

736

SCSL-04-14-T
(19805-19872)
SPECIAL COURT FOR SIERRA LEONE

19805

Before:

Judge Bankole Thompson, Presiding Judge

Judge Benjamin Mutanga Itoe

Judge Pierre Boutet,

Registrar:

Mr Lovemore G. Munlo, SC

Date:

22 November 2006

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

FINAL TRIAL BRIEF OF THE THIRD ACCUSED ALLIEU KONDEWA

Office of the Prosecutor:

Christopher Staker

Joseph Kamara

Mohammed Bangura

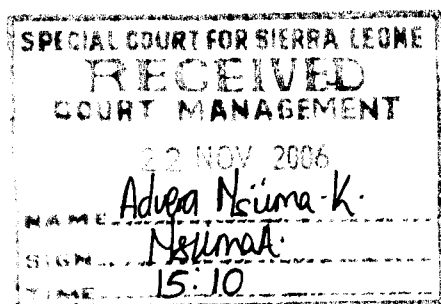
For Allieu Kondewa

Charles Margai

Yada Williams

Susan Wright

Ansu Lansana



For Samuel Hinga Norman

Dr. Bu-Buakei Jabbi

John Wesley-Hall, Jr.

Alusine Sani Sesay

For Moinina Fofana:

Victor Koppe

Arrow Bockarie

Michiel Pestman

Steven Powles

Table of Contents

- I. General Introduction and Commentary on Evidence
- II. Legal defects in evidence before the Trial Panel
- III. Failure to establish that Mr. Kondewa bore the “greatest responsibility”
- IV. The Civil Defence Force, the Kamajors and the role of Mr. Kondewa
- V. Failure to establish Mr. Kondewa’s Direct Participation in Crimes Alleged
- VI. Failure to establish Mr. Kondewa’s Participation in Joint Criminal Enterprise
- VII. Failure to satisfy constituent elements of Crimes Against Humanity
- VIII. Failure to satisfy constituent elements of Violation of the Geneva Convention (and protocols)
- IX. Failure to satisfy elements of specific offences set forth in the indictment
- X. Conclusion
- XI. Table of Authorities

I. General Introduction and Commentary on Evidence

The foundation of criminal responsibility is the principle of *personal* culpability¹ and a finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that it has been proved beyond reasonable doubt.² This requirement is shared by the Special Court for Sierra Leone, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia.³ Proof beyond a reasonable doubt has also been interpreted to be required under the fair trial provisions of the International Covenant on Civil and Political Rights, to which Sierra Leone is a party. “By reason of the presumption of innocence... [n]o guilt can be presumed until the charge has been proven beyond reasonable doubt.”⁴ This is ever more poignant when the case against the accused can be characterised as largely circumstantial.

“A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him...Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from the evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.”⁵

Bulk of evidence lacking specificity which enables it to be challenged or rebutted.

Very few of the witnesses called by the prosecution gave names of the perpetrators whose acts they described and even fewer gave details about dates and locations. While understandable, given the time which has passed and the nature of the events being recounted, it seriously limits the ability of the accused to identify and interview potential witnesses to the events described, in order to test the credibility of the account given. Where Kamajor perpetrators names were provided by prosecution witnesses and they could be located, many came to give evidence before the Court and of them nearly all contradicted accounts of their behaviour.

Hearsay

While the Rules of Procedure and Evidence do not bar the admission of hearsay evidence, as the Trial Chamber seeks to attribute weight to the evidence before it a rehearsal of the policy which militates against reliance on hearsay of evidence may be useful.

The following reasons for excluding hearsay have been articulated:

- Evidence that is given second-hand is likely to be unreliable or subject to distortion;
- Evidence not given under oath and not the subject of cross-examination is more likely to be unreliable as the court cannot test its reliability, or observe the sincerity or demeanour of the witness.
- There is a danger that if the rule were relaxed there would be a proliferation of evidence directed to proving or negating hearsay.⁶

Credibility of witnesses

Although the Trial Chamber will naturally form an opinion as to the credibility of the witness during his or her testimony, the final assessment of credibility must be considered in light of the entire trial record.⁷ Examples of how the credibility of each witness is assessed can be found in the case of Bagilishema, which resulted in a judgment of acquittal. The Trial Chamber assessed the various witness testimonies on the:

- Credibility in terms of internal consistency and detail;
- Strength under cross-examination;
- Consistency against prior statements of the witness;
- Credibility vis-à-vis other witness accounts or other evidence submitted in the case;
- Possible motives on behalf of the witness.⁸

Where the testimony was weak on any of these points the Trial Panel looked for corroboration and if the corroboration was itself based upon hearsay the Panel would not use the testimony as a basis for conviction.⁹

Impeachment

Evidence of witnesses can be impeached on a number of grounds, including the following:

- *Prior inconsistent statements.* These should be put to the witness in cross-examination. Where relied upon, this Trial Chamber has even allowed them to be admitted into evidence. During the course of the trial, inconsistencies have been noted by counsel for each of the accused. In considering inconsistencies regard is given to factors such as the difficulties in recollecting precise events years later, the impact of trauma and the literacy of the witness.¹⁰
- *Character evidence* (of reputation for truthfulness or of specific misconduct).¹¹ During the course of the trial, such evidence has been lead by counsel for each of the accused.
- *Bias.* During the course of the trial, witnesses for the prosecution and defence were attacked on bias, including relationships with the other witnesses and with the accused, personal disputes with other witnesses and with the accused and identification with or sympathy for the prosecution or with the accused as well as financial motivation. While witnesses for the defense withstood these attacks, it is respectfully submitted that those for the prosecution did not.
- *Sensory deficiencies.* During the course of the trial witnesses were attacked on the basis of not having been able to clearly see or hear the events about which they were giving evidence.

Prosecution witnesses whose evidence has been contradicted

The testimony of a number of prosecution witnesses was contradicted, either by other prosecution witnesses or by defense witnesses. The details of these contradictions are recounted below, in the applicable sections setting forth evidence by count.

Counts 1 and 2

Prosecution

A farmer from Sorgia saw his village attacked twice. The second time was by Kamajors who included one named Conteh who threw the witness's mother in a fire. Witness was not, however, tortured or even bothered. Joseph Lansana (28/9/06) (contradicting TF2-014 (10/3/05))

The brother of Mustapha Fallon testified that Mustapha took part in an attack on Koribondo and as part of that attack he saw his brother killed in Koribondo, long before time mentioned by Nallo. Mohammed Fallon (27/9/06) (contradicting Albert Nallo (14/3/05))

Another witness also refutes Nallo's evidence and denied that Norman, Fofana and Kondewa killed Mustapha Fallon. He denied there was anyone named Mustapha Fallon at Talia. Witness was born in Talia, grew up there, knew everyone there and knew no Mustapha Fallon. "If it happened I would know. We owned that place, our parents are chiefs." Haroun Aruna Collier a.k.a. Hardway (12/5/06) It is noteworthy that this is entirely consistent with the testimony of Fallon's brother's.

Witness refutes evidence of TF2-047 and denies that he ordered TF2-047 to bury 150 corpses in Tongo. B.J.K. Sei (15/5/06) (contradicting TF2-047(22 /2/05))

Witness refutes evidence of TF2-027, 22 February 2005 and testifies that he never ordered Kamajors in Konia to bury 30 corpses under a coffee tree. Likewise testifies that he never controlled Konia region. Keikula Amara a.k.a. Kamabotie (17/5/06) (contradicting TF2-027 (22/2/05))

Witness knew Soko Doguba in Kombema Town and himself found Doguba's dead body on the ground in Kombema after an attack by juntas. Witness saw mortar pestles nearby and testifies that juntas had beaten Doguba to death. Fallah Bindi (23/5/06)

Witness knew Mr. Thomas, a treasury clerk killed in Moyamba. Although witness was not in Moyamba at time of Mr. Thomas's death, Mustafa Ngobea reported to witness that Thomas was writing to rebels at Camp Charlie in order to coordinate an attack on Moyamba and Kamajors had recovered one of the letters. The next day, witness saw boys carrying Thomas's head in a wheelbarrow, singing and went to Ngobea to ask why he had done this. Ngobea told him the civilians had done it. Witness testified that in fact no Kamajors among the crowd who killed collaborator Mr. Thomas. Kini Torma (2/6/06)

Witness was in Kenema for two weeks during the period in question and testifies that no initiator took part in combat in Kenema. He likewise denies that Mr. Fofana and Mr. Kondewa were in charge of Kamajors at Kenema. Fallah Bindi (23/5/06) (contradicting TF2-223 (28/9/04))

Witness testifies that no Kapra was killed at Base Zero and that no Kapra named Alpha Dauda Kanu came to Base Zero. Moses Bangura (17/10/06) (14-15). Witness testifies that Kapras slept together in the mosque and assembled each morning. He is confident that if one had been killed, he would have known. (17)

Count Five: Looting

Describes the attacks at Kenema, Gofor, and SS camp. On 15 February civilians saw Kamajors entering Kenema, recognized their glittering mirror-adorned Kamajor dress. There was rejoicing and dancing. On the same day witness saw civilians setting fire to houses in Kenema. Civilians said they were houses of those who had burnt the civilians' own houses. Fallah Bindi (23/5/06)

Multiple counts

Witness is a Kamajor from Bonthe district and denies there were any trade fairs in Baoma Kpengeh and that the fairs were in fact in Gbap). Witness knows no other Kamajor with his name, Junisa Conneh and testifies he never saw Albert Nallo at Baoma Kpengeh. Junisa Conneh (28/9/06)

Witness has been town chief since 1996 and denies that a trade fair was there. Likewise testifies that he never heard of death of Fullah trader. Tommy Jabbi (28/9/06)

Witness denies that three Kamajor prisoners were burned with tires, saying that he saw these people being put in a vehicle and taken to Shenge. Kini Torma (2/6/06) (contradicting TF2-165 (7/3/05))

Witness was chiefdom speaker and regent chief of Gambia during the coup. Testifies that there is in fact no playing field in Gambia. Denies there is a Vaahun village near Gambia and says that Norman has not been in Gambia in more than 15 years. He describes the visit of Mr. Kondewa and states that no helicopter landed during his visit. Remarks that as chiefdom speaker any killing would have been reported to him but he received no such reports. Alhaji Joe Soma Kpana Lewis (10/10/06) (92-99). (contradicting TF2-187 (1/6/05))

Witness is a midwife, dealing with pregnant women and delivering babies in Gambia. If pregnant women had been killed she would have known. Denies any such deaths. Yeama Lewis (11/10/06) (123)

Witness was part of group that was not in fact attacked while traveling from Kpandebu to Bumpe and reached Talama without incident. Kamabotie introduced the group to hunters there and witness was searched, along with others who were searched at random in groups of mixed tribes. Witness refutes evidence alleging a checkpoint in Talama and denies that people were separated according to tribal groupings. Denies that Temnes, Lokos and Limbas were separated from group and killed. After the search, Witness returned to her home town Panguma and no one was left behind. (51) Does Kelfella (17/10/06) (47-51)

Contradicts aspects of role and responsibility of individual Kamajors

Witness refutes evidence and denies that Norman, Fofana, Kondewa, Orinko, Koroma and Nallo sent people to fight, saying it was not their job. Mohamed Turay Collier -17TH February 2006 at page 17 lines 3 to 19, page 18 lines 15 to 29, page 19 lines 1 to 29, (contradicts TF2-005 (15/2/05))

Witness refutes evidence and maintains there was no report or complaint made of Alpha Dada Kanu being hacked to death and skinned by Norman, Fofana and Kondewa. Mohamed Turay Collier 17th February 2006 at page 20 lines 13 to 29, page 21 lines 1 to 29, page 22 lines 1 to 29 and page 23 lines 1 to 29 (contradicts TF2-014 10/3/05))

Witness refutes evidence and denies that Kondewa had commanders or provided logistics for commanders. Mohamed Turay Collier - 17th February 2006, page 25 and 26 (contradicts TF2-079 (26/5/05))

Witness never saw anyone bringing guns or food for Mr. Kondewa. Mohamed Turay Collier 17th February 2006, page 25 and 26 (contradicts TF2-189 (3/6/05))

Witness refutes evidence and maintains that in the area Mr. Kondewa conducted initiations only in Mokasi, 3 miles from Talia and at Tihun Sogbini, 14 miles from Talia. Mohamed Turay Collier 17th February 2006, page 25 and 26 (contradicts Albert Nallo (10/3/05))

Denies that anyone died during initiation at Tihun and denies that Mr. Kondewa used deceased's ashes in initiation. Haroun Aruna Collier a.k.a. Hardway (12/5/06) (contradicts Albert Nallo (10/3/05))

Witness never saw or heard about Kondewa attending any meeting at Tihun Sogbini. "If the chieftom people will even hold any meeting, if they called any meeting, he would not attend it." Sampha Sesay a.k.a. Carpenter 12/10/06 (96). (contradicts TF2-190 (10/2/05))

Denies Kamajor forces handed over seized arms to Kondewa at his house in Tihun. Kondewa "had no business with guns." Sampha Sesay a.k.a. Carpenter 12/10/06 (99-100)

Prosecution witnesses who have been impeached

There are a number of prosecution witnesses who have been impeached on terms consistent with the aforementioned jurisprudence. As the Trial Chamber now considers what if any weight to give

their testimony, it is respectfully submitted that reference should be made to the following examples:

Witness TF2-017

“Let me rephrase the question to you then. In your mind, it is okay to make up facts if you are hesitant about the facts; is that correct? A. Yes, you are correct.” TF2-017 (22/11/04) (44)

“Mr Witness, you will agree with me that the Court has expended a considerable amount of money on you during your twenty-two month stay in Freetown. A. Yes, because I have been here for a long time. Mr Witness, these people, meaning Auntie Sue and Henry Tucker and your sister Rosaline, they were very much concerned when your father was hospitalised at the Bo Government Hospital; am I correct? A. Yes. [...] Q. Mr Witness, did you inform any one of them that you had been given \$1,000 towards your father's medication?” TF2-017 (22/11/04) (53)

Albert Nallo

Albert Nallo was suspended by the War Council “because of the bad commands he used to give us.” Joe Nunie (11/5/06)

Nallo claims that there were disputes with Mr. Hinga Norman when he tried to enforce discipline but was unable to provide a single example of someone who was punished for failing to carry out orders. TF2-014.

