

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.

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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 (16/11/04 page 61) and TF2-068 (17/11/04 page 91). 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

(15/5/06 pages 5, 6 & 11). As the leader of the Death Squad testified, the Death Squad had no duties at Base Zero and took orders from chieftain 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 (15/5/06 page 11)

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.

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Although they were being accused of breaking the rules he had given to them, it became clear that h : 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.

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

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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

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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

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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.

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- 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

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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 person 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

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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)

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- 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

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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

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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.

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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." Peter Penfold (8/02/06 page 47) He likewise noted their continued allegiance to their paramount chiefs, a phenomena analysed by Dr. Hoffman in his testimony and report.

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There was no 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. ECOMOG were considered “the principal defender of the government” Lt. General David Richards (21st February 2006 pages 8 & 9)

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 -26th 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.

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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.

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V) I. 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

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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 centres. ⁹⁴

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)

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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

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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 page 87) 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

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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 pages 9, 10, 12, 14 & 19)
- "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)

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VI I. 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;

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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 **FENGHEUN** 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

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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)]

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- 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;

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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.

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 FENGHEUN** 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

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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 **FONTHE**, 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;

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- 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 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

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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 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.

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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.

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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:

- 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 & 96)
- The damage done to the Eastern Motel and Southern Motel stemmed from a prior grudge. Morries Ngobeh (27/9/06 pages 7 & 8)

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:

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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

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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

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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

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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.

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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 27th day of November, 2006



YADA WILLIAMS.

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