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WEDNESDAY, 12 MARCH 2008.

JUDGE WINTER: Special Court for Sierra Leone Appeals Chamber. Case Number SCSL-2004-14-A. The Prosecutor against, Moinina Fofanah and Allieu Kondewa for Hearing of Appeals.

MR STAKER: May it please the Chamber for the Prosecution, Christopher Staker, with me I have Stephen Rapp, Joseph Kamara, Karim Agha, Regine Gachoud, Elizabeth Baumgartner, Bridget Osho and Francis Banks - Kamara.

MR CARROL: May it please Your Honour.

JUDGE KING: Just a second please. I got up to Joseph Kamara.

MR STAKER: Karim Agha, Regine Gachoud.

Judge King: Sorry?

MR STAKER: Regine Gachoud. R E G I N E, G A C H O U D.

JUDGE KING: THANK YOU.

MR STAKER: Elizabeth Baumgartner. It`s Elizabeth with an S--

JUDGE KING: Elizabeth?

MR STAKER: With an S not with a Z. Baumgartner.

1 JUDGE KING: That's not an English Elizabeth.

2 MR STAKER: That is a Swiss Elizabeth.

3 PRESIDING JUDGE: Swiss Elizabeth, I thought so. Thank you.

4 MR STAKER: Bridget Osho and Francis Banks - Kamara.

5 JUDGE KING: That's a very formidable team is itn't it.

6 MR STAKER: Thank you for what I take to be a complement

7 Your Honour.

8 JUDGE KING: It couldn't be anything else. Thank you. Yes
9 the Defence.

10 MR CARROL: May it please Your Lordships, I appear for the
11 respondent and with me is, my name is Bola Carol.

12 JUDGE KING: Is that so?

13 MR CARROL: That is so Your Lordship. And with me is, my
14 learned friend Mr Mohammed Pa Momo Fofanah. As Your Lordships
15 pleases.

16 MR KING: Mr Bola Carol and -- -

17 MR CARROL: Mohammed Pa Momo Fofanah.

18 MR KING: Your from Banjul are you?

19 MR CARROL: Indeed Your Lordships.

20 MR KING: Mohammed Fofanah?

21 MR CARROL: No, no. He`s from Sierra Leone.

22

23 JUDGE KING: No. I said you..

24 MR CARROL: I am, Your Lordships.

25 JUDGE KING: Mohammed Pa---

1 MR CARROL: Pa Momo. M O M O. Without an H. As Your
2 Lordship pleases.

3 MR KING: That`s a--- you are for who? You`re for who MR
4 CARROL?

5 MR CARROL: For for the first respondent Your Lordships.

6 MR KING: Yes.

7 MR WILLIAMS: May it please Your Lordships, for the second
8 respondent Yada Williams. And with me is Usman Jalloh My Lords.

9 MR KING: Thank you. Right. Are we ready to go?

10 MR STAKER: Yes, Your Honour before we commence I
11 understand my friend Mr Williams has an application he wishes to
12 make.

13 MR KING: Very well.

14 MR WILLIAMS: May it please Your Lordships, My Lord, it's a
15 small or slight amendment I wish to seek to Ground IV of our
16 notice of appeal My Lords.

17 MR KING: Yes.

18 MR WILLIAMS: My Lords ground iv of our notice of appeal
19 challenged the Trial Chamber judgment on the basis that the
20 Chamber ^ in failing to establish the correct Mens rea for
21 aiding and abetting in relation to the offences that occurred in
22 Tongo fields, My Lords. My lord, Our appeals brief extensively
23 argued ground iv that the Chamber also ^ in failing to
24 establish the correct actus reus My Lords. In Paragraph 5,8 of
25 it's response to the --

1 MR KING: Just a minute, I want to follow you. Which
2 amendment do you wish to make.

3 MR WILLIAMS: To a notice of appeal My Lord.

4 MR KING: . Yes. To Ground IV?

5 MR WILLIAMS: Yes, My Lord.

6 MR KING: Read Ground IV then.

7 MR KING: Can you please read ground iv.

8 MR WILLIAMS: Just a second My Lord.

9 MR KING: Come on hurry, because you should have your
10 grounds ready.

11 MR WILLIAMS: My Lord the amendment that --

12 MR KING: I said read ground iv.

13 MR WILLIAMS: Yes My Lord, that the majority of the Trial
14 Chamber ^ in failing to establish the correct Mens rea
15 requirement for aiding and abetting and the determination of
16 individual criminal responsibility pursuant to article 61 for
17 count 2,4 and 7 in Tongofields My Lord.

18 MR KING: Yes.

19 MR WILLIAMS: My Lord, the application, the amendment is
20 seeking to add the words actus reus between the words Correct
21 and Mens rea on the second line My Lord.

22 MR KING: The charge is the correct.

23 MR WILLIAMS: It should now read if the amendment is
24 granted My Lord.

25 MR KING: Just state the amendment first.

1 MR WILLIAMS: The three words Actus reus and.

2 MR KING: Just a minute. So what you wish to amend is to
3 insert the words actus reus and after the word correct is that
4 right?

5 MR WILLIAMS: Exactly My Lord.

6 MR KING: Do you have any objections to that.

7 MR STAKER: In this particular instance, no Your Honour.
8 We are aware that the appeals Chamber is the instance of last
9 resort in this legal system and it is important that a party be
10 able to bring all relevant issues before the appeals Chamber.
11 The rules are there to ensure that adequate notice is given and
12 things are done in an orderly fashion. But ofcourse the rules
13 are meant to be the servant of justice and not vice versa. And
14 we concede that in this case the parties have fully briefed this
15 additional issue of the actus reus in their written submissions
16 and we are prepared today to argue them orally so we don't
17 opposed the application.