B.J.K. Sei

BJK Sei testified at length about his involvement in the attacks at Tongo and was later contradicted by a Kamajor insider who said “he had no hands in it.” This affects his overall credibility, including but not limited to events to which he testified relative to Tongo attacks. Siaka Lahai (17/5/06) (11)

TF2-057

The witness was impeached on the basis of denying that he knew an individual who he later admitted to be his son. TF2-057 (30/11/04) (63)

TF2-005

Witness testified in detail about the work of the Death Squad and was emphatic that they were only answerable to Mr. Hinga Norma, Mr. Fofana and Mr. Kondewa. Later Borbor Tucker himself testified that he was in fact that head of the Death Squad, not the three accused. Given the allegations of wrongdoing attributed to the Death Squad, Mr. Tucker has no motive to lie about or exaggerate his role in its work. The inescapable conclusion is therefore that witness TF2-005 purposely misled the Trial Chamber.

Evidence of rebels disguised as Kamajors

Evidence of rebels dressed like civilians is relevant to question of the presence of civilians. Evidence of rebels disguised as Kamajors is relevant to the question of whether there are other inferences to be drawn from the evidence before the Trial Chamber and whether those inferences amount to reasonable doubt of Mr. Kondewa's guilt. As the Trial Chamber now considers that issue it is respectfully submitted that reference should be made to the following examples, many of which came from Prosecution witnesses:

After people realized that the government was providing for Kamajors, many people approached ECOMOG, saying that they were Kamajors. Arthur Koroma (3/5/05)

"This is just an example, My Lord. I am saying that the rebels wore military -- sorry, Kamajor dress, disguised themselves and attacked villages." Albert Joe Edward Demby (13/2/06) (27)

"[P]eople were caught manufacturing these dresses. One Mr Konneh in Koribondo. [...] Yes, in Koribondo. One Jalloh in Bo, and MB Sesay in Bo, Bo Town." Albert Joe Edward Demby, (13/2/06) (28)

“And you recounted that battle as being fierce because the junta disguised themselves as Kamajors; correct? A. Yes. I said it was difficult because they were wearing an attire that looks like Kamajor attire. So it was very difficult.” Ishmael Koroma (23/2/06) (30)

Soldiers used Kamajor uniforms they had seized, wore them to loot villages. Fallah Bindi (23/5/06)

As a commander, Witness knew of soldiers/rebels dressing in Kamajor ronkos, causing havoc. Heard it happened in other towns and it happened to Witness himself. Mohamed Kineh Swaray (25/5/06)

JUDGE BOUTET: Again, Mr Witness, the question is relatively simple. You have described the dress, some of the dress of rebels to be of native clothing. THE WITNESS: Yes, similar to the Kamajors. JUDGE BOUTET: Was this similar to the dress of the Kamajors? THE WITNESS: Yes, My Lord. TF2-222 (18/2/05) (24)

Mr Witness, isn't it true that in that takeover the juntas disguised themselves as Kamajors wearing the Kamajor ronko? A. You are right. TF2-014(14/3/05) (54)

“There are also reports that Mende speakers were dressed in Kamajor clothing and infiltrated behind the CDF position to cause additional panic and confusion. This has been confirmed by AFRC sources.” Colonel Iron report, D7.9.

During the fight for Bo, junta forces disguised themselves as Kamajors. TF2-001 (15/2/05) (5)

AFRC wore Kamajor clothes to attack Bo. TF2-162 (8/9/04) (91). Heard of soldiers dressing in ronkos and attacking Bo. TF2-032 (9/9/04) (51); When the junta took over Bo some were disguised as Kamajors. TF2-001 (15.2.05) (5); Sometimes similar to Kamajor dress. TF2-222 (18/2/05) (24).

Rebels adopted Kamajor clothing to lull civilians. Bobor Brima (10/5/06)

Placing 92 bis materials in context

In ruling on the admissibility of 92 *bis* materials, this Trial Panel has said, “[t]he rules favour a flexible approach to the issue of weight to be determined at the end of the trial when assessing probative value of the totality of evidence.”¹² Among the materials admitted, there are numerous references to wrongdoing which is in line with the charges alleged in the indictment but it should be noted that no reference is made to CDF or the Kamajors:

“Women and girls reported atrocities committed by all fighting forces during the war. Early in the conflict the RUF perpetrated widespread violence across southern and eastern Sierra Leone. Violence against women and children and general terror in rural and urban centers quickly became cornerstones of the movement and were encouraged by RUF leadership. As government revenues fell from the loss of mineral sales, so too did the salaries and the resolve of the SLA. Soldiers committed gross human rights violations, including rape, mutilations, looting, property destruction, and murder. They forced women and girls to exchange sex for “protection: and used them as prostitutes.”¹³

The same report cites examples of girls who had been abducted and forced to be “captive wives” and there is likewise no reference to CDF or Kamajors.¹⁴

II. Legal defects in evidence before the Trial Chamber

Evidence which fails to comport with geographical areas set forth in indictment.

Despite having filed an indictment, an amended indictment, a Bill of Particulars, a Pre-Trial Brief and a Supplemental Pre-Trial Brief, the Prosecution has never alleged criminal wrongdoing in a number of geographical areas about which evidence was lead. When this issue was raised by counsel for Mr. Kondewa during the proceedings on 1 June 2005, relative to a witness testifying to events alleged to have taken place in Gambia, the Prosecution averred that since the indictment uses the word *including* “there certainly does not close the categories.” But as the Trial Chamber has

indicated in previous rulings, the language “included but not limited to” is “impermissibly broad and also objectionable in not specifying the precise allegations against the Accused.”¹

If the Trial Chamber were inclined to this broad interpretation it would have accepted the argument proffered by the Prosecution in its Rule 98 oral argument and would not likely have reached the conclusion it did in its Ruling on Motions for Acquittal, granting judgment relative to sections of indictment which related to specific crimes bases.

As the Trial Panel now considers whether the language is impermissibly broad, it is respectfully submitted that reference should be made to the following examples:

- In mid-February 1998 at Dassama, witness saw an unidentified “batch of Kamajor” chasing a man and accusing him of being a collaborator; they hacked the man and mutilated his body TF2-079 (26/5/05) (69)
- There were burned houses in Combema. Civilians said it was rebels. TF2-201 (5th November 2004 page 18 lines 26 to 29, page 19 lines 1 to 3)
- Saw Kamajors burning houses and killing people in Maka. TF2-004 (9th November 2004 page 67 lines 10 to 14)
- Witness alleges that Yamorto base was where they ate human beings. Witness TF2-152 (27th September 2004 page 118)
- In Sorgina, Bangura pointed at Joseph Lansana and said he’s RUF, he was tortured, we cut off his ear, lit plastic and dripped it on his body. His mother, an old woman came and they accused her of cooking for the juntas. She was chopped. Compound burned and old woman thrown on the fire. TF2-014 (10th March 2005 pages 43 to 46)

¹ The Prosecutor v. Allieu Kondewa, SCSL-2003-12-PT, Bill of Particulars, 5 December 2003, para. 11 quoting The prosecutor v. Santigie Borbor Kanu, SCSL-2003-13-PT) Decision and Order on Defence Preliminary Motion for Defects in the Indictment, 19 November, 2003, para. 33.

- Relative to counts six through eight, the crimes were alleged to have taken place on the entire territory of Sierra Leone an accusation which is so broad as to make it virtually impossible for the accused to answer the charge.

Based upon the foregoing the accused submits that the language of the indictment is impermissibly broad and objectionable in not specifying the precise allegations against the Accused relative to foregoing geographical locations and respectfully asks the Trial Chamber to enter a judgment of acquittal with regard to said evidence.

Evidence which fails to comport with temporal period provided for in indictment

Prosecution witness alleges that Fofana and Kondewa were in charge of Kamajors in Kenema but cannot establish timeframe. Witness TF2-223 (28th September 2004 pages 98 & 99)

Based upon the foregoing the accused submits that the evidence fails to comport with the temporal period provided for in the indictment and respectfully asks the Trial Chamber to enter a judgment of acquittal with regard to said evidence.

Charges about which there are no agreed elements and no jurisprudence (collective punishment and child soldiers)

Relative to the charges of collective punishment and the recruitment of child soldiers the accused respectfully submits that the indictment fails to provide sufficient detail so as to notice the accused on the offences he is charged with in such a way that he can adequately prepare his defense. Without the benefit of jurisprudence which elaborates the elements of these purported offences he is unable to properly respond. Relative to recruitment of child soldiers, while the elements arrived at by the parties to the Rome Statute bind the International Criminal Court, they have no such weight for this tribunal.

Based upon the foregoing the accused submits that the language of the indictment is impermissibly broad and objectionable in not specifying the elements of counts seven and eight and respectfully asks the Trial Chamber to enter a judgment of acquittal with regard to these counts.

No service of amended indictment

Mindful and fully respectful of the fact that the Chamber has ruled on this issue, as has the Appeal Chamber, counsel for the accused respectfully renews its objection to the amended indictment on the grounds that he has not been served with a copy of the amended indictment in this case which is in some aspects materially different from the original indictment. The date for service having passed, counsel respectfully requests that the Trial Chamber limits its findings to those charges which formed the original indictment, with which Mr. Kondewa has been served.

III. Failure to establish that Mr. Kondewa bore the “greatest responsibility”

The Trial Chamber in its ruling on the Preliminary Defence Motion on the Lack of Personal Jurisdiction, 14th November 2004 Prosecutor V Norman et al SCSL -2004-14-PT-110 held that, “in the ultimate analysis, whether or not in actuality the Accused is one of the persons who bears the greatest responsibility for the alleged violations... is an evidentiary matter to be determined at the trial stage”.

The Prosecution must not only lead evidence to prove beyond reasonable doubt the allegations contained in the Indictment, superior responsibility under Article 6(3) of the Statute but also that the Third Accused is one of the persons who bears the greatest responsibility for the alleged violations.

In other words it is insufficient to prove the allegations in the Indictment and to establish superior responsibility under Article 6(3) of the Statute. The Prosecution must also prove by way of evidence to the Trial Chamber that there are no other persons more extraordinarily culpable than the Third Accused.

Counsel for Kondewa submits that even if and assuming without conceding that the allegations in the Indictment have been proved the Prosecution have failed woefully to establish by way of evidence or otherwise that the Third Accused is one of the persons who bears the greatest responsibility for the alleged violations. We have been unable to find any evidence which goes at establishing greatest responsibility. Not even the discredited ‘holy trinity evidence’ (a figment of Nallo’s imagination) proves the issue of ‘greatest responsibility’.

We would submit that *even if* (which is not conceded) the Third Accused is most responsible he should be acquitted if he is not one of the persons who bears the greatest responsibility for the alleged violations. 'Greatest Responsibility' requires a much greater threshold of proof and is limited to the most narrow class of offenders.

Ralph Zacklin, UN Assistant Secretary-General Office of Legal Affairs, on the 25th September 2000 in a press briefing said as follows:

“ In terms of those who bear the greatest responsibility for the crimes, in our report we will be suggesting a slightly different variation of this formula. That would be 'those most responsible.' The reason for this is that we feel that the formula 'greatest responsibility' probably pitches the personal jurisdiction very narrowly and probably too high to capture all of those who bear some degree of command or leadership responsibility that may have committed crimes”

The Prosecution have failed to show that the Third Accused in law and on the evidence belongs to the category of people who bear the greatest responsibility for the alleged violations of International Humanitarian Law and he must be acquitted.

IV. Allieu Kondewa, the Kamajors and the Civil Defence Force

Allieu Kondewa

History of initiation

Initiation developed over time. People applied “mystic medicinal herbs” to become immune to bullet wounds.” Initiators” applied mystical herbs. “Initiates” were those who received herbs. There is a popular view that initiation is immunization. Initiation provided immunization against bullet wounds. Initiators are “like private medical doctors who sit in their homes or places of practice, and people who want to be immunized or be initiated go to them, pay them before they are immunized.” Civilians and non-combatants sought immunization, individually or in family groups. Women and children sought immunization. Paramount chiefs, sub-chiefs paid initiators to immunize existing chiefdom Kamajor groups en masse. Dr. Albert Joe Demby (10th February 2006 pages 11,12,13,14)

Role as initiator

The Trial Chamber heard a great deal of evidence of Mr. Kondewa's role as initiator. Much of this evidence is corroborated by both prosecution and defence witnesses. The following are representative examples:

- Mr. Kondewa began initiating even before the war. TF2-82 (17/9/04) (2)
- He himself never went to battle, in fact no initiators did after one particular initiator, Kamoh Kowa, went to warfront without a gun and was killed. Lansana Bockarie (26/5/06)
- Mr. Kondewa didn't take part in combat. No initiators took part in planning, fighting war. Kondewa not involved with distribution of arms, ammunition. Joe Nunie (11/5/06)
- Initiators did not go into combat and Mr. Kondewa did not have troops under his command, only aides or bodyguards. TF2-011 (8/6/05) (54-55) It is worth noting that bodyguards in this context play a very different role than might be imagined. As the evidence showed, Mr. Kondewa had some bodyguards who were young unarmed children, an unlikely choice given his size. It was pointed out that the term bodyguard is used to describe clients for whom the patron was responsible for and whose loyalty could be counted upon rather than persons provided protection in a physical sense. Dr. Daniel Hoffman (9/10/06) (122)
- The "[s]ole task of Kondewa and his co-initiators was to prepare you people, the fighters, for the battlefield... to immunize you, the fighters, against bullets." TF2-190 [10th February 2005 page 86 lines 11 to 21 (86)]
- Kondewa meant so much to Kamajor society that Kamajors overprotected him to ensure no harm befell him. Kondewa was never present during planning for war. Osman Vandy (Vanjawai) (17th February 2006 page 105 lines 9 to 23)

