

able to find conclusive evidence only against the 3rd Accused, Allieu Kondewa under Article 6(1) and this, in relation to only two child soldiers. The evidence also reveals the use of children as 'Commanders', who danced in front of advancing CDF warriors as they went to battle¹¹ and furthermore, the revelation of their use in check points in an unidentified location or command structure that would clearly have established under whose command they were operating in order to facilitate the determination of responsibility for the offence so disclosed under Count 8.

35. It is in evidence, that at the early stages of the war, children went through the initiation and immunisation process only for their protection and with the consent of their Parents, participated alongside the said parents and elders to defend their communities against rebel incursions. There is however, no evidence volunteered by the Defence or by the Prosecution as to the evolution of their status thereafter and as to whether they were used eventually to participate actively in hostilities since they had fulfilled the CDF criteria for enlistment into their combat wing.

ACTIVITIES OF CDF CHILD SOLDIERS ALSO KNOWN AS 'SMALL HUNTERS'

36. In the Kamajor culture and terminology, these child soldiers were called 'Small Hunters' and they were involved in committing certain atrocities during the conflict. There is evidence on record that is credible, that one Keikura Amara aka Komabotie, a very ruthless Kamajor who in a place called Talama, killed 150 civilians in a queue, slit open the stomach of one victim and displayed his entrails in a bucket before the remaining civilians.¹² He gave a single barrel bullet to a 12 year old boy named 'small hunter' and ordered him to kill Witness TF2-035. Two Kamajors intervened on TF2-035's behalf but their efforts were unsuccessful. 'Small Hunter' shot Witness TF2-035 five times but he, TF2-035, managed to escape to the bush. One bullet is still in his body.¹³

THE AVONDO SOCIETY

37. Sometime after March 10, 1998, Kondewa founded the Avondo Society together with one Skeke Kaillie, 'aka Bombowai'. From the evidence, Avondo means that when you go to the

¹¹ Exhibit 100.

¹² Transcript of 14 February 2005, TF2-035, pp. 49-50.

¹³ Transcript of 14 February 2005, TF2-035, pp. 56-68.

warfront, the medicine enters your body when you sweat.¹⁴ There was a cabinet of the Society which was responsible for marking the bodies of the initiates.¹⁵ Members of the cabinet were: Kamoh Gboni, Kamoh Fuwad, Gibrilla, CO Makossi, Hallie Namoi and Woodie.¹⁶

38. Members of Avondo Society were the Kamajors, the notorious group. They had no sympathy for anyone. Whoever they caught they would kill or amputate.¹⁷

39. In 1999, when Witness TF2-021 was thirteen years old, he was initiated into the Avondo Society, a group of Kamajors led by Kondewa. He received a certificate (exhibit 18) which shows his membership in this group. The certificate bears details showing the place of initiation (Bumpeh), the initiate's name, photograph and age. It also bears Kondewa's name, signature and stamp.

40. From the available evidence, the children who were initiated into the Avondo Society acted differently. They did not want to be touched by or stand near female teachers. They did not want to hold a sweeping brush, unlike other children who would sweep at the schools. They began to show violent behaviour and acted like they were better than the other children even the other children that had been initiated into the CDF.¹⁸ (See Factual Findings of 20/7/07 Page 29 of Footnotes Folder.

41. Still in relation to the activities of CDF Child Soldiers, the deceased 1st Accused, Norman, had threatened the War Council and said 'These small boys you have seen here, if they kill, you have nobody to be responsible for you. These boys you are dealing with, when they do bad, they kill you here, and nobody will be responsible. I have no security guarantee here.' When two War Council members were molested, late Norman did not do anything to the Kamajors. So this created fear in the War Council members. A young Kamajor with a gun molested Hon. R.P. Kombe Kajne, a 70 year old former member of Parliament and member of the War council who was placed on the ground and stepped onto. When this matter was reported to late Norman, he just laughed and said 'I have told you.' No disciplinary measure was taken against the Kamajor.

¹⁴ Transcript of 11 March 2004, TF-021, pp. 20-21 and 49.

¹⁵ Transcript of 10 March 2005, Albert J Nallo, pp. 28-30

¹⁶ Transcript of 10 March 2005, Albert J Nallo, pp. 28-30

¹⁷ Transcript of 14 February 2005, TF2-001, pp. 77-78.

¹⁸ TF2-EW2, 2005.06.16, pp. 21-22.

Alhaji Duramy Rogers, also a notable and a member of the War Council based in Base Zero, suffered a similar fate and Norman only laughed and again said he had told them.¹⁹

42. I would like to observe here that those major incidents provoked by 'small hunters' in Base Zero against these two respected and reputed notables and member of the War Council, could not have occurred in the geographically small village of Talia, without their being reported to or coming to the knowledge of Fofana and Kondewa who after Norman were the 2nd and 3rd in the real command hierarchy of the CDF in that village. I do observe here that the evidence reveals that Kondewa moved around Talia with his body guards because of the importance of Initiators within the hunter's society also known as the Kamajor society. He also had a child soldier acting as one of his body guards.

43. It is plausible to adopt as credible, the evidence that Father Garrick went to see Kondewa who was considered supreme head of the Kamajors in Tihun Sogbini²⁰

44. His powers are further highlighted and demonstrated in a meeting at Base Zero to plan the attack on Tongo at which the 3 Accused were in attendance. Norman and Fofana spoke first. Then all the fighters looked at Kondewa, admiring him as a man with mystic power and he gave them the last command saying, 'a rebel is a rebel; surrendered, not surrendered, they're all rebels; The time for their surrender had long since been exhausted, so we don't need a surrendered rebel.' He then said, 'I give you my blessings; go my boys, go.'²¹

45. In fact, he was so powerful and influential in the organisation that Father Garrick testified²² that on the 24th of August when his delegation from Bonthe arrived in Talia to discuss the restoration of security issues with Kondewa who had command and control over the Kamajors in Bonthe. On reaching Kondewa's house, they met a young boy of 15 years of age playing a guitar outside the house and were singing about the greatness of Kondewa and the Kamajor society. The Kamajors were guarding the house, armed with rifles and guns.

¹⁹ Transcript of 8 June 2005, TF2-011, pp. 23-24 (CS).

²⁰ Transcript of 11 November 2004, TF2-071, pp. 50-52; Transcript of 18 February 2005, TF2-222, pp. 48-50; Transcript of 10 October 2006, JD Murana, pp. 23-33 and 45.

²¹ Transcript of 17 February 2005, TF2-222, p. 119, line 24 - p. 120 line 11.

²² Transcript of 10 November 2004, Father Garrick, p. 10.

46. On the strength of the evidence adduced which is credible, and which confirms his powers and the very high esteem and exaltation he enjoyed amongst the Kamajors and in the CDF as an organisation, it is said that Kondewa's job was to prepare herbs which the Kamajors smeared on their bodies to protect them from bullets.²³ Kondewa was not a fighter,²⁴ he himself never went to the war front²⁵ or into active combat,²⁶ but whenever a Kamajor was going to war, he would go to Kondewa for advice and blessing.²⁷ Kondewa's role was to decide whether a Kamajor could go to the war front that day. Before combat, the Kamajors would go in a line and Kondewa would say, "You go out of the line. You not go this time." Although, he could say, "don't go", it was similar to a fortune teller saying so.²⁸ Because of the mystical powers Kondewa possessed, he had command over the Kamajors from every part of the country. No Kamajor would go to war without Kondewa's blessing.²⁹ For example, he did this for the Kamajors leaving Base Zero for Tongo.³⁰

47. Kondewa walked around Base Zero with his bodyguards³¹ because of the importance of initiators within the hunters' society.³² He also had a child soldier acting as one of his bodyguards at Base Zero.³³ Kondewa had a house in Nyandehun, which was about a quarter mile from Talia.³⁴

NORMANS KNOWLEDGE OF USE OF CHILDREN UNDER THE AGE OF 15 TO PARTICPATE ACTIVELY IN HOSTILITIES

48. In January 1998, Norman spoke at a meeting at Base Zero. He complained that the child combatants were out performing the adults, who spent more of their time in looting.³⁵ Children were present at this meeting. Norman acknowledged that there were children serving under his command. President Kabbah made many commitments to cease the recruitment of children

²³ Transcript of 4 November 2004, TF2-201, p. 107 (CS).
²⁴ Transcript of 15 March 2005, Albert J Nallo, p. 46.
²⁵ Transcript of 16 November 2004, TF2-008, pp. 48-50.
²⁶ Transcript of 23 November 2004, TF2-008, pp. 57-60.
²⁷ Transcript of 23 November 2004, TF2-008, pp. 57-60.
²⁸ Transcript of 23 November 2004, TF2-008, pp. 57-60.
²⁹ Transcript of 16 November 2004, TF2-008, pp. 48-50.
³⁰ Transcript of 4 November 2004, TF2-201, p. 107 (CS).
³¹ Transcript of 15 March 2005, Albert Nallo, p. 46; see also Transcript of 8 June 2005, TF2-011, pp. 45-47 (CS).
³² Transcript of 3 February 2006, Sam Hinga Norman, pp. 74-76.
³³ Transcript of 27 May 2005, TF2-079, p. 13.
³⁴ Transcript of 18 February 2005, TF2-222, pp. 48-50; Transcript of 11 October 2006, JD Murana, pp. 32-33 and 45.
³⁵ Transcript of 19 November 2004, TF2-017, pp. 89-91.



during the time when Norman was Deputy Defence Minister.³⁶ Norman acknowledged that children took part in hostilities on the 'defending side' prior to the Coup. From the time of the Coup until 10th March, 1998, Norman knew that children under 15 were being actively involved in hostilities on the side of the CDF. Norman informed President Kabbah that action should be taken to discourage children from across the Country from participating in the conflict.³⁷

49. Norman publicly agreed to stop using child soldiers in the CDF at a social event in Freetown on the 28th of May, 1998, (There was no indication the Fofana or Kondewa were present) though he repeated this promise at the UNAMSIL Headquarters on the 25th of June, 1998, on this second occasion Norman qualified his words by adding that it would not be possible to disengage and demobilise children if the war went badly. There is no indication that Fofana or Kondewa were present.

50. Besides the case of the 3rd Accused, Allieu Kondewa, no direct evidence has been led by the Prosecution against the establishment of enlistment of children under 15 years of age into the armed Kamajor groups or of using them to participate actively in hostilities. There is evidence, however, that as many as 300 children under the age of 15 years were demobilised by the CDF during the DDR programme as shown in Exhibit 100. Norman, accompanying President Kabbah, assured Mr. Olara Otunnu, the SRSG in a meeting that there was going to be a halt in the enlistment of children into the armed groups.

51. Paragraph 50 of Exhibit 100 states as follows:

"I saw armed children from between the ages of 12 - 15 years of age manning CDF checkpoints. As a Child Protection Officer, I was forced to speak with these children in areas where all agencies had free access."

³⁶ Transcript of 7 June 2005, TF2-218, pp. 32-33. Note however that many of these commitments refer to children aged less than 18, not children aged less than 15: *see e.g.* Exhibit 100, para 52. [No Registry page numbers indicated.] REPORT IS CONFIDENTIAL. Exhibit 104A, "Report of the UN Secretary General, 9 June 1998", (S/1998/486), para 23; Exhibit 105A, "Report of the UN Secretary General, 12 August 1998", (S/1998/750), para 16; Exhibit 105B, "Report of the UN Secretary General, 12 August 1998", (S/1998/750), para 43; Exhibit 105C, "Report of the UN Secretary General, 12 August 1998", (S/1998/750), para 59; Exhibit 107, "Report of the UN Secretary General, 16 December 1998", (S/1998/1176), para 39; Exhibit 108B, "Report of the UN Secretary General, 4 June 1999", (S/1999/645), para 36; Exhibit 114, "Sierra Leone Humanitarian Situation Report, 15 June 1998", para 13.

³⁷ Transcript of 2 February 2006, Sam Hinga Norman, pp. 18-19.

52. In paragraph 55 of the Exhibit 100 it is reported that late Norman acknowledged that children were present amongst CDF and that they were being initiated for their own protection. The Author says:

“I held later meetings with Norman where I referred to CDF child soldiers which he did not deny.”

53. TF2-041 (PW-15) testified that up to 81 boys were handed over to a child protection agency monitored by the Minister of Children and Gender Affairs.³⁸ They lived in a camp in Moyami and were taught to forget the war. Children were given training or schooling, depending on which they requested.³⁹ Norman used to visit the camp and check whether the boys were properly cared for.⁴⁰ TF2-140 (PW-8, a child soldier) testified that the program he was in failed and he was left in the street; he had nowhere to go, so he decided to go to Norman's house in Freetown.⁴¹ According to TF2-140 (PW-8), since Norman pushed him into a program that failed, he had no option. So Norman sent him to school in Pujehun; Norman continued to support TF2-140 (PW-8) until he was arrested.⁴²

54. TF2-EW2 (PW-74)'s report notes the following:

Demobilisation of children associated with the Civil Defence Force (CDF) was also a major concern in child protection. The NCDDR [National Committee on Disarmament, Demobilization and Reintegration] also secured an agreement to ensure the non-recruitment of children by the CDF and to commence the demobilisation of children associated with their forces. The CDF, in collaboration with child protection agencies, carried out the pre-demobilisation registration of over 300 children in the Southern Province in 1999.

These 300 children were registered as child combatants by the CDF themselves. UNICEF received CDF registration forms that included the child's name, individual age - all of which were under 14, and the name of commander [sic] that the child was under, the location where the child was based and the type of weapon that the child had been assigned.

³⁸ Transcript of 14 September 2004, TF2-140, p. 96.

³⁹ Transcript of 14 September 2004, TF2-140, pp. 97-98.

⁴⁰ Transcript of 14 September 2004, TF2-140, pp. 97-98.

⁴¹ Transcript of 14 September 2004, TF2-140, pp. 97-98.

⁴² Transcript of 14 September 2004, TF2-140, pp. 118-119.

UNICEF later changed the format of this CDF registration form to include names of the child's parents and the original home.⁴³

55. TF2-EW2 (PW-74) noted further that:

As the war effort intensified in 1998, child protection agencies started to receive reports of children being initiated into the CDF and actually joining the older fighters in battle. With the evidence gathered and due to the fact that the CDF were a pro-government group, this practice was given special attention by Mr Olara Otunnu during his visit to Sierra Leone in July 1998. The President, His Excellency Dr. Ahmed Tejan-Kabbah and the Deputy Minister of Defence Honourable Hinga Norman, agreed to halt all recruitment of children into the CDF as part of their commitments to Mr Olara Otunnu, SRSG for Children and Armed Conflict in May.

Following this meeting, the CDF registered child combatants. Over 300 children in the Southern Province under the CDF were registered. However, these 300 children were not provided with the agreed disarmament and demobilization as per the national DDR plan and the earlier commitment that had been made to the SRSG. Despite these agreements and efforts, UNICEF continued to receive reports from across the country of the increase in the initiation and the arming of children among the CDF.

56. In the light of such consistent and coherent evidence of the presence of children under the age of 15 years within the ranks of the CDF where they were at times being used to take part in combat or combat related activities. The following facts are also clearly established:

1. That during the demobilisation processes 300 children under the age of 15 years were handed over by Norman as CDF child soldiers to the DDR;
2. Late Norman admitted that children were being initiated for their own protection coupled with the fact that child soldiers were present in Talia which was the Command Headquarters of the 3 Accused Persons, where we learn from the evidence that thousands of people from other communities congregated for purposes of initiations by the 3rd Accused Allieu Kondewa I Base Zero.
3. That the 2nd Accused, Moinina Fofana, Director of war was permanently based in Talia where initiations of Kamajors and their military training by Ms. Dumbuya was taking place.

⁴³ Exhibit 100, paras 29-30.

4. That the 2nd Accused, Moinina Fofana, addressed the trainees during passing out ceremonies and in late Norman's presence with who he collaborated very closely.

57. The issue to be clarified at this juncture is whether the two remaining Accused Persons did or did not know, or even approve, either expressly or tacitly, of this massive enlistment, at least of the identified 300 children under the age of 15 years, into their Kamajor armed groups and facilitating their use to participate actively in hostilities or in combat related activities.

58. The evidence on the record is that although it was Norman who featured prominently in the demobilisation of the child soldiers, and on the face of it, appears to have been privy to their enlistment and use, it is clear that he was not alone in this plan because the evidence establishes that he was after all, not permanently resident in Talia where Kondewa was conducting his initiations at the same time that military training of Kamajors was going in.

59. Base zero, through Kondewa's initiations and Dumbuya's Military training of the Kamajors, who of course could not undergo the said training for purposes of enlistment into the CDF armed group without having gone through a prior initiation, was a nursery and the breeding ground for CDF combat troops and manpower. The 2nd and the 3rd Accused were basically permanently resident in Base zero and followed up all the activities that were going on in that village that has been described as very small.

LIABILITY OF THE 2ND ACCUSED, MOININA FOFANA UNDER COUNT 8

60. As far as the 2nd Accused is concerned, there is no direct evidence whatsoever linking him with any of the elements of the offences charged under Count 8 of the Indictment. The only evidence available is that he was the Director of War in charge of conducting the war whose execution, it must be affirmed and stated here, necessarily depends on the availability, first of all, and more importantly, of combat man power, and then, of the traditional military equipments and supplies for use in the conduct of the hostilities against the enemy.

THE DEMOBILISED 300 CHILD SOLDIERS

61. In this same vein, the only alleged evidence also available on the records for the commission of offences under Count 8 is what is recorded in terms of the activities of the late 1st Accused Norman, during the DDR.

62. What therefore, are the proven facts which would allow one and one inference only to be drawn which is that Moinina Fofana and Allieu Kondewa, acting in concert, did or did not facilitate, plan, instigate or order the recruitment of 300 child combatants who were clearly and positively identified by the CDF organisation itself as their ex child combatants. These children, who were all under the age of 15 years, were turned in by the late 1st Accused, Samuel Hinga Norman, to the DDR programme at the end of the conflict, a factor which necessitated their demobilisation and reintegration into normal civilian and ordinary life. Is there any other inference or inferences as the case may be, that would tend to weaken or to destroy an inference that Moinina Fofana and Allieu Kondewa, acting in concert with the late 1st Accused Norman are liable for offences under Article 6(1) for the 300 demobilised under 15 children who were handed in to the DDR by the late 1st Accused as children who had taken part as CDF fighters, actively in hostilities.

63. In the context of these proven realities on how enlistment into the CDF Kamajor armed group was conducted, it is necessary to make a determination on the nature and consequences on the liability of the two Accused, on the evidence to the effect that the deceased 1st Accused, Samuel Hinga Norman, who at all material times as the Indictment alleges, acted in concert and in furtherance of a common purpose with the two remaining Accused Persons, Moinina Fofana the Director of War and the 2nd Accused, Initiator into the Kamajor cult and High Priest of the establishment, handed over to the DDR programme, at least an identified group of 300 child soldiers under the age of 15 years.

64. As has been observed earlier, the intent, the common purpose and the design which the Prosecution is seeking to impute on all the original three, now two Accused Persons, is that of agreeing to enlist children under the age of 15 years into the Kamajor armed group or in the alternative, to use them to participate actively in hostilities in order to defeat the combined forces of the RUF and of the AFRC as alleged in paragraph 19 of the Indictment.

65. The allegation by the Prosecution given the state of the evidence, is that the Accused Persons, Fofana and Kondewa, were acting in concert and in pursuit of the common objective that is criminalised by Article 4(c) of the Statute and by International Humanitarian Law as defined as well in Article 77(2) of Additional Protocol I and in Article 4(c) of Additional Protocol II of the Geneva Convention of 12th of August 1949. Is this allegation sustainable having regard to the state of the entire evidence in the records?

CIRCUMSTANTIAL EVIDENCE

66. I would like to, in addressing this question, reiterate the rules relating to the burden of proof in criminal matters which is discharged by the Prosecution either by adducing direct or in its absence, and on condition of the fulfilment of certain criteria, by relying on circumstantial evidence. I observe here that the application of the rule of circumstantial evidence and the dependence on it by Courts to enter a verdict of guilty or not guilty is a universally accepted rule of law that is applied by the community of civilised nations and in civilised legal systems in the world.

67. The reliance on and use of circumstantial evidence in the absence of direct evidence, We would say, has acquired such notoriety that it can, without any reservations, be considered as a rule of customary international law in international criminal procedure. Pursuant therefore to the provisions of Rule 72bis of the Rules of Procedure and Evidence, it is proper to invoke in this case, the application of the principle of circumstantial evidence as a general principle of law derived from national legal systems of the world and particularly the common law systems.

68. I would like to say here that if the principle of applying circumstantial evidence were not available to the Courts, many offences and offenders, in situations where direct evidence is not available or handy or where it cannot provide a solution on whether a verdict of guilty or not guilty should be entered would go either unpunished or unjustly punished.

69. This rule of evidence finds its justification and in fact justifiably steps in where direct evidence is not, or cannot, because of its unavailability, be adduced to prove a material fact in issue which could determine the guilt or innocence of an accused. In such a situation the law allows for the application of the evidentiary rule of circumstantial evidence which permits that a fact or facts in issue can be inferred from already proven and established facts, on the condition that the

inference on which such proof is grounded, is the only one that can be drawn from the facts which have been proven and established by direct oral or documentary evidence.

70. As Lord Normand put it on this subject in the case of *Teper v. R*,⁴⁴ such evidence 'must always be narrowly examined if only because evidence of this kind may be fabricated to cast suspicion on another..... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'⁴⁵

FACTS IN ISSUE WHICH ARE BORNE BY THE RECORDS IN THIS CASE

71. The facts which have been clearly proven by direct oral and documentary evidence, and also by Prosecution and Defence admissions are as follows to mention just some amongst others that are in the record:

1. Talia also known as Base Zero is, the evidences goes, a very small village. Intimacy and regular interaction would, of necessity, be the norm.
2. Fofana and Kondewa, after the deceased first Accused, Norman, were the most prominent figures in Base Zero.
3. In the absence of Norman, Fofana deputised for him.⁴⁶
4. The three Accused Persons were fighting to restore the democratically elected government of President Kabbah which was ousted in a *coup d'Etat* by the AFRC on the 25th of May 1997.
5. The Accused Persons were acting in concert and with a common design and purpose to achieve that goal to defeat the AFRC which ousted the Kabbah Government. The Accused therefore needed to organise themselves by constituting an armed group.
6. An organisation called the CDF was accordingly formed and the Accused persons embarked on the recruitment of traditional hunters called Kamajors including others, into the Kamajor organisation to serve as combatants to ensure the restoration of the Kabbah Government.

⁴⁴ [1952] AC 480 at p. 489 (PC).

⁴⁵ See Archbold, *Criminal Pleadings Evidence and Practice*, 1997 Edition, p. 1138, para 10.3 on circumstantial evidence.

⁴⁶ Transcript of 4 November 2004, TF2-201, pp. 97-98 (CS).

7. No Kamajor could be recruited into the armed and combat group of the CDF without having undergone the ritual of initiation and immunisation. It was a condition precedent for any recruitment for reasons already stated.

8. Initiation and immunisation were performed by Initiators, one of who was Kondewa, who because he was at the head of all of them, was designated and known as the High Priest.

9. Initiation and immunisation did not amount the offence of enlistment into the armed force or group but in the Kamajor setting, it constituted a preliminary stage to recruitment and use as combatants in that they were, having acquired the bullet proof protection, were predisposed for recruitment and active participation in hostilities.

10. There was an influx of thousands of people into the tiny village of Talia, for purposes of undergoing initiation and immunisation.⁴⁷

11. Before the establishment of Base Zero, children under the age of 15 years were also initiated and immunised at the behest of their parents and elders so as to have them protected against bullets as they fought alongside their elders to defend their communities against any possible rebel incursions.

12. There was a training base in Talia for the military training of the Kamajors before participating in combat.

13. Fofana and Kondewa, after Norman had done so first, also addressed the crowd of trained Kamajors at their passing out ceremonies and urged them to go to war.

14. There were child soldiers in Talia perpetrating terror and violence against their elders.⁴⁸

15. The last and the crowning established fact from which the inference that is sought can be made in order to hold the two Accused Persons responsible for crimes charged in Count 8 of the Indictment as a violation of Article 4(c) of the Statute is that the deceased 1st Accused, Samuel Hinga Norman, handed over former CDF child combatants,

⁴⁷ Transcript of 8 May 2005, TF2-011, pp. 16-17 (CS); Transcript of 8 June 2005, TF2-011, pp. 16-17 [CS]; Transcript of 23 November 2004, TF2-008, p. 56.

⁴⁸ Transcript of 14 February 2005, TF2-035, pp. 24-27; Transcript of 11 March 2005, TF2-014, pp. 56-59.

indeed 300 of them, all of who were under the age of 15 years, to the DDR programme for their integration into normal civilian and family life.

72. If this fact were accepted as credible as it indeed is, given all the circumstances of this case, the question is whether the inference can or should be drawn to conclude that Fofana and Kondewa, acting in concert with the now deceased 1st Accused, Samuel Hinga Norman, should bear responsibility under Article 6(2) of the Statute for enlistment of these under 15 years children into the CDF armed group through initiations, immunisations or other complicity, and of using them to participate actively in hostilities, by either encouraging, facilitating, planning, ordering, instigating or aiding and abetting in the planning, preparation or execution of the above mentioned crimes charged in the indictment as being contrary to and punishable under Article 4(c) of the Statute.

73. The remaining two Accused in this case, Moinina Fofana and Allieu Kondewa are, as they were in this Indictment which concerned the three of them, together charged with the late Samuel Hinga Norman for what, in another legal expression, would amount to accomplice responsibility which has been characterised by the Appeals' Chamber of the ICTY in the *Tadić* case as a Joint Criminal Enterprise. An accomplice is defined as any person who aids and abets, counsels or procures the commission of an offence. The accomplice is tried and punished for that offence as a principle offender.⁴⁹

74. Accomplice, just as joint criminal enterprise liability, requires a plurality of persons who have all agreed and embarked on the commission of a criminal offence like this one which, for our purposes, is defined under Article 4(e) as read with Article 6(1) of the Statute.

75. In the case of *Rook*⁵⁰ it was held that the same principles apply to a party who is absent as to one who is present because the absent party may be the mastermind and the most culpable party.

76. The evidence in this case reveals that it was the late 1st Accused who handed over the 300 child soldiers to DDR programme following a series of negotiations with the UN Representative Mr. Olara Otunni. It is not stated that either Fofana or Kondewa were present on this occasion.

⁴⁹ Richard Card, *Criminal Law*, 15th Ed., p. 20.02-20.03.

⁵⁰ [1993] 2 ALL ER, 955, p. 126.

This fact, in my opinion, does not negate the finding that Kondewa as an initiator was, in comparison with late Norman's involvement in it, principally responsible for aiding and abetting in the execution of the crime for which they are indicted in Count 8. We say this because it was initiations and immunisations which were encouraged by both Accused whose action in concert with the late 1st Accused, very largely contributed in aiding and abetting in the execution of those crimes.

77. TF-EW2⁵¹ testified that as the war effort intensified in 1998, Child Protection Agencies started to receive reports of children being initiated into the CDF and actually joining the older fighters in battle. This practice was given special attention by Mr. Olara Otunnu during his visit to Sierra Leone in July 1998 when President Kabbah and the Deputy Minister of Defence, the deceased 1st Accused, agreed in an open meeting, to halt all recruitment of children into the CDF.

78. In Exhibit 100, paragraph 5, the Expert Witness had this to say:

"From speaking to those children, I learned that the CDF recruitment was determined by community ties. Initial reports from Child Protection Officers who also spoke to these children mostly in the Southern Province of Bo, reported children's involvement with the CDF being initially linked to the preparation to battle. Boys as young as 7 years old danced in front of advancing CDF warriors as they went to battle."

79. In paragraph 54 the Report says:

"In 1999, I observed the establishment of the Avondo Society which included initiations of children. The Society was headed by Allieu Kondewa."

80. In the light of the foregoing analysis, I am left in no doubt when I draw, as I now do, the inference from the enumerated proven facts, to consider as proven the fact that Moinina Fofana, under Article 6(1) of the Statute, is criminally responsible for offences charged under Count 8 of the Indictment for aiding and abetting in the execution of the crime of using children under the age of 15 years to participate actively in hostilities as refined in Article 4(c) of the Statute with particular reference to the demobilised 300 child soldiers all of who were under the age of 15 years.

⁵¹ Transcript of 16 June 2005, TF2-EW2, pp. 19-25 (CS).

PRESIDENT KABBAH'S ROLE IN THE CONFLICT

81. As has been briefly mentioned in the introduction of The Chamber Judgement, persistent references and allusions were made by the Defence Team in the course of the proceedings that have preceded this Judgement, to President Kabbah and his alleged involvement in the conflict on the side of the CDF.

82. In this regard, and again as mentioned in passing in the introduction of this Judgement, the Chamber recalls that the three Accused Persons, all along in the course of these proceedings, raised a veiled Defence that all they did and stand charged for was as a result of their struggle to restore to power, President Kabbah's democratically elected government that had been ousted in a *coup d'Etat* by the Armed Forces Revolutionary Council (AFRC) on the 25th of May 1997.

