest of all the Kamajors in the country, a status which the Trial Chamber found did not by itself give Kondewa effective control over the Kamajors, the only other evidence relied on by the Trial Chamber consisted of statements made by the alleged perpetrators and the use of the vehicle by Kondewa after it had first been given to Norman. The Appeals Chamber finds that the fact that the Kamajors in question identified themselves as "Kondewa's Kamajors" is insufficient to establish the existence of a superior-subordinate relationship beyond reasonable doubt, the statement having been made in the absence of Kondewa. Furthermore, the fact that they also stated that they had come from Talia and Tihun, among other villages, was insufficient. The Trial Chamber, in its findings on the responsibility of Kondewa in Bonthe District, found that apart from the Kamajors who carried out the 15 February 1998 attack on Bonthe, there was no evidence on which it could conclude beyond reasonable doubt that "Kondewa did exercise the same degree of control over other Kamajor commanders and fighters who operated in the surrounding areas of Bonthe Town, prior to the attack or subsequently."[413]

215. There was thus, insufficient evidence linking Kondewa to these particular Kamajors that could establish beyond reasonable doubt that he had a superior-subordinate relationship with them. The Appeal Chamber finds, therefore, that on the evidence it was not open to a reasonable tribunal of fact to conclude that Kondewa was individually criminally responsible as a superior for this

[411] CDF Trial Judgment, paras 645-648. Talia is also known as Base Zero, and Kondewa had established his authority in Tihun since before the establishment of Base Zero, *see ibid* at paras 294, 295.
[412] *Ibid* at para. 954.
[413] *Ibid* at para. 873.

particular act of pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute in Moyamba District.

4. Disposition

216. For the reasons set out above, the Appeals Chamber grants Kondewa's Third Ground of Appeal and reverses the verdict of guilt on Count 5 and substitutes a verdict of not guilty.

D. Kondewa's Sixth Ground of Appeal: Cumulative Convictions and Collective Punishments

1. Introduction

217. The majority of the Trial Chamber, Justice Thompson dissenting, convicted Kondewa of collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute (Count 7), as well as for three other war crimes, namely, violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, punishable under Article 3.a. of the Statute (Counts 2 and Count 4, respectively); and pillage, punishable under Article 3.f. of the Statute (Count 5).[414] In his Sixth Ground of Appeal,[415] Kondewa submits that the majority of the Trial Chamber erred in law in entering a conviction for collective punishments (Count 7) which is impermissibly cumulative with his convictions for murder (Count 2), cruel treatment (Count 4) and pillage (Count 5), because they are based on the same conduct.[416]

218. Kondewa does not dispute the Trial Chamber's pronouncement on the legal standard for cumulative convictions,[417] but instead takes issue with its application.[418] Kondewa asserts that the Indictment limits the crimes that can be considered for collective punishments to the crimes charged in Counts 2, 4 and 5. He argues that while the Prosecution relied upon the same conduct to charge

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[414] *Ibid* at para. 975 and Disposition, pp. 290-292. *See also* Kondewa Appeal Brief, para. 163.
[415] The Appeals Chamber notes that Kondewa's Fifth Ground of Appeal in his appeal brief corresponds to his Sixth Ground of Appeal in his Notice of Appeal. The Appeals Chamber will follow the numbering set forth in Kondewa's notice of appeal. Accordingly, the Appeals Chamber will refer to this ground as Kondewa's Sixth Ground of Appeal. In addition, the Appeals Chamber notes that the Prosecution Response Brief refers to the Grounds of Appeal in accordance with the numbering in Kondewa Appeal Brief, *see* Prosecution Response Brief, para. 1.6.
[416] Kondewa Appeal Brief, paras 160-174. Kondewa submits that "[i]n the event the Appeals Chamber does not accept the Defence arguments for overturning the convictions for Counts 2, 4 and 5, the Defence sets out Ground five," *Ibid* at para. 160.
[417] *Ibid* at para. 162.
[418] *Ibid* at paras 168-173.

collective punishments in Count 7 and the crimes in Counts 2, 4 and 5, the Trial Chamber impermissibly widened the interpretation of punishment for the purposes of collective punishments beyond the conduct charged in Counts 2, 4 and 5.[419] In particular, the Trial Chamber found that "the term punishment in the first element [of collective punishments] is meant to be understood in its broadest sense and refers to all types of punishments."[420] Kondewa submits that the Trial Chamber therefore erred in finding that "because the *actus reus* and the *mens rea* of collective punishments can be broader than the 'punishments' of Count [*sic*] 1-5, it is permissible to enter convictions under Count 7 as well as Counts 2-5."[421]

219. The Prosecution argues that when an accused has been charged with two crimes in relation to the same conduct, the relevant question is whether the two statutory provisions, as a matter of law, both contain a materially distinct element not contained in the other.[422] The question is not whether the two statutory provisions, as a matter of fact, are each based on a material fact on which the other is not based.[423] The Prosecution argues that the relevant crimes, as a matter of law, contain materially distinct elements and that cumulative convictions are therefore permissible.[424]

2. Discussion

220. The Trial Chamber held that the "issue of cumulative convictions arises when more than one conviction is imposed for the same criminal conduct" and that multiple convictions for the same conduct are permissible if each statutory provision has a materially distinct element not contained in the other.[425] Elements are materially distinct from one another if each requires proof of a fact not required by the other.[426] The Trial Chamber stated that "multiple convictions may only be upheld if

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[419] *Ibid* at paras 164-168.
[420] *Ibid* at paras 164-168; CDF Trial Judgment, para. 181.
[421] Kondewa Appeal Brief, para. 167. The Appeals Chamber notes that Kondewa was only convicted of murder (Count 2), cruel treatment (Count 4) and pillage (Count 5).
[422] Prosecution Response Brief, para. 6.14.
[423] *Ibid* (emphasis omitted).
[424] *Ibid* at paras 6.15-6.28.
[425] CDF Trial Judgment, para. 974, *quoting Čelebići* Appeal Judgement, para. 412, *citing Prosecutor v. Musema*, ICTR 96-13-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 16 November 2001, paras 361-363 [*Musema* Appeal Judgement]; and *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 3 May 2006, paras 584-585.
[426] *Ibid.*

both of the provisions require proof of an element that is not required by the other provision."[427] The Appeals Chamber agrees with the Trial Chamber's pronouncement of the law in this regard.

221. Before examining the Trial Chamber's application of the law on cumulative convictions to the crimes at issue in this ground of appeal, the Appeals Chamber first sets forth the following elements for the crime of collective punishments under Article 3.b. of the Statute as stated by the Trial Chamber:

> (i) A punishment imposed collectively upon persons for omissions or acts that they have not committed; and
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> (ii) The Accused intended to punish collectively persons for these omissions or acts or acted in the reasonable knowledge that this would likely occur.[428]

222. Article 3.b. of the Statute is based on Article 33 of the Fourth Geneva Convention and Article 4(2)(b) of Additional Protocol II to the Geneva Conventions, both of which prohibit collective punishments against protected persons.[429] The prohibition of collective punishments embodies an elementary principle of humanity that penal liability is personal in nature.[430] Restrictive interpretations of collective punishments must be avoided because the prohibition of this crime is one of the fundamental guarantees of humane treatment.[431] The prohibition on collective punishments must be understood in its broadest sense so as to include not only penalties imposed during normal judicial processes, such as sentences rendered after due process of law, but also any other kind of sanction such as a fine, confinement or a loss of property or rights.[432]

223. The Appeals Chamber emphasises that a "punishment" for the purposes of the crime of collective punishments is an indiscriminate punishment imposed collectively on persons for omissions or acts for which some or none of them may or may not have been responsible. As such, a "punishment" is distinct from the targeting of protected persons as objects of attack. The targeting of protected persons as objects of war crimes and crimes against humanity may not

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[427] *Ibid.*
[428] CDF Trial Judgment, para. 180.
[429] Article 33 of Geneva Convention IV states that: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Article 4(2)(b) of Additional Protocol II states that collective punishments against "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities" "are and shall remain prohibited at any time and in any place whatsoever." *See also* Article 75(2)(d) of Additional Protocol I.
[430] ICRC Commentary to Geneva Convention IV, Article 33, p. 225.
[431] ICRC Commentary on Additional Protocols, para. 4536.
[432] *Ibid.*

necessarily be predicated upon a perceived transgression by such persons and therefore does not constitute collective punishments. Thus, the *mens rea* element of collective punishments represents the critical difference between this crime and the act of targeting. While targeting takes place on account of who the victims are, or are perceived to be, the crime of collective punishments occurs in response to the acts or omissions of protected persons, whether real or perceived. The targeting of protected persons who are residents of a particular village, for instance, is therefore distinct from the collective punishment of protected persons in a given village who are perceived to have committed a particular act, such as providing rebel forces with shelter.

224. The Appeals Chamber finds that the correct definition of collective punishments is:

i) the indiscriminate punishment imposed collectively on persons for omissions or acts for which some or none of them may or may not have been responsible;

ii) the specific intent of the perpetrator to punish collectively.

225. In light of the above definition of collective punishments, it is the view of the Appeals Chamber that convictions are permissible for collective punishments, in addition to murder, cruel treatment and pillage. The crime of collective punishments requires proof of an intention to punish collectively, which murder, pillage and cruel treatment do not. In addition, murder requires the death of the victim, which collective punishments does not and pillage requires proof of appropriation which the crime of collective punishments does not. Finally, cruel treatment requires proof of serious mental or physical suffering or injury, which collective punishments does not. Thus, because each of these crimes requires proof of materially distinct elements, cumulative convictions are permissible in this instance.

226. Despite our finding that the Trial Chamber did not err in determining that cumulative convictions are permissible for the crime of collective punishments in addition to murder, cruel treatment and pillage, the Appeals Chamber must, nonetheless, re-examine the Trial Chamber's factual findings on collective punishments in light of the Appeals Chamber's definition of the elements of this crime.

227. In relation to the commission of murder and cruel treatment in Tongo, the Trial Chamber found both Fofana and Kondewa liable pursuant to Article 6(1) for aiding and abetting in the

preparation of the commission of collective punishments under Count 7.[433] In relation to the commission of murder and cruel treatment in Koribondo, the Trial Chamber found Fofana liable as a superior, pursuant to Article 6(3), for the commission of collective punishments under Count 7.[434] In relation to the commission of murder, cruel treatment and pillage in Bo District, the Trial Chamber found Fofana liable as a superior pursuant to Article 6(3), for the commission of collective punishments under Count 7.[435] Finally, in relation to the commission of murder, cruel treatment and pillage in Bonthe District, the Trial Chamber found Kondewa liable as a superior pursuant to Article 6(3), for the commission of collective punishments under Count 7.[436]

228. The Trial Chamber relied on numerous factual findings concerning murder, cruel treatment and pillage to support its convictions of Fofana and Kondewa for the commission of collective punishments in the various locations mentioned above. The Appeals Chamber's examination of these findings reveals that the victims of murder, cruel treatment and pillage were being targeted in these places because of their identities or their locations at the time of the Kamajors' attacks. In particular, the Kamajors targeted individuals who were identified or accused of being rebels and collaborators, or who were related to rebels.[437] In addition, the Kamajors targeted Loko, Limba and Temne tribe members,[438] policemen[439] and civilians in close proximity to the National Diamond Mining Company (NDMC) Headquarters in Tongo.[440] Finally, many other civilians appear to have been targets of murder, cruel treatment and pillage merely by chance, due to the indiscriminate nature of the attacks on these locations.[441] Thus, the Trial Chamber's factual findings indicate that the individuals who came under attack in Tongo, Koribondo, Bo District and Bonthe District were being targeted due to their perceived identities, their locations, or by sheer chance.

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[433] CDF Trial Judgment, paras 763-764.
[434] *Ibid* at para. 798.
[435] *Ibid* at para. 846.
[436] *Ibid* at para. 903.
[437] *Ibid* at para. 750(i), (iii), (iv), (vii), (x)-(xi), (xiv)-(xv) (murder in Tongo); para. 756(ii) (cruel treatment in Tongo); para. 786(i), (iii)-(v) (murder in Koribondo); para. 830(i)-(ii) (murder in Bo District); para. 883(ii), (v) (murder in Bonthe District); para. 890(i), (ii) (cruel treatment in Bonthe District).
[438] *Ibid* at para. 750(ii) (murder in Tongo); para. 756(iv) (cruel treatment in Tongo); para. 786(ii) (murder in Koribondo).
[439] *Ibid* at para. 835(ii) (cruel treatment in Bo District).
[440] *Ibid* at para. 750(vi), (viii)-(ix) (murder in Tongo); para. 756(i) (cruel treatment in Tongo).
[441] *Ibid* at para. 750(xii)-(xiii) (murder in Tongo); para. 756(iii) (cruel treatment in Tongo); 791(i)-(ii) (cruel treatment in Koribondo); para. 839(ii)-(iv) (pillage in Bo District); para. 883(i), (iii)-(iv), (iv) (murder in Bonthe District); para. 890(iii) (cruel treatment in Bonthe District); para. 896(i)-(iii) (pillage in Bonthe District).

229. The Trial Chamber's factual findings do not, however, indicate that these individuals were objects of attack because of perceived acts or omissions for which the Kamajors sought to punish them.

230. The Appeals Chamber holds that Trial Chamber's factual findings do not prove beyond reasonable doubt that the perpetrators of these crimes were attacking protected persons in these areas with the intent to collectively punish them for their perceived acts or omissions. In the result, the Appeals Chamber finds that the requisite *mens rea* for collective punishments, which represents the key distinction between targeting and collectively punishing, has not been satisfied. Given that the *mens rea* requirement for collective punishments has not been met, the Appeals Chamber need not examine whether the *actus reus* has been fulfilled.

3. Disposition

231. For these reasons, the Appeals Chamber, Justice Winter dissenting, reverses the Trial Chamber's verdict of Fofana and Kondewa for collective punishments under Count 7 and substitutes a conviction of not guilty.

IV. PROSECUTION'S APPEAL

A. Prosecution's First Ground: Crimes Against Humanity

1. Introduction

232. Paragraph 25 of the Indictment sets out the material facts upon which Fofana and Kondewa were charged with murder as a crime against humanity under Article 2.a. of the Statute (Count 1) and as a war crime under Article 3.a. of the Statute (Count 2). The material facts of acts of physical violence and infliction of mental harm or suffering are set out in paragraph 26 of the Indictment, charging both Fofana and Kondewa with inhumane acts, as a crime against humanity under Article 2.g. of the Statute (Count 3) and cruel treatment as a war crime under Article 3.a. of the Statute (Count 4).

233. The Trial Chamber convicted Fofana and Kondewa under Counts 2 and 4, finding that the legal requirements for murder and cruel treatment as well as the general requirements for war

crimes were satisfied.[442] However, the Trial Chamber acquitted them of Counts 1 and 3 because it held that the general requirements of crimes against humanity were not satisfied in this case.

234. The Prosecution submits that the Trial Chamber erred in law and in fact in not finding that the general requirement for crimes against humanity was satisfied.[443]

2. The Findings of the Trial Chamber

235. The Trial Chamber confirmed the following general requirements (or *chapeau* elements) of crimes against humanity as follows:

(i) There must be an attack;

(ii) The attack must be widespread or systematic;

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

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

(v) The Accused knew or had reason to know that his or her acts constitute part of a widespread or systematic attack directed against any civilian population.[444]

236. The Trial Chamber held that the first and second of these elements were satisfied in this case.[445] It found that the attacks carried out by the Kamajors in Tongo in late November/early December 1997, early January 1998 and on 14 January 1998; in Koribondo between 13 and 15 February 1998; in Bo Town between 15 and 23 February 1998; in Bonthe on 15 February 1998; and in Kenema between 15 and 18 of February 1998, constituted "part of a widespread attack."[446] The Trial Chamber considered that "in the light of the broad geographical area over which these attacks occurred, . . . the requirement of a widespread attack has been established in this case."[447]

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[442] *Ibid* at paras 696-697.
[443] Prosecution Appeal Brief, para. 2.5.
[444] CDF Trial Judgment, paras 110, 690.
[445] *Ibid* at paras 691-692.
[446] *Ibid* at para. 691.
[447] *Ibid*.

237. Turning to the third element, the Trial Chamber stated, as held in the *Kunarac* Appeal Judgment, that this element requires that the civilian population "be the primary rather than an incidental target of the attack."[448] The Trial Chamber found that:

> "the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack. By contrast, there is evidence that these attacks were directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone. In this regard the Chamber recalls the admission of the Prosecutor that 'the CDF and the Kamajors fought for the restoration of democracy.'"[449]

238. As a result, the Trial Chamber considered that the requirement that an attack be directed against any civilian population was not satisfied beyond reasonable doubt, and therefore acquitted Fofana and Kondewa under Count 1 (murder as a crime against humanity) and Count 3 (inhumane acts as a crime against humanity).

239. Under this Ground of Appeal, the main issue that arises is whether the Trial Chamber erred in law or in fact in finding that the third element of crimes against humanity had not been satisfied. The Appeals Chamber will consider, in turn, the alleged errors of law and of fact raised by the Prosecution.

3. Alleged Errors of Law

(a) Submissions of the Parties

240. The Prosecution contends that the Trial Chamber erred in its legal interpretation of the third element of crimes against humanity. The Prosecution submits that the Trial Chamber's finding that the civilian population was not the primary object of the attacks was based on the evidence that "these attacks were directed against the rebels or juntas."[450] According to the Prosecution, "it is apparent from this finding that the Trial Chamber considered, as a matter of law, that an attack will not be one that is "directed against" a civilian population if civilians are attacked in the course of attacks directed against opposing forces."[451] The Prosecution submits that under the case law of the ICTY and ICTR, the expression that the civilian population be the "primary object of the attack" was not intended to mean that widespread or systematic attacks against civilian populations will not

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[448] *Ibid* at para. 114, *citing Kunarac* Appeal Judgement, para. 92.
[449] *Ibid* at para. 693 (footnote omitted).
[450] Prosecution Appeal Brief, para. 2.16, *quoting* CDF Trial Judgment, para. 693.

constitute crimes against humanity merely because they occurred during attacks on opposing forces or in the course of operations that had a military objective.[452] It further submits that the Trial Chamber erred in law in finding that the fact that CDF "fought for the restoration of democracy" may in any way be a material consideration for the purpose of crimes against humanity.[453]

241. In response, Kondewa states that the Trial Chamber was correct in finding that the general requirements of crimes against humanity were not satisfied in this case. He submits that the Trial Chamber applied the correct legal standard in concluding that the civilian population was not the primary object of the attack.[454] He further submits that the Trial Chamber did not find that since there was an attack against the rebels, there could not be an attack against the civilian population.[455] Instead, the Trial Chamber simply found that, based on the evidence, the civilian population was not directly and specifically attacked as the primary target.[456] Kondewa further submits that the Trial Chamber was correct to state that the CDF "fought for democracy," in view of the fact that the existence of a plan or policy can be relevant to proving that an attack was directed against a civilian population.[457]

242. In response, Fofana concurs with the reasoning of the Trial Chamber. He argues that the factors outlined in *Kunarac* for determining whether the attack was directed against a civilian population are not cumulative and the Trial Chamber was not required to ascertain that all factors were met for the purpose of crimes against humanity[458] and that the CDF never had a policy of terrorising civilians.[459]

243. In reply to Kondewa's submission that the absence of a plan or a policy to target the civilians may be relevant to ascertain that there was no "attack directed against a civilian population," the Prosecution contends that a distinction must be drawn between the "purpose of an

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[451] *Ibid* at para. 2.16.
[452] *Ibid* at para. 2.20.
[453] *Ibid* at para. 2.51.
[454] Kondewa Response Brief, para. 1.2
[455] *Ibid* at para. 1.6.
[456] *Ibid.*
[457] *Ibid* at para. 1.8.
[458] Fofana Response Brief, paras 6-10.
[459] *Ibid* at para. 16.

attack," *e.g.*, contributing to the reinstatement of democracy and the "target" of an attack, which may be a civilian population."[460]

(b) Discussion

244. As has been earlier stated, the Trial Chamber found that the requirement that the attack be directed against the civilian population was not satisfied in this case.

245. The Prosecution submits that two legal errors arise from that finding: first, it contends that the Trial Chamber erred in considering that the fact that CDF fought for democracy was a relevant factor; and second, that the Trial Chamber incorrectly considered that, as a matter of law, an attack is not directed against a civilian population if civilians are targeted in the course of an attack against opposing forces.

(i) Whether Fighting for Democracy May be a Material Element for the Purposes of Crimes Against Humanity

246. The Prosecution submits that "the elements of crimes against humanity prohibit attacks against the civilian population regardless of their purpose."[461] The Appeals Chamber notes Kondewa's contentions that while the existence of a plan or policy can be evidentially relevant in proving that an attack was directed against a civilian population – although it is not a legal element of crimes against humanity – "it should be evidentially relevant in proving that an attack was not directed against a civilian population."[462]

247. In the opinion of the Appeals Chamber, it is manifestly incorrect to conclude that widespread or systematic attacks against a civilian population cannot be characterised as crimes against humanity simply because the ultimate objective of the fighting force was legitimate and/or aimed at responding to aggressors. The Appeals Chamber deems it necessary to emphasise that rules of international humanitarian law apply equally to both sides of the conflict, irrespective of who is the "aggressor," and that the absolute prohibition under international customary and conventional law on targeting civilians precludes military necessity or any other purpose as a

[460] Prosecution Reply, paras 2.6, 2.11.
[461] Transcript, CDF Appeals Hearing, 12 March 2008, page 10, lines 9-11.
[462] Kondewa Response Brief, para. 1.8 (emphasis in the original).

justification. The Appeals Chamber holds that it is no justification that the perpetrators of a crime against humanity were fighting for the restoration of democracy.

248. The Trial Chamber's finding shall not be interpreted as legitimizing any unlawful acts committed against the civilians. The Trial Chamber's Judgment, read as a whole, makes it clear that the Trial Chamber underscored the prohibition on targeting civilians and the criminality of any acts directed against such protected persons. In its description of the applicable law on crimes against humanity, the Trial Chamber recalled that "there is an absolute prohibition against targeting civilians in customary international law."[463]

249. For these reasons, the Appeals Chamber is unable to find that references by the Trial Chamber to the purpose for which the CDF was fighting was a decisive consideration in its determination of the general requirements for crimes against humanity.

(ii) Whether an Attack Could Not be One "Directed Against A Civilian Population" if Civilians are Attacked in Connection with Legitimate Military Operations

250. The Prosecution argues that the challenged finding of the Trial Chamber implies that, as a matter of law, an attack could not be one "directed against a civilian population" if civilians are attacked in the course of, or immediately after, an attack directed against opposing forces.[464] At the appeals hearing, the Prosecution specified that it would be incorrect to consider that an attack against a civilian population occurring at the same time as, or immediately after a military attack and undertaken by the same fighting forces "must all be seen as one attack."[465] Kondewa agreed with this interpretation of the law.[466]

251. The Appeals Chamber finds no ambiguity in the Trial Chamber's articulation of the applicable law. The Trial Chamber did not exclude the possibility that these attacks were directed against a civilian population merely because there was proof of military attacks targeting the opposing forces. Instead, the Trial Chamber found that while there were attacks against the rebels or juntas, there was no evidence beyond reasonable doubt of the existence of parallel and coexisting

[463] CDF Trial Judgment, para. 115, *referring* to *Blaškić* Appeal Judgement, para. 109.
[464] Prosecution Appeal Brief, para. 2.16.
[465] Transcript, CDF Appeals Hearing, 12 March 2008, p. 8.
[466] Kondewa Appeal Brief, para. 1.4; Transcript, CDF Appeals Hearing, 12 March 2008, p. 124.

attacks directed against the civilian population. The Trial Chamber found that a number of civilians were killed and subject to mistreatments.[467]

252. The Appeals Chamber is unable to conclude that the Trial Chamber considered that, as a matter of law, a military attack cannot coexist with an attack directed against a civilian population.

4. Alleged Errors of Fact

(a) Submissions of the Parties

253. The Prosecution submits that based on the findings and the evidence regarding the attacks on Tongo, Koribondo, Bo Town, Bonthe District and Kenema District, it is evident that civilians were deliberately targeted.[468] In the Prosecution's submission, a review of the evidence accepted by the Trial Chamber demonstrates a "pattern of victimisation of civilians" and makes it clear that the attacks against the civilians "were specifically intended to make victims out of civilians" and that "civilians were not merely incidental casualties of an attack 'directed against the rebels or juntas.'"[469] The Prosecution bases this assertion on the manner in which the crimes were perpetrated[470] and on the instructions, directions and incitement which the leaders of the Kamajors gave prior to these attacks or as they happened.[471]

254. Kondewa responds that the evidence does not support a finding that the civilian population was the primary object of the attacks. Kondewa admits that perceived collaborators are accorded civilian status under international law.[472] He also concedes that certain civilians and collaborators were deliberately and directly targeted.[473] However, relying on the *Limaj* Trial Judgment, he contends that "those perceived and suspected collaborators . . . were targeted as individuals rather than as members of a larger targeted civilian population."[474] In addition, relying on the case law of the ICTY and ICTR, Kondewa submits that to establish that the attack was directed against a civilian population, it must be shown that civilians are targeted because of some distinguishable

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[467] CDF Trial Judgment, paras 750(i)-(iv); 750(vi)-(xi); 756(i)-(iv); 786(i)-(v); 791(i)-791(ii); 830(i)-(ii); 835(i)-(ii); 883(i)-(iv); 890(ii)-(iv)
[468] Prosecution Appeal Brief, para. 2.36.
[469] *Ibid* at para. 2.42.
[470] *Ibid* at paras 2.37-2.42.
[471] *Ibid* at paras 2.43-2.49.
[472] Kondewa Response Brief, para. 1.19.
[473] *Ibid* at para. 1.19.
[474] *Ibid*.

characteristic of a civilian population.[475] In this case, however, individual civilians were attacked because of their suspected affiliation with the fighting forces, not because of a "freestanding characteristic of the individual."[476]

255. Fofana responds that "all the factual findings in the present case glaringly illustrated that there was no attack on a mass number of civilians that can qualify or be regarded as a 'population.' To the contrary, the attacks were . . . directed against the opposing warring factions; and . . . a limited and randomly selected number of individuals, and in some cases groups of civilians incidentally became collateral victims of the attacks."[477]

256. In reply, the Prosecution emphasises that the Trial Chamber found that civilians were specifically targeted in the relevant attacks,[478] and that the CDF specifically targeted civilians who were perceived collaborators of the enemy.[479] The Prosecution accordingly states that the Defence cannot argue that civilians were merely "collateral victims" of a military attack.[480] It further objects to Kondewa's reliance on the *Limaj* Trial Judgment, stating that, unlike in *Limaj*, in this case there was a plan and specific orders from Norman to target civilians and civilians were attacked indiscriminately in large numbers.[481] The Prosecution finally contends that a discriminatory intent is a requirement only for the crime of persecution as a crime against humanity.[482]

(b) Preliminary Considerations

257. Relying on *Kunarac* Appeal Judgment, the Trial Chamber stated that "directed against a civilian population" requires "that the civilian population be the primary rather than incidental target of the attack."[483] In *Kunarac*, the ICTY Appeals Chamber held that:

> "In order to determine whether the attack may be so directed [against a civilian population], the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have

[475] *Ibid* at paras 1.26-1.29.
[476] *Ibid* at para. 1.30.
[477] Fofana Response Brief, para. 12.
[478] Prosecution Reply, paras 2.2, 2.11, *referring* to CDF Trial Judgment, paras 751, 787, 831, 884.
[479] *Ibid* at para. 2.6.
[480] *Ibid*.
[481] *Ibid* at para. 2.12.
[482] *Ibid* at para. 2.15.
[483] CDF Trial Judgment, para. 114, *referring* to *Kunarac* Appeal Judgement, para. 92.

> complied or attempted to comply with the precautionary requirements of the laws of war."[484]

258. The Trial Chamber stated that "civilian population" must be interpreted broadly. It includes "all those persons who are not members of the armed forces or otherwise recognised as combatants."[485] It also stated that the population must be predominantly civilian in nature and that the presence of certain non-civilians in their midst does not change the character of the population.[486] It further stated that the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been the subject of that attack.[487] The Trial Chamber finally stated that:

> "the targeting of a select group of civilians – for example, the targeted killing of a number of political opponents – cannot satisfy the requirements of Article 2. It would therefore be sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population', rather than against a limited and randomly selected number of individuals."[488]

259. Article 50 of Additional Protocol I provides:

> "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2. The civilian population comprises all persons who are civilians. 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."

The Appeals Chamber considers that Article 50(1) of the Additional Protocol I is a useful tool in determining a "civilian population." The Appeals Chamber agrees with the view expressed in several judgments of international tribunals that "the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic"[489] and "[t]he civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."[490] In line with this principle, the

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[484] *Kunarac* Appeal Judgement, para. 91.
[485] CDF Trial Judgment, para. 116, *referring* to *Blaškić* Appeal Judgement, paras 110-113.
[486] *Ibid* at para. 117.
[487] *Ibid* at para. 119.
[488] *Ibid*, *referring* to *Prosecutor v. Limaj et al.*, IT-03-66-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 30 November 2005, para. 187; *Kunarac* Appeal Judgement, para. 90.
[489] *Galić* Appeal Judgement, para. 144, *citing Blaškić* Appeal Judgement, para. 113.
[490] *Galić* Appeal Judgement, para. 144, *citing Kordić* Appeal Judgement, para. 50.

Appeals Chamber takes the view that the presence of rebels or juntas within the victims does not deprive the population of its civilian character.

260. The Appeals Chamber further considers that perceived "collaborators" are accorded civilian status under international law.[491] The Appeals Chamber also notes that the Trial Judgment mentions the killings and mistreatments of a number of police officers. The Trial Chamber found that, as a general presumption and in the execution of their typical law enforcement duties, police forces are considered civilians for the purpose of international humanitarian law, unless they operate under the control of the military.[492]

261. The Trial Chamber noted in this regard that the Sierra Leone Police operated under the control of a civilian authority.[493] Nonetheless, as stated by the Trial Chamber, the status of police officers has to be determined on a case-by-case basis. In its factual findings in respect to the attack in Bo, the Trial Chamber found that, in the early stage of the conflict in Sierra Leone the police were duty bound to support the soldiers, but that they ceased to support the junta in late 1997,[494] and that the Kamajors "turned against the police because of their 'alleged collaboration with the junta.'"[495] The Appeals Chamber further notes, from the Trial Judgment, that "while the Kamajors were in Bo, they captured and killed police officers. [. . .] The police that had been killed did not have ammunition."[496] The Appeals Chamber therefore, holds, that police officers who have been subject to killings and mistreatments in Bo are "civilians." In Kenema, a number of police officers were also killed when the Kamajors entered Kenema Town on 15 February 1998.[497] The Trial Judgment shows no findings that those police officers were armed or fought against the Kamajors. The following day, upon the return of the juntas to Kenema, there were exchange of fire for several hours between the Kamajors and the rebels–among whom were police officers who were fighting.[498] In this context, the Appeals Chamber does not consider those police officers as "civilians."

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[491] Kondewa Response Brief, para. 1.19.
[492] CDF Trial Judgment, para. 136.
[493] *Ibid.*
[494] *Ibid* at paras 438-439.
[495] *Ibid* at para. 440.
[496] *Ibid* at para. 451.
[497] *Ibid* at paras 586-593.
[498] *Ibid* at paras 595-596.

262. The Appeals Chamber now turns to Kondewa's submission that, to establish that the attack was directed against a civilian population, it must be shown that civilians were targeted because of some distinguishable characteristic of the civilian population.[499] He relies in this regard on the case law of the ICTY and ICTR, where the Kosovo Albanian population, the Croats, the Bosnian Muslims, and the Tutsi were found to be a "civilian population."[500] His submission implies that for crimes against humanity to be committed civilians must be targeted on a specific discriminatory ground.

263. In the opinion of the Appeals Chamber the argument is misconceived and inconsistent with the well-established principle that discriminatory intent is only a requirement for the crime of persecution,[501] and not for other crimes against humanity. Further, while several cases have held that crimes against humanity were committed as a result of attacks against civilian populations sharing a common nationality, race or ethnicity, the same has also been found in several cases where civilians were targeted based on less defined grounds.[502] In some of these cases alleged or perceived opponents to a regime, faction or political party have been targeted.[503] Indeed, the Trial Chamber found in the *AFRC* Trial Judgment that attacks against the civilian population were "aimed broadly at quelling opposition to the regime and punishing civilians suspected of supporting the CDF/Kamajors."[504]

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[499] Kondewa Response Brief, para. 1.27.
[500] *Ibid* at paras 1.26-1.29.
[501] In *Tadić*, the Appeals Chamber found that "the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent" and ruled that: "Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is concerning various types of persecution. *Tadić* Appeal Judgement, para. 305.
[502] In *Semanza,* the Trial Chamber stated in relation to crimes against humanity that "The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attacks." *Semanza* Judgement and Sentence, para. 330; for case-law supporting this principle, *see* AFRC Trial Judgment, para. 225; and *Almonacid-Arellano et al v. Chile*, Inter-American Court of Human Rights, Judgment, (26 September 2006).
[503] For instance, in *Almonacid-Arellano et al v. Chile*, the Inter-American Court of Human Rights found that following the overthrow of the Allende government, the Military Junta in Chile carried on a "widespread repression against alleged opponents to the regime," constitutive of crimes against humanity. According to the Court, this repression was a "standard State policy" "though subject to changing intensity and various selectivity levels for choosing victims". The killings were part ...of an attempt to carry out a 'cleanup' operation aimed at those who were regarded as dangerous by reason of their ideas and activities and to instil fear into their colleagues who eventually might be a 'threat'. The Court specified that "during the initial repression stage, the selection of victims was largely carried out arbitrarily." *Almonacid-Arellano et al v. Chile*, Inter-American Court of Human Rights, Judgment, (26 September 2006).
[504] AFRC Trial Judgment, para. 225.

264. The Appeals Chamber holds that as a matter of law perceived or suspected collaborators with the rebels or juntas, as in the present case, are likewise part of a "civilian population." The Appeals Chamber will now turn to the main issue in this ground of appeal, in light of the Trial Chamber's factual findings.

(c) The Trial Chamber's Findings of Fact

265. In determining whether the Trial Chamber erred in finding that the evidence adduced did not prove beyond reasonable doubt that the attacks were "directed against a civilian population" the Appeals Chamber will now consider the relevant findings of fact made by the Trial Chamber in respect to each of the locations where the attacks have been carried out by the Kamajors, namely: in Tongo in late November/early December 1997, early January 1998 and on 14 January 1998; in Koribondo between 13 and 15 February 1998; in Bo Town between 15 and 23 February 1998; in Bonthe on 15 February 1998; and in Kenema between 15 and 18 February 1998.[505]

(i) The Attacks on Tongo

266. The Prosecution charged Fofana and Kondewa with murder as a crime against humanity for the unlawful killing of an unknown number of civilians and those identified as "collaborators," along with captured enemy combatants at or near Tongo Field and at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun, between about 1 November 1997 and 30 April 1998.[506] The Prosecution also charged the Accused with inhumane acts as a crime against humanity for acts of physical violence and infliction of mental harm against an unknown number of civilians in Tongo Field and the surrounding areas between 1 November 1997 and 30 April 1998[507] and for intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians, through acts of screening for collaborators, unlawfully killing suspected collaborators, often in plain view of friends and relatives, illegal arrest and unlawful imprisonment of collaborators, the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot, in the towns of Tongo Field between November 1997 and December 1999.[508]

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[505] CDF Trial Judgment, para. 691.
[506] Indictment, paras 24.a., 25.a.
[507] *Ibid* at para. 26.a.
[508] *Ibid* at para. 26.b.

267. The Trial Chamber found that the attacks carried out by the Kamajors in Tongo in late November/early December 1997, early January 1998 and on 14 January 1998 constituted part of a "widespread attack," within the meaning of crimes against humanity.[509]

268. The Trial Chamber found that, at the passing out parade held between 10-12 December 1997, Norman ordered the Kamajors to attack Tongo because its possession would "determine the outcome of the war."[510] The evidence accepted by the Trial Chamber demonstrates that three main attacks on Tongo Town were launched by the Kamajors, one of the key commanders was Kamabote.[511] The first attack, which was launched in December 1997, aimed at determining the rebels' location.[512]

269. The second attack was launched in early January 1998.[513] More than 1000 civilians attempting to flee the attack were detained at a rebel checkpoint.[514] The Kamajors took control of the civilians and led them to Kenema.[515] In Talama, they searched for their belongings and ordered them to form queues according to their tribes.[516] Loko, Limba and Temne tribe members were ordered to form one queue, which contained 150 men and one 12-year-old boy.[517] Kamabote killed the boy, when he discovered he was related to a rebel.[518] On the orders of Kamabote, the Kamajors killed each of the 150 people with cutlasses.[519] They slit open the stomach of one victim and displayed his entrails in a bucket before the remaining civilians.[520] The remaining civilians were told by BJK Sei that the Kamajors had been unable to capture Tongo, that they would attack it again and that anyone that had not left the town would be killed.[521] Witness TF2-035 had survived the killing of the Limbas in Talama, claiming he was a Madingo. When Kamabote discovered he was a

[509] CDF Trial Judgment, para. 691.
[510] *Ibid* at para. 381.
[511] *Ibid* at para. 376.
[512] *Ibid* at para. 380.
[513] *Ibid* at para. 383.
[514] *Ibid.*
[515] *Ibid.*
[516] *Ibid* at para. 385.
[517] *Ibid.*
[518] *Ibid* at para. 386.
[519] *Ibid.*
[520] *Ibid.*
[521] *Ibid* at para. 387.

Limba, he ordered a 12 year-old boy to kill him.[522] He was shot but managed to escape into the bush.[523]

270. The third attack on Tongo was launched on 14 January 1998.[524] Many civilians had received warnings of the attack and most of those that could leave did so.[525] At the beginning of the attack, there was gunfire and thousands of civilians ran towards the NDMC Headquarters.[526] At least six individuals were shot, including Witness TF2-015, three women, a man named Joskie and a Fullah boy.[527] At the entrance of the NDMC Headquarters, there were hundreds of corpses of men, women and children.[528] After exchange of fire between the rebels and the Kamajors, the rebels began to retreat; before the rebels snuck away, a bomb dropped among the civilians.[529] A Kamajor chopped at three people who had been lying on the ground to avoid the crossfire.[530]

271. After the rebels' retreat, civilians were gathered at the football field. BJK Sei told the Kamajors he would dismiss anyone he saw killing people.[531] Meanwhile, Kamabote asked two women to identify rebels.[532] Two men identified as rebels were shot.[533] Ten others were led behind the NDMC Headquarters where cows are slaughtered.[534] Another group of 200 men and women, identified as rebels, were taken behind the NDMC Headquarters.[535] Dr Blood, a man identified as a rebel was killed by Kamabote, so was Fatmata Kamara for having cooked for the rebels.[536] Witness TF2-048's uncle, a woman and a child were killed.[537]

272. The following day, on 15 January 1998, 20 men accused of being rebels were hacked to death.[538] The civilians other than Limbas, Lokos and Temnes were allowed to leave.[539] The

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[522] *Ibid* at para. 388
[523] *Ibid*.
[524] *Ibid* at para. 389
[525] *Ibid*.
[526] *Ibid* at para. 390.
[527] *Ibid*.
[528] *Ibid* at para. 391.
[529] *Ibid*.
[530] *Ibid*.
[531] *Ibid* at para. 392.
[532] *Ibid* at para. 393.
[533] *Ibid*.
[534] *Ibid*.
[535] *Ibid*.
[536] *Ibid* at para. 394.
[537] *Ibid* at para. 395.
[538] *Ibid* at para. 398.
[539] *Ibid* at para. 399.

Kamajors said that Limbas, Lokos and Temnes should be killed.[540] However, a group of men speaking Liberian told everyone to go home; a Kamajor commander ordered the civilians to leave the Headquarters.[541] Another commander, however, ordered the Kamajors to shoot at the crowd and the Kamajors shot sporadically at the civilians. Many were hit by stray bullets and at least one died.[542] On the same day, outside the NDMC Headquarters, the Kamajors went to Witness TF2-048's house, showed his brother a list of Limbas to be killed, and they cut his throat with machete and mutilated his body.[543] At another check point, the Kamajors took the belongings of the civilians, and hacked to death a man and a boy for carrying, respectively, a photograph of a rebel and a wallet that resembled SLA fatigues.[544]

273. On the way to Bunnie, the Kamajors fired at a group of civilians, who were organised into lines, killing many of them.[545] Men and women were separated; five men were killed after making them stare at the sun.[546] The day after, remaining civilians were joined by another group of civilians numbering 65 people.[547] At Kamboma bridge, they were attacked by the Kamajors who said they received orders to kill anyone who passed by.[548] They were separated into two lines. Except one who survived his injury, each of the 65 civilians was killed.[549] On the same day, at Dodo Junction, the Kamajors struck a woman on the back and cut off the hand of a man identified as a rebel.[550] Finally, in Lalehun in mid-February 1998, Aruna Konowa was denounced as a rebel collaborator and was killed and disembowelled.[551] Brima Conteh, also denounced as the chief of the rebels, was decapitated and mutilated.[552]

(ii) The Attack on Koribondo

274. The Prosecution charged Fofana with murder as a crime against humanity for the unlawful killing of an unknown number of civilians and those identified as "collaborators," along with

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[540] *Ibid.*
[541] *Ibid* at para. 400.
[542] *Ibid.*
[543] *Ibid* at para. 401.
[544] *Ibid* at para. 402.
[545] *Ibid* at para. 404.
[546] *Ibid.*
[547] *Ibid* at para. 406.
[548] *Ibid.*
[549] *Ibid.*
[550] *Ibid* at para. 407.
[551] *Ibid* at para. 408.
[552] *Ibid* at para. 409.

captured enemy combatants in locations in Bo District, including Koribondo in or about January and February 1998,[553] 1 November 1997 and 30 April 1998.[554] The Prosecution also charged the Accused with inhumane acts as a crime against humanity for intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians, through acts of screening for collaborators, unlawfully killing suspected collaborators, often in plain view of friends and relatives, illegal arrest and unlawful imprisonment of collaborators, the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot, in Koribondo between November 1997 and December 1999.[555]

275. The Trial Chamber found that the attack carried out by the Kamajors in Koribondo between 13 and 15 February 1998 was "part of a widespread attack," within the meaning of crimes against humanity.[556]

276. The Trial Chamber found that before the coup, Koribondo and its surroundings were controlled by the rebels and its capture by the Kamajors was expected to facilitate the movement of ECOMOG.[557] Between 1997 and 1998, the Kamajors launched various attacks on Korinbondo. At the Commanders' meeting for Koribondo in early 1998, Norman said that the Kamajors should take it "at all costs" and told the commanders not to "leave any house or any living thing there, except mosque, church, the *barri* and the school,"[558] and that they "should destroy or burn everything in the town and that anyone left in Koribondo should be termed an enemy or a rebel and killed."[559] At a meeting with Nallo in early 1998, Norman said that the capture of Koribondo had failed "because the civilians had given their children to the juntas in marriage and thus, they were all 'spies and collaborators;'" and, therefore, that "'anybody that was met there should be killed' and nothing should be left 'not even a farm' or '[. . .] a fowl.'"[560]

277. The final attack on Koribondo was launched on 13 February 1998 at 1:30 pm and lasted for about 45 minutes.[561] The Trial Chamber found that the following crimes were committed after the

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[553] Indictment, para. 25.d.
[554] *Ibid* at paras 24.a., 25.a.
[555] *Ibid* at para. 26.b.
[556] CDF Trial Judgment, para. 691.
[557] *Ibid* at para. 416.
[558] *Ibid* at para. 329.
[559] *Ibid*.
[560] *Ibid* at para. 335.
[561] *Ibid* at para. 420.

capture of Koribondo. On 15 February 1998, five Limba civilians accused of being junta members were beaten and mutilated by the Kamajors.[562] On the same day, two Limba civilians were mutilated and killed.[563] The following day, the Kamajors killed five men belonging to the junta and three of the soldiers' wives, two of them in a gruesome manner.[564] The three womens' bodies were disembowelled. The same day, the Kamajors killed, mutilated and decapitated Chief Kafala, accused of being a junta, in the presence of many people.[565] Lahai Bassie, an elderly person, was arrested and beaten by the Kamajors who accused him of being a collaborator because his son was a soldier. He died of his wounds one week later.[566] Further, on 13 February 1998, Witness TF2-032's house was set on fire by Kamajors and between 13 and 15 February 1998, Kamajors went on a rampage and burnt 25 houses.[567]

278. After the capture of Koribondo, at the end of March 1998, Norman addressed an audience of 200 civilians and 400 Kamajors, and expressed his "disappointment" that the Kamajors did not do what they were asked to, stating that "inside Koribondo I only want . . . three houses . . . Oh, look at all these houses. I told you that I wanted the mosque, the court *barri* and one house where I would have to reside, but look at all this crowd that I am seeing here. You people are afraid of killing. Why?"[568]

(iii) The Attack on Bo Town

279. The Prosecution charged Fofana with murder as a crime against humanity for the unlawful killing of an unknown number of civilians and those identified as "collaborators," along with captured enemy combatants on or about January and February 1998, in locations in Bo District, including the District Headquarters town of Bo, Kebi Town, Kpeyama, Fengehun and Mongere.[569] The Prosecution also charged the Accused with inhumane acts as a crime against humanity for intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians, through acts of screening for collaborators, unlawfully killing suspected collaborators, often in plain view of friends and relatives, illegal arrests and unlawful imprisonment of

[562] *Ibid* at paras 421, 786(i).
[563] *Ibid* at paras 422, 786(ii).
[564] *Ibid* at paras 423, 786(iii).
[565] *Ibid* at paras 425, 786(iv).
[566] *Ibid* at paras 426, 786(v).
[567] *Ibid* at paras 427, 428, 791(i), 791(ii).
[568] *Ibid* at para. 434.
[569] Indictment, paras 25.d.

collaborators, the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot, in Bo and surrounding areas between November 1997 and December 1999.[570]

280. The Trial Chamber found that the attack carried out by the Kamajors on Bo Town between 15 and 23 February 1998 constituted "part of a widespread attack," within the meaning of crimes against humanity.[571]

281. The Trial Chamber found that, at the commanders' meeting for Bo in early January 1998, Norman addressed the Kamajors and told them to "kill enemy combatants and people who had connections with or supported the rebels and who were, therefore, worse than the combatants;"[572] he referred to them as "collaborators."[573] The Kamajors were also told to "burn down houses and loot big shops."[574] Norman added that the adult fighters were doing less than the children and were just eating and looting.[575]

282. The Trial Chamber found that, in early January 1998 the Kamajors attacked and captured Kebi Town, in Bo District, which was the location of the juntas' Brigade Headquarters.[576] The Kamajors had left Bo after the coup.[577] At that time, the Kamajors turned against the police because of their alleged collaboration with the juntas.[578] Before launching the attack on Bo, Norman gave specific orders to Nallo to kill certain identified civilians in Bo who were labelled as "collaborators," loot and burn their houses, loot the Southern Pharmacy and bring the medicines to Norman.[579] Specifically the name of MB Sesay was mentioned. Norman also ordered Nallo to kill the police officers.[580]

283. The junta soldiers left Bo on 14 February 1998;[581] therefore, when the Kamajors entered Bo on 15 February 1998, there were no forces fighting in Bo and they met no resistance.[582] They

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[570] *Ibid* at para. 26.b.
[571] CDF Trial Judgment, para. 691.
[572] *Ibid* at para. 332.
[573] *Ibid*.
[574] *Ibid*.
[575] *Ibid*.
[576] *Ibid* at para. 443.
[577] *Ibid* at para. 439.
[578] *Ibid* at para. 440.
[579] *Ibid* at para. 446.
[580] *Ibid*.
[581] *Ibid* at para. 441.
[582] *Ibid* at para. 449.

captured and killed unarmed police officers.[583] They killed eight police men,[584] beat OC Bundu, the SSD Boss,[585] killed Corporal Freeman,[586] mutilated Witness TF2-199, killed James Vandy, the Sub-Inspector of police and cut his body into pieces,[587] and, stating that policemen were all juntas and should be killed, opened fire at the hospital because several policemen were patients there.[588]

284. Civilians other than members of the police were also subjected to unlawful acts in Bo. When the Kamajors entered Bo, there was fear among the civilians. Many people had been killed. The situation reports of the Kamajors indicated excessive killing of civilians.[589] The Kamajors chased, captured and chopped at people with cutlasses. There was a lot of gunfire and many civilians fled, crying. Some civilians were killed and others suffered amputations.[590] An unidentified woman who had cooked for the rebels, and a man, John Musa who had traded for the rebels were killed.[591] The Kamajors attacked five persons with knives and hit Witness TF2-006 with a stick and amputated the fingers of his hand.[592] The Kamajors killed and mutilated a man accused of being a junta collaborator because he was a Limba.[593]

285. At a Kamajor checkpoint, two men and two women were forced to lay naked in the sun while the Kamajors stepped on their stomachs.[594] One of the women was shot and mutilated.[595] In Bo, John Hota was killed by the Death Squad which had received direct instructions from Norman to kill John Hota because "he had no place to keep prisoners of war."[596] On 16 February 1998, the Kamajors tortured Witness TF2-198 and decapitated his brother.[597] On 22 February 1998, the Kamajors chopped and killed Witness TF2-030's husband because he was a Temne, saying that they would weed all the Temne from Bo Town.[598] Six other people were hacked to death.[599]

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[583] *Ibid* at para. 451.
[584] *Ibid* at para. 452.
[585] *Ibid* at para. 453.
[586] *Ibid* at para. 455.
[587] *Ibid* at para. 459.
[588] *Ibid* at para. 462.
[589] *Ibid* at para. 468.
[590] *Ibid* at para. 472.
[591] *Ibid* at paras 469, 470.
[592] *Ibid* at para. 472.
[593] *Ibid* at para. 473.
[594] *Ibid* at para. 474.
[595] *Ibid.*
[596] *Ibid* at para. 475.
[597] *Ibid* at para. 477.
[598] *Ibid* at para. 479.
[599] *Ibid.*

Around 22 February 1998, the Kamajors assaulted Witness TF2-156, killed his two brothers as well as two other men.[600] Other unlawful acts against civilians were committed by the Kamajors in Bo after the arrival of ECOMOG on 23 February 1998.[601]

286. After the capture of Bo, Norman held various meetings, in which he asked the people "not to blame the Kamajors" that he took the responsibility for their actions and that they should accept losses and deaths because these occurred in war.[602] He also complained to the Kamajors that they lied to him about the burnt down police barracks and policemen killed in Bo Town and that he felt deceived after having seen the barracks intact and the police at the parade.[603]

(iv) The Attack on Bonthe

287. The Prosecution charged the Accused with murder as a crime against humanity for the unlawful killings of an unknown number of civilians along with captured enemy combatants between October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town.[604] The Prosecution also charged the Accused with inhumane acts as a crime against humanity for intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians, through acts of screening for collaborators, unlawfully killing suspected collaborators, often in plain view of friends and relatives, illegal arrest and unlawful imprisonment of collaborators, the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot, in Bonthe District between November 1997 and December 1999.[605]

288. The Trial Chamber found that the attack carried out by the Kamajors in Bonthe on 15 February 1998 constituted part of a "widespread attack," within the meaning of crimes against humanity.[606]

289. The Trial Chamber found that on 15 September 1997, the Kamajors entered Bonthe with the aim of seizing a military gunboat but the attack did not succeed.[607] However, the soldiers left

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[600] *Ibid* at paras 480-481.
[601] *Ibid* at paras 482-504, 515-519. However, the crimes charged under the Indictment for Bo District covered the period of January-February 1998.
[602] *Ibid* at paras 509, 510, 512.
[603] *Ibid* at para. 511.
[604] Indictment, para. 25.f.
[605] *Ibid* at para. 26.b.