18 MR KING: Thank you Mr Staker.

19 MR KING: The application is granted.

20 MR WILLIAMS: Most grateful My Lord s.

21 MR KING: Thank you. Yes Mr Staker.

22 MR STAKER: May it please the Chamber, all of the
23 Prosecution's grounds of appeal in this appeal have been fully
24 argued in our written submission and we continue to rely fully
25 on those written submissions. In our oral submissions today we

1 propose merely to highlight some of the salient points and to
2 assist the Bench with any matter if called upon to do so. I
3 will be presenting the Prosecution's submissions on our first
4 fifth sixth 8th and ninth grounds of appeal and I would then
5 invite the appeals Chamber to call on Mr Kamara to address the
6 third fourth and seventh grounds of appeal and then on Mr Rapp
7 to address the 10th ground of appeal. I have already provided
8 the Bench and the other parties with copies of a number of
9 authorities that I will be referring to in the course of my oral
10 arguments. In view of the limited time I won't be taking you to
11 any of the specific passages but any case law that is cited in
12 my oral arguments, copies have been provided for reference. And
13 with that I turn to the Prosecution's first ground of appeal
14 which concerns the Trial Chambers failure to enter conviction
15 for crimes against humanity on Count One and Three for those
16 acts alleged in paragraphs 25 and 26 of the indictment for which
17 the accused were found guilty of war crimes under counts two and
18 four.

19 Now the outset we would emphasise that although the accused
20 have already been convicted of this conduct as war crimes, this
21 ground of appeal is not merely abstract or fruitless. The case
22 law of international criminal Tribunals is quite clear that an
23 accused can be convicted in respect of the same conduct of both
24 the war crime and a crime against humanity. Such cumulative
25 convictions serve to describe the full criminal culpability of

1 the accused. For that proposition I refer to ^ appeal
2 judgement paragraph 217. The ^ appeal judgement Paragraph 585.
3 We submit that a failure to enter cumulative convictions where
4 both crimes have been proved is an error that is appropriately
5 corrected by the appeals Chamber. Perhaps more importantly we
6 submit that the Trial Chamber`s finding on this issue contains
7 an error of law on an important issue of legal principal and we
8 submit that it is in the interest of justice in the interest of
9 international criminal law that this error not stand as the last
10 word of the special Court on this issue but that it be corrected
11 at the appellate level.

12 What have happened is that the Trial Chamber found that the
13 attack in which these crimes were committed was indeed a
14 widespread attack. I refer to Paragraph 692. And it found that
15 this attack included the attacks on Tongo, Koribondo,Bo, Bonth
16 and Kenema. The only thing we submit that the Trial Chamber
17 expressly found was not proved beyond a reasonable doubt, was
18 that the attack was one that was directed against the civilian
19 population. That relevant finding is in Paragraph 693.

20 The final sentence of that paragraph states that the CDF
21 fought for the restoration of democracy. That we submit is
22 irrelevant, and to the extent that the Trial Chamber took it
23 into account is ^ in law. International Humanitarian Law
24 applies equally to all parties in a conflict regardless of the
25 justness of their cause. And an armed force that's fighting for

1 the restoration of democracy is just as capable as an armed
2 force seeking to overthrow democracy of committing crimes
3 against humanity.

4 Then the second sentence of Paragraph 693 of the Trial
5 Chamber's judgment states that there was evidence that the
6 attacks in question were directed against rebels or juntas that
7 controlled particular areas in Sierra Leone. That sentence must
8 be read together with the first sentence which says that it was
9 not proved that civilians must be the primary object of the
10 attack.

11 Now, we submit that its evident in the Trial Chamber `s
12 reasoning, the way that they approached the matter, was to say
13 that where there is an attack against a civilian population that
14 occurs at the same time as a military attack or immediately
15 after a military attack, and where that attack against civilians
16 is committed by the same people, who perform the military
17 attack, then that must all be seen as one attack. And it's
18 necessary to determine whether the primary object of that one
19 attack was an attack against civilians as opposed to having the
20 primary object of being a military attack.

21 Now, we submit that, that's wrong in law. We do
22 acknowledge that in the ^ appeal judgment at paragraph 91, the
23 appeals Chamber did say that the civilian population must be the
24 primary object of the attack. But at paragraph '92 it clarified
25 that what was meant was that the civilian population must be the

1 primary rather than an incidental target of the attack.

2 Now we submit the correct approach is this: It must be
3 looked at, at whether civilians were deliberately attacked as a
4 civilian population. A crime against humanity is where a
5 civilian population as a civilian population was attacked. Now
6 if it's the case that it's found that the few civilians who were
7 casualties were, in fact, the incidental or collateral effect of
8 a military attack, then it might be found that there was no
9 attack against a civilian population as such at all. The
10 victims were just isolated victims of military fighting. But we
11 submit that where it is clear that there was a deliberate attack
12 on a civilian population, and if that attack is widespread or
13 systematic then the general requirement for crimes against
14 humanity is satisfied even if that attack against the civilian
15 population occurred at the same time as a military attack or
16 immediately after a military attack and even if that attack was
17 committed by the same people who were involved in the military
18 attack. The primary object test, we submit, is, means that the
19 target of the attack must be the civilian population as such
20 rather than a limited and randomly selected number of
21 individuals. And for that proposition we refer to the ^ trial
22 judgment, paragraph 49,2 and I will also refer to the ^ appeal
23 judgment Paragraph 144, for the proposition that the presence of
24 combatants amongst the civilian population does not alter the
25 civilian character of the civilians.