83. In view of the fact that the exigencies of justice require that a defence whether directly or indirectly raised by an accused in a criminal matter, needs to be examined, I will proceed to determine, whether the President's alleged role, viewed in the light of his status and that of his government-in-exile, constitutes a legal defence that is available to the Accused Persons.

84. In the light of the evidence adduced I have no doubt in my mind that President Kabbah occupied and played a central role in this conflict because it was his overthrown Government that was waiting in the wings to be restored after the bitter wrangling and struggle that preceded it and continued with greater intensity, after the Kabbah Government was overthrown.

SOME DETAILS ABOUT STRATEGIC EVENTS

85. In February/March 1997, the then Vice President, Albert Joe Demby, organised two meetings to address military dissatisfaction over rice distributions because while officers were receiving only one bag for every two officers the senior officers were each receiving about 50 bags. A plan to reduce the rice rations provoked discontent and unrest in the Army.⁵²

⁵² Transcript of 8th February 2006, Peter Penfold, pp. 7-9.

86. In a meeting between President Kabbah, the Vice President Demby and the Army Officers, the late Accused Norman accused two army officials, Hassan Conteh and Col Marx Kanga of planning a coup; an accusation which they denied.⁵³

87. Peter Penfold the then British High Commissioner to Sierra Leone, the American Ambassador John Hirsh and the UN Special Representative, Ambassador Berhanu Dinka, in a meeting with President Kabbah, warned him of a possible *coup* against his government. He told them that he had already heard about that coup and that he would be talking to the Military.⁵⁴

88. Meantime, late Norman, in April 1997, had seen President Kabbah and handed over to him the strategic keys, in a bag with working parts of dangerous weapons for safe keeping.

89. Like the Ambassadors who preceded him, Norman told President Kabbah that there was an imminent plot to overthrow him but that the *coup d'Etat* may not be deadly or destructive without those parts of the weapons. On the 5th of May 1997, President Kabbah told Norman that he returned the contents of the bag to the Chief of Defence Staff and the Army Chief, late Brigadier Hassan Conteh and late Max Kanga. Norman then told President Kabbah that the *coup d'Etat* against his government could not be averted.

90. After the *coup d'Etat* of the 25th of May 1997, President Kabbah went into exile in Guinea. His government-in-exile was still recognised and from Conakry, he encouraged late Norman and his Kamajor collaborators like the Accused, Moinina Fofana and Allieu Kondewa and other CDF personnel who were engaged in this struggle to restore him to power.

91. He bought a satellite phone for Norman's use to report to him regularly on the progress of the war. He continued to provide logistics support to the Kamajors and their leaders. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa who were involved in the delegation from Bonthe, went to Freetown to see President Kabbah amongst others to complain about lootings and killings by Kamajors. The President sent 100 bags of rice to the Kamajors in Bonthe Town.⁵⁵

⁵³ Transcript of 10 February 2006, Albert Joe Demby, pp. 22-23; Transcript of 24 January 2006, Norman, pp. 80-83.

⁵⁴ Transcript of 8 February 2006, Peter Penfold, pp. 9-13.

⁵⁵ Transcript of 21 November 2004, JF2-071, pp. 82-83.

92. In view of the international recognition accorded to his Government, President Kabbah made it possible for the Economic Community of West African States through ECOMOG to provide military assistance to the CDF to enable it attain the objective of restoring his ousted Government to power. Indeed, ECOMOG fought alongside the CDF Kamajor forces against the combined forces of the RUF and of the AFRC as the war raged inside the country for control of areas occupied by enemy forces.

93. It is also on record, that Lady Patricia Kabbah the President's wife gave the sum of \$10,000US to Hon. Momoh Pujoh to be conveyed to late Norman for use as part of logistical support to the fighters particularly the amphibious Cassilla battalion in Bonthe. She said that she was very proud of them. She even promised them that she was communicating by a letter and that she would give further offers.⁵⁶ Lady Kabbah was particularly very concerned about that part of Sierra Leone she came from and she was always asking about Bonthe, about Borhoi, her birth Village.⁵⁷

94. Defence Witness, Osman Vandj, testified that a meeting which President Kabbah held in Bo, he thanked the Kamajors for dislodging the junta and restoring him as President and that he promised the Kamajors more rice which he later did.⁵⁸

95. In a second meeting held in Bo and at which prominent dignitaries were in attendance, President Kabbah told the Kamajors he would return and give the all medals. He left two sample medals at the Hall.⁵⁹

96. Late Norman testified that in October 1998, President Kabbah assigned Norman and the Vice-President to Kenema to assist ECOMOG to finally put an end to rebel activities in the entire Eastern province. Following this assignment, Norman spent almost 1.5 months in Kenema⁶⁰ to fulfil that Presidential assignment.

⁵⁶ Transcript of 30 January 2006, Norman, pp. 10-12.

⁵⁷ Transcript of 30 January 2006, Norman, pp. 10-12.

⁵⁸ Transcript of 17 February 2006, Osman Vandj, pp. 99-101.

⁵⁹ Transcript of 17 February 2006, Osman Vandj, pp. 99-101.

⁶⁰ Transcript of 2 February 2006, Samuel Hinga Norman, pp. 70-71

97. In fact, the President gave instructions for the strength of the Kamajors to be increased in numbers so that they can, fighting alongside the ECOMOG forces, achieve the objective of defeating the rebels and restoring him to power.⁶¹

98. It is in evidence that President Kabbah was the one who appointed late Norman as the National Coordinator of the CDF and that he, the President, further created the National coordination Council (NCC),⁶² of the CDF in order to improve on the performances and the welfare of the Kamajors.

99. On the issue of child soldiers, records show that the President was involved in the effort to demobilise child combatants and assurances were give to the SRSG, Mr Olara Otunni that this was going to be done.⁶³

NO REBUTTAL EVIDENCE WAS ADDUCED BY THE PROSECUTION

100. The Chamber notes that no evidence was proffered by the Prosecution in rebuttal of all the facts which detailed President Kabbah's role in the conflict. In the Chambers perspective, the testimony to this effect on all the facts so testified to by these Dignitaries who I find transparently credible and reliable, is credit worthy and particularly so because the acts and reactions so attributed to him, reflect his concern and appreciation to the Kamajors who, supported by ECOMOG, were leading the crusade to restore him to power.

101. One of the key defences which the Accused Persons put across was that given to the content of what the President did and the support and logistics he supplied to the Kamajors during the conflict, he also bore the greatest responsibility for the crimes that were committed and for which they stand indicted. This indeed was the gravamen of the subpoena proceedings introduced against President Kabbah because the Accused Persons, through this process, wanted

⁶¹ Transcript of 2 February 2006, Norman, pp. 44-45, See Exhibit 123.

⁶² Transcript of 25 January 2006, Samuel Hinga Norman, pp.25-27; Transcript of 10 February 2006, Joe Demby, pp.17-18; Transcript of 8 February 2006, Peter Penfold, pp. 27-28.

See Exhibit 120 the letter from the Presidency creating the NCC, defining its composition and functions.

⁶³ Transcript of 7 June 2005, TF2-218, pp. 17-19 (CS).

to compel him, after he had refused to come and testify voluntarily at their request, so as to testify in their favour and on their responsibility during the conflict.⁶⁴

102. I have no hesitation in rejecting this assertion in its totality because the President was never in the war front with the Kamajors nor is any evidence proffered by the Defence to show that he approved of or ordered the commission of the crimes for which they stand indicted or that from his Conakry base in exile, he gave instructions for those crimes to be committed. Furthermore, it has not been demonstrated by the Accused Persons that President Kabbah had effective command and control over the Kamajors who have been associated with the commission of the offences charged and for which the Accused are being held criminally responsible either under Article 6(1) or 6(3) of the Statute. In the light of the above, I have no reservations in rejecting this allegation and veiled defence for want of merit and substance.

103. The other defence raised by the Accused in a veiled manner, is that the alleged offences for which they stand indicted were committed in the course of their struggle and engagement to restore to power, the democratically elected Government of President Kabbah which had been overthrown in a *coup d'Etat* by the AFRC on the 25th of May 1997.

104. It is my finding that this veiled defence which has persistently and constantly been raised by the 3 Accused Persons, stands on a very strong foundation in that the CDF and their Kamajor fighting forces had as their principal objective, the restoration to power, of the democratically elected Government of President Kabbah. They pursued this objective with determination, with vigour and with enormous supreme sacrifices. The President himself, through his actions and appreciative material gestures to the Kamajors, certainly recognised and rightfully so, this meritorious sacrifice on the part of the Accused Persons. In fact, one of them, the 3rd Accused, Allieu Kondewa, who was a force to reckon with and an influence to count on in the Bonthe area, while addressing a crowd in Talia when receiving the Father Garrick Bonthe Peace delegation to him, Kondewa, told them that he was not going to give all areas under his control to a military government, meaning the AFRC who had seized power through the *coup d'Etat*, but to the democratically elected Government of President Ahmed Tejan Kabbah.⁶⁵

⁶⁴ Father Garrick, Transcript of 10 November 2004, pp. 21-22.

⁶⁵ Transcript of 6 February 2006, Samuel Hinga Norman, p. 26.

105. The genuineness of this defence is further demonstrated and buttressed by the admissions made by the then Prosecutor of the Special Court, Mr Desmond de Silva, on the 8th of May 2005, that:

1. There is no dispute or challenge by the Prosecution that the CDF and the Kamajors fought for the restoration of democracy;
2. There is no dispute that HE President Kabbah, was very grateful to the CDF and the Kamajors for what they did for the restoration of democracy;
3. There is no dispute nor is there a challenge that the Kamajor fighters received aid from ECOMOG. What may be in dispute is the period, but in general terms there is no dispute about the fact that indeed the Kamajors in the CDF received aid from a number of sources;
4. There is no dispute about the way in which the National Coordinating Committee came to be formed.

106. The Chamber however, at this stage, must address its mind to the validity and legality of this acceptable and very plausible defence that in effect, is admitted and accepted as founded by the Prosecution, against the background of the crimes for which the Accused Persons stand indicted.

107. It is my view however, that for this defence to be sustained, the crimes alleged should be shown to have been committed for the sole purpose of restoring to power, as the Accused Persons claim, the democratically elected Government of President Kabbah which, one must admit, was ousted illegally and unconstitutionally. In making the legal findings on the criminal responsibility of the two Accused Persons for the crimes charged, I will like to factor into the analysis, the principle of attacks perpetrated by the Kamajors against legitimate military targets for which the Accused should not be held criminally responsible on the reasoning and understanding, that a *de facto* army of the State cannot be held liable for seeking to defend constitutionality and National institutions which is what the Sierra Leonean Armed Forces are, under Section 165 of the Constitution, vested to do. In this regard Section 165(2) of the constitution provides as follows:

“The principal function of the Armed Forces shall be to guard and secure the Republic of Sierra Leone and preserve the safety and territorial

integrity of the State, to participate in its development to safeguard the peoples achievements, and to protect this constitution.'

108. This of course implies ensuring and protecting the President of the Republic and the stability of the Institutions of the State.

109. If the Kamajors and the CDF, indeed, the Accused Persons, had limited their operations to these legitimate objectives and ensured that they achieved them in a legally acceptable manner, it would be difficult if not impossible, to hold them liable even for what may be characterised as collateral damage in the course of their carrying out this legitimate mission.

110. What must be said here is that if the Chamber has held some of their conduct culpable, it is because of the exaggerations and abuses and also because the crimes for which they have been held criminally responsible, had absolutely nothing to do with pursuing the legitimate objectives which is conceded by the Prosecution. In making this observation I am referring here to repeated offences of looting which were very prevalent and also of enlisting or using children under the age of 15 years to participate actively in hostilities.

111. I do also, in this regard, like to highlight war crimes and crimes against humanity such as horrendous instances of mass killings and virtual slaughtering of civilians, most of them innocent, but maliciously and arbitrarily labelled as collaborators and who unarmed were placed under Kamajor arrest or surveillance and at the material time were not even participating in hostilities. This is coupled with acts of horrifying brutalities, like beheading victims and parading openly and in festivity, with the severed head, or cutting open the stomach of an unfortunate victim, and using the entrails as barriers and check points; exactions and acts of terror which had no connection, indeed, no link whatsoever with the legitimate purpose for which, it is admitted, they were defending and fighting for.

112. It is my opinion that these reprehensible criminal acts, when viewed and weighed in terms of a retaliation or punishment for the victims' alleged but unproven support for the rebels on the one hand, are totally unjustifiable even if a far fetched justifiable legal shield of self defence in any form were pleaded.

113. In making these observations, I would like to observe that HE President Kabbah is not an Indictee of the Special Court. Even if it were conceded however, that he, President Kabbah, as is alleged against them, also bears the greatest responsibility for the crimes for which they stand indicted on the grounds that they were acting in his favour and in his interests as their superior in hierarchy and under his command and control, I am of the opinion that this does not absolve them from individual or collective responsibility for the criminal acts which they committed outside the scope of what is legitimate and acceptable in the process of defending and protecting the legitimacy of President Kabbah and his state institutions. This in my considered opinion destroys any pleas of justification for committing the crimes on which their prosecution is based, nor does it, again in my considered opinion, constitute a valid defence that should absolve them from a finding guilt if the evidence adduced so warrants.

114. In this regard the Chamber would like to refer to the provisions of Article 6(4) of the Statute which states and very clearly too:

“The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.”

115. The Chamber accordingly, therefore, dismisses these veiled defences that were persistently raised by the Accused in the course of these proceedings.

THE CRIMINALITY OF SOME ACTS OF THE ACCUSED PERSONS

116. In paragraph 4 of the Indictment which is the principal accusatory instrument that details the crimes that the Accused is alleged to have committed, and I quote:

‘At all times relevant to this indictment, a state of armed conflict existed in Sierra Leone for purposes of this indictment the organised armed factions involved in this conflict included the Civil Defence Forces (CDF) fighting against the combined forces of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC).

117. Paragraph 6 of the Indictment states that:

“the CDF was an organised armed force comprising various tribally based traditional hunters who were known as Kamajors”.

118. Paragraph 7 of the Indictment states:

“that the RUF was founded about 1988 or 1989 in Libya and began organised armed operations in Sierra Leone in or about March 1991. The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected Government of Sierra Leone via a *coup d’Etat* on 25 May 1997. Soldiers of the Sierra Leone Army comprised the majority of the AFRC membership. Shortly after the AFRC seized power, the RUF joined with the AFRC.”

119. Clearly therefore, and in the light of the statements of facts as revealed and confirmed in the Indictment, the armed conflict was between the CDF , mainly the Kamajors on one side, fighting against the combined and allied forces of the RUF and of the AFRC.

120. Paragraph 18 of the Indictment alleges:

“In the position referred to in the aforementioned paragraphs, SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA, individually or in concert exercised authority, command and control over all subordinate members of the CDF.”

and further in paragraph 19 of the Indictment the allegation is that:

“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. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathisers and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone. Each Accused acted individually and in concert with subordinates to carry out the said plan, purpose or design.”

121. I have examined with interest and having regard to all the circumstances of this case, the foundation of the allegations contained in paragraph 19 of the Indictment to wit: ‘...to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone...’

122. I understand from this general allegation that the Accused Persons were in fact fighting, not necessarily to restore the democratically elected Government of President Kabbah, but in fact,

like the AFRC had done, to also, after defeating the AFRC, take over power as well⁶⁶ and rule for 3 years before inviting President Kabbah back to power.

123. It is my observation that this evidence which featured vaguely and rather timidly in the case as presented by the Prosecution, was wholly rebutted by the evidence of the late Accused Norman himself, Vice President Demby, High Commissioner Penfold and very precisely in a military sense, by Lt. General David Richards who had this to say in his testimony:

“If Sam Hinga Norman had wanted to overthrow the Government it would have been easy for him to do so in 1999-2000.”⁶⁷

124. Lt General Richards noted that at no stage did Sam Hinga Norman say anything or make any actions that suggested he was anything less than completely loyal to the President.⁶⁸ Over this period, Sam Hinga Norman had the military power to take over the Government. General Richards adds that although he did not control all forces loyal to the Government, Sam Hinga Norman had sufficient power and influence to have taken over the Government.⁶⁹

125. Putting this testimony in the context of the evidence on the record, I consider Lt Gen David Richards as credible a witness as his testimony before the Chamber.

126. It is on record that the 3rd Accused who was a force to reckon with in Bonthe, made a pronouncement that he was not handing over his Kamajor occupied territory to any military but only to the democratically elected Government of President Kabbah.

127. Late Norman himself manifested loyalty to the President as borne out by his confronting those members of the Sierra Leone Armed Forces for planning a *coup*, a fact they refused. He also handed to President Kabbah some keys to key military equipment so as to frustrate the *coup* plot by late Brigadier Hassan Conteh and late Max Kanga. Rather, President Kabbah handed over the kit to these military people who not long thereafter overthrew him.⁷⁰

⁶⁶ Transcript of TF2-014; TF2-017, TF2-079.

⁶⁷ Transcript of 21 February 2006, David Richards, p. 31, lines, 21-23, pp. 36, 103 and 105.

⁶⁸ Transcript of 21 February 2006, David Richards, pp. 34-36

⁶⁹ Transcript of 21 February 2006, David Richards, p. 105.

⁷⁰ Transcript of 24 January 2006, Norman, pp. 80-83; Transcript of 8 February 2006, Peter Penfold, pp. 9-13; Transcript of 10 February 2006, Albert Joe Demby, pp. 22-23.

128. From the totality of the evidence as has been presented, this allegation by the Prosecution, in the Indictment is baseless because I do not find the witnesses credible, the allegations not having been supported by any substantial facts which negate the fact that Norman, Fofana, and Kodewa were, at all material times, and as Lt General David Richards has stated, loyal to the President.

129. If anything at all, the evidence which is, to all intent and purposes, credible, is that Norman did all within his means to avert the *coup d'Etat* by the Army Officers who he personally confronted. Moreover, he could not be said to have been planning a *coup d'Etat* and at the same time putting the President on guard against it and handing over to him, in order to forestall same, key and strategic instruments of the armoury for safe keeping instead of fomenting the *coup* himself.

130. In the light of the above analysis, I find that the Indictment in this regard against the Accused Persons is not only ridiculous but lacks any credible foundation. I am of the opinion that the AFRC *coup d'Etat* and the calamitous events that followed may have been averted if His Excellency President Kabbah was more alert, more vigilant and more pre-emptive after all the alerts and alarms were sounded and the alleged facts which turned out to be true, brought directly to his knowledge.

131. I accordingly dismiss these allegations in paragraph 19 as for want of any foundation or justification. The Defendant's demonstrated loyal conduct only comes in to demonstrate and confirm the manifest falsity of those allegations.

CONCLUSION ON COUNT 8

132. In conclusion and as I have already indicated, it is my finding that the evidence adduced has proved beyond reasonable doubt that Moinina Fofana and Allieu Kondewa are each individually criminally responsible for aiding and abetting in the execution of a crime of using 300 children all under the age of 15 years, to participate actively in hostilities as defined in Article 4(c) of the Statute.

133. I accordingly find each of them guilty of that offence as alleged in Count 8 of the Indictment and convict them accordingly.



134. The sentence to be inflicted on them for this offence will be pronounced after the sentencing hearing which will take place on a date to be fixed by a Scheduling Order soon after the Chamber rises at the close of this session.

Done in Freetown, Sierra Leone, this 2nd day of August, 2007.



Hon. Justice Benjamin Mutanga Itoe
Presiding Judge

[Seal of the Special Court for Sierra Leone]



ATTACHMENT TO ANNEX A

780.)

SCSL-04-14-T
(21024-21037)

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SPECIAL COURT FOR SIERRA LEONE

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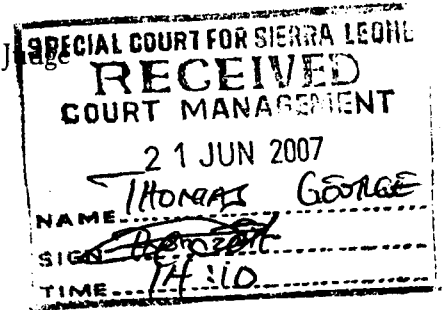
TRIAL CHAMBER I

Before: Hon. Justice Bankole Thompson, Presiding J.
Hon. Justice Pierre Boutet
Hon. Justice Benjamin Mutanga Itoe

Registrar: Herman von Hebel, Acting Registrar

Date: 22nd of June 2007

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



Public Document

ORDER ON NEW APPLICATION FOR THE APPOINTMENT OF CO-COUNSEL FOR THE TAYLOR DEFENCE TEAM

Office of the Prosecutor:

Stephen Rapp
James C. Johnson
Joseph Kamara

Court Appointed Counsel for Moinina Fofana:

Victor Koppe
Arrow Bockarie
Michiel Pestman
Steven Powles

Court Appointed Counsel for Allieu Kondewa:

Charles Margai
Yada Williams
Ansu Lansana
Susan Wright

Hogg

TRIAL CHAMBER I ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Bankole Thompson, Presiding Judge, Hon. Justice Pierre Boutet, and Hon. Justice Benjamin Mutanga Itoe;

SEIZED of a Memorandum and its appendices to Trial Chamber I from Vincent Nmehielle, Principal Defender, dated the 1st of June 2007, entitled "Notice of Intention to Appoint Mr. Steven Powles, Court Appointed Counsel for Moinina Fofana as Co-Counsel to Charles Taylor" ("Memo"), in which the Principal Defender submits a fresh application requesting that the Chamber approve Mr. Powles' appointment as Co-Counsel for the Taylor Defence Team;

MINDFUL of Article 14(C) of the Directive on Assignment of Counsel ("Directive"), which provides that:

No Counsel shall be assigned to more than one Suspect or Accused unless the concerned Suspects or Accused have received independent legal advice and have waived their right to be represented by separate Counsel. Any application by Counsel to be assigned to more than one Suspect or Accused must be made, through the Principal Defender, to the Presiding Judge of the appropriate Chamber.

MINDFUL of this Chamber's Order Regarding the Appointment of Co-Counsel for the Taylor Defence Team filed on the 28th of May 2007 ("Order"), in which the Chamber denied an application from the Principal Defender to approve the appointment of Mr. Powles as Co-Counsel to the Taylor Defence Team on the basis that the waiver signed by Mr. Fofana on the 16th of May 2007 was not an unconditional waiver of his right to be represented by separate counsel, and that there was therefore no compliance with Article 14(C) of the Directive;

NOTING that the Memo contains a new waiver from Mr. Fofana, signed on the 31st of May 2007, stating that:

I, Moinina Fofana, accused before the Special Court of Sierra Leone, hereby give my unequivocal consent for my assigned counsel, Mr. Steven Powles, to act in proceedings before the Special Court of Sierra Leone on behalf of the accused Mr. Charles Taylor.¹

I give this consent on the understanding that, should there be an appeal (against either conviction/sentence or acquittal) in my case, and in the event that I would like Mr. Steven Powles

¹ Emphasis in original.
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K B HBT

to continue representing me, Mr. Steven Powles will do his utmost to fulfil his professional obligations to me.²

CONSIDERING that the Chamber is of the view that this waiver, still being conditional on a certain eventuality, does not constitute a proper waiver of Mr. Fofana's right to be represented by separate counsel;

CONSIDERING that the Chamber is therefore of the opinion that there still has not been compliance with the requirements as envisaged in Article 14(C) of the Directive;

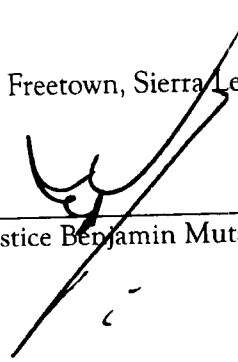
MINDFUL of Article 17 of the Statute of the Special Court for Sierra Leone and Rules 54 and 26bis of the Rules of Procedure and Evidence;

THE TRIAL CHAMBER

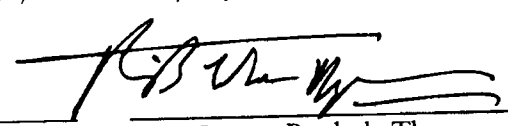
DENIES the application.

Justice Benjamin Mutanga Itoe entirely agrees with this Decision but has issued a Dissenting Opinion only on the issue of the exclusion of the name of the deceased First Accused, Samuel Hinga Norman from the cover page of this Decision.

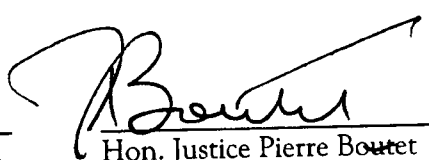
Done at Freetown, Sierra Leone, this 22nd day of June 2007.



Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Bankole Thompson
Presiding Judge
Trial Chamber I



Hon. Justice Pierre Boutet



² Memo, Annex III.
Case No. SCSL-04-14-T

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1. I would like to indicate here before I proceed any further, that I am totally in agreement with and fully endorse the conclusion and Decision of the Trial Chamber on the substantive issue relating to the waiver that Mr. Moinina Fofana, the Second Accused, is alleged to have given to Mr. Steven Powles so as to make the latter's designation as Co-Counsel for the Charles Taylor Defence Team, possible.

2. Let me state here however, that our unanimity on this substantive issue was not built on, nor did it concern the issue of deleting Late Norman's name from the cover sheet of that decision. Indeed, it could not have been and was not the case because this issue was neither canvassed by the Parties nor did we deliberate on it in the course of examining the substantive Moinina Fofana / Powles waiver issue during which the question of deleting the Late Norman's name did not arise at all.

3. My decision to take this dissenting position on an issue such as this would appear, and indeed, on the face of it, appears trivial. Should it even be characterised as a dissenting opinion in its empirical sense? I ask this question because the decision I am in disagreement with is not reduced to writing, nor was it arrived at in the usual conventional and traditional manner. In fact, there are issues and standards of procedural and legal tidiness in it which, to my mind, were not respected in the process of arriving at this Majority Decision.

4. In the decision that we were all about to unanimously sign, but for my detection of the omission of the name of the First Accused, the Late Samuel Hinga Norman on the cover page, for which I took an objection, My Learned Brothers and Colleagues, on the contrary, took the view that his name should, because of his death, be deleted. The logical and legal consequences and effects of this Majority stand is that the deceased's name should not and will no longer feature on the records of the Chamber, particularly on the cover sheets of our decisions and other processes relating to what has hitherto been, and is still being popularly referred to as the 'Hinga Norman Case'.

5. This mention on the cover sheet, we all know, is consecrated principally to clearly feature and identify the Parties to the case on the record and on the decision. The argument My Learned Colleagues confronted me with verbally is that we could rightfully delete his name because his death has had the effect of terminating the proceedings against him. In response, I took, and still take the



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view, that this is not only procedurally improper but also amounts to interfering with the judicial and historical records as well as it violates the due process principles that govern judicial proceedings.

JUSTIFICATION FOR THIS ARGUMENT

6. In this regard and to buttress this argument, it is my view that a decision to delete the name of an Accused Person from the records cannot, in circumstances such as those in this case, be taken by the Chamber exclusively on its own motion. It is my considered opinion that to so act, the Chamber must be seized of an application to this effect by either the Prosecution or by the Defence Team of the Accused Person concerned, and that a decision on it can only be taken by the Chamber after hearing or considering the submissions of the Parties.

7. The reason for taking this stand, I would like to indicate, is that decisions of this nature are potentially appealable and only on proper records which in this case, do not exist on this issue, particularly so because there are, to my mind, exceptional circumstances that surround it and that an irreparable prejudice might be occasioned to an aggrieved party should an application for leave, if any, is made in this regard under the provision of Rule 73(B) of the Rules of Procedure and Evidence, be refused.

8. In our unanimous decision dated the 21st of May 2007, on the Registrar's Application seeking a directive on what action he had to take following the First Accused Norman's death, we unanimously held that "*the trial proceedings against the Accused Samuel Hinga Norman are hereby terminated by reason of his death.*"¹ We did not go further to order that his name should no longer appear in Chamber records or in the Court's documented processes.

9. My Honourable and Learned Colleagues however, took the view that we can, from now henceforth, merely on the strength of this unanimous decision and without more, proceed, as they have already done in their Majority Decision as opposed to mine, to delete the name of the deceased, the First Accused Samuel Hinga Norman, from the cover sheet of this decision and certainly, from other processes that are yet to be published by the Chamber in relation to this case, and to conserve only the names of the two surviving co-Accused, Moinina Fofana and Allieu Kondewa, respectively the Second and the Third Accused.



10. I very respectfully and with all due deference, do not share their reasoning in this regard and am accordingly constrained, in the circumstances, to enter this Dissenting Opinion against what really is a unilaterally conceived and unwritten Chamber Majority Decision which, it should be noted, has been arrived at, off the records, and without calling for a hearing or considering submissions from the Parties on this particular issue before taking this very far reaching stand that they have adopted.

