

waiving this objection the accused acknowledges though does not accepted, that it is theoretically comparable to the elements of “serious bodily or mental harm established by the International Criminal Tribunal for the former Yugoslavia:”¹¹³

- Victim must have suffered serious bodily or mental harm;
- The degree of severity must be assessed on case by case basis, considering the individual circumstances;
- Suffering must be the result of an act of accused or his subordinate;
- The accused or his subordinate must have been motivated by intent to inflict serious bodily or mental harm upon victim when the act was committed.

The following are also to be considered to determine the seriousness/severity of the act:

- the factual circumstances including the nature of act or omission;
- the context in which it occurred;
- the personal circumstances of the victim including age, sex and health;
- the physical, mental and moral effects of the act upon the victim;
- whether an act had long-term effects.¹¹⁴

Intent

Inhumane acts must deliberately cause suffering *mens rea* whether intent to inflict suffering on the third party or knowledge that likely to cause suffering and acted recklessly.

“[T]he mens rea is satisfied where the principal offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victims, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission.”¹¹⁵

There is no direct of evidence of Mr. Kondewa’s participation in such acts and no evidence of his intent to do so. 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 three.

Violence to life, health and physical or mental well being – cruel treatment (Violation of the Geneva Convention)

Allegations contained in the indictment:

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

between about 1 November 1997 and 30 April 1998, at various locations, including **TONGO FIELD, KENEMA TOWN, KAMBOMA** 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 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.a. of Statute.

Elements of specific charge:

- An intentional act or omission;
- Causing serious mental or physical suffering or injury or constituting a serious attack on human dignity.
- The accused or a subordinate, by act or omission, caused serious mental or physical suffering or injury or constitutes a serious attack on the human dignity of a victim who was taking no active part in the hostilities.116

Intent

Relative to elements governing the degree of suffering that is required, although it is lower than the required for torture, it must be wilful.¹¹⁷ There is no direct evidence of Mr. Kondewa's participation in such acts and no evidence of his wilful intent to do so.

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 four.

Looting and burning (Violation of the Geneva Convention)

Allegations contained in the indictment:

Looting and burning included, between about 1 November 1997 and about 1 April 1998, at various locations including in **KENEMA DISTRICT**, the towns of **KENEMA, TONGO FIELD** and surrounding areas, in **BO DISTRICT**, the towns of **BO, KORIBONDO** and the surrounding areas, in **MOYAMBA** district, the towns of **SEMBEHUN, GBANGBATOKE** and surrounding areas, and in **BONTHE DISTRICT**, the towns of **TALIA (BASE ZERO), BONTHE TOWN** and surrounding areas, the unlawful taking and destruction by burning of civilian owned property.

Count 5: Pillage, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute.

Elements of specific charge:

- The perpetrator appropriated private or public property;
- The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
- The appropriation was without the consent of the owner.¹¹⁸

Other inferences possible from evidence

Relative to burning and looting, there are other inferences possible from circumstantial evidence. As the Trial Chamber now considers whether such inferences are possible, it is respectfully submitted that reference should be made to the following examples:

- Rebels and soldiers burned down houses when they attacked villages near Koribondo. TF2- 82 (17/9/04) (130)
- Witness was told by civilians that when the junta forces pulled out, they burned houses. TF2-201 (4/11/04) (126)
- The soldiers, they moved directly to my house. They burnt my house. One of my younger brothers was there, who was not able to come out. He was killed. They burnt all my house. Kenneth Koker 20/2/06 (62)
- They burnt in the same street, they went down, they went to another Kamajor's house who was a Kamajor under me who was Daniel Sandy. His house was also burnt. And even at Fourth Street, one of our brothers is there also." Kenneth Koker 20/2/06 (63)
- After the coup, rebels set houses on fire. Dauda Sheriff (8/5/06) (95)
- The damage done to the Eastern Motel and Southern Motel stemmed from a prior grudge. Morries Ngobeh (27/9/06)

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 five.

Terrorizing the civilian population (Violation of the Geneva Convention)

Allegations contained in the indictment:

At all times relevant to this Indictment, the CDF, largely Kamajors, committed the crimes set forth in paragraphs 22 through 27 and charged in counts 1 through 5, including threats to kill, destroy and loot, as part of a campaign to terrorize the civilian populations of those areas and did terrorize those populations. The CDF, largely Kamajors, also committed the crimes to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces.

Count 6: Acts of Terrorism, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute;

The accused submits that use of a key term like terrorism which is the subject of uncertain and conflicting jurisprudence undermines his right to prepare his own defense. Without waiving this objection the accused acknowledges though does not accept, that it is theoretically comparable to the definition of terrorism used by ICTY.