1 There's two further points I would make. The first, is
2 that the purpose of the attack against the civilian population
3 is irrelevant. It can be presumed that the attackers wouldn't
4 attack the civilian population for no purpose at all. The
5 purpose may be to eliminate sympathizers or supporters of the
6 enemy. Or the purpose may be to win the war. Or the purpose
7 may simply be to inflict suffering on the civilian population
8 because the attackers have some political, religious or ethnic
9 hatred against them. We say it makes no difference. The
10 elements of crimes against humanity prohibit attacks against the
11 civilian population regardless of their purpose.

12 A second point is that it's irrelevant, if not every single
13 civilian in a civilian population is attacked. Quite typically
14 in the case of crimes against humanity the attacking group will
15 only attack a selected part of the civilian population. An
16 armed force belonging to one political group may only attack
17 those members of the civilian population that are perceived to
18 belong to an opposing political group or an armed force of one
19 ethnic group may only attack those civilians that belong to
20 another ethnic group. Again this is still an attack against a
21 civilian population. The test is that an attack against any
22 civilian population, not an attack against the entire civilian
23 population of a country. For that refer to the ^ appeal
24 judgment at paragraph 90. We submit that in this case the
25 findings of the Trial Chamber are perfectly clear. The CDF

1 forces deliberately attacked on a large scale and in a most
2 brutal way, civilians in the whole area under attack in the
3 brief that any civilian who was in that area must be a rebel
4 collaborator or sympathizer. Even though the Trial Chamber
5 found that the civilians were unarmed and offering no resistance
6 and not participating in hostilities and that the crimes
7 happened after the combat activities have ceased. For that
8 finding I need only refer to paragraphs forty-six, forty seven
9 and eighty five of the sentencing judgment. In the case of
10 Tongo, for instance, the Trial Chamber describes that
11 Paragraph 385 to 388, how the Kamajors made civilians form
12 queues according to their ethnicity, how all of the people on one
13 queue were hacked to death, and how the other civilians were
14 told that they would be killed next time the CDF returned to
15 town if they did not leave in the meantime. Those civilians
16 were clearly deliberately targeted and were not incidental
17 victims of a military operation. In the case of Koribondo, the
18 Trial Chamber found in Paragraph 420 that the attack lasted
19 45 minutes. The crimes described in the subsequent paragraphs
20 420 to 437 of the trial judgment occurred well after the
21 fighting had ceased in Koribondo and the town had been captured.
22 In the case of Bo, The Trial Chamber that found Paragraph 449,
23 that by the time the CDF forces arrived the junta forces had
24 pulled out and no resistance was offered, that there was no
25 fighting again. The crimes against civilians were totally

1 unconnected to any military operation. The same is true in
2 relation to Kenema. I refer to 582 of the trial judgment. The
3 rebels were not in Kenema when the Kamajors arrived and they
4 captured it without firing shots.

5 In Paragraph 2.27 of the Prosecution appeal brief we quote
6 the factors identified in the ^ appeals judgment that can be
7 considered in determining whether an attack has been directed
8 against a civilian population. While this list is not
9 exhaustive or definitive, we submit that an application of these
10 kinds of factors leads inexorably to the conclusion that the
11 attack was one that was directed specifically against the
12 civilian population. The intention of the CDF to specifically
13 and deliberately attack civilians is clear in the various
14 speeches made by Norman before and after the attacks which are
15 referred to in paragraphs 2.44 to 2.48 in the Prosecution appeal
16 brief. We would note also the finding of Paragraph 321 of the
17 trial judgment, that Norman said at the December 1997 passing
18 out parade that if the International Community is condemning
19 human rights abuses then I take care of human left abuses.

20 [Indiscernible].

21 MR STAKER: It was a sarcastic comment in our submission
22 that clearly was intended to indicate that no regard should be
23 had to International law standards.

24 MR KING: Was-- was he speak in English or on what
25 language?

1 MR STAKER: He was not speaking in English.

2 MR KING: What language was he speaking.

3 MR STAKER: In Mende.

4 MR KING: Thank you.

5 MR STAKER: Accordingly we submit that the only conclusion
6 open to a reasonable ^ of fact is that there was an attack
7 directed against the civilian population and we request the
8 appeals Chamber to substitute convictions on counts one and
9 three.

10 I turn then to the Prosecution`s Fifith Ground of Appeal
11 concerning the recruitment and use of child soldiers. In this
12 ground of appeal, the prosecution request the Appeals Chamber to
13 consider separately the crime of enlistment and the crime of the
14 use of child soldiers. And I turn first to the case of Fofanah.
15 At Paragraph 962, the Trial Chamber found that there was ample
16 evidence that the CDF as an organisation was involved in the
17 recruitment of children under the age of 15 and used them to
18 participate actively in hostilities. However, it held by
19 majority with Judge Etoe dessenting that it was not proved
20 beyond a reasonable doubt that Fofanah was personally involved
21 in those crime s. We submit that the only conclusion open to
22 any reasonable ^ of fact on the findings of the Trial Chamber
23 on the evidence it accepted, is that Fofanah was responsible for
24 aiding and abetting both enlistment and use. The Trial Chamber
25 did not make any expressed finding as to whether Fofanah

1 actually knew that the CDF was recruiting and using child
2 soldiers. But it equally never made any finding that he had no
3 knowledge. In this respect we refer to the Prosecution appeal
4 brief paragraphs 4.5 and 4.6 and 4.20 -- 4.20 to 4.26. As well
5 as the dissenting opinion of Judge Etoe at paragraphs 56 to 59
6 and 71.