Bonthe on 14 February 1998, in a Sierra Leone Navy gunboat and the Kamajors entered Bonthe the following morning.[608]

290. On 15 February 1998 a fisherman named Kpana Manso was shot by the Kamajors for being the father of a soldier.[609] The same day, the Kamajors looted household items and equipment from the Bonthe Technical College, the Bonthe Holiday Complex, the government building, the Police station, the state prison, the district office, the elections office, the Ministry of Works and the Fisheries Department, the Post Office and the telecommunications department.[610] The same day, Lahai Ndokoi Koroma, accused of being a junta collaborator, was captured, stripped naked and tied.[611] Three delegations came from Base Zero to investigate the matter.[612]

291. On 16 February 1998, a young man was mutilated and shot and another fisherman was killed.[613] The same day, a house in Bonthe was looted and vandalized by the Kamajors.[614] At a meeting, the Commander Julius Squire announced that the Kamajors were looking for three collaborators.[615] He singled out Witness TF2-116, stating that he should be killed because he was a member of the Working Committee which had cooperated with the juntas.[616] At the same meeting, a boy named Bendeh Battiama, accused of being a collaborator, was shot.[617] The District Commander Morie Jusu said that no one else would be killed, but that the civilians had to pay 100,000 Leones for each of the 14 people that were at the meeting.[618] On 17 February 1998, Abu Conteh was killed because he was suspected to have prepared talismans and magical concoctions to protect the soldiers.[619]

292. On 23 February 1998, Norman came to Bonthe and said that "Any complaint against the Kamajors is useless as [*sic*] they had fought and saved the nation. Working with the Kamajors was

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[606] CDF Trial Judgment, para. 691.
[607] *Ibid* at para. 538.
[608] *Ibid* at para. 539.
[609] *Ibid* at paras 541, 883(i).
[610] *Ibid* at para. 540.
[611] *Ibid* at para. 552.
[612] *Ibid*.
[613] *Ibid* at paras 545, 546.
[614] *Ibid* at para. 543.
[615] *Ibid* at para. 547.
[616] *Ibid* at para. 548.
[617] *Ibid* at paras 549, 883(ii).
[618] *Ibid* at para. 550.
[619] *Ibid* at para. 551.

like working with the cutlass [. . .] It cuts you, you drop it, and you pick it up again."[620] At a public meeting on 1 March 1998, Kondewa said that he had not authorised his men to enter Bonthe and apologised on their behalf.[621]

293. In March 1998 in Morumbo, the Kamajors mutilated Witness TF2-086 and killed her business partner.[622] In Gambia Village, Witness TF2-187's uncle, who complained that the initiates uprooted his cassava, was tortured and killed.[623]

(v) The Attack on Kenema

294. The Prosecution charged the Accused with murder as a crime against humanity for the unlawful killings of an unknown number of civilians along with captured enemy combatants on or about 15 February 1998, at or near the District Headquarter town of Kenema and at the nearby locations of SS Camp, and Blama and for the unlawful killings of Sierra Leone Police Officers on or about 15 February 1998, at or near Kenema;[624] and with inhumane acts as a crime against humanity for intentional infliction of serious bodily harm and serious physical suffering on an unknown number of civilians in Kenema Town, Blama and the surrounding areas between 1 November 1997 and 30 April 1998.[625]

295. The Trial Chamber found that the attack carried out by the Kamajors in Kenema between 15 and 18 of February 1998 constituted "part of a widespread attack," within the meaning of crimes against humanity.[626]

296. The Trial Chamber found that, prior to February 1998, the AFRC was in control of Kenema. The SS Camp in Kenema District was very strategic. The Soldiers fled SS Camp when the Kamajors approached. When the Kamajors took the Camp, the rebels and soldiers attacked it but were unsuccessful in regaining the camp.[627] About one week later, on 11 February 1998, the rebels left Blama; the Kamajors arrived on 15 February 1998.[628] On that day, the Kamajors entered the

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[620] *Ibid* at para. 554.
[621] *Ibid* at para. 553.
[622] *Ibid* at paras 563, 883(iv).
[623] *Ibid* at paras 564, 883(v).
[624] Indictment, paras 25.b, 25.c.
[625] *Ibid* at para. 26.a.
[626] CDF Trial Judgment, para. 691.
[627] *Ibid* at paras 572, 573.
[628] *Ibid* at para. 570.

police barracks in Blama. They threatened Witness TF2-041 saying that Norman had instructed that police should be killed. Thereafter Sergeant Fosana was killed.[629] The following day, the Kamajors separated all those who arrived in Blama into lines according to their tribe, saying that: "Temnes are all relatives of Sankoh" and that "Sankoh [. . .] brought the war;" one Temne man ran from the line and he was caught and decapitated.[630] The Kamajors arrived in Kenema on 15 February 1998. Since the rebels had already left, they captured it easily.[631] On that day, the Kamajors killed two young men who were tenants in a house, although they protested not being part of the junta.[632] On the same day also, the Kamajors killed police officers at the Kenema police barracks and they shot Sergeant Mason, Corporal Fanda and Momoh Tawol.[633] Two other police officers, Sergeant Turay and SI Mimor were killed.[634] While crossing the police football field, OC Kano and Desmond Pratt were shot.[635] On 16 February 1998, the junta returned and attacked Kenema. There was heavy exchange of fire between Kamajors and rebels for several hours. Some of the firing against Kamajors came from the direction of the police barracks. Some policemen were among the rebels that were shooting at the Kamajors. Eventually, the rebels were pushed out of Kenema.[636] After driving out the rebels, Kamajors entered the Kenema Police Barracks. A group of three Kamajors searched the houses and killed some policemen that were hiding under their beds. At least one body was taken outside and burnt in the field.[637]

(d) Discussion

297. The Trial Chamber concluded, in respect of the third element for crimes against humanity, (*i.e.*, an attack "directed against a civilian population") that:

> "the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack. By contrast, there is evidence that these attacks were directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone. In this regard the Chamber recalls the admission

[629] *Ibid* at para. 579.
[630] *Ibid* at para. 581.
[631] *Ibid* at para. 582.
[632] *Ibid* at paras 584, 585.
[633] *Ibid* at paras 587-590.
[634] *Ibid* at paras 591, 592.
[635] *Ibid* at para. 593.
[636] *Ibid* at paras 595-597.
[637] *Ibid* at para. 599.

of the Prosecutor that 'the CDF and the Kamajors fought for the restoration of democracy.'"[638]

298. At the outset, the Appeals Chamber notes that the Trial Chamber's conclusion in regard to the third element of crimes against humanity is devoid of articulation of its reasoning. While it is not always mandatory, the Appeals Chamber is of the view that, in the interest of justice, a Trial Chamber should endeavor to provide reasons for its conclusions.

299. The Appeals Chamber will now consider whether, based on the findings of the Trial Chamber in relation to the attacks on Tongo, Koribondo, Bo, Bonthe and Kenema, it was open to the Trial Chamber to conclude that the Prosecution failed to prove beyond reasonable doubt that the attacks were not "directed against the civilian population." The Appeals Chamber approves the opinion of the Trial Chamber that the expression "directed against" a civilian population requires that "the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack."[639] The Appeals Chamber emphasizes that what must be primary is the civilian population as a target and not the purpose or the objective of the attack.

300. The Trial Chamber found that "the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack. By contrast, there is evidence that these attacks were directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone."[640] The Appeals Chamber is of the view that the Trial Chamber appears to have misdirected itself when applying the principle it had already stated, by confusing the target of the attack with the purpose of the attack. When the target of an attack is the civilian population, the purpose of that attack is immaterial.

301. During the second attack on Tongo, immediately after the military operation on the rebel checkpoint, the Kamajors "took control" of the civilians and killed civilians consisting of 151 Limbas, Lokos and Temnes. Most of the crimes committed on civilians during the third attack on Tongo on 14-15 January 1998 occurred after the rebels retreated.[641] Those crimes included a mass killing of a group of 65 civilians.[642]

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[638] *Ibid* at para. 693 (footnote omitted).
[639] *Ibid* at para. 114, *citing Kunarac* Appeal Judgement, para. 92.
[640] CDF Trial Judgment, para. 693.
[641] *Ibid* at paras 391-410.
[642] *Ibid* at para. 406.

302. The Appeals Chamber has examined the findings in regard to each of the locations earlier mentioned. There is no doubt from those findings that the Trial Chamber was satisfied beyond reasonable doubt that civilians were attacked in various ways by the Kamajors in several of these locations. It was on these findings that the Trial Chamber found that war crimes were proved beyond reasonable doubt.

303. The Appeals Chamber is of the opinion that having found as earlier stated, the Trial Chamber fell into error in not testing these findings against the actual situation in the various locations, before coming to a general conclusion that attacks directed against a civilian population had not been proved beyond reasonable doubt. Had it done so it would have found on the evidence that there were locations in which the rebels and junta had already withdrawn before the attack on the civilian population by the Kamajors occurred.

304. The Trial Judgment reveals that the attacks in Bo,[643] Bonthe[644] and Kenema[645] were launched and carried out after the departure of the rebels and juntas.

305. In this context, the Appeals Chamber notes the holding of the Trial Chamber in its Sentencing Judgment that:

> "[I]nstead of limiting themselves and directing these attacks on legitimate military targets and objectives . . . the Accused Persons and their Kamajors . . . went beyond these acceptable military and legal limits and carried out killings and other atrocities against unarmed civilians who they characterised and designated as 'rebel collaborators'. In fact, we note here that the crimes for which they have been found guilty *were perpetrated by the Accused Persons and CDF/Kamajor fighters when combat activities and operations against the enemy AFRC forces were already over.*[646]

306. In view of the absence of military operations between the Kamajors and the rebels/soldiers at the time of the commission of most of the crimes against the civilians, the Appeals Chamber rejects Fofana's submission that those civilians were "collateral victims" of military operations,[647] and further opines that those civilians could not reasonably be considered as mere "incidental targets"[648] of a legitimate military attack. Rather, in the view of the Appeals Chamber, the context

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[643] *Ibid* at paras 441, 449.
[644] *Ibid* at para. 539.
[645] *Ibid* at paras 570, 582.
[646] CDF Sentencing Judgment, para. 85 (emphasis added).
[647] Fofana Response Brief, para. 12.
[648] *Kunarac* Appeal Judgement, para. 92.

of the commission of the crimes, remote from military operations, supports a reasonable conclusion that the "attacks" were, in fact, specifically "directed against" a civilian population, within the meaning of Article 2 of the Statute.

307. In view of these findings of fact, taken as a whole, the Appeals Chamber is of the view that the criminal conduct against those civilians was neither random nor isolated acts but was rather perpetrated pursuant to a common pattern of targeting the civilian population.

308. In view of the foregoing, having regard to the factual findings of the Trial Chamber, the Appeals Chamber holds that the Trial Chamber erred in concluding that it had not been proved beyond reasonable doubt that the attacks were directed against a civilian population.

309. The Prosecution's First Ground of Appeal is granted in this respect. Under this Ground of Appeal, the Prosecution requests the Appeals Chamber to enter corresponding convictions against Fofana and Kondewa under Counts 1 and 3 in respect of all acts for which they were found by the Trial Chamber to be guilty under Counts 2 and 4.[649] The Appeals Chamber will next consider whether the remaining legal requirements for crimes against humanity are satisfied in this case.

5. The Act Must be Part of the Widespread or Systematic Attack Against the Civilian Population

310. In regard to the fourth element the Prosecution submits that on the basis of the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that the crimes that were committed were part of an attack against a civilian population.

311. Neither Fofana nor Kondewa contested this submission in their response briefs.

312. The Appeals Chamber agrees with the submission of the Prosecution and finds that the fourth element of crimes against humanity is proved.

313. We now turn to the fifth element of crimes again humanity.

[649] Prosecution Appeal Brief, para. 2.8.

6. The Perpetrators Knew or had Reason to Know That There was an Attack Against the Civilian Population and Their Acts Were Part of the "Attack"

314. In relation to the fifth element the Prosecution submits that the only conclusion available to a reasonable trier of fact is that the Accused knew or had reason to know that the act constituted part of a widespread or systematic attack directed against any civilian population.

315. However, in regard to this fifth element the Appeals Chamber is of the view that the knowledge required in order to find that crimes against humanity had been committed is that of the actual perpetrator.

316. For this reason, the Appeals Chamber will consider whether the actual perpetrators had such knowledge.

317. In relation to the attack on Tongo, Norman told the Kamajors that "there is no place to keep captured or war prisoners like the juntas, let alone their collaborators"[650] and that "all collaborators should forfeit their properties."[651] In relation to the attack on Koribondo, Norman instructed the Kamajors not to "leave any house or any living thing there, except mosque, church, the *barri* and the school,"[652] and that "anyone left in Koribondo should be termed an enemy or a rebel and killed."[653] He further said that the capture of Koribondo had failed "because the civilians had given their children to the juntas in marriage and thus, they were all 'spies and collaborators' [and], [t]herefore, . . . 'anybody that was met there should be killed' and nothing should be left 'not even a farm' or '[. . .] a fowl.'"[654] In relation to the attack on Bo, Norman told the Kamajors to "kill enemy combatants and people who had connections with or supported the rebels and who were therefore worse than the combatants;" he referred to them as "collaborators."[655] At several occasions, Norman also ordered the Kamajors to kill police officers.[656]

318. The above findings of the Trial Chamber demonstrate that the "all out offensive" military attacks against towns and villages occupied by the rebels and juntas encompassed also an element

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[650] CDF Trial Judgment, para. 321.
[651] *Ibid* at para. 322.
[652] *Ibid* at para. 329.
[653] *Ibid*.
[654] *Ibid* at para. 335.
[655] *Ibid* at para. 332.
[656] *Ibid* at paras 446, 578.

of targeting civilians perceived or alleged "collaborators." In the view of the Appeals Chamber, it is without a reasonable doubt that this policy was pursued by the Kamajors, through killings of definite individuals in view of any perceived or alleged relationships with the rebels, the commission of mass-killings of groups of civilians, a recurrent targeting of police officers and indiscriminate shootings at civilians, the burning of their houses or looting of their properties.

319. The evidence accepted by the Trial Chamber shows that the actual perpetrators of the crimes knew that a widespread or systematic attack was planned to break any possible resistance or collaboration by the population. Orders had been given to do so and punishment for not obeying was made clear to the perpetrators as well.[657]

320. The Appeals Chamber states that the only conclusion is that the actual perpetrators had the requisite knowledge.

7. Conclusion

321. The Appeals Chamber holds that whenever the Trial Chamber has found Fofana and Kondewa individually criminally responsible for war crimes under Counts 2 and 4, it reasonably follows that the same responsibility attaches to them for crimes against humanity in the same locations.[658]

8. Disposition

322. The Appeals Chamber, Justice King dissenting, sets aside the verdict of not guilty against Fofana and Kondewa by the Trial Chamber under Counts 1 and 3 and substitutes, therefore, a verdict of guilty on those Counts. The Appeals Chamber will consider and impose appropriate

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[657] *Ibid* at paras 321, 324, 325, 332.

[658] The Trial Chamber found Fofana and Kondewa individually criminally responsible pursuant to Article 6(1) of the Statute for aiding and abetting in the preparation of the crimes of murder at paragraphs 750(i)-(iv) and 750(vi)-(xv) of the Trial Judgment and of cruel treatment at paragraphs 756(i)-(iv) of the Trial Judgment committed in the towns of Tongo Field. It found Fofana individually criminally responsible as a superior pursuant to Article 6(3) of the Statute for the crimes of murder at paragraph 786(i)-(v) of the Trial Judgment and the crime of cruel treatment at paragraph 791(i)-(ii) committed in Koribondo and the surrounding areas. It further found Fofana individually criminally responsible as a superior, pursuant to Article 6(3) of the Statute for the crimes of murder at paragraph 830(i)-(ii) of the Trial Judgment the crime of cruel treatment at paragraph 835(i)-(ii) of the Trial Judgment committed in Bo District and Kondewa individually criminally responsible as a superior pursuant to Article 6(3) of the Statute for the crimes of murder at paragraph 883(i)-(iv) and of cruel treatment at paragraph 890(ii)-(iv) of the Trial Judgment in Bonthe District.

sentences in respect of those Counts as part of its Disposition of the Prosecution's Tenth Ground of Appeal.

B. Prosecution's Sixth Ground of Appeal: Fofana's and Kondewa's Acquittals for Acts of Terrorism

1. Introduction and Findings of the Trial Chamber

323. The Trial Chamber acquitted Fofana and Kondewa of the crime of acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute (Count 6).[659] It concluded that neither Fofana nor Kondewa were criminally responsible under Article 6(1) or Article 6(3) of the Statute for acts of terrorism because it was not proved beyond reasonable doubt that either possessed the requisite *mens rea* to establish criminal responsibility.[660]

324. In arriving at its conclusion, the Trial Chamber stated that it adopted a limited interpretation of Count 6[661] and that "only those acts for which the Accused have been found to bear criminal responsibility under another count of the Indictment may form the basis of criminal responsibility for acts of terrorism."[662] It further found that it was not proved beyond reasonable doubt that the criminal acts committed by the Kamajors in Tongo, Koribondo and Bonthe District had the specific intent to spread terror[663] and found that whilst instructions given by Norman in advance of the attacks might have had the specific intent to spread terror, this was not the only reasonable inference that could be drawn from the evidence.[664]

325. In its Sixth Ground of Appeal, the Prosecution raises four distinct heads. These are that:

(a) The Trial Chamber erred in law in adopting a limited interpretation of Count 6. It argues that in so doing, the Trial Chamber adds a prerequisite to the elements of the offence which

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[659] Prosecution Notice of Appeal, para. 15.
[660] CDF Trial Judgment, paras 731, 743, 779-780, 879.
[661] *Ibid* at para. 49.
[662] *Ibid* at para. 900.
[663] *Ibid* at paras 729-731,779, 879.
[664] *Ibid* at para. 731, 743.

resulted in it erroneously disregarding acts of violence charged in the Indictment, such as the burning of houses,[665]

(b) The Trial Chamber erred in law and fact in failing to find Fofana and Kondewa criminally responsible under Article 6(1) of the Statute for aiding and abetting acts of terrorism in Tongo,[666]

(c) The Trial Chamber erred in law and in fact in failing to find Fofana criminally responsible as a superior under Article 6(3) of the Statute for acts of terrorism in Koribondo. It submits that on the findings of the Trial Chamber, and the evidence it accepted, the only conclusion open to any reasonable tribunal of fact is that Fofana knew or had reasons to know that his subordinates would commit acts of terrorism or that such acts had already been committed,[667]

(d) The Trial Chamber erred in law and fact in failing to find Kondewa criminally responsible as a superior under Article 6(3) of the Statute for acts of terrorism in Bonthe District. It submits that on the findings of the Trial Chamber, and the evidence it accepted, the only conclusion open to any reasonable tribunal of fact is that Kondewa knew or had reasons to know that his subordinates would commit acts of terrorism or that such acts had already been committed.[668]

326. The Prosecution now requests the Appeals Chamber to reverse the Trial Chamber's findings and find Fofana and Kondewa criminally responsible for the crime "acts of terrorism" charged under Count 6 of the Indictment.[669]

2. Submissions of the Parties

(a) The Trial Chamber's Limited Interpretation of Count 6

327. The Prosecution submits that the Trial Chamber's limited interpretation of Count 6 amounts to an error of law because it adds a requirement not included in the elements of the crime "acts of terrorism."[670] This is the requirement that responsibility for acts of terrorism may only be based on

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[665] Prosecution Appeal Brief, paras 5.8, 5.14-5.15, 5.18, 5.22, 5.44.
[666] *Ibid* at para. 5.15.
[667] *Ibid* at paras 5.45, 5.55.
[668] *Ibid* at paras 5.60-5.63.
[669] *Ibid* at para. 5.5.
[670] *Ibid* at para. 5.6.

acts of violence, which themselves amount to other crimes under international criminal law.[671] This, the Prosecution submits, is erroneous because the *actus reus* of the crime of "acts of terrorism" need not involve an act that is otherwise criminal under international criminal law.[672]

328. The Prosecution claims that the Trial Chamber should have given independent consideration to all conduct pleaded in the Indictment notwithstanding whether such conduct was itself a crime and satisfied the elements of any other Count in the Indictment.[673] In support, it argues that the language in Count 6 of the Indictment: "*including threats* to kill, destroy and loot, as part of a campaign to terrorize the civilian populations"[674] makes it clear that the evidentiary basis relied on to establish the crime "acts of terrorism" included conduct that was not itself a crime.[675] The Prosecution submits that a correct reading of the Indictment and application of the law required the Trial Chamber to consider all conduct pleaded in relation to Counts 1-5 of the Indictment, including acts of burning notwithstanding the finding that acts of burning do not satisfy the elements of pillage.[676]

329. In response, Kondewa submits that the Trial Chamber's statement that it adopted a limited interpretation of Count 6, did not have the effect of adding a requirement to the elements of the crime "acts of terrorism."[677] Rather, the Trial Chamber's statement merely indicated how it interpreted the Indictment.[678] He submits that the Trial Chamber's interpretation of the Indictment is within its broad discretion and that there is nothing to indicate that the Trial Chamber in this instance abused its discretion.[679] Kondewa further claims that Count 6 was overly broad and disproportionate in its scope and that a failure to limit Count 6 would have resulted in prejudice against him because paragraph 28, containing the charges under Count 6 is vague and duplicitous.[680] He submits that the Trial Chamber was correct in not considering acts of burning

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[671] *Ibid* at para. 5.7.
[672] *Ibid* at para. 5.9.
[673] *Ibid* at para. 5.10.
[674] *Ibid*.
[675] *Ibid* at paras 5.1, 5.9-5.10. The Prosecution further relies on the AFRC Trial Judgment which it argues conducted just such an independent evaluation of the evidence. *Ibid* at para. 5.11.
[676] *Ibid* at para. 5.14.
[677] Kondewa Response Brief, para. 5.8.
[678] *Ibid*.
[679] *Ibid* at para. 5.9.
[680] *Ibid* at paras 5.11-5.13.

because acts of burning do not satisfy the crime of pillage and is, therefore, precluded from being considered under Count 6.[681]

330. Fofana similarly submits that the Trial Chamber's interpretation of Count 6 is correct. He argues that it is only by virtue of the alleged commission of crimes charged under Counts 1-5 that he is also charged with acts of terrorism.[682] Fofana employs the same argument as Kondewa in submitting that acts of burning should not have been considered by the Trial Chamber in its evaluation of Count 6.

(b) Aiding and Abetting Acts of Terrorism in Tongo

331. The Prosecution argues that the Trial Chamber erred in law and fact in failing to find Fofana and Kondewa criminally responsible for acts of terrorism under Article 6(1) of the Statute for aiding and abetting "acts of terrorism" in the town of Tongo.[683] It submits that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable tribunal of fact is that first, the perpetrators of crimes committed in Tongo had the specific intent of terrorizing the population and second, that Fofana and Kondewa as aiders and abetters had the requisite knowledge of the specific intent to spread terror.[684]

332. In support of its argument, it claims that the Trial Chamber's evaluation of the evidence exclusively relied on the instructions given by Norman at the December 1997 Passing Out Parade. It submits that the instructions given by Norman was but one of a number of factors that should have been considered by the Trial Chamber.[685]

333. The Prosecution further challenges the Trial Chamber's finding that "while spreading terror may have been Norman's primary purpose in issuing the order to kill captured enemy combatants and 'collaborators,' . . . this is not the only reasonable inference that can be drawn from the evidence."[686] It argues that orders given by Norman demonstrate an intent to spread terror. Statements such as "any junta you capture, instead of wasting your bullet, chop of his left [hand] as

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[681] *Ibid* at para. 5.19.
[682] Fofana Response Brief, para. 81. He submits that he "cannot commit terrorism by virtue of criminal offences that he did not commit."
[683] Prosecution Appeal Brief, para. 5.15.
[684] *Ibid* at paras 5.15-5.18.
[685] *Ibid* at para. 5.17.
[686] CDF Trial Judgment, para. 731.

an *indelible mark* [...] to be a signal,"[687] can only be reasonably interpreted as demonstrating the specific intent to spread terror amongst the civilian population.

334. The Prosecution lists several proven acts of violence committed in Tongo and argues that because of the "gruesomeness and cruelty of these acts, the fact that it targeted civilians according to their ethnicity, the *modus operandi* of the Kamajors, and the fact that the entrails of one victim were displayed in front of the remaining civilians"[688] no reasonable tribunal of fact could have concluded that these acts did not show the specific intent to spread terror.[689]

335. In submitting that both Fofana and Kondewa had knowledge of the physical perpetrators' specific intent to spread terror, the Prosecution contends that first, the contents of the orders given by Norman indicate an intention to spread terror and second, that they had knowledge that civilians had in the past been terrorized by the CDF.[690]

336. In response, Fofana submits that knowledge of the specific intent to spread terror cannot be imputed to him from the orders given by Norman. He proffers alternative inferences that may be drawn from Norman's comments and argues that at best, Norman's comments contained an intent to commit criminal acts but that it "cannot be interpreted . . . in its meaning to transfer knowledge on Fofana of a specific intent of the Kamajors to spread terror."[691]

337. Kondewa similarly submits that the "decision [by the Trial Chamber] to rely on the instruction at the Passing Out Parade was within [its] discretion" and that even if it is established that the specific intent of the perpetrators of acts of violence committed in Tongo was to spread terror, there is no evidence to suggest that he had the requisite knowledge that such was the case.[692]

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[687] Prosecution Appeal Brief, para. 5.23, *referring* to CDF Trial Judgment, para. 321.
[688] *Ibid* at para. 5.20.
[689] *Ibid* at paras 5.21-5.23.
[690] *Ibid* at paras 5.26, 5.32. The Prosecution submits that "Fofana was aware 'that the Kamajors who operated in the towns of Tongo Field had previously engaged in criminal conduct.'" *Ibid* at para. 5.28, *citing* CDF Trial Judgment, para. 724.
[691] Fofana Response Brief, para. 94.
[692] Kondewa Response Brief, paras 5.32-5.33.

(c) Responsibility of Fofana as a Superior for Acts of Terrorism under Article 6(3) of the Statute in Koribondo

338. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that the evidence adduced had not established beyond reasonable doubt that Fofana knew or had reasons to know that his subordinates would commit acts of terrorism in Koribondo or had already done so.[693] It argues that in arriving at its conclusion, the Trial Chamber relied exclusively on its finding that "the commission of such acts [of violence with the primary purpose to spread terror] was not explicitly included in Norman's order."[694] In so doing, the Prosecution contends that the Trial Chamber failed to consider circumstantial evidence and therefore misapplied the law with respect to the *mens rea* required to establish superior responsibility.[695]

339. Relying on similar arguments made in relation to crimes committed in Tongo, the Prosecution lists several proven acts of violence committed in Koribondo and argues that such acts of violence can only reasonably lead to the conclusion that the perpetrators had the specific intent to spread terror.[696] The Prosecution further submits that several of Norman's instructions such as his statement in January 1998 in advance of the attack in Koribondo, that fighters not leave "any house, or any living thing there" and his instructions given to "Nallo in Fofana's presence to kill anybody in Koribondo" can only be reasonably interpreted as demonstrating the specific intent to spread terror amongst the civilian population.[697] The Prosecution submits that, at the very least, Norman's instructions placed Fofana on notice that acts of terrorism were about to be committed.[698] The Prosecution similarly relies on Fofana's alleged prior knowledge that civilians had been in the past terrorized in Tongo and the Trial Chamber's finding that there was a reporting system in place and that "Albert J Nallo did all the planning for the Koribondo attack and then submitted it to . . . Fofana."[699]

340. In response, Fofana relies on similar arguments raised in relation to criminal responsibility for acts of terrorism alleged in Tongo and submits that there is no evidence demonstrating that he

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[693] Prosecution Appeal Brief, paras 5.38.
[694] *Ibid* at para. 5.40 (emphasis omitted).
[695] *Ibid* at para. 5.44.
[696] *Ibid* at paras 5.21-5.23, 5.54.
[697] *Ibid* at para. 5.46-5.47.
[698] *Ibid* at para. 5.48.
[699] *Ibid* at paras 5.50.

knew or had reason to know that his subordinates were perpetrating acts of violence with the specific intent to spread terror.[700] Fofana refutes the Prosecution's submissions that Norman's instructions demonstrated the specific intent to spread terror and argues that other inferences than the spreading of terror may be drawn from the evidence, such as the primary purpose of the Kamajors was "to capture or take towns that were under rebel or Junta control."[701] Fofana submits that evidence as accepted by the Trial Chamber reveals that the reporting system and organisation of the CDF was poor[702] and that certain Kamajors acted on their own outside the knowledge of the CDF.[703]

341. He further argues that the Prosecution's argument that he had prior knowledge of crimes committed by Kamajors is flawed because "knowledge that previous instances of violence cannot amount to proof of knowledge beyond reasonable doubt that acts of terrorism would be committed in the future."[704]

(d) Responsibility of Kondewa as a Superior for Acts of Terrorism under Article 6(3) of the Statute in Bonthe District

342. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that the evidence adduced had not established beyond reasonable doubt that Kondewa knew or had reason to know that his subordinates would commit acts of terrorism in Bonthe District or had already done so.[705] In support of its argument, the Prosecution similarly relies on Kondewa's alleged knowledge that civilians had been in the past terrorized in Tongo and proven acts of violence committed in Bonthe District.[706] The Prosecution further relies on Kondewa's admission that "he was aware of the atrocities committed by the Kamajors during the attack."[707]

343. In response, Kondewa relies on similar arguments raised in relation to acts of terrorism alleged in Tongo and submits that there is no evidence demonstrating that he knew or had reason to know that his subordinates were perpetrating acts of violence with the specific intent to spread

[700] Fofana Response Brief, paras 105-115.
[701] *Ibid* at para. 100.
[702] *Ibid* at para. 105.
[703] *Ibid* at paras 104, 110.
[704] *Ibid* at para. 111.
[705] Prosecution Appeal Brief, paras 5.59.
[706] *Ibid* at para. 5.32.
[707] *Ibid* at paras 5.63-5.64.

terror. He argues that the "link between the acts of the subordinates and his knowledge regarding the specific act of terrorism is unfounded."[708]

3. Discussion

Applicable law: acts of terrorism

344. Article 3.d. of the Statute, grants the Special Court jurisdiction to prosecute "acts of terrorism" in violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. Additional Protocol II contains two separate articles prohibiting acts of terrorism: Article 4(2)(d) and Article 13(2). Article 4(2)(d) contains a general prohibition of "acts of terrorism" and provides:

> "Without prejudice to the generality of the foregoing, the following acts against . . . [persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted] are and shall remain prohibited at any time and in any place whatsoever: . . . (d) acts of terrorism."

345. Article 3.d. of the Statute which borrows its language from Article 4(2)(d) of Additional Protocol II, therefore, prohibits acts of terrorism in its broad sense.

346. Additional Protocol II also contains a narrower offence prohibiting acts of terrorism. Article 13(2) provides:

> "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

347. As the ICRC Commentary to Additional Protocol II makes clear, Article 13(2) of Additional Protocol II constitutes a "special type of terrorism:"

> "It should be mentioned that acts or threats of violence which are aimed at terrorizing the civilian population, constitute a special type of terrorism and are the object of a specific prohibition in Article 13."[709]

348. Article 13(2) is a narrower derivative of Article 4(2)(d). An offence under Article 13(2) of Additional Protocol II may be charged under Article 3.d. of the Statute. This is because acts of

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[708] Kondewa Response Brief, para. 5.37 (emphasis omitted).
[709] ICRC Commentary on Additional Protocol II, Article 13(2).

terrorism under Article 4(2)(d) inherently encompass the narrower elements of acts of terrorism prohibited under Article 13(2).

349. The Appeals Chamber notes that Count 6 of the Indictment does not specify which of the above provisions Fofana and Kondewa were charged under. The Appeals Chamber is of the view, however, that after considering the Prosecution's Pre-Trial Brief, the Trial Judgment, and reliance placed upon the ICTY case of *Prosecutor v. Galić* by all parties to establish the elements of the crime, it is clear that the intention and understanding of all parties from the outset of the trial, was to interpret Count 6 as being a charge under Article 13(2) of Additional Protocol II.

350. The Appeals Chamber finds that the elements of the crime of acts of terrorism under Article 13(2) of Additional Protocol II are:

(i) Acts or threats of violence;

(ii) That the offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts or threats of violence; and

(iii) The acts or threats of violence were carried out with the specific intent of spreading terror among the civilian population.[710]

(i) Acts or Threats of Violence

351. The *actus reus* of the crime, acts of terrorism, may be proved by acts or threats of violence. Acts or threats of violence may comprise not only of attacks but also threats of attacks against the civilian population. Consistent with the ICRC Commentary to Additional Protocol II, this "covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect."[711] Acts or threats of violence are also not limited to direct attacks against civilians or threats thereof but include indiscriminate or disproportionate attacks or threats.[712]

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[710] *See Prosecutor v. Galić*, IT-98-29-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement and Opinion, 5 December 2003, para. 133 [*Galić* Trial Judgement]; *Galić* Appeal Judgement, paras 99-104; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 17 January 2005, para. 589 [*Blagojević* Trial Judgement].
[711] ICRC Commentary on Additional Protocol II, Article 13(2).
[712] *Galić* Appeal Judgement, para. 102.

352. Acts of terrorism may, therefore, be established by acts or threats of violence independent of whether such acts or threats of violence satisfy the elements of any other criminal offence. Not every act or threat of violence, however, will be sufficient to satisfy the first element of the crime of "acts of terrorism." The Appeals Chamber is of the view that whilst actual terrorisation of the civilian population is not an element of the crime,[713] the acts or threats of violence alleged must, nonetheless, be such that are at the very least capable of spreading terror. Whether any given act or threat of violence is capable of spreading terror is to be judged on a case-by-case basis within the particular context involved. For this purpose, the Appeals Chamber agrees with the Trial Chamber in *Galić* that "terror" should be understood as the causing of extreme fear.[714]

(ii) That the Offender Wilfully Made the Civilian Population or Individual Civilians not Taking Direct Part in Hostilities the Object of Those Acts or Threats of Violence

353. The second element of the crime "acts of terrorism" is that the offender "wilfully" made the civilian population or individual civilians the object of an act or threat of violence.

354. The Appeals Chamber notes that Article 85 of Additional Protocol I and its corresponding commentary[715] define the term "wilfully," in relation to the distinct prohibition of making the civilian population or individual civilians the object of attack. The Appeals Chamber finds, however, that there is no reason why the definition of the term "wilfully"[716] as discussed in relation to Article 85 of Additional Protocol I should not apply to the crime "acts of terrorism."

355. It follows, that for the crime "acts of terrorism" the second element ("wilfully made the civilian population or individual civilians, the object of an act or threat of violence") requires the Prosecution to prove that an accused acted consciously and with intent or recklessness in making

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[713] *Ibid* at para. 104.
[714] *See also Galić* Trial Judgement, para. 137. The majority in *Galić* accepted the Prosecution's submission that terror may be defined as "extreme fear," commenting that the *travaux preparatoire* of the Diplomatic Conference did not suggest an alternative meaning.
[715] ICRC Commentary on Additional Protocol I, Article 85, para. 3474.
[716] *Ibid* ("[W]ilfully: the accused must have acted consciously and with intent, *i.e.*, with his mind on the act and its consequences, and willing the (criminal intent or malice aforethought), this encompasses the concepts of wrongful intent or recklessness, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening, on the other hand, ordinary negligence or lack of foresight is not covered.").

the civilian population or individual civilians the object of an act or threat of violence. Negligence, on the other hand, is not enough. [717]

(iii) Specific Intent to Spread Terror

356. The third element of the crime of "acts of terrorism" is the specific intent to spread terror amongst the civilian population. The Prosecution is required to prove not only that the perpetrators of acts of threats of violence accepted the likelihood that terror would result from their illegal acts or threats, but must prove that that was the result which was specifically intended.[718] The spreading of extreme fear must, therefore, be specifically intended.

357. The specific intent to spread terror need not be the only purpose of the unlawful acts or threats of violence. It is well established that "[t]he fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge."[719] The existence of a coexisting purpose does not, however, detract from the requirement that what must be proved irrespective of any other coexisting purpose, is the specific intent to spread terror. Whether the specific intent to spread terror is satisfied is determined on a case-by-case basis and may be inferred from the circumstances, the nature of the acts or threats and the manner, timing or duration of acts or threats of violence.[720]

358. The Appeals Chamber will now discuss the four heads of the Prosecution's Sixth Ground of Appeal.

(a) The Trial Chamber's Limited Interpretation of Count 6

359. In light of the elements of the offence set out above, the crime "acts of terrorism" may be proved by any act or threat of violence capable of spreading extreme fear amongst the civilian population. The Appeals Chamber, therefore, agrees with the Prosecution that acts of terrorism need not involve acts that are otherwise criminal under international criminal law. The Appeals Chamber further agrees that acts of burning are acts or threats that are potentially capable of

[717] *See also Galić* Trial Judgement, para. 54. ("[T]he notion of 'wilfully' incorporates the concept of recklessness, whilst excluding mere negligence.").
[718] *Ibid* at para. 136.
[719] *Galić* Appeal Judgement, para. 104.
[720] *Ibid.*

spreading terror, notwithstanding the finding that acts of burning do not satisfy the elements of pillage.

360. Whether the Trial Chamber erred in failing to consider conduct not amounting to a crime (acts of burning in this instance), however, raises a separate question that relates to the pleading of the Indictment.

361. Paragraph 28 of the Indictment, charging acts of terrorism under Count 6, states:

> "At all times relevant to the 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."

362. The Appeals Chamber finds that the Trial Chamber's statement that it adopted a limited interpretation of Count 6 amounts to a finding that Count 6 of the Indictment was defective to the extent that the Trial Chamber excluded 'threats to kill, destroy and loot' proved under Counts 1-5 in its evaluation of Count 6.

363. In considering whether the Trial Chamber's limited interpretation of Count 6 amounts to an error of law, the Appeals Chamber recalls that the principal function of an Indictment is to provide for a fair trial and to maintain the integrity of proceedings by notifying an accused of the nature and cause of the charge against him.[721] This imposes an obligation on the part of the Prosecution to state the material facts underpinning the charges in an indictment, but does not extend to pleading the evidence by which such material facts are to be proved.[722] An Indictment which fails to notify an accused of the nature and cause of the charge against him may, however, in certain

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[721] *See* Article 17(4) of the Statute: "In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her, (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing." Rule 47(C) provides that: "The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case."

[722] *Kupreškić* Appeal Judgement, para. 88.

circumstances be cured by timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[723]

364. The Appeals Chamber finds that paragraph 28 of the Indictment is clear in establishing that the material facts supporting criminal responsibility under Count 6 are the material facts pleaded in relation to Counts 1 to 5 of the Indictment. These include "threats to kill, destroy and loot." The Trial Chamber, therefore, erred in stating it would only consider crimes "charged and found to have been committed under Counts 1-5 in the Indictment."[724] The Trial Chamber should have considered all conduct that was adequately pleaded in the Indictment irrespective of whether such conduct satisfied the elements of any other crimes under Counts 1-5.

365. Whether the Trial Chamber's error invalidates the decision is discussed below as it is dependent on whether the Trial Chamber erred in its determination of the *mens rea* requirement for acts of terrorism. In particular, Fofana's and Kondewa's liability for acts of terrorism under Article 6(1) and Article 6(3) of the Statute depends on whether they had the requisite *mens rea* for liability as aiders and abetters or superiors. Accordingly, the Appeals Chamber will examine whether a reasonable tribunal of fact could have found, as the Trial Chamber did, that neither Fofana nor Kondewa had the requisite *mens rea*.

(b) Fofana's and Kondewa's Responsibility for Aiding and Abetting Acts of Terrorism in Tongo

366. The Appeals Chamber has previously endorsed the following statement of the *mens rea* for aiding and abetting:

> "The *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed."[725]

[723] *Ibid* at para. 114.
[724] CDF Trial Judgment, para. 49.
[725] AFRC Appeal Judgment, paras 242-243.

367. The person aiding and abetting a specific intent crime need not possess the principal's intent to commit the crime, but must at least have knowledge of the principal's specific intent.[726]

368. In regard to the acts of terrorism committed in Tongo, the Appeals Chamber is not persuaded by the Prosecution's submission that no reasonable tribunal of fact could have found that Fofana and Kondewa may not have been aware of the specific intent to commit acts of terrorism in Tongo. The Prosecution argues that the Trial Chamber's error resulted from its "exclusive reliance on the instruction given by Norman at the December 1997 Passing Out Parade to determine whether the *perpetrators* of the proven acts of violence had the specific intent to terrorise the civilian population."[727] Contrary to the Prosecution's assertion, the Trial Chamber used evidence of Norman's statements at the December 1997 Passing Out Parade to determine whether Fofana and Kondewa were aware of his specific intent to spread terror. While the instructions given by Norman are inherently illegal, they are ambiguous with respect to his intent to spread terror, and therefore a reasonable tribunal of fact could have determined that Fofana and Kondewa were not aware of the specific intent with respect to any acts of terrorism in Tongo.

369. The Prosecution further argued that Fofana must have known of the specific intent to commit acts of terrorism because he was aware "that the Kamajors who operated in the towns of Tongo Field had previously engaged in criminal conduct."[728] A similar argument was advanced in relation to Kondewa.[729] However, the Prosecution makes no submission as to how knowledge of past general intent crimes would provide Fofana or Kondewa with knowledge of the principal's specific intent to spread terror.

370. The Prosecution's argument with respect to Fofana's and Kondewa's liability for aiding and abetting acts of terrorism in Tongo must be rejected.

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[726] *See Ntakirutimana* Appeal Judgement, para. 501 (regarding genocide); *Ndindabahizi* Trial Judgement and Sentence, para. 457 (and references therein).
[727] Prosecution Appeal Brief, para. 5.17 (emphasis in original).
[728] *Ibid* at para. 5.28 (emphasis omitted).
[729] *Ibid* at para. 5.34.

(c) Fofana's Superior Responsibility Under Article 6(3) of the Statute for Acts of Terrorism in Koribondo

371. To be held responsible as a superior for acts of terrorism in Koribondo, Fofana must have known or had reason to know that acts of terrorism were about to be committed or were committed by his subordinates with the specific intent to spread terror.[730]

372. The Prosecution relies on four principal arguments to establish that Fofana knew or had reason to know that acts of terrorism were committed in Koribondo. These are:

(i) Fofana had knowledge of previous criminal acts, including crimes that could have been qualified as terrorism;[731]

(ii) Norman's instructions in advance of the attack in Koribondo demonstrated an intent to spread terror;[732]

(iii) Acts of terrorism were perpetrated in Koribondo; and

(iv) The Trial Chamber's findings that a reporting system existed and that the planning of the attack in Koribondo was submitted by Nallo to Fofana, who submitted it to Norman.[733]

373. Although acts of terrorism may have been committed in Koribondo, the Prosecution does not demonstrate that Fofana knew or had reason to know that acts of terrorism would be or were committed there. The Prosecution only points to one finding of fact to suggest that Fofana may have learned, after the fact, that acts of terrorism were committed in Koribondo, however even this finding is far from conclusive. The Prosecution submits that the Trial Chamber found that "Fofana received reports on any military operation, in particular when Nallo was involved."[734] In fact, in the relevant paragraphs, the Trial Chamber found that Fofana "received frontline reports, both written and verbal, from the commanders in the field and passed them on to Norman" and that the strategies for war operations planned by Nallo and Fofana "did not include the killing of innocent civilians,

[730] *See, e.g.*, *Blaškić* Appeal Judgement, para. 484.
[731] Prosecution Appeal Brief, para. 5.50.
[732] *Ibid* at para. 5.48.
[733] *Ibid* at para. 5.50.
[734] *Ibid* at para. 5.55, *citing* CDF Trial Judgment, paras 340, 721(iv).

looting of property or raping of women."[735] Neither of these findings points ineluctably to the conclusion that Fofana knew or had reason to know that acts of terrorism were committed in Koribondo.

374. The real strength of the Prosecution's argument that Fofana must have known or had reason to know that acts of terrorism would be committed in Koribondo lies in his knowledge of Norman's orders, but even there the argument must fail. Although Norman's statement at the December 1997 Passing Out Parade contained illegal orders, it did not unambiguously indicate a specific intent to spread terror. In light of this ambiguity, a reasonable tribunal of fact could find that Fofana neither knew nor could have known of the specific intent.

375. The Prosecution's argument with respect to Fofana's superior responsibility for acts of terrorism in Koribondo must be rejected.

(d) Kondewa's Superior Responsibility Under Article 6(3) of the Statute for Acts of Terrorism in Bonthe District

376. The Appeals Chamber is not convinced by the Prosecution's submissions that the Trial Chamber erred in not finding that Kondewa knew or had reasons to know that acts of terrorism were about to be or had been committed in Bonthe District. A reasonable tribunal of fact could conclude, as did the Trial Chamber, that instructions given by Norman during the Passing Out Parades in December 1997 and in early January 1998 did not convey the specific intent to spread terror.

377. The additional submissions by the Prosecution also do not render the Trial Chamber's conclusion on Kondewa's lack of *mens rea* unreasonable. As discussed above, and contrary to the Prosecution's submission, the Trial Chamber reasonably concluded that Kondewa was not aware that civilians had been terrorized in Tongo, although it found that he was aware that the Kamajors who operated in the towns of Tongo Field had committed crimes.[736] Further, Kondewa's admission that "he was aware of the atrocities committed by the Kamajors during the attack" on Bonthe[737] does not necessarily demonstrate that he was aware that his subordinates committed acts of

[735] CDF Trial Judgment, paras 340, 721(iv).
[736] *See ibid* at para. 737.
[737] Prosecution Appeal Brief, paras 5.63-5.64.

terrorism. A reasonable tribunal of fact could have concluded that he had the requisite knowledge that some crimes had been committed in Bonthe, but lacked knowledge of the crime "acts of terrorism."

378. The Prosecution's argument with respect to Kondewa's superior responsibility for acts of terrorism in Bonthe must be rejected.

4. Disposition

379. The Appeals Chamber, therefore, finds no reason to disturb the Trial Chamber's findings with respect to the criminal responsibility of Fofana and Kondewa for acts of terrorism under Article 6(1) and/or Article 6(3) of the Statute. The Appeals Chamber rejects the Prosecution's Sixth Ground of Appeal in its entirety.

C. Prosecution's Seventh Ground of Appeal: Burning as Pillage

1. Introduction

380. The Prosecution submits that the Trial Chamber erred in law by finding that "an essential element of pillage is the unlawful appropriation of property" and that "the destruction by burning of property does not constitute pillage."[738]

381. Count 5 of the Indictment charged Fofana and Kondewa with "looting and burning" as pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute.[739] The Trial Chamber found that numerous acts of burning occurred as alleged in the Indictment. However, the Trial Chamber found as a matter of law that "an essential element of pillage is the unlawful appropriation of property."[740] The Trial Chamber, therefore, held that it would not take into account acts of burning for the purposes of determining the individual criminal responsibility of Fofana and Kondewa under Count 5.[741]

[738] *Ibid* at para. 6.2, *referring* to CDF Trial Judgment, para. 166.
[739] Indictment, para. 27.
[740] CDF Trial Judgment, para. 166.
[741] *Ibid*.