**BACKGROUND OF THE CHAMBER'S UNANIMOUS DECISION OF
THE 21ST OF MAY 2007**

11. The First Accused, Samuel Hinga Norman, died on the 22nd of February 2007. After this sad event, there were no initiatives taken by any of the Parties before the Chamber to address issues relating to the direction the case should take. We did not as a Chamber either, want to proceed to pre-emptively issue a directive on it without having been seized of the issues related thereto by any of the Parties to this case.

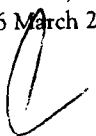
12. It was in the course of this protracted period of uncertainty and expectation that the Registrar of the Court finally, on the 6th of March 2007, pursuant to the provisions of Rule 33(B) of the Rules, filed an application, according to him, "*for this Chamber to take any measures that it may deem appropriate in relation to Mr Norman's demise.*"²

13. Rather than act only on the Registrar's submissions which did not address the core issues that were of concern to us, the Chamber, on the 7th of March 2007, with a view to hearing all the Parties to this case on the crucial issues involved, made an Order for Extended Filing to the said Parties, in which we called on them, *inter alia*, to make their submissions since this was, as we indicated in that Order, and I quote:

"in the interests of justice that submissions or any other initiatives by the Prosecution and each of the Defence Teams are necessary in order to contribute to a resolution of the legal and factual issues and or consequences that have arisen or are likely to arise in the judicial determination of the case

¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-T, Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, 21 May 2007, Order No. 1, p. 8 ["Norman Decision"].

² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-T, Registrar's Submissions Pursuant to Rule 33(B) Relating to the Death of Mr. Sam Hinga Norman, 6 March 2007, para 5.



against the Accused Person as a result of the death of the First Accused Sam Hinga Norman."³

14. In the submissions that were filed following this Extended Filing Order, the Defence Team of the First Accused Samuel Hinga Norman, now deceased, argued and canvassed that "a verdict should be delivered in respect of him one way or another without any special consideration for his having passed away."⁴ They submitted and urged this Chamber to hold that "it would be in the interests of justice to deliver a free and unfettered verdict or judgement for all the three accused persons including Norman as soon as possible".⁵ They base this argument and submission on the fact that the deceased Accused had after all, "stood his full trial."⁶ It should be noted in this regard, that in the course of the trial of these three Accused Persons, the Late Accused testified on his own behalf as a witness and only died after the closure of the defence case and while waiting for the substantive judgement which is yet to be delivered.

15. In their further submissions filed on the 29th of March 2007, the Defence Team for the Second Accused, Moinina Fofana, submitted that "it has no objection to the delivery of a judgement with respect to the First Accused provided that such delivery does not negatively impact upon Mr Fofana's right to be tried without undue delay."⁷

16. The submissions by the Defence Team of the Third Accused filed on the 16th of March 2007, were silent on this issue.

17. In their submissions filed on the 16th of March 2007, the Prosecution submitted that it is "not asking the Trial Chamber to issue a verdict against Norman but to make findings of fact with respect to all the evidence adduced before the Trial Chamber to the extent it is necessary to do so in order to issue verdicts against the two remaining Accused."⁸ In conclusion, the Prosecution submitted that "it would be very difficult if not impossible, to separate evidence in this joint trial and ask the Trial Chamber to issue findings of fact with

³ Prosecutor v. Norman, Fofana and Kondewa, SCSL04-14-T, Order for Extended Filing, 7 March 2007, p. 2.

⁴ Prosecutor v. Norman, Fofana and Kondewa, SCSL04-14-T, Norman Defence Team Submissions on his Death, 22 March 2007, para 28.

⁵ Ibid., para 29.

⁶ Ibid.

⁷ Prosecutor v. Norman, Fofana and Kondewa, SCSL04-14-T, Further Fofana Submissions on the Death of the First Accused, 29 March 2007, para 1.

⁸ Prosecutor v. Norman, Fofana and Kondewa, SCSL04-14-T, Prosecution Submissions Pursuant to Order for Extended Filing, 16 March 2007, para 27.

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respect to the elements of the crime, the crime bases and modes of liability with respect to Norman, without issuing a final verdict on either his guilt or innocence.”⁹

18. These, in a nutshell, are the submissions that were made before us and to which we addressed our minds and considered before we unanimously arrived at the decision under reference.

19. In our examination of the submissions of the Parties and in arriving at that unanimous decision, the issue of deleting Late Norman’s name from the records, least still, from the Indictment, was never considered because it was neither canvassed by the Prosecution or by any of the Defence Teams in their submissions, nor was it a subject matter on which the decision was articulated or based. It in fact did not constitute one of the findings or directives made by the Chamber in the unanimous decision. Indeed, this issue has only been raised *ex improviso* at this stage by this Chamber with an informal Majority Decision taken by analogy on the strength of our unanimous decision of the 21st of May 2007.

DELIBERATION

20. One of the cardinal benchmarks in law which underlies judicial traditions and practices is that a Court makes decisions and articulates them only on those issues which it is seized of and which have been canvassed by the Parties before it in their submissions.

21. It is of course conceded that a Court of law, in the exercise of its inherent jurisdiction, may make a decision on either substantive, tangential or collateral issues raised on its own motion. In this regard however, it is trite law that this can only be done on condition that the Parties have been afforded the opportunity of being heard on those issues raised by the Court of its own motion, particularly where the said issues really do impact, or have the potential of impacting negatively on the legal rights of the Parties or on the dictates of ensuring the integrity of the proceedings or of procedural tidiness. A departure from this universally and legally accepted principle, in my opinion, not only amounts to a violation of the legal rights of either or all the Parties to the case, but also, to an abuse of the judicial process.



⁹ *Ibid.*, para 28.

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22. On the issue relating to deleting or in seeking to delete the name of Samuel Hinga Norman from the records of the Chamber and of the Court on the grounds of his death, it is necessary to point out, as I have indicated earlier, that this Chamber was not seized of such a request by any of the Parties, nor did we call on them to make submissions on this issue as we did in our Order for Extended Filing of the 7th of March 2007, following the Registrar's application of the 6th of March 2007. In fact, not even the Prosecution made an application to this effect under the provisions of Rule 51(C) of the Rules of Procedure and Evidence as it did with the indictment, not only against the Late Accused, Foday Saybana Sankoh¹⁰ but also that against the Late Accused, Sam Bockarie¹¹.

23. The Defence Team of the deceased First Accused did not raise the issue of the withdrawal either, after his death. We now know, from their submissions, what the Norman Defence Team's opinion is following our Order for Extended Filing. It is in fact calling for a clear finding and verdict of guilt or of innocence in respect of him, notwithstanding his death. As a Chamber, we have unanimously rejected and overruled this submission and option. We stand by it and only leave ourselves open to the exercise by the Appeals Chamber, of its prerogatives in this regard should this eventuality arise.

**MAJORITY DECISION TO DELETE NORMAN'S NAME
NOT REDUCED TO WRITING**

24. A feature that is particular to this case is that the Majority Decision which has triggered my dissent is not written. It is a short-circuited conceptually conceived decision that has neither been judicially crafted nor motivated in the traditional manner for the records and for scrutiny, as well as for the purpose of eventually putting it into effect. If, as I now understand, it was to be conceived, understood, or was to be treated as a decision that can logically flow or be inferred from our 21st May 2007 unanimous decision, as My Learned Brothers now inform me, it could only have been consequential to that decision, and therefore, ought to have been reduced into writing for our signature in the form of a Consequential Order to that unanimous Decision.



¹⁰ *Prosecutor v. Foday Saybana Sankoh*, SCSL-03-02-I, Prosecution Request for Appearance before the Trial Chamber to Withdraw the Indictment, Pursuant to Rule 51(B), 14 November 2003.

¹¹ *Prosecutor v. Sam Bockarie*, SCSL-03-04-I, Prosecution Request for Appearance before the Trial Chamber to Withdraw the Indictment, Pursuant to Rule 51(B), 14 November 2003.

25. There is no such Order in the Chamber or in Court records. The decision is only made by inference from our unanimous decision of the 21st of May 2007, where we held the “*the trial proceedings against Accused Samuel Hinga Norman are terminated by reason of his death.*” We ended there. We did not go further to order that the indictment against him, like we did with those of Late Sankoh¹² and Late Bockarie¹³ on the initiative and application of the Prosecution, be withdrawn. This is because it was for the Prosecution to initiate this course of action like they did in the Sankoh and Bockarie cases. In this one, it did not. Not even in the entirety of its submissions following our Order for Extended Filing, did the Prosecution canvass or suggest this course of action.

26. The legal situation that is a reality therefore, is that this deleted Norman’s name still remains intact in the Indictment as there is neither an application nor is there an order issued to this effect as yet by the Chamber. Why then should this same Chamber without more, proceed to delete his name from the Cover Sheet that has given rise to this dissent?

THE NAME OF SAMUEL HINGA NORMAN ON THE RECORDS

27. As a matter of law therefore, the name of Samuel Hinga Norman, even though he is no more, should continue to feature in the indictment with his former co-Accused Persons and by analogy, in the Records of the Chamber and in those of Court Management right up to the stage of our Judgement. This, I humbly consider, is the logical and legal solution to this issue because his name in any event, will, following our Decision of the 21st May 2007, continue to feature largely and quite predominantly in one episode or the other in whatever decisions that will be taken by this Chamber.

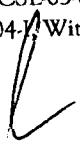
28. This course of action, as I have indicated, is even more imperative in the light of Our findings in paragraphs 20 and 21 and of Our Order No. 3 of Our unanimous decision dated the 21st of May 2007, which read as follows:

“Paragraph 20. As already noted, the entirety of the trial proceedings against the three Accused were completed before the death of the Accused Norman. The trial proceedings were conducted in full respect of the right to a fair trial of each of the Accused.

Paragraph 21. On the issue of the legal effect of the death of Norman on the case against the other two Accused, the Chamber finds that it is neither

¹² Prosecutor v. Foday Saybana Sankoh, SCSL-03-02-1, Withdrawal of Indictment, 8 December 2003.

¹³ Prosecutor v. Sam Bockarie, SCSL-03-04-1, Withdrawal of Indictment, 8 December 2003.



possible nor desirable to separate the evidence presented at the trial against the Accused Norman from the entire evidentiary record.

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Order No. 3. The Judgement of the Chamber in relation to the two remaining Accused persons will be based on the evidence that was adduced on the record by all the Parties up to when the entire case for the Defence was closed;¹⁴

29. In the light of these findings and within the context of our Order No. 3, the name of the First Accused, Samuel Hinga Norman, even though deceased, is, and still remains, for purposes of our evidential, factual and legal analysis and findings *vis-a-vis* his surviving Co-Accused Persons, excepting of course a finding of his guilt or of his innocence, a permanent feature that cannot be easily nor should it be deleted from any processes related to this case.

30. In fact, a deletion of the name of the deceased First Accused, Samuel Hinga Norman, from the cover page of documents relating to a case in which he is the undisputed legend, occasions a disconnect in terms of the traditional appellation of this case in the Records of the Court which are supposed to be kept intact. Furthermore, it eclipses the real judicial history and jurisprudence we have created and continue to create in this case which will certainly have to take its rightful place, featuring the Parties with all their names, in the archival policy and programming of the records of the Special Court.

31. As was and would widely have been expected, given the trend and tone of their submissions, the Defence Team of the deceased, First Accused, on the 24th of May 2007, which was the third and last day when they were supposed to file their application for leave to appeal, filed a Motion for extension of time within which to file an application for leave to appeal against our unanimous decision of the 21st of May 2007, which, as I had mentioned earlier, could eventually be forwarded to the Appeals Chamber for a further and final determination of this issue.¹⁵

OUR UNANIMOUS DECISION OF THE 21ST OF MAY, 2007 IS NOT YET FINAL

32. In view of the fact that our unanimous decision has so far, not hit the bar of finality because of the pending status of this still-unresolved and intriguing Motion by the Defence Team for extension of time, it could, and should be concluded in law, that the Majority unwritten Decision on

¹⁴ Norman Decision, paras 20, 21, Order No. 3.

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this issue cannot, and should not, in addition to the preceding arguments, stand in view of the apparent and obvious prematurity in making that unwritten Order to delete the Late Accused Person's name from the cover sheet of the said decision and a *fortiori*, from the records of the Court on the grounds of his death.

33. I would like to reiterate here, that the deletion of a deceased Accused Person's name from the records is, and remains a judicial act that should be preceded by a judicial process. Even if, as I have already mentioned, it is conceded that a Tribunal, in the exercise of its inherent jurisdiction, can, of its own motion, take such a decision, it is my opinion that this one is taken illegally because it cannot stand the legal test on which the Court's jurisdiction in this regard can lawfully be invoked.

34. I say this because this particular silently taken and mute decision by my Distinguished Colleagues is, in my opinion, in violation of the basic principles of due process which require that the parties to a case should be heard on the issue or issues at stake before a decision is taken on it and that such a decision should be reduced to writing for the attention of the Parties and for the records of the process before it is enforced.

CONCLUSION

35. In this regard, I would like to observe that a purported legal Order of such judicial magnitude and importance such as this one, that is made by a Tribunal on a mere inference and off the records, clearly lacks any legal validity, is null and void, and consequently, unenforceable because it is made in violation of the best judicial and Court Management processes and practices. In fact, making it effective would amount to executing a legally mute extra judicial decision that has neither been regularly taken nor does it exist on any Chamber or Court record.

36. It is accordingly my view and opinion, in light of the foregoing analysis, that this decision to delete Late Samuel Hinga Norman's name from the records should be disregarded and set aside. In fact, in order to remain in harmony with our current practices and the records kept by Court Management, the name of Samuel Hinga Norman, even though he is now deceased, should continue to feature on the cover page of Our Chamber processes, decisions and in Court records because his

¹⁵ Norman, unlike Milosevic (*Prosecutor v. Milosevic*, IT-02-54) was only one of 3 Accused persons on the same Indictment who died after the Defence case had closed and before Judgement was delivered.

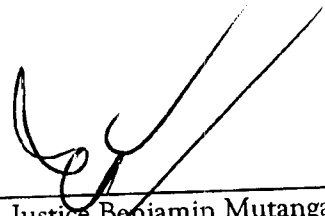
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current status as a deceased Accused will of course be acknowledged and commented on in the Judgement that will be rendered by this Chamber in due course in the case concerning the two surviving Co-Accused Persons in this matter.

37. I accordingly so decide in the light of the above, and ORDER AS FOLLOWS:

1. THAT THE NAME OF THE DECEASED FIRST ACCUSED, SAMUEL HINGA NORMAN, BE REINSERTED IN THE SAME POSITION THAT IT HAS ALWAYS OCCUPIED WITH THE OTHER ACCUSED PERSONS ON THE COVER SHEET OF OUR DECISIONS BEFORE IT WAS DELETED IN EXECUTION OF THE UNWRITTEN MAJORITY DECISION.
2. THAT THIS ORDER BE CARRIED OUT.

Done at Freetown this 22nd day of June, 2007



Hon. Justice Benjamin Mutanga Itoe

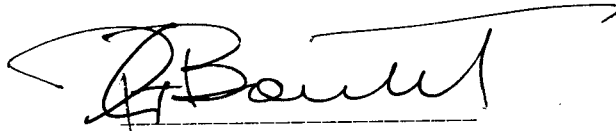


**ANNEX B: SEPARATE AND CONCURRING OPINION OF JUSTICE
BOUTET**

1. The Chamber has chosen to consider whether President Kabbah's alleged role forms the basis of a possible independent defence available to the Accused. In my opinion, President Kabbah's role in the conflict should not have received the degree of prominence it did in the Judgement, as it is very much a collateral matter. It is my view that a Trial Judgement should instead focus on what is the central issue in the trial - the liability of Fofana and Kondewa.
2. In my view, the only relevance of the role of President Kabbah and the fact that Fofana and Kondewa acted with the aim of restoring democracy and ensuring the return of the Kabbah government is in assessing the liability of the Accused with respect to the specific Counts with which they have been charged. The Chamber has considered these issues in that context. The Chamber found, for example, that the attacks were directed against rebels with the aim of restoring democracy, and thus that the civilian population was not the primary target of these attacks. It therefore dismissed the Counts of Crimes against Humanity (Counts 1 and 3).
3. The role of Kabbah was also not raised by either Fofana or Kondewa in their final submissions as an independent defence. Rather, President Kabbah's role in the conflict and the fact that the acts of Fofana and Kondewa were done with the aim of restoring democracy and ensuring the return of the Kabbah government was used by Counsel for the Accused only to demonstrate that certain elements of the crimes as pleaded had not been proven beyond reasonable doubt.
4. Insofar as the Chamber has chosen to consider the alleged role of President Kabbah as forming part of several possible independent defences, however, I concur with my learned brother, Hon. Justice Benjamin Mutanga Itoe, in dismissing them. However, I do not subscribe to all of the facts as they are presented in this section in support of his conclusion, nor do I subscribe to his reasoning in reaching such a conclusion.



Done in Freetown, Sierra Leone, this 2nd day of August 2007.



Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]



ANNEX C - SEPARATE CONCURRING AND PARTIALLY DISSENTING OPINION
OF HON. JUSTICE BANKOLE THOMPSON FILED PURSUANT TO ARTICLE 18
OF THE STATUTE

PART ONE: KEY ISSUES OF DISAGREEMENT

I. Introduction

1. Two judicial philosophies have inspired the Partially Dissenting Part of this Opinion from the Main Judgement in this case. The first relates to the awesome responsibility assigned to judges of international criminal tribunals, when adjudicating on cases involving crimes against humanity and war crimes, of reconciling the principle of due regard for the conscience of the international community and the principle of legality. Choice along that borderline is in every respect difficult, given the powerful nature of human passion and its pressures on the quintessential values of the judicial culture, namely, impartiality, objectivity and dispassionateness as enshrined in the judicial oath. The second is the perceptive observation of the Appeals Chamber in the *Tadić Case* where it stated authoritatively that:

“It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.”¹

2. With that acknowledgement of the Herculean task confronting the international adjudicating bodies, I deem it judicially important in the discharge of such a responsibility in this case to begin this Opinion with an articulation of the complexity of the task of the Trial Chamber, as I view it, justifying the judicial course I have taken of dissenting from the Main Judgement on Counts 2, 4, 5, and 7 in respect of the Accused Moinina Fofana and Counts 4, 5, 7 and 8 in respect of the Accused Allieu Knodewa, before proceeding to explain the reasons in support of it. As I perceive it, the present case confronts this Court with the complex and delicate task of determining where legitimate collective action, whether, in the context of conventional or unconventional warfare, in defence of one's state, country, town, community or village against forces that have usurped the legal and democratic order ends and where criminality begins. Or put concisely, where legitimate collective defensive action in an armed conflict ends and where joint criminal enterprise begins. This is a boundary line which, in law, is imperceptibly unclear

¹ *Prosecutor v. Tadić*, IT-94-IA, Judgement (AC), 15 July 1999 [*Tadić Appeal Judgement*], para 64.



and difficult to define. It must inevitably depend upon the particular facts and circumstances of each case, and not determinable by any golden measuring rod.

II. Disagreement with Main Judgement: First Key Issue

3. For an avoidance of doubt, I should at the outset disclose that my disagreement with the Main Judgement focuses on two key aspects of the ultimate question of the guilt or innocence of the Accused persons on the charges as laid in the Indictment in so far as the Counts in respect of which they have been found guilty are concerned. The first relates to a small segment of the findings of fact in respect of alleged ritual killings or cannibalism carried out by Kamajors but not specifically charged in a count or counts, and of the permissibility of the initiation process. Generally, I dissent strongly from the findings of fact on these issues to the extent to which they have tended to becloud the real issues in controversy between the Prosecution and the Defence thereby assuming a major rather than a collateral importance. Specifically, I also dissent from any findings of fact in relation to the initiation process to the extent to which they might have appeared to serve as a basis for the tribunal to pronounce on the permissibility or legality of initiation either as a cultural imperative for membership of the Kamajor society or as a prerequisite for military training for combat purposes in the context of the said society.

III. Disagreement with Main Judgement: Second Key Issue

4. The second aspect of the case in respect of which I record this partial dissent from the Majority Judgement is, I must emphasize, an issue of much substantiality in the sphere of criminal adjudication. It is an issue that goes to the very core of the principle of legality, which we judges have come to regard as a key aspect of the criminal law as a social control mechanism, nationally or internationally. It is the question of the entitlement of a person charged with a crime to certain recognised defences in law and the obligation of a court to consider whether such defence or defences are sustainable having regard to the facts and circumstances of the case. Embedded in the jurisprudence of municipal law systems it is an emanation of the doctrine of fundamental fairness that underlies the criminal adjudication process. In other words, it has long been established in national criminal laws that an accused is entitled to have the benefit of the consideration of any defence that may arise upon the evidence even though not raised by him or



her.² It is, at this juncture, that I feel compelled to make a judicial detour from the path along which my distinguished learned colleagues and I have travelled in this matter.

5. It is noteworthy that in the sphere of international criminal justice, the acknowledgment of recognised defences to international criminal liability is still evolutionary. One learned author put the issue in context in these terms:³

“Defences at first played only a marginal role in the practice of international and national courts. At the start, the greatest challenge for practical international criminal law consisted in finding a legal basis for individual criminal liability under international law. Thus no grounds for excluding criminal responsibility were provided for in the Nuremberg Charter; in consequence, the lawyers for defendants who found themselves in the sights of international criminal justice took aim, at first, primarily at the international community’s authority to punish and the legitimacy of international justice as such.”

Continuing, he observed:⁴

“Only as the principle of individual criminal responsibility took firmer root in international law did various grounds for excluding criminal responsibility move to the centre of defence efforts. As early as the Nuremberg successor trials, but especially in the trials before the Yugoslavia and Rwanda Tribunals, defences played a greater role. The establishment of conditions for excluding criminal responsibility, however, remained up to the Courts.....”

6. As a matter of principle, international criminal tribunals should not resile from their sacred responsibility, in dispensing even-handed justice, of acknowledging and applying recognised defences to criminal liability in municipal law systems. To this effect, I can do no better than adopt the observation of one learned author on Article 21 of the Rome Statute that:

“In developing the international criminal law relating to defences, it is essential that the Court be permitted to draw on principles of criminal law

² See the English case, *R v. Hopper* (1915) 2KB241; See also *R v. Palmer* (1971) AC 814 at 823, where Lord Morris authoritatively stated:

“It is always the duty of the judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them.”

³ Gerhard Werle, *Principles of International Criminal Law*, (The Hague: T.M.C. Asser Press, 2005) p. 138.

⁴ *Ibid.*

derived from national legal systems.....which therefore enhances the Court's ability to fill *lacunae* in the international criminal law."⁵

7. In municipal criminal law, it is a fundamental rule of law that even where the Prosecution has proved that a person charged with a crime did the proscribed act with the requisite mental state, he can still be excused from criminal liability by reason of the proof of certain defences recognised by the law. The application of a different rule in the international criminal law domain would give rise to the spectre of crimes against humanity and war crimes being essentially crimes of strict liability or absolute prohibition, giving the criminal judicial process a profile reminiscent of the discredited English Court of Star Chamber. In my considered opinion, the case for the recognition of legal defences to crimes against humanity and war crimes rests solidly on "the principle of procedural fairness, this fairness being part of international due process."⁶ On this issue, therefore, my disagreement with the Main Judgement is both profound and fundamental. It does not fully address this issue. I address the said issue extensively in Part Eight of this Opinion.

PART TWO: CHALLENGES TO FORM OF INDICTMENT

(A) CHALLENGES RAISED BY SECOND ACCUSED

I. Introduction

8. In this part of the Opinion, I address the preliminary issues raised by the Defence, on behalf of the Accused Moinina Fofana, as challenges to the form of the Indictment and also a grave irregularity as to the form of the Indictment arising out of the formulation of paragraph 28 of the said Indictment, though not raised by the Defence. The challenges raised on behalf of the Accused Moinina Fofana relate to the manner of the pleading of his alleged liability under Article 6(1) of the Statute as to individual criminal liability and joint criminal enterprise and under Article 6(3) as to command responsibility. It is a three-pronged attack on the form of the Indictment, to wit: (i) that the Prosecution should have pleaded the different heads of liability under Article 6(1) separately; (ii) that the Prosecution should have pleaded the identities of victims and co-

⁵ Margaret McAuliffe de Guzman, "Commentary on the Rome Statute", in Otto Triffterer, ed., as cited in Geert-Jan G.J. Knoops, *Defenses in Contemporary International Criminal Law*, (New York: Transnational Publishers Inc, 2001) p. 31.

⁶ Knoops, *ibid*, p. 268

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perpetrators; (iii) and that the Prosecution should have pleaded his participation in the joint criminal enterprise with greater specificity.

II. Applicable Law and Analysis

9. With respect to these challenges, let me say that I do subscribe unreservedly to both the exposition of the applicable law and the judicial analysis of the Trial Chamber’s reasoning in its previous decisions and as embodied in the Main Judgement.

III. Conclusion

10. I likewise concur with the Conclusion reached in the Main Judgement on the three-pronged challenge to the form of the Indictment brought by Defence for the Accused Moinina Fofana, namely, that the alleged forms of liability of the said Accused under Articles 6(1) and 6(3) of the Statute are pleaded in the Indictment with the requisite degree of specificity. I, accordingly, find the challenges to be devoid of merit.

(B) GRAVE DEFECT NOT RAISED PRELIMINARILY OR DURING CLOSING ARGUMENTS

I. Introduction

11. Let me now, *suo motu*, address here what, as I perceive it, is a grave irregularity in the form of the Indictment. It relates specifically to the formulation of paragraph 28. Paragraph 28 of the Indictment alleges as follows:

“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.

By their acts or omissions in relation to these events, SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA, pursuant to Article 6.1 and, or alternatively, by Article 6.3 of the Statute, are individually criminally responsible for the crimes alleged below.”

II. Legal Analysis

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12. Paragraph 28 appears under Counts 6-7 which specifically charge the Accused with the offences of terrorizing the population and collective punishments respectively. As a matter of law, I opine that the legal effect of charging the Accused with the separate and distinct offences of terrorizing the population and collective punishments in separate and distinct counts is to notify the Accused with specificity and precision of the charges against them. This is the basic rule governing specificity as to the form of an indictment.⁷

13. Consistent with the foregoing consideration, it is clearly impermissible to charge an accused person in a general, vague and uncertain manner. The authorities make it clear that where within the count system of charging, allegations are framed in such a way as to create multiplicity, vagueness and uncertainty, the particular count or counts are accordingly defective.⁸ A close examination of paragraph 28 discloses a multiplicity of allegations in the particulars of the alleged offences of terrorizing the civilian population and collective punishments. The paragraph charges, by a process of incorporation, the Accused in both Counts 6 and 7 with five additional offences, to wit: (i) Murder, a Crime Against Humanity; (ii) violence to life, health and physical or mental well-being of persons, in particular murder, as a War Crime; (iii) inhumane acts as a Crime Against Humanity; (iv) Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, as a War Crime; and (v) Pillage, as a War Crime.

14. Evidently, each of the said additional offences is given two new proscriptive aggravating dimensions, to wit, that each of the said crimes was allegedly committed "as part of a campaign to terrorize the civilian populations of those areas and did terrorize those populations", and "to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces", thus making them brand new species of criminality. The difficulty here is that of incorporating in a Particulars of Offence paragraph, references to Counts 1-5 which are separate and distinct offences separately charged.

⁷ See Rodney Dixon, et al (eds.), *Archbold International Criminal Courts, Practice Procedure and Evidence*, (London: Sweet & Maxwell, 2002) para 6.53.

⁸ See an illuminating article on the subject by Professor Glanville Williams entitled, "The Count System and the Duplicity Rule", (1966) *Crim.L.R.*, pp. 255-265, (under whom I was privileged to study Criminal Law at the University of Cambridge).



15. Based on the above analysis, the foregoing five additional crimes are, each, separate and distinct offences from the two specific and distinct offences embodied in the Statement of Offences Section of Counts 6 and 7. This is the reason for charging them separately in Counts 1 - 5. In effect, the Indictment in either of Counts 6 and 7 has charged each Accused with six different offences. It clearly proliferates the issues for trial. This is a textbook example of an infringement of the rule governing the form of an indictment technically known as the rule against duplicity, multiplicity, or uncertainty. The problem is compounded by charging these additional crimes not in separate additional counts, each in its own separate Statement of Offence Section of the Indictment, but in the Particulars of Offence Section to the existing Counts 6 and 7. I opine that this is an unorthodox and convoluted way of laying charges in an indictment. It creates nothing short of a penumbra of uncertainty as to what specific charge or charges the Accused are called upon to answer and defend in respect of Counts 6 and 7. Even where cumulative charging is permissible, it must still not offend the rule against duplicity, multiplicity and uncertainty. In a landmark decision of the Sierra Leone Court of Appeal⁹, applying leading English case-law authorities on duplicity, multiplicity and uncertainty as defects in the form of an indictment, it was authoritatively stated that:

“The general rule is that for each separate count there should be only one act set out which constitutes the offence. If two or three offences are set out in the same count, separated by the disjunctive ‘or’ and the conviction should be quashed.”¹⁰

16. Based on the foregoing analysis and applying the authorities cited, I come irresistibly to the conclusion that Counts 6 - 7 of the Indictment by incorporating the offences charged separately in Counts 1 - 5 in the said Counts 6 - 7 offend the rule against duplicity, multiplicity and uncertainty, and I so hold. As stated earlier, it should suffice for the purposes of my dissent that these observations are strictly *obiter*. Hence, I do not propose to take the analysis beyond this limited judicial focus.