7 The Trial Chamber found at Paragraph 961 that Fofana was
8 present at Base O where child soldiers were seen. Fofanah held a
9 senior position in the CDF and was one of the three known as the
10 `Holy Trinity.` Paragraphs 337 to 343. He was present at the
11 January 1998 passing out parade where child soldiers were also
12 present, Paragraph 323. And at the 2nd January 1998 commanders
13 meeting at which Norman complained that the adult fighters were
14 doing less well than children. Paragraph 332. The Trial
15 Chamber found that children were, in fact, used in the various
16 attacks led by the CDF, Paragraph 669 to 673. 676 to 681 and
17 687 to 688 including the attacks on Tongo, Paragraph 388, Bo,
18 Paragraph 449 and Kenema Paragraph 688. We submit that no
19 reasonable ^ of fact can conclude that Fofanah did not know.
20 We submit that --

21 JUDGE AYoola: Sorry before you go further. That Fofanah
22 did not know what? That they were being used or that they were
23 being enlisted?

24 MR STAKER: Both that they were being recruited and that
25 they were being used.

1 JUDGE AYoola: The recruitment, didn't the recruitment come
2 before the findings you referred to?

3 MR STAKER: Yes but on the findings of the Trial Chamber,
4 the recruitment was also occurring at Base 0 where initiations
5 were being conducted. In that respect there are further
6 findings to which I can direct the Appeals Chamber. For
7 instance Judge Etoe noted at paragraph 711 of his dissenting
8 opinion that there was evidence in Normans absence Fofana
9 deputized for him this relates to his senior position. At
10 Paragraph 315, it found that after the coup, initiations were no
11 longer coordinated at the local or Chiefdom level and that
12 everyone came to base 0 to be initiated. At Paragraph 318, it
13 found that anyone who`d wanted to be a combatant had to undergo
14 training at base 0.

15 JUDGE AYoola: Those were minority findings judge Judge Etoe
16 [indiscernible].

17 MR STAKER: No, no, no. The finding that Fofana deputized
18 for Norman in his absence was a matter referred to specifically
19 in Judge Etoe`s dissenting opinion but not in the main judgment.
20 The other findings to which i refer--

21 JUDGE AYoola: How far can we rely on the findings in a
22 minority judgment.

23 MR STAKER: As i say Your Honours, the only finding in the
24 minority judgement to which I refer is the one that Fofana
25 deputized for Norman in his absence. There was a reference to

1 the evidence to that effect. It's not the most important piece
2 of evidence. The main point is that the majority of the Trial
3 Chamber found, infact not the majority I would say that there
4 wasn't a dissent on this particular factual finding, that after
5 the coup, initiations were no longer coordinated at the local or
6 Chiefdom level everyone came to base 0. And to be a combatant,
7 you had to undergo training at base zero. At paragraph 303, the
8 Trial Chamber found that thousands travelled to base 0 to
9 undergo training and initiation. The Trial Chamber found that
10 Paragraph 388, that by mid August 1998, over 300 and some 315 to
11 350 children under the age of 15 had been registered by the CDF
12 in a demobilization programme. And that in 1999 the CDF
13 registered over 300 children age less than 14 in a disarmament
14 programme in southern province. We submit that from all of
15 these findings it's clear that Fofanah as a very senior figure
16 was present at base 0 while child soldiers were being recruited
17 and used there on a large scale. In those circumstances we
18 submit that, it will not be open to a reasonable trier of fact
19 given the other matters to which I've referred. He was at
20 meetings where Norman expressly complained that the adults
21 weren't doing as well as the children. He was present at a
22 passing out parade when children who were about to participate
23 in the attacks were present at that meeting. We submit clearly
24 he knew.

25 And we submit that by his acts he directly encouraged the

1 commission of both recruitment and use. As I say, he was
2 present at the January 1998 passing out parade as a senior
3 member of the CDF and delivered a speech directed to both the
4 adult and the children fighters. He knew that they'd undergone
5 military training. He knew that they were going to participate
6 in the attack. We submit that's the only reasonable inference.
7 And at Paragraph 234, it was found that Fofana said to the
8 assembled including the children, the time has come for us to
9 implement what we've learned. We submit the only reasonable
10 conclusion is that this speech not only encouraged the Kamajors
11 to use child soldiers but it also encouraged the children
12 themselves to participate as combatants and thereby rendered
13 practical assistance to the Kamajors who intended to use them.

14 We submit that Fofana also provided practical assistance
15 through the performance of his functions at base 0 including for
16 the receipt and provision of logistics for the frontline. We
17 submit the only possible inference from Paragraph 322, 333 --
18 721 little Roman nine and 809 (ii) is that Fofana provided the
19 commanders with logistics for the attacks on Tongo and Bo in
20 which, as I said, the Trial Chamber found that child soldiers
21 were used. We submit that where a person does something
22 knowingly to provide practical assistance or support for a
23 military operation knowing that crimes are going to be committed
24 in that military operation, the person aids and abets those
25 crimes even though the acts of practical assistance may have

1 been directed to the military operation rather than the crimes
2 specifically, if you assist the operation knowing the crimes
3 will be committed in that operation you aid and abet those
4 crimes.