2. Submissions of the Parties

382. The Prosecution argues that the Trial Chamber erred in law in failing to consider that destruction by burning could amount to pillage.[742] The Prosecution's argument is based on four lines of reasoning. First, the Prosecution argues that the meaning of pillage in English and French supports the inclusion of burning as destruction as a form of pillage.[743] The Prosecution uses the *Oxford English Dictionary* to draw linguistic connections between "pillage" and "destroy,"[744] and further submits that the Trial Chamber erred in relying on *Black's Law Dictionary* instead of referring to "reliable judicial or statutory authority in the relevant field of the law."[745] Fofana responds that unlike *Black's Law Dictionary*, the *Oxford English Dictionary* and the *Oxford Thesaurus* are not concerned with legal definitions.[746]

383. Second, the Prosecution submits that the military manuals of at least three States (the United Kingdom, Canada and Australia) recognize that pillage includes destruction of property.[747] Without elaboration, Fofana responds that these military manuals express a "military viewpoint"[748] and have "little or no legal value."[749]

384. Third, the Prosecution points to the *Pohl Case* at Nuremberg in which the US Military Tribunal described the destruction of the Warsaw Ghetto as "the most complete task of destruction of a modern city since Carthage . . . It was the deliberate and intentional destruction of a large modern city and its entire civilian population. It was wholesale murder, pillage, thievery, and looting . . . "[750] According to the Prosecution, the Tribunal's use of pillage refers to the destruction of property since "thievery and looting" describe acts of appropriation of property and no other term would accomplish the Tribunal's intention to describe "the most complete task of destruction" and the "deliberate and intentional destruction of a large modern city."[751]

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[742] Prosecution Appeal Brief, para. 6.3.
[743] *Ibid* at paras 6.5-6.6.
[744] *Ibid* at paras 6.5-6.6.
[745] *Ibid* at para. 6.9.
[746] Fofana Response Brief, para. 121.
[747] Prosecution Appeal Brief, para. 6.7.
[748] Fofana Response Brief, para. 121.
[749] *Ibid* at para. 121.
[750] Prosecution Appeal Brief, para. 6.8, *quoting U.S. v. Pohl* (Judgment) *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, [Washington: US Government Printing Office, 1952] vol. 5, 193, 986.
[751] *Ibid.*

385. Fourth, the Prosecution argues that customary international law prohibits the destruction of the property of an adversary unless required by military necessity, and the prohibition against pillage is the only provision against the destruction of property contained in the fundamental guarantees provided in Article 4 of Additional Protocol II.[752] According to the Prosecution, if the prohibition against pillage in Article 4 of Additional Protocol II does not include a prohibition against the destruction of property, then an "inexplicable lacuna" exists in the law.[753] The Prosecution submits that the inclusion in the Statute of the Special Court of offences of wanton destruction of property under the Malicious Damage Act of 1861 does not resolve the "broader question as to whether wanton destruction of property is a conduct reasonably coming within the general prohibitory province of common Article 3 to the Geneva Conventions or of Additional Protocol II."[754]

386. Fofana submits that the existence of a lacuna in Additional Protocol II with respect to the destruction of property in non-international armed conflict is precisely the reason the Statute provides jurisdiction pursuant to domestic law for such crimes.[755] Apparently arguing in the alternative, Fofana submits that Additional Protocol II contains a protection against wanton destruction of civilian property in the general protections under Article 13(1).[756] Therefore, "pillage" need not be expansively interpreted to provide such protection.[757] Fofana also argues that under the maxim of construction *expressio unius exclusio alterius*, the Statute's inclusion of arson under Sierra Leonean law demonstrates its exclusion from the other jurisdictional provisions.[758]

387. Kondewa cites the Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone in support of his argument that the inclusion of Sierra Leonean law in the Statute was intended "to take care of 'cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law.'"[759]

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[752] *Ibid* at para. 6.11.
[753] *Ibid.*
[754] *Ibid* at para. 6.12.
[755] Fofana Response Brief, para. 124.
[756] *Ibid* at para. 127, *quoting* Article 13(1) of the Additional Protocol II which states that "The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations."
[757] *Ibid.*
[758] *Ibid* at para. 125.
[759] Kondewa Response Brief, para. 6.19, fn. 168, *citing* Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc S/2000/915, para. 19 (stating that inclusion of the Malicious Damage Act of 1861 as Article 5 of the Statute was to take care of "cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law.").

Kondewa agrees with the Prosecution that if pillage does not include unlawful destruction of property then no "obvious" prohibition exists in the Geneva Conventions or Additional Protocol II for such acts committed in non-international armed conflict.[760]

388. Further, Fofana and Kondewa submit that ICTY jurisprudence demonstrates that pillage, plunder, looting and spoliation are used synonymously to describe unlawful appropriation during armed conflict.[761] Fofana notes that the ICTY Appeals Chamber considers the *actus reus* of pillage to include unlawful appropriation of property[762] and the *mens rea* of pillage to be satisfied where an accused intended to appropriate the property by depriving the owner of it.[763] Kondewa also notes that the definition of pillaging in the Rome Statute of the International Criminal Court includes "appropriation of property" as an element of the crime.[764]

3. Discussion

389. The Appeals Chamber notes that the relevant question in this ground of appeal is whether the crime of pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute[765] can, as a matter of law, include acts of burning. For the purpose of this discussion, the Appeals Chamber considers the acts of burning relevant to this case to be acts of destruction not justified by military necessity. Therefore, the question here is whether the prohibition against pillage in common Article 3 and Additional Protocol II and as reflected in customary international law can include a prohibition against destruction not justified by military necessity.

390. The prohibition against pillage and the prohibition against destruction not justified by military necessity are long-standing rules in international humanitarian law. Both prohibitions exist in customary international law applicable to non-international armed conflict at the times relevant to

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[760] *Ibid* at para. 6.17.
[761] Fofana Response Brief, para. 118, *citing Čelebići* Trial Judgement, para. 591, *Blaškić* Appeal Judgement, paras 147-148; Kondewa Response Brief, paras 6.11-6.13, *citing Prosecutor v. Simić et al.*, IT-95-9-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 17 October 2003, paras 98-99 [*Simić* Trial Judgement].
[762] Fofana Response Brief, para. 119, *citing Kordić* Appeal Judgement, paras 79, 84.
[763] *Ibid* at para. 118, *citing Kordić* Appeal Judgement, para. 84.
[764] Kondewa Response Brief, para. 6.9.
[765] *See* Indictment, para. 27.

this case.[766] However, they have been more substantially elaborated upon in the conventional international law applicable to international armed conflict and occupied territories, specifically.

391. An analysis of conventional international law and State practice indicates that the prohibition against pillage and the prohibition against destruction not justified by military necessity have been maintained as separate prohibitions. For example, the Lieber Code of 1863 qualifies the prohibition against "destruction of property" as conduct "not commanded by the authorized officer" whereas the prohibition against "pillage and sacking' is absolute.[767] The distinction is more pronounced in the contemporaneous Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, which provided for protections against pillage and destruction or seizure in separate articles.[768] Similarly, Article 32 of the Laws of War on Land, Oxford, 9 September 1880, separately forbids combatants "(a) To pillage, even towns taken by assault; [and] (b) To destroy public or private property, if this destruction is not demanded by an imperative necessity of war . . . ."

392. The 1907 Hague Regulations[769] and 1949 Geneva Conventions similarly provide separate prohibitions against pillage and destruction not justified by military necessity. Article 28 of the Hague Regulations of 1907 prohibits "pillage of a town or place, even when taken by assault" and Article 47 provides that "pillage is formally prohibited." Article 23(g) forbids a State "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[770]

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[766] *See Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-AR73.3, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, 11 March 2005, paras 30, 38.

[767] Article 44 of the Lieber Code states: "All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, *all pillage or sacking*, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior" (emphasis added).

[768] Article 18 states: "A town taken by assault ought not to be given over to pillage by the victorious troops." Article 13(g) forbids "[a]ny destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war."

[769] Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[770] 1907 Hague Regulations, Article 23(g). Seizure is distinct from pillage because seizure is the appropriation of property for public purposes, whereas pillage is for private purposes.

393. Geneva Convention IV provides that "[p]illage is prohibited" in Article 33, paragraph 2 and that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" are grave breaches in Article 147.[771] Geneva Convention IV, Article 53 states:

> "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

394. Additional Protocol II expressly prohibits pillage whereas there are no provisions explicitly prohibiting destruction not justified by military necessity or unlawful attack on civilian property.

395. Article 13, paragraph 1, of Additional Protocol II states that the civilian population and individual civilians enjoy general protection against the dangers arising from military operations. The ICRC Commentary on Article 13 states that securing general protection of the civilian population in conformity with this Article is "based on the general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or an internal one."[772] In particular, the principles of distinction and proportionality indicate that attacks against dwellings, schools and other buildings occupied by civilians are prohibited unless the buildings have become legitimate military objectives.[773]

396. Although the prohibition against pillage and the prohibition against destruction of property not justified by military necessity are distinct in the principal conventional international law instruments, an examination of relevant ICRC Commentaries on the Geneva Conventions and the additional protocols to the Geneva Conventions suggests that the prohibitions are related. According to the ICRC Commentary, the prohibition against pillage in Article 4(2)(g) of the Additional Protocol II:

> "is based on Article 33, paragraph 2 of [Geneva Convention IV]. It covers both organized pillage and pillage resulting from isolated acts of indiscipline. It is prohibited to issue

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[771] Geneva Convention IV, Article 147. *See also* Geneva Convention I, Article 50; Geneva Convention II, Article 51.
[772] ICRC Commentary on Additional Protocol II, para. 4772.
[773] The ICRC Commentary states that in Protocol II, unlike Protocol I, "[c]ivilian objects do not enjoy a general protection." *Compare* ICRC Commentary on Additional Protocol II, para. 4759 *with* Art. 52, Additional Protocol I; *see also* ICRC Commentary on Additional Protocol I, para. 2011.

order whereby pillage is authorized. The prohibition has a general tenor and applies to all categories of property, both State-owned and private."[774]

397. The ICRC Commentary on Article 33, paragraph 2 of Geneva Convention IV states:

> "The purpose of this Convention is to protect human beings, but it also contains certain provisions concerning property, designed to spare people the suffering resulting from the destruction of their real and personal property (houses, deeds, bonds, etc., furniture, clothing, provisions, tools, etc.).
>
> This prohibition is an old principle of international law, already stated in the Hague Regulations in two provisions: Article 28, which says: 'The pillage of a town or place, even when taken by assault, is prohibited', and Article 47, which reads: 'Pillage is formally forbidden'. The Geneva Convention of 1949 omitted the Word 'formally' in order not to risk reducing, through a comparison of the texts, the scope of other provisions which embody prohibitions, and which, while they contain no adverb, are nevertheless just as absolute in character. This prohibition is general in scope. It concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay. Paragraph 2 of Article 33 is extremely concise and clear; it leaves no loophole. The High Contracting Parties prohibit the ordering as well as the authorization of pillage. They pledge themselves furthermore to prevent or, if it has commenced, to stop individual pillage. Consequently, they must take all the necessary legislative steps. The prohibition of pillage is applicable to the territory of a Party to the conflict as well as to occupied territories. It guarantees all types of property, whether they belong to private persons or to communities or the State. On the other hand, it leaves intact the right of requisition or seizure."[775]

398. Thus, this commentary notably suggests that the Geneva Convention IV is "designed to spare people the suffering resulting from the destruction of their real and personal property"[776] and appears to relate the prohibition against pillage to that objective.

399. Nonetheless, the absolute prohibition against pillage distinguishes it from the prohibition against destruction or seizure of civilian property, as the latter allows for such conduct in conditions of military necessity. This distinction has the consequence that an express absolute prohibition against pillage logically does not implicitly include the qualified prohibition against destruction of property.

400. The preceding discussion demonstrates that the prohibitions against pillage and wanton destruction have been considered distinct in the conventional law prior to time relevant to this case.

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[774] ICRC Commentary to Additional Protocol II, para. 4542.
[775] ICRC Commentary to Geneva Convention IV, pp. 226-227.
[776] *Ibid* at p. 226.

The Appeals Chamber notes that the interpretation of pillage at other international courts and State practice also demonstrate that pillage relates specifically to unlawful appropriation and therefore could not include acts of destruction.

401. The ICTY's interpretation and application of the prohibitions against pillage and wanton destruction is consistent with the distinction between the two crimes. Only one case at the *ad hoc* tribunals listed acts of destruction as pillage,[777] and there it was said *obiter dicta* and has not been followed in any subsequent cases.[778] The ICTY Appeals Chamber in *Kordić and Čerkez* defined the "crime of plunder" as:

> "all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as 'pillage'."[779]

402. ICTY chambers consider the terms "pillage," "plunder" and "spoliation" to describe the unlawful appropriation of public and private property during armed conflicts,[780] and that "plunder" should be understood as encompassing acts traditionally described as "pillage."[781]

403. The Preparatory Commission for the International Criminal Court defined the elements of the "war crime of pillage" as including the requirement that the "perpetrator appropriated certain property," "for private or personal use,"[782] "without the consent of the owner."[783] International tribunals give consideration to the work done in producing the Rome Statute on the establishment of an international criminal court, and, specifically, the finalized draft text of the elements of crimes

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[777] *Čelebići* Trial Judgement, para. 585.

[778] In some instances, the ICTY Appeals Chamber has implicitly considered pillage to constitute an act of destruction of property. *See Blaškić* Appeal Judgement, paras 144-149 (The Appeals Chamber discussed the conventional and customary international law prohibitions against destruction of property and pillage and, partly in light of the prohibition against pillage, it concluded "the *destruction of property*, depending on the nature and extent of the destruction, may constitute a crime of persecutions"); *Kordić* Appeal Judgement, paras 108-109.

[779] *Kordić* Appeal Judgement, para. 79.

[780] *Čelebići* Trial Judgement, para. 591; *Prosecutor v. Stakić,* IT-97-24-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 31 July 2003, para. 762; *Prosecutor v. Naletilić and Martinović,* IT-98-34-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 31 March 2003, paras 612-613. The Appeals Chamber notes that acts of burning and destruction do not constitute acts of appropriation because no property interest is acquired or transferred by the perpetrator.

[781] *Čelebići* Trial Judgement, paras 584-592; *Prosecutor v. Blaškić*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 3 March 2000, para. 184 [*Blaškić* Trial Judgement]; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 26 February 2001, paras 349-353.

[782] The ICC Elements of Crimes provide that: "As indicated by the use of the term "private or personal use," appropriations justified by military necessity cannot constitute the crime of pillaging." ICC Elements of Crimes, PCNICC/2000/INF/3/Add. 2, 6 July 2000, FN 61, Article 8(2)(e)(v) War Crime of Pillaging.

completed by the Preparatory Commission for the International Criminal Court in July 2000.[784] Although that document post-dates the acts involved here, it is nonetheless helpful in assessing the state of customary international law. In this regard, it should be noted that all the States attending the conference, whether signatories of the Rome Statute or not, were eligible to be represented on the Preparatory Commission. From this perspective, the document is a useful indication of the *opinio juris* of States.

404. The ICRC compendium on Customary International Humanitarian Law, published in 2005, surveyed State practice and concluded that pillage is the "specific application of the general principle of law prohibiting theft" thereby involving the "appropriation" of property "for private or personal use."[785]

405. The Prosecution's argument that Australia, Canada and the United Kingdom consider pillage to include the destruction of property is unavailing. The Prosecution appears to suggest that these three military manuals demonstrate State practice and therefore are indicative of the rule in customary international law. In determining customary international law with reference to State practice, the International Court of Justice in the *North Sea Continental Shelf cases* stated that the "State practice ... [should be] both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[786] Here, no such uniform practice is indicated by an isolated examination of the military manuals of three States. Notably, the Prosecution provides no submissions regarding the practice of the remaining States.

406. Further, the "practice" evidenced by the military manuals of Australia, Canada and the United Kingdom is not uniform. While Australia's Defence Force Manual appears to consider that "[p]illage is the seizure or destruction of enemy private or public property . . . for private purposes," Australia's Commanders' guide appears to define pillage as "the violent acquisition of property for

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[783] *Ibid* at Article 8(2)(b)(xvi), War Crime of Pillaging.
[784] *See Ibid.*
[785] Jean-Marie Henckaerts, Louise Doswald-Beck. ICRC, Customary International Humanitarian Law, Volume I: Rules, Cambridge, University Press (2005), p. 185.
[786] ICJ, *North Sea Continental Shelf cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, 20 February 1969, *ICJ Reports* 1969, para. 74. Applying the approach to determining customary international law elaborated in the *North Sea Continental Shelf cases*, the ICRC summarized the requirements as follows, "State practice has to be weighed to assess whether it is sufficiently dense to create a rule of

private purposes."[787] A similar apparent disagreement exists in the Canada's military manuals.[788] Further, the United Kingdom military manual relates pillage to theft.[789] Moreover, the military manuals of Australia, Canada and the United Kingdom each provide separate prohibitions against wanton destruction and pillage, indicating that those States do not consider the prohibition against pillage to encompass the prohibition against destruction.

407. Finally, evidence that the prohibition against pillage does not include the prohibition against destruction or seizure of property can be found in the drafting history of the Statute of the Special Court. Article 3 of the Statute provides jurisdiction over serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, including "pillage." According to the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, the drafters had recourse to Sierra Leonean law:

> "in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to . . . wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act."[790]

408. If pillage included wanton destruction, there would have been no reason to include the provision of the 1861 Malicious Damage Act.

4. Disposition

409. Taking into consideration the definition of pillage applied by the ICTY and ICTR which logically excludes acts of destruction, the distinction between the prohibitions against pillage and destruction not justified by military necessity, which is preserved throughout applicable conventional international law and the drafting history of the Statute of the Special Court, the Appeals Chamber finds that a necessary element of the crime of pillage is the unlawful appropriation of property. Consequently, burning and other acts of destruction of property not

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customary international law. To establish a rule of customary international law, State practice has to be virtually uniform, extensive and representative." ICRC, Customary International Humanitarian Law, Volume I: Rules, at xxxii.

[787] Australia Commanders' Guide (1994), § 610.

[788] *Compare* Canada, Law of Armed Conflict Manual (1999), Glossary, p. GL-15 and p. 6-5, § 50 ("pillage, the violent acquisition of property for private purposes . . . . Pillage is theft . . . ."), *with ibid.*, p. 12-8, § 67 ("Pillage is the seizure or destruction of enemy private property or public property . . . for private purpose . . . .").

[789] The UK Military Manual (1958), § 589 ("Private property must be respected. It must not be . . . pillaged . . . Theft and robbery are as punishable in war as in peace").

[790] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, para. 19.

amounting to appropriation as a matter of law, cannot constitute pillage under international criminal law. This Ground of Appeal therefore fails.

D. Prosecution's Eighth Ground of Appeal: Denial of Leave To Amend the Indictment in Order To Charge Sexual Crimes

410. Under its Eighth Ground of Appeal, the Prosecution alleges that the Trial Chamber erred in law, in fact and in procedure in dismissing, by Decision of 20 May 2004, the Prosecution's motion for leave to amend the Indictment to include charges of sexual violence.[791] The relief sought by the Prosecution is limited to a reversal by the Appeals Chamber of the legal reasoning employed by the Trial Chamber to arrive at the erroneous decision and a declaration to that effect. The Prosecution does not request the Appeals Chamber to substitute any additional conviction or to order any further trial proceedings.[792]

1. Procedural History

411. On 9 February 2004, the Prosecution filed a Motion before the Trial Chamber[793] seeking leave to amend the Indictment against Norman, Fofana and Kondewa to add four new counts of gender-based crimes, namely: rape, as a crime against humanity under Article 2.g. of the Statute (Count 9); sexual slavery and any other forms of sexual violence as crimes against humanity under Article 2.g. of the Statute (Count 10); other inhumane acts, as a crime against humanity under Article 2.i. of the Statute (Count 11); and outrages upon personal dignity as a war crime under Article 3.e. of the Statute (Count 12).

412. On 20 May 2004, the Trial Chamber issued a decision by majority, Justice Boutet dissenting, denying the Prosecution's motion ("Indictment Amendment Decision"), on the ground that granting the amendment would have prejudiced the Accused and violated their right to be tried without undue delay and would constitute an abuse of process.[794]

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[791] Prosecution Notice of Appeal, para. 27.
[792] *Ibid* at para. 28.
[793] *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Special Court for Sierra Leone, Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 9 February 2004.
[794] *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Special Court for Sierra Leone, Trial Chamber, Decision on Prosecution Request For Leave to Amend the Indictment, 20 May 2004 [Indictment Amendment Decision].

413. On 4 June 2004, the Prosecution sought leave to appeal against the Indictment Amendment Decision due to "exceptional circumstances" and to avoid irreparable prejudice pursuant to Rule 73(B) of the Rules. On 2 August 2004, a majority of the Trial Chamber, Justice Boutet dissenting, refused the Prosecution's application ("Trial Chamber's Decision on Leave to Appeal").[795]

414. On 30 August 2004, the Prosecution filed an appeal against the Trial Chamber's Decision on Leave to Appeal. On 17 January 2005, the Appeals Chamber ruled that it had no jurisdiction to entertain the Prosecution's appeal without leave of the Trial Chamber, and it therefore did not consider the merits of the Indictment Amendment Decision ("Appeals Chamber's Decision on Leave to Appeal").[796]

2. Introduction

415. Under Ground Eight, the Prosecution requests that the Appeals Chamber find that the Trial Chamber committed an error of law, of fact, and/or a procedural error in denying its request in the Indictment Amendment Decision. The Prosecution contends that the alleged errors have invalidated the Trial Judgment and/or occasioned a miscarriage of justice, within the meaning of Article 20(1) of the Statute, so as to prevent any consideration in the Judgment of gender-based crimes. The Prosecution does not seek the remittal of the case to the Trial Chamber for consideration of additional counts on gender crimes, should the Appeals Chamber uphold the Prosecution's request in this ground.

416. Kondewa responds that the Appeals Chamber lacks jurisdiction to entertain this ground of appeal. First, he submits that the Rules do not allow for interlocutory appeals to be brought at this stage of the proceedings.[797] He relies on the Appeals Chamber's Decision on Leave to Appeal which held that the Appeals Chamber had no jurisdiction to entertain the Prosecution's appeal

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[795] *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Special Court for Sierra Leone, Trial Chamber, Majority Decision on The Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana And Allieu Kondewa, 2 August 2004 [Decision on Leave to Appeal].
[796] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Appeals Chamber, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005 [Decision on Appeal of Refusal of Leave to File Interlocutory Appeal].
[797] Kondewa Response Brief, para. 7.10.

against the Trial Chamber's Decision on Leave to Appeal.[798] Second, Kondewa contends that the principle of *res judicata* bars the Appeals Chamber from dealing with the issue.[799] He avers that the matter has already been adjudicated in the Appeals Chamber's Decision on Leave to Appeal.[800] Third, Kondewa asserts that this Ground of Appeal falls outside the scope of Article 20(1) of the Statute. He argues that "[t]o bring a ground of appeal within the purview of Article 20(1)(b) there must be an error of law which renders the decision invalid, *i.e.*, . . . errors on a point of law which, if proven, affect the guilty verdict."[801] Kondewa contends that the Prosecution has not demonstrated that the Indictment Decision affected the verdict in this case or rendered any part of the Trial Judgment invalid.[802] He further argues that the Prosecution has failed to demonstrate "an error of fact . . . [that] invalidates the decision in the judgment or occasions a miscarriage of justice,"[803] within the meaning of Article 20(1)(c).

3. Discussion

(a) Whether the Appeals Chamber Lacks Jurisdiction

417. Kondewa's submissions with regard to the scope and effect of the Appeals Chamber's Decision on Leave to Appeal are misguided. The Appeals Chamber did not hold that, as a general rule, it cannot hear appeals against interlocutory decisions when a Trial Chamber denies a party leave to appeal. Instead, the Appeals Chamber held that it lacked jurisdiction to hear *interlocutory appeals*, within the meaning and purpose of Rule 73(B),[804] when leave to appeal was denied. The Appeals Chamber held that it is precluded from hearing an interlocutory appeal under Rule 73(B) unless leave is granted. However, it did not hold that it is precluded from entertaining the issue if raised in an appeal on the merits at the post-judgment stage.

418. The legal effect of a Trial Chamber's decision not to grant leave to appeal is confined to the interlocutory stage and does not concern the Appeals Chamber's competence to examine the issue if

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[798] Decision on Appeal of Refusal of Leave to File Interlocutory Appeal, para. 44.
[799] Kondewa Response Brief, paras 7.33-7.49.
[800] *Ibid* at para. 7.37.
[801] *Ibid* at para. 7.26.
[802] *Ibid.*
[803] *Ibid* at para. 7.27.
[804] Rule 73(B) states that: "Decisions rendered on [motions other than preliminary motions] are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders."

raised at the post-judgment stage. Indeed, the Appeals Chamber explicitly affirmed that its lack of jurisdiction over appeals against interlocutory decisions where leave to appeal has been denied pertains exclusively to appeals lodged "in the course of the trial."[805]

419. The Appeals Chamber considers that this holding is equally applicable at the Special Court and therefore rejects Kondewa's submission in this regard.

(b) *Res Judicata*

420. Kondewa submits that the principle of *res judicata* bars the Appeals Chamber from entertaining the Prosecution's Eighth Ground of Appeal, in view of the Appeals Chamber's Decision on Leave to Appeal which already adjudicated the issue.[806]

421. As Kondewa submitted, lack of jurisdiction due to the principle of *res judicata* arises when the subject matter in dispute is the same, it came before a court of competent jurisdiction, which rendered a decision that binds every other court.[807] Had the Appeals Chamber dealt with the merit of the applicant's submission, it would have been prevented by the principle of *res judicata* from reconsidering the issue on post-judgment appeal, unless it decided to reconsider its previous decision.[808] In this case, however, the Appeals Chamber declined to adjudicate the issue for want of jurisdiction. As a result, it refrained from examining the merit of the Prosecution's submission, that is, whether the Trial Chamber erred in denying the Prosecution leave to amend the Indictment in order to charge sexual violence. The principle of *res judicata*, therefore is not applicable. Kondewa's contentions therefore are misplaced and the Appeals Chamber rejects Kondewa's submission in this respect.

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[805] Decision on Appeal of Refusal of Leave to File Interlocutory Appeal, para. 42 ("It would subvert [Rule 73(B)] ... to permit applications to this Chamber to be made without leave and it would be usurp the exclusive jurisdiction of the Trial Chamber to determine which – if any – of its interlocutory decisions should be reviewed on appeal in the course of the trial.")

[806] Kondewa Response Brief, paras 7.33-7.49.

[807] *Ibid* at para. 7.41.

[808] *Prosecutor v. Nahimana*, ICTR-99-52-A, International Criminal Tribunal for Rwanda, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2. (stating "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent en injustice."); *see also Kajelijeli* Appeal Judgement, para. 203.

(c) Whether the Ground of Appeal Falls Outside the Scope of Article 20 of the Statute

422. Kondewa submits that the Prosecution failed to identify a procedural error, an error of law or an error of fact arising from the Indictment Amendment Decision that invalidates the Trial Chamber's finding in its Judgment or occasions a miscarriage of justice. Appellate proceedings at the Special Court are governed by Article 20 of the Statute[809] and Rule 106 of the Rules.[810] According to these provisions, the Appeals Chamber may hear appeals on the grounds of: (a) a procedural error; (b) an error on a question of law invalidating the decision; and (c) an error of fact which has occasioned a miscarriage of justice.

423. In order for the Appeals Chamber to hear an error of law, such error must have invalidated *the decision*. The Prosecution argues that the Indictment Amendment Decision was based on an error of law which rendered this interlocutory decision "invalid," and consequently invalidated "the final judgment to the extent that it contains no verdict on certain charges that would have been pronounced upon had there been no error in [the] interlocutory decision."[811]

424. Appeals against interlocutory decisions issued by the Trial Chamber may, as a matter of law, be challenged at the post-judgment appeal stage. Nonetheless, it is incumbent upon the Appellant to show that the alleged error(s) contained in the impugned decision invalidates the verdict. The Appeals Chamber may decide without further reasoning not to examine an alleged error of law raised on appeal which, even if upheld, has no chance to affect the verdict.[812]

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[809] Article 20 of the Statute states: "1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds: a. A procedural error; b. An error on a question of law invalidating the decision; c. An error of fact which has occasioned a miscarriage of justice. 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber."

[810] Rule 106 of the Rules states: "(A) Pursuant to Article 20 of the Statute, the Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds: (a) A procedural error; (b) An error on a question on law invalidating the decision; (c) An error of fact which has occasioned a miscarriage of justice. (B) The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber."

[811] Transcript, CDF, 13 March 2008, p. 23.

[812] *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 22 April 2008, para. 8 [*Hadžihasanović* Appeal Judgement]; *Prosecutor v. Krnojelac*, IT-97-25-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 17 September 2003, para. 10 [*Krnojelac* Appeal Judgement]; *Brđanin* Appeal Judgement, para. 9; *Prosecutor v. Halilović*, IT-01-48-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 16 October 2007, para. 7 [*Halilović* Appeal Judgement]; *Prosecutor v. Nahimana*, ICTR-99-52-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 28 November 2007, para. 12 [*Nahimana* Appeal Judgement]; *Gacumbitsi* Appeal Judgement, para. 7. *See also Galić* Appeal Judgement, para. 197 ("Galić has failed to meet his burden on appeal to demonstrate an error on the part of the Trial Chamber that invalidates the decision. He does not explain why a specific definition is required, or how the Trial Chamber erred by not providing a definition. Moreover, he fails to explain how these alleged errors would have changed the outcome of the Trial Judgement.").

Similarly, submissions of a party on error of fact which does not lead to a miscarriage of justice and does not have the potential to cause the impugned judgment to be reversed or revised may be dismissed and need not to be considered on the merits.[813]

425. In the instant case, the Prosecution merely requests the Appeals Chamber to declare that the Indictment Amendment Decision contains an error of law and or of fact. The Prosecution notes that, "[i]f the present Ground of Appeal is upheld, in order for any verdict to be reached on the individual responsibility of the Accused for the additional counts of gender crimes, the Appeals Chamber would . . . have to remit the case to the Trial Chamber for further trial proceedings on those counts."[814] The Prosecution "accepts that this would not be practicable," and therefore, does not seek any other remedy than a finding that the Trial Chamber erred in the impugned decision.[815]

426. In view of the scope of the Prosecution's request and its failure to seek any remedy other than a mere finding of an error of law in the Indictment Amendment Decision, coupled with the fact that the alleged errors under this ground of appeal do not relate to Counts contained in the Indictment upon which the verdict was made, the Appeals Chamber finds that the Prosecution has not shown that the error of law would invalidate the decision or that an error of fact would lead to a miscarriage of justice. The findings in the Trial Judgment were made upon the charges brought by the Prosecution in the Indictment. The Trial Chamber's decision refusing leave to amend the Indictment does not, as such, affect any of the legal and factual findings set forth in the Trial Judgment. It is also recalled that the amendment of the Indictment sought by the Prosecution was aimed at including new and additional charges based on various acts of sexual violence.[816] Denying the amendment did not preclude the Prosecution from charging the Accused with these crimes, since it is within the Prosecution's discretion to bring, alongside the original indictment, a separate indictment regarding the new allegations it intended to bring in the case.

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[813] *Hadžihasanović* Appeal Judgement, para. 14; *Prosecutor v. Blagojević and Jokić,* IT-02-60-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 9 May 2007, para. 10 [*Blagojević* Appeal Judgement]; *Halilović* Appeal Judgement, para. 12 ; *Prosecutor v. Limaj et al.,* IT-03-66-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 27 September 2007, para. 14 [*Limaj* Appeal Judgement].

[814] Prosecution Appeal Brief, para. 7.7.

[815] *Ibid.*

[816] Counts 9 to 12 of the Proposed Amended Indictment, namely: Rape, as a crime against humanity; Sexual Slavery and any other form of sexual violence as a crime against humanity; Other inhumane acts as a crime against humanity and; in addition or in the alternative, Outrage upon personal dignity as a violation of Article 3 Common to the Geneva Conventions and Additional Protocol II. Proposed Amended Indictment, para. 31, Annex I to the Prosecution Request For Leave To Amend The Indictment, 9 February 2004.

427. In view of the foregoing, the Appeals Chamber finds that the consideration of this Ground of Appeal would be an academic exercise. The Appeals Chamber, Justice Winter dissenting, concludes that the Prosecution's Eighth Ground of Appeal is an unnecessary exercise and that it fails in its entirety.

E. Prosecution's Ninth Ground of Appeal: Alleged Error Concerning Admissibility of Evidence of Sexual Violence

1. Introduction and Procedural Background

428. In the Prosecution's Ninth Ground of Appeal, the Prosecution alleges that the Trial Chamber erred in law and in fact and/or procedure in denying its request to lead and adduce evidence of sexual violence under Count 3, other inhumane acts, a crime against humanity, punishable under Article 2.i. of the Statute and Count 4, violence to life, health and physical or mental well-being, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.a. of the Statute.[817]

429. On 9 February 2004, the Prosecution filed a motion before the Trial Chamber[818] seeking leave to amend the Indictment to add four new counts of sexual violence.[819] The Trial Chamber, on 20 May 2004, Justice Boutet, dissenting, denied the Prosecution's motion to amend the Consolidated Indictment ("Indictment Amendment Decision").[820] The Trial Chamber, by majority, also denied the Prosecution's request for leave to appeal this decision. [821]

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[817] Prosecution Notice of Appeal, para. 29.

[818] *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Special Court for Sierra Leone, Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 9 February 2004.

[819] The charges sought to be included were: rape, as a crimes against humanity punishable under Article 2.g. of the Statute (Count 9); sexual slavery and any other forms of sexual violence, a crime against humanity punishable under Article 2.g. of the Statute (Count 10); other inhumane acts, a crime against humanity under Article 2.i. of the Statute (Count 11); and outrages upon personal dignity, a war crime punishable under Article 3.e. of the Statute (Count 12). The Prosecution referred to it as crimes of sexual violence but it also includes forced marriage. The Appeals Chamber will use this terminology though noting that forced marriage is not predominantly a sexual crime. *See* AFRC Appeal Judgment, para. 195.

[820] Indictment Amendment Decision.

[821] Trial Chamber Decision on Leave to Appeal. On 30 August 2004, the Prosecution filed an appeal against the Trial Chamber Decision on Leave to Appeal. *See Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004, Refusing Leave to File an Interlocutory Appeal, 30 August 2004. On 17 January 2005, the Appeals Chamber ruled that it had no jurisdiction to entertain the Prosecution's appeal without leave of the Trial Chamber, and it therefore did not consider the merits of the Indictment Amendment Decision. Decision on Appeal of Refusal of Leave to File Interlocutory Appeal, para. 42.

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430. On 3 June 2004, the trial commenced. On 2 November 2004 the majority of the Trial Chamber, Justice Boutet dissenting, orally stated that evidence on crimes of a sexual nature and/or forced marriage is not admissible under existing Counts 3 and 4 of the Indictment in light of the Trial Chamber's Indictment Amendment Decision denying the Prosecution's request for leave to amend the Indictment to add four new counts relating to sexual violence.[822]

431. On 15 February 2005, the Prosecution filed an urgent motion for a ruling on the admissibility of evidence ("Admissibility of Evidence Motion").[823] The Prosecution sought a ruling as to the effect of the Indictment Amendment Decision and, in particular, whether that decision precluded the admissibility of evidence of sexual crimes under Counts 3 and 4 of the Indictment.[824]

432. In a decision dated 23 May 2005, the Trial Chamber by a majority, Justice Boutet dissenting, ruled that evidence concerning the commission of sexual crimes was not admissible in relation to Counts 3 and 4 of the Indictment and that a written decision would follow shortly.[825] On 22 June 2005, the Trial Chamber issued a Majority decision stating the reasons for the decision rendered on 23 May 2005 ("Reasoned Admissibility of Evidence Decision").[826]

433. The Trial Chamber found that because the allegations of sexual violence were not specifically pleaded in the Indictment, to admit evidence of sexual violence would infringe the Accused's rights under Article 17(2) and (4) of the Statute, either because the Accused would not have been properly informed of the nature of the case against him or the admission of such evidence would require a lengthy delay in the trial proceedings, thus violating the Accused's right to a fair and expeditious trial.[827] The Trial Chamber held that the admission of evidence of sexual violence would prejudice the rights of the accused because: first, Counts 3 and 4 of the Indictment contained no specific factual allegations concerning sexual violence, and therefore, evidence cannot be

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[822] CDF Trial Transcript, 2 November 2004, pp. 53-54.
[823] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence, 15 February 2005.
[824] *Ibid* at para. 1.
[825] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Decision on Urgent Prosecution Motion Filed on 15 February 2005 for a Ruling on the Admissibility of Evidence, 23 May 2005, pp. 2-3.
[826] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 22 June 2005, para. 19.
[827] *Ibid* at para. 19.

properly adduced;[828] second, admitting the disputed evidence at that very late and crucial stage of the trial, derogates significantly from Article 17(4)(a) of the Statute which guarantees every accused the right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charges against him;[829] and third, "nothing in the records seems to support the Prosecution's assertion that evidentiary material under reference had been disclosed to the Defence in 'some form' over 12 months ago,"[830] especially in light of the fact that specific allegations are not contained in the Indictment.[831]

434. On 27 June 2005, the Prosecution requested leave of the Trial Chamber to appeal the Reasoned Admissibility of Evidence Decision.[832] This was denied, by a majority, Justice Boutet dissenting, on 9 December 2005.[833]

2. Submissions of the Parties

435. The Prosecution challenges the Reasoned Admissibility of Evidence Decision, arguing that the Trial Chamber erred in law, procedure and fact in finding that evidence of a sexual nature was not admissible in relation to Counts 3 and 4.[834] The Prosecution submits that the Trial Chamber erred in law in reaching the conclusion that notice of facts underpinning a charge can only be provided on the face of an Indictment and nowhere else, and therefore, the Trial Chamber committed a procedural error by exercising its discretion to deny the Admissibility of Evidence Motion on the wrong legal principle.[835]

436. The Prosecution submits that it is settled law that a defective indictment can be cured where there has been timely, clear and consistent information provided to the accused detailing the factual basis of the charges against him.[836] Furthermore, it submits that, as a matter of law, the war crime of violence to life, health and physical and mental well being of persons, in particular cruel

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[828] *Ibid* at para. 19(i)-(iii).
[829] *Ibid* at para. 19(viii).
[830] *Ibid* at para. 19(v).
[831] *Ibid* at para. 19(v).
[832] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence, 27 June 2005.
[833] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Trial Chamber, Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence, 9 December 2005, para. 11 [Decision on Admissibility of Evidence].
[834] Prosecution Appeal Brief, para. 8.8.
[835] *Ibid* at paras 8.7, 8.8.
[836] *Ibid* at para. 8.9.

treatment can include crimes of a sexual nature.[837] In light of these legal principles, the Prosecution contends that had the Trial Chamber exercised its discretion correctly and applied the correct legal principle it would have found that the Prosecution did provide timely, clear and consistent information that crimes of a sexual nature were being alleged under Counts 3 and 4 of the Indictment, over twelve months before it sought to lead evidence of sexual violence, through its pre-trial, supplemental pre-trial briefs, and opening statement.[838] To the extent that the Trial Chamber found that "nothing in the record seems to support the Prosecution's assertion that the evidentiary material under reference had been disclosed to the Defence 'in some form' over 12 months ago," the Prosecution contends that the Trial Chamber erred in fact.[839]

437. The Appeals Chamber observes that Kondewa's submission in response refers the Appeals Chamber to paragraphs relating to his response to the Prosecution's Eight Ground of Appeal. However, his references are inconsistent and confusing;[840] and often contain arguments which are specific to the Prosecution's Eighth Ground of Appeal.[841] The Appeals Chamber will only address Kondewa's arguments that clearly relate to the Prosecution's Ninth Ground of Appeal.[842]

438. Kondewa's principal argument in response to this ground is that "the Rules do not allow for interlocutory appeals to be brought at this stage of the proceedings and that the Appeals Chamber does not have jurisdiction to hear Ground 9."[843] Kondewa argues that the Admissibility of Evidence Motion is governed exclusively by Rules 73(A) and (B) and that under these rules, the Appeals Chamber has already found that it has no jurisdiction to entertain the appeal without leave of the Trial Chamber.[844] Furthermore, Kondewa asserts that the Prosecution's reliance on Article 20(1)(b) and (c) as a source of jurisdiction is misplaced because the Prosecution has failed to show that its allegations concerning errors of law and fact either invalidated the Trial Judgment or occasioned a miscarriage of justice nor does the Prosecution seek clarification on an important point

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[837] *Ibid* at para. 8.10.
[838] *Ibid* at paras 8.11-8.15.
[839] *Ibid* at para. 8.16, *quoting* Decision on Admissibility of Evidence, para. 19(v).
[840] In para. 8.8 of Kondewa Response Brief relating to the Prosecution's Ninth Ground of Appeal, he states that he rely on paras 7.10- 7.14, 7.7-7.32. However, in para. 8.10 Kondewa requests the Appeals Chamber to "strike out Ground 9" based on the arguments in paras 7.10-7.14, 7.17-7.21.
[841] *See, e.g.*, Kondewa Response Brief, paras 7.12, 7.15, 7.16.
[842] AFRC Appeal Judgment, para. 34. *See also Kvočka* Appeal Judgement, para. 15; *Limaj* Appeal Judgement, para. 14; *Simić* Appeal Judgement, para. 13, *Blaškić* Appeal Judgement, para. 13.
[843] Kondewa Response Brief, para. 8.9.
[844] *Ibid* at paras 7.12, 7.15, 7.16.

of law.[845] Thus, under Article 20(1)(b) and (c) Kondewa asserts that the Appeals Chamber has no jurisdiction to hear this Appeal.[846]

439. Fofana raises six arguments in response to the Prosecution's arguments. First, Fofana notes that the evidence the Prosecution seeks to introduce under existing Counts 3 and 4 was the very same evidence it was to adduce in order to prove four counts of sexual violence had it been allowed to amend the indictment.[847] Fofana thus submits that it is fundamentally unfair for the Prosecution to now seek to introduce evidence through the backdoor that was rejected by the Trial Chamber in refusing to grant leave to amend the Indictment.[848] Second, he submits that the evidence, if it is admitted by the Appeals Chamber, is irrelevant because it will not go to the proof of any Count in the Indictment.[849] Fofana argues that the failure of the Prosecution to plead gender-based crimes is fatal to the admissibility of the evidence because a mere allegation of inhumane acts is too vague to comply with Rule 47(C) and too vague to help the accused prepare his defence.[850] Third, Fofana submits that the Trial Chamber was correct in refusing to admit evidence of sexual violence as it would have necessitated a reasonably lengthy adjournment for the Defence to carry out investigations on the proposed evidence and his rights under Article 17(4)(c) of the Statute would have been violated.[851] Fourth, Fofana claims that had the Trial Chamber admitted this evidence of sexual violence it would have indirectly overturned the Trial Chamber's ruling refusing to grant the Prosecution leave to amend the Indictment to include counts of sexual violence.[852] Fifth, Fofana argues that the evidence sought to be adduced would be prejudicial to the accused persons.[853] Sixth, Fofana argues that an Indictment cannot be "cured" at the Special Court, because the Rules differ from the Rules at ICTY and the ICTR.[854]

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[845] *Ibid* at para. 7.26.
[846] *Ibid* at para. 7.28.
[847] Fofana Response Brief, para. 144.
[848] *Ibid*.
[849] *Ibid* at para. 45.
[850] *Ibid* at para. 146.
[851] *Ibid* at para. 147.
[852] *Ibid* at para. 148.
[853] *Ibid* at para. 149.
[854] *Ibid* at paras 153-156.

3. Discussion

440. In this ground of appeal, the Prosecution alleges that the Trial Chamber committed both an error of law and of fact in refusing to admit evidence of sexual violence under existing Counts 3 and 4 of the Indictment.

441. The Appeals Chamber is of the opinion that acts of sexual violence may constitute "other inhumane acts" as alleged in Count 3 of the Indictment[855] as well as "cruel treatment," as alleged in Count 4 of the Indictment.[856]

442. Counts 3 and 4 of the Indictment do not explicitly list the acts of sexual violence that amounts either to an "other inhumane act" under Article 2.i. of the Statute or "cruel treatment" under Article 3.a. of the Statute. The Indictment on its face was defective with respect to allegations relating to sexual violence.

443. However, case law at the *ad hoc* Tribunals recognizes that in limited circumstances, a defect in the indictment may be "cured" if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.[857] While a vague indictment not cured by timely, clear and consistent notice causes prejudice to the accused, the defect may be deemed harmless if the Prosecution can demonstrate that the accused's ability to prepare his defence was not materially impaired. Factors to be considered in this respect include, among others, information provided in the Prosecution's pre-trial brief or its opening statement, the timing of the communications, the importance of the information to the ability of the accused to prepare his defence and the impact of the newly-disclosed material facts on the Prosecution's case.[858] The Appeals Chamber adopts these principles.

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[855] AFRC Appeal Judgment, para. 186; *Akayesu* Trial Judgement, paras 688, 697; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 1 December 2003, para. 936 [*Kajelijeli* Trial Judgement]; *Niyitigeka* Appeal Judgement, para. 465.

[856] *Akayesu* Trial Judgement, paras 711-712; *Kayishema* Trial Judgement, para. 108; *Prosecutor v. Musema*, ICTR-96-13-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 27 January 2000, para. 156; *Čelebići* Trial Judgement, paras 551-552.

[857] *Kupreškić* Appeal Judgement, para. 114; *Kvočka* Appeal Judgement, para. 43; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 7 July 2005, para. 28; *Ntakirutimana* Appeal Judgement, para. 27; *Gacumbitsi* Appeal Judgement, paras 175-179; *Prosecutor v. Seromba*, ICTR-01-66-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 12 March 2008, para. 100. *See also Blaškić* Appeal Judgement, para. 238-239.

[858] *Simić* Appeal Judgement, para. 24.

444. The Appeals Chamber notes that the Prosecution's Pre-Trial Brief, filed on 2 March 2004, clearly notes that in relation to Bonthe District, "[t]he evidence will demonstrate that their daughters and wives [civilians] were systematically raped and held in sexual slavery."[859] The Prosecution's Supplemental Pre-Trial Brief, filed on 22 April 2004, alleged that under Counts 3 and 4 of the Indictment, in relation to Bonthe District, both Fofana and Kondewa were being held responsible pursuant to Article 6(1) of the Statute for subjecting women and girls to "sexual assaults, harassment, and non-consensual sex, which resulted in widespread proliferation of sexually transmitted diseases, unwanted pregnancies and severe mental suffering . . . ,"[860] as well as for "committing unlawful physical violence and mental harm or suffering through sexual assaults as well as other acts during the attacks in Bonthe District."[861] Furthermore, the Prosecution's opening statement, delivered on 3 June 2004, referred to the testimony of several witnesses relating to evidence of sexual violence or forced marriage.[862]

445. The Appeals Chamber therefore is satisfied that by the time the Prosecution filed its Admissibility of Evidence Motion, the Accused had timely and consistent notice for nearly one year

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[859] Prosecution Pre-Trial Brief, para. 62. The Pre-Trial Brief itself does not set out factual allegations in relation to specific Counts or specific individuals. On 1 April 2004, the Trial Chamber ordered the Prosecution to file a Supplemental Pre-Trial Brief, finding that the Prosecution's Pre-trial Brief of 2 March 2004 does not sufficiently address factual issues, does not provide with reasonable sufficiency notice and an overview of the Prosecution's case against each individual accused, and the nexus between the crimes alleged and the individual criminal responsibility of each accused. *See Prosecutor v. Norman et al.*, SCSL-04-14-PT, Special Court for Sierra Leone, Order to the Prosecution to File a Supplemental Pre-Trial Brief, 1 April 2004.

[860] Prosecution Appeal Brief, para. 8.13; Prosecution Supplemental Pre-Trial Brief, paras 91(b), 220(b).

[861] Prosecution Brief, para. 8.13; Prosecution Supplemental Pre-Trial Brief, para. 92.

[862] The Prosecution stated: "At Tihun, one of the Kamajors wanted to be his wife – wanted her to be his wife, but she refused and, in reward, she was threatened with death. The Kamajor had her perform conjugal duties and that witness was held in sexual slavery for a whole year. The witness was unable to escape because at every point in time there was a Kamajor that stood guard to prevent her from doing so. It was at Talia [Bonthe District] the witness met her mother in captivity and it was also the same place that she met the third Accused, Allieu Kondewa, who took her into his bedroom and raped her many times into the night. That witness will be here to testify to that." Referring to another witness who would testify, the Prosecutor further stated: "She will testify that she was raped by one Kamajor, who then forcefully took her as his wife. She spent three months at Talia with the Kamajors and during her captivity she witnessed a lot of killings of innocent civilians who were brought into town by these Kamajors." The Prosecutor also referred to witnesses who would testify that: "The witnesses also testify that some girls and women were brought to Base Zero and they were forced to have sex and they were raped and they were held in sexual slavery and subject to systematic sexual violence with Kamajor commanders like Kamoh Lahai and King Kondewa himself. The Court will hear testimonies of looting, raping and terrorizing civilians committed by this dreadful death squad." CDF Trial Transcript, 3 June 2004, p. 23. *See also* Dissenting Opinion of Judge Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 26.

that acts of sexual violence were being alleged in relation to Bonthe District under Counts 3 and 4 of the Indictment.[863]

446. Fofana argues that the Trial Chamber was correct in refusing to admit evidence of sexual violence because the "evidence sought to be adduced would be prejudicial to the interest of the accused persons. Such evidence would cast a cloak of doubt on the image of innocence that the Accused enjoys under law, until the contrary is proved."[864] The Appeals Chamber is of the view that the right to a fair trial enshrined in Article 17 of the Statute cannot be violated by the introduction of evidence relevant to any allegation in the trial proceedings, regardless of the nature or severity of the evidence.[865] The Appeals Chamber concludes that evidence of sexual violence was relevant to charges in the Indictment and that the Trial Chamber was in error in prospectively denying the admittance of such evidence. Further, the accused were put on notice of such evidence, which is not prejudicial in itself.