⁹ *Lansana and Eleven Others v. Regina*, ALR SL. 186 (1970-1971), [Sierra Leone].

¹⁰ *Ibid.*

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PART THREE: BACKGROUND TO CONFLICT AND POLITICAL CONTEXT**I. Introduction**

17. This Part of the Opinion relates to the Background to the Armed Conflict and Political Context in Sierra Leone.

II. Context

18. I endorse fully the narration contained in the Main Judgement on this aspect of the case.

PART FOUR: APPLICABLE LAW**I. Introduction**

19. In this Part of the Opinion, I address three key aspects of the applicable law, *to wit*, jurisdiction, the law governing the crimes charged and the law governing the forms of liability charged, indicating my concurrences with, or divergences from, the Main Judgement.

II. Jurisdiction

20. Beginning with jurisdiction, I subscribe wholly to and support the exposition of the law on the subject as found in the Main Judgement.

III. Law Governing Crimes Charged

21. On the subject of the law governing the crimes charged, there are no judicial differences between the exposition of the diverse facets of the law in the Main Judgement and my judicial appreciation of them.

IV. Law Governing the Forms of Liability Generally

22. As regards the law governing the three forms of liability charged, I diverge only from the Main Judgement on some controversial aspects of joint criminal enterprise as a form of international criminal liability. I now proceed to address these issues.



V. Joint Criminal Enterprise: The Unsettled State of the Law

23. As a preliminary matter, I do agree with the exposition of the law in the Main Judgement as to the juridical existence of joint criminal enterprise as a mode of liability “firmly established in customary international law” at the time of the alleged commission of the crimes laid in the Indictment. I also unreservedly subscribe to the view of the law expounded in the aforesaid Judgement that Article 6(1) of the Statute of the Special Court for Sierra Leone implicitly or impliedly provides for or incorporates the notion of joint criminal enterprise, as a mode of liability, and that it derives its juridical origins from customary international law.

24. However, I do not support the rather uncritical adoption of the existing jurisprudence on the subject, given the lack of judicial consensus on the scope of the doctrine and the unsettled state of the law.¹¹ Commenting on the judicial perils of applying incoherent, disparate and unsettled principles of law, I did observe elsewhere that:

“It cannot be asserted with any degree of accuracy that there is, as at yet, at the level of international criminal adjudication, a settled and authoritative *corpus* of jurisprudence applicable in granting amendments to indictments. To seek to apply whatever disparate, incoherent and inconclusive general principles that exist in the form of an evolving jurisprudence *without constructive* adaptation is a logical mistake that may well make us, as judges, victims of the *fallacy of slippery precedents*.”¹²

25. By parity of reasoning, these are of some of the dangers of applying the existing law on joint criminal enterprise. The law, in its present state, is riddled with technicalities. Shorn of its technicalities, the existing law is that a person charged with the commission of a crime may be held liable for all crimes committed pursuant to the existence of a common plan or design which falls

¹¹ To the same effect is this observation, to wit:

“After ten years of the *ad hoc* Tribunals, joint criminal enterprise still remains one of the most contentious issues in their jurisprudential life and its contours have fluctuated a great deal over the years.”

See Guénael Mettraux, *International Crimes and the Ad hoc Tribunals*, (New York: Oxford University Press, 2005) pp. 287-288.

¹² See Dissenting Opinion of Hon. Justice Bankole Thompson in *Prosecutor v. Brima, Kanu and Kamara*, SCSL-03-16-T, Motion for Leave to Amend Indictment Against Accused Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, 6 May 2004, paras 5-7.

within the proscriptive ambit of the statute if the accused participates in conjunction with others in the execution of the common design.

26. In its technical sense, the law is that a joint criminal enterprise is a mode of committing a crime by an accused person, acting jointly or in concert with others. The accused is liable as a co-perpetrator, each co-accused being criminally responsible for the alleged crime. A co-accused is not exonerated merely by reason of not having physically committed the crime. There are three distinct categories of this mode of liability, namely: (i) the “basic” form which requires an intent to perpetrate a certain crime, such intent being shared by all co-accused; (ii) the “systemic” form, the essence of which is personal knowledge of the system of ill-treatment as well as an intent to further the said system; and (iii) the “extended” form, which involves liability for participating in acts outside the criminal design as long as such acts are a natural and foreseeable consequence of the effecting of that common purpose.¹³

27. Judicially, I reckon it is not difficult to fathom that the present trifurcated nature of the doctrine of joint criminal enterprise as expounded in the jurisprudence is a judicial creation. It is, I again reckon, not difficult to discover that the rationale behind the third category of the doctrine is to create some form of implied criminal liability, under customary international law or treaty law, in respect of persons accused of crimes against humanity and war crimes where direct or circumstantial evidence of their participation in the alleged crimes may be lacking. One can also comprehend, in my considered judgement, that categories two and three seem to have grown out of the crimogenic, juridical and socio-cultural peculiarities of genocide as one major proscriptive conduct targeted by the indictments before the ICTY and the ICTR. Hence the need for judicial circumspection and vigilance in applying these two categories of this mode of liability to crimes that are emanations of a different crimogenic, juridical and socio-cultural settings.

28. I opine that the law, as presently formulated, is incomprehensively opaque on three main grounds. First, it is unclear as to how expansive the scope of liability envisaged by category three

¹³ See *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement (TC), 15 March 2002, para 80; *Tadić Appeal Judgement*, paras 195-226; *Prosecutor v. Vasilejević*, IT-98-32-A, Judgement (AC), 25 February 2004, paras 97-98; *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (TC), 26 June 2001, paras 24-27; *Prosecutor v. Mulinović et al*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction: Joint Criminal Enterprises (TC), 21 May 2003, para 25, *Prosecutor v. Kvočka*, IT-98-30-IT, Judgement (TC), 2 November 2001, paras 309 and 311.



should be. Second, there is also lack of clarity as to how foreseeability in the context of the aforesaid category three should judicially be interpreted or construed. Third, the authorities are unclear as what principles are applicable in determining the impact of the said category three on existing two key due process guarantees for an accused person, namely, that a person charged with criminal wrongdoing can only be punished for his individual choice to engage in the alleged criminal wrongdoing, and that the attribution of criminal responsibility to a person charged with violation of the criminal law can only be predicated upon his own individual conduct.¹⁴

29. Equally problematic is the judicial tendency to equate the *mode of liability* with the *criminal conduct* itself. In my respectful opinion, this is anomalous. Likewise flawed is the disposition to describe the joint criminal enterprise as comprising an *actus reus* and a *mens rea*. In my considered view, the *mode of liability* cannot simultaneously constitute the proscribed conduct itself.

30. Furthermore, the existing jurisprudence depicts joint criminal enterprise and conspiracy as dichotomous. It is trite law that the proscriptive objective of complicity and conspiracy is that of penalising multiple or collective criminality. Hence, their doctrinal affinity with joint criminal enterprise as forms of accomplice liability.¹⁵ To assert that the doctrine of joint criminal enterprise is not a form of accomplice liability perpetuates a judicial myth. It is trite knowledge that the rationale behind conspiracy is to criminalise the agreement as the prohibited act and nip it in the bud before it is consummated, whereas the rationale behind the joint criminal enterprise is to criminalise the objective of the design which is the prohibited act, rendering it punishable on consummation.

¹⁴ It is instructive to note that this rubric of joint criminal enterprise form of liability is acutely controversial because many national law systems do not, in the field of criminal law, recognize the liability of alleged offenders in a common plan for crimes falling outside the scope of the alleged common criminal design. For example, Germany, Netherlands, and Switzerland make no provision for this type of liability in their criminal codes. Under English and Canadian criminal laws, the doctrine does not penalise persons charged with a crime purportedly committed in pursuance of a joint criminal enterprise for crimes outside the scope of the common criminal design on the grounds of foreseeability. Why it has come to acquire such primacy in international criminal law seems rather intriguing and perilous.

¹⁵ See an illuminating article on the subject by Allison Marstan Danner and Jenny S. Martinez entitled "Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law" in *California Law Review* [2005] pp. 77-169; See also Smith, K.J.M., *A Modern Treatise on the Law of Criminal Complicity*, (Oxford: Clarendon Press, 1991), for the view that the "common purpose doctrine known to English law, on which the doctrine of joint criminal enterprise is based, is used exclusively for acts that fall outside the main purpose of the agreement between co-conspirators".

31. To apply the existing principles in their present state without further legal clarity, precision and logical consistency is to compound the conceptual pitfalls and doctrinal uncertainties of the existing law governing this form of criminal liability.

PART FIVE: EVIDENTIARY PRINCIPLES

I. Introduction

32. In this Part of the Opinion I articulate, with much specificity, the principles of law that should guide an adjudicating body trying persons accused of crimes falling within the proscriptive ambit of international criminal law and that in fact guided the Trial Chamber throughout in evaluating the massive evidence presented by both the Prosecution and the Defence in this case. I do emphasize that these principles are deducible from the evolving jurisprudence, both case-law and textual authorities. Though I do subscribe to the general exposition of the said principles in the Main Judgement, I do feel judicially compelled to elaborate on them here so as to reinforce my concurrence with the factual findings and the legal findings in the Main Judgement in respect of the Counts on which 'not guilty' verdicts have been entered. It is of significance that the Chamber considers these principles to be of paramount importance in assessing the credibility of both testimonial and documentary evidence presented at the trial and in determining the ultimate question of the guilt or innocence of the Accused.

II. Evidentiary Principles: General Aspects

33. It is trite law that evidence, in legal terms, refers to "all legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation." As a preliminary point, it is noteworthy, given both the fact-intensive nature and legally complex features of this case, that nearly every category or type of evidence as a means of proving or disproving the facts in issue and the facts relevant to those in issue was implicated in this trial.

34. The first general applicable principle here is that the Special Court for Sierra Leone is mandated by its Statute to assess and evaluate evidence in cases brought before it in conformity with the doctrines and rules enunciated in the said Statute and Rules of Procedure and Evidence ("Rules"). To this end, the aforementioned Statute provides that::

“1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.”¹⁶

35. Consistent with the foregoing observation, the first principle of which the Chamber took cognisance is the principle of the non-binding effect of national rules of evidence within the sphere of international criminal adjudication. In short, the Chamber attached no strict precedential value to them, primarily adhering to Rule 89 of the Court’s Rules of Procedure and Evidence which states that:

(A) The rules of evidence set forth in this section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.¹⁷

36. The Chamber was also mindful that where no guidance is provided by the stipulated sources, it is under a duty to evaluate the evidence in a way that “will best favour a fair determination of the case and which is consistent with the spirit of the Statute and the general principles of law.” We were also pre-eminently aware throughout, that it is our duty to evaluate the evidence before us, primarily in the light of the presumption of innocence and the principle of reasonable doubt, which requires the resolution of a reasonable doubt in favour of the Accused, and secondly, having regard to general evidentiary principles of fairness.

37. The Chamber took cognisance of the fact that a criminal trial involves the ultimate adjudication or resolution of two key issues. The first is that the crimes charged in the Indictment

¹⁶ Statute of the Special Court for Sierra Leone, 2002 [Statute].

¹⁷ Rule 89 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended on 27th May 2004.

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were indeed committed, as alleged. The second is the attribution of criminal responsibility to the accused for the commission of those crimes. In effect, there must be a nexus between the said crimes and the conduct of the accused. Where there is no such nexus, the crime has not been proven.

III. Evidentiary Principles¹⁸: The Presumption of Innocence

38. Recognising that the starting point in the process of criminal adjudication is the entitlement of the accused to a presumption of innocence as embodied in Article 17(3) of the Statute, the Chamber was mindful throughout that it is the duty of the Prosecution to establish the guilt of each of the Accused persons, the implication being that the Prosecution is obliged, in law, to prove all the facts and circumstances material and necessary to constitute the crimes charged and the criminal responsibility of each Accused person. We were equally mindful of the principle that the persuasive burden of proving the case against the Accused rests on the Prosecution throughout the entire trial; it does not shift, and that the standard required is that of proof beyond reasonable doubt and not any lower standard, fully realising this to be the cardinal principle of criminal liability that runs throughout the web of the criminal law. To this effect is the explicit provision of Article 17(3) of the Court's Statute to wit:

“The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.”¹⁹

¹⁸ For this detailed analytical approach to evidentiary principles, I sought guidance from and adopted with necessary modifications, the version of the said principles in *Prosecutor v. Radoslaw Bratanin*, IT-99-36-T, Judgement (TC), 1 September 2004, para 20-36.

¹⁹ Article 17(3). The universality of this presumption is now firmly established. It is entrenched in national criminal law systems (regardless of their legal tradition) regional human rights adjudicatory schemes and the international criminal law system. Under English common law, it was put succinctly by Viscount Sankey, L.C. in the celebrated case of *Woolmington v. D.P.P.* (1935) All England Law Reprint, p. 1 [England], where he declared:

“Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the Prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exception...”

The presumption is recognized in French law, German law, and American law and by reason of the common law juridical legacy under Sierra Leone law. Likewise the African Charter on Human and Peoples' Rights, the European Convention on Human Rights, and the Universal Declaration of Human Rights enshrine the doctrine in clear and express language.

IV. Evidentiary Principles: Application

39. Consistent with the foregoing fundamental principles of criminal liability, the Chamber approached the resolution of the key issues in this trial from a dual perspective, namely, whether the ultimate result of the totality of the evidence, and the application of the relevant principles of law, thereto, is weighty and convincing enough to establish beyond reasonable doubt the facts, circumstances, intentions and purposes alleged in the Indictment and, ultimately the guilt of each Accused for the crimes as charged in the Indictment. In this regard, the Chamber kept in clear focus the Prosecution's three theories of liability: (i) individual criminal liability;²⁰ (ii) liability pursuant to a joint criminal enterprise;²¹ and (iii) liability pursuant to the doctrine of command responsibility.²²

40. In determining whether the Prosecution: (i) has discharged the burden of proving the case against each Accused; and (ii) has fulfilled the requisite standard of proof, namely, beyond reasonable doubt establishing the guilt of each Accused, as regards each particular Count as laid in the Indictment; the Chamber paid due regard to the existence or otherwise of any reasonable explanation of the evidence adduced before the Trial Chamber other than the guilt of each Accused,²³ mindful of the legal doctrine that any ambiguity that creates a reasonable doubt in the evidence must be resolved to the advantage and benefit of the Accused. To this end, We relied, persuasively, on the statement of the Appeals Chamber of the ICTY in the case of *Prosecutor v. Delalic, et al*, acknowledging that "if there is another conclusion which is also reasonably open from the evidence, and which is as consistent with the innocence of an Accused as with his or her guilt, he or she must be acquitted."²⁴ In such an eventuality, the Chamber acknowledged that the reasonable conclusion to come to is that the charges against the accused have not been established beyond reasonable doubt.

41. Consistent with first principles in the sphere of the criminal law, We also applied the principle that where the Defence has failed to challenge certain factual allegations, as laid in an Indictment, this does not imply that an adjudicating tribunal must assume or presume the

²⁰ Statute, Article 6(1).

²¹ *Ibid.*

²² Statute, Article 6(3).

²³ See *Prosecutor v. Delalic, et al*, IT-96-21-A, Judgement (AC), 20 February 2001, para 458.

²⁴ *Ibid.* para 458.



allegations as proven. Any such implication, We realised, would be inconsistent with the cardinal principle that for each individual fact alleged the onus of proof rests squarely on the Prosecution. Pre-eminently, the Chamber took cognisance of the fact that the Statute of the Special Court guarantees to every person charged with a crime or crimes falling within the jurisdiction of the Court the right not to incriminate himself. To this effect is Article 17(4)(g) of the said Statute which states that:

“In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality? Not to be compelled to testify against himself or herself or to confess guilt.”²⁵

42. Guided by this statutory provision, and recalling that in the course of this trial the two Accused persons now before the Court did not give any evidence or make statements but chose to remain silent, consistent with the law as established, the Chamber drew no adverse inferences from their decision not to testify. In essence, We, in conformity with general principles of law recognised by civilised nations, paid proper regard to the due process rights of the Accused, acknowledging that their decision to remain silent did not amount to guilt or an admission of guilt.

43. Again, in conformity with the law, in evaluating the evidence of the witnesses that testified *viva voce*, the Chamber, consistent with established jurisprudence, took into account of these factors: (a) their knowledge of the facts to which they testified; (b) their demeanour; (c) conduct; and (d) character to the extent possible.²⁶ As regards all the witnesses in this case, We also considered the probability, consistency and related features of their testimonies and the totality of the circumstances of the case.²⁷ The Chamber further recognised the complexity of the issue of the credibility of witnesses for an adjudicating forum. Hence, relying on established jurisprudence, We proceeded to assess the credibility of witnesses on the basis of: (i) their knowledge of the facts in respect of which they testified; (ii) their disinterestedness (especially in the case of those characterised as “insider witnesses”); (iii) their integrity; (iv) their veracity; and (v) their motivation

²⁵ Statute.

²⁶ See *Brdanin*, *supra* note 15.

²⁷ *Ibid.*

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to speak the truth consistent with their oath.²⁸ Equally important for the evaluation of evidence as to its probative value were these factors: (i) internal consistency and detail; (ii) strength under cross-examination; (iii) consistency against prior statements of the witness; (iv) credibility vis-à-vis other witness accounts or other evidence submitted in the case, to wit, corroboration; and (v) possible motives of the witness.²⁹

44. The Chamber duly advised itself that evidence about facts which took place ten or more years prior to testifying may well involve inherent uncertainties due to the imperfections and vagaries of human perception and recollection.³⁰ Hence, We were mindful that the lack of particularity or specificity in respect of certain matters or events cannot, in general, justify the inference that the testimony in question is of minimal probative value or that it is worthless.³¹

45. In addition, the Chamber paid due regard to the principle of orality. This principle gives primacy to the evidence given orally by witnesses in Court as against statements made out-of-court on occasions prior to the testimony at trial. In effect, non-testimonial evidence should not be accorded primacy over testimonial evidence. We, accordingly, placed much reliance on a Decision of this Chamber entitled *Decision on Disclosure of Witness Statements and Cross-Examination*³², where it was emphasized that:

“The Special Court adheres to the principle of orality, whereby witnesses shall, in principle, be heard directly by the Court.”³³

46. Furthermore, We were guided by the principle that the extent of any material inconsistency between the oral testimony of a witness at a trial and his or her non-testimonial statement given prior to trial, if such a portion or portions thereof were admitted in evidence, must be factored into the evaluation equation, so as to determine what weight, if any, to be attached to the particular testimony. By parity of reasoning, We acknowledged that an inconsistency need not be fatal in that it depends on the circumstances, and may be explained by

²⁸ *Ibid.*

²⁹ See Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (New York: Transnational Publishers, Inc., 2002) p. 167, [May and Wierda, *International Criminal Evidence*].

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-PT, (TC), 16 July 2004.

³³ *Ibid.* para 25.

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such factors as: (i) the fallibilities of human recollection; and (ii) the nature, scope and methodology of questioning of witnesses during interviews by the party calling them.³⁴

47. Another basic principle that We applied is that the testimony of a single witness on a material fact does not require corroboration.³⁵ By this observation as to the law, We do not imply that a tribunal must not view the evidence of witnesses in the context of trials of such magnitude and complexity with caution, especially the testimonies of those characterised as “insider witnesses”, (accomplices). In this regard, as already alluded to, the Chamber was supremely mindful of the need to treat the testimonies of such witnesses with utmost circumspection realising that though they may have offered to testify out of a conviction of public-spiritedness yet they invariably are witnesses with self-serving interest or motivations.

48. In addition, as to the admissibility of hearsay testimony, the Chamber followed the operative principle in the sphere of international criminal adjudication, namely, that hearsay evidence is admissible and not *per se* inadmissible. We clearly kept in mind that where such evidence is admitted to prove the truth of its contents, a tribunal ought to be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, and that both its context and the circumstances under which it arose should be considered.³⁶ In this regard, We adhered to the principle that the absence of the opportunity to cross-examine the maker of a hearsay statement or whether it was “first-hand” or more removed are factors to be taken into account when considering the probative value of the evidence. Consistent with the Statute, the Rules of Procedure and Evidence and established international criminal jurisprudence, We acknowledged that the fact that evidence is hearsay in character does not necessarily deprive it of probative value, holding that the weight or probative value to be attached to such evidence will

³⁴ See May and Wierda, *International Criminal Evidence*, para 6:09 at page 167.

³⁵ See *Prosecutor v Aleksowski*, IT-95-25-T, Judgement (TC), 24 March 2000, para 62.

³⁶ For this approach, see May and Wierde, *International Criminal Evidence*, *supra* note at p. 117, where it is stated as follows:

“At an early stage in the history of the modern tribunals, hearsay was held to be admissible. Thus, the Trial Chamber in *Tadić* decided to admit hearsay evidence. The Chamber commented that the international tribunal was an amalgam of civil and common law features and did not strictly follow either jurisdiction. Judge Stephen pointed out that the relevant evidence is not affected by the fact that it is hearsay and such evidence is not necessarily without probative value.”



usually be less than that attributed to that given by a witness under oath who has been subjected to cross-examination, depending on the totality of the circumstances.³⁷

49. With respect to documentary evidence, the Trial Chamber did, on several occasions throughout this trial, admit documentary evidence. In this regard, as in the case of other kinds of evidence, the Chamber adopted the flexible approach now established by the existing jurisprudence of “extensive admissibility of evidence, leaving questions of credibility or authenticity” to be “determined according to the weight given to each of the materials by the Chamber at the appropriate time.”³⁸ When admitting documentary evidence during the course of this trial, We repeatedly indicated that despite the flexibility of the Chamber’s approach to the admissibility issue, the reliability of such documentary evidence was not thereby automatically established and that it would be one of the factors to be considered during the evaluation of probative value of the totality of the evidence in the case.

50. When admitting direct evidence of a witness testifying to events, incidents and episodes he actually witnessed, the Chamber was guided by the doctrine that where the witness is testifying truthfully, direct evidence of a fact in issue or, of a fact actually perceived by a witness, is the most reliable form of proof, that is to say, the best evidence.

51. Throughout the trial the evidence adduced was largely circumstantial. Circumstantial evidence is evidence of circumstances surrounding an event, episode, incident, from which a fact at issue may be reasonably inferred.³⁹ The Chamber’s approach to circumstantial evidence was that though the individual ingredients of circumstantial evidence may, in a particular case, be insufficient to establish a fact, yet taken conjunctively and cumulatively their effect may be revealing and sometimes decisive.⁴⁰ We also clearly reminded ourselves, as a matter of law, that where the Prosecution’s case is substantially based on circumstantial evidence the evidence must be

³⁷ See *Prosecutor v. Blaškić*, IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability (TC), para 12.

³⁸ See *May and Wierda*, *supra* note 21.

³⁹ See Colin Tapper (ed.) *Cross and Tapper on Evidence*, (London: Butterworths, 1995) p. 22.

⁴⁰ *Exall* (1866) Vol. 4 F&F922 at 929 [England], is one English case-law authority for this proposition: “Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”

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such as to satisfy the tribunal that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion.⁴¹

52. The Chamber also admitted expert evidence at the trial, guided by recognised and established principles in this area of the law. As to (a) the admissibility:⁴² (i) that the subject matter of the proposed expert testimony is a proper topic for expert evidence and not a matter within the knowledge and experience of the court; (ii) that where the subject matter is a proper one for expert evidence, it must be relevant in the sense of assisting the court to determine an issue in dispute; (iii) that the expert must possess the necessary qualifications and credentials in the professed field of expertise; (iv) that the reasoning or methodology underlying the testimony must be valid and properly applicable to the facts in issue; and (v) that the expert must be independent.⁴³

53. As to (b) the weight or probative value of the expert testimony, the Chamber took guidance from these principles: (i) that the expert must not determine the ultimate issue, that is, draw inferences or conclusions as to the guilt or innocence of the accused; (ii) that the expert must not usurp the function of the Court in assessing the credibility or truthfulness of a witness; (iii) that the expert's role is to express opinion or opinions on findings of fact but not to make those findings of fact; (iv) that the Court is not bound to accept the evidence of an expert; (v) that the criteria for evaluating the probative value of expert testimony includes mainly: (a) the professional competence of the expert; (b) the methodologies or reasoning underlying the expert evidence; (c)

⁴¹ See *Mogroy v. Director of Public Prosecutions*, (1973), 1 A11 ER. 503, [England].

⁴² See May and Wierda, *International Criminal Evidence*, pp. 199-200.

⁴³ These principles are based, with certain modifications, on the principles operative within national law systems. In this regard, it is noteworthy that the recent jurisprudence of Canada on the subject of expert evidence bears striking resemblance to the approach adopted by international criminal tribunals. The new "principled approach" to hearsay allows such evidence to be admitted if it is both necessary and reliable, for example, if the circumstances surrounding the evidence sufficiently assures the Court of its trustworthiness. Where expert evidence contains hearsay, this fact will diminish the weight to be attached to such expert evidence. By comparison, the Australian law is close to its Canadian counterpart. In Australia, it is explicitly required that when experts use hearsay information as a basis for their opinions, their reliance on such information must be reasonable. The formula is that the greater the hearsay remainder of an opinion's basis, the less reliable it will be. In the United States, the approach to expert evidence is a two-pronged one: reliability and relevance. In determining reliability, the Court must engage in a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether the reasoning can properly be applied to the facts in issue. In addition, when determining scientific reliability, the trial judge should consider: (a) whether the proffered knowledge can be or has been tested, (b) whether the theory or technique has been subjected to peer review, (c) the known or potential rate of error, and (d) whether the theory or technique has gained general acceptance in the relevant scientific discipline. See *Daubert v. Merrel Dow Pharmaceuticals Inc.* (113) S.Ct. 2786 (1993) [United States of America], a leading decision in the U.S.A.; see also the earlier case of *Frye v. United States*, 293 F. 1013 (DC.Cir.) (1923).

the credibility of the findings made in the light of (a) and (b) and other evidence accepted by the Court.

54. The Chamber also throughout, exercised due judicial vigilance against the possibility of using inferences to fill gaps in the evidence of both Prosecution and Defence, without prejudice to the application of commonsense in drawing reasonable inferences where necessary, especially as required for the purposes of proof by circumstantial evidence.

PART SIX: FINDINGS OF FACT

I. Introduction

55. In this Part of the Opinion, I direct my attention to the major feature of the case, to wit, the findings of fact.

II. Findings of Fact

56. Recalling my earlier observation as to the extremely fact-intensive nature of this case and recalling the application of the evidentiary principles set out in Part Five of this Opinion in arriving at the findings of fact, I endorse the entire findings of fact embodied in the Main Judgement, subject to what I have already stated in Part One, paragraph 3 of this Opinion in relation to the small segment of findings of fact on the issue of ritual killings and the initiation process. I also endorse fully the findings of fact as to the structure and organisation of the CDF and the Kamajors as contained in the Main Judgement.

III. Factual Guilt

57. In this Part of the Opinion, I take the view that the facts as established by the Prosecution's evidence indeed do prove beyond reasonable doubt the factual guilt of the Accused in respect of the charges as laid in the several Counts of the Indictment. However, It is trite learning that proof of factual guilt does not entirely dispose of the ultimate question of whether either Accused is guilty or not of the offences charged. In short, in elementary legal vocabulary, proof of the *actus reus* alone is not sufficient to constitute criminal liability. Hence, in Part Six of this Opinion, I address briefly the issue of legal guilt as found in the Main Judgement and reserve for a comprehensive analysis in Part Eight, the issue of possible valid defences open to the Accused on a

reasonable interpretation of the totality of the evidence and their entitlement in accordance with the doctrine of fundamental fairness, to a consideration of the merits or otherwise of such defences.

PART SEVEN: LEGAL FINDINGS

I. Introduction

58. In this Part of the Opinion, while concurring with certain legal findings in the Main Judgement as a key aspect of the determination of the ultimate question of guilt or innocence, I deem it appropriate to emphasize the importance of the distinction between factual guilt and legal guilt as part of the analytical foundation of the latter segment of my dissenting stance in this case.

II. Distinction Between Factual Guilt and Legal Guilt

59. The distinction between factual guilt and legal guilt has long been recognised in the domain of the criminal law. Findings of fact essentially point to and prove the factual guilt of the accused; findings of law are predicated upon the notion of legal guilt. Despite their importance in the liability-equation, findings of fact are not sufficient to establish legal guilt; there must be findings of law also. I reiterate therefore that findings of law entail a determination whether the law, when applied to the facts, show that the accused is both factually and legally guilty. Where he is only factually guilty, it is not sufficient as a basis for a conviction. He must also be legally guilty, a key element of which is proof of the criminal intent. It is settled law that, generally, proof of criminal intent is by circumstantial rather than by positive or direct evidence.