5 We also submit that it's established case law that the
6 presence of a superior person in a position of authority may of
7 itself amount to aiding and abetting if it's showing to have a
8 significant legitimizing or encouraging effect on the principle.

9 As propositions -- as authority for that proposition, we
10 refer to ^ appeal judgment paragraphs 46 to 48. The ^ Trial
11 Judgement Paragraph 283. And the ^ Trial Judgment
12 Paragraph 517. And we submit that this principle applies no less
13 in a case such as the present where the crime of recruitment and
14 use of child soldiers was an ongoing continuous crime rather
15 than the case of presence at the scene of a one off incident of
16 a crime.

17 I turn briefly to Kondewa --

18 JUDGE KING: Kondewa-- I just want to ask you to help me
19 here. Reading through the record and transcripts, one finds
20 that children were recruited by the rebels and also there is
21 quite a list of atrocities allegedly committed by them. What
22 would be your position if the other side trained children to
23 defend themselves against those children who had been trained by
24 the rebels?

25 MR STAKER: If I've understood the question Your Honour,

1 the question is if the other side was recruiting child soldiers,
2 was it legitimate for the accused in this case or for the CDF in
3 this case to be involved in the recruitment of child soldiers,
4 the simple answer to that is -- -

5 MR KING: No, the question is this: That if, in fact, the
6 rebels had been recruiting children and using them to fight and
7 commit atrocities what would be your position if the CDF for
8 instance trained children to defend themselves against such
9 attacks by other children?

10 MR STAKER: I understand, the short answer to that Your
11 Honour is that, that is not the evidence in this case. We would
12 concede that if a person is not a combatant, they are not part
13 of an armed force, they take no part in hostilities they lead
14 there ordinary civilian lives doing whatever they do in civilian
15 life. Under international Humanitarian Law, you are a protected
16 person. The opposing armed force is not allowed to deliberately
17 harm you. But if they did and you defended yourself, that would
18 not be unlawful combat, that would be self-defense. But the
19 situation is different where children are recruited into an
20 armed force, they live together with others as a organised armed
21 force and they go into combat with others, armed with others as
22 an armed force and they perform attacks. That is being engage
23 in combat, that is being a soldier. It`s an entirely different--

24 MR KING: No I understand that position. I was just thinking
25 of the situation I have given to you. I understand the other.

1 MR STAKER: Yeah. Self-defense implies that the person in
2 question does absolutely nothing to participate in hostilities
3 --

4 MR KING: Not necessarily self-defense I'm just saying
5 training the children in case they were attacked, to defend
6 themselves.

7 MR STAKER: Again we submit, that was not the evidence.

8 MR KING: I'm not saying it was I'm just asking you
9 hypothetically.

10 MR STAKER: Again if the training happened in an organised
11 armed force, I mean, I think this example is hypothetical if you
12 took is a group of children to judo classes or Konfu or to
13 taikwando classes, that's not recruiting or using child soldiers
14 but it may be training them to defend themselves if they are
15 ever attacked. If children are inducted into an armed force,
16 they are given military training. The training happened after
17 their initiations it happened for the purpose of them becoming
18 child soldiers. The training happened at a military base during
19 an armed conflict where all military operations were being
20 coordinated from. And -- well.

21 MR KING: Well develop it further. Suppose they were,
22 in fact, recruited into an armed force and trained for the
23 primary purpose of defending themselves if attacked by other
24 children or other rebels, what would be your position?

25 MR STAKER: The prohibition in international law is on both

1 recruitment and use of child soldiers. If children under the
2 age of 15 are recruited into an armed force even if they are not
3 actively used in hostilities, that in itself is a crime under
4 international law. So the short answer is, if they

5 JUDGE KING: Suppose they were recruited into an armed
6 force for the singular purpose of defending themselves against
7 their like children who'd attack them. What would be the
8 position?

9 MR STAKER: The position in our submission is that, that's
10 irrelevant. Because they have nonetheless been recruited into an
11 armed force and there is a reason for that as well. As soon as
12 a child is recruited in to an armed force regardless whether of
13 they actively participate in hostilities, they become a target
14 of the enemy. If we had large numbers of children at base 0
15 even if they never participated in hostilities and were only
16 undergoing training, the fact is, they were exposed to to the
17 risk of being attacked, potentially killed, injured by enemy
18 forces who may have conducted a military attack on base 0 which
19 was a military target.

20 MR KING: Yes. But you see, in a practical situation forget
21 about the International Humanitarian Law consequences for a
22 while. Just imagine the situation itself, that in several places
23 in Sierra Leone according to the evidence, children had been
24 recruited and that were being allegedly used by the rebels to
25 attack several people, including children, now suppose the other

1 side the CDF for instance because we're dealing with them now
2 decided that in those circumstances and the evidence is they
3 were trying to restore the legitimate government of Sierra
4 Leone. Suppose infact they decided that they were going to get
5 as many children as possible, if you like, enlist them or
6 recruit them and train them to defend themselves against
7 possible attacks from those -- from the other side, the children
8 that were being trained by the rebels to attack people.