- Kondewa did not do business with Kamajors after initiation. He didn't have command or control of Kamajors and didn't go to warfront. Witness never saw Kondewa punish a Kamajor. Kondewa had nothing to do with Witness after initiation. Kini Torma (2/6/06)
- When Kamajors go to war they must go to Kondewa to be advised. Kondewa chooses who goes to warfront, blesses them as high priest. Kondewa sometimes instructed them *not* to go but never instructed them to go. TF2-068 (emphasis added) (18th November 2004)
- Kondewa would say "I am going to give you my blessings. I'm going to give you the medicines, which would made you to be fearless if you didn't spoil the law...I will give it to you. I will prepare you." TF2-201 (4/11/04) (113-114)
- "Kondewa told us that all these powers that he has in him has been transferred to us so that nothing will be wrong with us, no cutlass will strike us. He's now satisfied. So all of us will go to the war front and come back with happiness, and let no one be afraid." TF2-190 (10/2/05) (43-48)
- "I give you my blessings; go my boys, go." TF2-222 (17/2/05) (119-120)
- Kondewa had no commanders attached to him, had nothing to do with Kamajors after initiation unless one approached him for help. Kondewa did not have power to punish Kamajors who broke the rules. Only the War Council had this power. No commander would report Kamajor atrocities to Kondewa. Haroun Aruna Collier a.k.a. Hardway (12/5/06)
- Advice was also given by Kondewa for the renewal of the initiation ceremony. Renewal of initiation was to strengthen the soldiers and give them zeal and ambition . Witness TF2-223 (26th September 2004 pages 57 and 58)
- Witness says that initiators did not take part in fighting or in the planning of war. Mohamed Bhonie Koroma (22/5/06)

- Initiators did not command troops, did not go into combat, did not sit down with commanders and plan battles. Did not supply arms, ammunition to fighters. Keikula Amara a.k.a. Kamabotie (17/5/06)
- Initiators never went to the warfront. They never commanded troops and were only there to initiate. Kamajors loyal to chiefdom authorities. Not initiators. Keikula Amara a.k.a. Kamabotie (17/5/06) Pages 70 and 71
- Never saw initiators command troops; “they hadn’t that right.” Keikula Amara a.k.a. Kamabotie (17/5/06) (22-23)
- Initiators never in combat. Initiators never supplied logistics, arms, ammunition to combatants. Brima Moriba (22/5/06)

Rules

Initiates were given laws during initiation. Laws were to protect their lives. If they did not comply they would die at the warfront. Mohamed Kaineh (19/5/06) page 11. The rules had their roots in the Bible. Samuel Hinga Norman

Witness recounts laws given to him upon initiation:

- Respect elders. Abibu Brima (12/10/06) (35)
- Fear women, don’t have affairs. (35)
- Don’t touch civilian property. (35)
- Don’t leave wounded fighters at the warfront. (35)
- Retrieve guns dropped by the enemy at the warfront. (36)
- Don’t harm surrendering combatants. Hand them to chiefdom authorities. (36)
- Don’t play with corpses. (37-38)
- We shall not kill any innocent person. TF2-005 (15/2/05) (82)
- We should not harass civilians whom we were meant to defend. (83)

These rules were seen by Kamajors as a code of conduct and everyone told not do anything to bring Kamajors into disrepute:

And you'd also agree with me that the Kamajors did not fight that war to enrich themselves?
 A. That was not the plan. Q. That was not the plan, thank you. And even though it was a very serious and fierce war, you the Kamajors had rules of engagement. In other words, you had a code of conduct to go by? A. Yes, there were laws, Q. Yes, thank you, yes. And please listen to me very carefully. If you don't understand say so, okay? A. Yes, sir. Q. One of the rules was that you must avoid harming civilians; you'd agree me? A. Yes, the law said that. TF2-190 (10/2/05) (91)

Outsiders did not recognise initiation rules as code of conduct:

"Now, General, in the British Army I take it that there are rules of engagement, no doubt?
 A. Yes. Q. And are these rules made known to every military personnel? A. Yes, very strictly. Q. Very strictly. And naturally you would expect strict adherence? A. It's a disciplinary offence not to adhere to them. Q. Thank you very much. In your strategising with General Khobe, General Shelpidi, were you at any time told about rules of engagement for the CDF? A. Not to my knowledge. I can't remember any discussion of them." Lt. General David Richards (21/2/06) (63).

This is perhaps not surprising. Kamajors themselves simply understood it as a natural extension of the roles they already played within their communities. Dr. Daniel Hoffman (9/10/06) (123)

Difference between initiation and immunization

There is an important distinction to be made between initiation and immunization as well as between initiation and recruitment, especially within the context of children and the elderly. This was the subject of the following evidence before the Trial Chamber:

- Witness was initiated for protective reasons and he did not fight. He had arranged for two of his children, aged seven and eight, to be initiated for immunization. Joseph Ali Kavura Kongomoh II (1/6/06)

- Witness joined Kamajors to become bulletproof and saw no link between initiation and military training. (TF2-068 page 79 lines 1 to 18)
- Witness notes that it is possible to be initiated just for protection, not as a combatant and that this would involve the same rites of initiation. Those initiated for protection only were not given a uniform after initiation but the rules were recounted. Arthur Koroma (3/5/06)
- In early 1996, Sherbros from Bonthe Chiefdom brought young boys to Mokosi. Kondewa immunized them against bullets and none were hurt in subsequent rebel attack. Witness's own son was immunized. Witness allowed his son to be initiated to protect him in times of trouble. Son was ten years old when initiated and never took part in combat. Witness maintains that more people were initiated as Kamajors for safety than were initiated for combat. Haroun Aruna Collier a.k.a. Hardway (12/5/06)
- Witness agrees that immunization prevented people dying in battle. Saw people shot at to test immunization. Bullets never pierced people. Witness saw water come out of guns. Haroun Aruna Collier a.k.a. Hardway (12/5/06)
- Witness was initiated but did not fight. Was told during initiation to protect civilians. Mustafa Conteh – TF2-012 (21st June 2004 pages 59 and 62 lines 21 to 29)
- Agrees one is made bullet-proof through immunization. Witness benefited immensely from immunization. Joe Nunie (11/5/06) (52)
- “In fact, for that reason, myself sitting down here, I allowed my own son to be initiated just for him to be immunised against bullets. I saw that. It had happened.” Haroun Collier (12/5/06) (20-21)
- Witness explains there is a difference between initiation and recruitment into Kamajor society. Not every initiate becomes a combatant. Witness himself was initiated but was never a combatant. TF2-011 (8/6/05) (42-43)

- Some would be initiated just to protect themselves from bullets. Alhaji Daramy Rogers (8/6/05) (44)

Belief in initiation and immunization

Although it is perhaps understandably difficult to believe the claims of immunization and bulletproofing, prosecution and defence witnesses have universally expressed their beliefs and shared their personal experiences:

- Witness and other Kamajors believed "...all these powers that [Kondewa] has in him has been transferred to us so that nothing will be wrong with us, no cutlass will strike us. He's now satisfied. So all of us will go to the war front and come back with happiness and let no one be afraid." TF2-190 (10th February 2006 page 45 lines 16 to 20)
- Witness believes in the mystical powers that initiators give initiates. Witness could disable the guns of his enemies. No bullet could pierce him or even burn his shirt. Keikula Amara a.k.a. Kamabotie (17/5/06) (69)
- Witness believes "[v]ery seriously" in powers he gained from initiation. Fought at warfront and was never pierced by bullet. Keikula Amara a.k.a. Kamabotie (17/5/06) (22-23)
- Witness believes in mystical powers of initiators. Soldiers fired at him and no bullet ever pierced him or hurt him. Knew immunization to be effective. Believes he was unhurt because he adhered to laws given by Lahai Koroma (24/5/06)
- Kamajors met rebels and soldiers at Gofor, although they hadn't guns they trusted to medicines. Mohamed Kinch Swaray (25/5/06)
- Witness observed that members of CDF seemed "almost stupidly brave", convinced of their own invincibility. Lt. General David Richards, (21st February 2006 page 38 lines 26 to 29). He testified that this made CDF soldiers braver but noted that there was in fact no

reason to believe that this bravery led to more casualties. Lt. General David Richards (21st February 2006 page 106 lines 16 to 22).

In its opening statement the Prosecution sought to familiarize the Trial Chamber with the Kamajors:

“The Kamajors, it must be noted, were merely a group of ordinary local hunters before the emergence of Allieu Kondewa; simple folks of the countryside used to hunting deer, rodents, and other bush animals for domestic consumption. There were no special initiation rites, nor military objectives. Hinga Norman, Monina Fofana and Allieu Kondewa schemed to take a traditional spiritual belief system and manipulated it to their own ends. Vulnerable young men, desperate for survival in a devilish war, fall easy prey to these men.” (3/6/05) (16).

Skepticism about the motivations of initiators who were receiving payment is understandable. But it is worth noting that no witness expressed the belief that having paid for (or having one’s chiefdom pay for) initiation undermined its effect in any way. Even if an initiator were in part motivated by the desire to earn money, it is not “contradictory to say that an initiator could take advantage of this opportunity for some kind of personal enrichment and simultaneously be performing this very important function for the CDF that people recognize as necessary...[it] is no less meaningful for the initiate, the initiator or the community.” Dr. Daniel Hoffman (9/10/06) (117)

And relative to the immunization itself, there is nothing criminal or nefarious about providing Kamajors with reassurance as they go off to battle. There are numerous examples the world over of exactly the same phenomenon. Some use bullet proof vests, advanced technology which ensures against detection by the enemy, chaff deployed during dangerous flights and the distribution of incomplete or misleading information to soldiers, all of which are routine and legitimate tactical practices during times of war. The Kamajors should not be patronized or judged more harshly for using means that seem less advanced or more unbelievable to others.

Consequence of breaking rules or taboos

A clear understanding and acceptance was vital to the initiation and each initiate understood the consequence of not following them:

- Initiation rules given – not following means you will die. TF2-004 (9th November page 114 line 22)
- If one violated these rules, one would be pierced or killed by bullets. Ishmael Senesie Koroma (22nd February 2006 page 37 lines 17 to 24)
- Kondewa conducted Witness's initiation at Mokasi and said if one broke the rules, one would die in war. Witness adhered to rules. No bullet hit him. Kini Torma (2/6/06)
- Initiation rules were important for magic to work. TF2-140 (14/9/04) (127)
- Kondewa told witness the laws and that the consequences of breaking laws was that you would die if shot at. TF2-82 (17/9/04) (8)
- If you did not obey Kamajor laws you would die in battle – this was your punishment. Kamajors themselves did not need to punish; TF2-140 (14/9/04)
- “[I]f you follow the laws you will not be caught by a bullet.” Witness says that when he followed the laws he was shot and nothing happened. TF2-013 (24/2/05) (31)
- Kamajors were strictly adhering to those rules because “if you could adhere to the rules God will help you.” TF2-013 (24/2/05) (37)

Just the same, the rules were not universally complied with:

- Now, my question is -- and also you agree with me that some Kamajors strictly adhered to these rules. My question is -- A. Yes. Q. -- there were some recalcitrant Kamajors who completely ignored these rules; isn't it? A. There was some of them who'd never adhere to the rule. TF2-013 (24/3/05) (30-37)

- So many of hunters never returned, who went against that truth, those rules. You receive your punishment in the battlefield. If you breach [above rules] you bear the consequences. Samuel Hinga Norman (27th January 2006 page 48 lines 1 to 23)

It is easy to conflate the consequence of breaking the rules and the issue of discipline. Some believed that the consequence of breaking rules vitiated the need for discipline, since death would come to those who broke the rules. See, e.g. TF2-140, “[i]f you did not obey Kamajor laws you would die in battle – this was your punishment –Kamajors themselves need not punish.

Others made sincere attempts to bring discipline to bear, sometimes at great personal sacrifice to themselves and almost always without success. This will be discussed in further detail later in the section of the brief dealing with Superior Responsibility.

Ongoing role of initiator

As significant as the role of initiator is, he or she has no ongoing role or responsibility vis-à-vis initiates. They return to their chiefdoms, falling outside the influence of their initiators.

Kamajors

Kamajors and CDF- chiefdom centrality

The Kamajors played an unexpectedly significant role in the defence of civilians in Sierra Leone, although by virtually every measure they were ill equipped to do so. Theirs was a role that is best described as entirely reactant. “As the war proceeded and the relationship between [rebels] and the state military deteriorated, the Kamajors were a logical focal point around which rural communities could organize their own defense.”¹⁵ Although the threats they were facing continued to change as the conflict wore on, the Kamajors’ role as protector of the community remained fairly consistent.¹⁶ Witnesses described it as follows:

“We [my chiefdom] decided to establish contact with the group of Kamajors who had already started resisting the AFRC at Gendema.” (7:1-2) “I was assigned the task of

actually establishing the contact, because I was myself a Kamajor, though I had been initiated into the society for protection only. So I made the journey.” Arthur Koroma (3/5/05) (7)

“I didn’t join it to go and fight. I joined it in order to protect my own life.” “Many, many, many, many” others joined for same reason. Mohamed Turay Collier (16th February 2006 page 69 lines 1 to 14).

Later on, the movement took on the role of civilian defense:

“I introduced idea of civil militia to Norman, his sub-chiefs.” I said Jiama Bongor, Baoma should cooperate in raising volunteers for civil militia in case either chiefdom were attacked. People were free to volunteer for proposed civil militia, regardless of age, sex, etc. It was not restricted to Kamajoisia. Dr. Albert Joe Demby (9th February 2006 page 114 lines 27 to 29, page 115, 10th February 2006 page 2 lines 23 to 29)

It was the “pride of every man, woman and grown-up child to contribute in the defence of his community”. Dr. Albert Joe Demby (10th February 2006 page 6 lines 11 to 17)

Is important to note that the term defence is being used in a civilian rather than military context and includes references to women and children. Every extended conflict takes a devastating toll on individuals by blocking their access to water food and shelter. And every individual had a role to play in fighting that enemy. This is the same phenomena referred to by Dr. Hoffman in explaining why guerilla warfare models (with which Kamajors share some features) are “only successful when civilians are not attacked...because people recognized you couldn’t have a centralized food distribution source, you needed to rely on the peasantry. Dr. Daniel Hoffman (10/10/06) (62-63)

The chieftaincy system in Sierra Leone concentrates a great deal of power on the local level. Since the movement grew organically out of chiefdoms it is not surprising that they maintained their centrality.