447. The Appeals Chamber notes that in filing its Urgent Motion for a Ruling on the Admissibility of Evidence on 15 February 2005, the Prosecution sought "clarification as to the extent to which the [Trial Chamber's Indictment Amendment Decision] limit[ed] the adduction of particular relevant and admissible evidence, under existing counts of the Consolidated Indictment."[866] At that stage of the proceedings, the Prosecution had attempted to tender only one

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[863] The Appeals Chamber notes that there is a distinction between the question of whether the Accused was on notice for the purposes of admitting evidence and whether the Prosecution provided adequate notice upon which a conviction could rest, which can only be made at the end of the trial after taking the totality of the evidence into consideration. *See* *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-AR73.2, International Criminal Tribunal for Rwanda, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, Appeals Chamber, 4 October 2004, para. 7.

[864] Fofana Response Brief, para. 149. This argument was argued by Justice Itoe, *see* Separate and Concurring Opinion of Hon. Justice Benjamin Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 65 stating that the admission of evidence of sexual violence constitutes unfair prejudice to the accused because it is considered as being "unfairly compromising of the interests and status of innocence or the good standing of the accused." In so finding, he considered that unfair prejudice occurs where, evidence if adduced, "has the potential of staining the mind of the Judge with an impression that adversely affects his clean conscience towards all parties, and particularly the party who is the victim of that evidence which is tendered, to the extent that it leaves in the mind of the Judge, an indelible scar of bias which could make him ill disposed to the cause of the victim of said evidence [in this case the Accused] as a result of which injustice could be occasioned to the party who after all, may be innocent or have a just cause, and who but for the admission of that contested evidence.

[865] *See* Dissenting Opinion of Judge Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 33. ("[E]vidence of acts of sexual violence are no different than evidence of any other act of violence for the purposes of constituting offences within Counts 3 and 4 of the Indictment and are not inherently prejudicial or inadmissible character evidence by virtue of their nature of characterisation as 'sexual'").

[866] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence, 15 February 2005, para. 1.

witness' testimony concerning sexual violence in evidence.[867] The Trial Chamber denied the Prosecution's request to tender such evidence.[868] The Prosecution did not appeal this denial, but three months later filed its Admissibility of Evidence Motion.

448. The Appeals Chamber is of the view that filing a motion seeking clarification pursuant to Rules 73 and 90(f) of the Rules is not the proper procedure by which to seek a ruling on the admissibility of evidence. Under Rules 73 and 90(f), the Trial Chamber has broad discretion over the admissibility of relevant evidence.[869] Debates over the admissibility of evidence at trial assist the Chamber to better ascertain the context of the evidence and to assess its relevance and probative value.[870] Thus, the Rules provide that as a general rule a party should seek to tender evidence at trial.[871] If a party wishes to appeal the Trial Chamber's decision concerning the admissibility of evidence at that juncture, Rule 73(B) provides that a party may seek leave to appeal such a decision from the Trial Chamber.

449. The Appeals Chamber acknowledges that in certain situations there may be unusual evidentiary circumstances that would cause unfair prejudice to a party or undue delay in the trial should a party be permitted to seek a ruling on the admissibility of evidence in advance of tendering such evidence.[872] Here, in its Admissibility of Evidence Motion, the Prosecution argued that it brought the motion to "avoid unnecessary arguments prior to the testimony of a number of witnesses" and because "a ruling on this motion would avoid numerous debates during hearings, interruptions to the testimony of witnesses, and serve the interests of judicial economy and a fair trial."[873] The Appeals Chamber, however, finds that nothing in the Prosecution's Admissibility of Evidence Motion concerning the proposed evidence indicates that tendering this evidence piece by piece at trial would have caused undue delay in the trial or unfairly prejudiced a party.

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[867] CDF Trial Transcript, 2 November 2004.
[868] *Ibid.*
[869] *See Prosecutor v. Halilović*, IT-01-48-AR73.2, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 14; *Prosecutor v. Prlić et al.*, IT-04-74-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Admission of Evidence, 13 July 2006 [*Prlić* Decision on Admission of Evidence].
[870] *See ibid.*
[871] *See Prosecutor v. Prlić* et al., IT-04-74-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Prosecution Motion for the Admission into Evidence of UNPROFOR Spanish Battalion Documents, 17 February 2006.
[872] *See, e.g., Prlić* Decision on Admission of Evidence.
[873] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Special Court for Sierra Leone, Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence, 15 February 2005, paras 3, 41.

450. The Appeals Chamber, Justice King dissenting, finds that the Trial Chamber erred in denying a hearing of evidence of acts of sexual violence on the basis that such acts had not been alleged in the Indictment. The Appeals Chamber holds that the Trial Chamber erred in dismissing the Admissibility of Evidence Motion for the reasons that it did.

4. Conclusion

451. Although the Prosecution's Ninth Ground of Appeal has not raised an error of law that invalidates the decision, *i.e.*, the conviction of the Accused on the Counts to which the evidence would have related, the Appeals Chamber, Justice King dissenting, has exercised its discretion to consider this ground as guidance to the Trial Chamber.

F. Prosecution's Tenth Ground of Appeal: Sentencing

1. Background

(a) Fofana

452. Fofana was convicted for:

(i) Aiding and abetting pursuant to Article 6(1) of the Statute under Counts 2, 4 and 7 for the Tongo Crime Base;

(ii) Superior responsibility pursuant to Article 6(3) of the Statute under Counts 2, 4 and 7 for the Koribondo Crime Base; and

(iii) Superior responsibility pursuant to Article 6(3) of the Statute under Counts 2, 4, 5 and 7 for the Bo District Crime Base.[874]

453. The Trial Chamber found that many of the crimes committed by Fofana's subordinates under his effective control and for which he was found liable under Article 6(3) were of a very serious nature, and were committed against innocent civilians.[875] In this regard, the Trial Chamber expressly discussed the "mutilation and the targeted killing of Limba civilians and the killing and

[874] CDF Sentencing Judgment, para. 45.

mutilation of Chief Kafala (whom the CDF/Kamajors considered a collaborator) in Koribondo, as indicative of the brutality of the offences committed by Fofana's subordinates."[876] The Trial Chamber also described the "gruesome murder of two women in Koribondo who had sticks inserted and forced into their genitals until they came out of their mouths. The women were then disembowelled, and while their guts were used as checkpoints, parts of their entrails were eaten."[877]

454. The Trial Chamber found that many of the offences for which Fofana was convicted under Article 6(1) were committed "on a large scale and with a significant degree of brutality."[878] The Trial Chamber specifically noted the "murder of 150 Loko, Limba and Temne tribe members in Talama," the hacking to death of 20 men on 15 January 1998 at the NDMC Headquarters in Tongo, and the "killing of 64 civilians in Kamboma, who were placed in two separate lines and killed, after which their corpses were rolled into a swamp" as "indicative of the scale and brutality of the crimes that Fofana was found to have aided and abetted."[879] The Trial Chamber found that these crimes were particularly serious because they were "committed against unarmed and innocent civilians, solely on the basis that they were unjustifiably perceived and branded as 'rebel collaborators.'"[880]

455. The Trial Chamber also noted that many of the victims were young children and women, and were therefore particularly vulnerable,[881] and considered the crimes to have had a "significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community."[882] In particular, the Trial Chamber noted the "lasting effect of these crimes on victims such as TF2-015, who was the only survivor of an attack on 65 civilians who were hacked to death by machetes or shot, and who was himself hacked with a machete and rolled into a swamp on top of the dead bodies in the belief that he was dead."[883]

456. With respect to Fofana's individual circumstances, the Trial Chamber noted that he was found liable for the crimes in Tongo Field as an aider and abettor under Article 6(1) of the Statute, that he was not present at the scenes of the crimes and that the degree of his participation amounted

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[875] *Ibid* at para. 46.
[876] *Ibid*.
[877] *Ibid*.
[878] *Ibid* at para. 47.
[879] *Ibid*.
[880] *Ibid*.
[881] *Ibid* at para. 48.
[882] *Ibid* at para. 49.
[883] *Ibid*, *citing* CDF Trial Judgment, para. 406.

only to encouragement.[884] With respect to the crimes for which Fofana was convicted under Article 6(3), the Trial Chamber considered that the gravity of the offences committed by Fofana in his leadership role as a superior who failed to prevent his subordinates from committing crimes is "greater than that of the actual perpetrators of the crimes."[885]

457. In respect to the crimes for which Fofana was found guilty, the Trial Chamber imposed a sentence of a total and concurrent term of imprisonment of six (6) years, as follows:

(i) six (6) years under Count 2 for murder as a war crime of violence to life, health and physical or mental well-being of persons;

(ii) six (6) years under Count 4 for cruel treatment as a war crime of violence to life, health and physical or mental well-being of persons;

(iii) three (3) years under Count 5 for pillage as a war crime; and

(iv) four (4) years for Count 7 (collective punishments, as a war crime).[886]

(b) Kondewa

458. The Trial Chamber found Kondewa guilty of:

(i) Aiding and abetting pursuant to Article 6(1) of the Statute under Counts 2, 4 and 7 for the Tongo Crime Base;

(ii) Failure to prevent pursuant to Article 6(3) of the Statute under Counts 2, 4, 5 and 7 for the Bonthe and Moyamba Crime Bases;

(iii) Commission (murder) pursuant to Article 6(1) of the Statute under Count 2 for the Talia/Base Zero Crime Base;

(iv) Commission (enlisting child soldiers) pursuant to Article 6(1) of the Statute under Count 8.[887]

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[884] *Ibid* at para. 50.
[885] *Ibid* at para. 51.
[886] *Ibid* at pp. 33-34.
[887] *Ibid* at para. 52.

459. The Trial Chamber found that many of the crimes committed by Kondewa's subordinates who acted under his effective control and for which the Trial Chamber found him liable under Article 6(3) were of a serious nature.[888] Kondewa was also convicted pursuant to Article 6(1) for the same crimes as Fofana in the Tongo area, and the Trial Chamber recalled that it had previously described "the scale and the barbaric nature of [those] crimes,"[889] and that the victims were particularly vulnerable.[890]

460. With respect to the offence of the enlistment of children for which Kondewa was convicted, the Trial Chamber noted the "particular vulnerability of [Witness] TF2-021, who was eleven years old when he was captured by the CDF/Kamajors and forcibly trained to kill and to commit crimes against innocent civilians."[891] The Trial Chamber considered the crimes for which Kondewa was convicted to "have had a significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community."[892]

461. With respect to Kondewa's individual circumstances, the Trial Chamber found that while he was held liable on the basis of aiding and abetting under Article 6(1) and as a superior under Article 6(3), he was also held liable for the direct perpetration of some acts, including the shooting of a town commander in Talia/Base Zero, and for committing the offence of the enlistment of children.[893]

462. With respect to Kondewa's liability under Article 6(3), the Trial Chamber found that in light of "his leadership role as a superior who failed to prevent his subordinates from committing crimes, the gravity of the offence committed by Kondewa is greater than that of the actual perpetrators of the crimes."[894] The Trial Chamber concluded that "the fact that Kondewa's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity, and therefore increases the seriousness of the crimes for which he has been convicted."[895]

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[888] *Ibid* at para. 53.
[889] *Ibid*.
[890] *Ibid* at para. 54.
[891] *Ibid* at para. 55.
[892] *Ibid* at para. 56.
[893] *Ibid* at para. 57.
[894] *Ibid* at para. 58.
[895] *Ibid*.

463. In respect to the crimes for which Kondewa was found guilty, the Trial Chamber imposed a sentence of a total and concurrent term of imprisonment of eight (8) years, as follows:

(i) eight (8) years under Count 2 for murder as a war crime of violence to life, health and physical or mental well-being of persons;

(ii) eight (8) years under Count 4 for cruel treatment as a war crime of violence to life, health and physical or mental well-being of persons;

(iii) five (5) years under Count 5 for pillage as a war crime;

(iv) six (6) years under Count 7 for collective punishments as a war crime; and

(v) seven (7) years under Count 8 for enlisting children under the age of 15 years into armed forces or groups or their use in active hostilities as a war crime.[896]

464. In its Tenth Ground of Appeal, the Prosecution alleges that the Trial Chamber committed ten distinct errors, including errors in law, errors in fact and procedural errors, in its determination of Fofana's and Kondewa's sentences. The Submissions of the Parties are discussed below in relation to each alleged error.

2. Standard of Review

465. The relevant provisions on sentencing are Article 19 of the Statute and Rules 99 to 105 of the Rules. Both Article 19 of the Statute and Rule 101 of the Rules contain provisions for sentencing. According to the provision of Article 19, a Trial Chamber must take into account the gravity of the offence[897] and the individual circumstances of the convicted person.[898] The Statute

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[896] *Ibid* at p. 34.

[897] The ICTY Appeals Chamber has held that the determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime. *Prosecutor v. Kupreškić et al.*, IT-95-16-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 14 January 2000, para. 852, *endorsed in Aleksovski* Appeal Judgement, para. 182. *See also Blaškić* Appeal Judgement, para. 683.

[898] The ICTY Appeals Chamber has held that the individual circumstances of the convicted person consist of a non-exhaustive list of mitigating and aggravating circumstances. Mitigating circumstances previously recognized by the ICTY include: (1) co-operation with the Prosecution; (2) the admission of guilt or a guilty plea; (3) the expression of remorse; (4) voluntary surrender; (5) good character with no prior criminal convictions; (6) comportment in detention; (7) personal and family circumstances; (8) the character of the accused subsequent to the conflict; (9) duress and indirect participation; (10) diminished mental responsibility; (11) age; and (12) assistance to detainees or victims. Aggravating circumstances previously recognized by the ICTY include: (i) the position of the accused, that is, his

also provides that in determining the term of imprisonment the Trial Chamber shall have recourse to the practice regarding prison sentences in the ICTR and the national courts of Sierra Leone, as appropriate. According to Rule 101 of the Rules, aggravating and mitigating circumstances shall, *inter alia,* be taken into account.[899] Rule 101(c) of the Rules provides that the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

466. Appeals against sentence, as appeals from a judgement of a Trial Chamber, are appeals *stricto sensu.* They are not trials *de novo.*[900] Trial Chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[901] The Appeals Chamber will not lightly overturn findings relevant to sentencing by the Trial Chamber.[902] As a general rule, the Appeals Chamber will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[903]

467. In the AFRC Appeal Judgment, the Appeals Chamber explained that to demonstrate that the Trial Chamber committed a discernible error in exercising its discretion:

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position of leadership, his level in the command structure, or his role in the broader context of the conflict of the former Yugoslavia; (ii) the discriminatory intent or the discriminatory state of mind for crimes for which such a state of mind is not an element or ingredient of the crime; (iii) the length of time during which the crime continued; (iv) active and direct criminal participation, if linked to a high-rank position of command, the accused's role as fellow perpetrator, and the active participation of a superior in the criminal acts of subordinates; (v) the informed, willing or enthusiastic participation in crime; (vi) premeditation and motive; (vii) the sexual, violent, and humiliating nature of the acts and the vulnerability of the victims; (viii) the status of the victims, their youthful age and number, and the effect of the crimes on them; (ix) civilian detainees; (x) the character of the accused; and (xi) the circumstances of the offences generally. *See Blaškić* Appeal Judgement, paras 685-686, 696

[899] In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute and in Rule 101(B)(iii).

[900] *Kupreškić* Appeal Judgement, para. 408; *Prosecutor v. Mucić et al.*, IT-96-21-A*bis*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement on Sentence Appeal, 8 April 2003, para. 11; *Čelebići* Appeal Judgement, para. 203.

[901] *See e.g., Čelebići* Appeal Judgement, para. 717. *See also* Article 19(2) of the Statute, Rule 101(B) of the Rules.

[902] AFRC Appeal Judgment, para. 309; *see also Krnojelac* Appeal Judgement, para. 11.

[903] *See Tadić* Judgement in Sentencing Appeals, para. 22; *Aleksovski* Appeal Judgement, para. 187; Prosecutor v. *Furundžija*, IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 21 July 2000, para. 239 [*Furundžija* Appeal Judgement]; *Čelebići* Appeal Judgement, para. 725; *Kupreškić* Appeal Judgement, para. 408; *Prosecutor v. Jelisić*, IT-95-10-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 5 July 2001, para. 99; *Prosecutor v Krstić*, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 19 April 2004, para. 242; *Blaškić* Appeal Judgement, para. 680.

> "the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."[904]

3. Alleged Refusal to Consider Sentencing Practices of the National Courts of Sierra Leone

(a) Trial Chamber Findings

468. Article 19(1) of the Statute states: "the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone."[905]

469. The Trial Chamber held that it would not give consideration to the sentencing practice in Sierra Leone because Fofana and Kondewa had not been convicted of any crime under Sierra Leone law and because the sentencing practice of Sierra Leone for the convictions in this case would indicate either sentence of death or life imprisonment.[906]

(b) Submissions of the Parties

470. The Prosecution submits that the Trial Chamber erred in law in holding as above.[907] The Prosecution argues that it is immaterial that Fofana and Kondewa were not convicted pursuant to Article 5 of the Statute (regarding certain crimes under Sierra Leone law) in light of the practice at the ICTY and ICTR to take into account the sentencing law and practices in the former Yugoslavia and Rwanda, respectively, despite not having jurisdiction over any violations of domestic law.[908]

471. The Prosecution also submits that the purpose of referring to national sentencing practice is that the punishment must reflect the victim's sense of justice and the needs of the affected communities.[909] The Prosecution further argues that the Statutory language instructing that the Trial Chamber "*shall*, as appropriate, have recourse to the practice regarding prison sentences in . . .

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[904] AFRC Appeal Judgment, para. 309.
[905] Article 19(1) of the Statute.
[906] CDF Sentencing Judgment, paras 42-43.
[907] Prosecution Appeal Brief, para. 9.9.
[908] *Ibid* at para. 9.10.
[909] *See* Prosecution Appeal Brief, para. 9.11.

the national courts in Sierra Leone,"[910] *requires* the Trial Chamber to have regard to those practices.[911] According to the Prosecution, this requirement cannot be negated on the basis that the practice of sentencing to a life sentence or the death penalty is not permitted by the Special Court.[912]

472. In response, Fofana emphasizes that Article 19(1) of the Statute only authorizes the Trial Chamber to consider the sentencing practices of Sierra Leone when an accused is convicted of a violation of Sierra Leonean law pursuant to Article 5 of the Statute.[913] Further, Fofana submits that the Prosecution did not make any submissions "to show that it was appropriate for the Trial Chamber to rely on the sentencing practices of Sierra Leone."[914] Fofana argues that a related provision in the ICTY Statute has been interpreted to require that the Trial Chamber "must consider the sentencing practices in the former Yugoslavia as an aid in determining the appropriate sentence; however, they are not bound by them."[915] Applying this interpretation, Fofana submits that it is "important" that "the Trial Chamber should give due consideration to the sentencing practice of Sierra Leone" but it is not bound by it.[916]

473. Fofana also emphasizes that unlike Sierra Leone, Rwanda has incorporated war crimes and crimes against humanity in their domestic legislation. Therefore, the ICTR and the Special Court are authorized to have recourse to the Rwanda sentencing practice for convictions under those crimes.[917]

474. Like Fofana, Kondewa submits that Article 19(1) of the Statute does not establish a requirement, but merely permits a Trial Chamber to have recourse to Sierra Leonean sentencing practice.[918]

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[910] Article 19(1) of the Statute.
[911] Prosecution Appeal Brief, para. 9.13.
[912] *Ibid.*
[913] Fofana Response Brief, para. 158.
[914] *Ibid.*
[915] *Ibid* at para. 160, *citing Blaškić* Appeal Judgement, para. 681 and *Čelebići* Appeal Judgement, para. 813. Fofana makes a similar argument regarding the provision in the ICTR Statute. *See also* Fofana Response Brief, paras 161-162, *citing Prosecutor v. Akayesu*, ICTR-96-4-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 1 June 2001, para. 420 [*Akayesu* Appeal Judgement[; *Prosecutor v. Serushago*, ICTR-98-39-S, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement (Appeal Against Sentence), 14 February 2000, para. 30.
[916] Fofana Response Brief, para. 160.
[917] *Akayesu* Appeal Judgement, para. 420.
[918] Kondewa Response Brief, para. 9.5, *quoting* Craies on Statute Law, S.G.G. Edgar, 6th Ed., p. 284.

(c) Discussion

475. The Appeals Chamber notes that at the time the ICTY Statute took effect, the former Yugoslavia had domestic legislation criminalizing "acts against humanity and international law."[919] Similarly, at the time the ICTR Statute took effect, Rwanda had domestic legislation criminalizing war crimes, crimes against humanity and genocide.[920] In contrast, Sierra Leone has not criminalized war crimes and crimes against humanity as such, and consequently there is no specifically relevant sentencing practice for a Trial Chamber to refer to.

476. The Special Court has jurisdiction over crimes defined in Sierra Leone law in addition to certain international crimes. Bearing this in mind, the Appeals Chamber is of the view that the best interpretation of the word "appropriate" is that a Trial Chamber is to have recourse to the practice of the ICTR for convictions for war crimes and crimes against humanity and is to have recourse to the national courts in Sierra Leone for convictions under Sierra Leone law contained in Article 5 of the Statute.

477. In the result, the Appeals Chamber concludes that the Trial Chamber did not err in holding that it will not consider the sentencing practice of Sierra Leone.

4. Alleged Error in Considering Mitigating Factors

(a) Fofana's and Kondewa's Statements at the Sentencing Hearing

(i) Trial Chamber Findings

478. Under the heading "Remorse," the Trial Chamber stated the following:

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[919] *See The Criminal Code of the Socialist Federal Republic of Yugoslavia,* adopted by the SFRJ Assembly at the session of the Federal Council held on September 28, 1976, published in the Official Gazette SFRJ No. 44 of October 8, 1976, a correction was made in the Official Gazette SFRJ No. 36 of July 15, 1977, *available at* http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm#chap_16, Articles 141-156 (pertaining to genocide and war crimes).

[920] Rwandan Organic Law No. 8/96, on the Organization of Prosecutions for Offences constituting Genocide or Crimes Against Humanity committed since 1 October 1990, published in the Gazette of the Republic of Rwanda, 35th year. No. 17, 1 September 1996. *See Semanza* Appeal Judgement, para. 378; *Prosecutor v. Akayesu*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, Trial Chamber, Sentencing Judgement, 2 October 1998, para. 16 [*Akayesu* Sentencing Judgement]. Under Rwandan law, genocide and crimes against humanity carry the possible penalties of death or life imprisonment, depending on the nature of the accused's participation. *See Prosecutor v. Simba*, ICTR-01-76-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 13 December 2005, para. 434 [*Simba* Judgement and Sentence].

> "During the Sentencing Hearing, Counsel for Fofana stated, at the specific request and on behalf of his client: '[...] Mr Fofana accepts that crimes were committed by the CDF during the conflict in Sierra Leone. Indeed, at least one witness was called on behalf of the Fofana defence, Joseph Lansana, accepting and attesting to crimes committed by the CDF. Mr Fofana [...] deeply regrets all the unnecessary suffering that has occurred in this country.'[921]
>
> Although Fofana by this statement does not expressly acknowledge his personal participation in the crimes for which the Chamber has convicted him, the Chamber finds that he has clearly expressed empathy with the victims of those crimes."[922]

479. In support of this approach to "[r]emorse" as a mitigating circumstance, the Trial Chamber cited the *Orić* Trial Judgement, noting that in that case:

> "the Chamber held that 'the Appeals Chamber has held that an accused can express sincere regrets without admitting his participation in a crime, and that this is a factor which may be taken into account. This can be done without an accused having to give evidence or being cross-examined by the Prosecution. In this case, the Accused made no such statement, but throughout the trial, there were a few instances when Defence counsel on his behalf expressed compassion to witnesses for their loss and suffering. The Trial Chamber does not doubt the sincerity of the Accused in expressing empathy with the victims for their loss and suffering, and has taken this sincerity into consideration as a mitigating factor."[923]

480. In relation to Kondewa, the Trial Chamber stated:

> "During the Sentencing Hearing, Kondewa addressed the court and the public in the following terms, 'Sierra Leoneans, those of you who lost your relations within the war, I plead for mercy today, and remorse, and even for yourselves.' The Chamber finds that although Kondewa did not expressly recognise his own participation in the crimes for which he has been found guilty, the empathy he has shown is real and sincere."[924]

(ii) Submissions of the Parties

481. The Prosecution submits that the Trial Chamber erred in fact and law in considering Fofana and Kondewa's statements as mitigating circumstances. According to the Prosecution, the Trial Chamber erred in law in considering that statements not constituting "remorse" could be considered

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[921] Transcript of 19 September 2007, p. 64.
[922] CDF Sentencing Judgment, paras 63-64.
[923] *Ibid* at para. 64, fn. 108, *quoting Prosecutor v. Orić*, IT-03-68-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 30 June 2006, para. 752 [*Orić* Trial Judgement], *citing Vasiljević* Appeal Judgement, para. 177.
[924] *Ibid* at para. 65, *citing* Transcript of 19 September 2007, p. 91.

in mitigation, and that the Trial Chamber erred in fact in considering the statements to have been "real and sincere."[925]

482. The Prosecution distinguishes between "expressions of empathy for victims made at a sentencing hearing" from "expression[s] of genuine remorse."[926] The Prosecution observes that the *Orić* Trial Chamber at the ICTY considered the accused's expressions of empathy as a mitigating circumstance without an acknowledgement of culpability. However the Prosecution distinguishes *Orić* on the basis that Orić expressed empathy prior to the sentencing hearing (e.g., prior to having been found guilty).

483. The Prosecution submits that the Trial Chamber erred in the exercise of its discretion in considering the cursory statements of Fofana and Kondewa as expressions of genuine remorse and that no significant mitigating weight could be attributed to expressions of empathy for victims made at a sentencing hearing without an acknowledgement of culpability.[927]

484. Fofana responds that empathy is a deeper form of remorse since it involves the convicted person putting himself in the shoes of his victims.[928] Further, Fofana submits that the Prosecution failed to provide any support that empathy with victims is not an expression of remorse, and that it is the discretion of the Trial Chamber to determine whether the words used "show real remorse and could therefore be considered as mitigating circumstance [*sic*]."[929] Fofana submits that, following the ICTY Appeals Chamber judgment in *Vasiljević*, an accused need not admit to his participation in a crime to be given credit for genuine expressions of regret as a mitigating factor.[930]

485. Kondewa responds that *Orić* constitutes persuasive authority for the Trial Chamber's approach and the Trial Chamber's reliance on *Orić* is "correct in every respect."[931] Kondewa also quotes the ICTY Appeals Chamber's discussion in *Vasiljević* for support of the argument that acknowledgement of responsibility is not required for regret to be counted as a mitigating circumstance.[932] According to Kondewa, a reasonable trial chamber could find that the following

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[925] Prosecution Appeal Brief, paras 9.15-9.21.
[926] *Ibid* at para. 9.21.
[927] *Ibid*.
[928] Fofana Response Brief, para. 167.
[929] *Ibid* at para. 168.
[930] *Ibid* at para. 170, *citing Vasiljević* Appeal Judgement, para. 177
[931] Kondewa Response Brief, para. 9.11.
[932] *Ibid* at paras 9.12-9.14.

statement made during the sentencing hearing constitutes genuine and sincere regret: "Sierra Leoneans, those of you who lost your relations within the war, I plead for mercy today, and remorse, and even for yourselves."[933]

(iii) Discussion

486. This sub-ground of the Prosecution appeal against sentence presents two questions: (1) must an accused acknowledge his participation in a crime for his statements to be considered real and sincere remorse; and (2) if not, did the Trial Chamber err in considering Fofana's and Kondewa's statements as genuine regret which could mitigate the sentence?

487. The Appeals Chamber is aware of only two cases at the *ad hoc* Tribunals in which the Chamber considered whether an accused's expressions of regret or empathy for victims without acknowledgement of responsibility for the crimes could constitute a mitigating factor. In *Vasiljević*, the ICTY Appeals Chamber opined that an accused can express sincere regrets without admitting his participation in a crime, and that this could be a factor taken into account by the Trial Chamber.[934] However, in *Vasiljević*, the Appeals Chamber declined to consider Vasiljević's expressions of regret to be a mitigating circumstance.[935]

488. The ICTY Trial Judgment in *Orić* is the only case in which a convicted person received credit for expressions of empathy for the victims without acknowledging responsibility.[936] In *Blaškić*, the accused attempted to express remorse while denying accountability and the Trial Chamber refused to take it into account because, after establishing the facts, it felt his remorse was not sincere.[937]

489. An accused's acknowledgement of responsibility can be a mitigating circumstance in sentencing because it makes an important contribution to establishing the truth and, thereby, an accurate and accessible historical record. Moreover, such an acknowledgement of responsibility may contribute to peace and reconciliation, may set an example for other persons to make the same

[933] *Ibid* at paras 9.16-9.18, *quoting* Transcript, CDF Sentencing Hearing, 19 September 2007, p. 64.
[934] *Vasiljević* Appeal Judgement, para. 177.
[935] *Ibid*.
[936] *Orić* Trial Judgement, para. 752.
[937] *See Blaškić* Trial Judgement, para. 775.

moral choice, and alleviate the pain and suffering of victims.[938] Further, acknowledgement of responsibility is part of the rehabilitative purpose of sentencing,[939] and therefore an accused who acknowledges responsibility can properly be credited with a reduced sentence.[940]

490. The Appeals Chamber is of the view that the Trial Chamber could consider genuine and sincere expressions of empathy for the victim's suffering or regret for crimes committed, without an acknowledgement of responsibility as a mitigating circumstance. The Appeals Chamber opines that the Prosecution has not shown that the Trial Chamber erred in considering that the statements made by Fofana's counsel and Kondewa were, in fact, sincere expressions of their empathy for the victims, and as such they could be considered as mitigating circumstances. The Appeals Chamber, Justice Winter dissenting, concludes that the Trial Chamber did not err in accepting the expression of remorse in mitigation.

(b) Fofana's and Kondewa's Lack of Training

(i) Trial Chamber Findings

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[938] For example, during the ICTY sentencing hearing of Biljana Plavšić, Alex Boraine, former Co-Chair of the South African Truth and Reconciliation Commission, testified about the relationship between the acceptance of responsibility and reconciliation process:

> "[S]ystems of criminal justice exist not simply to determine guilt or innocence, but also to contribute to a safe and peaceful society. And therefore, these systems are absolutely critical in the process of reconciliation. They are not at odds. They are not a contradiction. In my experience, accepting responsibility for terrible crimes can have a transformative and traumatic impact on the perpetrator, but also on the victims and the wider community. Such acceptance, whether by a guilty plea in a criminal case or in some other forum, can, I believe, be a significant factor in promoting reconciliation and creating what I would call space for new attitudes and new behaviour. It has that potential. I'm not saying it's always realised."

T., Sentencing Hearing, *Plavšić*, ICTY-00-40-S, 17 December 2002, p. 591.

[939] The ICTY Appeals Chamber considers rehabilitation, in accordance with international human rights, is a relevant factor in sentencing, but not one which should be given "undue weight." *Čelebići* Appeal Judgement, para. 806. Some scholars and practitioners reason that defendants who are remorseful are less likely to repeat their crimes and therefore need little deterrence. Stephanos Bibas and Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 Yale L.J. 85, 93-95 (2004).

[940] There exists an extensive academic literature on the normative questions about what role, if any, remorse should play in deriving a just sentence. *See, e.g.*, Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 Yale L.J. 85, 93-95 (2004); Michael M. O'Hear, Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines, 91 Nw. U. L. Rev. 1507, 1511, 1515-16 (1997) (urging that considerations of remorse be eliminated from or minimized in application of "acceptance of responsibility" guideline); Ellen M. Bryant, Comment, Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty, 44 Cath. U. L. Rev. 1269, 1296-97 (1995) (proposing to amend "acceptance of responsibility" provision to include automatic reduction for guilty pleas without consideration of factors like remorse).

491. Under the heading "Lack of Formal Education or Training," the Trial Chamber stated that it was:

> "aware that both men were propelled in a relatively short period of time, from civilian life to an effective position of authority in a very brutal and bloody conflict, with no adequate training for the roles which they were to play. The Chamber finds that it is only reasonable to take account of the fact that inexperience in difficult situations, [*sic*] does increase the likelihood of making the wrong decisions. Whilst this in no way reduces the gravity of the crimes which were committed, the Chamber recognises it as a factor in mitigation of sentence."[941]

492. At the Sentencing Hearing, counsel for Fofana stated that "Fofana may not necessarily have been young, but he certainly lacked experience and was thrown into the desperate situation and asked to act."[942]

(ii) Submissions of the Parties

493. The Prosecution concedes that a Trial Chamber *may* be entitled to take lack of training into account for sentencing purposes, but argues that the circumstances must amount to an accused who has been "very quickly propelled from civilian life to being a military commander, and has been immediately required, without any adequate training, to make numerous quick decisions in the heat of battle while under enemy fire."[943] According to the Prosecution:

> "To be a mitigating factor, there must in each individual case be established facts which show that the lack of training affected the ability of the accused to comply with the requirements of international law, and therefore somehow mitigated the moral culpability of the accused."[944]

494. The Prosecution argues that in the present case, these conditions did not exist or were not established by the Trial Chamber.[945]

495. Fofana responds that, as a matter of law, the Trial Chamber could consider as a mitigating circumstance the "difficult circumstances in which a convicted person had to operate."[946] Moreover,

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[941] CDF Sentencing Judgment, para. 66.
[942] CDF Sentencing Hearing, Transcript, 19 September 2007, p. 75.
[943] Prosecution Appeal Brief, para. 9.25 (characterizing the circumstances considered by the *Orić* and Hadžihasanović & Kubura Trial Chambers which allowed them as a mitigating factor).
[944] *Ibid* at para. 9.25.
[945] *Ibid* at paras 9.25-9.26.
[946] Fofana Response Brief, para. 179, *citing Čelebići* Trial Judgement, para. 1248.

even without this precedent, Fofana submits that the Trial Chamber could determine what constitutes a mitigating circumstance as an exercise of its discretion.[947]

496. Fofana responds that, contrary to the Prosecution's submissions, the Trial Chamber's statement that it was "aware" that Fofana and Kondewa were propelled in a relatively short period of time is an indication that the Trial Chamber took into consideration the evidence adduced during the trial to arrive at this conclusion.[948] In particular, Fofana points to the Trial Chamber's findings that Base Zero (Talia) was established by Norman in September 1997 and that shortly afterwards Fofana was appointed "Director of War," showing he was rapidly propelled from civilian life to an "effective position of authority."[949] Fofana argues that the Prosecution has not demonstrated that the Trial Chamber erroneously considered this factor in mitigation.[950]

497. Kondewa responds that "[i]n the *Bisengimana* case, the ICTR Trial Chamber held that the fact that the Accused person was educated amounted to an aggravating circumstance. By parity of reasoning, Counsel submits that the lack of military training and formal education is a mitigating circumstance."[951]

(iii) Discussion

498. As far as mitigating circumstances are concerned, Article 19(2) of the Statute provides that the Trial Chamber should take into account the individual circumstances of the convicted persons. The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as an aggravating or mitigating circumstance.

499. Accepting that, as a matter of law, the surrounding conditions including the convicted person's lack of training can be a mitigating circumstance, the Appeals Chamber opines that the Prosecution has failed to demonstrate that the Trial Chamber erred in considering Fofana's and Kondewa's individual circumstances, namely: their inadequate relevant preparation and training for their roles in the armed conflict as a mitigating circumstance.

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[947] *Ibid* at para. 181, *citing Musema* Appeal Judgement, para. 395.
[948] *Ibid* at para. 175.
[949] *Ibid* at para. 176.
[950] *Ibid*.

(c) Conduct Subsequent to the Conflict

(i) Trial Chamber Findings

500. Under the heading "Subsequent Conduct," the Trial Chamber stated it had examined evidence submitted by Fofana regarding his conduct subsequent to the conflict.[952] In particular, the Trial Chamber noted the submission regarding "Fofana's commitment to and observance of the Lomé Peace agreement,"[953] the "unchallenged evidence . . . in relation to his efforts subsequent to that agreement to work without any pay with the NGO community in ensuring that members of the CDF remained committed to the peace process within Sierra Leone,"[954] and "the certificate of good conduct filed by the Officer in Charge of the SCSL Detention Facility, attesting to Fofana's exemplary behaviour whilst in custody."[955] The Trial Chamber "commend[ed] Fofana's subsequent conduct in fostering the peace process, and recognises it as a factor in mitigation of his sentence."[956]

501. The Trial Chamber considered as a mitigating factor "evidence filed by the Fofana Defence regarding Fofana's conduct subsequent to the time frame in which the crimes he committed occurred."[957] Specifically, the Trial Chamber considered "Fofana's commitment to and observation of the Lomé Peace agreement."[958]

(ii) Submissions of the Parties

502. The Prosecution argues that the evidence relied upon by the Trial Chamber in regard to Fofana was "largely of a general nature, and does not give specific details of the precise conduct of Fofana that would enable an objective assessment to be made of his actual contribution or efforts to peace and reconciliation."[959]

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[951] Kondewa Response Brief, para. 9.19, *citing Prosecutor v. Bisengimana*, ICTR-00-60-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 13 April 2006, para. 182.
[952] CDF Sentencing Judgment, para. 67.
[953] *Ibid*, *citing* Transcript of 19 of September 2007, pp. 57-58. *See also Prosecutor v. Norman et al*, SCSL-04-14-T, Special Court for Sierra Leone, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (AC), Separate Opinion of Judge Robertson, 24 May 2005, para. 52.
[954] CDF Sentencing Judgment, para. 67, *citing* Fofana Sentencing Brief, (in particular) Annexes A and B.
[955] *Ibid* at Annex F.
[956] *Ibid* at para. 67.
[957] *Ibid.*
[958] *Ibid.*
[959] Prosecution Appeal Brief, para. 9.29.

503. Fofana responds that this sub-ground was not included in the Prosecution's Notice of Appeal and therefore should be disregarded.[960]

(iii) Preliminary Issue

504. Fofana argues that this sub-ground was not included in the Prosecution's Notice of Appeal and therefore should be disregarded.[961] Rule 108 of the Rules states in sub-paragraph (A) that "a party . . . shall . . . file with the Registrar and serve upon the other parties a written notice of appeal, setting forth the grounds of appeal."[962] The requirements of "setting forth the grounds of appeal" is neither elaborated upon in the Rules nor in a practice direction.

505. The Prosecution's Notice of Appeal stated in relevant part, "[i]n the Sentencing Judgment, the Trial Chamber erred in law and in fact, and committed a procedural error (in that there has been a discernible error in the exercise of the Trial Chamber's sentencing discretion), in sentencing Fofana to a total and concurrent term of imprisonment of six (6) years . . . ."[963] The Prosecution elaborated that "[i]n particular, the Trial Chamber erred in treating as mitigating circumstances matters which it was wholly improper to regard as such, and/or by giving weight to extraneous and irrelevant considerations that it considered as mitigating circumstances. These include its determination that the Respondents might have acted out of a sense of allegiance to a democratically elected government, rather than out of self-interest; treating as expressions of remorse statements of the Respondents which did not express any remorse at all; and lack of formal education."[964]

506. The Prosecution did not state that it would appeal consideration of Fofana's and Kondewa's post-conflict conduct as a mitigating factor. The Appeals Chamber will, therefore, decline to enter into the merits of this aspect of the Prosecution's submission.

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[960] Fofana Response Brief, para. 183, *citing Prosecutor v. Simba*, ICTR-01-76-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 27 November 2007, para. 326 [*Simba* Appeal Judgement].
[961] *Ibid.*
[962] Rule 108(A) of the Rules.
[963] Prosecution Notice of Appeal, para. 32.
[964] *Ibid* at para. 34.

(d) Lack of Previous Convictions

(i) Trial Chamber Findings

507. The Trial Chamber noted that neither Fofana nor Kondewa had any previous convictions, and summarily stated that "[f]or purposes of sentencing, a clean slate in terms of their criminal records, [*sic*] can be considered as a mitigating circumstance."[965]

(ii) Submissions of the Parties

508. The Prosecution submits that the Trial Chamber erred in law or abused its discretion in treating Fofana's and Kondewa's lack of prior convictions as a mitigating factor. The Prosecution argues that the case law of international criminal tribunals indicates that lack of previous convictions should not be considered as a significant mitigating factor.[966] It further submits that a Trial Chamber exercising its sentencing discretion properly could not treat Fofana and Kondewa's lack of previous convictions as a matter of any substantial significance in mitigation.[967]

509. In response, Fofana submits that the paragraph in *Galić* cited by the Prosecution does not address this issue.[968] Fofana argues that the Prosecution has not substantiated its argument that it is only in exceptional circumstances that good character can be considered in mitigation.[969] He cites *Ruggiu* as examples that "[a]bsence of criminal record has always been treated as a mitigating factor."[970]

510. Kondewa points to ICTY and ICTR case law to argue that a lack of prior convictions can be considered as a mitigating factor by international criminal courts.[971] He submits that the lack of

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[965] CDF Sentencing Judgment, para. 68, *citing Blaškić* Appeal Judgement, para. 696, *Prosecutor v. Deronjić*, IT-02-61-S, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Trial Chamber, Sentencing Judgement, 30 March 2004, para. 152.

[966] Prosecution Appeal Brief, para. 9.31, *citing Prosecutor v. Tadić*, IT-94-1-T*bis*-R117, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Sentencing Judgement, 11 November 1999, para. 59; *Galić* Appeal Judgement, para. 51; *Blagojević* Trial Judgement, para. 853.

[967] *Ibid* at para. 9.31.

[968] Fofana Response Brief, para. 189.

[969] *Ibid.*

[970] *Ibid* at para. 190, *citing Prosecutor v. Ruggiu*, ICTR-97-32-I, Judgement and Sentence, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence, 1 June 2000, paras 59-60 [*Ruggiu* Judgement and Sentence].

[971] Kondewa Response Brief, paras 9.30-9.31, *citing Kunarac* Appeal Judgement, para. 408; *Prosecutor v. Erdemović*, IT-96-22-T*bis*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Sentencing Judgement, 5 March 1998, para. 16; *Simić* Trial Judgement, para. 108; *Prosecutor v. Nikolić*, IT-94-2-S, International Criminal

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prior criminal conviction reflects the moral character of the convicted person and the potential for recidivism, and is therefore properly considered as a mitigating factor.[972]

(iii) Discussion

511. Good character with no previous convictions can be considered as a mitigating factor.[973] However, in certain circumstances even when prior good conduct is found, it may be given little weight in light of the gravity of the criminal conduct. Each case has to be determined in the light of its own circumstances.

512. The Appeals Chamber holds that the Trial Chamber did not err in taking a lack of previous convictions into consideration.

(e) CDF's Alleged "Just Cause" and Fofana's and Kondewa's Motive of Civic Duty

(i) Trial Chamber Findings

513. The Trial Chamber found, Justice Thompson dissenting, that there is no defence of "necessity" in international law, and that "necessity" cannot be taken into account as a mitigating factor in sentencing.[974] It was of the opinion that "validating the defence of Necessity in International Criminal Law would create a justification for what offenders may term and plead as a 'just cause' or a 'just war' even though serious violations of International Humanitarian Law would have been committed."[975] It considered that this would "negate the resolve and determination of the International Community to combat" the "heinous, gruesome or degrading" crimes against innocent victims which international humanitarian law intends to protect.[976]

Tribunal for the former Yugoslavia, Trial Chamber, Sentencing Judgement, 18 December 2003, para. 265 [*Dragan Nikolić* Sentencing Judgement]; *Kupreškić* Appeal Judgement, para. 459; *Ruggiu* Judgement and Sentence, paras 59-60; *Prosecutor v. Rutaganira*, ICTR-95-1C-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgement and Sentence Judgement, 14 March 2005, para. 130.

[972] *Ibid* at para. 9.31.

[973] *See Prosecutor v. Erdemović*, IT-96-22-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Sentencing Judgement, 29 November 1996, para. 16(i); *Kupreškić* Appeal Judgement, para. 459.

[974] CDF Sentencing Judgment, para. 74 ("Necessity cannot be sustained as a defence in this case and that by a parity of reasoning, cannot be considered either for purposes of mitigating the sentences because the Chamber opines that it either stands as a defence, or fails on all other grounds or circumstances.").

[975] *Ibid* at para. 79.

[976] *Ibid.*

514. Nonetheless, the Trial Chamber took into account as mitigating factors that Kondewa and Fofana and the "CDF/Kamajors" were fighting "to support a legitimate cause which . . . was to restore the democratically elected Government of President Kabbah,"[977] that the Kamajors "were comrades in arms with the regular Sierra Leone Armed Forces as early as from the outbreak of the rebel war,"[978] that the crimes were committed "in defending a cause that is palpably just and defendable,"[979] that Kondewa's and Fofana's "CDF/Kamajor fighting forces . . . , backed and legitimised by . . . ECOMOG, defeated and prevailed over the rebellion of the AFRC that ousted the legitimate Government,"[980] and that this "contributed immensely to re-establishing the rule of law" in Sierra Leone.[981] The Trial Chamber concluded that "the contribution of the two Accused Persons to the establishment of the much desired and awaited peace in Sierra Leone and the difficult, risky, selfless and for a very sizeable number of their CDF/Kamajors, the supreme sacrifices that they made to achieve this through a bloody conflict, is in itself a factor that stands significantly in mitigation in their favour."[982]

515. In regard to the motive of civic duty, the Trial Chamber held that:

> "there is nothing in the evidence which demonstrates that either Fofana or Kondewa joined the conflict in Sierra Leone for selfish reasons. In fact, we have found that both Fofana and Kondewa were among those who stepped forward in the efforts to restore democracy to Sierra Leone, and, for the main part, they acted from a sense of civic duty rather than for personal aggrandisement or gain. This factor in addition to others that have been raised in this Judgement has, for each of them, significantly impacted to influence the reduction of the sentence to be imposed for each count."[983]

(ii) Submissions of the Parties

516. The Prosecution argues that the effect of the Trial Chamber's findings was to "hold that it is a mitigating factor in sentencing that the convicted person was fighting on the 'right' side in the conflict."[984] The Prosecution argues that such a holding violates "the most fundamental tenets of

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[977] *Ibid* at paras 79, 83.
[978] *Ibid* at para. 84.
[979] *Ibid* at para. 86.
[980] *Ibid* at para. 87.
[981] *Ibid*.
[982] *Ibid* at para. 91.
[983] *Ibid* at para. 94.
[984] Prosecution Appeal Brief, para. 9.35.

international humanitarian law" that "necessity" is neither a defence nor a mitigating factor for sentencing.[985]

517. The Prosecution points to the fundamental distinction between *jus ad bellum* and *jus in bello* in international humanitarian law which is "intended to protect war victims and their fundamental rights."[986] The Prosecution notes that this "principle of parity" is reflected in the Additional Protocols to the Geneva Conventions and is applicable to all armed conflict.[987] This principle means that "even if one side to the conflict engages in serious violations of international criminal law, this does not justify the other side in committing similar crimes in response."[988] The Prosecution argues that accepting the so-called "justness" of the party to the armed conflict in mitigation "would almost certainly lead to a total disregard for humanitarian law."[989]

518. In relation to Fofana's and Kondewa's motive of civic duty, the Prosecution submits that the Trial Chamber's treatment of this factor is based entirely on its consideration that Fofana and Kondewa were fighting on the "right" side of the conflict, and incorporates its arguments above in the sub-ground related to "just cause."[990] The Prosecution argues that the absence of "base personal motives cannot be regarded as a mitigating factor."[991]

519. Fofana responds that the Prosecution has not demonstrated error in the Trial Chamber's findings.[992] Fofana compares the motives of so-called "just cause" and civic duty to "important factual and contextual difference[s]" that distinguish one case from another and assist a Trial Chamber in "scaling the sentences" (*i.e.*, individualizing the punishment).[993] Fofana argues that the Trial Chamber did not consider that he fought on the "right" side of the conflict as the mitigating factor, but that he had a good motive.[994] Fofana cites dicta from the U.S. Military Tribunal's

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[985] *Ibid*.
[986] *Ibid* at para. 9.36.
[987] *Ibid* at paras 9.36-9.37.
[988] *Ibid* at para. 9.39.
[989] *Ibid*, *quoting* C. Greenwood, Historical Development and Legal Basis, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), p. 8.
[990] Prosecution Appeal Brief, para. 9.43.
[991] *Ibid* at para. 9.45.
[992] Fofana Response Brief, para. 193.
[993] *Ibid* at para. 194.
[994] *Ibid* at paras 195-196.

Hostage case, which "observed that mitigation of punishment does not in any sense of the word reduce the degree of the crime."[995]

520. Kondewa responds that the Trial Chamber's consideration of his motives was part of its assessment of the particular circumstances of the case and the form and degree of his participation.[996] Kondewa quotes the ICTR Trial Chamber's Judgement in *Ruggiu* for the principle that "[w]ith respect to individualizing sentences, [Trial Chambers have] unfettered discretion in [their] assessment of the facts and the attendant circumstances. Such discretion allows the chamber to decide whether to take into account certain factor[s] in the determination of sentence."[997] Kondewa argues that since an "evil motive" can be considered as an aggravating circumstance, then a noble motive can be counted as a mitigating circumstance.[998]

(iii) Discussion

521. The Trial Chamber held that "although the commission of these crimes transcends acceptable limits, albeit in defending a cause that is palpably just and defendable, such as acting in defence of constitutionality by engaging in a struggle or a fight that was geared towards the restoration of the ousted democratically elected Government of President Kabbah, it certainly, in such circumstances, constitutes a mitigating circumstance in favour of the two Accused Persons."[999]

522. The Appeals Chamber considers that examination of motive for the purposes of sentencing presents significant problems. As one commentator has noted, inquiry into motive opens the door to speculation about the general moral worth of the convicted person, a task for which courts are ill-equipped.[1000] Nonetheless, the Appeals Chamber is of opinion that evaluation of the motivation, background, and character of the convicted person is part of any system that aims to make punishment proportional to blameworthiness.