9 MR STAKER: Yes, our submission remains, once recruitment
10 has happened that is a crime. If use happens that's another
11 crime. Your Honours, I'm aware of the time. Our internal
12 division had been intended that i would speak for 20 minutes,
13 then Mr Kamara for 20 minutes and Mr Rapp for 20 minuites. My
14 own internally allotted time is up. But if I may be permitted
15 some leeway without eating into the--

16 JUDGE KING: I took some of your time you can adjust it
17 accordingly.

18 MR STAKER: I'm much obliged Your Honour.

19 JUDGE KING: All in the interest of justice.

20 MR STAKER: I`m obliged Your Honour. In the case of
21 Kondowa, we submit that the situation is similar to that of
22 Fofana--

23 JUDGE AYoola: Sorry, before you go onto Kondewa, is it your
24 submission that initiation is the same as recruitment?

25 MR STAKER: That infact is the subject of one of Kondewa`s

1 grounds of appeal and we'll be addressing that tomorrow. But the
2 short answer is that, initiation in and of itself is not
3 inherently the same thing as recruitment but on the specific
4 facts of this case considering the evidence as a whole the Trial
5 Chamber found that in this specific instance initiation amounted
6 to recruitment.

7 JUDGE AYoola: I suppose you'll also want to address us on
8 the standard of ability review in a situation in which the Trial
9 Chamber said it had reasonable doubt.

10 MR STAKER: Yes, I have in fact had the honor of addressing
11 that subject at some length before this appeals Chamber in the
12 AFRC case and our position has certainly not changed since then.
13 In relation to alleged errors of, fact, we freely concede that
14 the burden is on the appellant to show that on the evidence
15 before it or on the intermediate factual findings that the Trial
16 Chamber itself made that on that basis no reasonable trier of
17 fact could have come to the conclusion that the Trial Chamber
18 did. And we submit that this standard is met in relation to the
19 grounds of appeal that we're advancing alleging errors of fact.

20 JUDGE AYoola: Are you really alleging errors of fact I
21 thought when you come to a finding that the case had not been
22 proved beyond a reasonable doubt, that relates to evaluation by
23 the Trial Chamber.

24 MR STAKER: It's a matter for the Trial Chamber to evaluate
25 the evidence and to determine whether it is satisfied of guilt

1 beyond a reasonable doubt and the case law acknowledges that
2 there may be a range of discretion. It's the Trial Chamber that
3 hears the witnesses sees their demeanor in a much better
4 position to assess firsthand the reliability and credibility of
5 evidence. So the appeals Chamber is a merely abstract or
6 fruitless. The case law of international criminal Tribunals is
7 quite clear that an accused can be convicted in respect of the
8 same conduct of both the war crime and a crime against humanity.
9 Such cumulative convictions serve to describe the full criminal
10 culpability of the accused. For that proposition I refer to ^
11 appeal judgement paragraph 217. The ^ appeal judgement
12 Paragraph 585. We submit that a failure to enter cumulative
13 convictions where both crimes have been proved is an error that
14 is appropriately corrected by the appeals Chamber. Perhaps more
15 importantly we submit that the Trial Chamber`s finding on this
16 issue contains an error of law on an important issue of legal
17 principal and we submit that it is in the interest of justice in
18 the interest of international criminal law that this error not
19 stand as the last word of the special Court on this issue but
20 that it be corrected at the appellate level.

21 What have happened is that the Trial Chamber found that the
22 attack in which these crimes were committed was indeed a
23 widespread attack. I refer to Paragraph 692. And it found that
24 this attack included the attacks on Tongo, Koribondo,Bo, Bonth
25 and Kenema. The only thing we submit that the Trial Chamber

1 expressly found was not proved beyond a reasonable doubt, was
2 that the attack was one that was directed against the civilian
3 population. That relevant finding is in Paragraph 693.

4 The final sentence of that paragraph states that the CDF
5 fought for the restoration of democracy. That we submit is
6 irrelevant, and to the extent that the Trial Chamber took it
7 into account is [^] in law. International Humanitarian Law
8 applies equally to all parties in a conflict regardless of the
9 justness of their cause. And an armed force that's fighting for
10 the restoration of democracy is just as capable as an armed
11 force seeking to overthrow democracy of committing crimes
12 against humanity.

13 Then the second sentence of Paragraph 693 of the Trial
14 Chamber's judgment states that there was evidence that the
15 attacks in question were directed against rebels or juntas that
16 controlled particular areas in Sierra Leone. That sentence must
17 be read together with the first sentence which says that it was
18 not proved that civilians must be the primary object on of the
19 attack.

20 Now, we submit that its evident in the Trial Chamber `s
21 reasoning, the way that they approached the matter, was to say
22 that where there is an attack against a civilian population that
23 occurs at the same time as a military attack or immediately
24 after a military attack, and where that attack against civilians
25 is committed by the same people, who perform the military

1 attack, then that must all be seen as one attack. And it's
2 necessary to determine whether the primary object of that one
3 attack was an attack against civilians as opposed to having the
4 primary object of being a military attack.

5 Now, we submit that, that's wrong in law. We do
6 acknowledge that in the ^ appeal judgment at paragraph 91, the
7 appeals Chamber did say that the civilian population must be the
8 primary object of the attack. But at paragraph '92 it clarified
9 that what was meant was that the civilian population must be the
10 primary rather than an incidental target of the attack.