- “There was no one leader of all Kamajors. They had leaders in their respective chiefdoms.” Arthur Koroma (3/5/05) (15 –16)

- Although Kamajors were themselves displaced, “[t]here was never a time when ‘local’ [i.e. chiefdom] control over the kamajors broke down as a result of being displaced from their territories of control.”¹⁷
- Kamajor relationships are described in terms of patronage and it is remarked that these chiefdom based patron-client relationships maintained central even in the face of “business, bureaucratic, political or even military logics.”¹⁸

Role of Chiefdom in selection and promotion of Kamajors

- Chiefdom elders screened initiates to ensure they were not criminals, had no bad record. Elders or parents paid for initiation. Initiator smears *moye* on an initiate’s forehead. If it sticks, he is fit for initiation. After this screening, initiator takes initiates to initiation bush. Admonishes initiates; tells them Kamajor rules. If initiate broke rules, he would die in war. Initiator would continue giving rules even after graduation ceremony. Whole chiefdom would attend, dance. Chiefdom elders would give Kamajors further rules. Haroun Aruna Collier a.k.a. Hardway (12/5/06)
- After village burned, section chief called a meeting in Baiama. Requested town chiefs supply five people from each town to be initiated into Kamajor society. Kini Torma (2/6/06)
- Who appointed you or made you a chiefdom Kamajor commander? A. My chiefdom people. BJK Sei (15/5/06) (80)
- Chiefdom people appointed witness commander and he later became overall commander when the chiefdom people came and said “[t]his man has fought so much for this land, so let’s give him this position...” Kenei Torma (2/6/06) (49)
- If Kamajors were needed for a task, chiefdoms would be requested to supply a specified number. After task was completed, Kamajors would return to their home chiefdoms.

- Chiefs provided as many soldiers as possible to fight juntas in Blama. (2nd June 2006 page 11 lines 25 to 29)

Role of Chieftdom in providing weapons and supplies

- As chieftdom commander, Witness's duties were to inform chiefs when Kamajors needed food, single-barrel cartridges; and to inform chiefs when soldiers needed Kamajors to assist in operations. Chiefs bought food, cartridges, organized Kamajors to send to soldiers.

As Dr. Hoffman has explained, the question of how and from whom Kamajors received their weapons played a significant role relative to whether they likely yielded to orders of others. He explains the patronage system as the most dominant feature of Kamajor society noting that "everybody in a community requires that somebody stand for them. What we have is a network of relationships that are sometimes referred to as patron/client...you have certain individuals to whom you are indebted as a client and then there are certain individuals who function as patrons...Patrons...will funnel resources as they get outward...as resources come in, they are sent out along these webs to one's client." An ideal world would mean no need to switch patrons, but the less ideal the world is the greater the strain is on the patronage and the more likely it is that a client would switch for survival. Dr. Daniel Hoffman (9/10/06) (102-103) This was especially so during war time and among those under 35. Dr. Daniel Hoffman (9/10/06) (118) "[F]or some people, this moment of the war was that opportunity to bypass obstacles they saw set up in front of them to accumulating resource materials." Dr. Daniel Hoffman (9/10/06) (118)

Receiving a weapon from a chieftdom authority or from an opponent meant you were either accountable (in the case of the former) or autonomous (in the case of the latter.) This phenomenon helps explain the lack of effective control among the actors. Once a Kamajor gained autonomy, the patronage link was often weakened beyond repair and he saw himself as accountable to no one. In fact capturing weapons meant that you could "disperse these along this web of clients and accumulate clients of your own" rather than being answerable to your patron. Dr. Daniel Hoffman (9/10/06) (120). "[F]or many, especially rural young people, young men, you know, an AK-47 was one of the first commodities that they had easy access to, commodities associated with a certain kind of privileged position." Dr. Daniel Hoffman (9/10/06) (119)

Role of Chiefdom in planning and ordering attacks

- Received orders from paramount chiefs. Kini Torma (2/6/06)
- In Blama attack, Witness answered to chiefs. Chief Francis Dawa, Chief Mambu Pewa II. Dawa was head of all section chiefs in Small-Bo. Pewa was paramount chief of Langrama. Did not participate in fighting. Gave order from his own chiefdom. As chiefdom commander, witness took orders from paramount chiefs. Kamajor organization structured in towns: town commanders, section commanders, chiefdom commanders. Witness was answerable to no other commander than CO Sahr and Sahr answered only to chiefs, who gave him the assignment. Lahai Koroma (24/5/06) page 27 and 28

Chiefdom centrality

In addition to internal Kamajor struggles and the lack of coherence caused by decentralization and poor communication, there were additional problems posed by the fact that chiefdom authorities insisted on maintaining a strong hold over the Kamajors they had sent. One witness described the failed attempt for Kamajors to exert control over chiefdoms citing the example of a chiefdom demand that Kamajors remove checkpoints which had to be honoured. Joseph Ali Kavura Kongomoh II (1/6/06)

Dr. Hoffman places the activities of Base Zero in context and explains that even it failed to function as a “forward offensive base” as intended. Dr. Daniel Hoffman (9/10/06) (73)

Kamajor structures – planning, ordering, housing prisoners

In addition to the challenges posed by having such strong local authority, Kamajors suffered from a lack of central command or structure, a fact that was noticed by the Kamajors themselves:

- Witness went to Base Zero to assist, had heard there was no command structure there. Did not succeed in establishing command structure. Alhaji Daramy Rogers (8/6/05) (41)

- “[T]he area of operation was so wide that in some cases, some fighters acted on their own, without the central command knowing. TF2-005 (16/2/05) (70)
- I saw that the whole organisation had an ineffective command and control. TF2-222 (17/2/05) (90)
- Witness testified that he had no commander and simply went where he wished. TF2-080 (6th June 2005 page 31 lines 5 to 14)
- Kamajors came in March 1998 in different groups, all mixed up as they came. TF2-168 (3rd March 2005 page 46)
- Kamajors were a “faction that was created by Hinga Norman with the aim of saving us, but these Kamajors were disorganised. They are not under control.” TF2-088 (25th November 2004 page 93 lines 11 to 13)
- “I didn’t see any control although Kamajors have a leader” TF2-167 (8th March 2005 page 48 lines 21- 29,page 49 line 1)
- Witness described CDF as a “loose organization of various command posts” with attacks directed locally. “Ours was a guerrilla war. You don’t plan it in the centre, you plan it on the spur of the moment. Otherwise it will leak and you are finished.”
- I had no commander. I had nobody who controlled me. Wherever I wished to go that was where I wished to. I had no commander. TF2-080 (6/6/05) (32)
- We were not trained. We were not given weapons. Whatever we wished to do is what we did. TF2-080 (6/6/05) (33)

At times not even the fighters themselves were supplied to Kamajors:

- Joe Tamide got the Kamajors for the attack on his own; they were not assigned to him. TF2-082 (15/9/04) (11)

When asked about the effect of poor central communication among Kamajors and its effect Dr. Hoffman notes "...if there is anything that points to this argument of a kind of conglomeration of local dynamics is this particular question. There simply was nobody in a position to make declarations that would be considered the word for the movement as a whole. The communication capacity wasn't there." Dr. Daniel Hoffman (9/10/06) (99) This is of additional relevance as the Trial Chamber considers issues of Superior Responsibility, discussed in greater detail hereinafter.

This lack of central command resulted in a notable lack of coordination and attacks that were in fact self-planned:

- There were two types of military operation that took place during this period. One were the dispersed defensive operations that took place - [...] Yes, these are the one that took place in the regions that the CDF still controlled primarily in the north and east of the country. They were conducted by those forces, those territorial defence forces still in place. *I have not seen evidence that these were coordinated activities.* TF2-EW1 (14/6/05) (33) (emphasis added)
- The attack was at reservation. It was there that the junta was living. Q. Mr Koker, who ordered that attack? A. That attack was just a random attack. It was not ordered by anybody." Kenneth Koker 20/2/06 (60)
- Who actually gave the order to attack Tongo Field? ... Are you saying that it was you that ordered the attack because there wasn't anyone else? We organised ourselves. We sat down, came together, just to protect our lives and to fight for our lives. We, too, went and attacked those people. Those orders came from us. BJK Sei (16/5/06) (13-14)
- You did say it was a random attack, is it? A. Yes. Q. Could you explain to this Court what do you mean by that random attack? A. Yes. The attack in which we didn't get order from the chiefdom, which we went and did on our own because we wanted -- because we wanted arms and ammunition from them because that was the place they were based. Kenneth Koker 20/2/06 (83) This phenomena is referred to in Dr. Hoffman's aforementioned explanation of the value of the AK-47. This is another

example of the militarization which “increasingly presents itself to some as a way to opt out to subvert the injustices of patronage by violently leveling the field. Here, belonging an[d] accumulation become indistinguishable.” Dr. Daniel Hoffman (10/10/06) (6)

- In Witness’s Lower Bambara Chiefdom, Kamajor chief, other chiefs planned war. Keikula Amara a.k.a. Kamabotie (17/5/06)
- After coup, Kamajors attacked junta headquarters at Bo reservation. Attack not ordered by anyone.
- How did you decide and plan how the war was to be fought? A. We did the planning amongst ourselves, the commanders. Mohammed Bonnie Koroma (22/5/06) (38)
- Still those of us who planned it were the people who went and attacked Kenema. Nobody gave us orders. Mohammed Swaray (26/5/06) (12)
- Now the attack on Taiama, where was the planning done? A. It is the same Moyamba District, those chiefs who were there, and all those others. Kenei Torma (2/6/06) (36)

Kamajors made several attempts at central structures, none of which were successful:

Chief Defence Committee

- People of chiefdom formed Civil Defence Committee. Organized chiefdom into sections. Witness was made defence committee chairman for Yumbuma town. Mohamed Kaineh (19/5/06)

NCC

- The NCC were asked to provide food, condiments for National War Council. NCC had never heard of War Council. Investigators, were told it had existed at Base Zero, “responsible for dealing with all matters concerning the war”, contained appointment committee, logistics committee, etc. NCC abolished War Council as it had been

superseded by NCC Dr. Albert Joe Demby (10th February 2006 pages 73 to 79, 13th February 2006 page 5 lines 11 to 27)

War Council

- Civilians, traditional rulers traditionally appointed chairman of War Council. TF2-201 (4th November 2004 page 87 lines 21 to 29, page 88 lines 1 to 7.)
- Conflicting testimony about Mr. Kondewa's membership but bulk of evidence indicates he was not a member. See, e.g. Haroun Aruna Collier a.k.a. Hardway (12/5/06); TF2-014 (10/3/05 (33-34); TF2-008 (16/11/04) (78-79)
- There is evidence that Mr. Kondewa was in fact critical and disrespectful of the council. Witness says Mr. Kondewa accused War Council members of taking shoes, uniforms. Permitted Kamajors to pelt War Council members with stones. Said the Council was fake, was just there to complicate matters. TF2-079 (26th May 2005 page 45 lines 8 to 29, page 46 lines 16 to 29)

It should however be noted that even without central structures the Kamajors were able to deal with the prisoners taken after attacks:

- One Kamajor witness testified that he himself was taken to Kamajor HQ where he was questioned and later freed. (TF2-057 30th November 2004 page 12)
- Many prisoners were brought to Witness in Panguma from Tongo. Witness released them because they were unarmed, were not junta forces. B.J.K. Sei (15/5/06)
- B.J.K. "said that anybody that was captured, whether it was civilian or rebel, he should be brought over to the headquarters." TF2-027 (18/2/05) (110)

Although much has been made of the lack of detention facilities maintained by Kamajors and the argument put forth that this lack is proof of a Kamajor policy to kill all prisoners. This argument is rebutted more fully hereinafter, but it should be noted that such facilities were only absent in

locations where no combatants would be found (e.g. Talia) or where they could easily be transferred to ECOMOG. Prisoners were either brought to Headquarters or turned over to ECOMOG, depending on where they were taken into custody. This clearly contradicts the prosecution's argument that because CDF did not have detention facilities they must have been killing all captured soldiers.

Discipline

The subject of discipline within the Kamajors is complicated, partly as a consequence of the lack of central command. This was of course exacerbated by the competing authority of the chiefdom, commanders and ECOMOG. The results are uneven, inconsistent and chaotic, leaving the clear impression that there was no effective disciplinary system in place.

- It was noted that groups on periphery of main CDF often did what they wanted rather than what they were told. Lt. General David Richards (21st February 2006 pages 38 & 39). This is a natural outgrowth of having a society in which the local plays a more significant role than the central.
- “[F]rom the onset as pretty much the day, the Kamajors were not disciplined.” Lack of discipline was responsible for the uncontrollable nature of the activities. TF2-008 (23/11/04) (32-33)
- “On the battlefield we certainly see a lack of discipline.” TF2-EW1 (14/6/05) (37)
- The commanders' authority and responsibility to that extent, discipline -- the disciplining of their men on the ground was entirely their own, My Lord, entirely the responsibility of the commanders.” Samuel Hinga Norman (5/2/06) (73)
- Disciplinary committee handled disciplinary issues. The committee did not inflict punishment but referred to coordinator. In severe cases, coordinator would seek War Council advice. Kamajors' discipline was responsibility of their commanders. Distinction between discipline and punishment.

- Kamajors were under control of paramount chiefs. Dr. Albert Joe Demby (13th February 2006)

Where disciplinary measures were successful they were meted out by patrons with particular strength and determination as well as localized control.

- Witness's husband investigated reports against Kamajors. Agrees if Kamajors did something bad, her husband would be in trouble. Wuiyatta Sheriff (9/5/06) (54–55)
- Witness was in charge of disciplining Kamajors in his chiefdom. Kamajors who wronged civilians received 12 lashes. Keikula Amara a.k.a. Kamabotie (17/5/06)
- “Timide established his own system of discipline in his force.” Iron report D3.6.