523. The Appeals Chamber is of the view that consideration of motive for the purposes of sentence is not to regard motive as a defence. Although motive may shade the individual

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[995] *Ibid* at para. 197.
[996] Kondewa Response Brief, para. 9.34.
[997] *Ibid* at para. 9.35, *quoting Ruggiu* Judgement and Sentence, para. 52.
[998] *Ibid* at paras 9.38-9.39, *citing Blaškić* Trial Judgement, para. 785.
[999] CDF Sentencing Judgment, para. 86.
[1000] Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635, 747.

perception of culpability, it does not amount to a legal excuse for criminal conduct. Therefore, any consideration here of Fofana's and Kondewa's "just cause" as a motive for the purposes of sentencing should not be considered as a defence against criminal liability for their conduct.

524. As a general principle, the Appeals Chamber opines that a convicted person's motives can be considered for sentencing purposes.[1001] Other international criminal tribunals have recognized motives as aggravating factors, such as enjoyment of criminal acts,[1002] sadism and desire for revenge,[1003] group hatred or bias,[1004] and a desire to cause terror.[1005] There may be several other motives that may be considered to be aggravating circumstances, such as a desire for pecuniary gain, a desire to inflict pain or harm, and a desire to avoid detection or escape punishment.

525. Fofana and Kondewa have also argued that motive should be considered as a mitigating factor. The Appeals Chamber has not been directed to any case at an international criminal tribunal in which such an argument has been accepted on the merits. In *Simba*, the ICTR Trial Chamber, in the context of mitigating circumstances, examined evidence that may have "impl[ied] that his participation in the massacres resulted from misguided notions of patriotism and government allegiance rather than extremism or ethnic hatred;" however, the Trial Chamber did not indicate whether it gave that evidence any weight.[1006] For all factors considered, the Trial Chamber

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[1001] In addition to the relevance of motive to sentencing, the Appeals Chamber opines that it may also be a consideration in two further circumstances: first, where it is a required element in crimes such as specific intent crimes, which by their nature require a particular motive; and second, where it may constitute a form of defence, such as self-defense.

[1002] *Dragan Nikolić* Sentencing Judgement, para. 213 ("The acts of the Accused were of an enormous brutality and continued over a relatively long period of time. They were not isolated acts. They expressed his systematic sadism. The Accused apparently enjoyed his criminal acts."); *Čelibići* Trial Judgement, para. 1264 ("Hazim Delić is also guilty of inhuman and cruel treatment through his use of an electrical shock device on detainees. The shocks emitted by this device caused pain, burns, convulsions and scaring and frightened the victims and other prisoners. The most disturbing, serious and thus, an aggravating aspect of these acts, is that Mr. Delić apparently enjoyed using this device upon his helpless victims.").

[1003] *Čelibići* Trial Judgement, paras 1235, 1269 ("The motive for the commission of these breaches of humanitarian law is also a relevant aggravating factor to be taken into account in the sentencing of Hazim Delić. The evidence indicates that, as well has having a general sadistic motivation, Hazim Delić was driven by feelings of revenge against people of Serb ethnicity.").

[1004] *See Blaškić* Appeal Judgement, para. 695 ("The Appeals Chamber considers that the Trial Chamber in the instant case was entitled to consider ethnic and religious discrimination as aggravating factors, but only to the extent that they were not considered as aggravating the sentence of any conviction which included that discrimination as an element of the crime of which he was convicted."); *Vasiljević* Appeal Judgement, para. 172; *Kunarac* Appeal Judgement, para. 357; *Blaškić* Trial Judgement, para. 785 ("The motive of the crime may also constitute an aggravating circumstance when it is particularly flagrant. Case-law has borne in mind the following motives: ethnic and religious persecution, desire for revenge and sadism.").

[1005] *Galić* Appeal Judgement, Separate Opinion of Judge Schomburg paras 2, 22, 24.

[1006] *Simba* Judgement and Sentence, para. 441.

concluded that "limited mitigation [was] warranted."[1007] On appeal, the ICTR Appeals Chamber suggested this passage "was merely speculation on the part of the Trial Chamber and did not reflect a finding that this motive was itself a separate mitigating factor" but did not state whether it would have considered it an error if the Trial Chamber had treated political motive as a mitigating factor.[1008]

526. In the *Media Case*, the ICTR Appeals Chamber noted that a defendant argued on appeal that he should receive a mitigated sentence because his actions were performed within a legitimate, democratic and pacific context.[1009] The ICTR Appeals Chamber ambiguously dismissed the argument on grounds that it was not convinced that the facts argued by the appellant constituted mitigating circumstances *or* that these facts had played a significant role in the determination of the sentence, and specifically suggested that it dismissed the appellant's democratic motive because he made no reference to any part of the case-file to sustain the arguments.[1010]

527. In *Kordić and Čerkez*, the ICTY Appeals Chamber rejected Kordić's argument that the Trial Chamber erred in failing to consider "that his primary motivation was to assist his community" as a mitigating circumstance.[1011] However, rather than stating that the factor was irrelevant or impermissible as a matter of law, the Appeals Chamber ruled that Kordić had "not demonstrated that his motivation to become engaged in politics . . . warrant[ed] mitigation in the light of the seriousness of the offences of which the Trial Chamber found him guilty."[1012] Similarly, the Prosecution there apparently argued that Kordić's political motivation was "insignificant when considered against the extreme gravity of the offences of which he was charged."[1013]

528. In the view of the Appeals Chamber, as a general principle, a convicted person's motive can be considered as a mitigating factor.

529. The Appeals Chamber turns to the question of whether the particular motive of "just cause" may be considered as a mitigating factor.

[1007] *Ibid* at para. 443.
[1008] *Simba* Appeal Judgement, para. 330.
[1009] *Nahimana* Appeal Judgement, para. 1069.
[1010] *Ibid.*
[1011] *Kordić* Appeal Judgement, paras 1046-1047, 1082.
[1012] *Ibid* at para. 1051.
[1013] *Ibid* at para. 1047, *citing* Prosecution Reply Brief, para. 7.8.

530. International humanitarian law specifically removes a party's political motive and the "justness" of a party's cause from consideration. The basic distinction and historical separation between *jus ad bellum* and *jus in bello* underlies the desire of States to see that the protections afforded by *jus in bello* (*i.e.*, international humanitarian law) are "fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts."[1014] The political motivations of a combatant do not alter the demands on that combatant to ensure their conduct complies with the law.

531. Any trial chamber considering punishment must weigh its obligations to the individual accused in light of its responsibility to ensure that it is upholding the purposes and principles of international criminal law. Consideration of political motive by a court applying international humanitarian law not only contravenes, but would undermine a bedrock principle of that law.

532. Furthermore, the Appeals Chamber is of the view that any motive taken into consideration as a mitigating factor must be consistent with sentencing purposes. The following have been recognized by the ICTY as legitimate sentencing purposes: (i) individual and general deterrence concerning the accused and, in particular, commanders in similar situations in the future;[1015] (ii) individual and general affirmative prevention aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses, and the general public in order to reassure them that the legal system is being implemented and enforced; (iii) retribution;[1016] (iv) public reprobation

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[1014] Additional Protocol I, preamble; *see also* Additional Protocol II, Article 1 ("These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character.")

[1015] *See Prosecutor v. Babić*, IT-03-72-S, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Sentencing Judgement, 29 June 2004, para. 45 ("The deterrent effect of punishment consists in discouraging the commission of similar crimes. The main effect sought is to turn the perpetrator away from future wrongdoing (special deterrence), but it is assumed that punishment will also have the effect of discouraging others from committing the same kind of crime under the Statute (general deterrence) . . . With regard to general deterrence, imposing a punishment serves to strengthen the legal order in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions,") *citing Aleksovski* Appeal Judgement, para. 185; *Čelebići* Appeal Judgement, para. 806.

[1016] *Aleksovski* Appeal Judgement, para. 185. Retribution and public reprobation and stigmatisation by the international community are similar purposes in the context of punishing crimes. As the Trial Chamber stated in the *Jokić* Sentencing Judgement, "[a]s a form of retribution, punishment expresses society's condemnation of the criminal act and of the person who committed it and should be proportional to the seriousness of the crimes." *Jokić* Sentencing Judgement, para. 31 (emphasis omitted). Considering retribution as a purpose of sentencing, the Trial Chamber in *Jokić* "focus[ed] on the seriousness of the crimes to which Miodrag Jokić has pleaded guilty, in light of the specific circumstances of their commission." *Ibid* at para. 32.

and stigmatisation by the international community;[1017] and (v) rehabilitation.[1018] The primary objectives must be retribution and deterrence.[1019]

533. The ICTY Appeals Chamber has held that a convicted person's motivation of "just cause" contravenes the sentencing purpose of affirmative prevention:

> "The sentencing purpose of affirmative prevention appears to be particularly important in an international criminal tribunal, not the least because of the comparatively short history of international adjudication of serious violations of international humanitarian and human rights law. The unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a 'just cause'. Those people have to understand that international law is applicable to everybody, in particular during times of war. Thus, the sentences rendered by the International Tribunal have to demonstrate the fallacy of the old Roman principle of *inter arma silent leges* (amid the arms of war the laws are silent) in relation to the crimes under the International Tribunal's jurisdiction."[1020]

534. The Appeals Chamber concurs with this view, Justice King dissenting. Allowing mitigation for a convicted person's political motives, even where they are considered by the Chamber to be meritorious, undermines the purposes of sentencing rather than promotes them. In effect, it provides implicit legitimacy to conduct that unequivocally violates the law—the precise conduct this Special Court was established to punish.[1021]

535. The Appeals Chamber, Justice King dissenting, upholds the Prosecution's submission on this respect of the Prosecution's Tenth Ground of Appeal.

(f) The Purpose of Reconciliation

(i) Trial Chamber Findings

536. In the conclusion to the Sentencing Judgment, the Trial Chamber found that:

[1017] *Erdomović* Sentencing Judgement, para. 65.
[1018] *Čelebići* Appeal Judgement, para. 806.
[1019] *Prosecutor v. Furundžija*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 10 December 1998, para. 288.
[1020] *Kordić* Appeal Judgement, para. 1082.
[1021] *See, e.g.*, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, para. 7 (indicating that the exclusion of the death penalty would be viewed in Sierra Leone as an "acquittal" of the accused).

> "a manifestly repressive sentence, rather than providing the deterrent objective which it is meant to achieve, will be counterproductive to the Sierra Leonean society in that it will neither be consonant with nor will it be in the overall interests and ultimate aims and objectives of justice, peace, and reconciliation that this Court is mandated by UN Security Council Resolution 1315, to achieve. The motivation of the Accused in this case, where they fought to reinstate democracy, and the prevailing circumstances in which their crimes were committed, has therefore been taken into consideration by the Chamber in arriving at an appropriate sentence."[1022]

(ii) Submissions of the Parties

537. The Prosecution submits that the Trial Chamber erred in law and in the exercise of its sentencing discretion by suggesting that a sentence, which would otherwise be imposed in accordance with established case law on sentencing, should be reduced in the interests of reconciliation.[1023] The Prosecution submits that U.N. Security Council Resolution 1315 (2000) "did not suggest that reconciliation could be promoted by the passing of sentences more lenient than would otherwise be appropriate, as a gesture of 'reconciliation.'"[1024] If anything, unduly lenient sentences for those who have committed the gravest crimes could undermine reconciliation.[1025] The Prosecution argues that if the sentences imposed by the Special Court are not consistent with "what the community would accept as a punishment fitting the crimes in question," then the Court's purpose of contributing to the process of national reconciliation cannot be achieved.[1026]

538. The Prosecution also submits that the objectives of reconciliation and the restoration of peace are served by the imposition of sentences which "dissuade for good those who will be tempted in the future to perpetrate such atrocities by showing them that the international community is no longer willing to tolerate serious violations of international humanitarian law and human rights."[1027] Furthermore, the most important factors in sentencing are deterrence and retribution.[1028] The Prosecution argues that the objectives of reconciliation and the restoration and maintenance of peace are already reflected in the requirement that the punishment must reflect calls for justice from

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[1022] CDF Sentencing Judgment, para. 95.
[1023] Prosecution Appeal Brief, para. 9.52.
[1024] *Ibid* at para. 9.47.
[1025] *Ibid.*
[1026] *Ibid* at para. 9.48.
[1027] *Ibid* at para. 9.51.
[1028] *Ibid.*

victims, as well as calls from the international community for an end to impunity for massive human rights violations and crimes committed during armed conflicts.[1029]

539. Fofana responds that the Appeals Chamber should dismiss this sub-ground of appeal because the Prosecution failed to include it in its notice of appeal.[1030] In the alternative, Fofana argues that "a sentence is unduly lenient where it falls outside of the range of sentences which the Judge, applying his mind to all the relevant factors, could reasonably consider appropriate."[1031] Fofana submits that the sentence is not lenient, but is instead appropriate because it strikes a balance between deterrence and reconciliation.[1032] While Fofana accepts "the general importance of deterrence as a consideration in sentencing," he argues that this factor must not be accorded undue prominence.[1033] Fofana argues that a "manifestly repressive sentence," rather than acting as a deterrent, would conflict with the objectives of justice, peace and reconciliation as mandated by U.N. Security Council Resolution 1315.[1034]

540. Kondewa responds that the Trial Chamber correctly exercised its discretion in imposing sentences on Kondewa which take into consideration the issue of reconciliation.[1035] Kondewa argues that the objective of reconciliation has begun to gain prominence in international criminal law, although sentencing practices have largely focused on deterrence and retribution.[1036] Kondewa therefore submits that the Trial Chamber correctly held that a repressive sentence against Kondewa would be counterproductive because there is no criminal propensity to be deterred and Kondewa has "unreservedly expressed remorse and real and sincere empathy with the victims . . . ."[1037] Kondewa further argues that the calls for justice by victims, as well as the call of the international community to end impunity, would not have been answered by a harsh sentence.[1038] In addition, Kondewa argues that "unlike the situation in Rwanda and the former Yugoslavia, the war that was

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[1029] *Ibid*, *referring* to *Blagojević* Trial Judgement, para. 814.
[1030] Fofana Response Brief, para. 202.
[1031] *Ibid* at para. 204.
[1032] *Ibid*.
[1033] *Ibid* at para. 206.
[1034] *Ibid* at para. 207.
[1035] Kondewa Response Brief, para. 9.50.
[1036] *Ibid* at para. 9.41.
[1037] *Ibid* at para. 9.43.
[1038] *Ibid* at para. 9.44.

fought in Sierra Leone by the CDF/Kamajor troops was done with the active support and collaboration of the international community."[1039]

(iii) Preliminary Issue

541. The Prosecution did not state that it in its Notice of Appeal that it would challenge the Trial Chamber's appeal consideration of Fofana's and Kondewa's post-conflict conduct as a mitigating factor. The Appeals Chamber, Justice Winter dissenting, will, therefore, decline to enter into the merits of this aspect of the Parties' submission.

5. Alleged Error in Considering the Sentences Would run Concurrently Without Adequate Consideration

(a) Trial Chamber Findings

542. The Trial Chamber stated that despite its discretion to impose global sentences, it chose to impose separate sentences for each of the crimes for which Fofana and Kondewa were convicted because it "better reflect[ed] the[ir] culpability . . . for each offence for which they were convicted, given that distinct crimes were committed by each Accused in discrete geographical areas."[1040] Without reasoning, the Trial Chamber then ordered that "the sentences shall run and be served concurrently."[1041]

(b) Submissions of the Parties

543. The Prosecution argues that whether the Trial Chamber imposes global or separate sentences for each count, and if separate, whether they are concurrent or consecutive, the Trial Chamber should ensure that the "final or aggregate sentence" must reflect the "gravity of the offences and the overall culpability of the offender so that it is both just and appropriate" (the "totality principle").[1042] The Prosecution notes that in the *Čelebići* case the ICTY Appeals Chamber did not opine directly on the propriety of imposing concurrent versus consecutive sentences,

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[1039] *Ibid* at para. 9.47.
[1040] CDF Sentencing Judgment, para. 97.
[1041] *Ibid* at Disposition.
[1042] Prosecution Appeal Brief, paras 9.54, 9.56, *citing Ntagerura* Judgement and Sentence, paras 822-827, *Semanza* Judgement and Sentence, paras 586-588, *Akayesu* Sentencing Judgement, p. 8.

because it considered the sentence inadequate and remitted it for revision.[1043] The ICTY Appeals Chamber held that the Trial Chamber's sentencing discretion "must be exercised by reference to the fundamental . . . consideration . . . that the sentence to be served by an accused must reflect the totality of the [convicted person's] criminal conduct" and that "a person who is convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes."[1044]

544. Fofana responds that the Statute and Rules are "sufficiently liberally worded" to allow the Trial Chamber to "impose a concurrent sentences or global sentence."[1045] Fofana argues that the Trial Chamber has the discretion to choose between concurrent and consecutive sentences, and that the "overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender."[1046] Fofana submits the Prosecution has not shown how the Trial Chamber violated the totality principle.[1047]

545. Kondewa submits that the Trial Chamber acted within its discretion in imposing separate sentences to run concurrently.[1048] Kondewa argues that contrary to the Prosecution's submission, the Trial Chamber only imposed multiple sentences to be served concurrently *after* analyzing all the aggravating and mitigating circumstances and after considering the gravity of the offences for which Kondewa was found guilty.[1049]

(c) Discussion

546. Rule 101(c) of the Rules states "[t]he Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently." The discretion conferred upon the Trial Chamber to choose between consecutive and concurrent sentences is not unchecked, because the Trial Chamber ultimately must impose a sentence that reflects the totality of the convicted person's culpable conduct. The totality principle is, in fact, recognized by all Parties and firmly supported in the case law of the international criminal tribunals. The totality principle requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due

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[1043] *Ibid* at para. 9.60.
[1044] *Ibid, quoting Čelebići* Appeal Judgement, para. 771.
[1045] Fofana Response Brief, para. 210.
[1046] *Ibid* at para. 211.
[1047] *Ibid* at para. 212.
[1048] Kondewa Response Brief, paras 9.51-9.52.

consideration to the particular circumstances of the case and to the form and degree of the participation of the accused.[1050]

547. The following examination of several legal traditions demonstrates that Trial Chambers typically enjoy broad discretion to choose between concurrent and consecutive sentences. However, as at the other tribunals, this discretion is restricted by the requirement that the sentence reflect the gravity of the crime and the culpability of the convicted person.

548. In Australia, courts have generally held that it is "impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively."[1051] Australian courts have recognized that "[t]he practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty."[1052] Generally, courts consider that consecutive sentences are appropriate when there are "truly two or more incursions into criminal conduct."[1053] However, where, "whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient."[1054]

549. In the United Kingdom (England and Wales), courts consider the "sentencer [is] entitled in his discretion to follow the course of imposing concurrent sentences, provided that the gravity of the criminal conduct . . . [is] properly reflected in the principal sentence."[1055]

550. Likewise, in Canada, courts give the sentencing judge discretion to set the duration and type of sentence due to his or her first-hand knowledge of the case.[1056] The decision to impose

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[1049] *Ibid* at para. 9.54.
[1050] *Furundzija* Appeal Judgement, para. 249; *Blaškić* Appeal Judgement, para. 683; *Aleksovski* Appeal Judgement, para. 182; *Čelebići* Appeal Judgement, para. 731.
[1051] *Attorney-General v Tichy* [1982] 30 SASR 84 at 92-93.
[1052] *See ibid*; *R v Van Der Horst* [2006] SASC 243 at para. 91.
[1053] *Attorney-General v Tichy* at 92-93; *see also Pearce v The Queen* [1998] 194 CLR 610 at 623.
[1054] *Ibid*; *R v Shaw* [1989] 39 A Crim R 343, 347, *referring* to Thomas "Principles of Sentencing" (1st Ed 1970).
[1055] *Court in Bottomley* [1985] 7 Cr. App. R. (S.) 355; *see also R. v. Allen John Wheeler* [2002] 2 Cr. App. R. (S.) 61, paras 27-28; *R. v. Dennis John Leckey* [1999] 1 Cr. App. R. (S.) 57; *R. v. Michael Dawkins* [1995] 16 Cr. App. R. (S.) 456; *R. v. David Ian Bottomley* [1985] 7 Cr. App. R. (S.) 355.
[1056] *R. v. M. (T. E.)* [1997] Carswell Alta 213, Supreme Court of Canada.

concurrent or consecutive sentences is accorded the "same deference [as] the length of sentences ordered"[1057] and a reviewing court defers to the decision to impose consecutive or concurrent sentences so long as the "global sentence" (*e.g.*, the ultimate sentence) "does not offend the totality principle"[1058] or the "transaction concept."[1059] The transaction concept is similar to the Australian notion that consecutive sentences are appropriate where there are two or more incursions into criminal conduct, and at least one Canadian court has found error when a sentencing judge issued consecutive sentences for crimes that were "part of the same transaction" (*e.g.*, part of the same event).[1060]

551. In the United States, a federal statute gives courts discretion to impose consecutive or concurrent sentences when "multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment."[1061] The same statute mandates that the "court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to reflect the seriousness of the offence, to promote respect for the law, and to provide just punishment for the offense . . . ."[1062]

[1057] *Ibid.*

[1058] *R. v. McNelis* [2007] CarswellOnt 7335, Ontario Court of Appeal; *see also R. v. Du.-B.* [2006] CarswellQue 2884, Cour d'appel du Québec, 2006, Allan R. Hilton, J.A., paras 14-18.

[1059] *R. v. Du.-B.* [2006] CarswellQue 2884, Cour d'appel du Québec, 2006, Allan R. Hilton, J.A., paras 14.

[1060] *Ibid at paras 14-18.*

[1061] 18 U.S.C.A. § 3584 ("Multiple sentences of imprisonment") (sub-part (B) requires the court to consider specific factors listed in 18 U.S.C.A. § 3553(a) in imposing concurrent or consecutive sentences terms of imprisonment).

[1062] 18 U.S.C.A. § 3553(a) (The full text of subpart (a) states, "Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed--(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for-- (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-- (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); (5) any pertinent policy statement--(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into

552. The Appeals Chamber notes that the Trial Chamber did not give reasons for its preference for concurrent sentences. However, the relevant question for the Appeals Chamber is not whether the choice of concurrent or consecutive sentences itself represented an error, but whether that choice resulted in sentences that fail to reflect the totality of Fofana's and Kondewa's criminal culpability. Accordingly, the merits of this sub-ground will be considered in the Prosecution's sub-ground alleging that the "manifest inadequacy of the sentence" demonstrates that it is "so unreasonable or plainly unjust" that the Trial Chamber must have erred.[1063]

6. Manifest Inadequacy of the Sentence

553. In view of the findings that the Trial Chamber has taken into consideration factors which it should not have considered in the exercise of its sentencing discretion, the Appeals Chamber will substitute its own discretion without the need to pronounce on the Prosecution's complaint that the sentence was manifestly inadequate.

7. Conclusions on Sentencing

554. The Appeals Chamber recalls the standard of review of sentencing decisions that have earlier been set out in this Judgement. Relying on those standards, the Appeals chamber notes that it has decided that the Trial Chamber was in error in taking into consideration "just cause" and motive of civic duty in exercising its sentencing discretion.

555. A careful perusal of the sentencing judgement shows clearly that those considerations formed the most important factors that influenced the exercise of the Trial Chamber's discretion. Indeed, the Trial Chamber stated that the fact that Fofana and Kondewa "stepped forward in the efforts to restore democracy to Sierra Leone, and, for the main part, they acted from a sense of civic duty . . . significantly impacted the influence to the reduction of the sentences to be imposed for each count."[1064] In the circumstances, the Appeals Chamber comes to the conclusion that the Trial Chamber proceeded on an erroneous basis and that it is entitled to revise the sentences handed down by the Trial Chamber.

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amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.")

556. The Appeals Chamber takes note of the extensive reiteration by the Trial Chamber in its Sentencing Judgment of its findings in regard to the responsibility of the accused persons and also its findings as to the gravity of the offences.

557. The Appeals Chamber gratefully adopts these findings, while having regard to such instances in which the Appeals Chamber has set aside the convictions of Kondewa. To put the exercise of its discretion in proper perspective, and for ease of reference, the Appeals Chamber deems it fit to quote, albeit at some length, some of the significant findings of the Trial Chamber that the Appeals Chamber cannot ignore.

558. Such findings are as follows:

> "46. With respect to the crimes for which Fofana was found liable under Article 6(3), the Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, as described in the Judgement, were of a very serious nature, and were committed against innocent civilians. The Chamber considers actions such as the mutilation and the targeted killing of Limba civilians and the killing and mutilation of Chief Kafala (whom the CDF/Kamajors considered a collaborator) in Koribondo, to be indicative of the brutality of the offences committed by Fofana's subordinates. The Chamber also notes the gruesome murder of two women in Koribondo who had sticks inserted and forced into their genitals until they came out of their mouths. The women were then disembowelled, and while their guts were used as checkpoints, parts of their entrails were eaten.
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> 47. The Chamber also finds that many of the offences for which Fofana was convicted under Article 6(1) were committed on a large scale and with a significant degree of brutality. In particular, the Chamber notes the murder of 150 Loko, Limba and Temne tribe members in Talama, the killings of 20 men on the 15th of January 1998 at the NDMC Headquarters in Tongo, who were hacked to death with machetes, and the killing of 64 civilians in Kamboma, who were placed in two separate lines and killed, after which their corpses were rolled into a swamp,[1065] as indicative of the scale and brutality of the crimes that Fofana was found to have aided and abetted in the Tongo Field area. Furthermore, the Chamber finds that the crimes were particularly serious insofar as they were committed against unarmed and innocent civilians, solely on the basis that they were unjustifiably perceived and branded as rebel collaborators.
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> 48. The Chamber notes that many of the victims of these crimes were young children and women, and therefore belong to a particularly vulnerable sector of society. For instance, we note our findings of the hacking to death by the CDF/Kamajors of a boy named Sule at a checkpoint in the Tongo area, the murder of a 12 year old boy in Talama, the murder of an unidentified woman who was alleged to have cooked for the rebels in Bo, and the atrocious murder of the two women in Koribundo as described earlier.

[1063] Prosecution Appeal Brief, para. 9.62.
[1064] CDF Sentencing Judgment, para. 94.
[1065] *Ibid* at para. 750(xiii).

49. The Chamber considers these crimes to have had a significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community. The testimony of witnesses heard by the Chamber during the trial, and appended to the Prosecution Brief in Annex D, indicates the impact which events such as amputations and the loss of family members have had on the lives of victims and witnesses. As appropriately described and summarized by our sister Trial Chamber II, victims who had their limbs hacked off not only endured extreme pain and suffering, if they survived, but lost their mobility and capacity to earn a living or even to undertake simple daily tasks. They have been rendered dependent on others for the rest of their lives. In particular, the Chamber notes the lasting effect of these crimes on victims such as TF2-015, who was the only survivor of an attack on 65 civilians who were hacked to death by machetes or shot, and who was himself hacked with a machete and rolled into a swamp on top of the dead bodies in the belief that he was dead.

50. With respect to the form and degree of Fofana's participation, the Chamber notes that he was found liable for the crimes in Tongo Field as an aider and abettor under Article 6(1) of the Statute. The jurisprudence of the ICTY and ICTR indicates that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation. The Chamber also notes that while Fofana was found liable for aiding and abetting, he was not present at the scenes of the crimes and that the degree of his participation amounted only to encouragement.

51. With respect to the crimes for which Fofana was convicted under Article 6(3), the Chamber has considered the gravity of Fofana's conduct in failing to prevent the crimes. It finds that the gravity of the offence committed by Fofana given his leadership role as a superior who failed to prevent his subordinates from committing crimes, is greater than that of the actual perpetrators of the crimes. In this case, the fact that Fofana's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity. This factor therefore, in our opinion, increases the seriousness of the crimes for which he has been convicted.

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53. With respect to the crimes for which Kondewa was found liable under Article 6(3), the Chamber has examined the gravity of the crimes committed by the subordinates under his effective control. Many of these crimes, as described in the Judgement, were of a serious nature. The Chamber notes, in particular, that the CDF/Kamajors in Bonthe stripped Lahia Ndokoi Koroma naked and tied him, a particularly humiliating and degrading act. With respect to Kondewa's liability under Article 6(1), he was convicted for the same crimes as Fofana in the Tongo area; the scale and the barbaric nature of such crimes has been described above.

54. As is the case with Fofana, the Chamber notes that many of the victims of these crimes were young children and women, and were therefore particularly vulnerable. It notes, in particular, the two incidents involving children in the Tongo area described above with respect to Fofana, and the killing of a boy called Bendeh Battiama by Rambo Conteh in Bonthe.

. . .

58. Furthermore, with respect to his liability under Article 6(3), the Chamber finds, as it did with Fofana, that given his leadership role as a superior who failed to prevent his subordinates from committing crimes, the gravity of the offence committed by Kondewa is greater than that of the actual perpetrators of the crimes. The Chamber finds that in this case, the fact that Kondewa's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity, and therefore increases the seriousness of the crimes for which he has been convicted.

. . .

60. The Chamber considers that, given his role as a former Chiefdom Speaker, a community elder and the CDF National Director of War, Fofana breached a position of trust in committing the offences for which he has been convicted."

62. The Chamber finds that given the cultural context, Kondewa, in his role as High Priest who blessed the CDF/Kamajors before they went to battle, and as someone widely respected for his mystical powers and abilities to immunize people against harm, held a unique and prominent position in the community. The Chamber therefore finds that he also breached a position of trust in committing the crimes for which he was convicted.

. . .

85. In executing this legitimate mission however, at a later stage that appears in the Indictment, and instead of limiting themselves and directing these attacks on legitimate military targets and objectives where collateral damage, if any ensued at all, could be perceived as justifiable, the Accused Persons and their Kamajors, as has been elucidated in the factual and legal findings of the Judgement, went beyond these acceptable military and legal limits and carried out killings and other atrocities against unarmed civilians who they characterised and designated as 'rebel collaborators'. We find that these atrocities were perpetrated, even though the evidence clearly established, and we so found, that the victims in fact, were disarrayed Sierra Leoneans including children fleeing for their lives and for safety from the bloody exchange of enemy fire, and further, that these civilian captives or fugitives, were unarmed and were not in the least, participating in hostilities. In fact, we note here that the crimes for which they have been found guilty were perpetrated by the Accused Persons and CDF/Kamajor fighters when combat activities and operations against the enemy AFRC forces were already over."

559. Notwithstanding these findings and the significant finding that the accused persons and their subordinates went beyond "acceptable military and legal limits" the Trial Chamber, importing a consideration of "just cause" and "civic duty" into the exercise of its discretion concluded that their sentences deserved to be reduced.

560. The Appeals Chamber has already decided that these were inappropriate considerations and will now review the sentences, taking into consideration the gravity of the offences as found and described by the Trial Chamber and taking note of legitimate mitigating circumstances which the

Trial Chamber has taken note of and the fact that in the case of Kondewa, the Appeals Chamber, Justice Winter dissenting, had not found any allegation of "committing" established against him.

561. In exercising its sentencing discretion, the Appeals Chamber re-emphasizes that it is an international court with responsibility to protect and promote the norms and values of the international community, expressed not only as part of customary international law but also, in several international instruments.

562. Shortly after the Special Court was established, the Appeals Chamber had occasion to pronounce on its character and decided, without hesitation, that it is an international court. In the *Decision of Constitutionality and Lack of Jurisdiction*,[1066] the Appeals Chamber stated that the Special Court "is an international tribunal exercising its jurisdiction in an entirely international sphere and not within the system of the national courts of Sierra Leone . . ."[1067] The Appeals Chamber came to the same conclusion in the *Decision on Immunity from Jurisdiction*.[1068]

563. The Appeals Chamber here emphasizes that the crimes of which the accused have been convicted are international crimes and not political crimes, in which consideration of national interest may be a relevant issue. What has to be paramount are international interests in protecting humanity. Such offences as Fofana and Kondewa have been convicted of are of the nature of such "offences that do not affect the interests of one State alone, but shock the conscience of mankind."[1069] They are not political offences. The Appeals Chamber gratefully adopts the opinion of the Supreme Military Tribunal of Italy quoted in *Tadic* (Jurisdiction) as follows:

> Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lese-humanite* (*reatu di lesa umanita*) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way

[1066] *Prosecution v. Kallon et al.*, SCSL-2004-15-AR72(E), Special Court for Sierra Leone, Appeals Chamber, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004.
[1067] *Ibid.* para. 80.
[1068] *Prosecutor v. Taylor,* SCSL-2003-01-I, Special Court for Sierra Leone, Decision on Immunity from Jurisdiction, 31 May 2004.
[1069] *Ibid* at para. 57.

as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed . . ."[1070]

564. What should be one of the paramount considerations in the sentencing of an accused person convicted of crimes against humanity and war crimes is the revulsion of mankind, represented by the international community, to the crime and not the tolerance by a local community of the crime; or lack of public revulsion in relation to the crimes of such community; or local sentiments about the persons who have been found guilty of the crimes. In describing what it described as the *"Justice Phase"* of the armed conflict that took place in Sierra Leone, the Appeals Chamber stated this in *"Decision on Immunity from Jurisdiction"*: The *Justice Phase* is that phase in which participants in the armed conflict have to answer for crimes committed in the course of the armed conflict. The *Justice Phase* itself involves separating what is in the exclusive domain of the municipal authority to be resolved under municipal law from what is in the concurrent jurisdiction of that authority and of the international community to be resolved by application purely of international law."[1071] The Appeals Chamber had earlier stated in that Decision that: "The parties, whether from the Government side or the insurgents, were . . . subjected to the obligations imposed by international law in a situation of internal armed conflicts."[1072]

565 In assessing the appropriate sentence, the obligation of the Appeals Chamber is, therefore, to impose sentences that reflect the revulsion of the international community to such crimes as those for which the accused persons have been convicted, after taking into consideration all factors that may be considered, legitimately, in mitigation as well as in aggravation.

566 In revising the sentences, the Appeals Chamber, Justice King and Justice Kamanda dissenting, takes into consideration those factors that the Majority of the Trial Chamber have, legitimately, taken into consideration. It also takes note of the opinion of the Majority of the Trial Chamber that Fofana and Kondewa have been found responsible mainly as aiders and abettors and the gravity of their respective responsibility as superiors in respect of some of the crimes.

565. Having taken all the circumstances of the case into consideration, the Appeals Chamber, Justice King and Justice Kamanda dissenting, revises the sentences on Fofana and Kondewa in

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[1070] *Ibid.*
[1071] *Ibid* at para. 19.
[1072] *Ibid* at para. 17.

respect of Counts 2, 4, and 5 and imposes sentences on Fofana and Kondewa on Counts 1 and 3 as follows:

i. In respect of Moinina Fofana the sentences of six (6) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to fifteen (15) years imprisonment on each of those Counts, and the sentence of three (3) years imposed on Count 5 is increased to five 5 years imprisonment;

ii. In respect of Allieu Kondewa, the sentences of eight (8) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to twenty (20) years imprisonment on each of those Counts, and the sentence of five (5) years imposed on Count 5 is increased to seven (7) years imprisonment;

iii. In respect of Counts 1 and 3, the Appeals Chamber, Justice King and Justice Kamanda dissenting, imposes sentences of 15 years imprisonment on Fofana on each of those Counts and sentences of 20 years imprisonment on Kondewa on each of those Counts;

The Appeals Chamber orders that the sentences imposed on Fofana, and Kondewa respectively, shall run concurrently;

V. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence;

NOTING the written submissions of the Parties and their oral arguments presented at the hearings on 12 and 13 March 2008;

SITTING in open session;

WITH RESPECT TO KONDEWA'S GROUNDS OF APPEAL;

DISMISSES, Justice King dissenting, Ground One and **UPHOLDS** the conviction of Kondewa pursuant to Article 6(3) of the Statute for murder, cruel treatment and pillage committed in Bonthe District;

ALLOWS Ground Two and **REVERSES** the verdict of guilty for Kondewa pursuant to Article 6(1) of the Statute for murder committed in Talia/Base Zero;

ALLOWS Ground Three and **REVERSES** the verdict of guilty for Kondewa pursuant to Article 6(3) of the Statute for pillage committed in Moyamba District;

DISMISSES, Justice King dissenting, Ground Four and **UPHOLDS** the conviction of Kondewa for aiding and abetting, pursuant to Article 6(1) of the Statute, for the crimes committed in Tongo Fields;

ALLOWS, Justice Winter dissenting, Ground Five and **REVERSES** the verdict of guilty for Kondewa for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities;

ALLOWS Ground Six and **HOLDS,** Justice Winter dissenting, that the Trial Chamber erred in respect of the convictions of Fofana and Kondewa for collective punishments;

WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL;

ALLOWS, Justice King dissenting, Ground One and **SETS ASIDE** the verdict of not guilty against Fofana and Kondewa for crimes against humanity;

NOTES that Ground Two has been abandoned;

DISMISSES Ground Three and does not enter convictions for Fofana and Kondewa for the crimes committed in Kenema District;

DISMISSES Ground Four and does not enter additional convictions for Kondewa for instigating crimes committed in Tongo Fields or for aiding and abetting crimes committed in Koribondo, Bo District and Kenema District; and does not enter additional convictions for Fofana for instigating and planning the crimes in Tongo Fields or for planning or aiding and abetting the crimes committed in Koribondo, Bo District and Kenema District;

DISMISSES, Justice Winter dissenting, Ground Five and does not enter additional convictions for Kondewa and convictions for Fofana for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities;

DISMISSES Ground Six and does not enter convictions of Fofana and Kondewa for acts of terrorism;

DISMISSES Ground Seven and **HOLDS** that destruction of property not amounting to appropriation does not constitute the crime of pillage;

DISMISSES, Justice Winter dissenting, Ground Eight and **HOLDS** that the Prosecution has not showed that the alleged error relating to the amendment of the Indictment constitutes an error of law invalidating the decision;

ALLOWS, Justice King dissenting, Ground Nine and **HOLDS** that the Trial Chamber erred in denying the hearing of evidence of acts of sexual violence;

ALLOWS Ground Ten and **HOLDS**, Justice King dissenting, that the Trial Chamber erred in finding that "just cause" can be a mitigating factor, although rejecting all other arguments raised by the Prosecution, Justice Winter dissenting with respect to accepting the expression of remorse and the purpose of reconciliation in mitigation;

CONSEQUENTLY REVISES, Justice King and Justice Kamanda dissenting, the sentences in respect of Counts 2, 4, and 5 as follows:

In respect of Moinina Fofana the sentences of six (6) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to fifteen (15) years imprisonment on each of those Counts, and the sentence of three (3) years imposed on Count 5 is increased to five (5) years imprisonment;

In respect of Allieu Kondewa, the sentences of eight (8) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to twenty (20) years imprisonment on each of those Counts, and the sentence of five (5) years imposed on Count 5 is increased to seven (7) years imprisonment;

CONSEQUENTLY;

FINDS in respect of Moinina Fofana;

COUNT 1: Murder, a crime against humanity, punishable under Article 2.a. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 2: Violence to life, health and physical or mental well-being of persons, in particular murder, punishable under Article 3.a. of the Statute, **GUILTY**, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 3: Other inhumane acts, a crime against humanity, punishable under Article 2.i. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the other inhumane acts committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the other inhumane acts committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, punishable under Article 3.a. of the Statute, **GUILTY**, of aiding and abetting under Article 6(1) of the Statute the cruel treatment committed in Tongo Fields and of superior

responsibility under Article 6(3) of the Statute for the cruel treatment committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 5: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute, **GUILTY,** of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Bo District; and **SENTENCES** Fofana to five (5) years of imprisonment;

COUNT 6: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute, **NOT GUILTY;**

COUNT 7: Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute, **NOT GUILTY,** by majority;

COUNT 8: Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an other serious violation of international humanitarian law, punishable under Article 4.c. of the Statute, **NOT GUILTY,** by majority;

FINDS in respect of Allieu Kondewa;

COUNT 1: Murder, a crime against humanity, punishable under Article 2.a. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 2: Violence to life, health and physical or mental well-being of persons, in particular murder, punishable under Article 3.a. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 3: Other inhumane acts, a crime against humanity, punishable under Article 2.i. of the Statute, **GUILTY,** by majority, of aiding and abetting under Article 6(1) of the Statute the other inhumane acts committed in Tongo Fields and of superior responsibility under Article 6(3) of the

Statute for the other inhumane acts committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, punishable under Article 3.a. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the cruel treatment committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the cruel treatment committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 5: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute, **NOT GUILTY**, of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Moyamba District; and **GUILTY**, by majority, of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Bonthe District; and **SENTENCES** Kondewa to seven (7) years of imprisonment;

COUNT 6: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute, **NOT GUILTY**;

COUNT 7: Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute, **NOT GUILTY,** by majority;

COUNT 8: Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an other serious violation of international humanitarian law, punishable under Article 4.c. of the Statute, **NOT GUILTY**, by majority;

ORDERS that the sentences shall run concurrently;

ORDERS that Moinina Fofana shall serve a TOTAL TERM OF IMPRISONMENT OF FIFTEEN (15) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

ORDERS that Allieu Kondewa shall serve a TOTAL TERM OF IMPRISONMENT OF TWENTY (20) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

RULES that this Judgment shall be enforced immediately pursuant to Rule 119 of the Rules of Procedure and Evidence;

ORDERS, in accordance with Rule 102 of the Rules of Procedure and Evidence that Moinina Fofana and Allieu Kondewa remain in the custody of the Special Court for Sierra Leone pending the finalisation of arrangements to serve their sentences.

Issued on 28 May 2008 at Freetown, Sierra Leone.

Justice George Gelaga King
Presiding

Justice Emmanuel Ayoola

Justice Renate Winter

Justice Raja N. Fernando

Justice Jon M. Kamanda

Justice King appends a Partially Dissenting Opinion to the Judgment and a Dissenting Opinion to the Sentencing.

Justice Winter appends a Partially Dissenting Opinion.

Justice Kamanda appends a Partially Dissenting Opinion.

VI. PARTIALLY DISSENTING OPINION OF HONOURABLE JUSTICE GEORGE GELAGA KING

I. INTRODUCTION

1. I append a Dissenting Opinion in respect of Counts 1, 2, 3 and 4 of the Indictment for which the majority of my distinguished colleagues find the Accused Moinina Fofana and the Appellant Allieu Kondewa Guilty, and concur with them in finding him Not Guilty, under Counts 5, 6, 7 and 8. It will be recalled that the Trial Chamber unanimously found Fofana and Kondewa Not Guilty under Counts 1 and 3 of Crimes against Humanity. Count 1 charges both Accused with Murder, a Crime against Humanity, punishable under Article 2.a. of the Statute and Count 3 with "Inhumane Acts." punishable under Article 2.i. of the Statute.[1073] The Indictment further charges that each of the Accused is individually criminally responsible for the crimes alleged pursuant to Article 6(1) and or alternatively, Article 6(3) of the Statute.

2. The Trial Chamber, by a majority, Justice Bankole Thompson dissenting, found both Accused Guilty of Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II under Count 2, and under Count 4 of Violence to life, health and physical or mental well-being of persons in particular cruel treatment, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. Both crimes are punishable under Article 3.a. of the Statute.

3. I shall deal with Counts 1 and 3 together and then Counts 2 and 4.

II. BACKGROUND

4. In arriving at the verdict of Not Guilty in respect of Counts 1 and 3, the Trial Chamber made the following finding:

> "That the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack. By contrast, there is evidence that these attacks were directed against the rebels or juntas that controlled towns, villages and communities throughout Sierra Leone. In this regard, the Chamber recalls the admission

[1073] CDF Trial Judgment, VII Disposition at pp 290-291.

of the Prosecutor that the CDF and the Kamajors fought for the restoration of democracy."[1074]

5. The Prosecution's First Ground of Appeal states: "Acquittal of Moinina Fofana and Allieu Kondewa of Murder and Other Inhumane Acts as Crimes against Humanity."

6. It alleges that "the Trial Chamber erred in law in holding that the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack."[1075] It contends that the Trial Chamber erred in law and in fact in finding that the chapeau elements of Crimes against Humanity were not satisfied.[1076]

7. The relief sought by the Prosecution in respect of Counts 1 and 3 is that the Appeals Chamber should find that all the general elements of Crimes against Humanity, in particular attacks directed against a civilian population were established in "relation to all the crimes charged in the Indictment" and that convictions be entered against Fofana and Kondewa for the two Counts.[1077]

8. The chapeau elements are what the Trial Chamber refers to in its Legal Findings as the general requirements which must be proved to show the commission of a crime against humanity. They are as follows:

(i) There must be an attack;

(ii) The attack must be widespread or systematic;

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

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

(v) The Accused knew or had reason to know that his or her acts constitute part of a widespread or systematic attack directed against any civilian population.[1078]

9. The Trial Chamber found that requirements (i) and (ii) had been proved by the Prosecution.[1079] With regard to (iii), it held that the Prosecution did not prove that requirement

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[1074] CDF Trial Judgment, para. 693.
[1075] Prosecution Notice of Appeal, para. 1.
[1076] Prosecution Appeal Brief, para. 2.5.
[1077] Prosecution Notice of Appeal, para. 2.
[1078] CDF Trial Judgment, paras 110, 690.

beyond reasonable doubt as stated in paragraph 5, *supra*. It consequently did not make any findings on (iv) and (v), the two remaining requirements.

10. In coming to the conclusion in respect of (iii) which requires that the attack must be directed against any civilian population, the Trial Chamber considered the *dictum* of the ICTY Appeals Chamber in *Kunarac et al.* that:

> "[T]he expression 'directed against' is an expression which specifies that in the context of a crime against humanity, the civilian population is the *primary object* of the attack."[1080] (Emphasis added)

The Trial Chamber was persuaded by the *dictum*, adopted it and concluded that the expression 'directed against any civilian population' requires that "the civilian population be the *primary* rather than an *incidental* target of the attack."[1081]

11. It is to be noted that in the Indictment, the Prosecution explains its terminology in terms of civilians or civilian population as follows:

> "The words civilian or civilian population used in this indictment refer to persons who took no active part in the hostilities, or were no longer taking an active part in the hostilities."[1082]

12. The Prosecution argues that "it is apparent from the finding that the Trial Chamber considered, as a matter of law, that an attack will not be one that is 'directed against' a civilian population if civilians are attacked in the course of attacks directed against opposing forces"[1083] It submits that "if a force in an armed conflict attacks the civilian population in a widespread or systematic manner in the course of attacks against opposing forces, that force will have undertaken a widespread or systematic attack against a civilian population."[1084] The Prosecution refers to the Trial Chamber's finding that the CDF "fought for the restoration of democracy" and submits that "the Trial Chamber erred in finding that this was in any way a material consideration in determining

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[1079] CDF Trial Judgment, paras 691-692.
[1080] *Ibid* at para. 114.
[1081] *Ibid* at para. 114.
[1082] CDF Indictment, para. 11.
[1083] Prosecution Appeal Brief, para. 2.16.
[1084] *Ibid* at para. 2.17.

whether the general requirements for crimes against humanity existed in this case. International Humanitarian Law applies equally to all parties in a conflict."[1085]

13. The Defence for Fofana contends that the attacks, whether random or selective, were never directed against the civilian population but against military targets.[1086] It argues further that the Trial Chamber found that many acts of the Kamajors were isolated, random and unauthorised by the CDF. It refers to the Chamber's finding that "[a]lthough the CDF was a cohesive force under one central command, there were some fighters who acted on their own without the knowledge of central command."[1087] It submits that it was never the policy of the CDF to terrorise civilians, since the Kamajors could not be said to be terrorising the very civilians they sought to protect.[1088]

14. The Defence for Kondewa submits that the Trial Chamber applied the correct legal standard in concluding that the attack was not directed against any civilian population, since the civilian population was not the primary object of the attacks, and that the Prosecution misconstrued the legal concept of Crimes against Humanity. It argues that having regard to the Prosecution's statement that the aim and objective of the CDF and Kamajors was the restoration of democracy, that statement was evidentially relevant to establishing that the civilian population was not the specific target of the attacks.[1089]

III. ANALYSIS

A. CRIMES AGAINST HUMANITY

1. Historical Facts

15. I deem it necessary, in adjudicating on the issues arising from the various submissions and arguments in respect of the Counts, to refer summarily to some historical facts found by the Trial Chamber relating to the Kamajors, the CDF, the Organisation of African States (OAU), President Ahmed Tejan Kabbah, President Sani Abacha of Nigeria (now deceased), the Ambassadors of the United States of America, Great Britain and Nigeria; the UNDP Representative and ECOMOG; and the part they played in the armed conflict which raged in Sierra Leone during the period 1991 to

[1085] *Ibid* at para. 2.51.
[1086] Fofana Response Brief, para. 6.
[1087] *Ibid* at para. 7.
[1088] Fofana Response Brief, para. 16.

2001. Those facts, I believe, are instructive, relevant and informative, not only in evaluating the totality of the evidence adduced in the Trial Chamber, but also in deciding whether the Prosecution had proved its allegations in paragraph 19 of the Indictment which I will deal with specifically later.