11 Now we submit the correct approach is this: It must be
12 looked at, at whether civilians were deliberately attacked as a
13 civilian population. A crime against humanity is where a
14 civilian population as a civilian population was attacked. Now
15 if it's the case that it's found that the few civilians who were
16 casualties were, in fact, the incidental or collateral effect of
17 a military attack, then it might be found that there was no
18 attack against a civilian population as such at all. The
19 victims were just isolated victims of military fighting. But we
20 submit that where it is clear that there was a deliberate attack
21 on a civilian population, and if that attack is widespread or
22 systematic then the general requirement for crimes against
23 humanity is satisfied even if that attack against the civilian
24 population occurred at the same time as a military attack or
25 immediately after a military attack and even if that attack was

1 committed by the same people who were involved in the military
2 attack. The primary object test, we submit, is, means that the
3 target of the attack must be the civilian population as such
4 rather than a limited and randomly selected number of
5 individuals. And for that proposition we refer to the ^ trial
6 judgment, paragraph 49,2 and I will also refer to the ^ appeal
7 judgment Paragraph 144, for the proposition that the presence of
8 combatants amongst the civilian population does not alter the
9 civilian character of the civilians.

10 There's two further points I would make. The first, is
11 that the purpose of the attack against the civilian population
12 is irrelevant. It can be presumed that the attackers wouldn't
13 attack the civilian population for no purpose at all. The
14 purpose may be to eliminate sympathizers or supporters of the
15 enemy. Or the purpose may be to win the war. Or the purpose
16 may simply be to inflict suffering on the civilian population
17 because the attackers have some political, religious or ethnic
18 hatred against them. We say it makes no difference. The
19 elements of crimes against humanity prohibit attacks against the
20 civilian population regardless of their purpose.

21 A second point is that it's irrelevant, if not every single
22 civilian in a civilian population is attacked. Quite typically
23 in the case of crimes against humanity the attacking group will
24 only attack a selected part of the civilian population. An
25 armed force belonging to one political group may only attack

1 those members of the civilian population that are perceived to
2 belong to an opposing political group or an armed force of one
3 ethnic group may only attack those civilians that belong to
4 another ethnic group. Again this is still an attack against a
5 civilian population. The test is that an attack against any
6 civilian population, not an attack against the entire civilian
7 population of a country. For that refer to the ^ appeal
8 judgment at paragraph 90. We submit that in this case the
9 findings of the Trial Chamber are perfectly clear. The CDF
10 forces deliberately attacked on a large scale and in a most
11 brutal way, civilians in the whole area under attack in the
12 brief that any civilian who was in that area must be a rebel
13 collaborator or sympathizer. Even though the Trial Chamber
14 found that the civilians were unarmed and offering no resistance
15 and not participating in hostilities and that the crimes
16 happened after the combat activities have ceased. For that
17 finding I need only refer to paragraphs forty-six, forty seven
18 and eighty five of the sentencing judgment. In the case of
19 Tongo, for instance, the Trial Chamber describes that
20 Paragraph 385 to 388, how the Kamajors made civilians form
21 queues according to their ethnicity, how all of the people on one
22 queue were hacked to death, and how the other civilians were
23 told that they would be killed next time the CDF returned to
24 town if they did not leave in the meantime. Those civilians
25 were clearly deliberately targeted and were not incidental

1 victims of a military operation. In the case of Koribondo, the
2 Trial Chamber found in Paragraph 420 that the attack lasted
3 45 minutes. The crimes described in the subsequent paragraphs
4 420 to 437 of the trial judgment occurred well after the
5 fighting had ceased in Koribondo and the town had been captured.
6 In the case of Bo, The Trial Chamber that found Paragraph 449,
7 that by the time the CDF forces arrived the junta forces had
8 pulled out and no resistance was offered, that there was no
9 fighting again. The crimes against civilians were totally
10 unconnected to any military operation. The same is true in
11 relation to Kenema. I refer to 582 of the trial judgment. The
12 rebels were not in Kenema when the Kamajors arrived and they
13 captured it without firing shots.

14 In Paragraph 2.27 of the Prosecution appeal brief we quote
15 the factors identified in the ^ appeals judgment that can be
16 considered in determining whether an attack has been directed
17 against a civilian population. While this list is not
18 exhaustive or definitive, we submit that an application of these
19 kinds of factors leads inexorably to the conclusion that the
20 attack was one that was directed specifically against the
21 civilian population. The intention of the CDF to specifically
22 and deliberately attack civilians is clear in the various
23 speeches made by Norman before and after the attacks which are
24 referred to in paragraphs 2.44 to 2.48 in the Prosecution appeal
25 brief. We would note also the finding of Paragraph 321 of the

1 trial judgment, that Norman said at the December 1997 passing
2 out parade that if the International Community is condemning
3 human rights abuses then I take care of human left abuses.

4 [Indiscernible].

5 MR STAKER: It was a sarcastic comment in our submission
6 that clearly was intended to indicate that no regard should be
7 had to International law standards.

8 MR KING: Was-- was he speak in English or on what
9 language?

10 MR STAKER: He was not speaking in English.

11 MR KING: What language was he speaking.

12 MR STAKER: In Mende.

13 MR KING: Thank you.

14 MR STAKER: Accordingly we submit that the only conclusion
15 open to a reasonable ^ of fact is that there was an attack
16 directed against the civilian population and we request the
17 appeals Chamber to substitute convictions on counts one and
18 three.