Relationship with ECOMOG

It is difficult to understand how the Kamajors and CDF functioned without understanding their relationship with ECOMOG. There has been a great deal of evidence on this issue, much of it confusing and contradictory. ECOMOG invited Kamajors to a meeting at Kenema, 20 February 1998. They thanked the Kamajors for their cooperation and contribution to Kenema operation and said they didn't know terrain of Sierra Leone and thus wanted Kamajors to continue supporting them. They also promised to provide Kamajors with any fighting implements they needed. At different times and in different parts of Sierra Leone ECOMOG related to Kamajors as follows:

Supplies

- Witness heard Eddie Massallay on the radio summoning those fighting for exiled government to Bo Waterside. Kamajors went there. Stayed as guests of ECOMOG. ECOMOG provided food. Siaka Lahai (16/5/06)
- “Colonel Yayah Abu Bakarr gave us about a platoon of ECOMOG troops and two personnel carriers, armoured personnel carriers.” Arthur Koroma, 3 May 2005 (31:5-9)

- ECOMOG donated to the CDF logistics, including a truck and two Mitsubishi pick-up vans. In addition to that, they used to provide the CDF, through me then at that time, all that was needed for a fighting force, a guerilla fighting force. I would take these materials across the border during weekends into a border village called Fairo in Sierra Leone. Mustapha Lumeh (5/5/06) (71)
- Food that was coming through the ECOMOG, it was he and the ECOMOG who had been distributing this food to us, rice.” Kenneth Koker 20/2/06 (57)
- In Kenema, Witness’s group presented themselves to ECOMOG commander Col. Yayah Abu Bakarr and reported that they had no supplies. Bakarr provided arms, ammunition, medicine, food, and a van. Group returned to Bunumbu with these. Mohamed Kaineh (19/5/06)
- As a number of Kenema witnesses from testified to waiting the arrival of ECOMOG who arrived with a support unit in Kenema five days after the Kamajors. TF2-223 (28/9/04) (102)

Planning and Orders

- While Witness was in Bunumbu, Col. Bakarr sent word that Witness’s Kamajors should meet ECOMOG to take Segbwema. Mohamed Kaineh (19/5/06)
- “Once we were together with ECOMOG the command was always -- we were just an auxiliary. Arthur Koroma (3/5/05) (31)
- “But who is commanding this group? Who is in charge of that group? THE WITNESS: The ECOMOG lieutenant. The ECOMOG lieutenant.” Arthur Koroma (3/5/05) (33)
- Now, when there was this joint operation between ECOMOG and CDF who was in command? A. ECOMOG. Q. ECOMOG. A. We supplied them the men. Q. Yes. And they gave the command? A. Yes. Q. Thank you. And this was the general pattern whenever you fought alongside ECOMOG? A. Yes. TF2-005 (17/2/05) (62)

- Witness and his troops were under orders of ECOMOG commander. ECOMOG commander provided food, arms, ammunition to Kamajors. Joe Nunie (11/5/06)
- ECOMOG was in control of the Kamajors during that period in SS Camp. Lahair Koroma (24/5/06) (54)
- As task force commander, witness worked alongside ECOMOG and took orders from ECOMOG. Osman Vandy (Vanjawai) (17th February 2006 page 76 lines 23 to 29, page 88 lines 19 to 29)
- ECOMOG General Khobe “had tactical control of forces, controlled how they were organized.” Lt. General David Richards, (21st February 2006 page 14 lines 10 to 13)
- Characterizes Norman as “an inspirational figurehead” who affected people’s morale, but maintains General Khobe exercised “hour-to-hour control of the CDF”. Lt. General David Richards –(21st February 2006 page 67 lines 1 to 4)
- When Witness discussed with the President events of January – February 1999 from a military perspective, it was with General Khobe and General Shelpidi, not with Norman, “...because he wasn’t running the battle. That was their job.” Witness did not see President give military orders to Norman, he gave them to Gen. Shelpidi, Gen. Khobe. Witness saw Norman’s primary task as reconstructing Ministry of Defence, defence policy, re-equipping army, rather than day-to-day defence of Freetown. Lt. General David Richards (21st February 2006, page 25, page 65 lines 17 to 25, page 101 lines 1 to 29)
- Letter from Major Omadachi in the office of CDS, 8 August 1998. (48) Letter says Kenema District is under operational command of 15th ECOMOG brigade. Says Kamajors should work alongside ECOMOG troops there. Witness notes there are additional similar letters. Arthur Koroma (3/5/06)

- ECOMOG commanded Kamajors during the attack on Kenema, February 1998. ECOMOG continued commanding Kamajors in Kenema after capture of town. Arthur Koroma (3/5/06) page 46
- ECOMOG held meeting with Kamajors. Said they would dictate whether fighting occurred. Fallah Bindi (23/5/06)
- When we were at Kpa, we heard that ECOMOG had joined our brothers [, the Kamajors,] from Bo Waterside to come to Kenema, and they were coming, capturing those areas. Kenneth Koker (20/2/06) (41)
- After, when they had captured the whole of the town, they called a general meeting for all of the Kamajor commanders. Q. What happened at that meeting? A. They told us that from that particular point no Kamajor should not do anything by himself; they should take orders from ECOMOG. Q. Who addressed you at that meeting? A. It was one General Buhari Musa. Q. Continue, please. A. He said anything that the Kamajors wanted to do, they should take orders from them. And it was from that very point that we started taking orders from them. Q. Yes? A. We started taking orders from them within the township of Bo.” Kenneth Koker (20/2/06) (50)
- “...all matters relating to combat, to fighting, logistics and everything was actually done in conjunction with ECOMOG, and it was the ECOMOG brigade commander or his subordinates who showed us our targets, what to do and what not to do.” Arthur Koroma (3/5/06) (42)
- Kenema was captured by “ECOMOG and the Kamajors.” Ishmael Koroma (23/2/06) (7)
- The entire Kenema District, including SS Camp, it was under the control of ECOMOG. The lieutenant was called Lieutenant Uma, Lieutenant Uma. He was the one who was there.” Ishmael Koroma (23/2/06) (26)
- Even when it came to general strategy and tactics, there was a time when we decided to attack Zimmi and, in our discussions with Eddie Massallay, he told us that at some

appointed time he would talk to ECOMOG to provide fire support, to shell Zimmi before we entered there. Of course, it never actually happened, but ECOMOG was mentioned in the general planning.” Arthur Koroma (3/5/06) (15–16)

- Command and control of all fighting forces was “vested clearly in ECOMOG.” Dr. Albert Joe Demby (13th February 2006)
- Kamajors fought alongside ECOMOG during the takeover of Bo. TF2-057 (30/11/04) (67)
- By March 1998, ECOMOG was in control of security in Bo. TF2-057 (30/11/04) (79).
- After ECOMOG set up shop at J. Matta’s Compound, joint patrols were conducted searching for arms and ammunition; prior to that, it was the Kamajors alone who executed the patrols. TF2-057 (30/11/04) (67).
- ECOMOG arrived in Bo approximately five days after the Kamajors. TF2-056 (12/6/04) (72)
- CDF fought alongside ECOMOG. TF2-011 (8/6/05) (51)

Surrender of prisoners

- In Kenema Kamajors took civilians to ECOMOG who told them not to burn houses but to report such junta houses to them. Brima Moriba (22/5/06)
- Witness acknowledges Kamajors arrested junta collaborators. Handed them to ECOMOG, who were in charge of Kenema security. Brima Moriba (22/5/06)
- ECOMOG took prisoner from Kamajors. (TF2-079 page 78 lines 11 to 14)
- One Kamajor testified that they had instructions from War Council to turn over captured soldiers, ammunition to ECOMOG. Joe Nunie (11/5/06)

Discipline

- ECOMOG took disciplinary action against CDF personnel at Bo Waterside, Kenema, Bo Town, Mile 91, Freetown, and Kono. Disciplined CDF personnel who were under their command. Samuel Hinga Norman
- Letters regarding disciplinary measures. ECOMOG disciplined Kamajors for giving guns to children.
- In April 1998 strong disciplinary measures taken against Kamajors for their excesses. According to minutes of meeting, “War Council formally requests ECOMOG to transfer to SDFSL the specific responsibility of the discipline of CDFSL fighting forces.” (TF2-222 -18th February 2005 page 26 lines 27 to 29, page 30 lines 7 to 29 and page 31 lines 1 to 3)
- One witness testified that he saw Kamajors begin looting until ECOMOG intervened to stop them. TF2-057 (29th November 2004 page 116)

Superior Responsibility, pursuant to Article 6(3)19

It is argued that as a consequence of holding a position of superior responsibility and exercising command and control over his subordinates, Allieu Kondewa is individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. He is alleged to be responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinates were about to commit such acts or had done so and he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The defence submits that Mr. Kondewa does not bear superior responsibility for any of the allegations in the Indictment because no superior-subordinate relationship existed between him and

the alleged perpetrators and that to the extent that such a relationship existed, Mr. Kondewa neither knew nor had reason to know that criminal acts were being committed and that to the extent that he heard about such criminal acts he was powerless to prevent or punish them.

As the Prosecution notes, “[t]o establish superior responsibility under Article 6(3) of the Statute the following must be proved:

- the existence of a superior-subordinate relationship between perpetrator and accused;
- that the superior knew or had reason to know that the crime was committed or about to be committed by the subordinate;
- the superior failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator thereof.²⁰

Superior responsibility amounts to “responsibility for the superior’s own acts or omissions in failing to prevent or punish the crimes of his subordinates whom he knew or had reason to know were about to commit serious crimes or had already done so.²¹ This theory has a significant jurisprudential history which testifies to the complexity of applying what seem to be straightforward elements. An examination of their application is thus warranted.

Was there a superior-subordinate relationship between perpetrator and accused?

The existence of a superior-subordinate relationship demands a hierarchical relationship, direct or indirect, between the superior and the subordinate who is alleged to have committed the crime within the court’s jurisdiction.²² “A hierarchical relationship may exist by virtue of the accused’s *de facto* authority over this subordinate or by virtue of his *de jure* position of superiority.²³

The subordinate need not be directly under the command of the superior.²⁴ The “influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure.”²⁵ But social or even political prominence is not sufficient.

The ICTR applied superior responsibility in a case where the accused had the power to issue orders to employees, enforce those orders by termination or discipline, and order the use of factory

supplied in the massacres. Even there, the reasoning only extended to employees of the accused. The tribunal was not persuaded by the fact that the accused was highly influential in the region.²⁶

Following the same reasoning, the ICTR also declined to hold a powerful local figure liable for the acts of others pursuant to a theory of command responsibility.²⁷ The accused was a journalist and news presenter on Radio Rwanda before assuming a position as Minister of Information in the Interim Government.²⁸ Without *de jure* authority over military or *prefet* operations the accused led several attacks, assumed a leadership role in planning meetings and routinely issued orders which various individuals followed.²⁹ Because, however, there was no evidence that those who complied with the accused's orders did so with the expectation that non-compliance might be punished, responsibility did not attach.³⁰

As the Trial Chamber now considers Mr. Kondewa's role and responsibility it is respectfully submitted that reference should be made to the following examples:

The post of initiator gives him power and responsibility relative to the initiation and immunization ceremonies conducted. But it does not establish a hierarchy and certainly does not place him at the head of it. Evidence demonstrated that Kondewa did not select the candidates, nor did he have any control over them once the initiation or immunization ceremony was complete.

Although the Prosecution alleged that Mr. Kondewa was a top leader within the Kamajors, the evidence amounted to only vague references to this conclusion, without evidence or examples to support it.

Though it was contended that Mr. Kondewa lead the Death Squad, that contention has now been soundly rebutted. TF2-190 testified that he alone was the leader of the Death Squad. TF2-190 (10/2/05) (31) This contradicts two of the prosecution's witnesses, TF2-008 and TF2-068. Two additional witnesses confirmed that TF2-190 was head of Death Squad. Sampha Sesay a.k.a. Carpenter 12/10/06 (112) and Haroun Aruna Collier a.k.a. Hardway (12/5/06) As the leader of the Death Squad testified, the Death Squad had no duties at Base Zero and took orders from chiefdom elders and the War Council. Kondewa had nothing to do with the Death Squad and never gave them commands. Haroun Aruna Collier a.k.a. Hardway (12/5/06)

Effective Control

In order for responsibility to attach, the accused must also be shown to have exercised “effective control” over his subordinates, regardless of whether the accused enjoyed military or civilian power, *de facto* or *de jure*.³¹ The fact that an accused may function as a *de jure* superior to the perpetrator does not on its own resolve the issue of whether he has “effective control.”³² Nor does the accused need to have a formal position in relation to the perpetrator. The issue is whether he has the “material ability” to punish the perpetrator or to prevent the crime.³³

What may be said to constitute “effective control” for the purpose of Article 6(3) must be distinguished from lower forms of influence or authority which will not suffice to attract criminal liability. This is the case, for instance, where a certain individual, charismatic enough, respected or otherwise persuasive enough to be followed, may be able to exercise some degree of influence over other individuals without their relationship being one of superior to subordinate and without this relationship reaching the threshold of “effective control.” There may, therefore, be cases where an individual “had some authority and power over other individuals which allowed him to exercise even considerable influence over them but which fell short of effective control and therefore of imposing command responsibility.”³⁴ As recounted in more detail herein, this is the category in which Mr. Kondewa falls.

Effective control requires possession of material abilities to prevent subordinate offences or to punish subordinate offenders. Substantial influence is not sufficient. It must be established that the accused had the material (actual) ability to prevent and punish crimes committed by individuals.³⁵ Such control may be acquired *de jure* or *de facto* and the court may find evidence that a particular individual derived authority from both sources. As a result, the existence of a command position cannot be determined by reference to formal status alone.³⁶ The Court must reach a factual determination of whether and to what extent the accused possessed the authority necessary to demand compliance with his or her orders and enforce such compliance if it was not forthcoming.

Although the Court may find effective control where an accused possessed only *de facto* authority over alleged subordinates, a superior who enjoys *de jure* authority must also exercise some degree of *de facto* authority for the court to deem his control effective and impose command responsibility.³⁷ This is particularly applicable to the case of Mr. Kondewa. “Although a person’s

de jure position as a commander in certain circumstances may be sufficient to invoke responsibility under Article 6(3), ultimately it is the actual relationship of command that is required for command responsibility.”³⁸

Quite aside from Mr. Kondewa’s own role, from the evidence it is not altogether clear if that relationship of command existed. When asked whether it was possible to attribute atrocities to a few “rogue” Kamajors, Dr. Hoffman responds:

“[T]hat implies that this rogue element is outside of a norm, which would be those who are sort of strictly following the order is the policy, etc. That is not what is happening here. What I am suggesting is that there are local aims and local concerns shot through and everyone – and this is not uncommon. Everyone is as concerned with those as they are with whatever the kind of overarching concerns might be.”