60. Convinced that the Trial Chamber was thus guided, and proceeded accordingly, I endorse unreservedly the legal findings in the Main Judgement on this aspect of the case in respect of Counts 1, 3, 6 and 8 as regards Accused Moinina Fofana and Counts 1, 3, and 6 as regards Accused Allieu Kondewa.

61. Moreover, for the sake of completeness, it thus seems to me that it ought to be emphasized that the Chamber adhered scrupulously to the exacting and stringent criteria meticulously crafted by the international community for determining the criminal liability of persons charged with crimes against humanity and war crimes. Besides, remaining vigilant throughout about the



obligation of the Prosecution to prove beyond reasonable doubt the charges brought, the Chamber kept in focus that to discharge this burden, the Prosecution must satisfy conjunctively two layers of requirements, namely, the *chapeaux* elements and the constitutive or specific elements of each crime. In effect, a conviction in law cannot be obtained where the Prosecution proves only the *chapeaux* elements without proving the specific elements of the crime and *vice versa*. By parity of reasoning, where the evidence in respect of any *chapeaux* or specific element does not measure up to proof, no liability attaches to an accused.

PART EIGHT: POSSIBLE DEFENCES RAISED BY THE TOTALITY OF THE EVIDENCE

I. Divergence from Main Judgement

62. Having agreed with the legal findings in the Main Judgement, in respect of the aforesaid Counts, one crucial issue remains for my judicial determination. It is whether, on a reasonable interpretation of the evidence, the facts and circumstances do raise, in favour of the Accused, any possible defence or defences to criminal liability whether under Article 6(1) or Article 6(3) of the Statute. This is where, as stated in Part One of this Opinion, I significantly depart from the verdict of the Main Judgement in respect of Accused Moinina Fofana on Counts 2, 4, 5 and 7 and in respect of Accused Allieu Kondewa on Counts 2, 4, 5, 7 and 8. It is, to my mind, a liability rather than a post-trial issue.

63. In this connection, I am guided by two key principles in the sphere of criminal adjudication. The first is that “to establish criminal liability the prosecution must prove that the accused or defendant did the act which is the target of the criminal law’s prohibition and that he had the requisite mental state.”⁴⁴ The second is that even where the prosecution has proved the *actus reus* and the *mens rea* of the offences charged, this “does not imply that criminal liability automatically attaches to the accused or defendant. His conduct may well have been, in the eyes of the law, justifiable or excusable.”⁴⁵ Stated slightly differently, it has been long established law , firstly, that in all criminal cases the prosecution has the burden of proof, and secondly, that even

⁴⁴ Bankole Thompson, *The Criminal Law of Sierra Leone*, (Maryland: University Press of America Inc., 1999) p. 259, [Thompson, *The Criminal Law of Sierra Leone*]

⁴⁵ *Ibid.* p. 259.

when the prosecution has proved the elements of the crime beyond reasonable doubt, the accused persons may still be exonerated from criminal liability by reason of certain defences.⁴⁶

64. These fundamental principles were concisely stated by Professor Glanville Williams in these terms:

“That a person does a forbidden act, even intentionally, does not mean that he is necessarily guilty of the offence. Various defences are recognised, quite apart from the defence of absence of the requisite element or degree of fault. Among the circumstances of justification or excuse are self-defence, duress, and (in some cases) the consent of the person affected. A verdict of “not guilty” does not necessarily mean that the defendant did not do the forbidden act. It may mean that he did not have the requisite mental state or other fault element, or else had some justification or excuse.”⁴⁷

65. I reiterate that it is precisely this question as to whether, on a reasonable interpretation of the totality of the evidence adduced before the tribunal, the Accused are entitled to some recognised defence or defences to criminal liability that is the anchor and bedrock of my Opinion. This is where my main judicial divergence from the Main Judgement originates and rests. In my considered judgement, a close examination and interpretation of the totality of the evidence adduced before the Court in this case, do reasonably raise certain defences to wit, necessity and the doctrine of *salus civis suprema lex est*, in favour of the Accused. And, I so find, significantly, as a preliminary issue.

66. Based on the foregoing significant preliminary finding, the proper judicial inquiry now is whether in applying the principles of law governing the said defences, there is cogent, compelling and conclusive evidence to justify a conclusion or conclusions of law that the Accused are entitled to be exonerated from criminal liability under Articles 6(1) and 6(3) in respect of the offences charged by reason of the said defence or defences. In determining this key issue, it is necessary, in this Part of the Opinion, (a) to explore the state of the law governing the said defences in both the municipal law systems and the international law system and (b) to apply the principles of law to the facts and circumstances of the case, as disclosed by the evidence adduced before the tribunal so as

⁴⁶ Joel Samaha, *Criminal Law*, (Wadsworth Thomson Learning Inc., Belmont, 2001) p. 212, [Samaha, *Criminal Law*].

⁴⁷ *Textbook of Criminal Law*, (London: Stevens & Sons Ltd, 1978) pp. 38-39.

to determine whether these defences do, as a matter of law, avail the Accused herein in respect of the crimes as laid in the Indictment.

67. It is settled law in national criminal law jurisdictions that even where an accused person does not plead or raise a specific or special defence in answer to the charge yet, if on a reasonable interpretation of the evidence, the facts and circumstances do raise certain possible defences to the alleged crimes, it is incumbent on the adjudicating body to, at least, consider the merits or otherwise, of such a defence or defences. It matters not whether the defence is raised directly, indirectly, obliquely, or implicitly. There is absolutely no ground of principle why the same doctrine should not apply in the sphere of international criminal justice. It is pre-eminently a matter of dispensing even-handed justice.

(A) NECESSITY

II. Introduction

68. An examination of the totality of the evidence adduced before the Trial Chamber amply reveals, in my considered judgement, a claim by the Accused that the CDF and the Kamajors were fighting to restore the lawful and democratically elected Government of President Kabbah to power after the May 25, 1997 *coup* by the Armed Forces Revolutionary Council (AFRC). The records indicate that the Prosecution admitted that the Kamajors were fighting for the restoration of democracy.⁴⁸

69. Based on the foregoing, it is evident that the defence of necessity is implicated in the facts of this case. Consistent with this reasoning, on a reasonable interpretation of the evidence, as a whole, I strongly opine that the defence of "necessity" is open to the Accused as an answer to the charges in the Indictment on the grounds that the preservation of democratic rule is a vital interest worth protecting at all cost in the face of rebellion, anarchy and tyranny. As I comprehend it, the position taken throughout the trial by the Accused and their witnesses is that the military efforts of the CDF and the Kamajors in the war were dictated by the overwhelming and compelling necessity of restoring the lawful and democratically elected Government of President Kabbah to power

⁴⁸ See Transcript of Trial dated 8th May 2006, Statement of Desmond de Silva (now Sir Desmond), Counsel for the Prosecution, p. 2, lines 23-26.

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following the overthrow of the said Government on May 215, 1997 by the Armed Forces Revolutionary Counsel (AFRC).

70. It is not my comprehension, and there is no supporting evidence to this effect, that they were acting under the orders of President Kabbah. Logically, therefore, Article 6(4) of the Statute of the Court does not apply. As a matter of both logic and practicality, the facts and circumstances of the case, as gathered from the totality of the evidence, reasonably speak to necessity as a possible defence in the context of determining the question of the guilt or innocence of the Accused. I shall now proceed to examine the merits or otherwise of necessity as a defence to the case against the Accused. Before doing so, let me postulate that the relevant authorities (case-law and textual), ancient and modern, agree that necessity, as a principle, can provide a defence to conduct that is in violation of the law.

III. Legal Analysis

71. Analytically, it is important to note that despite the existence of clearly-defined principles or propositions of law on the defence of necessity found in the jurisprudence of municipal law systems and international law, yet necessity, as a principle, remains acutely controversial and continues to be fraught with subtleties of legal interpretation. Writing elsewhere⁴⁹ on this theme, I put the issue in context in these terms:

“From the historical perspective of the English common law, the evolution of the defence of necessity bristles with conceptual and doctrinal difficulties. These controversies are still unsettled. According to Stephen (1950, 216), the defence of necessity is ‘a subject on which the law of England is so vague’ and is essentially a matter of judicial expediency. It is this kind of reasoning that crystallised into the notion today that necessity is nothing more than a dispensing power exercised by judges to remove the stigma of illegality from acts that are manifestly illegal, and that it is not a true defence to criminal liability. Hence, the characterization in Latin: *Necessitas facit licitum quod alias non est licitum*, meaning necessity makes that lawful which otherwise is not lawful. Providing some relief from this scepticism about the doctrine’s true nature is a submission of Williams (1961, 724) that necessity is recognised by English law, and particularly by the criminal law, conceding that the ‘peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision’ (1953, 218). In so far as its application within the domain of the criminal law is concerned, necessity has always been

⁴⁹ See Thompson, *The Criminal Law of Sierra Leone*, *supra*, pp. 267-268.



depicted as a choice between two evils, one of which involves contravening the law and the other the infliction of some serious harm on the action of another person, infringing the law always being perceived as the lesser and justifiable option.”⁵⁰

72. As a principle, the conceptual origins of necessity can be traced back to a practical example given by Aristotle to which the principle can properly apply. It is that of the jettisoning of cargo from a ship in distress.⁵¹ According to Aristotle, “any sensible man” would do so for the safety of both himself and his crew. Hobbes summed up his view of the doctrine in these terms:

“If a man by the terrour of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation. And supposing such a Law were obligatory: yet a man would reason presently thus, if I doe it not, I die presently: If I doe it, I die afterwards; therefore by doing it, there is time of life gained; nature therefore compells him to the fact.”⁵²

73. Pondering on the action of a person who sacrifices the life of another person so as to save his own life, Kant wrote:

“A penal law applying to such a situation could never have the effect intended, for the threat of an evil that is still uncertain (being condemned to death by a judge) cannot outweigh the fear of an evil that is certain (being drowned). Hence, we must judge that, although an act of self-preservation through violence is not inculpable, it still is unpunishable.”⁵³

74. In its articulation of the rationale behind necessity, as a principle, the Canadian Law Reform Commission noted thus:

“The rationale of necessity, however, is clear. Essentially it involves two factors. One is the avoidance of greater harm or the pursuit of some greater good, the other is the difficulty of compliance with the law in emergencies. From these two factors emerge two different but related principles. The first is a utilitarian principle to the effect that, within certain limits, it is justifiable in an emergency to break the letter of the law if the breaking the law will avoid a greater harm than obeying it. The second is a humanitarian principle to the effect that, again within limits, it

⁵⁰ *Ibid.*

⁵¹ See D. Ross (trans) *Aristotle's Nichomachean Ethics, Book III*, (Oxford: Oxford World Classics, 1975) p. 49.

⁵² *Leviathan*, (Pelican ed., 1968) p. 157.

⁵³ John Ladd (trans), *The Metaphysical Elements of Justice*, by Immanuel Kant, (Indianapolis: Bobbs-Merrill, 1965) p. 41.

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is excusable in an emergency to break the law if compliance would impose an intolerable burden on the accused.”⁵⁴

75. With that historical overview of the doctrine of necessity, it needs to be emphasized that the conceptualisation of necessity in excusatory and justificatory terms is a matter of much legal subtlety and theoretical complexity. This view is reinforced by the observation that, as a defence, necessity:

“rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience.”⁵⁵

76. This perspective of the defence is further underscored in these terms:

“The rationale of the necessity defence is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires. Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.”⁵⁶

77. Having set out the rationale of the principle of necessity, I shall now proceed to survey the municipal law principles applicable to the defence. Firstly, the English law principles governing the defence of necessity derive their origin from what may be described as the seminal case of *R v. Dudley and Stephens*. There, Lord Coleridge, CJ, cited a key passage from the learned persons who formed the Commission for preparing the Criminal Code, as follows:

“We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case.”⁵⁷

⁵⁴ See Working Paper 29 of the Law Reform Commission of Canada at p. 93.

⁵⁵ *Perka v. The Queen*, (1989) 2 SCR.234 at p. 248.

⁵⁶ See W.R. LaFave and A.W. Scott, *Handbook On Criminal Law*, (St. Paul: West Publishing Company, 1972) p. 382.

⁵⁷ (1884) 14 QBD 273 at p. 286, [England]. The facts in that case were that D and S, seamen, and the deceased, a boy aged between 17 years and 18 years, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean, and was probably more than 1000 miles from land that on the 18th day, Case No. SCSL-04-14-J

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The learned Chief Justice then went on to say:

“Now, except for the purpose of testing how far the conservation of a man’s own life is in all cases and under all circumstances, an absolute, unqualified, and permanent duty, we exclude from our consideration all the incidents of war.”

Sir James Stephen suggests:

“It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand.”⁵⁸

78. According to the learned editors of *Archbold*, the test that should be satisfied for the defence of necessity to succeed is: Was what the accused did actually necessary to avoid the evil in question?⁵⁹

79. The Canadian law on necessity may be summarised thus: The defence must be grounded either on excuse or justification. The act of the accused must have been done in the interest of self-preservation, characterised not by reference to its voluntariness but by its unpunishable nature. Mere negligence or involvement in criminal or immoral activity when the emergency arose will not disentitle an accused from relying upon the defence. Where sufficient evidence is placed before the court to raise the issue of necessity, the onus rests with the Prosecution to rebut the defence and prove beyond reasonable doubt that the act of the accused was voluntary. At a minimum the situation must be so imminent and the peril so pressing that normal human instincts cry out for action and make counsel of patience unreasonable.⁶⁰

when they had been 7 days without food and 5 days without water, D proposed to S that lots should be cast as to who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the 20th day D, with the assent of S killed the boy, and both of them fed on his flesh for 4 days; that at the time of the act there was no sail in sight nor any reasonable prospect of relief, and that under these circumstances there appeared to them every probability that unless they then or very soon fed on the boy, or one of themselves, they would die of starvation. Later, they were rescued. Upon those facts, they were indicted for murder and convicted. It was held that upon the said facts, there was no proof of any such necessity justifying the killing of the boy; See also *Morgentaler v. The Queen* (1976) 1 SCR 616, [Canada].

⁵⁸ See Sir James Stephens, *A History of the Criminal Law of England*, (London: MacMillan, 1883) p. 109.

⁵⁹ P.J. Richardson et al., *Archbold, Criminal Pleading, Evidence and Practice*, (London: Sweet and Maxwell, 1997), para 17-132.

⁶⁰ See *Perka v. The Queen* (1984) 2 SCR 234 per Wilson J, [Canada].

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80. In the United States of America, the principle of necessity is also known as the “choice - of - evil” defence. The gist of the defence is making the right choice, namely, choosing the lesser of two evils. The defence is provided for in Section 3.02 of the *Model Penal Code* which states that:

1. Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence.⁶¹

The application of the law in the U.S. requires three steps: (i) identification of the evils; (ii) ranking of the evils; and (iii) choosing the lesser.

81. Two key principles of law emanate from the municipal case-law authorities on the subject of the defence of necessity. The first is that necessity is a defence to criminal liability. The second is that whether a defence of necessity succeeds or not will depend upon the particular facts and circumstances of each case.

82. In the international law sphere, the first reference to the defence is found in the writings of Grotius. He noted that:

“a people may sometimes be engaged in war against their will, where they cannot be justly charged with entertaining hostile intentions.”⁶²

83. In line with the tradition of Grotius on the subject, Weiden observed that:

“...The doctrine has been approved by the early classic writers of International Law. It has supporters and adversaries - not only among German and other Continental writers, but even among English authorities. It has been recognised by the practice of most Great Powers. The doctrine, it is submitted, is not subversive, but contributory to an effective working of International Law.”⁶³

⁶¹ See Samaha, *Criminal Law*, p. 261-262. In the U.S., 21 States have enacted necessity defence statutes that have followed the *Model Penal Code* provisions.

⁶² A.C. Campbell (trans), *On the Law of War and Peace, De Jure Belli ac Pacis*, Book III, [London: Kessinger Publishing Co., 1814] chapter 11. It is also noteworthy that in one of Euripides tragedies, there is the proverb which says that “to kill a public enemy, or an enemy in war is no murder.”

⁶³ Paul Weiden, “Necessity in International Law”, *Transactions of Grotius Society*, Vol. 24 Problems of Peace and War Papers (1938) pp. 105-132.

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84. Modern support for the recognition of the defence in international law derives from the *Gabcikovo - Nagymaros Project Case* between Hungary and Slovakia⁶⁴. There, it was acknowledged by the International Court of Justice that necessity does exist as a defence under international law, but that by reason of international practice and case-law it has been strictly circumscribed. In that case, the Court clearly expressed the view that the defence of necessity was in fact recognised by customary international law and it was a ground available to States in order to evade international responsibility for wrongful acts.

85. Relying on the foregoing exposition of the law governing the defence of necessity in both municipal law and international law, the next judicial inquiry is whether the defence is legally sustainable as an answer to the charges against the Accused. In my considered view, the gist of the defence inferred from the totality of the evidence derives from the compelling and overwhelming preoccupation of the CDF and the Kamajors, to prevent the State of Sierra Leone from further destabilisation and disintegration, restore the democratically elected Government of Sierra Leone to power thereby regaining constitutional legitimacy, a fact admitted by the Prosecution

86. Predicated on this premise, I shall now proceed to consider whether the facts of the case, as gathered from the totality of the evidence, are so compelling as to justify reasonably a conclusion of law that necessity does provide an excuse for the crimes of the Accused, due regard being paid to the principle found in municipal law systems and international law that whether a defence of necessity succeeds or not will depend upon the particular facts and circumstances of each case, an issue that is not determinable beforehand.

87. In addressing this issue and based on the authorities, I postulate judicially as follows:

(1) The defence of necessity is a free-floating, residual excuse that attaches to every crime (although in some jurisdictions, not to homicide);⁶⁵

(2) Where the evil sought to be avoided by the criminal act is greater than the act would cause, the actor is permitted to choose the criminal act;⁶⁶

⁶⁴ ICJ Rep. 1997, See also *the Construction of a Wall Case (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)* ICJ Adv. Op. 9 July 2004.

⁶⁵ See Larry Alexander in Jules Coleman and Shapiro, Scott (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, [Oxford: Oxford University Press, 2004] p. 844. Note, however, that this author views the defence in justificatory terms.

- (3) (a) What counts as a lesser evil is not legislatively specified but is left for case by case development;⁶⁷
- (b) The categories of what may count as a lesser evil are not fixed;
- (4) The defence of necessity can avail an accused standing trial for crimes against humanity and war crimes where it is a reasonable inference from the totality of evidence adduced before the court that his non-compliance with the law was the lesser evil;
- (5) The restoration of democracy to a country where there has been a violent overthrow of the lawful and democratically elected government is a supreme end or a good worth pursuing even if effected through launching military attacks to dislodge a usurping regime, where this is the only reasonable and viable option;
- (6) The preservation of democratic rule in the contemporary world setting with its emphasis on a global culture that espouses freedom and human dignity as key values of modern civilisation is a vital interest of individual states and the international community in general worthy to be defended at all costs in the face of rebellion and anarchy.

88. Bearing in mind the foregoing legal exposition, I have given due consideration to the principles of law governing the defence of necessity articulated herein, and applying them to the facts and circumstances of this case, as gathered from the totality of the evidence, I have, on a reasonable interpretation of the said evidence, come irresistibly to the conclusion that the defence of necessity is clearly legally sustainable to excuse both Accused from liability in respect of the offences for which they have been found guilty. Accordingly I hold that, in the uniquely peculiar circumstances of this case, necessity succeeds as a valid defence. In effect, to plead in answer to charges of criminal conduct that took place during military encounters to suppress a rebellion against the legitimate government of a State and to restore the said democratically elected government to power is certainly not, in my judicial thinking, a fanciful defence.

89. Admittedly, cases of such bizarre factual dimensions and legal complexity do present judges with the agonising dilemma of reconciling two conflicting interests, to wit, the need for "the law to promote the achievement of higher values at the expense of lesser values", realising that

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

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“sometimes the greater good for society will be accomplished by violating the literal language of the criminal law”, of which the judges are themselves the assigned custodians.

90. Predicated upon these premises, there can be little doubt that in the context of the intensely conflictual situation prevailing at the material time in Sierra Leone dominated by utter chaos, fear, alarm and despondency, fighting for the restoration of democracy and constitutional legitimacy could be rightly perceived as an act of both patriotism and altruism, overwhelmingly compelling disobedience to a supranational regime of proscriptive norms.

IV. Significant Legal Findings

91. In the light of the foregoing considerations, I find specifically as follows:

- (i) that the emergency or peril to which the Accused as members of the Kamajor's group or CDF were responding was a real one;
- (ii) that the aforesaid emergency or peril indeed constituted an immediate threat of harm purportedly feared, to wit, fear, utter chaos, widespread violence of immense dimensions resulting from the *coup*, and intense discomfiture, locally and nationally;⁶⁸
- (iii) that the response to the emergency was indeed proportionate, to wit, the use of military force to counter the overthrow of the lawful and democratically elected by military means;
- (iv) that acquiescence in the violent overthrow of the lawful government could certainly not have been a reasonable alternative open to the Kamajors or CDF at the material times;
- (v) that fighting for the restoration of the lawful and democratically elected government to power was indeed vital to the survival of the State of Sierra Leone;
- (vi) that the collective defensive response was supported by President Kabbah, the *de jure* sovereign, vested with the supreme executive authority of the Republic.

92. In sum, I cannot judicially see my way clear to holding the Accused liable for their acts as charged in the Counts of the Indictment. I hold that, on a reasonable interpretation of the evidence, as a whole, their legal guilt in respect of Counts on which they have been convicted is excusable in the eyes of the law on the grounds of the defence of necessity. I recognise that there

⁶⁸ Creating an atmosphere depicting Shakespeare's portrayal of "fair is foul and foul is fair", (Macbeth, Act I, scene 1).
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may be valid legal reasons for adopting a restrictive approach to the application of the defence of necessity in the context of international humanitarian law transgressions but it is equally valid that to adopt a hyper-restrictive approach may lead to injustice.

(B) *SALUS CIVIS SUPREMA LEX EST*

I. Introduction

93. By parity of reasoning, I find that, on a reasonable interpretation of the evidence adduced before the Chamber, another defence seems open to the Accused. It is what is compendiously referred to in Latin as *Salus civis suprema lex est*, meaning the safety of the state is the supreme law.

II. Legal Analysis

94. This defence bears some conceptual and doctrinal affinity to the defence of necessity when applied to emergencies threatening the vital or essential interests of the State. In his celebrated writing *The Science of Right*, Kant put it in perspective in these terms:

“It is by the co-operation of these three powers - the legislative, the executive, and the judicial - that the state realizes its autonomy. This autonomy consists in its organizing, forming, and maintaining itself in accordance with the laws of freedom. In their union the welfare of the state is realized. *Salus rei publicae suprema lex*. By this is not to be understood merely the individual well-being and happiness of the citizens of the state; for as Rousseau asserts - this and may perhaps be more agreeably and more desirably attained in the state of nature, or even under a despotic government. But the welfare of the state, as its own highest good, signifies that condition in which the greatest harmony is attained between its constitution and the principles of right - a condition of the state which reason by a categorical imperative makes it obligatory upon us to strive after.”⁶⁹

95. Salmond in his classical work on *Jurisprudence*⁷⁰ observes that:

“Of all forms of human society the greatest is the State. It has immense wealth and performs functions which in number and importance are beyond those of all other associations.”

⁶⁹ W. Hastie (trans), *The Science of Right*, (Germany: Eris Etext Project, 1790)

⁷⁰ (1937) 9th ed., (London: Sweet and Maxwell, 1937), p. 443.

96. In the celebrated case of *Venn v. The State*⁷¹, the Sierra Leone Supreme Court noted that:

“Authorities agree on certain essential attributes of a State - population, territory, a government clothed with a monopoly of force for the preservation of peace and order and having a plenitude of authority within its territory independent of external control.”

III. Significant Legal Finding

97. Based on the foregoing legal analysis, I find that the evidence, in its totality, points irresistibly to the conclusion that the CDF and Kamajor resistance efforts were directed at the preservation of the safety of the State of Sierra Leone which, at the material time, was threatened by the forces of rebellion and anarchy.

PART NINE: CONCLUSION

98. By any objective reckoning, it seems to me that in the cruel world of military combat, irrespective of the socio-cultural context, human actions, impelled as they are by the primordial instinct of self-survival, do fall short of the anthropomorphic conception of justice which we judges are accustomed to apply in determining the permissibility or impermissibility of such actions from the proscriptive perspective. This is particularly so when it is acknowledged that even international criminal law which seeks to punish deviant conduct of international law dimensions does recognise the reality that every “armed conflict is made up of criminal and non-criminal use of force”⁷², a distinction, invariably indiscernible depending on the nature and complexity of the evidence adduced by the Prosecution especially where such evidence seeks to establish and attach liability for collective criminality.

99. In this regard, let me observe that one rather disturbing feature of the Prosecution’s evidence as it unfolded was that of a veiled indication that the Prosecution’s case was based on some further extended version of the notion of joint criminal enterprise approximating to the doctrine of guilt by association, requiring attribution of culpability to the entire Kamajor society for atrocities committed by some or rogue Kamajors. It is a fact that the Kamajor society is a distinct local cultural entity, indigenous to a specific geographical area of Sierra Leone whose

⁷¹ (1974-82) 1 SLBALR 172 at p. 181, [Sierra Leone].

⁷² See Gerhard Werle, *Principles of International Criminal Law*, (The Netherlands: T.M.C. Asser Press, 2005) p. 29.

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purpose is not to engage in criminality. It is not an organisation “institutionally intent upon actions contrary to international humanitarian law.”⁷³ Guilt by association, in contemporary juristic thinking, is a “thoroughly discredited doctrine”⁷⁴. It is an established principle of international criminal law that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁷⁵

100. Based on the legal analyses and considerations in Part Eight, and predicated upon the totality of the evidence in this case, I reiterate and hold that it is a reasonable conclusion that the CDF and the Kamajors’ involvement in the hostilities that took place in Sierra Leone culminating in the charges in the Indictment which has been the subject of this trial was primarily dictated by these considerations of necessity:

- (i) self-preservation as citizens of the Republic whose essential interests, individually and collectively, had been gravely imperilled by the prevailing state of affairs at the time;
- (ii) preventing the further destabilisation and eventual disintegration of the State resulting from the military takeover;
- (iii) restoring the lawful and democratically elected government of President Kabbah, the *de jure* sovereign, to power;
- (iv) restoring constitutional legitimacy thereby upholding the supremacy of the Constitution of Sierra Leone and the President as its guardian;
- (v) preventing further and continuing breakdown of law and order, characteristic of “failed States”.

101. The evidence also reasonably shows that the safety of the State of Sierra Leone, as the supreme law, became for the CDF and the Kamajors the categorical imperative and paramount obligation in their military efforts to restore democracy to the country. I entertain more than serious doubts whether in the context of the uniquely peculiar facts and circumstances of this case

⁷³ Antonio Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2003) p 245.

⁷⁴ *Uphaus v. Wyman*, (1959) 360 US 72, 79 [United States].

⁷⁵ Instructively, see International Military Tribunal, Judgement, in the Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - October 1, 1946 (1947) 171 at p. 223.

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a tribunal should hold liable persons who volunteered to take up arms and risk their lives and those of their families to prevent anarchy and tyranny from taking a firm hold in their society, their transgressions of the law notwithstanding.

102. Finally, from my judicial perspective, the issue is not one of the moral guilt of the Accused herein, reprehensible though some of the proven atrocities are from that viewpoint. Were moral guilt deemed to be co-extensive with criminal liability, then the Accused persons would clearly be criminally liable pursuant to Article 6(1) and Article 6(3) in respect of the Counts for which they have been adjudged guilty in the Main Judgement. I take it as granted that in the context of modern operative criminal justice systems, nationally and internationally, moral guilt bears no conceptual equivalence to legal guilt, a view reinforced by the express statutory mandate of the international community to pay due regard to the principle of legality rather than moral or political considerations in international criminal adjudication. Hence, the importance of this legal distinction for the purposes of this Opinion. It is true, in language reminiscent of Martin Luther King, Jr., that it is not always that "the arc of the moral universe bends toward justice".

103. Given, therefore, the uniquely peculiar facts and circumstances of this case coupled with the legal complexities posed thereby, in the context of armed hostilities where one of the fighting groups was engaged in defensive military action to restore the lawful and democratically elected government to power, I hold that the crimes in respect of which the Accused, as members of the CDF or Kamajors, have been found guilty are, in the circumstances, excusable by reason of the defences discussed in Part Eight of this Opinion.