2. The Kamajors

16. 'Kamajor' is a Mende word meaning 'hunter'. He is male, a traditional hunter, has specialised knowledge of the forest in his locality, is supposed to be an expert in the use of 'bush' medicines, is well skilled in navigating the forest and is reputed to be able and in a position to protect and defend his village community from natural and supernatural threats.[1090] The evidence discloses that when the civil conflict began in Sierra Leone in 1991, the Government ordered the Sierra Leone Army to muster and mobilise the Kamajors for use as vigilantes and as allies in defence of the areas in which they lived. The soldiers accordingly trained Kamajors for that purpose.[1091]

17. The Kamajor Society was formed in 1991 under the Chairmanship of the late Dr Lavalie (whose wife later became Deputy Speaker of the Sierra Leone Parliament), with Dr Albert Joe Demby (who in 1996 became Vice-President of Sierra Leone) as Treasurer. Chief Lebbie of Komboya Chiefdom was the Head and after his death in 1996 the Paramount Chiefs of the Southern Districts appointed Regent Chief Samuel Hinga Norman as the Kamajors' Chairman.[1092]

3. *Coup d'etat* in Sierra Leone in 1997

18. On 25 May 1997, around 5.30 in the morning, a *coup d'etat* took place in Sierra Leone. President Ahmed Tejan Kabbah and his elected Government were overthrown by some dissident members of the Sierra Leone Army who then called themselves 'The Armed Forces Revolutionary Council' (AFRC), and in a speech broadcast by Major Johnny Paul Koroma, invited the Revolutionary United Front (RUF) rebels, led by one Foday Sankoh, to join them. President Kabbah and some members of his Government sought refuge in neighbouring Guinea. Following the *coup*, the Kamajors went underground in the bush.[1093] One Eddie Massaly broadcast a rallying

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[1089] Kondewa Response Brief, para. 1.8.
[1090] Trial Judgment, para. 60.
[1091] Trial Judgment, paras 60-63.
[1092] *Ibid* at para. 64.
[1093] CDF Trial Judgment, para. 73.

call over the BBC summoning the Kamajors and other traditional hunters including the Kapras, Gbethis, Tamboros and the Donsos to assemble in Pujehun District in order to take up arms against the AFRC and the rebels.[1094]

4. Meeting of the Ambassadors of the United States of America, Great Britain and Nigeria; and the UNDP Representative

19. His Excellency Mr Peter Penfold, who was the High Commissioner of Great Britain to Sierra Leone, testified before the Trial Chamber on 8 February 2006. He said that with the accredited Ambassadors to Sierra Leone from the USA, Great Britain and Nigeria and the UNDP Representative, a meeting was arranged with President Kabbah and Hinga Norman in Conakry.[1095] At the meeting, they offered assistance from their respective Governments to the ousted Government on condition that President Kabbah and Norman agreed to work together in the interests of Sierra Leone. President Kabbah was informed that President General Sani Abacha of the Republic of Nigeria, who was then Chairman of the Economic Community of West African States (ECOWAS), was ready to support him and would prevail on the rest of the ECOWAS Member States to assist Sierra Leone, but only if he was convinced that the people of Sierra Leone were not prepared to accept the military regime that had seised power.[1096]

20. President Kabbah assured the Meeting that the people of Sierra Leone would welcome the support of the traditional hunters of Sierra Leone, the Kamajors and others, in their quest to reject the dissident military regime that had ousted his democratically elected Government. About three weeks after the military *coup*, on 17 June 1997, Eddie Massaly briefed Hinga Norman on the availability and preparedness of the Kamajors. Consequently, a meeting was held between Norman, Eddie Massaly and Borbor Tucker (the two leaders of the Kamajors), General Victor Malu and other senior military officers of the Nigerian Armed Forces.[1097] As a result of that meeting, Norman was mandated to mobilise as much Kamajor manpower as he possibly could and was charged with the responsibility of coordinating the supply and distribution of arms and ammunition.

[1094] *Ibid* at paras 72-75.
[1095] CDF Trial Judgment, para. 77.
[1096] *Ibid* at para.77.
[1097] CDF Trial Judgment, para. 78.

Soon after, a helicopter-load of arms and ammunition was flown to Gendema in the Southern Province of Sierra Leone.[1098]

5. Creation of the Civil Defence Force

21. President Kabbah created and established the Civil Defence Force (CDF) from his exile in Guinea. The *raison d'etre* for the formation of the CDF was to have a tangible follow-up to the decisions taken at the Ambassadors Meeting. The CDF was empowered to link up the various militia groups in Sierra Leone, organise the Kamajors and other civil defence forces and coordinate their activities with those of the Economic Community of West African States Monitoring Group (ECOMOG), for the purpose of conducting military operations to reinstate the democratically elected Government.[1099] In a conjoint manner, the CDF was to exercise power and control over efforts in Sierra Leone to re-establish President Kabbah's democratically elected Government and in the ensuing armed struggle to use their best endeavours to defeat the dissident military regime and those who would cooperate, and were cooperating with that illegal regime. President Kabbah appointed Hinga Norman National Coordinator of the CDF.[1100]

6. Economic Community of West African States Monitoring Group (ECOMOG)

22. H.E. Peter Penfold revealed in evidence that while President Kabbah was exiled in Conakry the capital of Guinea, the OAU designated ECOWAS to use its efforts to restore President Kabbah's Government to power. ECOWAS, in turn, called on ECOMOG to use its military might for that purpose. He said that the British Government itself assisted in the struggle by providing necessary equipment to ECOMOG.[1101]

23. ECOMOG made the following contributions to the Kamajors and the CDF: In July 1997, it donated logistics including a truck and two Mitsubishi pick-up vans, together with food and materials needed for a **guerrilla** fighting force (emphasis added). In August 1997, 430 arms and

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[1098] *Ibid* at paras 78-79.
[1099] CDF Trial Judgment, para. 80.
[1100] Transcripts of 8 February 2006, Peter Penfold, pp 25-29, Transcript of 10 February 2006, AJ Demby, p 17; Transcript of 25 January 2006, Hinga Norman, p.27.
[1101] Transcript of 8 February 2006, Peter Penfold, pp 15-17.

ammunitions (G3, FNRPG and GMPG), together with US$10,000 for rations and other incidental expenses.[1102]

24. On 13 August 1997, President Kabbah forwarded a plan to ECOMOG detailing joint action between ECOMOG and CDF with Hinga Norman as coordinator. The Nigerian contingent also supplied arms, ammunition, fuel, food, cash and other essentials to the CDF, as well as sharing intelligence and medical care with them.[1103]

25. On 8 October 1997, the United Nations Security Council adopted a Resolution on Sierra Leone which introduced sanctions against the military government in Sierra Leone

7. ISSUES RAISED ON APPEAL

(a) Whether CDF fighting "for the Restoration of Democracy" is a material consideration.

26. The Prosecution posits that "the Trial Chamber stated in paragraph 693 of its Judgment, when finding that it had not been established that the attacks were directed against the civilian population, that the alleged perpetrators 'fought for the restoration of democracy' and submits that "the Chamber erred in finding that this was in any way a material consideration in determining whether the general requirements for Crimes against Humanity existed in this case. International Humanitarian Law applies equally to all parties in a conflict."[1104] It further submits that "it would be contrary to the most fundamental principles of International Humanitarian Law to suggest that certain conduct is a crime against humanity if committed by the "wrong" side in a conflict, but that the same conduct is legitimate if committed by the "right" side.

27. It is true that International Humanitarian Law applies equally to all parties in a conflict; but it is not true to suggest that because the Trial Chamber stated that the CDF were fighting to restore the democratically elected Government, it becomes a question of a right or wrong side *vis a vis* the CDF and the rebels. I opine that the Trial Chamber was referring to the fact that the CDF were fighting the AFRC and the rebels in order to defeat them and restore the elected Government and had the full backing of the international community - the United States, Great Britain, Nigeria,

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[1102] Transcripts of 3 May 2006, Arthur Koroma, pp 15-16; Transcript of 5 May 2006, Mustapha Lumeh, p 71; see also, CDF Trial Judgment, paras 82-86..
[1103] CDF Trial Judgment, para. 86.
[1104] Prosecution Appeal Brief, para 2.51

ECOWAS, the UNDP, the United Nations Security Council, (sanction resolution of 8 October 1997) - in that regard.

28. The Trial Chamber certainly did not state in paragraph 693 what the Prosecution alleges. What the Trial Chamber in fact said in that paragraph is as follows:

> "the Chamber finds that the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack. By contrast there is evidence that these attacks were directed against the rebels and juntas that controlled towns, villages, and communities throughout Sierra Leone. In this regard, the Chamber recalls the admission of the Prosecutor that 'the CDF and the Kamajors fought for the restoration of democracy.' "[1105]

It is crystal clear therefore, that the Prosecution not only misquoted the Trial Chamber, but also misquoted it out of context. The fact that the CDF and the Kamajors fought for the restoration of democracy is, to my mind, one of the relevant and material factors for the Trial Chamber to consider in determining whether or not attacks were directed against any civilian population.

29. In my opinion, when all the historical facts referred to in paragraphs 16 to 25 *supra*, are considered, there is no doubt that the fact that the Kamajors and CDF were 'fighting for the restoration of democracy' was a material consideration for the Trial Chamber when it was evaluating the totality of the evidence as to whether the attacks were directed against the civilian population, rather than against the rebels and juntas.

30. The contention of the Prosecution with regard to the question whether the Accused, the CDF and allies were fighting to reinstate the democratically elected Government, which premise the Prosecution dismisses as immaterial, can further be examined, for the avoidance of doubt, by reference to paragraph 19 of the Indictment, where the Prosecution alleges something directly contrary, to *wit*, that the Accused and the CDF were fighting to gain and exercise control over the territory of Sierra Leone. It reads:

> "[T]he plan, purpose and design of SAMUEL HINGA NORMAN, MOININA FOFANA, ALLIEU KONDEWA and subordinate members of the CDF was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathisers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra

[1105] CDF Trial Judgment, para. 693.

> Leone. Each Accused acted individually and in concert with subordinates, to carry out the said plan, purpose or design."[1106]

31. Those allegations are not supported by the evidence. On the contrary, there is abundant evidence that the Accused and subordinate members of the CDF were fighting, at great personal sacrifice, to restore the democratically elected Government of Sierra Leone. The evidence reveals that they were fighting to completely eliminate the RUF/AFRC, restore the constitutionally elected Government, but not to gain complete control over the population of Sierra Leone. The Historical Facts referred to in paragraphs 16-25 inclusive put this conclusion beyond argument and beyond all reasonable doubt. The ghost of a so-called 'materiality' must be laid to rest once and for all.

(b) Whether the attack was directed against any civilian population

32. Article 2 of the Statute which has as its sub-heading: 'Crimes against Humanity' provides:

> "2. The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:
>
> a. Murder . . ."

33. The Appeals Chamber expresses the view that in Tongo, Bo, Bonthe, Kenema and Koribondo, the Kamajors and the CDF engaged in attacks directed against the civilian population. With respect, I do not accept my colleagues' view on this issue because I am not persuaded that the Trial Chamber's conclusion was in error and would, therefore, not overturn its finding.

(c) Whether the attacks on Tongo, Koribondo, Bo Town, Bonthe and Kenema had military objectives

34. The Trial Chamber specifically examined the attacks on Tongo Town, Koribondo, Bo, Bonthe and Kenema to determine whether crimes against humanity were committed in the context of those attacks. The Kamajors attacked each of the locations for military objectives. The Trial Chamber found that Kamajors launched numerous armed operations "against the rebels in an attempt to regain control over Tongo."[1107] According to the Trial Chamber, Tongo was a key

[1106] CDF Indictment, para. 19.
[1107] CDF Trial Judgment, para. 375.

military objective: Norman thought "that possession of Tongo would determine the outcome of the war."[1108]

(i) Koribondo

35. Koribondo was a Sierra Leone Army stronghold. It served as a company-sized military base until 1997. There were no barracks so the soldiers and the civilians had to live together.[1109] Before the *coup*, Koribondo and its surrounding villages were occupied and controlled by rebels. The RUF and the AFRC had a battalion stationed there and for this reason, after the *coup*, the Kamajors wanted to capture the town and flush out the AFRC and RUF rebels. The capture of Koribondo was expected to facilitate the movement of ECOMOG troops from Pujehun to Bo.[1110] The Kamajors had attacked the SLA on "numerous occasions."[1111] Between July and October 1997 all attacks by the Kamajors were repelled by the soldiers.[1112] Finally, on 13 February 1998, in an attack that lasted for about 45 minutes, Koribondo was captured by the Kamajors.[1113] The Trial Chamber did not find that there were civilian casualties during the attack. It found that there were only eleven civilian casualties during the days following the capture.[1114]

(ii) Bo Town

36. Bo Town was occupied by rebels and junta forces until 14 February 1998, but they dispersed before the Kamajors entered the next day.[1115] Three days later, Kamajor forces repelled a rebel attack on Bo. In the days immediately after the rebel attack, the Kamajors were obliged to search for and kill those they believed to be junta forces. In the guerrilla war that was raging and the enemy forces not being in uniform, those suspected to be rebels and junta members were attacked and killed.

(iii) Bonthe District

[1108] CDF Trial Judgment, para. 381.
[1109] *Ibid* at para. 412. Since 1991 it had been the Headquarters of the 34th Battalion of the SLA.
[1110] Transcript of 30 January 2006, Hinga Norman, pp 48-49
[1111] *Ibid* at para. 417.
[1112] Transcript of 15 May 2006, Haroun Collier.
[1113] *Ibid* at para. 420.
[1114] *Ibid* at para. 421.
[1115] *Ibid* at para. 449.

37. Bonthe District had been occupied by the SLA and Navy since 1991 because rebels were threatening to invade it. The Kamajors went to Bonthe for the first time in 1994. Immediately after the overthrow of the Kabbah Government the Kamajors retreated to the surrounding villages.[1116] On 15 September 1997, Kamajors entered Bonthe District aiming to seize a gunboat. They were repelled.[1117] The soldiers, however, left Bonthe about five months later on 14 February 1998 in a gunboat. Bonthe was captured by the Kamajors on 15 February 1998.[1118] The soldiers had fled the previous day but inevitably, the Kamajors carried out what, in the circumstances, can be described as "mopping-up" operations.[1119]

38. It is important to note here that in respect of Bonthe District, my colleagues had this to say:

> "because the Prosecution's concluding arguments include no mention of Bonthe District, the Appeals Chamber finds that the Prosecution has not met its burden of advancing the reasons for the alleged error and the Appeals Chamber will therefore not examine whether the Trial Chamber erred in relation to Bonthe District."[1120]

39. I agree and I will not consider whether the Trial Chamber erred in relation to Bonthe District.

(iv) Kenema

40. Prior to February 1998, the AFRC was in control of Kenema and were working with the rebels. Before the *coup*, Kamajors and soldiers worked together at SS Camp about five miles from Kenema on the main highway between Kenema and Liberia. Twelve miles from Kenema is Blama, the Headquarters Town of Small-Bo Chiefdom in the Kenema District. After the *coup*, the rebels took control of Blama and under death threats forced the police to do the Juntas' work.[1121] The Kamajors attacked and took control of Kenema on 15 February 1998, but on 16 and 18 February 1998, soldiers and rebels attacked Kenema and were repelled. The Trial Chamber found that in the days following, the Kamajors killed those fighting with the rebels, including some police, suspected

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[1116] Transcript of 10 November 2004, Father Garrick, pp 5-6.
[1117] *Ibid* at p 33.
[1118] CDF Trial Judgment, paras 539.
[1119] *Ibid* at para. 539.
[1120] Appeal Judgement, para 42
[1121] CDF Trial Judgment, paras 566-569.

juntas and rebels. During this fighting, the Kamajors came under fire from the police barracks, indicating that the police had taken up arms against the CDF.[1122]

41. I have viewed the facts to which I have just referred in a realistic and practical perspective and come to the conclusion that the primary object of the attacks was military (the AFRC, rebels and juntas) and not the civilian population and I agree with the Trial Chamber's findings.

7. The Trial Chamber's consequent Factual Findings and the Role of the Appeals Chamber

42. The Trial Chamber found that the attacks by Kamajors on Tongo, Koribondo, Bo Town, Bonthe and Kenema constituted part of a widespread attack. I opine that the Chamber was correct in coming to the conclusion, from the totality of the evidence, that such widespread attacks were not primarily directed against a civilian population but against the AFRC, RUF juntas and military targets. The Trial Chamber decided that having found that the attack was widespread, it would not consider whether it was systematic, because the expression "widespread or systematic" is disjunctive.[1123]

43. My colleagues in the Appeals Chamber then went on to consider "whether the remaining legal requirements for crimes against humanity are satisfied in this case"[1124] even though they have themselves held that where the Trial Chamber after adjudicating on one of two alternative charges, fails to consider the other, then the Appeals Chamber "cannot consider any evidence or pronounce a verdict on the alternative charge."[1125] I therefore assume that when my colleagues, in this instance went on to consider the remaining legal requirements, they must have done so *per incuriam*.

44. I reiterate my view expressed elsewhere in this Opinion that the Appeals Chamber ought not to assume the power conferred on the Trial Chamber by purporting itself to enter findings of fact in the first instance. It has not heard the evidence and it might select pieces of evidence which tend to support its findings of fact, whereas countervailing evidence may, in the circumstance, not be given the weight that the Trial Chamber, which saw and heard the witnesses, gave to it.

[1122] CDF Trial Judgment, paras 539, 567, 595, 596, 610.
[1123] CDF Trial Judgment, para. 692.
[1124] CDF Appeal Judgement, para 309
[1125] Ibid, paras133-134

45. The reasons for the deference to the factual findings of a Trial Chamber are well explained by the ICTY Appeals Chamber in the *Kupreskic* Appeal Judgement which *dictum* I accept and adopt:

> "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."[1126]

This is why I dissent from my learned colleagues on this point. It is important for me to observe at this juncture that when the Prosecution is appealing against an acquittal, as in this case, it has a more onerous duty and more difficult task than an Accused who is appealing against a conviction. Where the Prosecution alleges that errors of fact have been committed by the Trial Chamber, the Prosecution must show that all reasonable doubt as to the Accused's guilt has been eliminated.[1127]

(a) Whether the expression 'directed against' was given its correct meaning

45. As stated earlier, The Trial Chamber found "that the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack." In deliberating on the expression 'directed against any civilian population', the Chamber deemed it a requirement that the civilian population "be the primary rather than an incidental target of the attack."[1128] In arriving at that criterion the Chamber was guided by the following dictum of the Appeals Chamber in *Kunarac et al*

> "[T]he expression 'directed against' is an expression which 'specifies that in the context of a crime against humanity, the civilian population is the primary object of the attack' In order to determine whether the attack may be said to be so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst."[1129]

[1126] *Kupreskic* Appeal Judgment, para. 32. See also, *Kunarac et al.,* Appeal Judgment, para. 40.
[1127] See *Bagilishema Appeal Judgment,* paras 11-12.
[1128] CDF Trial Judgment, para. 114.
[1129] *Kunarac at al., Appeal* Judgment, para. 91.

46. The Trial Chamber considered all those stated factors in interpreting the expression 'directed against any civilian population.' It also had those factors in mind when it found that the following events constituted part of a widespread attack in the named locations by the Kamajors and came to the conclusion that, despite the attacks which it had found to be widespread, the civilian population was not the primary object:

(i) Attacks by Kamajors in Tongo in late November/December 1997 and in January 1998

(ii) Attack by Kamajors in Koribondo between 13 and 15 February 1998

(iii) Attack by Kamajors in Bo Town between 15 and 23 February 1998

(iv) Attack by Kamajors in Bonthe on 15 February 1998, and

(v) Attack by Kamajors in Kenema between 15 and 18 February 1998

47. The Trial Chamber, having considered all those factors and having found that the attacks, even though they were widespread, by reason of the fact that they occurred over a broad geographical area, were not directed against the civilian population, after evaluating the totality of the evidence adduced by the Prosecution, arrived at its crucial Legal Finding and stated as follows:

> "The Chamber finds, however, that the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack."[1130]

It then went on to pronounce:

> "having thus found that the essential requirement of an attack against the civilian population has not been satisfied beyond reasonable doubt, the Chamber finds that Fofana and Kondewa are Not Guilty of Crimes against Humanity as charged in Count 1 (Murder as a Crime against Humanity) and Count 3 (Other Inhumane Acts as a Crime against Humanity."[1131]

48. It can be seen from all that I have recounted, that the Trial Chamber went to great lengths to examine relevant legal authorities on the issue, to assess the factual evidence of the attacks in specified locations to find out whether or not the civilian population was the primary object. It then applied the stated legal principle to those facts before coming to the conclusion that the third of the

[1130] CDF Trial Judgment, paras 691-694

chapeau elements had not been proved. I, therefore, with respect, dissent from my learned colleagues when they aver "that the Trial Chamber's conclusion in regard to the third element of the crimes against humanity is devoid of articulation of its reasoning ... the Appeals Chamber is of the view that, in the interest of justice, a Trial Chamber should endeavour to provide reasons for its conclusion."[1132]

49. As it is in the interest of justice that the Trial Chamber provides reasons for its conclusions, *a fortiori* it is even more in the interest of justice that both Accused, who were unanimously found Not Guilty and acquitted by a bench of three Trial Chamber Judges, should not have that verdict overturned by the Appeals Chamber, which is the final appellate tribunal, and verdict of Guilty substituted, unless no reasonable tribunal would have acquitted. The dictum in the *Kunarac et al.* Appeal Judgment that my colleagues highlighted on the issue, was itself thoroughly scrutinised by the Trial Chamber in the process of deciding the issue. That is an example of the articulation of the Trial Chamber's reasoning in arriving at its conclusion. It is for all the reasons I have given that I disagree with my learned colleagues and I would uphold the Trial Chamber's conclusion.

50. I do not accept the Prosecution's contention that it is "apparent" from the Trial Chamber's findings that the Trial Chamber considered, as a matter of law, that an attack will not be one that is 'directed against a civilian population if civilians are attacked in the course of attacks directed against opposing forces.'[1133] That point of view cannot be attributed to the Trial Chamber. The pith and substance of the matter is that the Trial Chamber, after considering and evaluating all the relevant evidence, came to the clear and unambiguous conclusion that the evidence adduced by the Prosecution did not prove beyond reasonable doubt that the civilian population was the *primary object* of the attack (emphasis added).

51. I will now refer to the Trial Chamber's Factual Findings that support its decision that the civilian population was not the primary, but rather the incidental, object of the attacks.

(i) Factual Findings That Civilian Population Was Not The Primary Object of Attack

[1131] CDF Trial Judgment, para. 694.
[1132] CDF Appeal Judgment, para. 302.
[1133] Prosecution Appeal Brief, para. 2.16.

(a) The Kamajors launched a third attack on Tongo in the afternoon of 14 January 1998. Many civilians had received warnings that the Kamajors were planning to attack and most of those that were able to leave had done so.[1134] Emphasis added.

(b) Before the *coup* Koribondo and its surrounding villages were controlled by rebels. The RUF and AFRC had a battalion stationed at Koribondo. For this reason the Kamajors wanted to capture Koribondo and flush out the AFRC and RUF rebels from Koribondo.[1135] After the coup arrangements were put in place at Base Zero for the RUF and AFRC military unit in Koribondo to be captured. The capture and control of Koribondo was expected to facilitate the movement of ECOMOG troops from Pujehun to Bo."[1136] Emphasis added.

(c) Witness testified that when they arrived at the NDMC Headquarters they saw hundreds of corpses of men, women and children at the entrance. There were also corpses at the football field inside where the civilians were gathering inside the NDMC Headquarters. There was an exchange of fire between the Kamajors and the rebels. This fighting continued until the rebels were eventually overpowered and began to retreat; many of the rebels changed into civilian clothing as they ran."[1137] Emphasis added.

(d) After the rebels retreated, the Kamajors began singing in Mende that they had captured the NDMC Headquarters. TF2-027 who was hiding in a mosque in town during the attack, was taken at gunpoint to the NDMC Headquarters. When he arrived there civilians were being gathered at the football field. BJK Sei entered the field with Siaka Lahai. BJK Sei told the Kamajors that he would dismiss anyone who he saw killing people. He then left the headquarters and went to the Labour Camp repeating his order to 'please be careful about the civilians.' Shortly after this a group of Kamajors came to the *Barri* inside the Headquarters. One Kamajor reported to Norman on a wireless communication set. He said 'chief, chief, we've captured Tongo, we have captured Tongo, and we are now in Tongo.'"[1138] Emphasis added.

[1134] CDF Trial Judgment, para. 389; Transcript of 17 May 2006, Siaka Lahai p. 10; Transcript of 15 May 2006 BJK Sei, p. 84; Transcript of 23 February 2005, TF2-048 p. 27.
[1135] Transcript of 16 September 2004, TF2-082 pp 136-137.
[1136] Transcript of 30 January 2006, Norman pp 48-49; CDF Trial Judgment, para. 416.
[1137] CDF Trial Judgment, para. 391.
[1138] CDF Trial Judgment, para. 392.

52. It is clear from the portions that I have underlined above and from the findings in respect of those locations specifically referred to by the Trial Chamber in paragraph 33, *supra,* and having regard to, and applying the legal principles evinced from the decision of the Appeals Chamber in *Kunarac et al.*, the Trial Chamber was correct in law to conclude that the Prosecution had not proved beyond reasonable doubt that the civilian population was the *primary object* of the attacks.

53. My learned colleagues are of the view that "the Trial Chamber appears to have misdirected itself when applying the principle it had already stated, by confusing the target of the attack with the purpose of the attack. When the target of attack is the civilian population the purpose of the attack is immaterial."[1139] With respect, I do not agree that the Trial Chamber is guilty of any such alleged or any confusion. It is my learned colleagues who are in fact saying that the civilian population was the target of the attack, while the Trial Chamber is saying the contrary, that is, that the Prosecution had not proved beyond reasonable doubt that the civilian population was the *primary object* of the attack. Furthermore, the Trial Chamber made it abundantly clear in its decision that the primary object of the attacks was the AFRC and its allies and not the civilian population. Where then is the Trial Chamber's so-called confusion?

54. I am satisfied that in determining whether the Prosecution had discharged its burden of proving the guilt of each of the Accused beyond reasonable doubt with regard to Counts 1 and 3, the Trial Chamber paid due regard to the totality of the evidence adduced, bearing in mind the guiding legal principle that any evaluation that raises a reasonable doubt in the evidence must be resolved in favour of the Accused. I refer to the dictum, which I accept and adopt, of the Appeals Chamber of the ICTY in the case of *Delalic et al*:

> "If there is another conclusion which is also reasonably open from the evidence and which is consistent with the innocence of the Accused as with his guilt, he or she must be acquitted."[1140]

55. I must restate and emphasise that it is the primary duty of the Trial Chamber to hear and evaluate the evidence brought before it. The Appeals Chamber ought, as a general rule, to defer to the findings of the Trial Chamber:

> "it is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber."[1141]

[1139] CDF Appeal Judgment, para. 304.
[1140] *Delalic et al.*, Appeal Judgment, para. 458.

As was said by the Appeals Chamber in the *Furunzija*, "this Chamber does not operate as a second Trial Chamber."[1142]

56. As I dissent from my distinguished colleagues, let me, with respect, reiterate unequivocally that fundamental and well-established principle: that it will always be profoundly wrong for an Appeals Chamber, particularly an Appeals Chamber that is the final appellate tribunal, to assume the power accorded by law to a Trial Chamber to decide, *inter alia*, questions of fact, to purport to operate itself, as if it were a second Trial Chamber.

57. The Trial Chamber found that the third general requirement for crimes against humanity i.e. that the attack must be directed against any civilian population, had not been proved beyond reasonable doubt by the Prosecution. The Trial Chamber consequently and correctly in my opinion, did not consider the fourth and fifth general requirements of the offence of Crimes against Humanity, nor the specific elements of the crimes mentioned in Counts 1 and 3.

58. The Prosecution, however, argues in its Appeal Brief that it had proved the specific elements of the crimes in Counts 1 and 3 and that the Appeals Chamber should grant the relief it seeks in paragraph 2 of the Prosecution's Notice of Appeal.[1143] Since I have held that the Trial Chamber was correct in law in finding that the third general requirement to prove the offence of Crimes against Humanity had not been met, I see no reason to consider the specific elements in respect of those crimes in Counts 1 and 3. It follows therefore, that Ground One of the Prosecution Grounds of Appeal is untenable. I accordingly dismiss it and uphold the Trial Chamber's acquittal of Fofana and Kondewa on Counts 1 and 3 of the Indictment.

[1141] *Delalic et al.*, Appeal Judgment, para. 202; see also, *Aleksovski* Appeal Judgment, para. 63; *Tadic* Appeal Judgment, para. 64; *Kupreskic et al.*, Appeal Judgment, para. 30.
[1142] *Furunzija* Appeal Judgment, para. 40; see also, *Blaskic* Appeal Judgment, para. 13.
[1143] See F, G and H of Prosecution Appeal Brief.

B. WAR CRIMES

59. I shall now consider Counts 2 and 4 of the Indictment for which the majority of my learned colleagues affirm the Trial Chamber's finding of Guilt in respect of Fofana and the appellant Kondewa, (Fofana not appealing), under Article 6(3), for crimes committed by Kamajors in Bonthe District. Counts 2 and 4 of the Indictment charge both Fofana and Kondewa with Murder and Cruel Treatment respectively, as War Crimes punishable under Article 3.a. of the Statute.

60. It will be recalled that the Trial Chamber, Justice Bankole Thompson dissenting, found Kondewa individually criminally responsible as a superior, pursuant to Article 6(3) for crimes committed by Kamajors in Bonthe District under Counts 2, 4, 5 and 7. As the Appeals Chamber has found Kondewa Not Guilty of Counts 5 and 7, I shall only deal with Counts 2 and 4.

Article 6(3) and 3a.of the Statute of the Special Court

61. Article 6(3) of the Statute reads

> "The fact that any of the acts referred in articles 2 to 4 of the present statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

Article 3 a. of the Statute referred to above states:

> "The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the protection of War Victims, and of Additional Protocol 11 thereto of 8 June 1977. These violations shall include:
>
> a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

Kondewa's Status

62. It is important to stress, *in limine,* that Kondewa was not found guilty of having personally committed any of the crimes stated in Article 3a. "He never went to the war front himself." He was found guilty because both the Trial Chamber and the majority of the Appeals Chamber found "that a superior-subordinate relationship existed between him and his alleged subordinates in Bonthe District."[1144] That is to say, although he himself was not physically present and did not personally commit the crimes, he is deemed to have done so because of an alleged superior/subordinate relationship with the actual perpetrators of the crimes. I agree with the Appeals Chamber's articulation of the law with respect to the concept of superior responsibility, but I differ from them in their application of the principle of effective control.

Kondewa's Grounds of Appeal.

63. Kondewa's First Ground of Appeal challenges his conviction for crimes committed by Kamajors in Bonthe District on the basis of superior responsibility. He challenges the Trial Chamber's application of the 'effective control' test and the existence of a superior-subordinate relationship. He contends that the Trial Chamber erroneously misapplied the 'effective control' test in determining whether a superior-subordinate relationship existed between him and the alleged perpetrators of crimes in Bonthe District

1. <u>The existence of a superior-subordinate relationship</u>

64. It is now settled law that in interpreting Article 6(3) a superior is one who possesses the power and authority in either a *de jure* or a *de facto* form to prevent a subordinate from committing a crime or to punish the subordinate after the crime is committed.[1145] I agree that the test for establishing the existence of a superior-subordinate relationship is effective control of both military and civilian superiors.[1146] This means that where the relationship is proved to exist, the superior will be held criminally responsible if he fails to punish the actual perpetrators of the crime [1147]

65. It follows, therefore, that "as long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise

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[1144] Appeal Judgement, para 190
[1145] see Celebici Appeal Judgement, para192
[1146] Appeal Judgement,para 177, AFRC appeal Judgement, para257
[1147] Delalic et al. paras 333-335.

such abilities of control."[1148] The superior must have the material ability of a superior to prevent or punish his subordinates' crimes.[1149] 'Substantial influence' or 'persuasive ability' does not constitute effective control for the purpose of command responsibility.[1150]

2. The Trial Chamber's Finding of Kondewa's *De Jure* Status

66. The Trial Chamber held with respect to Bonthe District that Kondewa "[b]y virtue of his *de jure* status as High Priest ... and his *de facto* status as a superior to these Kamajors in that District, Kondewa exercised effective control over them."[1151] It is evident from the Trial Chamber's findings that it relied significantly on Kondewa's *de jure* status as "High Priest" in finding effective control and consequently, his criminal responsibility as a superior under Article 6(3). Specifically, I refer to the Trial Chamber's finding that "Kondewa had the ***legal*** and material ability to issue orders to Kamara, both by reason of his leadership role at Base Zero, being part of the CDF High Command, and the authority he enjoyed in his position as High Priest in Sierra Leone and ***particularly so*** in Bonthe District."[1152] Emphasis added.

67. According to the evidence and the findings of the Trial Chamber:

> "Kondewa in his capacity as High Priest was in charge of the initiations at Base Zero and was the head of all the CDF initiators in the country. The Kamajors believed in 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. By virtue of these powers Kondewa had command over the Kamajors in the country. He never went to the war front himself, but whenever a Kamajor was going to war, Kondewa would give his advice and blessings, as well as the medicine which the Kamajors believed would protect them against bullets. No Kamajor would go to war without Kondewa's blessings."[1153]

68. The Appeals Chamber seems to have given undue credence to that passage from the Trial Chamber's Findings when adumbrating on Kondewa's alleged superior-subordinate relationship. I am impelled, therefore, to analyse that finding, if only to dismiss it as of no evidential or credential value. I start with

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[1148] Ibid para 198

[1149] *Prosecutor v. Blagojevic & Jokic*, ICTY Trial Chamber Judgment IT-02-60-T, 17 January 2005, Para. 792 ("*Blagojevic & Jokic*"), *Prosecutor v. Strugar*, ICTY Trial Chamber Judgment IT-01-42-T, 31 January 2005, Paras. 363-6 ("*Strugar*"), *Prosecutor v. Brdjanin*, ICTY Trial Chamber Judgment IT-99-36-T, 1 September 2004, Para. 282 ("*Brdjanin*"), *Limaj et al.*, Trial Chamber Judgment, Para 522, *Celebici*, Appeal Chamber Judgment, Para 256.

[1150] *Celebici, supra* note 1 at para. 257; *Halilovic, supra* note 19 at para. 59.

[1151] CDF Trial Judgment, paras 731, 743.

[1152] CDF Trial Judgment, para. 868.

[1153] CDF Trial Judgment, para. 721.

"High Priest": The evidence shows that Kondewa was not a priest, let alone a "High' one. A Priest, in the non-metaphorical sense, is an ordained minister or a person who performs religious ceremonies and duties in a non-Christian religion.[1154] Kondewa was none of these. He was, in fact, a 'juju man' or 'medicine man' or in local parlance 'meresin man'; he was a 'masked dancer' or in local parlance 'deble dancer' , a 'gorboi' dancer[1155] It is ludicrous to say that Kondewa's so-called High Priest appellation is analogous to 'Chaplain' in an army. One Dr Hoffman testified that Kondewa would have knowledge of the forest, supernatural or superhuman knowledge which anthropologists prefer to call 'occult' and could protect the village from witches and bush devils.[1156]

69. It boggles the imagination to think that on the basis of purporting to have occult powers, on the basis of his fanciful mystical prowess, Kondewa could be said to qualify as a 'commander' in a superior/subordinate relationship. Without remarking on the novelty of its finding, the Appeals Chamber Majority Opinion, for the first time in the history of international criminal law has concluded that a civilian Sierra Leonean juju man or witch doctor, who practised fetish, had never been a soldier, had never before been engaged in combat, but was a farmer and a so-called herbalist, who had never before smelt military service ("he never went to the war front himself") can be held to be a commander of subordinates in a bush and guerrilla conflict in Sierra Leone, "by virtue" of his reputed superstitious, mystical, supernatural and suchlike fictional and fantasy powers!

70. In my opinion, the roles found to have been performed by Kondewa as "High Priest", are so ridiculous, preposterous and unreal as to be laughable and not worthy of serious consideration by right-thinking persons in civilised society. If the Kamajors believe in the mystical power of Kondewa as an initiator, his imaginary immunisation powers (as if it was scientific), do the Chambers of the Special Court also believe that Kondewa could make Kamajors "bullet-proof" and that Kondewa's "blessings" would make them impervious to machine-gun bullets? And on that basis find him to be a commander? Obviously not. On these grounds alone I opine that there is no foundation for the Trial Chamber's finding, and its endorsement by my erudite colleagues, that "Kondewa had both the ***legal*** and material ability to prevent the commission of criminal acts by Kamajors or to punish them for those criminal acts."[1157]

[1154] Oxford Dictionary of English
[1155] Transcript 9 October 2006
[1156] Ibid
[1157] CDF Trial Judgment, para. 871. (emphasis added).

71. The Trial Chamber accepted evidence from Prosecution Witness Albert Nallo who testified that Kondewa did not at any time during the war command any troops. It would be recalled that the Trial Chamber found Nallo to be 'the single most important witness in the Prosecution evidence on the alleged superior responsibility of the Accused ...."[1158]

72. Third, the Trial Chamber found that Kondewa's *de jure* status as High Priest of the CDF gave him authority over all the initiators in the Country and put him in charge of initiations. This authority according to the Trial Chamber did not give Kondewa the power to decide who should be deployed to go to the war front. Kondewa also never went to the war front himself.[1159] And yet he is deemed to have a superior/ subordinate relationship with subordinates.

73. From the foregoing, I opine that the Trial Chamber committed an error of fact in relying on Kondewa's status as "High Priest" in the CDF, as a factor in determining the existence of a superior-subordinate relationship in Bonthe District.

3. The Trial Chamber's Finding of Kondewa's *De Facto* Status

74. The Trial Chamber found that in Tongo,[1160] Koribondo,[1161] Bo District,[1162] Kenema District[1163] and Talia/Base Zero, it was not established beyond reasonable doubt that there was a superior-subordinate relationship, either *de jure* or *de facto* between Kondewa and all the Kamajors. These findings were made despite the Trial Chamber's finding that Kondewa, as the High Priest, was a key and essential component of the leadership structure and organisation and that by virtue of his power as High Priest, Kondewa had command over the Kamajors in the country.[1164]

75. The facts relied on to establish a superior-subordinate relationship in Bonthe District must be carefully scrutinised, having regard in particular, to the fact that the CDF was a militia guerrilla fighting force or an 'irregular army', which although it had a hierarchical command structure, was comparatively less trained, resourced, organised and staffed than a regular army.

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1160 CDF Trial Judgment, para. 806.
1161 CDF Trial Judgment, para. 852.
1162 CDF Trial Judgment, para. 916.
1163 CDF Trial Judgment, paras 931 - 937.
1164 CDF Trial Judgment, paras 721.

76. The Trial Chamber in establishing Kondewa's effective control on the basis of his *de facto* command appears to rely on the following factors:

(i) Testimony that in Bonthe District Kondewa was regarded as the 'supreme head' of the Kamajors;[1165]

(ii) Kondewa's ability to release Lahai Ndokoi;[1166]

(iii) Kondewa's statement that "he was not going to give any of the areas under his control to a military government but to the democratically elected Government of President Ahmad Tejan Kabbah;"[1167]

(iv) Kondewa's ability to stop the Kamajors from harassing civilians from attacking Bonthe Town and his power to issue oral and written directives; order investigations for misconduct and threaten imposition of sanctions;[1168]

(v) Kondewa's legal and material ability to prevent the commission of criminal acts by Morie Jusu Kamara and Kamajors under the command of Morie Jusu Kamara.[1169]

(vi) Morie Jusu Kamara and Julius Squire's refusal to recognise the authority of the Attorney-General and not to accept any instructions, unless they came from Norman or Kondewa.[1170]

77. In evaluating the above evidence, I find that no reasonable tribunal could conclude that Kondewa was a *de facto* superior for the purpose of establishing a superior-subordinate relationship in Bonthe District. First, the Trial Chamber's finding that Kondewa was criminally responsible as a superior in Bonthe District because he was regarded as 'the supreme head' of the Kamajors in the area, directly conflicts with the Trial Chamber's failure to find Kondewa responsible as a superior in Talia/Base Zero. This contradiction is highlighted by the fact that Talia/Base Zero is in Bonthe District and was, at all material times, the Headquarters of the Kamajors.

[1165] CDF Trial Judgment, para. 869.
[1166] CDF Trial Judgment, para. 869.
[1167] CDF Trial Judgment, para. 869.
[1168] CDF Trial Judgment, para. 869.
[1169] CDF Trial Judgment, para. 871.
[1170] CDF Trial Judgment, para. 872.

78. While the Trial Chamber and my learned Appeals Chamber colleagues are of the opinion that Kondewa had 'substantial influence' as a "High Priest" over the Kamajors (which I rejected earlier), this is not the same as demonstrating that Kondewa had the 'material ability to prevent or punish subordinates for the commission of crimes.' It does not necessarily follow that ability to secure the release of an individual, or to stop the Kamajors from harassing civilians, necessarily demonstrates a capability to prevent or punish criminal activity in a superior/subordinate context.

79. The Trial Chamber in arriving at its conclusion held that, based on the evidence adduced; there was a superior-subordinate relationship between Kondewa and Morie Jusu Kamara, District Battalion Commander of Bonthe District, Julius Squire, Kamara's second in command and Kamajor Baigeh, Battalion Commander of the Kassilla Battalion. According to the Trial Chamber, Kondewa had authority and control over the actions of these Kamajor commanders and the Kamajors under their immediate command.[1171]

80. In my view, such conclusion is fallacious Kondewa in his Appeal Brief submits, rightly, that that there is no *direct evidence* of any relationship between him and either Morie Jusu Kamara, Julius Squire or Baigeh ("the three Commanders'). If anyone had a superior/subordinate relationship with the perpetrators, it must be, according to the evidence, those three commanders and not Kondewa. Furthermore, there is no *credible indirect evidence* of any relationship between the three Commanders and Kondewa. The Trial Chamber in concluding that a superior-subordinate relationship existed appeared to have engaged in a speculative exercise. Even assuming, arguendo, that a superior-subordinate relationship did exist, it is still my view that no reasonable tribunal would conclude that Kondewa had authority and control over the actions of the Kamajors, who were not under his command or control, but under the immediate and direct command of the three Commanders. It is important to note that the Trial Chamber expressly found that in March 1998, Morie Jusu Kamara, who in fact was the commander and superior of the Kamajors at all material times in Bonthe District, and not Kondewa, was not able to control the Kamajors:

> "When Father Garrick returned to Bonthe from Freetown in March 1998, Battalion Commander Morie Jusu Kamara told Father Garrick that he would stop the Kamajors from mistreating Chief George Brandon, one of the people hidden at Father Garrick's mission. However, he was not able to control the Kamajors."[1172].

[1171] CDF Trial Judgment, para. 868.
[1172] CDF Trial Judgment, para. 557.

4. Whether Kondewa's statements had a substantial effect on crimes committed in Tongo

81. The Trial Chamber found Kondewa criminally responsible under Article 6(1) for aiding and abetting war crimes in Tongo, in particular murder under Count 2 and cruel treatment under Count 4.[1173] It is not disputed that Kondewa himself did not commit the crimes. The Kamajors attacked Tongo Town at least three times, from late November or early December 1997 to late January 1998.[1174] The Trial Chamber also found that Kondewa's speech at the December 1997 Passing Out Parade had a substantial effect, (wrongly, in my opinion), on the perpetration of crimes by Kamajors in Tongo.[1175] It held that Kondewa was liable for adding and abetting crimes in Tongo, despite the fact that his statements were made more than a month before the crimes were committed and when Kondewa spoke in Talia..[1176] The Trial Chamber found that Kondewa had the requisite *mens rea* for aiding and abetting because he was aware that Kamajors would commit crimes such as murder and cruel treatment, based on his knowledge of Norman's orders and his knowledge that Kamajors had committed crimes in Tongo in the past.[1177]

82. I disagree with the Majority Opinion that a reasonable tribunal of fact could have found that Kondewa's conduct had a substantial effect on the crimes committed by Kamajors during their attack on Tongo, for the following reasons: From the evidence accepted by the Trial Chamber, Kondewa made a speech at a passing out parade sometime between 10 December and 12 December 1997 at Base Zero (Talia). The passing out parade was witnessed by many civilians and Kamajors. Kondewa spoke after Norman and Fofana and, according to the Trial Chamber:

> "Then all the fighters looked at Kondewa, admiring him as a man with mystical 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."[1178]

83. The Trial Chamber's paraphrasing of TF2-222's evidence does not accurately accord with what was actually said on reading the transcript. The transcript mentions "command", but in fact what Kondewa said was not a command, but a rallying cry and a statement of fact: "a rebel is a rebel; surrendered, not surrendered, they're all rebels . . ." That, in my opinion, is an innocuous

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[1173] CDF Trial Judgment, paras 721-764.
[1174] CDF Trial Judgment, paras 376,
[1175] CDF Trial Judgment, para. 736.
[1176] CDF Trial Judgment, para. 727.
[1177] CDF Trial Judgment, para. 737.
[1178] CDF Trial Judgment, para. 321 (emphasis added), citing TF2-222, pp. 119-120.

statement of fact. How can those words be reasonably said to aid and abet the crimes alleged to have been committed in Tongo? The opinion evidence of "admiring" and "a man who had mystical powers" is of no evidentiary value and confirms that both the Trial Chamber and my learned colleagues misdirected themselves by drawing the wrong inference.

84. The Trial Chamber relied entirely upon these comments made by Kondewa as his *actus reas* for aiding and abetting the crimes later committed in Tongo, finding that this statement had a substantial effect on the crimes committed.

85. There are, I opine, at least two errors in the Trial Chamber's evaluation of this evidence. First, the Trial Chamber made no finding whatsoever that any of the Kamajors that committed the crimes in Tongo (*i.e.*, the physical perpetrators) were actually present at the passing out parade to hear Kondewa's statements in Talia in mid-December 1997. The passing out parade was witnessed by "many civilians and Kamajors"[1179] but it does not say that those who committed the crimes - whose names are known, who have never been charged or prosecuted - were present.

86. Approximately a month later, another group of Kamajors met in Panguma and planned the second attack on Tongo with BJK Sei.[1180] Kondewa was not present, and there is no evidence that his previous statements were mentioned at the planning. On a morning in early January 1998, a group of approximately 47 Kamajors, led by one Kamabote, attacked Tongo and, in the course of the attack against rebels, they killed some civilians. In the circumstances, I opine that it would be unreasonable to suggest that anyone hearing Kondewa's words, which were clearly directed against the rebels, and not the civilians, could be taken as encouragement to murder civilians.

87. This error is compounded by the fact that Trial Chamber's paraphrasing does not portray the import of the words and the meaning of Kondewa's statement. The relevant portion of the transcript states:

> A. That a rebel is a rebel; surrendered, not surrendered, they're all rebels. The time for their surrender "
>
> Q. Apart from Moinina Fofana did anyone else speak at the meeting again?
>
> A. The only person who spoke was the high priest. He at that time [inaudible] give the last command.

[1179] CDF Trial Judgment, para. 320 (emphasis added).
[1180] CDF Trial Judgment, praa. 382.

Q. Sorry, I didn't get that.

A. He, after all other command had been given, we all looked at him to admire the man who had a mystic power, that he will be the one to give the last command.

Q. The last command?

A. Yes, My Lord.

Q. Was that last command given?
A. He did, yes, My Lord.

Q. What was the last command?
The time for surrender had long been since exhausted, so we don't need any surrendered rebel.

Q. Is that all?
A. Finally, "I give you my blessings; go my boys, go."

Q. Finally gave his blessings?

A. Yes, My Lord."[1181]

The words speak for themselves and do not support my learned colleagues' conclusion. In any event, there is no evidence that those who actually and personally committed the crimes were present when Kondewa made his speech. How can Kondewa, by his words, aid and abet those who did not hear his speech?

88. I repeat that the names of those who committed atrocities were given in evidence and Kondewa was not one of them. If he was, I would have not the slightest hesitation to hold him accountable.

89. For the reasons I have given, I have come to the conclusion that no reasonable tribunal of fact could have found that Kondewa's statements had a substantial effect on the crimes in Tongo.

90. Accordingly, I would reverse the convictions under Article 6(1) for aiding and abetting murder under Count 2 and cruel treatment under Count 4, and enter a finding of Not Guilty under Counts 2 and 4. Let me end up by asking the question: having regard to the Historical Facts in this case, could it also be said that those of the International Community, as Great Britain, the United States and Nigeria, who mandated Kondewa, ECOMOG, the Civil Defence Forces and their allies

[1181] Transcript of 17 February 2005, TF2-222, pp. 119-120.

to fight for the restoration of the democratically elected Government and are, apparently, in a superior/subordinate relationship with Kondewa and the others, are guilty of War Crimes?

91. Likewise, did the ICTY investigate allegations made by Western academics and Serb politicians, who accused NATO officials of War Crimes during the 1999 bombing of a Serb TV station killing journalists, and the lethal bombing of a railway bridge whilst a train was passing over it? If it is a question of victor's justice, then, in my opinion, it must first be experimented with, or practised in a developed State like Kosovo and not in a developing and young Country as Sierra Leone. Otherwise, it is a sure and certain recipe to undermine the stability and security of Sierra Leone. And accusations of double standards might arise!

92. As Charles Margai, counsel for Kondewa eruditely put it in his plea for leniency to the Trial Chamber:

> "We thank God, My Lords, that the war is over, but this war was described and has been described as the most brutal known to mankind. We should not lose sight of that. If it were not for the sacrifice of the CDF, God knows whether some of us, including my learned friend Kamara, would be here today. That I submit, My Lords, is a factor to be considered, because otherwise, if a sentence is severe and there occurs a rebel war, whether in Sierra Leone or elsewhere,, Government militias are going to ask themselves the question: **Is it advisable for us to intervene? If we do, might we not be treated in the same manner as Allieu Kondewa and others**." [1182] Emphasis added.