The ICTY Appeals Chamber defined “effective control” as the “material ability to prevent or punish criminal conduct, however that control is exercised.”³⁹ The Chamber explained that “customary law has specified a standard of effective control” but “it does not define precisely the means by which the control must be exercised.”⁴⁰ They also highlighted the case-by-case nature of the command responsibility inquiry, noting that “the indicators of effective control are more a matter of evidence than of substantive law.”⁴¹

As a consequence of Mr. Kondewa’s role as an initiator, he was known of and regarded by persons he did not himself know. There is evidence that he was thus approached with complaints when Kamajors were misbehaving. Witnesses testified to his attempts to persuade Kamajors to cease. Although they were being accused of breaking the rules he had given to them, it became clear that he had no standing to enforce them.

- In Bonthe Mr. Kondewa “...called a public meeting at the town hall, and the meeting was well attended. A lot of people spoke, complaints were made. For him, finally he said he did not allow his men to enter Bonthe, it was unfortunate, but they did not listen to his advice, they have now entered and done all what they did, therefore he was sorry.” TF2-116 (9/11/04) (30).

- Mr. Kondewa later “gave orders to his secretary to write a letter to all Kamajor commanders around Bonthe stopping them from attacking Bonthe.” But the letter was of no effect, the group had problems on the way. TF2-147 (10/11/04) (22-23)
- Witness relayed telling Mr. Kondewa that his Kamajors were looting. That night, Witness heard Kondewa tell Kamajors to stop stealing civilian property “because they have said that they were there to assist civilians”. It is clear that his efforts to persuade them were of no effect. (TF2-134 – 3rd June 2005 page 29 lines 6 to 8, lines 14 to 29 page 30 lines 1 to 15)
- After the killing of two civilians, three Kamajors were investigated and confessed. They were taken the Kondewa who turned them over to police. TF2-073 (2nd March 2005 page 49). Without the police Mr. Kondewa was powerless to detain or punish them.

One witness said of Mr. Hinga Norma, Mr. Fofana and Mr. Kondewa that “whatever happen they come together because they are the leaders and the Kamajors look up to them.” TF2-068 17th November 2004. But as the evidence made clear, being looked up to did not confer any power or authority on Mr. Kondewa.

Knowledge

Did superior know that the crime was committed or about to be committed?

In the absence of direct evidence, circumstantial evidence may be used to establish the superior’s actual knowledge of the offences committed, or about to be committed, by his subordinates. The fact that the crimes were committed frequently and notoriously by subordinates of the accused can be an indicator that the superior had knowledge. And an individual’s superior position *per se* is significant indicia that he had knowledge of the crimes committed by his subordinates.⁴²

Such evidence may include such details as:

- the number and type of illegal acts;
- their scope and wide spread occurrence;

- the time during which the illegal acts occurred and their geographical location;
- the modus operandi of similar illegal acts;
- the logistics and tactical tempo of operations involved;
- the number and type of troops, officers and staff;
- the location of the commander at the time.⁴³

Assuming that the accused was positioned to receive information within the organisation - which was not proven - there is ample evidence that the communication system was extremely rudimentary, very slow and often inaccurate. Incidents didn't come to the attention of those at Base Zero because of the lack of formal communications systems. TF2-079 (26/5/05) (35). In addition to the other questions surrounding Mr. Kondewa's alleged command and control is the issue of knowledge. The evidence has made clear that communication was very poor:

- There were very few, if any, radios being used at this level, so the communications had to be run by hand. TF2-EW1 (14/6/05) (33)
- "It is uncertain how effective the other Directors [than Nallo] were, given the difficulties of central coordination without effective communications." Iron Report, paragraph E2.5.
- Military reports to BZ were never distributed beyond Norman." Alhaji Daramy Rogers (8/6/05) (28)
- Because couriers were being used, and were travelling for days to reach their destinations "[i]mportant messages were normally written." Iron report, C5.2
- Q. Thank you. And, Mr Witness, would I also be correct to suggest that because of this absence of a communication system between Base Zero and the various points some of the incidents do not come to the knowledge of the Kamajor commanders at Base Zero?
A. Which of the commanders? Q. To the War Council members, the national coordinator; those who were at Base Zero? A. Yes, I agree some of the incident did not come to the notice of the War Council and the national coordinator because already before -- JUDGE THOMPSON: Because of the lack of communication? THE WITNESS: Yes. TF2-079 (27/5/05) (35)

The evidence has not established that Mr. Kondewa had firsthand knowledge about what was happening throughout the country or that he received reports of the same. Given the barriers posed by his illiteracy and the fact that the evidence established that most reports were sent by courier and

had to be in writing it was not established that Mr. Kondewa could even understand such reports from other parts of the country.

Did the superior have reason to know that the crime was committed or about to be committed?

The “had reason to know” standard is met when general information regarding the crime was available to the superior - the superior need not have possessed knowledge of the specific details of the crime.⁴⁴ Knowledge may also be presumed...if [the superior] had the means to obtain the knowledge but deliberately refrained from doing so.⁴⁵ This general knowledge must, however, pertain to the specific crime committed (or intended to be committed).⁴⁶

In cases where the accused had no actual knowledge of the crime, the required *mens rea* is still fulfilled if:

- The superior had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed by subordinates

The Prosecution has lead no evidence to this effect.

- when the absence of knowledge [of the accused] is the result of the negligence in the discharge of the superior’s duties, i.e. the superior failed to exercise the means available to him or her to learn of the offences and under the circumstances he or she should have known.”⁴⁷

For the reasons aforementioned Mr. Kondewa was wholly without the means to learn of such offences.

Localised control

Localised control is also relevant to the question of whether an accused had actual knowledge that subordinates were committing abuses or should have known that such violations were occurring.

Because a superior must not remain wilfully blind to the acts of his subordinates, the court will necessarily consider what exposure or contact an accused had to the operations carried out by his subordinates. The greater degree of localised operational control, the more likely it is that the court will impose command responsibility. The more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary to prove that he knew of the crimes.⁴⁸ As recounted in more detail above, as a consequence of his duties as initiator Mr. Kondewa was remote to and removed from the battlefield. Thus additional indicia would in this case be needed.

Did superior fail to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator thereof?

Localised Operational Control

Failure to punish or prevent also requires an inquiry into the degree of the accused's localised operational control. Any evaluation of the action taken by a superior to determine whether the duty has been met is inextricably linked to the facts of each particular situation.⁴⁹

Analysis of the question of localised control begins with determining the category into which Mr. Kondewa fits. The three significant categories are:

- High-level military and government superiors
- Military field commanders
- Civilian superiors

Where an accused occupies a high-level position in the government or military - and thus possesses a greater degree of *de jure* authority, a lesser showing of localised control will be necessary because the chain of command will provide a sufficient basis for finding that the accused's control was effective.⁵⁰ The greater the degree of localised operational control an accused exercised, the more likely it is that he possessed such power. Significant localised operational leadership is, however, insufficient to warrant a finding of command responsibility.⁵¹

The Prosecution offers no evidence to support the contention that Mr. Kondewa held any position of high level military or government superior. The evidence established, on the contrary, that his responsibilities for initiation and immunization flowed from his post as High Priest.

This places Mr. Kondewa squarely within the realm of a civilian. Tribunals have required the most extensive showing of localised operational control where the accused is alleged to have acted as a civilian superior. The ICTY has cautioned that “great care must be taken in assessing the evidence to determine command responsibility in respect of civilians, lest an injustice be done.”⁵² For a non-military superior to incur command responsibility, the Prosecution must demonstrate a considerable degree of localised operational control since such superiors lack *de jure* authority altogether. Their control derives exclusively from the exercise of *de facto* authority, which must amount to more than mere influence, participation or leadership. Rather a civilian superior must be regarded by others as a commander, act as a commander, be a major player in local operations and most important possess the authority to issue and demand compliance with orders. The evidence established that Mr. Kondewa lacked the authority to enforce even simple requests to stop looting.

The ICTY Chamber acknowledged that while “arguably effective control may be achieved through substantial influence,” substantial influence is insufficient without a showing of “effective control.”⁵³ The Tribunal considered the case of a politician who had “tremendous influence and power in Central Bosnia,” and even had an important role in the military.⁵⁴ Nonetheless he was “not in the top echelon, and remained a civilian who was not part of the formal command structure of the HVO. For command responsibility to attach, the prosecution must show that a civilian superior had the power to prevent and punish offences by subordinates and that the accused’s *de facto* authority was “accomplished by the trappings of the exercise of *de jure* authority.”⁵⁵

These so-called trappings include the following:

- awareness of a chain of command;
- the practice of issuing and obeying orders;
- the expectation that insubordination may lead to disciplinary action.”⁵⁶

Though there was evidence of a number of ad hoc councils which signified an attempt to centralize or coordinate the efforts of Kamajors these attempts were not successful. For the reasons elaborated

by Dr. Hoffman, the Kamajors never functioned along the lines of a military organization with coherent structures and division of responsibilities. Although the evidence has not established that Mr. Kondewa was a member of the War Council, there has been some evidence to indicate his presence at some meetings of the Council as well as other planning meetings of Kamajors. For the reasons set forth in greater detail herein, it is the respectful submission that such is neither credible nor reliable, but to the extent that the Trial Chamber is persuaded by that evidence it should be examined and understood within the context of the cultural phenomena described by Dr. Hoffman, namely that “you wouldn’t have important personages in your presence that you didn’t call together.” Dr. Daniel Hoffman (9/10/06) (77-78)

As discussed above, even if Mr. Kondewa were part of the War Council, it is clear that this body lacked the power to implement any decisions relative to punishment. War Council held hearings on Kamajor violations. TF2-008 (17/11/04) (34) War Council would investigate and make recommendations. TF2-008 (17/11/04) (47); War Council recommendations required Hinga Norman’s approval for implementation. TF2-068 (10/2/05) (91)

There was extensive evidence of warnings given to recruits and guarantees given to the public that there would be no looting and the evidence established that these warnings were defied and guarantees subsequently undermined. But it is crucial to examine Mr. Kondewa’s role.

- Kamajors came to witness’s home TF2-073 (2/3/05) (34-37) and announced that they were there on orders of Mr. Kondewa to loot. Witness expressed his surprise, having himself heard Mr. Kondewa’s public warnings against looting.
- Witness TF2-116 (9/11/04) (30) testified that after one attack which had numerous examples of misconduct, Mr. Kondewa made a public apology for the behaviour of Kamajors.
- Witness heard Mr. Kondewa address recruits and tell them that the Kamajor movement was not meant to harass, torment, loot or disadvantage civilians. It was meant to protect them. Mr. Kondewa gave warning to recruits – no harassment, no tormenting, no looting, warned against raping. TF2-073 (3/3/05) (38).

Requisite Intent

It is necessary for the Trial Chamber to “...ensure that there has been malicious intent or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.”⁵⁷

Accordingly the Defence respectfully moves this Chamber for the entry of a judgment of acquittal as to any and all alleged criminal liability on the basis of superior responsibility.

V. Failure to establish Mr. Kondewa’s Direct Participation in Crimes Alleged

“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.”⁵⁸

Prosecution’s Theory:

The Prosecution charges Mr. Kondewa with three forms of individual criminal responsibility: (1) planning, instigating, ordering or committing; (2) aiding and abetting those responsible for the crimes and (3) being responsible for the crimes that were within a common purpose, plan or design.

“Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa by their acts or omissions are individually 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.”⁵⁹

“The plan, purpose or 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...Each accused acted individually and in concert with subordinates to carry out the said plan, purpose or design.”⁶⁰

Intent

Although the *actus reus* may take place geographically and temporally removed from the crime, the accused must make a substantial contribution toward the completion of the crime in order to be found individually liable.⁶¹ This may be accomplished through an omission which “had a decisive effect on the commission of the crime and...was coupled with the requisite *mens rea*.”⁶²

“To establish that the accused planned, instigated or ordered a crime, it must be proved that: (i) the crime was physically performed by a person other than the accused (ii) the conduct of that persons was in furtherance of the plan, instigation or order of the accused; (iii) the accused was aware that the crime could materialize consequent to his acts.”⁶³ As discussed in greater detail above, the only plan which Mr. Kondewa sought to further was a legal one. As numerous witnesses recounted, the aim of the Kamajors was to protect civilian lives and property. Mr. Kondewa had no reason to expect that crimes could materialize consequent to the act of initiation and every reason to expect that they would not, given that such crimes would destroy the immunization and leave initiates vulnerable to death.

Mens rea of Planning, Instigating, Ordering

“If an order is general (e.g. to abuse civilians) the *mens rea* of recklessness or gross negligence is sufficient.⁶⁴ The required *mens rea* is knowledge that the acts of the accused assist in perpetrating the crime, coupled with his intention to assist or at least his awareness that assistance may be a foreseeable consequence of his acts. The accused must also be aware of the basic characteristics of the crime, including its requisite *mens rea*.⁶⁵ Although the Prosecution posits that Mr. Kondewa’s participation in the immunisation and initiation of individuals perpetrated their crimes, the evidence suggests the opposite. Given that those who were immunised and initiated were told repeatedly that the protections would be lost if they failed to follow the rules given to them, Mr. Kondewa had every reason to believe that they would strictly follow those rules. There is no evidence to support the contention that the immunization and initiation protected those who failed to follow the rules. Indeed there was evidence to the contrary, that the Kamajors widely believed that those who were killed in battle had violated the rules and those who survived had followed them.

Planning

“Planning is the contemplation of a crime and the undertaking of steps to prepare and arrange for its execution.”⁶⁶ It envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime. The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.⁶⁷

Because there was contradicting evidence, indicating both that Mr. Kondewa was and was not a member of the War Council, let us assume for the sake of argument that he did participate in the War Council. While at first blush the Council would seem to serve a planning function, the evidence did not establish this.