PART TEN: DISPOSITION

104. Having considered the totality of the evidence adduced before the Trial Chamber, the arguments of both the Prosecution and the Defence, the factual and legal findings as determined by the Chamber in the Main Judgement, and concurring with the findings of not guilty in favour of the Accused Moinina Fofana in respect of Counts 1, 3, 6 and 8 and in favour of the Accused Allieu Kondewa respect of Counts 1, 3 and 6 and based on the several considerations, analyses, and significant legal findings in Part Eight of this Opinion, I, Hon. Justice Bankole Thompson, one of the judges of Trial Chamber I of the Special Court for Sierra Leone, hereby decide as follows:



(1) That Second Accused, MOININA FOFANA is found NOT GUILTY and accordingly ACQUITTED on the following Counts:

COUNT 2

COUNT 4

COUNT 5

COUNT 7

(2) That Third Accused, ALIEU KONDEWA is found NOT GUILTY and accordingly ACQUITTED on the following Counts:

COUNT 2

COUNT 4

COUNT 5

COUNT 7

COUNT 8

Done in Freetown, Sierra Leone, this 2nd day of August, 2007.

Hon. Justice Bankole Thompson



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ANNEX D: CONSOLIDATED INDICTMENT

003

SCSL - 2004 - 14 - PT
CII - 217
THE SPECIAL COURT FOR SIERRA LEONE

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CASE NO. SCSL - 03 - 14 - I

THE PROSECUTOR

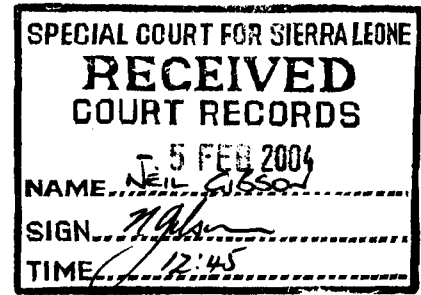
Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

INDICTMENT



The Prosecutor, Special Court for Sierra Leone, under Article 15 of the Statute of the Special Court for Sierra Leone (the Statute), charges:

SAM HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

with **CRIMES AGAINST HUMANITY, VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, and OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW** in violation of Articles 2, 3 and 4 of the Statute, as set forth below:

THE ACCUSED

1. **SAMUEL HINGA NORMAN**, was born on 1 January 1940, in Ngolala Village, Mongeri (or Monghere), Valunia Chiefdom, Bo District, in the Southern Province of the Republic of Sierra Leone. He served in the Armed Forces of the Republic of Sierra Leone from about 1959 to 1972 rising to the rank of Captain. In 1966 he

graduated from the Mons Officer Cadet School in Aldershot, United Kingdom. He has served as the Liaison Representative and Chiefdom Spokesman, Mongeri, Valunia Chiefdom, as Regent Chief of Jaiama Bongor Chiefdom, and as Deputy Minister of Defence for Sierra Leone. He is currently serving as the Minister of the Interior for Sierra Leone.

2. **MOININA FOFANA**, is believed to have been born in 1950, in Nongoba Bullom Chiefdom, Bonthe District, in the Republic of Sierra Leone. He currently resides in the town of Gbap, Nongoba Bullom Chiefdom, Bonthe District and is the Chiefdom Speaker for the Nongoba Bullom Chiefdom.
3. **ALLIEU KONDEWA, also known as (aka) King Dr Allieu Kondewa, (aka) Dr Allieu Kondewa**, is believed to have been born in the Bo District, in the Republic of Sierra Leone. He currently resides in the Bumpah Chiefdom, Bo District, and his occupation is that of a farmer and herbalist.

GENERAL ALLEGATIONS

4. At all times relevant to this Indictment, a state of armed conflict existed in Sierra Leone. For the purposes of this Indictment the organized armed factions involved in this conflict included the Civil Defence Forces (CDF) fighting against the combined forces of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC).
5. A nexus existed between the armed conflict and all acts or omissions charged herein as Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and as Other Serious Violations of International Humanitarian Law.
6. The CDF was an organized armed force comprising various tribally-based traditional hunters. The Kamajors were comprised mainly of persons from the Mende tribe resident in the South and East of Sierra Leone, and were the predominant group within the CDF. Other groups playing a less dominant role were the Gbethis and the Kapras, both comprising mainly of Temnes from the north; the Tamaboros,

comprising mainly of Korankos also from the north; and the Donsos, comprising mainly of Konos from the east.

7. The RUF was founded about 1988 or 1989 in Libya and began organized armed operations in Sierra Leone in or about March 1991. The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected government of Sierra Leone via a coup d'état on 25 May 1997. Soldiers of the Sierra Leone Army comprised the majority of the AFRC membership. Shortly after the AFRC seized power, the RUF joined with the AFRC.
8. The **ACCUSED** and all members of the CDF were required to abide by International Humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions, to which the Republic of Sierra Leone acceded on 21 October 1986.
9. All offences charged herein were committed within the territory of Sierra Leone after 30 November 1996.
10. All acts or omissions charged herein as Crimes Against Humanity were committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone.
11. The words civilian or civilian population used in this indictment refer to persons who took no active part in the hostilities, or were no longer taking an active part in the hostilities.

INDIVIDUAL CRIMINAL RESPONSIBILITY

12. Paragraphs 4 through 11 are incorporated by reference.
13. At all times relevant to this Indictment, **SAMUEL HINGA NORMAN** was the National Coordinator of the CDF. As such he was the principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF. He was also the leader and Commander of the Kamajors and as such had *de jure* and *de facto* command and control over the activities and operations of the Kamajors.

14. At all times relevant to this Indictment, **MOININA FOFANA** was the National Director of War of the CDF and **ALLIEU KONDEWA** was the High Priest of the CDF. As such, together with **SAMUEL HINGA NORMAN**, **MOININA FOFANA** and **ALLIEU KONDEWA** were seen and known as the top leaders of the CDF. **MOININA FOFANA** and **ALLIEU KONDEWA** took directions from and were directly answerable to **SAMUEL HINGA NORMAN**. They took part in policy, planning and operational decisions of the CDF.
15. **MOININA FOFANA** acted as leader of the CDF in the absence of **SAMUEL HINGA NORMAN** and was regarded as the second in command. As National Director of War, he had direct responsibility for implementing policy and strategy for prosecuting the war. He liaised with field commanders, supervised and monitored operations. He gave orders to and received reports about operations from subordinate commanders, and he provided them with logistics including supply of arms and ammunition. In addition to the duties listed above at the national CDF level, **MOININA FOFANA** commanded one battalion of Kamajors.
16. **ALLIEU KONDEWA**, as High Priest had supervision and control over all initiators within the CDF and was responsible for all initiations within the CDF, including the initiation of children under the age of 15 years. Furthermore, he frequently led or directed operations and had direct command authority over units within the CDF responsible for carrying out special missions.
17. **SAMUEL HINGA NORMAN**, as National Coordinator of the CDF and Commander of the Kamajors knew and approved the recruiting, enlisting, conscription, initiation, and training of Kamajors, including children below the age of 15 years. **SAMUEL HINGA NORMAN**; **MOININA FOFANA**, as the National Director of War of the CDF; and **ALLIEU KONDEWA**, as the High Priest of the CDF, knew and approved the use of children to participate actively in hostilities.
18. In the positions referred to in the aforementioned paragraphs, **SAMUEL HINGA NORMAN**, **MOININA FOFANA** and **ALLIEU KONDEWA**, individually or in concert, exercised authority, command and control over all subordinate members of the CDF.

19. 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. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone. Each **Accused** acted individually and in concert with subordinates, to carry out the said plan, purpose or design.
20. **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, by their acts or omissions are individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this indictment, which crimes each of them planned, instigated, ordered, committed, or in whose planning, preparation or execution each **Accused** otherwise aided and abetted, or which crimes were within a common purpose, plan or design in which each **Accused** participated or were a reasonably foreseeable consequence of the common purpose, plan or design in which each **Accused** participated.
21. In addition, or alternatively, pursuant to Article 6.3. of the Statute, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, while holding positions of superior responsibility and exercising command and control over their subordinates, are individually criminally responsible for the crimes referred to in Articles 2, 3, and 4 of the Statute. Each **Accused** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each **Accused** failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

CHARGES

22. Paragraphs 4 through 21 are incorporated by reference.
23. The CDF, largely Kamajors, engaged the combined RUF/AFRC forces in armed conflict in various parts of Sierra Leone – to include the towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas and the Districts of Moyamba and

Bonthe. Civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were termed “Collaborators” and specifically targeted by the CDF. Once so identified, these “Collaborators” and any captured enemy combatants were unlawfully killed. Victims were often shot, hacked to death, or burnt to death. Other practices included human sacrifices and cannibalism.

24. These actions by the CDF, largely Kamajors, which also included looting, destruction of private property, personal injury and the extorting of money from civilians, were intended to threaten and terrorize the civilian population. Many civilians saw these crimes committed; others returned to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property. Typical CDF actions and the resulting crimes included:
- a. Between 1 November 1997 and about 1 April 1998, multiple attacks on Tongo Field and surrounding areas and towns during which Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors screened the civilians and those identified as “Collaborators,” along with any captured enemy combatants, were unlawfully killed.
 - b. On or about 15 February 1998 Kamajors attacked and took control of the town of Kenema. In conjunction with the attack and following the attack, both at and near Kenema and at a nearby location known as SS Camp, Kamajors continued to identify suspected “Collaborators,” unlawfully killing or inflicting serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors also entered the police barracks in Kenema and unlawfully killed an unknown number of Sierra Leone Police Officers.
 - c. In or about January and February 1998, the Kamajors attacked and took control of the towns of Bo, Koribondo, and the surrounding areas. Thereafter, the practice of killing captured enemy combatants and suspected “Collaborators” continued and as a result, Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and enemy

combatants. Also, as part of these attacks in and around Bo and Koribondo, Kamajors unlawfully destroyed and looted an unknown number of civilian owned and occupied houses, buildings and businesses.

- d. Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembahun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected "Collaborators" and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.
- e. Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bombay, and the island town of Bonthe. As a result of these actions Kamajors identified suspected "Collaborators" and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property.
- f. In an operation called "Black December," the CDF blocked all major highways and roads leading to and from major towns mainly in the southern and eastern Provinces. As a result of these actions, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants.

COUNTS 1 – 2: UNLAWFUL KILLINGS

25. Unlawful killings included the following:
 - a. 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, Talama, Panguma and Sembahun, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;
 - b. 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

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- unlawfully killed an unknown number of civilians and captured enemy combatants;
- c. on or about 15 February 1998, at or near Kenema, Kamajors unlawfully killed an unknown number of Sierra Leone Police Officers;
 - d. in or about January and February 1998, in locations in Bo District including the District Headquarters town of Bo, Kebi Town, Koribondo, Kpeyama, Fengehun and Mongere, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;
 - e. between about October 1997 and December 1999 in locations in Moyamba District, including Sembahun, Taiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed an unknown number of civilians;
 - f. between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians;
 - g. between about 1 November 1997 and about 1 February 1998, as part of Operation Black December in the southern and eastern Provinces of Sierra Leone, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 1: Murder, a CRIME AGAINST HUMANITY, punishable under Article 2.a. of the Statute of the Court;

In addition, or in the alternative:

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.

COUNTS 3 – 4: PHYSICAL VIOLENCE AND MENTAL SUFFERING

26. 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, Blama, Kamboma and the surrounding areas, the CDF, largely Kamajors, intentionally inflicted serious bodily harm and serious physical suffering on an unknown number of civilians;
 - b. 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 the 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.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN**, **MOININA FOFANA** and **ALLIEU KONDEWA**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 3: Inhumane Acts, a **CRIME AGAINST HUMANITY**, punishable under Article 2.i. of the Statute;

In addition, or in the alternative:

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.

COUNT 5: LOOTING AND BURNING

- 27. 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 Sembahun, Gbangbatoke and surrounding areas, and in Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas, the unlawful taking and destruction by burning of civilian owned property.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crime alleged below:

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.

COUNTS 6 – 7: TERRORIZING THE CIVILIAN POPULATION and COLLECTIVE PUNISHMENTS

- 28. 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.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 6: Acts of Terrorism, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.d. of the Statute;

And:

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.

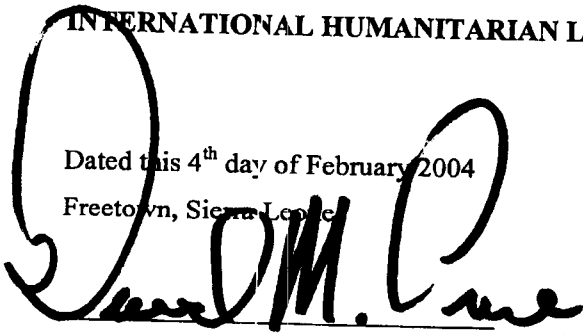
COUNT 8: USE OF CHILD SOLDIERS

29. 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.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crime alleged below:

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.

Dated this 4th day of February 2004
Freetown, Sierra Leone



David M. Crane
The Prosecutor

ANNEX E: JUDICIALLY NOTED FACTS

1. During the course of trial, the following facts were judicially noticed as to the truth of their contents:¹

- (a) The armed conflict in Sierra Leone occurred from March 1991 until January 2002
- (b) The city of Freetown, the Western Area, and the following districts located in the country of Sierra Leone: Kenema, Bo, Bonthe and Moyamba
- (c) Sierra Leone acceded to the Geneva Conventions of 12 August 1949 and Additional Protocol II to the Geneva Conventions on 21 October 1986.
- (d) The junta was forced from power on or about 14 February 1998. President Kabbah's government returned in March 1998.
- (e) Groups commonly referred to as the RUF, AFRC, and CDF were involved in armed conflict in Sierra Leone.

2. During the course of trial, the following documents were been judicially noticed as to their existence and authenticity:²

Reports of the Secretary-general of the United Nations on the Situation in Sierra Leone

- (a) 21 November 1995 (S/1995/975)
- (b) 5 December 1997 (S/1997/958)
- (c) 5 February 1998 (S/1998/103)
- (d) 18 March 1998 (S/1998/249)
- (e) 9 June 1998 (S/1998/486)
- (f) 12 August 1998 (S/1998/750)

¹ *Norman, Fofana and Kondewa*, SCSL-04-14-PT, Decision on Prosecution Motion for Judicial Notice and Admission of Evidence (TC), 2 June 2004, Annex I and II [Judicial Notice Decision (Trial)] In this decision, the Trial Chamber took judicial notice of several other facts that were held by the Appeals Chamber not to qualify (*Norman, Fofana and Kondewa*, SCSL-04-14-AR73, Fofana-Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" (AC), 16 May 2005, p. 20 [Judicial Notice Decision (Appeal).

² Judicial Notice Decision (Trial), Annex II.

- (g) 16 October 1998 (S/1998/960)
- (h) 16 December 1998 (S/1998/1176)
- (i) 4 March 1999 (S/1999/237)
- (j) 4 June 1999 (S/1999/645)
- (k) 30 July 1999 (S/1999/836)
- (l) 6 December 1999 (S/1999/1223)
- (m) 19 May 2000 (S/2000/455)

Other UN reports³

- (a) UNICEF Press Release, "Stop Using Child Soldiers, Sierra Leone Told," 19 June 1997. Comments on recruitment of child soldiers by the AFRC and also states that between 1992 and 1996, 4500 children were forced to fight on the RUF and governmental sides.
- (b) UNICEF Monthly Report, "Events Pertaining to Children" 31 July 1999. Refers to CDF pledge on 18 June 1999 to stop recruitment of children, "Kamajor Action Plan" signed by Hinga Norman.

UN Security Council Resolutions⁴

- (a) Res. 1346 (30 March 2001)
- (b) Res. 1313 (4 August 2000)
- (c) Res. 1306 (5 July 2000)
- (d) Res. 1299 (19 May 2000)
- (e) Res. 1289 (7 February 2000)
- (f) Res. 1270 (22 October 1999)
- (g) Res. 1220 (12 January 1999)
- (h) Res. 1181 (13 July 1998)

³ Judicial Notice Decision (Trial), Annex II, pp. 3-4.

⁴ Judicial Notice Decision (Trial), Annex II, p. 4. The Appeals Chamber held that the Security Council Resolutions (documents 22-30) qualified for judicial notice once the facts contained therein are extrapolated from each of the Resolutions and recognised as incapable of reasonable dispute (Judicial Notice Decision (Appeal), pp. 20-21).

- (i) Res. 1132 (8 October 1997)

Maps, Peace Agreements, Treaties⁵

- (a) The Lome Peace Accord, The Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), 7 July 1999.
- (b) The Abidjan Peace Accord, The Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), 30 November 1996.
- (c) The Conakry Accord: ECOWAS SIX-MONTH PEACE PLAN FOR SIERRA LEONE 23 OCTOBER 1997-22 APRIL 1998, 23 October 1997.
- (d) Ceasefire Agreement Between Government and the Revolutionary United Front, 18 May 1999
- (e) Map of Sierra Leone, Scale 1:350,000 UNAMSIL Geographic Information Service, 6 May 2000.
- (f) ICRC List of States party to the Geneva Conventions and their Additional Protocols
- (g) Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977.

⁵ Judicial Notice Decision (Trial), Annex II, p. 4.

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ANNEX F: PROCEDURAL HISTORY

1. Indictment, Arrest, Initial Appearance.

1. Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa were each indicted for 8 counts relating to Crimes Against Humanity, Violations of Common Article 3 and Additional Protocol II and Other Serious Violations of International Humanitarian Law in violation of Articles 2, 3 and 4 of the Statute of the Special Court for Sierra Leone.
2. Norman was arrested on 10 March 2003 following his indictment on 3 March 2003¹ and the approval of the Indictment by Hon. Justice Thompson.² He had his initial appearance at the Special Court Provisional Detention Facility in Bonthe on 15, 17 and 21 March 2003 where he pleaded “not guilty” to all counts.
3. Fofana and Kondewa were both indicted on 24 June 2003³ following approval of the Indictment by Hon. Justice Thompson.⁴ Orders for transfer and provisional detention were issued for both Accused by Hon. Justice Boutet pursuant to Rule 40bis,⁵ and on 29 May 2003, both Fofana and Kondewa were arrested. On 2 June 2003, Counsel for Kondewa filed an application which contested the validity of Kondewa’s arrest, transfer and detention under Rule 40bis (J).⁶ The application was dismissed. The Defence was however invited to file an application under Rule 40bis (K), which it did on 11 June 2003. The Chamber dismissed this application on 21 November 2003.⁷

¹ *Prosecutor v. Norman*, SCSL-03-08-I, Indictment, 3 March 2003 (filed on 7 March 2003).

² *Prosecutor v. Norman*, SCSL-03-08-PT, Decision Approving the Indictment and Order for Non-Disclosure (TC), 7 March 2003.

³ *Prosecutor v. Fofana*, SCSL-03-11-I, Indictment, 24 June 2003; *Prosecutor v. Kondewa*, SCSL-03-12-I, Indictment, 24 June 2003.

⁴ *Prosecutor v. Fofana*, SCSL-03-11-PT, Decision Approving the Indictment and Order for the Continued Detention of the Accused (TC), 26 June 2003, *Prosecutor v. Kondewa*, SCSL-03-12-PT, Decision Approving the Indictment and Order for the Continued Detention of the Accused (TC), 26 June 2003.

⁵ *Prosecutor v. Fofana*, SCSL-03-11-PD, Order for Transfer and Provisional Detention Pursuant to Rule 40bis (TC), 28 May 2003; *Prosecutor v. Kondewa*, SCSL-03-12-PD, Order for Transfer and Provisional Detention Pursuant to Rule 40bis (TC), 28 May 2003 (filed 29 May 2003).

⁶ *Prosecutor v. Kondewa*, SCSL-03-12-PD, Urgent Application for Release from Provisional Detention, 2 June 2003.

⁷ *Prosecutor v. Kondewa*, SCSL-03-12-PT, Decision on the Urgent Defence Application for Release from Provisional Detention (TC), 21 November 2003.

4. Fofana and Kondewa had their initial appearances at Bonthe Island on 1 July 2003. Both pleaded “not guilty” to all counts.
5. On 5 February 2004, the separate indictments of the three Accused were combined to form a consolidated indictment following joinder proceedings.⁸ A motion was filed by the Prosecution to amend the new indictment to include counts relating to sexual offences. It was dismissed on the basis of undue delay in the filing of the request.⁹
6. Counsel for Norman filed a motion on 21 September 2004 which requested his re-arraignment. He argued that the consolidated indictment added new charges and had a broader application.¹⁰ The Chamber stayed the materially different portions of the indictment, but found re-arraignment to be unnecessary.¹¹ On appeal, the Appeals Chamber granted leave to the Prosecution to belatedly amend the consolidated indictment to include the changes. The Chamber held that Norman was not prejudiced by the amendments since he had delayed filing his motion for seven months, during which time the Prosecution had proceeded with the charges. The original indictments were marked as “not to be proceeded with”, and the issue was redirected to the Trial Chamber.¹² The Trial Chamber again found re-arraignment unnecessary.¹³ Leave to appeal was denied.¹⁴ Fofana and Kondewa filed similar motions. The Chamber found that the consolidated indictment added no new crimes or charges, and dismissed the motions.¹⁵

⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Indictment, 5 February 2004 (filed on 4 February 2004).

⁹ *Prosecution v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment (TC), 20 May 2004 (filed on 1 June 2004).

¹⁰ *Prosecution v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Motion for Service and Arraignment on Second Indictment (TC), 20 September 2004 (filed on 21 September 2004).

¹¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment (TC), 29 November 2004.

¹² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-A, Decision on Amendment of Consolidated Indictment (AC), 16 May 2005.

¹³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Consequential Order on Amendment of the Consolidated Indictment (TC), 25 May 2005.

¹⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Defence Request for Leave to Appeal against the Consequential Non-Arraignment Order of Trial Chamber I (TC), 25 July 2005.

¹⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the Second Accused's Motion for Service and Arraignment on the Consolidated Indictment (TC), 6 December 2004; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the Third Accused's Motion for Service and Arraignment on the Consolidated Indictment and Further Appearance (TC), 8 December 2004.

2. Consequential Issues of the Stayed Portions of the Consolidated Indictment

2.1. Witness Indexing

7. Defence for Norman filed a motion requesting that the Prosecution provide a clear listing of witnesses who had already given or were likely to give testimonies as to the respective aspects of the stayed portions of the consolidated indictment.¹⁶ The motion was dismissed as the Prosecution had already disclosed their intended witnesses and evidence.¹⁷

2.2. Decision on the Moyamba Crime Base

8. The Prosecution proposed to call witnesses to testify about the Moyamba crime base. The Chamber considered whether, in terms of fairness to Norman and in the interests of justice, these witnesses should be called to testify as their evidence would relate to portions of the Consolidated Indictment that were stayed following the Decision of 29 November 2004. The Chamber found that no prejudice would ensue, and allowed witnesses to testify about the Moyamba crime base.¹⁸ Leave to appeal was denied.¹⁹

3. Preliminary Motions

9. Following their arrests, both Norman and Fofana filed motions to alter their detention conditions. In both cases, the motions were denied.²⁰ Counsel for Fofana appealed this Decision. The Appeals Chamber found that, although the Trial Chamber had erred in refusing to admit

¹⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Defence Request for "Stayed" Witness Indexing, 7 March 2005.

¹⁷ *Prosecution v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Request for "Stayed" Witness Indexing (TC), 28 April 2005.

¹⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Presentation of Witness Testimony at Moyamba Crime Base (TC), 28 April 2005.

¹⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base (TC), 23 May 2005 (filed on 24 May 2005).

²⁰ *Prosecutor v. Norman*, SCSL-03-08-PT, Decision on Motion for Modification of the Conditions of Detention (TC), 26 November 2003; *Prosecutor v. Fofana*, SCSL-03-14-T, Fofana - Decision on Application for Bail Pursuant to Rule 65 (TC), 5 August 2004.

certain unsigned documents, this did not affect the result, and therefore dismissed the appeal.²¹ A Prosecution motion to freeze the bank account of Norman was also denied.²²

10. Counsel for Norman filed six motions based on challenges to the jurisdiction of the Special Court, four of which were subsequently referred to the Appeals Chamber. The first motion, relating to the lawfulness of the Court's establishment, was decided by the Appeals Chamber in tandem with similar motions filed by Counsel for Morris Kallon²³ and Brima Bazzy Kamara.²⁴ It held that the Special Court does not form a part of the judiciary of Sierra Leone, and thus its establishment did not violate the Constitution, that the Government of Sierra Leone had authority to enter the Agreement establishing the Special Court, and that the crimes charged existed under customary international law at the time of their alleged commission. The motions were therefore dismissed.²⁵

11. Fofana was granted intervener status for the second and third motions, which concerned judicial independence and child recruitment. Both motions were dismissed, with the majority holding that the funding arrangements of the Court did not lead to any real likelihood of bias or lack of judicial independence²⁶ and that child recruitment was a crime under customary international law at all times relevant to the indictment.²⁷

12. The remaining two Norman motions, concerning command responsibility and a potential Rule 15 Disqualification, were decided by the Trial Chamber. They were dismissed as groundless.

13. Counsel for Fofana filed four preliminary motions relating to the jurisdiction of the Special Court. A Decision dismissing the initial three motions dealing with the illegal delegation

²¹ *Prosecutor v. Kondewa and Fofana*, SCSL-04-14-AR65, Fofana - Appeal against Decision Refusing Bail (AC), 11 March 2005.

²² *Prosecutor v. Norman*, SCSL-03-08-PT, Norman - Decision on *Inter Partes* Motion by Prosecution to Freeze the Account of the Accused Sam Norman at Union Trust Bank (SL) Limited or at any other Bank in Sierra Leone (TC), 19 April 2004.

²³ *Prosecutor v. Kallon*, Case No. SCSL-03-07-PT, Preliminary Motion Based on Lack of Jurisdiction: Establishment of the Special Court Violates the Constitution of Sierra Leone, 16 June 2003.

²⁴ *Prosecutor v. Kamara*, Case No. SCSL-03-10-PT, Application by Brima Bazzy Kamara in Respect of Jurisdiction and Defects in the Indictment, 22 September 2003.

²⁵ *Prosecutor v. Kallon*, SCSL-04-15-A; *Prosecutor v. Norman*, SCSL-03-08-A; *Prosecutor v. Kamara*, SCSL-04-16-A, Decision on Constitutionality and Lack of Jurisdiction (AC), 13 March 2004.

²⁶ *Prosecutor v. Norman*, SCSL-03-08-A, Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence) (AC), 13 March 2004 (filed on 15 March 2004).

²⁷ *Prosecutor v. Norman*, SCSL-03-08-PT, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) (TC), 31 May 2004.

of powers and the nature of armed conflict was rendered by the Appeals Chamber on 25 May 2004.²⁸ It held that the establishment of the Special Court did not involve a transfer of jurisdiction or sovereignty by Sierra Leone and that the establishment of the Special Court was properly within the powers of the Security Council and Secretary General of the United Nations. The issues raised in the motion on the nature of armed conflict were found to have no bearing on the applicability of the Statute of the Court. The Trial Chamber dismissed the fourth motion concerning lack of personal jurisdiction on the basis that it had jurisdiction to try Fofana as one bearing the greatest responsibility for crimes committed in Sierra Leone during the relevant period.²⁹

14. Counsel for Kondewa filed a Preliminary Motion based on defects in the indictment on 7 November 2003. The motion was denied with the exception of a rephrasing of some counts³⁰ which were then incorporated into the 5 December 2003 Bill of Particulars.³¹ Counsel also filed two motions concerning the jurisdiction of the Special Court. The motions questioned the constitutionality of the Court's establishment and whether the amnesty provided by the Lomé Accord could be overruled. Both were dismissed because the arguments were similar to those raised in previous preliminary motions brought on behalf of other Accused, which had been dismissed.³²

4. Counsel/Norman Self Representation

15. After their indictment and arrest, the three Accused were assigned separate Counsel to represent them during the Pre-Trial Phase.³³ On 3 June 2004, Norman submitted a letter to the Principle Defender in which he indicated his wish to represent himself. Accordingly, the Chamber

²⁸ *Prosecutor v. Fofana*, SCSL-03-11-A, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of powers by the United Nations (AC), 25 May 2004 (filed on 26 May 2004); Decision on Preliminary Motion on Lack of Jurisdiction: Nature of the Armed Conflict (AC), 25 May 2004 (filed on 26 May 2004); Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (AC), 25 May 2004 (filed on 26 May 2004).

²⁹ Decision on Personal Jurisdiction, para 48.

³⁰ *Prosecutor v. Kondewa*, SCSL-03-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (TC), 27 November 2003.

³¹ *Prosecutor v. Kondewa*, SCSL-03-12-PT, Bill of Particulars, 5 December 2003.

³² *Prosecution v. Kondewa*, SCSL-04-14-T, Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of the Special Court Violates the Constitution of Sierra Leone (TC), 25 May 2004 (filed on 27 May 2004); *Prosecutor v. Kondewa*, SCSL-03-12-T, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (TC), 25 May 2004.

³³ Counsel for Norman: James B. Jenkins-Johnson; Counsel for Fofana: Michiel Pestman; Counsel for Kondewa: James Mac Guill, later replaced by Charles Margai.

granted him qualified self representation³⁴ and assigned standby Counsel.³⁵ He was granted the use of additional resources, including a computer, to prepare his defence.³⁶

16. On 20 September 2004, Norman informed the Chamber that he would not participate in the Trial until a determination was made on several issues he had raised. That afternoon, none of the Accused appeared in Court.³⁷ The Chamber appointed Counsel for each defendant. On 1 October 2004, the Chamber presented a written decision concerning the Accused's non-appearance.³⁸ The Chamber held that pursuant to Rule 60, trial proceedings would continue, as it would not be in the interest of justice to allow Norman's deliberate absence to interrupt the trial. Norman's right to self-representation and his allowance for additional resources were revoked.