Proffered (though not accepted) Definition of Terrorism¹¹⁹

- Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities;
- Causing death or serious injury to body or health within the civilian population;
- The offender wilfully made the civilian population or individual civilians not taking part in hostilities the object of those acts of violence;
- The above violence was committed with the primary purpose of spreading terror among the civilian population.¹²⁰

Proffered (though not accepted) Elements of specific charge:

- Acts or threats of violence directed against protected persons or their property;
- The offender wilfully made protected persons or their property the objects of those acts and threats of violence;
- The acts or threats of violence were committed with the primary purpose of spreading terror among protected persons.¹²¹

Weaknesses in evidence which result in elements not being satisfied

No discernible constituent elements of this offence exist, violating the precept that there is no crime without law, *nullum crimen sine lege*. Arguing by analogy is not sufficient in the context of individual criminal responsibility where laws must be specific enough to enable that “all those who may fall under the prohibition of the law know in advance precisely what behaviour is allowed and which conduct is instead proscribed.”¹²² At a minimum the accused is entitled to “a formulation of the offence which satisfies the basic standards for any serious crime, namely a clear statement of the conduct which is prohibited and a satisfactory requirement for the proof of *mens rea*.”¹²³

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 six.

Collective punishment (Violation of the Geneva Convention)

Allegations contained in the indictment:

At all times relevant to this Indictment, the CDF, largely Kamajors, committed the crimes set forth in paragraphs 22 through 27 and charged in counts 1 through 5, including threats to kill, destroy and loot, as part of a campaign to terrorize the civilian populations of those areas and did terrorize those populations. The CDF, largely Kamajors, also committed the crimes to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces.

Count 7: Collective Punishments, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute.

Proffered (though not accepted) Elements of specific charge:

- A punishment was imposed upon protected persons for acts that they have not committed and
- The intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishment.¹²⁴

No discernible constituent elements of this offence exist, violating the precept that there is no crime without law, *nullum crimen sine lege*.

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 seven.

Use of child soldiers (Other serious violation of international humanitarian law)

Allegations contained in the indictment:

At all times relevant to this Indictment, the Civil Defence Forces did, throughout the Republic of Sierra Leone, initiate or enlist children under the age of 15 years into armed forces or groups, and in addition, or in the alternative, use them to participate actively in hostilities.

Count 8: Enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an Other Serious Violation of International Humanitarian Law, punishable under Article 4.c. of the Statute.

Elements of Serious Violation of International Humanitarian Law:

The four factors for determining whether it is a “serious violation of international humanitarian law are set out in the *Tadic* decision on Defence Motion for Interlocutory Appeal on Jurisdiction:125

- The violation must constitute an infringement of a rule of international humanitarian law;
- The rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- The violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby 'private property must be respected' by any army occupying an enemy territory;
- The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule."126

Proffered (though not accepted) Elements of specific charge:

- The perpetrator conscripted or enlisted one or more person into an armed force or group or used one or more persons to participate actively in hostilities;

- Such person or persons were under the age of 15 years;
- The perpetrator knew or should have known that such persons were under the age of 15 years;
- The conduct took place in the context of and was associated with an armed conflict;
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict;127

The child's participation must be active. This entails actually arming a child and sending him or her into battle, or sending the child to transport munitions, gather information or guard bases.128

Weaknesses in evidence which result in elements not being satisfied:

As described above it is vital to distinguish among the very different activities engaged in by initiators, namely that some ceremonies were meant to initiate those who would engage in fighting whereas others were meant only to immunise or protect them. It is a poignant and obvious truth that one need not be participating in the armed conflict in order to be in harm's way. This was most true of the population of children, many of whom were brought for immunization by their families.

It is also clear that some of those alleged to be child soldiers were in fact trained by the rebels and given protection, food and shelter by the Kamajors. See, e.g. report of the child soldier expert who highlights the case of orphaned children provided for by, as she puts it, CDF; Witness had been fighting with RUF where he was trained to use weapons. TF2-140 (14/9/04) (121)

No discernible constituent elements of this offence exist, violating the precept that there is no crime without law, *nullum crimen sine lege*.


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 eight.

X. Conclusion

Given the burden of proof that is upon the Prosecution, the circumstantial nature of the case against Mr. Kondewa, the fact that the Prosecution's witnesses have been impeached, the fact that the Prosecution's evidence has been soundly rebutted, and the existence of legal defects recounted herein, counsel respectfully submits that Mr. Kondewa's guilt has not been proven beyond a reasonable doubt and prays the Trial Chamber to therefore enter a judgment of acquittal in his favour on all counts raised in the indictment.

COUNSEL FOR ALLIEU KONDEWA

Done in Freetown this 22nd day of November, 2006



YADA WILLIAMS.

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