- The War Council not responsible for deployment of fighting forces. TF2-008 (17/11/04) (11)
- The War Council did not engage in military planning for the war, establish a command structure or appoint positions for the execution of the war. TF2-068 (17/11/04) (115)
- The War Council did not give direct orders to any commander. TF2-005 (16/2/05) (17)
- The War Council only presented recommendations to Hinga Norman. TF2-005 (16/2/05) (17)
- The War Council’s proposals were thwarted because Hinga Norman disregarded them and the old system in effect remained in place. It was a War Council in name only. It was just a nominal council I will say, but we have no way to do anything.” TF2-222 (17/2/05) (99)
- The War Council played an advisory role only. TF2-079 (26/5/05) (19)

There is no evidence of Mr. Kondewa participating in any planning relative to the attacks or the atrocities that were alleged to take place during these attacks.

Instigating

“Instigating is prompting another to commit an offence.”⁶⁸ Although the instigation need not be direct and public, proof is required of a causal connection between the instigation and the commission of the crime.”⁶⁹ There is no evidence that Mr. Kondewa encouraged or prompted any Kamajor to commit any offence. To the contrary there is ample evidence that he gave warnings against commitment of offences by all those who were immunised and initiated. But he was in no position to control their actions. After Mr. Kondewa immunized people they were at liberty to return to their villages. TF2-82 (17/9/04) (10)

An instigation need not be express or implied and can be achieved through omission.⁷⁰ There is ample evidence that Mr. Kondewa repeatedly recounted the rules for those being immunised and initiated and gave repeated warnings about the immunization not working if the rules were not followed. It is therefore impossible to argue that he instigated acts through any omission. The Prosecution has introduced evidence that Mr. Kondewa’s name appeared on documents. Given that he is illiterate, he could neither have written nor read them. Moreover, the fact that a defendant’s name appears on an official document does not mean that he has “responsibility for or power and right of decision with respect to the subject matter of such document.”⁷¹

Ordering

“Ordering a crime entails responsibility as long as the accused has authority to order, even absent a formal superior-subordinate relationship”.⁷² Ordering requires a situation where an individual has a position of authority and uses that authority to order - and thus compel - another individual who is subject to that authority, to commit a crime. Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-subordinate relationship between the individual who gives the order and the one who executes it.⁷³ “Ordering a crime entails responsibility when the person in a position of authority uses that authority to convince another to commit an offence.”⁷⁴

For the reasons set forth in detail in the “Superior Responsibility” section, there was no superior-subordinate relationship between Mr. Kondewa and other Kamajors. In addition to the fact that Mr.

Kondewa lacked this relationship, there is no evidence that he ever ordered a Mr. Kamajor to commit any crime.

Aiding and Abetting

While the acts of an aider and abettor must have a substantial effect upon the crime's perpetration, acts of members in a joint criminal enterprise must simply further the common plan or purpose. The aiding and abetting doctrine also necessitates a substantial contribution to the commission of the crime, though it need not be an indispensable element of the crime.⁷⁵

To the extent that there was a common plan to protect civilians lives and property, there is ample evidence that Mr. Kondewa's actions in immunising individuals who shared that goal did in fact further it. In addition to protecting the person being initiated or immunized, the initiation protected civilians. In fact nearly all of the rules given during initiation related to the protection of civilians.

State of Mind

It is contended that an aider and abettor need only be aware of the crime's requisite *mens rea*.⁷⁶ However, for whichever crime is committed, the accused must have had knowledge of the specific intent of the perpetrator in order to be accused of aiding and abetting.⁷⁷ The accused must possess knowledge that his or her actions will aid or abet the perpetrator's crime.⁷⁸

Mr. Kondewa had no reason to know that those who he immunised or initiated had any such intent, and the prosecution has failed to prove such intent. To the contrary, he had every reason to believe that the rules given by him would be followed. The relationship between the accused and the perpetrator should be considered in determining whether the conduct of the former assisted or facilitated the crime.⁷⁹ Given that the role played by Mr. Kondewa was one of immuniser and initiator who lacked any control over individuals once the ceremonies were complete, this consideration only further weakens the claim that he aided and abetted crimes.

VI. Failure to establish Mr. Kondewa's Participation in Joint Criminal Enterprise

Crimes are sometimes committed by a multitude of persons who all participate in the furtherance of a large-scale criminal scheme, or a “joint criminal enterprise.” Under international law, a member of such a criminal enterprise is regarded as having committed the crimes resulting from it, as long as he contributed to their perpetration and intended either that they be committed or that the criminal enterprise be furthered while foreseeing that these crimes were likely to be committed. Accordingly, membership in a joint criminal enterprise is regarded as implicitly included in Article 6(1). Accountability in these cases is not for mere membership in the joint criminal enterprise, but rather for participation in the crime resulting from the enterprise.

Elements of Joint Criminal Enterprise

- Plurality of persons (not necessarily organised in a military manner).⁸⁰

It is conceded that this element is met.

- The existence of a common plan, design or purpose which involves the commission of a crime provided for in the Statute. It is not necessary for this plan, design or purpose to have been prearranged, and it may materialize extemporaneously and be inferred from that fact that a plurality of persons act in unison to put in effect a joint criminal enterprise, or from other circumstances.”⁸¹

No such plan existed, aside from protecting the civilians’ lives and property. There has been no evidence which establishes such a plan, aside from the comments and threats of individuals over whom the accused had no control and with whom the accused had no joint undertakings. There is also no evidence that any such plan was common to Mr. Kondewa.

- Participation of the accused in the common plan, design or purpose which amounts to taking actions in its furtherance. The accused does not have to commit the specific crime, but rather may act to assist in, or contribute to, the execution of the joint criminal enterprise. The degree of participation required must be significant as to render the enterprise efficient or effective.⁸²

The Prosecution argues that Kondewa's actions in immunising and initiating individuals rendered the Kamajor enterprise efficient or effective. To the extent that the plan was to protect the lives and property of civilians, it may be conceded that his actions did so. But they rendered no assistance to any criminal enterprise, nor to the criminal acts committed by individuals. Quite the contrary. The immunisation and initiation had no effect on those who failed to follow the rules given them by the accused.

- Shared intent of the participants to further the common plan, design or purpose.⁸³

There was no such shared intent. Nor has there been any evidence which establishes such intent.

- The accused intended the resulting crime or was at least aware of its likelihood and continued to participate.

The accused neither intended nor considered likely that his role as immuniser and initiator would result in crimes committed by those who were given specific rules and warnings about the failure to adhere to them.

There are three forms of Joint Criminal Enterprise, none of which apply in this case:

There was no Joint Criminal Enterprise where the participants shared the same criminal intention

Each enterprise member must voluntarily participate in one aspect of the common design and intends the resulting crimes.⁸⁴

It is readily admitted that those within the CDF, chiefly the Kamajors, shared a common plan. As the prosecution's own military expert noted:

All CDF operations as far as I can see appear to have been driven by the central strategic idea of the CDF, which was to defend their homelands -- [...] I can't recall the exact words, but seemed to accord to the central idea of the CDF, which was to defend their homelands against the RUF and subsequently junta forces. TF2-EW1 (14/6/05) (34)

One witness described his motivation for becoming a Kamajor this way:

Because the war came from my home town, the way it was destroying my home town, killing my people, it was then the chieftom people came together and said let's gather the young men together so that we'll be initiated and eventually protect our land. So I was willingly initiated so that will help the soldiers fight the war. Keikula Amara (17/5/06) (69)

Then High Commissioner Peter Penfold met with civil militia who he indicated had:

"a very clear idea of what they were fighting for...protection of homes, families, villages and restoration of Kabbah government." He likewise noted their continued allegiance to their paramount chiefs, a phenomena analysed by Dr. Hoffman in his testimony and report.

There was not expression of the need or desire to resort to illegal actions in furtherance of this plan. Rather there was every reason to believe that Kamajors took their promises seriously. The CDF were considered "the principal defender of the government" Lt. General David Richards 21st February 2006

Kamajors issued specific warnings against wrongdoing:

When the war is over, anybody who had done something bad to his companion would regret it if the companion comes and overtakes him. . . . Those days that you did those things, there was no place to report you. But now, the law is here." (TF2-088 -25th November 2004 page 68)

A great deal of speculation has been leveled at the following Hinga Norman statement recounted by a number of witnesses:

"One of [Norman's] promises were we were to capture and – we were to restore the SLPP government and, by so doing, we automatically become the national army of this nation and that is only done by eliminating more -- especially the known as the junta forces." This would then be the case for three years, before restoration of democracy. TF2-223 (28/9/04) (20)

The Prosecution's own military expert offered the following explanation, based upon his background and experience:

“One instance where this basic strategic idea of the CDF might have changed was when Norman declared, prior to the ECOMOG intervention, that CDF forces would control Sierra Leone for three years before inviting the return of democratic government. This can be interpreted as a bid for strategic power of the CDF; alternatively it could be interpreted as a misguided extension of the self-defence strategy, ensuring the threat to Sierra Leone is extinguished before restoration of democratic rule.” Report, paragraph C2.2

As history has shown, most recently in the example of Thailand, this is a fairly routine phenomenon of countries emerging from conflict.

There is no evidence establishing that Mr. Kondewa shared a criminal intention with individuals who he immunised and initiated, or with any other Kamajor.

There was no Joint Criminal Enterprise where the participants acted pursuant to a concerted plan

In order to show that participants acted pursuant to a concerted plan, there must be “an organised system to commit the alleged crimes and where the accused actively participates in its enforcement is aware of its nature and intends to further its purpose.”⁸⁵ The requisite *mens rea* may be inferred from the position of authority of the accused within the system.⁸⁶ But there was no such plan to commit crimes. The system through which the Kamajors came to function existed to further the goal of protecting the lives and property of civilians during a devastating time in the country's history.

There was no Joint Criminal Enterprise involving foreseeable conduct outside the common design

Where one of the participants commits a crime which is outside the common plan, but nevertheless a natural and foreseeable consequence of its execution, responsibility attaches to all the participants. Such a non-envisaged crime is considered foreseeable when participants, although not intending this result, were “able to predict” it and regardless continued to participate in the plan.⁸⁷

It should be reemphasized that no crimes were committed in furtherance of the plan to protect civilian lives and property. But to the extent that the Trial Chamber finds that such evidence exists, it is respectfully submitted that there is no evidence to support the contention that those crimes were part of any common plan known to the accused. Nor could the accused have foreseen any such crimes on the basis of his involvement as immuniser and initiator. Mr. Kondewa had every reason to believe that the initiates would follow the rules he gave them since their incentive was as strong as one can imagine – the desire to stay alive.

The Defence submits that Mr. Kondewa does not bear criminal responsibility under Article 6.1 and respectfully moves this Chamber for the entry of a judgment of acquittal as to any and all alleged criminal liability on that basis.

VII. Failure to satisfy constituent elements of Crimes Against Humanity

Elements of Crime Against Humanity:

- There must be an attack;
- The acts of the accused must be part of the attack
- The attack must be directed against any civilian population;
- The attack must be widespread or systematic;
- The accused must know that his acts constitute part of a pattern of widespread or systematic crimes against a civilian population.⁸⁸

Weaknesses in evidence which result in elements of Crime Against Humanity not being satisfied

Not directed against a civilian population

The attack is not directed against a civilian population unless the civilian population is the primary object of the attack, not if civilians are collaterally affected.⁸⁹ To make a determination it is necessary to consider:

- means and method of attack;

- victims' status and number;
- discriminatory nature of attack;
- nature of crimes committed;
- resistance of assailants; and
- extent to which attacking force may have attempted to comply with the laws of war.⁹⁰

A "sufficient number" must be subject to the attack in order for it to be directed against the civilian population. Sufficient number means not a limited or randomly selected number of individuals.⁹¹

Collateral Damage

In order to be considered an attack on a civilian population, "the targeted population must be predominantly civilian in nature."⁹² It should be noted that it was a Kamajor practice to send messages before its attacks in order that civilians would leave town.

See, e.g. Bobor Brima (10/5/06), BJK Sei (15/5/06) (83-84)

Combatants cannot shield legitimate military targets with the mere presence of civilians and they are themselves committing a war crime if they do so by, e.g. using human shields. Protocol I of the Geneva Convention defines a legitimate military target as:

"...those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁹³

The following are objects directly used by the armed forces:

- Weapons
- Equipment
- Transports
- Fortifications
- Depots

- Buildings occupied by armed forces
- Staff headquarters
- Communications centres⁹⁴

Even civilian objects which take on a dual-use, such as bridges or factories are nevertheless legitimate military targets.⁹⁵ Koribondo housed a military base from 1992 – 1997 and it is not clear whether vestiges of its use continued. Samuel Hinga Norman (31/1/06) (10)

Civilian, defined

Perhaps the central and most well established customary rule of warfare is the principle that civilians must not be attacked.⁹⁶ This applies regardless of the nature of the conflict as internal or international. But answering the question of who is a civilian is not so clear. Since it is an element of the crimes charged, the Prosecution must prove beyond a reasonable doubt that the particular victims were civilians under the law.⁹⁷ “Determining whether a victim is taking an active part in hostilities is a matter for factual determination on the basis of specific circumstances surrounding the individual victims.”⁹⁸

Combatant Status Disguised

It is a war crime for combatants to feign civilian status or not clearly distinguish themselves from the civilian population by, at a minimum, openly carrying arms.⁹⁹ As the Trial Chamber now considers the question of whether civilians were the targets, it is respectfully submitted that reference should be made to the following examples:

- There is ample evidence that the groups that seemed to be civilian were in fact a mixture of combatants and civilians. By the way the corpses were dressed, they seemed to be a mixture of civilians and fighters. TF2-047 (22/205) (61)
- Of victims of the Tongo attack witness says a majority of the twenty bodies he saw at the back of HQ were soldiers. TF2-047 (22/2/05) (114)
- Rebels dressed in anything and everything TF2-222 (18/2/05) (22).
- Rebels mixed with civilian population when they attacked. TF2-222 (18/2/05) (24) Apart from being a war crime, this fact should also be considered in the broader context of

analysing how many combatants are within a population for the purpose of analysing direction and proportionality.