17. On 24 May 2006, Norman was not able to attend Court due to pain in his right hip.³⁹

5. Request by the Truth and Reconciliation Commission ("TRC")

18. The TRC requested a public hearing with Norman. The request was denied by the Chamber since such a hearing could endanger victims and witnesses as well as the fair trial of the Accused.⁴⁰ On appeal, the TRC was allowed to communicate with Norman via written statements, but a public hearing was prohibited.⁴¹

³⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court (TC), 8 June 2004.

³⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order for Assignment of Standby Counsel for Sam Hinga Norman (TC), 15 June 2004 (filed on 16 June 2004); Standby Counsel: Bu-Buakei Jabbi, John Wesley Hall, Quincy Whitaker and Tim Owen Q.C. Interim Counsel: Ibrahim Yillah.

³⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Request by Norman for Additional Resources to Prepare his Defence (TC), 23 June 2004.

³⁷ Kondewa did not attend due to health problems, while Fofana agreed with Norman's position. Later, Kondewa also failed to attend Court without reason.

³⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings (TC), 1 October 2004 (filed on 4 October 2004).

³⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Report by Chief of Detention on Non Attendance in Court of Samuel Hinga Norman, 24 May 2006.

⁴⁰ *Prosecutor v. Norman*, SCSL-03-08-PT, Decision on the request by the TRC of Sierra Leone to Conduct a Public Hearing with the Accused, 29 October 2003.

⁴¹ *Prosecutor v. Norman*, SCSL-03-08-PT, Decision on Appeal by the TRC for Sierra Leone and Chief Samuel Hinga Norman JP against the decision of his Lordship, Mr. Justice Bankole Thompson Delivered on 30 October 2003 to Deny the TRC's Request to Hold a Public Hearing with Chief Samuel Hinga Norman JP (AC), 28 November 2003.

6. Norman Request to the TRC

19. On 7 March 2005, Counsel for Norman submitted a request for a subpoena or binding order to the TRC for its unexpurgated underlying documents.⁴² The request was denied.⁴³

7. Trial Preparation

20. On April 11 2003, the Prosecution was ordered to disclose all relevant materials to Counsel for Norman.⁴⁴ Similar Orders concerning disclosure to Counsel for Fofana and Kondewa followed in July.⁴⁵ Disclosure and other materials for trial were filed by the Prosecution on 26 April 2004.⁴⁶ Pre-Trial Briefs were submitted by each of the Accused and the Prosecution.⁴⁷ Supplementary Briefs were submitted by the Prosecution and by Counsel for Kondewa.⁴⁸ On 1 June 2004, a Statement of Agreed Facts was filed by the Prosecution and Defence.⁴⁹ Status Reports have been submitted on a regular basis since that date.

8. Trial Summary

21. The trial began with opening statements from the Prosecution on 3 June 2004. It ended following closing arguments from all Parties on 30 November 2006 spanning eight sessions and

⁴² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Ex Parte and Confidential Motion of First Accused for Binding Order or Subpoena Duces Tecum to the Sierra Leone Truth and Reconciliation Commission for Its Unexpurgated Underlying Documents , 7 March 2005.

⁴³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Confidential Decision on Confidential Motion (TC), 25 July 2005.

⁴⁴ *Prosecutor v. Norman*, SCSL-03-08-PT, Scheduling Order (TC), 11 April 2003.

⁴⁵ *Prosecutor v. Fofana*, SCSL-03-11-PT, Interim Order for the Transmission of the Disclosure Materials to the Registrar (TC), 30 July 2003; *Prosecutor v. Kondewa*, SCSL-03-12-PT, Interim Order for the Transmission of the Disclosure Materials to the Registrar (TC), 30 July 2003 (filed on 31 July 2003).

⁴⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial (TC), 1 April 2004.

⁴⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73bis) of 13 February 2004, 2 March 2004; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Pre-Trial Brief of Defendant Allieu Kondewa, 22 March 2004; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Moinina Fofana Defence Pre-Trial Brief, 28 May 2004; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Defence Pre-Trial Brief Pursuant to the Revised Order for the Filing of Defence Pre-Trial Briefs (Under Rules 54 and 73bis) of 22nd March 2004, 31 May 2004.

⁴⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004, 22 April 2004; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-PT, Allieu Kondewa-Supplemental Pre-Trial Brief Pursuant to an Order of the Trial Chamber Dated the 22nd April 2004, 18 April 2004.

⁴⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Status Report Regarding "Decision on Co-operation Between the Parties Dated 26 May 2004, 1 June 2004.

162 days.⁵⁰ The Prosecution called 75 witnesses, including three expert witnesses, and 44 witnesses testified for the Defence. The Prosecution case ended on 14 July 2005. The Defence case began for the First Accused on 20 January 2006, and closed following the case for the Third Accused on 18 October 2006.

22. Prior to each trial session, a Status Conference was held. Pre-Trial and Pre-Defence Conferences were also held prior to the start of the trial and the start of the Defence presentation respectively.

9. Witnesses

23. On 25 January 2005, the Chamber ordered the Prosecution to provide each Defence team and the Chamber with a list of witnesses it intended to call fourteen days in advance of their testimony and to provide the Chamber with a confidential copy of unredacted witness statements one week prior to their testimony.⁵¹ The Prosecution filed accordingly.⁵²

24. Following the Status Conference of 25 November 2005, the Chamber noted the failure of all Defence Teams to comply with an Order of 21 October 2005 to provide witness summaries for all Defence witnesses.⁵³

9.1. Witness Protection

25. Several motions were granted by the Chamber to ensure the protection of witnesses.⁵⁴ In particular, on 9 June 2004, the Chamber granted a Prosecution motion which allowed all

⁵⁰ The dates for each session are as follows: First Session: 3 June 2004 to 23 June 2004, Second Session: 8 September 2004 to 31 September 2004, Third Session: 2 November 2005 to 7 December 2005, Fourth Session: 9 February 2005 to 15 March 2005, Fifth Session: 26 May 2005 to 14 July 2005, Sixth Session: 19 January 2006 to 23 February 2006, Seventh Session: 3 May 2006 to 16 June 2006, Eighth Session: 15 September 2006 to 18 October 2006. This excludes the dates of Status Conferences, Hearings on the Judgement for Acquittal and Closing Arguments.

⁵¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to Prosecution to Provide Order of Witnesses and Witness Statements (TC), 25 January 2005 (filed on 26 January 2005).

⁵² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Confidential Prosecution Order of Witnesses to be Called in the 5th Trial Session, 11 May 2005.

⁵³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case (TC), 28 November 2005.

⁵⁴ *Prosecutor v. Norman*, SCSL-03-08-PT, Decision on the Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure (TC), 23 May 2003; *Prosecutor v. Fofana*, SCSL-03-11-PT, Decision on Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, (TC), 16 October 2003; *Prosecutor v. Kondewa*, SCSL-03-12-PT, Ruling on the Prosecution Motion for

witnesses who had not waived their right to protection to testify with the use of special measures to prevent their identities from becoming public.⁵⁵

26. On 18 November 2004, the Chamber ruled that only where a Party is able to establish on a preponderance of probabilities that a witness is no longer in need of protection will protective measures be rescinded, varied, or augmented.⁵⁶ Counsel for Kondewa submitted a motion for protection of Defence witnesses which was later withdrawn.⁵⁷

9.2. Investigators and Expert Witnesses

27. On 7 December 2004, the Chamber granted a Defence request to call two investigators as witnesses to describe inconsistencies between the testimony and original statements of a prior witness.⁵⁸

28. Despite objections from the Defence and in separate October and December 2004 Decisions, the Chamber permitted the Prosecution call three additional expert witnesses: a military expert, an expert on child soldiers and an expert on forensic evidence.⁵⁹ The Defence was invited to cross-examine each witness.⁶⁰

29. On 1 March 2005, the Chamber dismissed an oral Defence motion to call as witnesses OTP Investigators who took the statements of a Prosecution witness whose testimony was in

Immediate Protective Measures for Witnesses and Victims and for Non Public Disclosure and Urgent Request for Interim Measures until Appropriate Protective Measures are in Place (TC), 10 October 2003.

⁵⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the Prosecution Motion for Modification of Protective Measures for Witnesses (TC), 8 June 2004.

⁵⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Ruling on Motion for Modification of Protective Measures for Witnesses (TC), 18 November 2004.

⁵⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Motion by the Third Accused Allieu Kondewa for Orders of Protective Measures for Defence Witnesses (TC), 17 November 2005; *Prosecution v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Notice of Withdrawal of Motion by Third Accused Allieu Kondewa for Orders of Protective Measures for Defence Witnesses (TC), 5 December 2005.

⁵⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Ruling on Defence Oral Application to Call OTP Investigators Who Took Down in Writing Statements of Prosecution Witness TF2-021 (TC), 7 December 2004.

⁵⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Reasoned Written Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders of Protective Measures (TC), 23 June 2005 (filed on 21 June 2005); *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund (TC), 1 October 2004.

⁶⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Consequential Order to Decision on Prosecution Request for Leave to Call Additional Expert Witness (TC), 1 October 2004; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures (TC), 24 May 2005.

contention. It was dismissed on the basis that the issue was collateral and unrelated to the charges in the indictment.⁶¹

9.3. Recall of Witnesses

30. A confidential motion was submitted by Counsel for Kondewa to recall a witness. The Chamber granted the motion.⁶²

9.4. Disclosure and Characterisation of Age of Witnesses

31. On 2 May 2005, the Prosecution complied with an Order from the Chamber to ascertain by independent means the age of TF2-080 and submitted an age assessment report.⁶³

9.5. Rebuttal Witnesses

32. During the presentation of the Defence case, the Prosecution filed a motion for leave to call rebuttal witnesses.⁶⁴ The motion was denied in an oral Decision. A Reasoned Written Decision followed on 27 November 2006. The Chamber found that the Prosecution could have reasonably expected the Defence evidence which it wanted to rebut. The Prosecution should have called its rebuttal witness during the Prosecution case.⁶⁵

10. Judicial Notice

33. On 2 June 2004, the Chamber issued a Decision on the Prosecution's motion for judicial notice of certain factual statements and documents and took notice of several facts.⁶⁶ Counsel for Fofana and Kondewa jointly requested leave to appeal, which was granted to Fofana, but not Kondewa. The Appeals Chamber delivered its Decision on 16 May 2005. It was held that while

⁶¹ *Prosecution v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Ruling on Defence Oral Application to Call an OTP Investigator Who Took a Written Statement from Prosecution Witness TF2-022 (TC), 1 March 2005.

⁶² *Prosecution v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Confidential Decision on Allieu Kondewa Motion for Recall of Prosecution Witness TF2-057 (TC), 8 March 2005.

⁶³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Confidential Prosecution Filing in Compliance with Order on Disclosure and Characterisation of the Age of Witness TF2-080, 2 May 2005.

⁶⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Prosecution Motion for Leave to Call Evidence in Rebuttal and for Immediate Protective Measures for Proposed Rebuttal Witnesses, 13 October 2006.

⁶⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Written Reasoned Decision on Prosecution Motion for Leave to Call Evidence in Rebuttal and for Immediate Protective Measures for Proposed Rebuttal Witness (TC), 27 November 2006.

⁶⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence (TC), 2 June 2004. See also Annex E: Judicially Noted Facts.

the Chamber had correctly identified the criteria for assessing whether to take judicial notice of a fact, it had erred in taking judicial notice of some of the facts.⁶⁷

11. Admissibility of Evidence

11.1. Evidence of Gender Crimes

34. On 23 June 2005 the Chamber denied a Prosecution request to admit evidence of gender crimes under existing counts in the Indictment. To allow such evidence would be prejudicial, particularly since it did not relate directly to a specific charge in the Indictment.⁶⁸ Leave to appeal was denied.⁶⁹

11.2. Testimony of Witness TF2-218

35. Defence for Norman filed a motion to exclude the testimony of TF2-218.⁷⁰ The motion was dismissed.⁷¹

36. On 8 June 2005, the Chamber made a confidential order regarding Witness TF2-218.⁷² The order was later quashed by the Appeals Chamber.⁷³

12. Exhibits and Documentary Evidence

37. On 27 October 2004, the Chamber issued an Order to the Prosecution to highlight all areas of interest on the map of Sierra Leone, and on separate maps, all areas of interest as they

⁶⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-AR73, Fofana - Decision on Appeal Against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence (TC), 16 May 2005 (filed on 18 May 2005). See also Annex E: Judicially Noted Facts.

⁶⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-T, Reasoned Majority Decision on Prosecution Motion for Admissibility of Evidence (TC), 23 May 2005.

⁶⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-T, Majority Decision on Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on Admissibility of Evidence (TC), 9 December 2005.

⁷⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-T, Confidential Norman Defence Motion to Exclude the Testimony of Witness TF2-218, 1 June 2005.

⁷¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-T, Confidential Decision on Norman Defence Motion to Exclude Witness TF2-218 (TC), 23 June 2005.

⁷² *Prosecution v. Norman, Fofana, Kondewa*, SCSL04-14-T, Confidential Decision on Defence Application Regarding Witness TF2-218 (TC), 8 June 2005.

⁷³ *Prosecution v. Norman, Fofana and Kondewa*, SCSL04-14-A, Decision on Prosecution Appeal Against Confidential Decision on Defence Application concerning Witness TF2-218 (AC), 26 May 2006.

related to the counts in the Indictment. Copies were to be distributed to the Defence teams and Chambers.⁷⁴

38. On 14 July 2005, the Chamber issued a Decision on a Prosecution request to admit certain documents into evidence pursuant to Rules 92bis and 98(c). The motion was granted in part.⁷⁵

13. Abuse of Process

39. On 28 April 2005, the Chamber rendered a decision on an abuse of process motion submitted by the Defence for Norman. It was held that the motion related to the jurisdiction of the Special Court, and as such, should have been filed as a preliminary motion. The Chamber also relied on the principle of *res judicata* to hold that the Defence could not raise or litigate issues on which the Chamber had rendered final decisions, except where exceptional circumstances were shown. The motion was dismissed.⁷⁶ Two requests for leave to appeal were denied.⁷⁷

14. Judgement of Acquittal

40. Counsel for Norman filed a motion for Judgement of Acquittal pursuant to Rule 98 on 3 August 2005.⁷⁸ Counsel for Fofana and Kondewa each filed similar motions the following day.⁷⁹ The Prosecution Responses to the three motions for Judgement of Acquittal were submitted on 18 August 2005.⁸⁰ In the interests of conducting a public hearing, redacted versions of the

⁷⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order on Prosecution Map Exhibits (TC), 27 October 2004.

⁷⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution’s Request to Admit into Evidence Certain Documents Pursuant to Rule 92bis and 89(c) (TC), 14 July 2005 (filed on 15 July 2005).

⁷⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on First Accused’s Motion on Abuse of Process (TC), 28 April 2005.

⁷⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber’s Decision on First Accused’s Motion on Abuse of Process (TC), 24 May 2005; *Prosecution v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Norman Counsel’s Request for Leave to Appeal under Rule 46(H) (TC), 25 July 2005.

⁷⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Motion for Judgement of Acquittal for the First Accused Samuel Hinga Norman, 3 August 2005.

⁷⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Motion for Judgement and Acquittal, 4 August 2005; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Motion for Judgement of Acquittal of the Third Accused Allieu Kondewa, 4 August 2005.

⁸⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98 (TC), 21 October 2005.

Prosecution Responses were later released to the public by Court Order.⁸¹ On 20 September 2005, the Parties made oral submissions, and on 21 October 2005, a Decision on the Motion for Judgement of Acquittal was rendered by the Court.⁸²

41. The Chamber determined that to enter a Decision of acquittal under Rule 98, it must find no evidence capable of supporting a conviction on one or more counts of the indictment. The legal standard set by Rule 98 limited the Court to a determination of whether the evidence *could* support a conviction, not whether it *should* support a conviction.

42. The motion was dismissed as lacking merit. However, the Court did find that there was no evidence capable of supporting convictions against the Accused in respect of the charge of Murder as a Crime Against Humanity and Murder as a Violation of Common Article 3 and Additional Protocol II in 13 specific locations. There was also no evidence to support a conviction in respect of the offence of Inhumane Acts as a Crime Against Humanity or Cruel Treatment as a Violation of Common Article 3 and Additional Protocol II in respect of Blama, or of the offence of Pillage as a Violation of Common Article 3 and Additional Protocol II in respect of Mobayeh. The Concurring Opinion of Judge Thompson endorsed the findings of the majority and elaborated upon the Chamber's approach to reliance on the jurisprudence of other international criminal tribunals and the scope of judicial discourse concerning Rule 98.

15. Preparation and Presentation of the Defence Case

43. On 17 November 2005, the Defence jointly filed its Materials pursuant to a 21 October 2005 Order to that effect. The Defence also submitted that particular aspects of that Order were contrary to the presumption of innocence and made proposals in relation to those aspects.⁸³ After the Chamber issued its Consequential Order for Compliance with the Order of 21 October,

⁸¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Public Version of the Prosecution Response to Motion for Judgement of Acquittal of the First Accused Samuel Hinga Norman, 27 September 2005; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Public Version of the Prosecution Response to Fofana Motion for Judgement of Acquittal, 27 September 2005; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Public Version of the Prosecution Response to Motion for Judgement of Acquittal of the Third Accused Allieu Kondewa, 27 September 2005.

⁸² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98 (TC), 21 October 2005.

⁸³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Joint Defence Materials Filed Pursuant to 21 October 2005 Order of Trial Chamber I and Request for Partial Modification Thereof, 17 November 2005.

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Defence for Fofana filed a motion for reconsideration.⁸⁴ The motion was dismissed on 29 November 2005.⁸⁵ Defence for Fofana submitted a second motion for reconsideration which was also dismissed.⁸⁶ Leave to Appeal was denied.⁸⁷

44. Defence for all three Accused filed Materials pursuant to the Chamber's Consequential Order for Compliance with the Order of 21 October 2005 on 5 December 2005.⁸⁸

45. On 6 December 2005, the Prosecution requested an Order to the Defence to disclose any written witness statements in its possession.⁸⁹ The Chamber denied the motion as the Prosecution had not sufficiently shown the potential for irreparable prejudice.⁹⁰

46. On 9 December 2005, the Chamber issued an Order to each of the Defence teams to file an evidentiary chart indicating the testimonial and documentary evidence on which the Defence would rely.⁹¹ The Chamber later ordered the Defence to produce additional materials to accompany their witness summaries.⁹² Each of the three Accused consequently filed updated

⁸⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-01-14-T, Urgent Fofana Motion for Reconsideration or, in the Alternative, for Leave to Appeal the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 29 November 2005.

⁸⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order on Urgent Motion for Reconsideration of the 25 November 2005 Oral Ruling and the 28 November Consequential Order of Trial Chamber I or, Alternatively, Request for Leave to Appeal Both (TC), 29 November 2005.

⁸⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case (TC), 7 December 2005.

⁸⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Urgent Fofana Request for Leave to Appeal the 7 December Decision of Trial Chamber I (TC), 8 June 2006.

⁸⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Defence Witness and Exhibits List for the First Accused as Per the Consequential Order for Compliance of 28th November 2005 Concerning the Preparation and Presentation of the Defence Case, 5 December 2005; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Materials filed Pursuant to the Consequential Order for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 5 December 2005; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Materials Filed by the Third Accused Allieu Kondewa Pursuant to Consequential Order for Compliance with the Order Concerning Preparation and Presentation of the Defence Case, 5 December 2005.

⁸⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Prosecution Request for Order to Defence Pursuant to Rule 73ter to Disclose Written Witness Statements, 6 December 2005.

⁹⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Prosecution Request for Order to the Defence Pursuant to Rule 173ter(B) to Disclose Written Witness Statements (TC), 21 February 2006.

⁹¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to the Defence for the Filing of an Evidentiary Chart (TC), 9 December 2005.

⁹² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Consequential Order to the Status Conference of 18 January 2006 (TC), 18 January 2006.

witness lists, witness orders and other materials.⁹³ Each of the Accused continued to file updated information until the end of May 2006.

47. Counsel for Norman submitted a request to file additional witness and exhibit lists on 1 February 2006.⁹⁴ The Chamber ordered that Norman should re-file his request to include details about the proposed witnesses and their proposed testimony.⁹⁵ After a second Order to re-file,⁹⁶ the Chamber granted the motion in part.⁹⁷ Another motion for leave to file additional exhibits was granted by the Chamber on 31 July 2006.⁹⁸

48. Following the March 2006 Status Conference, the Chamber issued a Consequential Order to each of the Accused to file a list of common witnesses and summaries of their testimonies.⁹⁹

49. On 3 April 2006, Counsel for Kondewa filed a statement of admissions of fact and statement of matters not in dispute.¹⁰⁰ Counsel for Fofana filed a similar admission on 25 April 2006,¹⁰¹ parts of which were disputed by the Prosecution.¹⁰² Counsel for Norman filed his admissions and statement of facts on 5 May 2006 with the Prosecution's suggested changes.¹⁰³

⁹³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Materials Filed Pursuant to the Consequential Order to the Status Conference of 18 January 2006, 23 January 2006; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Materials for the First Accused as per Consequential Order to the Status Conference of 18 January 2006, 23 January 2006; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Materials Filed by Third Accused Allieu Kondewa Pursuant to Consequential Order to the Status Conference of 18 January 2006, 23 January 2006.

⁹⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Urgent Motion for Leave to File Additional Witness and Exhibit Lists, 1 February 2006.

⁹⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to the First Accused to Re-File Summaries of Witness Testimonies (TC), 2 March 2006.

⁹⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Consequential Order to the Status Conference of 22 March 2006 (TC), 24 March 2006.

⁹⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on First Accused's Urgent Motion for Leave to File Additional Witness and Exhibit Lists (TC), 6 April 2006.

⁹⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the First Accused's Motion for Leave to Add Two Exhibits to the Exhibit List (TC), 31 July 2006.

⁹⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Consequential Order to the Status Conference of 22 March 2006 (TC), 23 March 2006.

¹⁰⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Submissions by Counsel for the Third Accused Allieu Kondewa Pursuant to the Consequential Order to the Status Conference of the 22nd Day of March 2006, 3 April 2006.

¹⁰¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Public Fofana Admissions of Fact and Statement of Matters Not in Dispute, 25 April 2006.

¹⁰² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Prosecution Response to 'Public Fofana Admissions of Fact and Statement of Matters Not in Dispute', 1 May 2006.

¹⁰³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Admissions by the Parties and a Statement of Other Matters Which are not in Dispute, Filed by Court Appointed Counsel for the first Accused, 5 May 2006.

50. On 6 June 2006, Counsel for Norman filed a motion to defer further evidence and the closing of the Defence case until the September-December 2006 Trial Session.¹⁰⁴ The Chamber found that enough time had been allotted for Norman's Defence and denied the motion with the exception of allowing Major General Abdul One Mohammed and J.A. Carpenter to testify during the September-December 2006 Trial Session. Alternatively, Counsel for Norman could enter exhibits in lieu of the testimony of JA Carpenter.¹⁰⁵ A request for an extension of time to file a complete submission of documents pursuant to the Decision was denied.¹⁰⁶ Leave to appeal was also denied.¹⁰⁷

51. On 8 June 2006, the Chamber dismissed motions from Kondewa and Fofana requesting leave to raise evidentiary objections during the Prosecution's cross-examination of witnesses that were not their own.¹⁰⁸

52. On 27 June 2006 Counsel for Fofana submitted a notice of removal of several witnesses from Fofana's witness list.¹⁰⁹ In a separate motion filed on the same day, Counsel for Fofana applied to call additional witnesses.¹¹⁰ The Chamber rendered its Decision on 17 July 2006 allowing seven of eight new witnesses.¹¹¹

¹⁰⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session, 6 June 2006.

¹⁰⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session (TC), 14 June 2006 (filed on 15 June 2006).

¹⁰⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on First Accused Urgent Motion for Extension of Time to Submit Documents Pursuant to Rule 92Bis (TC), 28 June 2006 (filed on 29 June 2006).

¹⁰⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Application by First Accused for Leave to Appeal Against The Decision on Their Motion For Extension of Time to Submit Documents Pursuant to Rule 92Bis (TC), 17 July 2006 (filed on 18 July 2006).

¹⁰⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the Third and Second Accused's Request For Leave to Raise Evidentiary Objections (TC), 8 June 2006 (filed on 9 June 2006).

¹⁰⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Additional Fofana Notice of Reduction of Witnesses, 27 June 2006 (filed on 28 June 2006).

¹¹⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Application for Leave to Call Additional Witnesses, 27 June 2006 (filed on 28 June 2006).

¹¹¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Fofana Application for Leave to Call Additional Witnesses (TC), 17 July 2006 (filed on 18 July 2006).

53. Counsel for Kondewa filed a request to call additional witnesses on 29 August 2006.¹¹² The motion was granted.¹¹³ A second motion to allow the addition of witness Morie Jusu Kamara to the witness list was also granted.¹¹⁴

54. On 24 October 2006, Counsel for Fofana filed a request pursuant to Rule 68 in which it submitted that the Prosecution had failed to disclose exculpatory evidence to the Defence. This gave rise to concerns that other important materials were also not disclosed. The motion was dismissed after the Chamber found that the material in question was not exculpatory in nature.¹¹⁵

16. Defence Witnesses

55. Following an oral motion by Counsel for Fofana, the Chamber released its Decision concerning disclosure under Sub-Rule 66(A)(iii). Counsel for Fofana had requested access to material statements and interview notes which had been given to the Prosecution by Fofana Defence Witnesses. The Chamber granted the motion, holding that Sub-Rule 66(A)(iii) was broad enough to allow the Defence access.¹¹⁶

16.1. Propriety of Contacting Defence Witnesses

56. On 11 May 2006, Counsel for each of the Accused submitted a joint request for clarification as to the propriety of the Prosecution contacting and interviewing confirmed Defence witnesses.¹¹⁷ The Chamber held that the Prosecution has a qualified right to contact Defence witnesses but could only contact them through the Witness and Victim Section of the Special

¹¹² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Kondewa Application for Leave to Call Additional Witnesses, 29 August 2006.

¹¹³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Kondewa Application for Leave to Call Additional Witnesses (TC), 20 September 2006.

¹¹⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Kondewa Application for Leave to Call One Additional Witness (TC), 3 October 2006.

¹¹⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Fofana Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure (TC), 6 November 2006.

¹¹⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Application by the Second Accused Pursuant to Sub-Rule 66(A)(iii) (TC), 14 June 2006.

¹¹⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Urgent Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses, 11 May 2006.

no errors of law or abuse of the Trial Chamber's discretion had been committed and dismissed the appeals.¹²⁵

16.4. Major-General Abdul One Mohammed

59. The testimony of Major-General Abdul One Mohammed was deferred to the September-December Trial Session as a result of a 17 July 2006 Order of the Chamber.¹²⁶ His expanded witness summary was submitted on 14 July 2006.¹²⁷ On 8 September 2006, Counsel for Norman notified the Chamber of Mohammed's continuing health problems and requested permission to admit documents in lieu of his oral testimony, pursuant to Rules 89(c) and 92Bis.¹²⁸ The motion was granted.¹²⁹

16.5. Daniel J Hoffman PhD.

60. Fofana filed a request to add Daniel J. Hoffman PhD, an expert in socio-cultural anthropology, as an expert witness on 16 June 2006, on the basis that he would assist the Chamber in understanding the structure and organization of the CDF.¹³⁰ The Chamber accepted Dr. Hoffman as an expert witness.¹³¹ The Prosecution notified Counsel for Fofana of their intention to cross-examine Dr. Hoffman on 29 August 2006.¹³²

¹²⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Motions by the First and Second Accused for Leave to Appeal the Chambers Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone (TC), 28 June 2006 (filed on 29 June 2006).

¹²⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-A, Decision on the Interlocutory Appeals Against Trial Chambers Decision Refusing to Subpoena the President of Sierra Leone (AC), 11 September 2006 (filed on 11 September 2006).

¹²⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Norman Motion to Defer Further Evidence and Closing of His Case to September-December Trial Session (TC), 14 June 2006 (filed on 15 June 2006).

¹²⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Expanded Witness Summary of Maj-Gen. Abdul One Mohammed, 14 July 2006.

¹²⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, First Accused Request to Admit Certain Documents in Lieu of the Oral Testimony of Major-General Abdul-One Mohammed Pursuant to Rules 89(c) and 92bis and Request for Clarification on Procedure for Closing, 8 September 2006.

¹²⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Norman Request to Admit Documents in Lieu of the Testimony of Abdul-One Mohammed Pursuant to Rules 89(c) and 92bis (TC), 15 September 2006.

¹³⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Submission Regarding Proposed Expert Witness Daniel J. Hoffman PhD, 16 June 2006.