93. I understand and appreciate his concerns, not only for his client, but *a fortiori,* for the overriding interests of his Country, Sierra Leone. As the Trial Chamber Judges put it, also eruditely: "**The contribution of the two Accused Persons to the establishment of the much desired peace in Sierra Leone and the difficult, risky, selfless and for a very sizeable number of their CDF/Kamajors, the supreme sacrifices that they made to achieve this through a bloody conflict, is in itself a factor that stands significantly in mitigation in their favour. In fact, the medal awarded to Moinina Fofana, after the restoration, by the reinstated President Kabbah, is a testimony of gratitude and appreciation of Sierra Leonean Society which the President incarnates.**"[1183] Emphasis added. I agree, without any reservation whatsoever. The learned Trial Chamber Judges made it abundantly clear that the mitigating factor was the fight for the restoration of the democratically elected Government, and not any far-fetched thesis about an unwarranted allegation of a so-called "just war"!

5. Disposition

94. I would grant Kondewa's Appeal in its entirety and enter a finding of Not Guilty on all the Counts for which my colleagues have him Guilty and acquit him on Counts 1, 2, 3 and 4.

IV. DISSENTING OPINION OF JUSTICE GELAGA KING AS TO SENTENCE

1. Introduction

95. On the 28th May 2008, the Appeals Chamber by a majority, Justice Gelaga King dissenting, allowed the Prosecution's Appeal in respect of Counts 1 and 3, reversed the Trial Chamber's Decision and found Fofana and Kondewa guilty on those counts. It affirmed, Justice Gelaga King, dissenting, the Trial Chamber's verdict of guilty of Counts 2 and 4.

96. On the same date the Appeals Chamber, Justices Gelaga King and Jon Kamanda dissenting, delivered a Sentencing Judgement against both Accused in respect of the Counts of which they were convicted.

11. JUSTICE GELAGA KING'S DISSENTING OPINION FROM SENTENCING JUDGEMENT

97. It will be recalled that in my Partially Dissenting Opinion I came to the conclusion that Kondewa was not guilty of any of the eight Counts charged in the Indictment. . It will be recalled also that Fofana did not appeal.

98. It is my misfortune to have to dissent, once again, from my learned colleagues. With respect, I believe that they went outside the ambit of the relevant statutory provisions relating to Penalties and Sentencing and, in my opinion, interfered, unjustifiably, with the unfettered discretion to the Trial Chamber.

2. The applicable law

99. The Statute of the Special Court, which is the primordial binding source of the Rules of Procedure and Evidence, provides as follows:

[1182] Transcript of 19 September 2007, pp 83-84

"Article 19: Penalties

1. The Trial Chamber shall impose upon a convicted person other than a juvenile offender imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone. Emphasis added.

2. In imposing sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person." Emphasis added.

100. Rule 101: Penalties, provides:

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

(i) Any aggravating circumstances;

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

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

3. The Sentences

101. The Trial Chamber, Justice Bankole Thompson dissenting, imposed multiple sentences to run concurrently for both Accused: Fofana, a total of a term of imprisonment of six years and Kondewa, eight years.[1184]

102. The Appeals Chamber, Justice Gelaga King and Kamanda dissenting, has revised the Trial Chamber's sentences as follows: Fofana, a total term of imprisonment for multiple offences to run concurrently XX years and Kondewa, XX years.[1185]

4. Prosecution's Ground 10: Sentencing

103. The Prosecution's Ground 10 is on sentencing and it is stated as in the sub-heading 3. It then goes on to contend "that the Trial Chamber erred in law and in fact, and committed a procedural

[1183] Trial Chamber Sentencing Judgement, para 91.
[1184] Trial Chamber's Sentencing Judgment, VII Disposition.

error (in the sense that there has been a discernible error in the Trial Chamber's sentencing discretion), in imposing the sentences that it did, in the case of both Accused. The errors in the Sentencing Judgment are set out below."[1186]

5. Alleged Errors of the Trial Chamber

104. The Prosecution alleged ten errors of the Trial Chamber. In errors 2 and 10, the Prosecution did not state whether they are errors in law or in fact. This infringes the provisions of Article 20(1) of the Statute which states that grounds of appeal should be on an error on a question of law invalidating the decision, and/or an error of fact which has occasioned a miscarriage of justice.[1187] I, therefore, will not consider errors 2 and 10.

105. The Appeals Chamber considered the remaining 8 errors alleged by the Prosecution and dismissed all except one – the sixth which reads: "treating the 'just cause' of the Accused as a mitigating factor."[1188]

6. Whether 'just cause' is a Mitigating Factor

106. The Appeals Chamber states that "the Trial Chamber was in error in taking into consideration 'just cause' and motive of civic duty in exercising its sentencing discretion."[1189] I disagree. It states further that the Trial Chamber proceeded on an erroneous basis and that it is entitled to revise the sentences handed down by the Trial Chamber.[1190] I disagree.

7. Whether 'just cause' was pleaded in mitigation by Kondewa

107. With the greatest respect to my learned colleagues, at no time did the Trial Chamber take into consideration 'just cause' in the way my colleagues put it, in exercising its sentencing discretion. This is palpably and factually incorrect. What in fact, the Trial Chamber took into account as a mitigating factor is the plea that:

[1185] Appeals Judgment, para. 566.
[1186] Prosecution Appeal Brief, paras 9 and 9.3.
[1187] See also, Rule 106(A), (B) and (C).
[1188] Prosecution Appeal Brief, para. 4.
[1189] Appeals Judgment, para. 554.
[1190] Ibid, para. 555.

> "[t]he acts of the Accused and those of the Kamajors for which they have respectively been found guilty, did not emanate from a resolve to destabilise the established Constitutional Order. Rather, and on the contrary, the CDF/Kamajors was a fighting force that was mobilised and was implicated in the conflict in Sierra Leone to support a legitimate cause which, as we have already seen, was to secure the democratically elected Government of President Kabbah, which had been illegally ousted through a Coup d'Etat orchestrated and carried out on the 25th of May 1997, by a wing of the Sierra Leone Armed Forces that later constituted and baptised itself as the Armed Forces Revolutionary Council (AFRC)."[1191]

108. In the above quote, there is no mention of 'just cause' which only appears when the Trial Chamber was commenting on the defence of 'Necessity' which had been propounded by Justice Bankole Thompson in his Dissenting Opinion. This is what the Trial Chamber said:

> "The Chamber further opines that validating the defence of Necessity in International Criminal Law would create a justification for what offenders may term and plead as a 'just cause' or a 'just war' even though serious violations of International Humanitarian Law would have been committed. This we observe, would negate the resolve and determination of the International Community to combat these crimes which have the common characteristics of being heinous, gruesome or degrading of innocent victims or of the civilian population that it intends to protect."[1192]

109. At the trial, the Accused did not put forward a defence of necessity – it was raised by Justice Thompson in his Dissenting Opinion. In any event, it is my considered opinion that it was wrong for the majority of the Trial Chamber to purport to sit, as if it were an Appeals Chamber, in judgement of Justice Thompson's Opinion as to Necessity as a defence. That right and privilege belong exclusively to the Appeals Chamber. All the Judges of the Trial Chamber are of coeval jurisdiction and they are, therefore, not competent to pass judgement on each other's opinion.

110. Let me give another conclusive example of what the Trial Chamber deems to be a mitigating circumstance, if only to prove that it was not 'just cause' as my colleagues, with respect, erroneously held to be the case. The passage is referred to by my colleagues as well.[1193] The Trial Chamber held that "although the commission of these crimes transcends acceptable limits, albeit in defending a cause that is palpably just and defendable, such as acting in defence of constitutionality by engaging in a struggle or a fight that was geared towards the restoration of the ousted

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[1191] Trial Chamber Sentencing Judgment, para. 62.
[1192] Ibid, para. 79.
[1193] Ibid, para. 521.

democratically elected Government of President Kabbah, it certainly, in such circumstances constitutes a mitigating circumstance in favour of the two Accused persons."[1194] Emphasis added

8. Whether Recourse was had to Individual Circumstances of the Accused

111. In paragraph 98 *supra,* I referred to Article 19(1) and 19(2) of the Statute. The Trial Chamber, in determining the terms of imprisonment shall, as appropriate, have recourse to the practice regarding prison sentences in the ICTR and national courts of Sierra Leone. It should take into account, not only the gravity of the offence, but also, the individual circumstances of the convicted person. Emphasis added.

112. Significantly, unlike Article 20(3) of the Statute, which provides that Appeals Chamber shall be guided by the decisions of the Appeals Chamber of the ICTY and the ICTR, there is no requirement in Article 19(1) that the Trial Chamber shall have recourse to the practice regarding prison sentences in ICTY.

113. It follows, therefore, that in exercising its sentencing discretion the Trial Chamber shall have recourse, not to ICTY, but to ICTR and Sierra Leone national courts, where appropriate and consider, *inter alia*, the individual circumstances of the Accused.

114. Having considered the individual circumstances of the Accused[1195] such as: remorse, lack of formal education or training, subsequent conduct, lack of prior convictions and historical background, the Trial Chamber found as follows:

(i) "There is nothing in the evidence which demonstrates that either Fofana or Kondewa joined the conflict in Sierra Leone for selfish reasons. Infact, we have found that both Fofana and Kondewa were among those who stepped forward in the efforts to restore democracy to Sierra Leone and for the main part, they acted from a sense of civic duty, rather than for personal aggrandisement or gain. This factor in addition to others that have been raised in this Judgment has for each of them, significantly impacted to influence the reduction of the sentence to be imposed for each count."[1196]

[1194] Ibid, para. 86.
[1195] Ibid, paras 83-84.
[1196] Ibid, para. 94.

(ii) "The acts of the Accused and those of the CDF/Kamajors for which they have respectively been found guilty did not emanate from a resolve to distabilise the established Constitutional Order."[1197]

(iii) "These historically traditional hunters, from the evidence adduced, were comrades in arms with the regular Sierra Leone Armed Forces as early as from the outbreak of the rebel war. They acted as guides to the regular Army and facilitated the war against the rebels. Indeed, even the military regime of the NPRC that seised power in a military Coup in 1992, used them to fight against the rebels, and to protect the Constitutional Institutions of Sierra Leone. In this process and in defence of their communities, the local chiefs mobilised, enlisted and initiated their young and fit ones, into the Kamajor Society with the sole objective of combating the rebels and preventing the brutal killings of their kith and kin, and other atrocities, in addition to protecting their land and their properties."[1198]

(iv) "It should be recognized however, that the crimes for which the Chamber has convicted them are grave and very serious, but what, in a sense atones for this vice is the fact that the CDF/Kamajors fighting forces of the Accused persons, backed and legitimized by the internationally deployed force, the ECOMOG, defeated and prevailed over the rebellion of the AFRC that ousted the legitimate Government. This achievement, the Chamber notes, contributed immensely to re-establishing the rule of law in this Country where criminality, anarchy and lawlessness, which the United Nations sought to end and was determined to achieve in adopting Security Council Resolution 1315 (2000), had become the order of the day."[1199]

115. I opine that from the passages quoted, a reasonable person will inevitably come to the conclusion that the Trial Chamber meticulously, exhaustively, comprehensively, justly and even-handedly 'took into account', not only the gravity of the offence, but 'the individual circumstances' of the convicted person.[1200]

[1197] Ibid, para. 83.
[1198] Ibid, para. 84.
[1199] Ibid, para. 87.
[1200] Article 19(2) of the Statute.

1203

116. The Trial Chamber correctly applied the provisions of Article 19 of the Statute. This is why it is impossible for me to agree with my learned colleagues when they say: "in view of the findings that the Trial Chamber has taken into consideration factors which it should not have considered in the exercise of its sentencing discretion, the Appeals Chamber will substitute its own discretion without the need to pronounce on the Prosecution's complaint that the sentence was manifestly inadequate."[1201]

117. With respect, I do not agree that the Trial Chamber did any such thing. On the contrary, having regard to the provisions of Article 19(1) of the Statute, it is my learned colleagues who, contrary to those provisions, went on to conduct "examination of several legal traditions"[1202] in Australia, United Kingdom and Canada. In effect, what my learned colleagues have done is, with respect, to usurp the discretionary powers of the Trial Chamber, when the Appeals Chamber says it will substitute its own discretion for that of the Trial Chamber's.

118. It follows from all I have said that I find the Prosecution's Ground of Appeal against sentence untenable and I dismiss it.

V. DISPOSITION

I accordingly disagree with the Decision of the majority to increase the terms of imprisonment of Fofana and Kondewa.

Done at Freetown, this 28th Day of May, 2008

Hon. Mr. Justice George Gelaga King, GORSL

[1201] Appeals Chamber Judgment, para. 553
[1202] Ibid, paras 547-531.

VII. PARTIALLY DISSENTING OPINION OF HONOURABLE JUSTICE RENATE WINTER

A. Introduction

1. Introducing my partially dissenting opinion, I would like to comment on a few general matters that have come to my mind during my evaluation of legal issues in regard to the appeals process of this case.

2. First and foremost, I consider it a primordial duty of an Appeals Chamber to address parties' arguments that raise important issues of law or fact that bear on the innocence or guilt of an accused or the fairness of the trial, even on the basis that either the parties' pleadings are defective or that it would be an academic exercise which maybe perceived as unnecessary to consider a given ground of appeal, as a possible remedy was not sought by a party. It seems to me that it is a key function of an Appeals Chamber to clarify legal issues, to provide guidance where appropriate to trial chambers and to remedy errors of facts in the interest of the parties as well as in the interest of justice.

3. I, furthermore, deem it necessary to state that to evaluate evidence and findings using an overall approach is the right and the duty of an Appeals Judge (and not only of an Appeals Judge). I will not accept that evidence and findings relevant for one ground of appeal cannot be used for another one if relevant there as well, for the sole reason that they have not been properly raised by a party. An indictment, a decision and a judgement have, in my view, always to be looked at as a whole.

4. The Special Court for Sierra Leone, being a "hybrid" international criminal court, must never look into the "righteousness" of any particular political cause. Not being a domestic court, it cannot also accept any cultural consideration as excuses for criminal conduct. The principle of individual criminal responsibility requires that an accused be held responsible for his acts or omissions, whatever his status. In the case where concrete acts or omissions of an accused have an impact on the commission of the crime in question, it is irrelevant, for instance, if this accused believes that he has supernatural powers or if he uses the cultural superstitions of people involved.

5. As to sentencing, it is not only important in my view to state which mitigating or aggravating circumstances might apply in determining the appropriate sentence. It is also mandatory for a court for both mitigating and aggravating circumstances, to evaluate their specific

weight. There are, for example, mitigating circumstances that are purely formal in the context of the Sierra Leone armed conflict, such as a clear criminal record in a time where the rule of law (police administration, prosecution and trials at court) existed to a lesser extent in several parts of the country. I believe that a sentencing judgement has to address this issue, in order to clarify for the convicted persons as well as for the public concerned the reasons for which the specific punishment has been pronounced.

6. With these considerations in mind, I must dissent from the Majority's Decision on Grounds Five (child soldiers) and Six (collective punishments -partially) of Kondewa's Appeal and Grounds Five (child soldiers) and Eight (amendment of the Indictment to charge sexual crimes), and Ten (sentence-partially) of the Prosecution's Appeal.

B. Kondewa's Fifth Ground of Appeal and Prosecution's Fifth Ground of Appeal

1. Introduction

7. I do not agree with the Majority's decisions first, to acquit Kondewa for liability under Article 6(1) of the Statute for "committing" the crime of enlisting Witness TF2-021, a child under the age of 15 into an armed force or group;[1203] second, in finding that "it cannot consider any evidence or pronounce a verdict on whether Kondewa aided and abetted the 'use' of child solders;" and third, in finding Fofana not guilty of aiding and abetting the use and enlistment of child soldiers.

2. Kondewa's Liability for Enlistment and Use of Children

(a) Kondewa's Fifth Ground of Appeal: Enlistment of Witness TF2-021

8. In this Judgment, the Majority overturns the Trial Chamber's finding that Kondewa was guilty of enlisting Witness TF2-021 into the CDF. In overturning the Trial Chamber's decision, the Majority finds that:

> "[I]t is clear that the enlistment of Witness TF2-021 had taken place before he was initiated by Kondewa. The evidence shows that the Witness had first been captured by

[1203] Enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities," an other serious violation of international humanitarian law punishable under Article 4.c. of the Statute.

1206

the rebels in 1995 and was later captured by the CDF in 1997. Upon his capture by the CDF, Witness TF2-021 was forced to carry looted property by the CDF."[1204]

9. I do not agree with this interpretation and analysis on the facts of this particular case. In finding that the act of forcing Witness TF2-021 to carry looted property constituted enlistment, the Majority misapplies the concept of enlistment as it relates to the circumstances surrounding the CDF's recruitment of children under the age of fifteen.[1205] While I agree that in certain circumstances the "use" of a child soldier may constitute enlistment, based on the Trial Chamber's findings of facts in relation to Witness TF2-021, this particular "use" could not have constituted enlistment.

10. Article 4.c. of the Statute punishes "***conscripting or enlisting*** children under the age of 15 years into armed forces or groups or ***using*** them to participate actively in hostilities" (emphasis added). Our earlier interlocutory decision in this case held that conscripting and enlisting children under the age of fifteen into an armed force or group and/or using children to participate actively in hostilities is prohibited under customary international law.[1206]

11. Enlistment entails "accepting and enrolling individuals when they volunteer to join an armed force or group."[1207] As the Majority points out, it includes any conduct accepting the child as part of an armed force or group. In my opinion, the key test to determine whether an act in question

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[1204] CDF Appeal Judgment, para. 142.

[1205] *Ibid.*

[1206] Child Recruitment Decision, para. 18. Article 4(3)(c) of Additional Protocol II provides that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups *nor allowed to take part in hostilities*," which would appear to proscribe the "use" of child soldiers (italics added). The Appeals Chamber found that this formed part of customary international law.

[1207] AFRC Trial Judgment, para. 735. The Majority found that the "act of enlisting presupposes that the individual in question voluntarily consented to be part of the armed force or group." *See also* CDF Appeal Judgment, para. 140. The Trial Chamber, on the other hand, found that the term "enlistment" encompasses both voluntary enlistment and forced enlistment, although some Trial Chambers have found that there is a distinction between conscription and enlistment, conscription being forcible recruitment and enlistment pertaining to more voluntary recruitment. AFRC Trial Judgment, para. 735 (enlistment is a voluntary act); *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, International Criminal Court Decision on the Confirmation of Charges, 29 January 2007, paras 246-247 (conscription and enlistment are two forms of recruitment...enlisting is a voluntary act, whilst conscripting is forcible recruitment.). I am of the opinion that any distinction between conscription and enlistment is of little practical significance in the context of armed conflict, especially because a child's consent cannot be a valid defence to the crime.

constitutes enlistment is whether the act substantially furthers the process of a child's enrolment and acceptance into an armed force or group.

12. In finding that Kondewa's initiation of Witness TF2-021 did not constitute enlistment, the Majority implicitly considers that only one act could constitute enlistment. I disagree with this proposition and find that enlistment may in some circumstances be a process involving several acts which may substantially further the enrolment and acceptance of a child under the age of fifteen into an armed force or group. Religious initiation, military training and the signing of a certificate declaring a child fit for combat may all be acts that substantially further a child's enlistment. In other circumstances, enlistment may be a very short process and may constitute a single act, such as abducting a child and giving him/her a gun. In certain armed forces or groups there may be no clear record of a child's enlistment, but there may be several instances of the "use" of a child.

13. In the situation where there are no formal or informal processes for enlisting individuals, especially children, the "use" of a child to participate actively hostilities may amount to enlistment. However, where the evidence demonstrates the existence of a process that contributes to the enrolment and acceptance of a child into an armed force or group, logic dictates that "use" of a child cannot constitute enlistment. Accordingly, the types of acts which constitute the crime of enlistment must necessarily depend on the particular circumstances of each case.

14. In the CDF, as opposed to AFRC, the Trial Chamber findings demonstrate a clearly defined enlistment process which consisted of a child receiving ritualized initiation and military training. Although the purpose of this procedure changed as the war evolved, initiation and military training remained the cornerstones of enlistment in the CDF at all times during the conflict.[1208]

15. The Trial Chamber's findings and the evidence in the trial record reveal that the initiation of Witness TF2-021 and the other twenty boys was a major part of the process of enrolling them and accepting them into the CDF. Witness TF2-014 testified that Kamajors went to war at an early age provided that they had been initiated.[1209] Expert Witness TF2-EW2 testified that initiation was a stepping stone to recruitment as a soldier because it was used as a means to prepare men and young

[1208] CDF Trial Judgment, para. 315. ("After the Coup,...[t]he primary purpose of the initiation was still to prepare the fighters for the war and to receive the protection against bullets by immunisation.")
[1209] CDF Trial Transcript, 11 March 2005, pp. 15-16.

boys to participate in the fighting groups.[1210] The Trial Chamber, nonetheless, acknowledged that initiation into the Kamajor society alone did not always amount to enlistment,[1211] and therefore, was very careful to evaluate whether a particular instance of initiation amounted to enlistment.[1212]

16. In the circumstances of Kondewa's initiation of Witness TF2-021 and the twenty boys around his age, the Trial Chamber considered the following evidence:

> In 1997, when the witness was eleven years old he was captured by Kamajors and forced to carry looted property. The Kamajors subsequently took him to Base Zero for initiation.
>
> 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.[1213]

17. The Trial Chamber concluded that the evidence clearly showed that on this occasion, the initiates had become fighters."[1214] The Trial Chamber also found Witness TF2-021 was eleven years old when he was initiated by Kondewa.

18. The Trial Chamber also found that Kondewa knew or had reason to know he was initiating an eleven year old boy into the CDF because Kondewa regularly performed initiation ceremonies, issued certificates confirming *e.g.* the age of eleven[1215] and would have known the difference between an eleven year old boy and a fifteen year old boy.[1216] On the basis of these findings, it is clear that Kondewa's initiation of Witness TF2-021 in 1997 was the condition *sine qua non* for Witness TF2-021's enrolment and acceptance into the CDF. Therefore, it was reasonable for the

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[1210] CDF Trial Judgment, para. 969, fn 1576; CDF Trial Transcript. 16 June 2005, Closed Session, p.91.
[1211] CDF Trial Judgment, para. 969.
[1212] *Ibid.* (The Chamber 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 have said to have been enlisted into an armed force or group.)
[1213] CDF Trial Judgment, para. 968(i)-(iii).
[1214] CDF Trial Judgment, para. 970.
[1215] CDF Trial Judgment, para. 721(viii).
[1216] CDF Trial Judgment, para. 970.

Trial Chamber to conclude that given these circumstances, when Kondewa was initiating the boys "he was also performing an act analogous to enlisting them for active military service."[1217]

19. Furthermore, the act of carrying looted property that the Majority of the Appeals Chamber finds constituted enlistment, cannot be deemed as conduct accepting a child into an armed group or force. When Witness TF2-021, upon his capture in 1997, was forced to carry looted property by the CDF, he was not participating in active hostilities or in any activity that involves the CDF as a military organization, but was instead being forced to assist CDF soldiers in the illegal appropriation of property for the soldiers' private use. Nothing in the evidence indicates he (or the soldiers for whom he was carrying looted property) was participating actively in hostilities. Looting is a term of art used by international courts to denote the appropriation of property for private purposes rather than military necessity.[1218] The Trial Chamber understood looting to refer to the appropriation of property for private purposes.[1219] This act of carrying loot, therefore, could not have constituted enlistment into an armed force or group or the use of a child to participate actively in hostilities because it was done for private purposes.

20. I, therefore, dismiss Kondewa's Fifth Ground of Appeal and affirm the Trial Chamber's conviction of Kondewa for committing the crime of enlistment of Witness TF2-021 into the CDF, punishable under Articles 4.c. and 6(1) of the Statute.

3. Prosecution's Fifth Ground of Appeal: Kondewa's Responsibility For Enlisting Children (More Than One) Under Age of Fifteen Years into an Armed Force Or Group

21. Having concluded that the evidence established beyond a reasonable doubt that Kondewa committed the crime of enlisting *a child* under the age of 15 into an armed force or group,[1220] I am of the opinion that the Trial Chamber should also have found Kondewa guilty of committing the crime of enlisting more than one child. The Trial Chamber found that Kondewa initiated Witness TF2-021 along with around twenty other young boys. Witness TF2-021 testified that he estimated

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[1217] CDF Trial Judgment, para. 970.
[1218] *Simić* Trial Judgment, para. 98.
[1219] CDF Trial Judgment, para. 676 ("After the shooting had subsided, TF2-021 and other Kamajors looted tapes, bicycles and clothing.")
[1220] CDF Trial Judgment, para. 971.

the boys to be in *almost* the same age group as him, that means slightly younger than him.[1221] The Trial Chamber also found "beyond a reasonable doubt that Kondewa, in these circumstances, when initiating the *boys*, was also performing an act analogous to enlisting them for active military service."[1222]

22. On the basis of these findings alone, the Trial Chamber was required to enter a conviction against Kondewa for enlisting children rather than only Witness TF2-021.

23. The Majority of the Appeals Chamber concluded as well that in the absence of evidence concerning the age of the other boys, no reasonable trier of fact could have found the testimony of Witness TF2-021 sufficient to establish the age of the twenty young boys. However, as mentioned before, Witness TF2-021 testified that he estimated the boys to be in *almost* the same age group as him.[1223] Given that Witness TF2-021 was eleven when Kondewa initiated him, it is therefore logical and reasonable to conclude that the other twenty boys were younger than fifteen. The Trial Chamber found no reason to doubt his testimony. On the contrary, the Trial Chamber found that his testimony was "highly credible and largely reliable," and that the "intensity of his experience has left him with an indelible recollection of the events in question."[1224] In light of the fundamental principle that a Trial Chamber is in the best position to evaluate and assess the evidence, I find that the Majority's conclusion is without merit.

24. Other Trial Chamber findings circumstantially show that Kondewa initiated many more than 20 boys under the age of 15 and that these initiations qualified as enlistments into armed forces. In addition to the testimony given by Witness TF2-021, the Trial Chamber also accepted the evidence provided by two other former child soldiers who underwent initiation before participating in active military service.[1225] The Trial Chamber found that Witness TF2-140 was initiated into the Kamajor society at the age of 14 along with adults as well as other children who were 10 or 11 years old.[1226] Initiation fees were paid to the district initiator who then sent the fees to Kondewa, the High Priest

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[1221] CDF Trial Judgment, para. 968(ii); Transcript, 2 November 2004, TF2-021, pp. 38-39 ("I was older than some of them and we were of the same age as others").
[1222] CDF Trial Judgment, para. 970 (emphasis added).
[1223] CDF Trial Judgment, para. 968(ii); Transcript, 2 November 2004, TF2-021, pp. 38-39.
[1224] CDF Trial Judgment, para. 282.
[1225] CDF Trial Judgment, paras 667, 673, 683-687, 958, 964, 968.
[1226] CDF Trial Judgment, para. 668.

of the Kamajors who was responsible for all of the initiators.[1227] The Trial Chamber also found that Witness TF2-004 was initiated at Liya by Muniro Sherif along with many others, including children as young as 10 years old.[1228] On the same day that he was initiated, TF2-004 left Liya to go fight in Zimmi.[1229] The purpose of the initiation was to fight the war.[1230]

25. Furthermore, the Trial Chamber found that the CDF as an organization was involved in the recruitment of children under the age of 15 into an armed force or group.[1231] In particular, in 1999, the CDF registered over 300 children under the age of 14 in a disarmament, demobilization and reintegration program in the Southern Province in Sierra Leone.[1232]

26. The Trial Chamber found that Kondewa performed initiations at Base Zero where he was present during its entire existence and where numerous child soldiers were also present.[1233] The Trial Chamber also found that Kondewa used child soldiers as body guards at Base Zero.[1234]

27. Given that Kondewa, as the High Priest of the entire CDF organisation, accepted initiation fees of children under the age of 15 years,[1235] was the head of all CDF initiators, performed initiations at Base Zero and the fact that no Kamajor would go to war without his blessings,[1236] Kondewa must have either personally, or through an initiator subordinate to him, enlisted many children under the age of 15 years into the CDF. In light of this evidence, I find that no reasonable trier of fact could have failed to conclude that the only reasonable inference from the evidence was that Kondewa enlisted many children under the age of 15 years into the armed forces.

28. I, therefore, hold that the Trial Chamber erred in failing to find that Kondewa enlisted children into the CDF and grant the Prosecution's Fifth Ground of Appeal in this respect and enter a conviction for Kondewa for enlisting many children into the CDF.

[1227] *Ibid.*
[1228] CDF Trial Judgment, para. 685.
[1229] *Ibid.*
[1230] *Ibid.*
[1231] CDF Trial Judgment, para. 688, 962.
[1232] CDF Trial Judgment, para. 688(i).
[1233] CDF Trial Judgment, para. 958(ii) (The Trial Chamber found that child fighters were present at various times at Base Zero); CDF Trial Judgment, paras 347 (TF2-079 testified that he saw children between 10 and 14 present in Base Zero).
[1234] CDF Trial Judgment, para. 688(a).
[1235] CDF Trial Judgment, para. 685.
[1236] CDF Trial Judgment, para. 721(vii).

4. Prosecution's Fifth Ground of Appeal: Kondewa's Liability for Aiding and Abetting the Use of Child Soldiers

29. In relation to Kondewa's liability for aiding and abetting the "use" of child soldiers, the Majority finds that it cannot consider any evidence or pronounce a verdict on whether Kondewa was liable for the "use" of child soldiers because the Trial Chamber declined to examine this issue. The Appeals Chamber corrected the Trial Chamber's error of law in considering that the Trial Chamber should have considered the evidence on the alternative charge. In light of the standard of appellate review, the Appeals Chamber was in a position to consider existing evidence concerning Kondewa's "use" of child soldiers, especially where the Trial Chamber had made findings demonstrating Kondewa's aiding and abetting the "use" of child soldiers.[1237] Therefore, I find the Majority's statement misplaced. I now turn to the merits of the Prosecution's appeal.

30. As demonstrated above, Kondewa initiated many children under the age of fifteen into the CDF. The Trial Chamber findings show that Kondewa was aware in performing these initiations for children that the purpose of initiation of many of the children was to prepare them to become fighters. Initiations were of paramount importance in Kamajor society as a prerequisite to participation in active military service. No Kamajor would go to war without Kondewa's blessings.[1238] Moreover, Kondewa's job included the preparation of herbs which the initiates smeared onto their bodies to protect themselves from bullets.[1239] He himself told initiates that the initiation would make them powerful for fighting.[1240] Furthermore, he also knew or had reason to know as demonstrated already that the children were under the age of fifteen years.[1241] On the basis of this evidence, I am also satisfied that Kondewa's initiation of these children offered practical assistance to the CDF's "use" of children under the age of fifteen to participate in active hostilities and that it had a substantial effect on the commission of this crime.

[1237] *Stakić* Appeal Judgment, para. 9; *Kvočka* Appeal Judgement, para. 17; *Kordić* Appeal Judgement, para. 17; *Blaskić* Appeal Judgement, para. 15. (Where the Appeals Chamber finds an error of law in a Trial Judgment arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.)

[1238] CDF Trial Judgment, para. 721(vii).

[1239] CDF Trial Judgment, para. 345.

[1240] CDF Trial Judgment, para. 968(ii).

[1241] CDF Trial Judgment, para. 970. (The Trial Chamber found that "there can be no mistaking of a boy of eleven years old for a boy of fifteen years old, especially for a man such as Kondewa who regularly performed initiation ceremonies.")

31. Therefore, I find that the Trial Chamber and the Majority of the Appeals Chamber erred in failing to find Kondewa liable for aiding and abetting the use of children under the age of 15 to participate actively in hostilities. I grant the Prosecution's Fifth Ground of Appeal in this respect and I enter a conviction accordingly.

5. Prosecution's Fifth Ground of Appeal: Fofana's Liability for Enlistment and Use of Child Soldiers

32. The Majority declines to address the merits of the Prosecution's argument under this sub-ground of appeal because the Prosecution "merely proffers arguments based on evidence which the Trial Chamber considered and rejected, but does not point to any error in the reasoning of the Trial Chamber."[1242] I cannot agree with the Majority's position.

33. In paragraphs 4.5 to 4.26 of the Prosecution's Appeal Brief, the Prosecution sets forth in great detail the Trial Chamber's factual findings and other evidence in the trial record and more importantly demonstrates that these findings indicate that the Trial Chamber erred in fact in finding that Fofana was not guilty of aiding and abetting the enlistment and use of children under the age of fifteen to participate actively in hostilities.[1243] I now turn to the merits of the Prosecution's appeal.

34. Based on the Trial Chamber's findings, in my opinion, no reasonable trier of fact could have come to any conclusion other than that Fofana was aware that children were both enlisted in the CDF and "used" to participate actively in hostilities. Fofana was present at the passing out parade in early January 1998, where children involved in operations were present.[1244] At a subsequent commander's meeting held on the same day, where Fofana was present,[1245] Norman commented that "adult fighters were doing less than children, just eating and looting."[1246] Children were present at this meeting.[1247] Fofana also was one of the architects of the Black December

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[1242] CDF Appeal Judgment, para. 152.
[1243] Prosecution Appeal Brief, paras 4.5-4.26.
[1244] CDF Trial Judgment, para. 323; CDF Trial Transcript of 19 November 2004, pp.88-89 (children participated in Black December operation, carrying guns and fighting like fighters, and in food finding operations.)
[1245] CDF Trial Judgment, para. 721(xi).
[1246] CDF Trial Judgment, para. 958.
[1247] CDF Trial Judgment, para. 689.

Operation,[1248] an operation where children were present everywhere on the frontlines and in support roles.[1249] The Trial Chamber also found that Fofana was present at Base Zero for its entire existence, and was the overall boss of Base Zero and that child soldiers were present at various times at Base Zero.[1250] At Base Zero, Kondewa also initiated children into the CDF, and the child initiates were trained for war there.[1251]

35. Moreover, child soldiers were present throughout CDF operations. Children who appeared to be under the age of fifteen years were conscripted, enlisted, or used to participate actively in hostilities in the following locations: Kenema, Base Zero, Bo, Daru, Masiaka, Port Loko, Yele, and Ngiehun.[1252] They participated directly in combat, often leading the Kamajors into combat, and they served at monitoring checkpoints.[1253] Thus, the only conclusion available to any reasonable Trial Chamber is that Fofana knew that children under the age of fifteen were being enlisted and used to participate actively in hostilities because Fofana, was the 'Director of War' for the CDF. He was part of the High Command and actually made many decisions along with Norman and Kondewa and was the overall boss of the Commanders at Base Zero.[1254] Significantly, he was also the one responsible for the receipt and provision of logistics to the frontline, including the provision of manpower.[1255] Given that he had to have known that the CDF was enlisting and "using" children in active military service, his provision of logistics, manpower, and strategic directions provided practical assistance and had a substantial effect on the commission of the crime of enlisting and using children under the age of fifteen to participate actively hostilities.

36. Therefore, no reasonable trier of fact could have found that Fofana aided and abetted the commission of this crime.

[1248] CDF Trial Judgment, para. 340.
[1249] CDF Trial Transcript of 19 November 2004, pp.88-89 (children participated in Black December operation, carrying guns and fighting like fighters, and in food finding operations.)
[1250] CDF Trial Judgment, para. 721(vi).
[1251] CDF Trial Judgment, paras 920, 958, and 970. In paragraph 970, the Trial Chamber found that Kondewa initiated Witness TF2-021, who was eleven years old at the time, and 20 other boys of the same age and this initiation amounted to the crime of enlisting a child under the age of 15 into an armed force or group.
[1252] CDF Trial Judgment, para. 688.
[1253] CDF Trial Judgment, para. 688a)-(i).
[1254] CDF Trial Judgment, para. 721(vi).
[1255] CDF Trial Judgment, paras 342 and 721(i)-(vii).

37. Furthermore, there is ample evidence in the trial record that Fofana, as a leader in the High Command of the CDF, did not take a stand in public or at any of the commanders' meetings against the enlistment or use of children under the age of 15 in military activities. Although Fofana did not enlist or use child soldiers personally, I am satisfied that his high position within the CDF command structure and his physical presence at meetings where child soldiers were either present or were discussed, constituted tacit approval, encouragement and moral support to the commanders and Kamajors to continue to enlist and use children under the age of 15 to participate actively in hostilities.[1256] Fofana's tacit approval served to leave no doubt in the minds of the Kamajors that they enjoyed his full support in their enlistment and use of child soldiers. I am thus satisfied that Fofana's conduct had a substantial effect on the commission of this crime.

38. I, therefore, grant the Prosecution's Fifth Ground of Appeal in this respect as well and find Fofana responsible under Article 6(1) for aiding and abetting the crimes of enlistment of children under the age of 15 into armed forces or groups and the use of children under the age of 15 to participate actively in hostilities, crimes punishable under Article 4.c. of the Statute.

6. Conclusion

39. For the foregoing reasons I dismiss Kondewa's Fifth Ground of Appeal and grant the Prosecution's Fifth Ground of Appeal in its entirety.

C. Kondewa's Sixth Ground of Appeal: Cumulative Convictions

1. Introduction

40. In paragraph 160 of Kondewa's Sixth Ground of Appeal,[1257] he submits that:

[1256] See *Brđanin* Appeal Judgment, para. 273. ("An accused can be convicted of aiding and abetting a crime when it is established that his[/her] conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the commission of the crime.... In the cases where this category was applied, the accused held a position of authority, he was physically present on the scene of the crime, and his non-intervention was seen as tacit approval and encouragement.")

[1257] For ease of reference, I adopt the Majority's numerology for Kondewa's grounds of appeal. Thus, although the Kondewa Appeal Brief, the Prosecution Response Brief and Kondewa Reply Brief refer to this issue as Kondewa's Fifth Ground of Appeal, I have called it his Sixth Ground of Appeal as was done in the Kondewa Notice of Appeal.

> "[t]he Majority of the Trial Chamber erred in law in entering convictions under Count 7 as well as under Counts 2-5 stating it was permissible to do so even where the underlying facts for the conviction are the same."[1258]

41. The gravamen of Kondewa's submissions on this ground, as he elaborates in the subsequent paragraphs of his appeal, is 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."[1259] Kondewa submits that because of the manner in which the crimes are alleged in the Indictment, the acts constituting "punishment" under Count 7 are based on same underlying conduct alleged in Counts 2, 4 and 5 of the Indictment. Thus, according to him, "the crimes of Counts 2, 4 and 5 are absorbed into Count 7."[1260]

42. Though inartfully phrased, Kondewa's entire submission in this ground concerns whether the Trial Chamber could enter cumulative convictions for murder, cruel treatment, pillage and collective punishments. I agree with the Majority that "because each of these crimes requires proof of materially distinct elements, cumulative convictions are permissible in this instance."[1261] In my view, Kondewa's Sixth Ground of Appeal should be rejected on that basis alone.

43. For the reasons set out in the following paragraphs, I disagree with Majority holding on this ground.

2. Whether Kondewa Raised The Argument On Appeal

44. Although there is no appeal against the finding of guilt for collective punishment as such, the Majority endeavors to correct a purported error of law notwithstanding that the Parties do not allude to or brief the question. Kondewa advances no arguments *whatsoever* regarding any error of law in the definition of the elements of the crime "collective punishments." In my view, it is unusual for an Appeals Chamber to undertake to define the elements of a crime without the parties having raised it on appeal.

45. Nonetheless, I recognize that in the case of an error of law the Appeals Chamber has the discretionary power to correct the error *proprio motu* if the interests of justice so require. The

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[1258] Kondewa Appeal Brief, para. 160.
[1259] Kondewa Appeal Brief, para. 168.
[1260] Kondewa Appeal Brief, para. 173.
[1261] CDF Appeal Judgment, para. 225.

interests of justice are particularly acute when an accused has been convicted of a crime as a result of legal error. In such instances, I endorse the Appeals Chamber's discretionary exercise of its inherent powers as the final appellate body. Nevertheless, for the reasons that follow, the Trial Chamber's error of law does not invalidate the convictions.

3. Whether 'Collective Punishments' Is A Specific Intent Crime

46. I agree with the Majority that collective punishments is a specific intent crime, however, in my view, the elements are more clearly defined as: (i) an indiscriminate sanction directed against protected persons for their perceived conduct;[1262] and (ii) the specific intent to punish persons or groups of persons collectively for their perceived conduct.

47. Having found an error of law, the Majority determined that it "must . . . re-examine the Trial Chamber's factual findings on collective punishments in light of the Appeals Chamber's definition

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[1262] Geneva Convention IV, Art. 33 states in relevant part, "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." The ICRC Commentary to this provision states in part: "The first paragraph embodies in international law one of the general principles of domestic law, *i.e.*, that penal liability is personal in character. This paragraph then lays out a prohibition on collective penalties. This does not refer to punishments inflicted under penal law, *i.e.*, sentences pronounced by a court after due process of law, but *penalties of any kind inflicted on persons or entire groups of persons*, in defiance of the most elementary principles of humanity, for acts that these persons have not committed"(p. 225). Additional Protocol II, Art. 4 states in relevant part, "(2) Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: . . . (b) collective punishments." The ICRC Commentary for this provision states in part, "[The concept of collective punishment] should be understood in its widest sense, and concerns not only penalties imposed in the normal judicial process, but also *any other kind of sanction* (such as confiscation of property) as the ICRC had originally intended. The prohibition of collective punishments was included in the article relating to fundamental guarantees by consensus. That decision was important because it is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation. In fact, to include the prohibition on collective punishments amongst the acts unconditionally prohibited by Article 4 is virtually equivalent to prohibiting 'reprisals' *against protected persons*." (p. 1373) *See also* Art. 50 of the 1907 Hague Regulations which states, "[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible"; and Geneva Convention III, Art. 87, third paragraph which states in relevant part, "[c]ollective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden."

of the elements of this crime."[1263] This application of the standard of review by the Majority is inexplicably inconsistent with the Majority's approach to the review of the legal errors found in Kondewa's Fifth Ground of Appeal in relation to the enlistment and use of child soldiers.[1264] In principal, I support the approach to appellate review taken by the Majority here, however, I believe it is important to enunciate and apply a consistent standard.

48. In my view, when the Appeals Chamber establishes that the Trial Chamber erred in law, it is necessary for the Appeals Chamber to apply the corrected law to the factual findings of the Trial Chamber. When the legal error found by the Appeals Chamber creates a requirement for an additional factual finding before a conviction of guilt can be entered, the Appeals Chamber must establish that it is convinced beyond reasonable doubt that the additional legal requirement is satisfied before the conviction is affirmed on appeal.

49. Here, the legal error described by the Majority only creates an additional requirement with respect to the *mens rea* for collective punishments, therefore, the Appeals Chamber must give deference to the Trial Chamber's findings on the *actus reus* of collective punishments.

4. Whether The Factual Findings Prove Collective Punishments

50. With respect to collective punishments, the Trial Chamber found the following:

(i) In relation to the commission of murder and cruel treatment in Tongo, the Trial Chamber found both Fofana and Kondewa liable pursuant to Article 6(1) for aiding and abetting in the preparation of the commission of collective punishments under Count 7.[1265]

(ii) In relation to the commission of murder and cruel treatment in Koribondo, the Trial Chamber found Fofana liable as a superior, pursuant to Article 6(3), for the commission of collective punishments under Count 7.[1266]

[1263] CDF Appeal Judgment, para. 226.
[1264] CDF Appeal Judgment, para. 133.
[1265] CDF Trial Judgment, paras 763-764.
[1266] CDF Trial Judgment, para. 798.

(iii) In relation to the commission of murder, cruel treatment and pillage in Bo District, the Trial Chamber found Fofana liable as a superior pursuant to Article 6(3), for the commission of collective punishments under Count 7.[1267]

(iv) In relation to the commission of murder, cruel treatment and pillage in Bonthe District, the Trial Chamber found Kondewa liable as a superior pursuant to Article 6(3), for the commission of collective punishments under Count 7.[1268]

51. According to the Majority, the Trial Chamber's numerous findings concerning murder, cruel treatment and pillage in Tongo, Koribondo, Bo and Bonthe reveal that the victims:

> "were being targeted in these places because of their *identities* or their locations at the time of the Kamajor's attacks. In particular, the Kamajors targeted individuals who were identified or accused of being rebels or collaborators, or who were related to rebels. In addition, the Kamajors targeted Loko, Limba and Temne tribe members, policemen and civilians in close proximity to the National Diamond Mining Company (NDMC) headquarters in Tongo. Finally, many other civilians appear to have been targets of murder, cruel treatment and pillage merely by chance, due to the indiscriminate nature of the attacks on these locations."[1269]

52. The Majority concludes that "the individuals who came under attack in Tongo, Koribondo, Bo District and Bonthe District were being targeted due to their perceived identities, their locations, or by sheer chance," and not due to omissions or acts which they may or may not have committed.[1270] The Majority, in my view, erred in the following ways:

53. *First*, the Majority erroneously distinguishes between victims targeted because of their identity as collaborators and victims punished collectively for omissions or acts for which they may or may not be responsible. The distinction does not withstand minimal scrutiny, and it is expressly contradicted by the Majority's holdings elsewhere, Justice King dissenting, that:

> "In relation to the attack on Tongo, Norman told the Kamajors that 'there is no place to keep captured or war prisoners like the juntas, *let alone their collaborators*'[1271] and that *'all collaborators should forfeit their properties.*'[1272] In relation to the attack on Koribondo, Norman instructed the Kamajors . . . that 'anyone left in Koribondo should be

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[1267] CDF Trial Judgment, para. 846.
[1268] CDF Trial Judgment, para. 903.
[1269] CDF Appeal Judgment, para. 228.
[1270] *Ibid.*
[1271] CDF Trial Judgment, para. 321.
[1272] CDF Trial Judgment, para. 322.

> *termed an enemy or a rebel and killed.*'[1273] He further said that the capture of Koribondo had failed '*because the civilians had given their children to the juntas in marriage' and thus, they were all 'spies and collaborators;' and, therefore, 'anybody that was met there should be killed'* and nothing should be left 'not even a farm or ... a fowl.'[1274] In relation to the attack on Bo, Norman told the Kamajors to *'kill enemy combatants and people who had connections with or supported the rebels and who were therefore worse than the combatants;' he referred to them as 'collaborators.*[1275] At several occasions, Norman also ordered the Kamajors to kill police officers[1276] [because they were juntas].[1277]
>
> The above findings of the Trial Chamber demonstrate that the 'all out offensive' military attacks against towns and villages occupied by the rebels and juntas encompassed also *an element of targeting civilians perceived or alleged [to be] "collaborators."* In the view of the Appeals Chamber, it is without a reasonable doubt that this policy has been pursued by the Kamajors, through *killings of definite individuals in view of any perceived or alleged relationship with the rebels, the commission of mass-killings of groups of civilians, a recurrent targeting of police officers* and indiscriminate shootings at civilians, the burning of their houses or looting of their properties."[1278]

54. The Appeals Chamber, therefore, found that collaborators were people perceived to have supported the rebels. The Kamajors distinguished collaborators from other civilians on the basis of the perceived support they gave to rebels. The Kamajors targeted collaborators for murder, cruel treatment or pillage because of this distinction. The Majority now refers to this distinction as their 'identity;' but any such identity is derivative of perceived conduct, namely: support for the rebels. To target protected persons for murder, cruel treatment or pillage *because* they are perceived to support the rebels is exactly the same as intentionally punishing them as a group for omissions or acts for which they may or may not be responsible.

55. *Second*, the findings quoted above and additional findings discussed below are tantamount to findings that the CDF/Kamajors, typically acting on Norman's orders, had the specific intent to punish collaborators collectively and that civilians were seen as collaborators because of their conduct. In my view, these findings, relied upon by the Appeals Chamber in another context, satisfy the burden of proof beyond reasonable doubt for specific intent and, coupled with the following findings on Fofana's and Kondewa's *mens rea* for aiding and abetting and superior responsibility, militate that their convictions for collective punishments are upheld.

[1273] CDF Trial Judgment, para. 329.
[1274] CDF Trial Judgment, para. 335.
[1275] CDF Trial Judgment, para. 332.
[1276] CDF Trial Judgment, paras 446, 578.
[1277] CDF Appeal Judgment, para. 283, *citing* CDF Trial Judgment, para. 462.
[1278] CDF Appeal Judgment, paras 318 (emphasis added).

56. In relation to Tongo, Fofana and Kondewa were convicted pursuant to Article 6(1) for aiding and abetting in the preparation of the commission of collective punishments under Count 7.[1279] The relevant question, here, is whether Fofana and Kondewa had knowledge of the principal perpetrator's specific intent.[1280] Fofana and Kondewa were present when Norman issued the orders for collective punishment.[1281] The only reasonable conclusion is that, upon hearing these orders, Fofana and Kondewa must have known of his intent to collectively punish collaborators.

57. In relation to Koribondo and Bo District, Fofana was convicted pursuant to Article 6(3) for superior responsibility for collective punishments under Count 7.[1282] The relevant question on this ground is whether he knew or had reason to know that collective punishments were about to be committed or were committed by his subordinates with specific intent. The Trial Chamber found that prior to the Koribondo and Bo attacks, Norman gave "specific instructions for these two attacks" to Nallo with Fofana in attendance.[1283] According to the Trial Chamber, Norman stated that the Kamajors had been unsuccessful in capturing Koribondo "because the civilians had given their children to the juntas in marriage and thus they were all spies and collaborators. *Therefore*, anybody that was met [in Koribondo] should be killed and nothing should be left not even a farm or a fowl."[1284]

58. Regarding Bo, the Trial Chamber made the following findings relevant to collective punishments:

> "[Norman] told Nallo to kill Paramount Chief Veronica Bagni of Valunia chiefdom, *because she was against the Kamajor movement*; . . . MB Sesay *because he gave money to the juntas and prepared the ronko which the juntas wore* so that they could not be differentiated from the Kamajors . . . . Nallo was to kill Ali Fataba and burn his house *because he was a collaborator who supplied fuel to the juntas*. He should kill Cecil Hanciles *for liaising between the juntas and the civilians*. He was to kill Brima Tolli, if he saw him, and to burn his house and loot his property *because the juntas ate and spent time at the house*. Norman ordered Nallo to kill the police officers *who used to work under the AFRC junta. Nallo carried out the orders as far as burning and looting but did not see most of the people.* He would have killed them had he seen them because the law

[1279] CDF Trial Judgment, paras 763-764.
[1280] CDF Appeal Judgment, para. 367.
[1281] CDF Trial Judgment, paras 321, 322, 323, 328, 332, 334.
[1282] CDF Trial Judgment, para. 845.
[1283] CDF Trial Judgment, para. 334.
[1284] CDF Trial Judgment, para. 335 (internal quotations omitted).