- Witness testified that “based on his own personal experience” the rebels mixed with the civilian population when they attacked. TF2-222 (18/2/05) (25)
- “It was very difficult to distinguish the difference between civilians and the forces, especially the RUF that had no distinctive military uniform that was operating in this country. If they were attacking, they were RUF. If they were attacked, then they became civilian. Samuel Hinga Norma (26/1/06) (90)

Taking a direct part in hostilities

There is no clear authority on the question of what constitutes taking a direct part in hostilities. Even in the drafting of the additional Protocols to the Geneva Convention there was no consensus on the meaning of “direct” participation. Several delegations considered that the term hostilities also covers preparations for combat and returning from combat.¹⁰⁰ Classically, spies were presumed to be combatants and if engaging in espionage by any means of deception or without a military uniform, they lost the protections afforded to prisoners of war.¹⁰¹ There is ample evidence of the persons classified by the Prosecution as civilians who were in fact engaging in espionage

Equally, saboteurs who make an “attempt on the life or limb of members of the occupying forces administration” who pose “a grave collective danger” or who “seriously damage the property of the occupying forces or administration or the installations used by them” have been deemed combatants and no “caught in the act” requirement exists.¹⁰² There is ample evidence of the persons classified by the Prosecution as civilians being such saboteurs.

One who materially supports the military efforts of a party to a conflict would be hard pressed to claim civilian status unless he specifically surrendered or was placed in *hors de combat*. Therefore, given that crimes against humanity in particular require a criminal *mens rea*, a good faith attack on a suspected military target (even if that target lacks the traditional indicia of a military target) would be permissible, subject to the limitations of surrender and *hors de combat*.¹⁰³ This applies to the targeting of the AFRC/RUF operation in Tongo Field which, as a consequence of its diamond mines, was instrumental to AFRC/RUF financing, as well as to AFRC/RUF spies and bureaucrats.

Police officers

The justification normally given for including police in the category of civilians stems from the traditional non-participation of police in international hostilities. In the context of a civil war, however, this rationale does not hold. The trial chamber in ICTR has concluded in dicta that police were combatants and therefore legitimate targets. The justification given was that police were armed and duty bound to pursue the government's objectives.¹⁰⁴

The Geneva Conventions and their additional Protocols are silent on the matter and police are neither expressly protected persons (such as medical personnel) nor expressly defined as armed forces. Under a traditional reading of the Geneva Conventions, this would place police into the category of non-combatants *exclusion alteris*.¹⁰⁵ Though not directly applicable to the conflict in Sierra Leone, Article 43 of Protocol I of the Geneva Convention specifically requires that parties to a conflict notify their counterparts when police or paramilitaries have been incorporated into the armed forces.¹⁰⁶ The implication is that at least for the purposes of Protocol I (in an *international* conflict), police are considered civilian until they "take direct part in the hostilities" or officially incorporate into the armed forces, the rationale being the necessity of the police for the preservation of civil society and their presumed non-participation in international hostilities. This rationale breaks down, however, if applied to internal conflicts such as took place in Sierra Leone. By their nature, civil wars imply the breakdown of civil society and international humanitarian law's role in internal conflicts is to avoid the impunity that would otherwise exist if only the victors were given justice. Police, as agents of the government, are duty bound and armed to prevent rebels from carrying out their aims. In considering the issues ICTR has opined that police were combatants because they had "the duty to maintain public order and have the legitimate means to exercise force."¹⁰⁷

There is ample evidence that the police cooperated with the junta. Police continued work under the junta. TF2-42 (17/9/04) (130). Police handed people over to the junta. TF2-42 (17/9/04) (131). The Inspector General of Police, Kandeh Bangura, was on the AFRC Council during the junta period. TF2-33 (20/9/04) (80). Police in Bo supported the junta in the early days of the occupation. TF2-001 (15/2/05) (17). Police sergeant said they were not going to fight the government of the day. Said the police would serve any government in power. Brima Moriba (22/5/06) Even if police

were categorised as non-combatants it cannot be said that giving the police the same protections in a civil war reasonably falls within the application of the principle.¹⁰⁸

Mens rea

ICTR and ICTY have articulated the required *mens rea* element for any Crime Against Humanity. The perpetrator must knowingly participate in a widespread or systematic attack and be cognizant of the link between his misconduct and the attack, or he must know about the attack and have taken the risk that his acts were part of it. Such a demonstration has not been made through the evidence.

Nexus

Relative to the death of Kamajors taking part in initiation ceremonies, assuming for the sake of argument that the elements of murder are satisfied, it cannot reasonably be argued that such acts must be part of the attack against a civilian population as is required for Crimes Against Humanity. Nor can it be argued that the victims were civilians since they were in fact Kamajors (or members of CDF). See, e.g. Kondewa shot three initiates dead during an initiation and seriously wounded six who later died. TF2-017 (19/11/04) (33).

Another significant phenomenon is acts which were motivated by prior grudges or disputes and did not in fact take place in the context of and in association with an armed conflict. The war “may have been an opportunity to settle scores with community members for whom they may have not been able to do that in the past.” Dr. Daniel Hoffman (9/10/06) (86)

- Eastern Motel incident, Southern Motel incidents were revenge for owner Sesay giving Kamajor ronkos to rebels. Morries Ngobeh (27/9/06)
- “Now, I’m putting it to you that what transpired between you and OC Sheriff was a personal matter between you and him as a result of the cassette investigation. A. Yes.” TF2-041 (24/9/04) (92)
- I have mentioned to you earlier five names of people of whom you spoke earlier today. And you yourself gave other names of men who were present. A. Yes, sir. Q. You have said to the people who interviewed you that all these men -- that all these men -- owed money to your father. A. Yes, sir. TF2-166 (8/3/05) (80)

VIII. Failure to satisfy constituent elements of Violation of the Geneva Convention (and protocols)

Elements of Violation of Geneva Conventions and of Additional Protocol:

- Person or persons were civilians taking no active part in the hostilities;
- The accused or a subordinate was aware of the factual circumstances that established this status;
- Conduct took place in the context of and was associated with an armed conflict (not of an international character);
- The accused or a subordinate was aware of the factual circumstances that established the existence of an armed conflict.

Relative to the death of Kamajors taking part in initiation ceremonies, assuming for the sake of argument that the elements of murder are satisfied, it likewise cannot reasonably be argued that such acts “took place in the context of and was associated with an armed conflict” as is required under the Geneva Convention. Nor can it be argued that the victims were civilians since they were in fact Kamajors (or members of CDF). See foregoing section.

IX. Failure to satisfy elements of specific offences set forth in the indictment

While counsel respectfully submits that there is insufficient evidence to satisfy the underlying constituent elements of Crimes Against Humanity and Violations of the Geneva Convention, if the Trial Chamber finds such evidence adequate, an examination of the substantive charges themselves is required.

Murder (Crime Against Humanity)

*Allegations contained in indictment*¹⁰⁹

Count 1: Murder, a Crime Against Humanity, punishable under Article 2.a. of the Statute of the Court;

Unlawful killings included the following:

between about 1 November 1997 and about 30 April 1998, at or near **TONGO FIELD**, and at or near the towns of **LALEHUN**, **KAMBOMA**, **KONIA**, and **TALAMA** Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;

on or about 15 February 1998, at or near the District Headquarters town of **KENEMA** and at the nearby locations of **SS CAMP**, and **BLAMA** Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;

on or about 15 February 1998, at or near **KENEMA**, Kamajors unlawfully killed an unknown number of Sierra Leone Police Officers;

in or about January and February 1998, in locations in Bo District including the District Headquarters town of **BO**, **KORIBONDO**, and **FENGHEHUN** Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;

between about October 1997 and December 1999 in locations in **MOYAMBA DISTRICT**, including **TAIMA** and **RIBBI**, Kamajors unlawfully killed an unknown number of civilians;

between about October 1997 and December 1999 in locations in **BONTHE DISTRICT** including **TALIA** (Base Zero), **MOBAYEH AND BONTHE TOWN**, Kamajors unlawfully killed an unknown number of civilians;

Elements of specific charge:

- Death of the victim who was taking no active part in the hostilities.
- Resulting from an act or omission of the accused;
- Committed with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.¹¹⁰

Weaknesses in evidence which result in elements not being satisfied:

Relative to the death of civilians, there are other inferences possible from circumstantial evidence. Witness heard that prior to Kamajor attack on Koribondo rebels and soldiers were killing civilians. Rebels and soldiers burned down houses when they attacked villages near Koribondo. TF2-82 (17/9/04) (130); Witness saw corpses on the street before Kamajors came to town. TF2-152 (27/9/04) (126)

There is evidence of deaths which resulted from either the initiation ceremony itself or from its preparation. Assuming for the sake of argument that the elements of murder are satisfied, it cannot reasonably be argued that such acts were “committed as part of” an attack directed against civilians as is required to prove a Crime Against Humanity.

As the Trial Chamber now considers whether the elements are met, it is respectfully submitted that reference should be made to the following examples:

- Mr. Kondewa shot three initiates dead during an initiation and seriously wounded six who later died. TF2-017 (19/11/04) (33).
- While at Base Zero, witness was led to the corpse of one of his Kapras, Alpha Dauda Kanu, by Hassan Sheriff then Kondewa and his herbalists mutilated the body and removed certain parts. TF2-017 (19/11/04) (58–59)
- Relative to a Kanu corpse, Kondewa confronts witness and says to direct questions to Hinga Norman who is alleged to say that part of his body needed for herb concoction and powerful shirt. Kondewa removed body parts. TF2-017 (19th November 2004 page 63 to 69)
- “After 7 days of isolation Kondewa came to the school and told initiates to wash the next day. Said they would be tested with a gun, to determine whether anyone had broken the law. Kabama did the testing. All six later died. [TF2-017 19th November 2004 (30)]
- We killed Mustapha Fallon because Kondewa said we needed a human sacrifice to protect the fighters and make them invisible). Kondewa said the spirit had chosen him

(Fallon). Body burned and eaten, brothers paid and threatened not to tell. TF2-014 (10th March 2005 pages 51 to 53)

The Prosecution argues that “[a]ll the crimes were tied to the war effort and its goals, and the plan to commit them together with the manner of their commission proves the nexus” and that “since the initiation ceremonies were carried out in an extensive manner precisely to render Kamajors fearless in battle, the nexus with the conflict is readily apparent.”² This argument is perhaps a bit circular, in that there must first be an attack against a civilian population.

Based upon the foregoing the accused respectfully submits that the Prosecution has failed to prove Mr. Kondewa’s guilt beyond a reasonable doubt and respectfully asks the Trial Chamber to enter a judgment of acquittal on count one.

Murder (Violation of the Geneva Convention)

Allegations contained in the indictment:

Count 2: 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, punishable under Article 3.a. of the Statute.

Unlawful killings included the following:

between about 1 November 1997 and about 30 April 1998, at or near **TONGO FIELD**, and at or near the towns of **LALEHUN, KAMBOMA, KONIA AND TALAMA** Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;

on or about 15 February 1998, at or near the District Headquarters town of **KENEMA** and at the nearby locations of **SS CAMP**, and **BLAMA** Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;

on or about 15 February 1998, at or near **KENEMA**, Kamajors unlawfully killed an unknown number of Sierra Leone Police Officers;

² Prosecution v. Hinga Norman, Fofana and Kondewa, SCSL-2004-14-T, Response to Third Accused Motion for Judgment of Acquittal, 18 August 2005, para. 26.

in or about January and February 1998, in locations in **BO DISTRICT** including the District Headquarters town of **BO, KORIBONDO AND FENGHUN** Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;

between about October 1997 and December 1999 in locations in **MOYAMBA DISTRICT**, including **TAIAMA** and **RIBBI**, Kamajors unlawfully killed an unknown number of civilians;

between about October 1997 and December 1999 in locations in **BONTHE DISTRICT** including **TALIA** (Base Zero), **MOBAYEH** and **BONTHE TOWN**, Kamajors unlawfully killed an unknown number of civilians;

Elements of specific charge:

- The death of the victim (who was taking no active part in the hostilities);
- resulted from an act or omission of the accused;
- Committed with the intent to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.¹¹¹

As with count one, relative to the death of civilians, there are other inferences possible from circumstantial evidence. Witness heard that prior to Kamajor attack on Koribondo rebels and soldiers were killing civilians. Rebels and soldiers burned down houses when they attacked villages near Koribondo. TF2- 82 (17/9/04) (130); Witness saw corpses on the street before Kamajors came to town. TF2-152 (27/9/04) (126)

Likewise as with count two, there is evidence of deaths which resulted from either the initiation ceremony itself or from its preparation. Assuming for the sake of argument that the elements of murder are satisfied, it cannot reasonably be argued that such acts took place in the context of and was associated with an armed conflict as is required to prove a violation of the Geneva Convention. Based upon the foregoing the accused respectfully submits that the Prosecution has failed to prove Mr. Kondewa's guilt beyond a reasonable doubt and respectfully asks the Trial Chamber to enter a judgment of acquittal on count two.

Inhumane Acts (Crime Against Humanity)

Allegations contained in the indictment:

Acts of physical violence and infliction of mental harm or suffering included the following:

a. between about 1 November 1997 and 30 April 1998, at various locations, including **TONGO FIELD, KENEMA TOWN, KAMBONA** and the surrounding areas, the CDF, largely Kamajors, intentionally inflicted serious bodily harm and serious physical suffering on an unknown number of civilians;

between November 1997 and December 1999, in the towns of **TONGO FIELD, KENEMA, BO, KORIBONDO** and surrounding areas, and the Districts of **MOYAMBA** and **BONTHE**, the intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians by the actions of CDF, largely Kamajors, including screening for “Collaborators,” unlawfully killing of 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.

Count 3: Inhumane Acts, A Crime Against Humanity, punishable under Article 2.i. of the Statute of the Court;

Elements of specific charge:

- The occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article;
- The act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity;
- The act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.¹¹²

Relative to the element regarding serious injury to body or to mental or physical health, there is not specific analysis for this term. The accused submits that use of a key term like this, which is the subject of no jurisprudence or analysis, undermines his right to prepare his own defense. Without