¹³¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Fofana Submissions Regarding Proposed Expert Witness Daniel J. Hoffman PhD (TC), 7 July 2006.

¹³² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Public Notice of Intention to Cross-Examine Defence Witness Daniel J. Hoffman, PhD, 29 August 2006.

16.6. Fofana Motion Pursuant to Rule 92bis

61. In a motion filed on 27 September 2006, Counsel for Fofana requested permission to submit into evidence the statements of two witnesses unable to attend the trial in person.¹³³ The Chamber granted the motion in part, striking out inadmissible portions of the statement of one of the witnesses.¹³⁴

17. Final Trial Briefs

62. On 29 September 2006, the Chamber issued an Order to the Parties to file their final trial briefs no more than three weeks after the close of the Defence case.¹³⁵ The Chamber later granted a joint motion from the Prosecution and Defence teams to extend the deadline.¹³⁶ The final filings for each Accused occurred following the close of the trial. Norman's was filed on 27 November 2006, Fofana's on 24 November 2006 and Kondewa's on 8 January 2007.¹³⁷ The Prosecution submitted its final version of the Prosecution Final Trial Brief on 15 December 2006.¹³⁸

18. Death of Norman

63. Norman died on 22 February 2007 following a medical procedure in Dakar, Senegal.

64. In its Decision of 21 May 2007, the Chamber held that as a result of Norman's death, the Chamber had lost its jurisdiction *ratione personae* over the Accused Norman. The Chamber held that by virtue of the doctrine of abatement or extinguishment, there could be no further proceedings in respect of the Accused Norman. The Chamber therefore found that all proceedings against Norman were legally terminated as a result of his death. Consequently, the Chamber

¹³³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Request to Admit Evidence Pursuant to Rule 92bis, 27 September 2006.

¹³⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis (TC), 9 October 2006 (filed on 10 October 2006).

¹³⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order for Filing Final Trial Briefs and Presenting Closing Arguments (TC), 29 September 2006.

¹³⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Scheduling Order for Filing Final Trial Briefs and Presenting Closing Arguments (TC), 18 October 2006.

¹³⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Norman Final Trial Brief, 27 November 2006; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Final Trial Brief, 24 November 2006; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Final Trial Brief of Third Accused, Allieu Kondewa, Re-Filed Pursuant to Decision I dated 15th December 2006, 8 January 2007.

¹³⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Public Prosecution Filing, Pursuant to Order to Refile page 119, Registry page 20659 of Prosecution Final Trial Brief, dated 27th November 2006, 15 December 2006.

Court. Interviews could only be conducted after a witness had given informed consent and the witness had a right to refuse to be interviewed.¹¹⁸

16.2. Impermissibility of Eliciting Evidence Concerning the Second Accused During Cross-Examination of a Witness Called by the Third Accused

57. On 10 November 2006, the Chamber issued a written Decision following an oral objection made by Counsel for Fofana during the cross-examination of a witness for Kondewa. The Chamber sustained the objection stating that in the absence of notice to the Fofana of the areas to be discussed during cross-examination, questions involving Fofana were manifestly unfair to the Defence.¹¹⁹

16.3. Motion for Issuance of Subpoena to President Kabbah

58. On 15 December 2005, Counsel for Norman and Fofana filed motions for the issuance of a subpoena *ad testificandum* to President Ahmed Tejan Kabbah.¹²⁰ The Attorney General sent a written Notice to the Registrar stating that if a subpoena was issued to the President, the Attorney General intended to apply for it to be set aside.¹²¹ On 19 January 2006, the Chamber granted the Attorney General leave to intervene and present oral arguments in relation to the subpoena.¹²² The Chamber rendered its Decision on 13 June 2006. The motions were dismissed as the Applicants had failed to demonstrate how the proposed testimony would materially assist their respective cases.¹²³ Leave to appeal was granted.¹²⁴ In the Appeals Chamber, the majority held that

¹¹⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses (TC), 20 June 2006.

¹¹⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the Impermissibility of Eliciting Evidence Involving the Second Accused Through Cross-Examination of Witnesses Called by the Third Accused (TC), 10 November 2006.

¹²⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmed Tejan Kabbah, 15 December 2005; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Norman Motion for Issuance of a Subpoena *ad Testificandum* to H.E. Alhaji Dr. Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, 15 December 2005 (filed on 16 December 2005).

¹²¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Re: Application by Motion of Moinina Fofana and Samuel Hinga Norman for Issuance of Subpoena *Ad Testificandum* to President Ahmed Tejan Kabbah, 17 January 2006 (filed on 19 January 2006).

¹²² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order on the Motion for Issuance of a Subpoena *Ad Testificandum* to H.E. Dr. Ahmed Tejan Kabbah, the President of the Republic of Sierra Leone and Leave to Intervene (TC), 19 January 2006 (filed on 20 January 2006).

¹²³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Motions on Issuance of a Subpoena to President Kabbah (TC), 13 June 2006 (filed on 14 June 2006).

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determined that it would not make a final pronouncement on his guilt or innocence, though the evidence would be considered in its entirety for the remaining two Accused.¹³⁹ Defence for Norman sought leave for an extension of time to appeal this decision, which was denied.¹⁴⁰

65. The majority of the Chamber removed Norman's name and those of his lawyers from the cover sheets of further Decisions.¹⁴¹ The Hon. Justice Itoe dissented, holding that this issue had not been raised by the parties and that the Chamber could not decide it on its own motion. He held further that Norman's name should continue to feature in the name of the indictment up until the date of judgement as there had been no order nor application to remove it.¹⁴²

19. Miscellaneous

19.1. Media

66. On 4 October 2004, the Chamber authorized representatives of the Press and Public Affairs office to film in the Courtroom during trial proceedings, except during closed sessions.¹⁴³ Other requests for filming on specific dates were authorized for NBC,¹⁴⁴ Reuters Television,¹⁴⁵ and Radio Suisse Romande Espace 2.¹⁴⁶ At different times during the trial, two photographers were

¹³⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues (TC), 21 May 2007.

¹⁴⁰ *Prosecutor v. Kondewa and Fofana*, SCSL-04-14-T, Decision on Norman Defence Motion for Extension of Time to Seek Leave to Appeal Against Decision on Registrar's Submission of Evidence of the Death of Accused Samuel Hinga Norman and Consequential Issues (TC), 19 July 2007.

¹⁴¹ *Prosecutor v. Kondewa and Fofana*, SCSL-04-14-T, Order on New Application for the Appointment of Co-Counsel to for the Taylor Defence Team (TC), 22 June 2007.

¹⁴² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Majority Decision to Delete the Name of the First Accused, Samuel Hinga Norman (Now Deceased) from the Cover Sheets of Chamber Rulings, Decisions, Court Process and Records (TC), 22 June 2007.

¹⁴³ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to Permit Filming in the Court Room (TC), 4 October 2004.

¹⁴⁴ *Prosecutor v. Norman, Fofana and Kondewa*, Order to Permit Filming in the Court Room, (TC), 26 November 2004; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Corrigendum to Order to Permit Filming in the Court Room (TC), 30 November 2004.

¹⁴⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to Permit Filming in the Court Gallery (TC), 1 June 2005 (filed on 2 June 2005).

¹⁴⁶ *Prosecutor v. Hinga Norma, Fofana, Kondewa*, SCSL-04-14-T, Order to Permit Filming in the Court Gallery (TC), 1 June 2005 (filed on 2 June 2005).

authorized to take still photos of the trial proceedings with limitations based on witness protection and the fairness of the trial.¹⁴⁷

19.2. Trial Monitoring

67. Following a request by international monitors operating under the auspices of the War Crimes Studies Centre of the University of California at Berkley, and national monitors operating under the auspices of the Coalition for Justice and Accountability and the International Centre for Transitional Justice, national and international monitors were permitted to observe closed sessions of the Trial Chamber.¹⁴⁸ The number of authorized persons was later increased.¹⁴⁹ A further Order was issued authorizing continued monitoring and detailing certain restrictions on the number of monitors and use of information gathered during closed sessions.¹⁵⁰

19.3. Prohibition of Visits

68. On 20 January 2004, the Registrar prohibited communications and visits for Norman for a period of 14 days after a Prosecution motion demonstrated that Norman may have been prepared to call various factions to arms.¹⁵¹

69. As a result of several letters written by Norman being published in local newspapers, on 8 November 2004, the Registrar prohibited all visits between Norman and any other persons, with the exception of Court Appointed Counsel, for a period of four weeks.¹⁵²

70. On 6 June 2005, the Registrar again prohibited communications and visits for Norman for a period of 28 days after learning that Norman was responsible for writing and sending a letter "To

¹⁴⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to Permit Photography in Court Room (TC), 14 February 2005; *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order to Permit Photography in Courtroom (TC), 25 May 2006.

¹⁴⁸ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order on Trial Monitoring During Closed Session (TC), 27 October 2004.

¹⁴⁹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order on Trial Monitoring During Closed Session (TC), 5 November 2004.

¹⁵⁰ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Further Order on Trial Monitoring during Closed Session (TC), 7 February 2006.

¹⁵¹ *Prosecutor v. Norman*, SCSL-03-08-PT, Decision Prohibiting Communications and Visits (TC), 20 January 2004 (filed on 24 January 2004).

¹⁵² *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision Prohibiting Visits (TC), 8 November 2004.

all South Easterners of Sierra Leone and all Kamajors, Family and Friends". A motion to reverse the Registrar's decision was dismissed.¹⁵³

71. On 3 March 2005, the Chamber rendered a confidential decision on a confidential Defence motion on a detention issue.¹⁵⁴

19.4. Surveillance Cameras in the Detention Facility

72. On 6 April 2006, the Chamber issued a Decision allowing the installation of surveillance cameras in the visitation area of the detention facility.¹⁵⁵ A Reasoned Written Decision followed on 22 June 2006. The Chamber found that the Principal Defender lacked standing to bring the motion since the role of the Principal Defender was administrative not legal.¹⁵⁶

19.5. Right of Audience for Mr. Ianuzzi

73. Counsel for Fofana requested that the Chamber grant Mr. Ianuzzi, a legal assistant for the Fofana Defence team, a right of audience to make submissions and lead witnesses before the Chamber for the duration of the Defence case. On 27 June 2006, the Chamber dismissed the motion as not properly before the Court. The Chamber stated that it only has jurisdiction to appoint Counsel when necessary and to review decisions of the Principle Defender when they violate the rights of the Accused.¹⁵⁷

¹⁵³ *Prosecutor v. Norman*, SCSL-04-14-T, Decision on Request to Reverse the Order of the Acting Registrar Under Rule 47(A) of the Rules of Detention of 6 June 2005 (TC), 29 June 2005.

¹⁵⁴ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Confidential Motion on Detention Issue (TC), 2 March 2005.

¹⁵⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on the Principal Defender's Motion for a Review of the Registrar's Decision to Install Surveillance Cameras in the Detention Facility (TC), 6 April 2006.

¹⁵⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Written Reasons on Decision on the Principal Defender's Motion for a Review of the Registrar's Decision to Install Surveillance Cameras in the Detention Facility (TC), 22 June 2006.

¹⁵⁷ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Application by Court Appointed Counsel for the Second Accused for Right of Audience for Mr. Ianuzzi (TC), 27 June 2006.

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ANNEX G: TABLE OF AUTHORITIES

1. Special Court for Sierra Leone Decisions and Judgements

Full Citation	Short Name (If Applicable)
<i>Prosecutor v. Norman, Fofana and Kondewa</i>	
<i>Prosecution v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis (TC), 9 October 2006.	
<i>Prosecution v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Decision on Norman Request to Admit Documents in Lieu of Oral Testimony of Abdul One-Mohammed Pursuant to Rules 89(C) and 92bis (TC), 15 September 2006.	
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Decision on Motions for Judgment of Acquittal pursuant to Rule 98 (TC), 21 October 2005.	Rule 98 Decision.
<i>Prosecution v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C) (TC), 14 July 2005.	
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures (TC), 21 June 2005.	<i>Norman</i> Decision on Additional Witnesses.
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence (TC), 24 May 2005.	Admissibility of Evidence Decision.
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Decision on Amendment of the Consolidated Indictment (AC), 16 May 2005.	
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-A, Fofana - Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" (AC), 16 May 2005.	Appeal Decision on Judicial Notice.
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-A, Fofana - Appeal Against Decision Refusing Bail (AC), 11 March 2005.	<i>Fofana</i> Bail Appeal.
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment (TC), 29 November 2004.	
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination (TC), 16 July 2004.	<i>Norman</i> Decision on Disclosure of Witness Statements.
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses (TC), 8 June 2004.	
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-PT, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence (TC),	Trial Decision on Judicial Notice.

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2 June 2004.	
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on behalf of Accused Fofana (TC), 3 March 2004.	Decision on Personal Jurisdiction.
<i>Prosecutor v. Norman, Kondewa and Fofana</i> , SCSL-04-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment) (AC), 31 May 2004.	Appeal Decision on Child Recruitment.
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-04-14-A, Decision on Preliminary Motion on Lack of Jurisdiction <i>Materiae</i> : Nature of the Armed Conflict (AC), 25 May 2004.	Appeal Decision on Nature of Armed Conflict.
<i>Prosecutor v. Norman, Fofana and Kondewa</i> , SCSL-2004-14-PT, Indictment, 4 February 2004.	
<i>Prosecutor v. Norman</i>	
<i>Prosecutor v. Norman</i> , SCSL-03-08-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure (TC), 23 May 2003.	
<i>Prosecutor v. Fofana</i>	
<i>Prosecutor v. Fofana</i> , SCSL-03-11-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure (TC), 16 October 2003.	
<i>Prosecutor v. Kondewa</i>	
<i>Prosecutor v. Kondewa</i> , SCSL-03-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (TC), 27 November 2003.	<i>Kondewa</i> Decision.
<i>Prosecutor v. Kondewa</i> , SCSL-03-12-PT, Ruling on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure and urgent Request for Interim Measures until Appropriate Protective Measures are in Place (TC), 10 October 2003.	
<i>Prosecutor v. Sesay, Kallon and Gbao</i>	
<i>Prosecutor v. Sesay, Kallon and Gbao</i> , SCSL-04-15-T, Oral Decision on RUF Motions for Judgement of Acquittal Pursuant to Rule 98, 25 October 2006.	<i>Sesay et al.</i> Rule 98 Oral Decision.
<i>Prosecutor v. Sesay, Kallon and Gbao</i> , SCSL-04-15-T, Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination (TC), 2 August 2006.	
<i>Prosecutor v. Sesay, Kallon and Gbao</i> , SCSL-04-15-T, Written Reasoned Ruling on Defence Evidentiary Objections Concerning Witness TF1-108 (TC), 15 June 2006.	
<i>Prosecutor v. Sesay, Kallon and Gbao</i> , SCSL-04-15-T, Ruling on Gbao	

Application to Exclude Evidence of Prosecution Witness Mr. Koker (TC), 23 May 2005.	
<i>Prosecutor v. Sesay, Kallon and Gbao</i> , SCSL-04-15-PT and <i>Prosecutor v. Brima, Kamara and Kanu</i> , SCSL-04-16-PT, Decision on the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-04-15-PT and SCSL-04-16-PT (TC), 11 May 2004.	
<i>Prosecutor v. Sesay</i>	
<i>Prosecutor v Sesay</i> , SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (TC), 13 October 2003.	Sesay Decision.
<i>Prosecutor v Sesay</i> , SCSL-2003-05-I, Indictment, 7 March 2003.	
<i>Prosecutor v. Gbao</i>	
<i>Prosecutor v. Gbao</i> , SCSL-03-09-I, Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension on Time for the Filing of a Response to the Prosecution Motions And The Suspension of any Ruling on the Issue of Protective Measures that may be Pending before other Proceedings before the Special court as a Result of Similar Motions Filed to those that have been Filed by the Prosecution in this Case (TC), 16 May 2003.	
<i>Prosecutor v. Brima, Kamara and Kanu</i>	
<i>Prosecutor v. Brima, Kamara and Kanu</i> , SCSL-04-16-T, Judgement (TC), 20 June 2007	
<i>Prosecutor v. Brima, Kanu and Kamara</i> , SCSL-03-16-T, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98 (TC), 31 March 2006.	<i>Brima et al.</i> Rule 98 Decision.
<i>Prosecutor v. Sesay, Kallon and Gbao</i> , SCSL-04-15-PT and <i>Prosecutor v. Brima, Kamara and Kanu</i> , SCSL-04-16-PT, Decision on the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-04-15-PT and SCSL-04-16-PT (TC), 11 May 2004, para 38.	
<i>Prosecutor v. Brima, Kamara and Kanu</i> , SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment (TC), 1 April 2004.	<i>Kamara</i> Decision on Form of Indictment.
<i>Prosecutor v. Kanu</i>	
<i>Prosecutor v Kanu</i> , SCSL-2003-13-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (TC), 19 November 2003.	<i>Kanu</i> Decision.

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2. International Criminal Tribunal for Rwanda Decisions and Judgements

Full Citation	Short Name (If Applicable)
<i>Prosecutor v. Akayesu</i>	
<i>Prosecutor v. Akayesu</i> , ICTR-96-4-A, Judgement (AC), 1 June 2001.	<i>Akayesu</i> Appeal Judgement.
<i>Prosecutor v. Akayesu</i> , ICTR-96-4-T, Judgement (TC), 2 September 1998.	<i>Akayesu</i> Trial Judgement.
<i>Prosecutor v. Akayesu</i> , ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness (TC), 9 March 1998.	
<i>Prosecutor v. Bagilishema</i>	
<i>Prosecutor v. Bagilishema</i> , ICTR-95-1A-1, Judgement (Reasons) (AC), 3 July 2002.	<i>Bagilishema</i> Appeal Judgement.
<i>Prosecutor v. Bagilishema</i> , ICTR-95-1A-T, Judgement (TC), 7 June 2001.	<i>Bagilishema</i> Trial Judgement.
<i>Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva</i>	<i>Bagosora</i> Appeal Decision
<i>Prosecutor v. Bagosora</i> , ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber Decision (AC), 18 December 2006.	
<i>Prosecutor v. Gacumbitsi</i>	
<i>Prosecutor v. Gacumbitsi</i> , ICTR-01-64-A, Judgement (AC), 7 July 2006.	<i>Gacumbitsi</i> Appeal Judgement.
<i>Prosecutor v. Gacumbitsi</i> , ICTR-2001-64-T, Judgment (TC), 17 June 2004.	<i>Gacumbitsi</i> Trial Judgement.
<i>Prosecutor v. Kajelijeli</i>	
<i>Prosecutor v. Kajelijeli</i> , ICTR-98-44A-A, Judgement (AC), 23 May 2005.	<i>Kajelijeli</i> Appeal Judgement.
<i>Prosecutor v. Kamuhanda</i>	
<i>Prosecutor v. Kamuhanda</i> , ICTR-99-54A-A, Judgement (AC), 19 September 2005.	<i>Kamuhanda</i> Appeal Judgement.
<i>Prosecutor v. Karemera, Ngirumpatse and Nzirodera</i>	
<i>Prosecutor v. Karemera, Ngirumpatse and Nzirodera</i> , ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (AC), 12 April 2006.	<i>Karemera</i> Appeal Decision on Joint Criminal Enterprise.
<i>Prosecutor v. Kayishema and Ruzindana</i>	
<i>Prosecutor v. Kayishema and Ruzindana</i> , ICTR-95-1-T, Judgement (TC), 21 May 1999.	<i>Kayishema and Ruzindana</i> Trial Judgement.
<i>Prosecutor v. Musema</i>	
<i>Prosecutor v. Musema</i> , ICTR-96-13-A, Judgement (AC), 16 November 2001.	<i>Musema</i> Appeal Judgement.
<i>Prosecutor v. Musema</i> , ICTR-96-13-T, Judgement and Sentence (TC), 27	<i>Musema</i> Trial Judgement.

January 2000.	
<i>Prosecutor v. Niyitegeka</i>	
<i>Prosecutor v. Niyitegeka</i> , ICTR-96-14-A, Judgement (AC), 9 July 2004.	
<i>Prosecutor v. Ntagerura, Bagambiki and Imanishimwe</i>	
<i>Prosecutor v. Ntagerura, Bagambiki and Imanishimwe</i> , ICTR-99-46-A, Judgement (AC), 7 July 2006.	
<i>Prosecutor v. Ntakirutimana and Ntakirutimana</i>	
<i>Prosecutor v. Ntakirutimana and Ntakirutimana</i> , ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004.	Ntakirutimana Appeal Judgement.
<i>Prosecutor v. Rutaganda</i>	
<i>Prosecutor v. Rutaganda</i> , ICTR-96-3-A, Judgement (AC), 26 May 2003.	Rutaganda Appeal Judgement.
<i>Prosecutor v. Rutaganda</i> , ICTR-96-3-T, Judgement and Sentence (TC), 6 December 1999.	Rutaganda Trial Judgement.
<i>Prosecutor v. Semanza</i>	
<i>Prosecutor v. Semanza</i> , ICTR-97-20-A, Judgement (AC), 20 May 2005.	Semanza Appeal Judgement.
<i>Prosecutor v. Semanza</i> , ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003.	Semanza Trial Judgement.

3. International Criminal Tribunal for the Former Yugoslavia Decisions and Judgements

Full Citation	Short Name (If Applicable)
<i>Prosecutor v. Aleksovski</i>	
<i>Prosecutor v. Aleksovski</i> , IT-95-14/1-T, Judgement (TC), 25 June 1999.	Aleksovski Trial Judgement.
<i>Prosecutor v. Aleksovski</i> , IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence (AC), 16 February 1999.	Aleksovski Decision on Hearsay Evidence.
<i>Prosecutor v. Babic</i>	
<i>Prosecutor v. Babic</i> , IT-03-72-A, Judgement on Sentencing Appeal (AC), 18 July 2005.	Babic Judgement on Sentencing Appeal.
<i>Prosecutor v. Blagojevic</i>	
<i>Prosecutor v. Blagojevic</i> , IT-02-60-T, Judgement (TC), 17 January 2005.	Blagojevic Trial Judgement.
<i>Prosecutor v. Blaskic</i>	
<i>Prosecutor v. Blaskic</i> , Case No. IT-95-14-A, Judgement (AC), 29 July 2004.	Blaskic Appeal Judgement.
<i>Prosecutor v. Blaskic</i> , IT-95-14-T, Judgement (TC), 3 March 2000.	Blaskic Trial Judgement.

<i>Prosecutor v. Brdjanin</i>	
<i>Prosecutor v. Brdjanin</i> , IT-99-36-A, Judgement (AC), 3 April 2007.	<i>Brdjanin Appeal Judgement.</i>
<i>Prosecutor v. Brdjanin</i> , IT-99-36-T, Judgement (TC), 1 September 2004.	<i>Brdjanin Trial Judgement.</i>
<i>Prosecutor v. Brdjanin and Talic</i> , IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (TC), 26 June 2001.	
<i>Prosecutor v. Delalic, Mucic, Delic and Landzo</i>	
<i>Prosecutor v. Delalic, Mucic, Delic and Landzo</i> , Judgement, IT-96-21-A, Judgement (AC), 20 February 2001.	<i>Celebici Appeal Judgement.</i>
<i>Prosecutor v. Delalic, Mucic, Delic and Landzo</i> , Judgement, IT-96-21-T, Judgement (TC), 16 November 1998.	<i>Celebici Trial Judgement.</i>
<i>Prosecutor v. Furundzija</i>	
<i>Prosecutor v. Furundzija</i> , IT-95-14/1-A, Judgement (AC), 21 July 2000.	<i>Furundzija Appeal Judgement.</i>
<i>Prosecutor v. Furundzija</i> , IT-95-17/1-T, Judgement (TC), 10 December 1998.	<i>Furundzija Trial Judgement.</i>
<i>Prosecutor v. Galic</i>	
<i>Prosecutor v. Galic</i> , IT-98-29-A, Judgement (AC), 30 November 2006.	<i>Galic Appeal Judgement.</i>
<i>Prosecutor v. Galic</i> , IT-98-29-T, Judgment (TC), 5 December 2003.	<i>Galic Trial Judgement.</i>
<i>Prosecutor v. Galic</i> , IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps (TC), 3 July 2002.	
<i>Prosecutor v. Hadzihasanovic and Kubura</i>	
<i>Prosecutor v. Hadzihasanovic and Kubura</i> , IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, 11 March 2005.	
<i>Prosecutor v. Hadzihasanovic, Alagic and Kubura</i> , IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (AC), 16 July 2003.	<i>Hadzihasanovic et al. Appeal Decision on Command Responsibility.</i>
<i>Prosecutor v. Halilovic</i>	
<i>Prosecutor v. Halilovic</i> , IT-01-48-T, Judgement (TC), 16 November 2005, para 32 and footnoted references.	<i>Halilovic Trial Judgement.</i>
<i>Prosecutor v. Jelusic</i>	
<i>Prosecutor v. Jelusic</i> , IT-95-10-A, Judgment (AC), 5 July 2001.	<i>Jelusic Appeal Judgement.</i>
<i>Prosecutor v. Jelusic</i> , IT-95-10-T, Judgement (TC), 14 December 1999.	<i>Jelusic Trial Judgement.</i>
<i>Prosecutor v. Kordic and Cerkez</i>	
<i>Prosecutor v. Kordic and Cerkez</i> , IT-95-14/2-A, Judgement (AC), 17 December 2004.	<i>Kordic and Cerkez Appeal Judgement.</i>

<i>Prosecutor v. Kordic and Cerkez</i> , IT-95-14/2-T, Judgement (TC), 26 February 2001.	<i>Kordic and Cerkez Trial Judgement.</i>
<i>Prosecutor v. Krajisnik</i>	
<i>Prosecutor v. Krajisnik</i> , IT-00-39-T, Judgement (TC), 27 September 2006.	<i>Krajisnik Trial Judgement.</i>
<i>Prosecutor v. Krnojelac</i>	
<i>Prosecutor v. Krnojelac</i> , IT-97-25-A, Judgement (AC), 17 September 2003.	<i>Krnojelac Appeal Judgement.</i>
<i>Prosecutor v. Krnojelac</i> , IT-97-25-T, Judgement (TC), 15 March 2002.	<i>Krnojelac Trial Judgement.</i>
<i>Prosecutor v. Krstic</i>	
<i>Prosecutor v. Krstic</i> , IT-98-33-A, Judgement (AC), 19 April 2004.	<i>Krstic Appeal Judgement.</i>
<i>Prosecutor v. Krstic</i> , IT-98-33-T, Judgement (TC), 2 August 2001.	<i>Krstic Trial Judgement.</i>
<i>Prosecutor v. Kunarac, Kovac and Vukovic</i>	
<i>Prosecutor v. Kunarac, Kovac and Vukovic</i> , IT-96-23 & 23/1-A, Judgement (AC), 12 June 2002.	<i>Kunarac et al. Appeal Judgement.</i>
<i>Prosecutor v. Kunarac, Kovac and Vukovic</i> , IT-96-23 & 23/1-A, Judgement (TC), 22 February 2001.	<i>Kunarac et al. Trial Judgement.</i>
<i>Prosecutor v. Kunarac et al.</i> , IT-96-23 and IT-96-23/1-T, Decision on Motion for Acquittal (TC), 3 July 2000.	<i>Kunarac et al. Rule 98bis Decision.</i>
<i>Prosecutor v. Kunarac, Kovac and Vukovic</i> , IT-96-23 & 23/1, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony (TC), 3 July 2000.	
<i>Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic</i>	
<i>Prosecutor v. Kupreskic, Kupreskic, Kupreskic and Santic</i> , IT-95-16-A, Judgement (AC), 23 October 2001.	<i>Kupreskic et al. Appeal Judgement.</i>
<i>Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic</i> , IT-95-16-T, Judgement (TC), 14 January 2000.	<i>Kupreskic Trial Judgement.</i>
<i>Prosecutor v. Kvocka</i>	
<i>Prosecutor v. Kvocka Kos, Radic, Zigic and Prcac</i> , IT-98-30/1-A, Judgement (AC), 28 February 2005.	<i>Kvocka et al. Appeal Judgement.</i>
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ANNEX H: TABLE OF ABBREVIATIONS

AFRC	Armed Forces Revolutionary Council
AK-47	Avtomat Kalashnikova 1947
CDF	Civil Defence Forces
CO	Commanding Officer
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
ERECOM	Eastern Region Defence Committee
GPMG	General Purpose Machine Gun
G3	Gewehr 3
ICTR	International Criminal Court for Rwanda
ICTY	International Criminal Court for the former Yugoslavia
NCC	National Coordinating Committee
NDMC Headquarters	National Diamond Mining Corporation headquarters in Tongo
OAU	Organisation of African Unity
OC	Officer Constable
Rebels	AFRC and RUF forces
Ronkos	cotton cloths with talismans
RPG	Rocket propelled grenade
RUF	Revolutionary United Front
Rules	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SLA	Sierra Leone Army
SS Camp	Special Security Camp
SSD	State Security Division
UNDP	United Nations Development Programme