> given by the National Coordinator was that if Kamajors did not follow their orders they would cut off your ear or kill you."[1285]

59. Norman gave these instructions to Nallo, who was the direct subordinate of Fofana, and Fofana was present at the meeting. Without any doubt Fofana had every reason to know of Norman's intention to punish collectively the collaborators for their support for rebels.

60. Fofana was also present at an early January 1998 commanders' meeting held in preparation for the attack on Bo.[1286] At the meeting, Norman addressed the group and according to the Trial Chamber's finding he "told [the Kamajors] to kill enemy combatants and *people who had connections with or supported the rebels and who were therefore worse than the combatants.*"[1287] He referred to these non-combatants who supported the rebels as "*collaborators.*"[1288]

61. Therefore, Fofana was aware of Norman's orders in relation to Koribondo and Bo which were direct commands to commit collective punishments and prove Norman's specific intent regarding collective punishments. His knowledge of the orders demonstrates beyond reasonable doubt that Fofana, at the very least, had reason to know his subordinates would commit collective punishments.

62. In relation to Bonthe District, Kondewa was convicted pursuant to Article 6(3) for superior responsibility for collective punishments under Count 7. The relevant question for this ground is whether he knew or had reason to know that collective punishments were about to be committed or were committed by his subordinates with specific intent. The Appeals Chamber, Justice King dissenting, accepted the Trial Chamber's findings that Morie Jusu Kamara sent several reports to Kondewa about the situation in Bonthe and that based on these reports three delegations came to Bonthe to investigate the situation.[1289] The first two delegations acted under Kondewa's instructions and the third was led by Kondewa himself.[1290] The Appeals Chamber, Justice King dissenting, accepted that the evidence showed that Kamara reported to Kondewa about events in

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[1285] CDF Trial Judgment, para. 336 (emphasis added).
[1286] CDF Trial Judgment, para. 332.
[1287] *Ibid* (emphasis added).
[1288] *Ibid* (emphasis added).
[1289] CDF Appeal Judgment, para. 183.
[1290] *Ibid.*

Bonthe in his capacity as *de facto* commander of the Kamajors who carried out the attack.[1291] Kondewa has not challenged the Trial Chamber's finding that he "knew that the attack on Bonthe Town involved the commission of criminal acts by the Kamajors under the command of Morie Jusu Kamara."[1292] Kondewa also does not challenge that he "had reasons to know that the Kamajors under his effective control were about to commit or were committing criminal acts in Bonthe District, particularly that they were targeting suspected 'collaborators'."[1293] These findings, to which the Appeals Chamber must defer, demonstrate beyond reasonable doubt that Kondewa, at the very least, had reason to know that collective punishments were committed or were about to be committed in Bonthe.

63. In summary, the Trial Chamber's findings of fact prove beyond reasonable doubt that both the principal perpetrators and Fofana and Kondewa had the requisite *mens rea* to support Fofana's and Kondewa's convictions for collective punishments. For these reasons, I uphold Fofana's and Kondewa's convictions under Article 6(1) and Article 6(3) for collective punishments under Count 7.

D. Prosecution's Eighth Ground of Appeal: Denial of Leave To Amend the Indictment in Order To Charge Sexual Crimes[1294]

1. Introduction

64. I concur with the findings of the Appeal Chamber in respect to the Prosecution's Ground Eight contained in paragraphs 417-421 of the Appeal Judgment, rejecting Kondewa's submissions

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[1291] *Ibid.*

[1292] *Compare* CDF Trial Judgment, para. 874 (regarding Kondewa's knowledge of the attack on Bonthe Town), *with* CDF Appeal Judgment, para. 156 (Kondewa only challenged the Trial Chamber's finding that he had effective control, not his *mens rea*).

[1293] *Compare* CDF Trial Judgment, para. 875 (regarding Kondewa's knowledge the crimes committed by his subordinates in Bonthe District), *with* CDF Appeal Judgment, para. 156 (Kondewa only challenged the Trial Chamber's finding that he had effective control, not his *mens rea*).

See CDF Appeal Judgment, para. 156 (Kondewa only challenged that he had effective control, which is part of the *actus reus*);

[1294] In its Ground of Appeal, the Prosecution uses the term "sexual violence" in reference to the charges sought to be added in the Indictment. Those charges, however, also included forced marriage charged as the crime against humanity of 'other inhumane acts,' punishable under Article 2(i) of the Statute. The Appeals Chamber in AFRC found that forced

that (i) the Appeals Chamber lacks jurisdiction to entertain this ground of appeal; and (ii) the principle of *res judicata* prevents the Appeals Chamber from entertaining this ground of appeal on the merits.

65. However, I disagree with the Majority of the Appeals Chamber which decided to summarily dismiss this Ground of Appeal on the basis that it falls outside the scope of the appellate review. As a result, the Majority declined to adjudicate the merits of the Prosecution's submissions that the Trial Chamber erred in denying its request for leave to amend the Indictment.[1295] In this respect, I further consider that the Trial Chamber's Decision on Leave to Amend the Indictment (the "Indictment Amendment Decision"),[1296] issued on 20 May 2004 and hereby challenged by the Prosecution under this Ground of Appeal, contained both errors of law invalidating the decision and errors of facts which have occasioned a miscarriage of justice.

2. The Majority's Decision on Prosecution's Eighth Ground of Appeal

66. The Majority dismissed Ground Eight of the Prosecution's Appeal based on procedural considerations. The Majority considers that the Prosecution has not shown that the alleged error of law would invalidate the decision or that an error of fact would lead to a miscarriage of justice.[1297] The Majority notes that the Prosecution does not seek any remedy other than merely a finding of an error of law in the Indictment Amendment Decision. While this factor did not preclude the Appeals Chamber from entertaining Ground Nine of the Prosecution's Appeal, the Majority considered that the alleged errors had no chance to affect the verdict as distinguished from Ground Nine because they do not relate to any count contained in the Indictment upon which the verdict was issued.[1298] The Majority further considers that "denying the amendment did not preclude the Prosecution from charging the accused with these crimes, since it is within the Prosecution's discretion to bring,

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marriage is not predominantly a sexual crime. See AFRC Appeal Judgment, para. 195. In view of this consideration, the term sexual violence will be referred to as "gender-based violence."

[1295] *Prosecutor v. Norman Fofana, and Kondewa,* SCSL-04-14-PT, Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 9 February 2004.

[1296] *Prosecutor v. Norman Fofana, and Kondewa,* SCSL-2004-14-PT, Decision on Prosecution Request For Leave to Amend the Indictment, 20 May 2004. ("Indictment Amendment Decision.").

[1297] CDF Appeal Judgment, para. 426.

[1298] *Ibid.*

alongside the original indictment, a separate indictment regarding the new allegations it intended to bring in the case."[1299] I disagree with the Majority's reasoning.

67. First, this Ground of Appeal falls undeniably, in my opinion, within the scope of the appellate review set out in Article 20(1) of the Statute and Rule 106 of the Rules, whereby the Appeals Chamber may hear appeals arising from "an error on a question of law invalidating the decision." While the challenged "decision" within the meaning of Article 20(1)(b) generally concerns the final judgment of the Trial Chamber in the context of a post-judgment appeal, I consider that it may also refer to an interlocutory decision issued during the course of the trial.[1300] In any event, assuming *arguendo* that the "decision" in a post-judgment appeal exclusively refers to the Judgment itself, I hold that, in the instant case, the alleged errors in the Indictment Amendment Decision had the potential, if established, to invalidate the Trial Chamber's verdict on appeal and to occasion a miscarriage of justice. The conclusions reached by the Trial Chamber in the Indictment Amendment Decision significantly altered the trial proceedings in such a way that the proceedings did not address any of the offences alleged in the new counts sought to be included in the Indictment. As a result, the Indictment Amendment Decision affected the Trial Judgment such that it does not address the responsibility, if any, of the accused in relation to these crimes. As a consequence, the alleged errors in the Indictment Amendment Decision rendered the trial proceedings and the judgment invalid.

68. Had the Majority of the Appeals Chamber decided to entertain this Ground of Appeal and had it found that the Indictment Amendment Decision was erroneous, the effective remedy could have been an order remitting the case for retrial. The fact that the Prosecution did not seek any remedy from the Appeals Chamber other than merely a declaration of an error does not alter the fact that, as a matter of law, the alleged error in this Decision had the potential to affect the judgment and to occasion a miscarriage of justice within the meaning of Article 20(1) of the Statute and Rule 106 of the Rules. I further deem it necessary to emphasise that the Prosecution did not ask for the case to be remitted for retrial because it "accepted that this would not be practicable."[1301] In my opinion, the pragmatism of the Prosecution's position, obviously based on the limited lifespan of

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[1299] *Ibid.*
[1300] For appeals against interlocutory decisions examined at the post-judgment stage, see, *Gacumbitsi* Appeal Judgment, paras 11-35; *Simba* Appeal Judgment, paras 12-39; *Kajelijeli* Appeal Judgment, paras. 199-210.
[1301] Prosecution Appeal Brief, para. 7.7.

the Court, should not be put against the Prosecution to hold that this Ground of Appeal falls outside the scope of appellate review.

69. For these reasons, it is therefore established, in my view, that the Appeals Chamber should have considered this Ground on its merits.

70. Second, I disagree with the Majority's position with regard to the Prosecution's discretion to bring a separate indictment charging the Accused with the additional counts. At the outset, I find that the most appropriate course of action for the Prosecution for adding new charges against the Accused was to file a request to amend the Indictment pursuant to Rules 50(A) and 73(A).[1302] The Rules expressly provide a procedure to bring new charges by amending the Indictment. At the *ad hoc* tribunals, only in exceptional circumstances and, as far as I am aware, only in one case has a separate indictment been brought against an accused in view of the amount and the distinct gravity of the new charges in completely new locations.[1303]

71. The Majority suggests that the relevant procedural remedy for a denial of leave to amend the Indictment is to file a new indictment.[1304] I find the argument misplaced. Under Rule 50(A) and Rule 73(B), the available remedy in this situation is to request from the Trial Chamber leave to appeal the Trial Chamber's Decision, as the Prosecution did. This request, however, was denied by the Majority of the Trial Chamber, Justice Boutet dissenting, on 2 August 2004.[1305]

72. It should also be emphasised that six months had elapsed between the Prosecution's request for leave to amend the Indictment filed on 9 February 2004 and the Trial Chamber's denial of leave to appeal the Indictment Amendment Decision on 2 August 2004. In the meantime, the trial had already started on 3 June 2004. In this context, given the limited mandate of the Special Court as to its lifespan, it would have been neither reasonable nor appropriate for the Prosecution to file a new indictment against the Accused two months after the start of the trial.

[1302] See Rule 50 "(A) . . . At or after [the] initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73 . . . (B) If the amended indictment includes *new charges* and the accused has already made his initial appearance in accordance with Rule 61 . . ." [Emphasis added]. This understanding is reinforced by Rule 47(I) whereby "The dismissal of a count in an Indictment shall not preclude the Prosecutor from subsequently submitting an amended indictment including that count."

[1303] See *Prosecutor v. Milošević et al.*, IT-99-37-PT, Second Amended Indictment, 16 October 2001, [Kosovo]; *Prosecutor v. Milošević*, IT-02-54-T, Second Amended Indictment, 23 October 2002, [Croatia]; *Prosecutor v. Milosevic*, IT-02-54-T, Amended Indictment, 22 November 2002 [Bosnia].

[1304] CDF Appeal Judgment, para. 426.

[1305] Decision on Leave to Appeal, para. 39

73. Finally, I hold that a review by the Appeals Chamber of the merits of the Prosecution's submissions against the Indictment Amendment Decision cannot be regarded as an "academic exercise."[1306] Because the Trial Chamber denied leave to appeal, the merits of the Prosecution's submissions against the Indictment Amendment Decision have never been addressed by this Chamber. Accordingly, refusing to address the merits of the Prosecution's Ground of Appeal at the final appeal stage permanently denies the Prosecution the opportunity to have the merits of its contentions adjudicated on appeal, which, in my view, denies it the right to a fair trial. This element, in my opinion, should have compelled the Majority to entertain this Ground of Appeal.

74. Moreover, the Majority Trial Chamber's Decision on Leave to Appeal contained a reversible error of law. Rather than considering the application for leave to appeal on the factors permitted under Rule 73(B) of the Rules and either rejecting or granting the application on the merits of the application, the Majority of the Trial Chamber denied the motion *on merits of the of the decision that would have been appealed.*[1307] By doing so, the Trial Chamber effectively substituted itself for the Appeals Chamber, a gross misinterpretation of its authority. The approach of the Trial Chamber amounted in my view to a discernible error in the exercise of its discretion. This procedural error should have constituted a further reason for the Majority of the Appeals Chamber to examine the Indictment Amendment Decision at the post-judgment stage and to entertain this Ground of Appeal on the merits.

75. I will now turn to the consideration on the merits which the Appeals Chamber should have done. The relevant question is whether the Trial Chamber erred in law, in procedure or in fact in denying the Prosecution's Motion for leave to amend the Indictment.

[1306] CDF Appeal Judgment, para. 427 (The Majority finds that consideration of this Ground of Appeal would be an academic exercise.)

[1307] The Trial Chamber declined to address whether the requirement of 'irreparable prejudice,' under Rule 73(B) was satisfied based on the assertion that the principle of estoppel barred the Prosecution from raising the issue. The Trial Chamber considered that the Prosecution is now estopped from raising the issue of irreparable prejudice as this was occasioned the lack of diligence and promptitude on its part in carrying out investigations for the gender crimes. (Trial Chamber Decision on Leave to Amend, para.38.) A Trial Chamber is however prevented from considering the merit of the challenged decision in deciding whether leave to appeal should be granted. See *Prosecution v. Milošević*, Trial Chamber, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire proceedings, 20 June 2005 ("A request for certification [to appeal] is not concerned with whether a decision was correctly reasoned or not. That is a matter for appeal, be it an interlocutory appeal or one after final Judgement has been rendered has been rendered. Rule 73(B) concerns the fulfilment of two criteria, after which the Trial Chamber may decide to certify an interlocutory appeal.")

3. The Appeal Against the Indictment Amendment Decision

76. The issue on appeal here is whether the Trial Chamber abused its discretion in reaching the Indictment Amendment Decision.[1308] In my view, there are two main issues in this case: whether the Trial Chamber abused its discretion in finding that the Prosecution failed to act with due diligence and whether, in the exercise of its discretion, the Trial Chamber correctly balanced the Accused's right to a fair trial against other factors.

(i) Whether The Prosecution Failed to Act With Due Diligence

77. The Trial Chamber found that the Prosecution failed to act with due diligence in seeking to include new charges in the Indictment that is, on 9 February 2004.[1309] The initial indictments against Norman, and against Fofana and Kondewa, were filed on 3 March 2003[1310] and 24 June 2003,[1311] respectively. The Trial Chamber held that:

> "it is the traditional role and practice for the prosecution to bring as many counts in an indictment as possible and to amend them where it becomes necessary. Although it does not impose on the Prosecutor the obligation to bring all the charges that are borne out by the evidence, nothing prevents or prohibits him from preferring and bringing all the charges on which he intends to base his prosecution to the knowledge of the Court and to that of the defense, not only with a view to a proper determination of the case, but also and above all, to serve the overall interests of justice."[1312]

78. I disagree with this approach, which in my view, does not reflect the requirements for Review of Indictments set forth in Rule 47 of the Rules and affirmed by the Special Court's jurisprudence. The confirmation of an indictment requires that, based on the proposed indictment

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[1308] *Prosecution v. Norman et al,*. Appeals Chamber, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, para. 5; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T Decision on Prosecution Motion Regarding the Objection To The Admissibili8ty of Portions of Evidence of Witness TF1-371, 13 December 2007, paras 9, 10; *Prosecutor v. Pandurević and Trbić*, IT-05-86-AR73.1, Appeals Chamber, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006, para. 5; *Prosecution v. Gotovina et al.*, Appeals Chamber, Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006; *Prosecution v. Norman et al,*. Appeals Chamber, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, para. 5.

[1309] Indictment Amendment Decision, paras 43 (Trial Chamber questioned whether "a recourse to an amendment to add fresh and new charges as it is in this case would have been necessary if the Prosecution, during and after more than 2 years of investigations, had exercised due diligence to uncover long before now, these offences which, we would imagine, should have been included not only in the original individual indictments but also in the 3 consolidated indictment that the Prosecution filed with our leave.")

[1310] *Prosecutor v. Norman*, SCSL-03-08-I, Indictment, 3 March 2003 (filed on 7 March 2003).

[1311] *Prosecutor v. Fofana*, SCSL-03-11-I, Indictment, 24 June 2003; *Prosecutor v. Kondewa*, SCSL-03-12-I, Indictment, 24 June 2003.

and supporting material, sufficient information must establish reasonable grounds to believe that a person committed the crimes charged,[1313] supporting therefore a *prima facie* case. The applicable standard for the confirmation of an indictment is also applicable to its amendment concerning the inclusion of new charges.[1314]

79. Accordingly, the Prosecution could only have brought charges of gender-based violence in the Indictment only when sufficient material facts would have sustained a *prima facie* case. The Prosecution submitted that, in June 2003, there were "indications" of gender-based crimes; only in October 2003 did it obtain solid "evidence" capable of confirmation,[1315] meaning "evidence that is sufficient to prove the crimes alleged,"[1316] and to secure the cooperation of witnesses.[1317] I wish to underscore in this respect that victims of gender-based violence generally express greater reluctance to report and testify on those events than victims of other crimes.[1318] I note the Prosecution's assertion that "[i]n some instances, it was the existence of the Indictment and subsequent incarceration of the Accused that created the conditions for these potential witnesses to come forward and to give evidence whereas before they were unwilling to do."[1319] I do not find any genuine reason to reject the Prosecution's explanation as to why the Indictment Amendment Motion was not put before the Trial Chamber as early as June 2003, and I find that the Trial Chamber erred in law as to the standards for amending the indictment and in fact in finding that "evidence" of gender-based violence was *"available"* eight months prior to the filing of the Indictment Amendment Motion.[1320]

[1312] Indictment Amendment Decision, para. 34. (Emphasis added).
[1313] *Prosecution v. Norman, Fofana and, Kondewa,* SCSL-03-11-PT, Trial Chamber I, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004, para. 32.
[1314] *Prosecutor v. Popović et al.* Trial Chamber, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 8; *Prosecutor v. Haradinaj*, Trial Chamber, Decision on Motion to Amend the Indictment and on Challenges to the Form of the Indictment, paras 19-21.
[1315] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Prosecutor's Submission to Trial Chamber's Questions Pursuant to Status Conference, 9 March 2004, paras 1, 2; Prosecution Submission on Appeal Against The Trial Chamber's Decision of 20 May 2004 ("Prosecution Submission Appealing Trial Chamber's Refusal of Leave to File Interlocutory Appeal."), paras 8, 11.
[1316] Prosecution Submission, para. 8.
[1317] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Prosecutor's Submission to Trial Chamber's Questions Pursuant to Status Conference, 9 March 2004, para. 2.
[1318] Fifth Report of the Secretary-General on the United Nations Mission In Sierra Leone, S/2000/751, 31 July 2000. See also the relevant authorities mentioned in Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment, 31 May 2004, paras 26-33.
[1319] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 9 February 2004, para. 20.
[1320] Indictment Amendment Decision, para. 55.

80. The Trial Chamber held that it took two years of investigation for the Prosecution to uncover gender offences.[1321] If this were true, it would have meant that the Prosecution started investigations for the CDF case in February 2002. This finding was clearly erroneous as the Prosecution Team started full investigation in November 2002,[1322] one year before evidence of gender-based violence was verified.

81. The Prosecution explained that it filed the Indictment Amendment Motion on 9 February 2004, about three months after *prima facie* evidence of gender-based violence was available because it was awaiting a decision on its Motion for Joinder in order to file a single motion for amending the Indictment. The Decision on Joinder was issued on 27 January 2004 and the Consolidated Indictment was filed on 5 February 2004.[1323] I accept the Prosecution's approach in this regard, which, in my view, complies with the interest of judicial economy.

(ii) Whether The Trial Chamber Correctly Balanced the Rights of the Accused with Other Relevant Factors

82. In addressing whether to grant leave to amend an indictment, the overall consideration for a Trial Chamber is to ensure the accused's right to a fair hearing.[1324] The scope and nature of the amendments, their effect on the case and the consequences on the trial proceedings shall be considered in light of the rights of the accused to be tried without undue delay and to have adequate time to prepare his/her defense, as enshrined in Article 17 of the Statute. Further, international criminal tribunals examine whether the amendment may help to "ensure that the real issues in the case will be determined."[1325] As the ICTY Appeals Chamber held, "the timeliness of the Prosecutor's request for leave to amend the indictment must be measured within the framework of

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[1321] Indictment Amendment Decision, paras 43, 57, 63, 64.
[1322] The Agreement between the Government of Sierra Leone and the United Nations on the Establishment of the Special Court was signed on 16 January 2002; the Prosecutor and Deputy Prosecutor were appointed respectively in April and November 2002 and the Court began official operations in July 2002, with the arrival of, among others, the Prosecutor and his advance team. See Fifteenth Report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2002/987, 5 September 2002, para. 42; First Annual Report of the President of the Special Court for Sierra Leone, 2 December 2002- 1 December 2003, p. 14
[1323] Prosecution Appeal Brief, para. 7.13.
[1324] *Prosecution v. Gotovina et al.*, Appeals Chamber, Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006; *Prosecutor v. Kovacević*, Appeals Chamber, Decision Stating reasons for Appeals Chamber's order of 29 May 1998, 2 July 1998, para. 30.
[1325] *Prosecutor v. Popović et al.* Trial Chamber, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 8.

the overall requirement of the fairness of the proceedings."[1326] In this respect, I consider that the principle of fairness of the proceedings and of equality of arms applies to both, the Defence and the Prosecution which "acts on behalf of and in the interest of the community, including the interest of the victims of the offence charged."[1327]

83. In this case, the proposed amendments to the indictment included new charges based on various acts of gender-based violence,[1328] extended the timeframe of certain allegations and added new locations to others.[1329] Although the proposed amendments altered the case geographically, temporally and in terms of the nature of the charges against the Accused,[1330] I do not consider that the Defense's statutory rights would have been breached so as to render the trial unfair for the following reasons:

84. The Accused were informed of the potential new charges as of the filing of the Amendment Motion on 9 February 2004. The supporting material for these new charges was disclosed on 17 February 2004, which allowed the Accused to initiate preliminary investigations. The Indictment Amendment Decision was issued on 20 May 2004. The Majority of the Trial Chamber held that the proposed amendments to the Indictment would have required allowing the Accused at least two years to carry out investigations, which would lead to undue delays in the proceedings.[1331] This estimation was purely speculative. The Majority of the Trial Chamber arrived at this estimation based on the time it purportedly took the Prosecution to conduct its investigations.[1332] First, as stated above, the Prosecution's investigations covered a one year-period only.[1333] Second, the duty of the Prosecution to prove the accused's guilt beyond reasonable doubt differs from the Defence's burden to show that the threshold of proof beyond reasonable doubt was not proved. Accordingly, the principle of equality of arms does not necessarily imply that the Accused is entitled to the same

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[1326] *Prosecutor v. Kovacević,* Appeals Chamber, Decision Stating reasons for Appeals Chamber's order of 29 May 1998, 2 July 1998, para. 31.
[1327] *Prosecutor v. Aleksovski,* IT-95-14/1-AR73, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 25.
[1328] Proposed Amended Indictment, para. 31, Annex I to the Prosecution Request For Leave to Amend the Indictment, 9 February 2004. Counts 9 to 12 of the Proposed Amended Indictment contained Rape, as a crime against humanity; Sexual Slavery and any other form of sexual violence as a crime against humanity; Other inhumane acts as a crime against humanity and; in addition or in the alternative, Outrage upon personal dignity as a violation of Article 3 Common to the Geneva Conventions and Additional Protocol II.
[1329] Prosecution Request for Leave to Amend the Indictment, 9 February 2004, para. 5.
[1330] Indictment Amendment decision, para. 62.
[1331] Indictment Amendment Decision para. 63.
[1332] Indictment Amendment Decision, para. 63.
[1333] See *supra,* para. 80.

amount of time to prepare and present its case.[1334] This assessment must be conducted by a Trial Chamber on a case-by-case basis taking into account the specifics of the amendments of the Indictment. Furthermore, to guarantee that the amendments would not prejudice the Accused in the preparation of the case, a Trial Chamber may consider alternatives to denying leave to amend, such as ordering the Prosecution not to present any evidence involving the new facts for a certain period of time after the start of its case.[1335] In my opinion, such a decision would have been appropriate in this case in order to ensure, on the one hand, full respect of the rights of the Accused and, on the other, that the right of fair trial be guaranteed to the opposing party which furthermore acts in the interest of the victims. In my opinion, a decision that substantially impedes a party to duly exercise its duty and mandate infringes the basic principles of "international standards of justice, fairness and due process of law."[1336]

85. I further believe that, in deciding whether to grant leave to amend the indictment, consideration must be given to the impact on and significance of prosecuting the material facts alleged in the amended indictment. In the present case, the denial of the amendments precluded that any of the gender-based violence allegedly committed against women and girls by the Kamajors/CDF during the armed conflict could be prosecuted. Article 15(4) of the Statute specifically addresses the need for the Prosecution to consider employment of prosecutors and investigators specialised in gender-based violence. The Trial Chamber itself stated in another context that this provision "underscore[s] the necessity for international criminal justice to highlight the high profile nature of the emerging domain of gender offences with a view to bringing the alleged perpetrators to justice."[1337] It follows in my view that denying the Prosecution to prosecute acts of gender-based violence committed against women and girls during the armed conflict in Sierra Leone impeded the Special Court's fulfilment of its mandate.

[1334] *Prosecutor v. Norman et al,* SCSL-04-15-T, Order to the First Accused to Re-File Summaries of Witness Testimonies, 2 March 2006 para. 4; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Consequential Orders Concerning the Preparation and the Commencement of the Defence Case, 28 March 2007, para. 4; *Prosecutor v. Orić*, IT-03-68-AR73.2, Appeals Chamber, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7.

[1335] *Prosecutor v. Popović et al.*, Trial Chamber, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, where the Trial Chamber, having regard to the imminent start of the trial, instructed the Prosecution not to lead evidence in relation to this event earlier than six months from the prosecution opening statement at trial, so that the accused will have been provided with sufficient notice.

[1336] Security Council Resolution 1315 (2000), Adopted by the Security Council at its 4186th meeting, on 14 August 2000, S/RES.1315 (2000), 14 August 2000, para. 6 of the Preamble.

[1337] *Prosecutor v. Brima, Kamara and, Kanu,*, SCSL-2004-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Kanu, 6 May 2004, para. 34.

86. Finally, the approach adopted by the Majority of the Trial Chamber prevented victims of gender-based violence from seeing their case adjudicated before the Special Court. I consider that when an international forum is established to adjudicate gross violations of human rights, it has an inherent duty to fulfil its mandate by providing the victims with proper access to justice. This consideration is particularly relevant in the context of the prosecution of crimes committed in Sierra Leone during the armed conflict since the victims might be prevented from seeking remedy before the national courts in view of the Amnesty included in the Lomé Agreement.[1338]

87. For the above reasons, I consider that in denying the Prosecution's request for leave to amend the Indictment in order to add charges of gender-based violence, the Trial Chamber committed a discernable error of fact and of law in finding that the Prosecution did not act with due diligence and in failing to balance the rights of the accused with other factors, including the rights and duties of the Prosecution and the overall mandate of the Court.

88. I furthermore would like to state that the limited lifespan of the Special Court indirectly influences the practicability of a request as well of an order to remit the case for retrial if the interest of justice asks for it. I consider that neither a Chamber nor the Prosecution should have to deal with a situation where they have to choose between the interest of justice commanding a retrial and the impracticability of such remedy in view of an administrative purpose.

4. Conclusion

89. For the foregoing reasons, I consider that the Prosecution's Eighth Ground of Appeal falls within the scope of appellate review of the Appeals Chamber and should have been entertained by

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[1338] Article 9 of the Lomé Accord provides for an amnesty of members of the RUF, AFRC and CDF in respect of "anything done by them in pursuit of their objectives as members of those organisations since March 1991, up to the signing of the...Agreement." In this respect, however, the United Nations Secretary-General's Representative appended to the Lomé Agreement his understanding that the amnesty granted therein will not extent to the crimes of genocide, crimes against humanity, war crimes and other violations of International Humanitarian Law. In the same token, the Appeals Chamber has held that a norm of customary international law is developing towards the affirmation that granting amnesty for serious violations of Human Rights is in breach of international law.(*Prosecutor v. Kallon and Kamara*, SCSL-2004-16-AR72(E), Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, para. 82, 84..) However, one cannot pre-empt as to the effect the amnesty granted under the Lomé Agreement may have on a prosecution for such crimes contained in Article 2 to 4 of the Statute in the national courts of Sierra Leone, (*id.* para. 88) in view of the fact, in particular, that the President of Sierra Leone stated that the amnesty granted under the Lomé Agreement was intended to be effective in regard to the national courts. (Annex to Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to The United Nations Addressed to the President of the Security Council, S/2000/786, 10 August 2000.)

it. I grant Prosecution's Eighth Ground of Appeal and hold that the Trial Chamber erred in fact and in law in dismissing the Indictment Amendment Motion.

E. Whether Reconciliation Can Be Considered in Sentencing

90. I agree with aspects of the Majority decision on sentencing and therefore I only address here those parts with which I disagree. As a preliminary matter, I note that the Majority declined to consider the Trial Chamber's patently erroneous treatment of reconciliation as a mitigating factor because it was not properly noticed by the Prosecution. Conversely, the Majority, in another context, endeavoured to correct a legal error in the interests of justice when it was not even mentioned by the Parties, namely concerning the findings of Fofana's and Kondewa's guilt for collective punishments.[1339]

91. I agree with the Majority, in principle, that reconciliation can be a mitigating circumstance. Indeed, the concepts of reconciliation, justice and peace are inextricably linked in post-conflict societies, and the case is no different in Sierra Leone. The Security Council recognized this when it stated:

> "*Recognizing* that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,
>
> . . . 1. *Requests* the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, . . . "[1340]

92. However, some basic conditions connecting the purpose of reconciliation to the perpetrator of the crime must be met in order to make it possible that members of the same society can live again together in peace:

(i) The perpetrator must admit guilt or at least acknowledge responsibility for what *he/she* has done.

[1339] *See* CDF Appeal Judgment, para. 226, *supra*; *see also* Partially Dissenting Opinion of Justice Winter, paras 47-48 *infra*.
[1340] UN Security Council Resolution 1513 (2000).

(ii) The perpetrator must submit excuses for what *he/she* has done (to the individual victims if possible, in general if not).

(iii) The perpetrator must be prepared to assist in the reconciliation or peace process of the given community.

93. Fofana submits that the Trial Chamber rightly concluded that "a manifestly repressive sentence . . . [would] not be in the overall interests and ultimate aims and objectives of justice, peace and reconciliation, as mandated by the [sic] UN Security Council Resolution 1315."[1341]

94. The necessity of credible justice for reconciliation and peace has been the *raison d'etre* of this Special Court since its conception.[1342] The belief of the victims that justice in whatever form (*e.g.*, retributive, restorative, etc.) has been done or will be done is of paramount importance to the credibility of justice. This forms the foundation for the social trust upon which reconciliation can be built.

95. It is axiomatic that justice cannot be done unless it is seen to be done. In my view, it is unchallengeable that justice will not be seen to be done, and therefore will not be credible, if the sentence imposed is so lenient that victims cannot accept or even understand it.

96. Kondewa submits that "purpose of reconciliation has however started to gain prominence in international criminal law"[1343] and argues, therefore, that the Trial Chamber correctly held that "a repressive sentence against [him] would be counter-productive."[1344] He further argues that the calls for justice by victims as well as the call of the international community to end impunity would not have been answered by a harsh sentence.[1345]

97. I consider, first, that a sentence which adequately reflects the harm caused to victims is not "harsh" and will not be perceived as such. A sentence that adequately reflects the harm caused to victims is a just sentence. Second, an extremely lenient sentence fails to demonstrate to putative

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[1341] Fofana Response Brief, para. 207.
[1342] *See* UN Security Council Resolution 1513 (2000), *supra*.
[1343] Kondewa Response Brief, para. 9.41.
[1344] Kondewa Response Brief, para. 9.43.
[1345] Kondewa Response Brief, para. 9.44.

subsequent criminals that impunity will end. This principle of affirmative prevention cannot be outweighed by any purpose of reconciliation.[1346]

98. Turning to the requisite conditions for considering reconciliation as a mitigating factor for Fofana and Kondewa, I do not find them satisfied in this case.

99. I cannot see any remorse in the statement that Fofana made through his defence lawyers, (not even personally by himself):

> "Mr Fofana accepts that crimes were committed by the CDF during the conflict in Sierra Leone. Indeed, at least one witness was called on behalf of the Fofana defence, Joseph Lansana, accepting and attesting to crimes committed by the CDF. Mr Fofana deeply regrets all the unnecessary suffering that has occurred in this country."[1347]

100. Fofana's counsel did not express remorse (*i.e.*, acknowledgement of personal responsibility) or even regret for the suffering of the victims. Rather, he expressed global regret for the situation in Sierra Leone, without connecting this situation to himself in any way.

101. Kondewa's statements are equally lacking. Kondewa simply said, "Sierra Leoneans, those of you who lost your relations within the war, I plead for mercy today, and remorse, and even for yourselves."[1348] His address to "Sierra Leoneans" writ large can in no way be understood as meaning that *he* felt remorse. To the contrary, Kondewa had the audacity to ask *Sierra Leoneans* to have remorse and even if the translation has to account for this wording, nothing indicates any personal remorse.

102. Neither Fofana nor Kondewa has ever acknowledged their own responsibility. In fact, the record on appeal demonstrates to me that they only claim their criminal culpability could not be *proved*, not that it did not exist. I am unaware of any instance in which Fofana or Kondewa claimed they did not commit a crime.

[1346] "The sentencing purpose of affirmative prevention appears to be particularly important in an international criminal tribunal, not the least because of the comparatively short history of international adjudication of serious violations of international humanitarian law and human rights law." *Kordić* Appeal Judgment, para. 1082.
[1347] CDF Sentencing Judgment, para. 63.
[1348] CDF Sentencing Judgment, para. 65.

103. In my view, empathy with victims as has been accepted as mitigation by the Majority can only be accepted as real and sincere regret in limited circumstances.[1349] These circumstances are indicated in the facts of the *Orić* case cited by the Trial Chamber and relied upon by Fofana and Kondewa. Critically, in that case, Orić expressed empathy *several* times *before* he was found guilty.[1350] The two convicted persons here only found it worth mentioning that they felt empathy—if they even did that—*after* they were convicted. From this, it is clear to me that their statements were not expressions of remorse or empathy, but rather were simply calculated to achieve a reduced sentence. I therefore hold that the statements of the two convicted were neither real nor sincere.

104. Moreover, nothing in the statements of the two convicted persons pointed to any excuse for their criminal conduct or the harm they caused. In my view, the absence of this accounting, demonstrates that little weight, if any, could be given to their statements. The weight given to real and sincere expressions of empathy or remorse is evaluated case by case. When a rather cursory, indirect statement is made, it certainly does not show the required state of mind of a convicted person that he/she is prepared to contribute to reconciliation within his/her community, which would merit a mitigated sentence.

105. Under certain circumstances, a convicted person's post-conflict conduct, such as assisting in restoring peace, in addition to showing remorse, can be considered in mitigation.[1351] The fact that Fofana demonstrated "commitment to and observance of the Lomé Peace agreement, and . . . work[ed] without any pay with the NGO community in ensuring that members of the CDF remained committed to the peace process within Sierra Leone"[1352] indicates that he tried to assist in the reconciliation process of his country. I therefore come to the conclusion that mitigating circumstances, albeit to a very limited amount, can be credited to Fofana. Not having found anything similar in this regard concerning Kondewa, I hold that reconciliation cannot be a reason to reduce his sentence.

[1349] See *Vasiljević* para. 177. I note that the ICTY Appeals Chamber supported this conclusion in *Vasiljević*, but declined to consider the statements there in mitigation.
[1350] *Orić* Trial Judgment, para. 752 (Orić expressed compassion to witnesses for their loss and suffering *throughout the trial*).
[1351] *Bralo* Judgment on Sentencing Appeal, para. 72 (finding that efforts to assist in the location of the remains of his victims and others killed in the course of the conflict and aid de-mining operations "demonstrate[d] that [Bralo] is genuinely remorseful"); *Miodrag Jokić* Sentencing Judgement, paras. 90, 92 (finding that Miodrag Jokić's "post-conflict conduct" "reflect[ed] his sincere remorse"); *Blagojević* Appeal Judgment, para. 328; *Babić* Sentencing Appeal Judgment, para. 43 (placing remorse within the broader context of the "character of the accused after the conflict");
[1352] CDF Sentencing Judgment, para. 67.

Done at Freetown, this 28th Day of May, 2008

Hon. Justice Renate Winter

VIII. PARTIALLY DISSENTING OPINION ON SENTENCING OF JUSTICE JON KAMANDA

1. I have in this Judgment concurred with the majority view of my distinguished colleagues in the main Judgment in this case. I have, nonetheless, disagreed with the majority on the question of SENTENCE. I have, in consequence, had recourse to writing a partially dissenting opinion. Briefly stated, my position is that the sentences imposed by the Trial Chamber are fair and adequate because it is my view that the said Chamber considered all the relevant parameters in arriving at fair and just sentences, all the circumstances considered. Except in those areas where I have joined my learned colleagues to overturn the verdicts pronounced by the Trial Chamber, I have left the sentences undisturbed.

2. The two Accused, Moinina Fofana and Alieu Kondewa were each charged on 8 Counts of offences pursuant to crimes that could broadly be categorised under three heads, that is:

(a) Crimes against Humanity (Counts 1 and 3)

(b) War Crimes (Counts 2, 4, 5, 6 and 7)

(c) Other Serious Violations Of International Humanitarian Law (Count 8)

3. The Accused were charged pursuant to Article 6(1) and/or 6(3) of the Statute for the Special Court for Sierra Leone.

4. Article 6(1) of the Statute provides :

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime."

5. Article (6)(3) provides :

> "The fact that any of the acts referred to in articles 2 and 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done do and the superior had failed to take the necessary and reasonable measures to prevent such acts of to punish the perpetrators thereof.."

6. I have quoted these Articles *in extenso* to show that the Accused were not charged as persons who themselves committed these acts directly. Criminal responsibility was thrust upon

these two men by the operation of the Statute. I have mentioned the import of these assumed criminality because it is my considered view that this factor must be viewed from the perspective that these lowly-placed men could be clothed with the garment of major players in a very confused warfare where fighters were more often than not on frolic of their own. Since the law holds them culpable in any case, it is my strong view that that same law should in an even-handed manner operate also as a mitigating factor on the accused men's behalf.

7. The Trial Chamber found Fofana guilty on Counts 2, 4, 5, 7 with respective prison terms of 6 years, 6 years, 3 years and 4 years passed on him, to run concurrently. This in effect gave Fofana a maximum prison term of 6 years, inclusive of the time he had spent in the custody of the Special Court. He was found not guilty on Counts 1, 3, 6 and 8.

8. Kondewa was found guilty on Counts 2, 4, 5, 7, 8 with respective prison terms of 8, 8, 5, 6 and 7 years passed on him, to run concurrently. His maximum prison term was 8 years.

9. Kondewa appealed his conviction. Fofana did not. The Prosecution, among other grounds, appealed against the Counts on which the Accused were acquitted.

10. At the completion of the hearing, the Appeals Chamber, by a majority, overturned the not guilty verdict on the two Accused on Counts 1 and 3, entered a conviction on both Counts and imposed sentences in excess of the highest imposed on any Count by the Trial Chamber. The rest of the convictions passed by the Trial Chamber were confirmed and sentences revised upwards.

11. Having taken all the circumstances of the case into consideration, I pass the following sentences:

12. With respect to Fofana's convictions on Counts 1, 2, 3, 4, 5: I pass sentences of 6, 6, 5, 6 and 3 years respectively, the terms to run concurrently. Maximum term to be served being 6 years.

13. With respect to Kondewa's convictions on Counts 1, 2, 3, 4, 5: I hereby pass sentences of 8, 8, 5, 8, 5 years, the terms to run concurrently. Maximum term to be served being 8 years.

14. The terms of imprisonment for both men to take effect from 29 May 2003 when they were arrested and taken in custody of the Special Court for Sierra Leone.

15. I have had the benefit of reading the Partially Dissenting Opinion on Sentencing by my Learned and Distinguished Colleague, The Honourable Justice Gelaga King, and I most respectfully adopt it as part of this Opinion.

16. Done at Freetown this 28th day of May, 2008

Done at Freetown, this 28th Day of May, 2008

Hon. Mr. Justice Jon M. Kamanda

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IX. ANNEX A - PROCEDURAL HISTORY

1. Kondewa and Fofana were both indicted on 24 June 2003 in two separate indictments.[1353] Following the joinder of the cases, a consolidated Indictment ("Indictment"),[1354] charged Kondewa and Fofana with two crimes against humanity, namely: murder and 'other inhumane acts' (Counts 1 and 3, respectively). The Indictment also charged them with five violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, namely: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment; pillage; acts of terrorism and collective punishments (Counts 2, 4, 5, 6 and 7, respectively). In addition, the Indictment charged Kondewa and Fofana with one other serious violation of international humanitarian law, namely: enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities (Count 8).

2. On 2 August 2007, a majority of Trial Chamber I, Justice Thompson dissenting, convicted Fofana and Kondewa of the following: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment; pillage and collective punishments (Counts 2, 4, 5 and 7, respectively).[1355] The Trial Chamber found Fofana and Kondewa not guilty of the crimes against humanity of murder and 'other inhumane acts' and of acts of terrorism (Counts 1, 3 and 6, respectively).[1356] Finally, a majority of the Trial Chamber, Justice Thompson dissenting, convicted Kondewa of enlisting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities (Count 8).[1357] The majority of the Trial Chamber, Justice Itoe dissenting, found Fofana not guilty of the same charge (Count 8).[1358]

3. On 9 October 2007, the Trial Chamber sentenced Fofana and Kondewa to terms of imprisonment for all of the Counts under which they were convicted.[1359] The Trial Chamber sentenced Fofana to six (6) years of imprisonment for violence to life, health and physical or mental

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[1353] *Prosecutor v. Fofana*, SCSL-03-11-I, Special Court for Sierra Leone, Indictment, 24 June 2003; *Prosecutor v. Kondewa*, SCSL-03-12-I, Special Court for Sierra Leone, Indictment, 24 June 2003.
[1354] *Prosecutor v. Norman et al.*, SCSL-03-14-I, Special Court for Sierra Leone, Indictment, 5 February 2004, dated 4 February 2004 [Indictment]. The case number for the joined cases was SCSL-04-14. The Indictment originally charged Samuel Hinga Norman, but following Norman's death on 22 February 2007, the Trial Chamber decided to legally terminate the proceedings against Norman and to strike his name from the case name.
[1355] CDF Trial Judgment, Disposition, pp. 290-292.
[1356] *Ibid.*
[1357] *Ibid.*
[1358] *Ibid.*
[1359] CDF Sentencing Judgment.

well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 2); six (6) years of imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 4); three (3) years of imprisonment for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5) and four (4) years of imprisonment for collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7).[1360] The Trial Chamber further ordered that the sentences shall be served concurrently.[1361] The sentence took effect on 29 May 2003, when Fofana was arrested and taken into the custody of the Special Court.[1362]

4. The Trial Chamber sentenced Kondewa to eight (8) years of imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 2); eight (8) years of imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 4); five (5) years of imprisonment for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5); six (6) years of imprisonment for collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7); seven (7) years of imprisonment for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities, an other serious violation of international humanitarian law (Count 8).[1363] The Trial Chamber further ordered that the sentences shall be served concurrently.[1364] The sentence took effect on 29 May 2003, when Kondewa was arrested and taken into the custody of the Special Court.[1365]

5. The Prosecution and Kondewa filed notices of appeal on 23 October 2007.[1366] On the same date the Prosecution and Kondewa also filed a joint motion for extension of time and page limits for

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[1360] *Ibid* at p. 33.
[1361] *Ibid* at p. 34.
[1362] *Ibid.*
[1363] *Ibid.*
[1364] *Ibid.*
[1365] *Ibid.*
[1366] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Kondewa Notice of Appeal Against Judgement Pursuant to Rule 108, 23 October 2007; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Prosecution's Notice of Appeal, 23 October 2007.

the filing of appeal briefs.[1367] On 7 November 2007 the Appeals Chamber granted the motion, in part, ordering both Parties to file their appeal briefs no later than 11 December 2007 and limiting the length to no more than 150 pages.[1368]

6. In their respective notices of appeal, the Prosecution raised ten (10) grounds of appeal and Kondewa raised six (6) grounds of appeal.[1369]

7. On 29 November 2007, the Prosecution and Kondewa filed a joint motion for extension of time for the filing of response briefs,[1370] which was denied by the Appeals Chamber on 6 December 2007.[1371]

8. On 6 December 2007, Human Rights Watch filed a request for leave to appear as *Amicus Curiae* pursuant to Rule 74 of the Rules of Procedure and Evidence.[1372] Fofana filed a response on 10 December 2007, and the Prosecution filed submissions on 14 December 2007.[1373] The Appeals Chamber denied the request by Human Rights Watch on 21 January 2008.[1374]

9. The Prosecution and Kondewa filed their respective appeal briefs on 11 December 2007.[1375] The Prosecution withdrew its Second Ground of Appeal and therefore did not submit any arguments on that ground.[1376] The Prosecution, Fofana and Kondewa filed their response briefs on

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[1367] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Joint Defence and Prosecution Motion for Extension of Time for the Filing of Appeal Briefs and Extension of Page Limits for Appeal Briefs, 23 October 2007.
[1368] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Decision on Urgent Joint Defence and Prosecution Motion for an Extension of Time for the Filing of Appeal Briefs and Extension of Page Limits for Appeal Briefs, 7 November 2007, p. 4.
[1369] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Kondewa Notice of Appeal Against Judgement Pursuant to Rule 108, 23 October 2007; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Prosecution's Notice of Appeal, 23 October 2007.
[1370] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Joint Defence and Prosecution Motion for Extension of Time for the Filing of Response Briefs, 29 November 2007.
[1371] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Decision on Urgent Joint Defence and Prosecution Motion for Extension of Time for the Filing of Response Briefs, 6 December 2007, p. 3.
[1372] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Request for Leave to Appear as *Amicus Curiae* Pursuant to Rule 74, 6 December 2007.
[1373] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Fofana Response to Request for Leave to Appear as *Amicus Curiae* Pursuant to Rule 74 by Human Rights Watch, 10 December 2007; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Prosecution Submissions on the Request for Leave to Appear as *Amicus Curiae* Pursuant to Rule 74, Filed by Human Rights Watch on 6 December 2007.
[1374] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Decision on the Request by Human Rights Watch for Leave to Appear as Amicus Curiae Pursuant to Rule 74, 21 January 2008.
[1375] Prosecution Appeal Brief, Kondewa Appeal Brief.
[1376] Prosecution Appeal Brief.

21 January 2008.[1377] The Prosecution and Kondewa filed their reply briefs on 28 February 2008.[1378]

10. The Appeals Chamber heard oral arguments on 12 and 13 March 2008.[1379] On 12 March 2008 Kondewa made an application to amend his Notice of Appeal in relation to his Fourth Ground of Appeal.[1380] The Appeals Chamber granted this application.[1381]

[1377] Prosecution Response Brief, Kondewa Response Brief, Fofana Response Brief.
[1378] Prosecution Reply Brief, Kondewa Reply Brief.
[1379] Transcript, CDF Appeal Hearings, 12 March 2008, pp. 1-163 and 13 March 2008, pp. 1-153. *See also Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Scheduling Order, 11 February 2008.
[1380] Transcript, CDF Appeal Hearings, 12 March 2008, pp. 5-7.
[1381] *Ibid* at pp. 6-7.

X. ANNEX B: GLOSSARY

A. Cases Cited

1. Special Court for Sierra Leone

Prosecutor v. Norman Fofana, and Kondewa, SCSL-04-14-PT, Special Court for Sierra Leone, Trial Chamber, Decision on Prosecution Request For Leave to Amend the Indictment, 20 May 2004 [Indictment Amendment Decision].

Prosecutor v. Norman, SCSL-04-14-AR72(E), Special Court for Sierra Leone, Appeals Chamber, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004 [Child Recruitment Decision].

Prosecutor v. Norman Fofana, and Kondewa, SCSL-04-14-PT, Special Court for Sierra Leone, Trial Chamber, Majority Decision on The Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana And Allieu Kondewa, 2 August 2004 [Decision on Leave to Appeal].

Prosecutor v. Norman Fofana, and Kondewa, SCSL-04-14-T, Special Court for Sierra Leone, Appeals Chamber, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005 [Decision on Appeal of Refusal of Leave to File Interlocutory Appeal].

Prosecutor v. Norman Fofana, and Kondewa, SCSL-04-14-T, Special Court for Sierra Leone, Trial Chamber, Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence, 9 December 2005 [Decision on Admissibility of Evidence].

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