19 I turn then to the Prosecution`s Fifith Ground of Appeal
20 concerning the recruitment and use of child soldiers. In this
21 ground of appeal, the prosecution request the Appeals Chamber to
22 consider separately the crime of enlistment and the crime of the
23 use of child soldiers. And I turn first to the case of Fofanah.
24 At Paragraph 962, the Trial Chamber found that there was ample
25 evidence that the CDF as an organisation was involved in the

1 recruitment of children under the age of 15 and used them to
2 participate actively in hostilities. However, it held by
3 majority with Judge Etoe dissenting that it was not proved
4 beyond a reasonable doubt that Fofanah was personally involved
5 in those crimes. We submit that the only conclusion open to any
6 reasonable ^ of fact on the findings of the Trial Chamber on
7 the evidence it accepted, is that Fofanah was responsible for
8 aiding and abetting both enlistment and use. The Trial Chamber
9 did not make any expressed finding as to whether Fofanah
10 actually knew that the CDF was recruiting and using child
11 soldiers. But it equally never made any finding that he had no
12 knowledge. In this respect we refer to the Prosecution appeal
13 brief paragraphs 4.5 and 4.6 and 4.20 -- 4.20 to 4.26. As well
14 as the dissenting opinion of Judge Etoe at paragraphs 56 to 59
15 and 71.

16 The Trial Chamber found at Paragraph 961 that Fofana was
17 present at Base O where child soldiers were seen. Fofanah held a
18 senior position in the CDF and was one of the three known as the
19 `Holy Trinity.` Paragraphs 337 to 343. He was present at the
20 January 1998 passing out parade where child soldiers were also
21 present, Paragraph 323. And at the 2nd January 1998 commanders
22 meeting at which Norman complained that the adult fighters were
23 doing less well than children. Paragraph 332. The Trial
24 Chamber found that children were, in fact, used in the various
25 attacks led by the CDF, Paragraph 669 to 673. 676 to 681 and

1 687 to 688 including the attacks on Tongo, Paragraph 388, Bo,
2 Paragraph 449 and Kenema Paragraph 688. We submit that no
3 reasonable ^ of fact can conclude that Fofanah did not know.
4 We submit that --

5 JUDGE AYoola: Sorry before you go further. That Fofanah
6 did not know what? That they were being used or that they were
7 being enlisted?

8 MR STAKER: Both that they were being recruited and that
9 they were being used.

10 JUDGE AYoola: The recruitment, didn't the recruitment come
11 before the findings you referred to?

12 MR STAKER: Yes but on the findings of the Trial Chamber,
13 the recruitment was also occurring at Base 0 where initiations
14 were being conducted. In that respect there are further
15 findings to which I can direct the Appeals Chamber. For
16 instance Judge Etoe noted at paragraph 711 of his dissenting
17 opinion that there was evidence in Normans absence Fofana
18 deputized for him this relates to his senior position. At
19 Paragraph 315, it found that after the coup, initiations were no
20 longer coordinated at the local or Chiefdom level and that
21 everyone came to base 0 to be initiated. At Paragraph 318, it
22 found that anyone who`d wanted to be a combatant had to undergo
23 training at base 0.

24 JUDGE AYoola: Those were minority findings judge Judge Etoe
25 [indiscernible].

1 MR STAKER: No, no, no. The finding that Fofana deputized
2 for Norman in his absence was a matter referred to specifically
3 in Judge Etoe`s dissenting opinion but not in the main judgment.
4 The other findings to which i refer--

5 JUDGE AYoola: How far can we rely on the findings in a
6 minority judgment.

7 MR STAKER: As i say Your Honours, the only finding in the
8 minority judgement to which I refer is the one that Fofana
9 deputized for Norman in his absence. There was a reference to
10 the evidence to that effect. It's not the most important piece
11 of evidence. The main point is that the majority of the Trial
12 Chamber found, infact not the majority I would say that there
13 wasn't a dissent on this particular factual finding, that after
14 the coup, initiations were no longer coordinated at the local or
15 Chiefdom level everyone came to base 0. And to be a combatant,
16 you had to undergo training at base zero. At paragraph 303, the
17 Trial Chamber found that thousands travelled to base 0 to
18 undergo training and initiation. The Trial Chamber found that
19 Paragraph 388, that by mid August 1998, over 300 and some 315 to
20 350 children under the age of 15 had been registered by the CDF
21 in a demobilization programme. And that in 1999 the CDF
22 registered over 300 children age less than 14 in a disarmament
23 programme in southern province. We submit that from all of
24 these findings it's clear that Fofanah as a very senior figure
25 was present at base 0 while child soldiers were being recruited

1 and used there on a large scale. In those circumstances we
2 submit that, it will not be open to a reasonable trier of fact
3 given the other matters to which I've referred. He was at
4 meetings where Norman expressly complained that the adults
5 weren't doing as well as the children. He was present at a
6 passing out parade when children who were about to participate
7 in the attacks were present at that meeting. We submit clearly
8 he knew.

9 And we submit that by his acts he directly encouraged the
10 commission of both recruitment and use. As I say, he was
11 present at the January 1998 passing out parade as a senior
12 member of the CDF and delivered a speech directed to both the
13 adult and the children fighters. He knew that they'd undergone
14 military training. He knew that they were going to participate
15 in the attack. We submit that's the only reasonable inference.
16 And at Paragraph 234, it was found that Fofana said to the
17 assembled including the children, the time has come for us to
18 implement what we've learned. We submit the only reasonable
19 conclusion is that this speech not only encouraged the Kamajors
20 to use child soldiers but it also encouraged the children
21 themselves to participate as combatants and thereby rendered
22 practical assistance to the Kamajors who intended to use them.

23 We submit that Fofana also provided practical assistance
24 through the performance of his functions at base 0 including for
25 the receipt and provision of logistics for the frontline. We

1 submit the only possible inference from Paragraph 322, 333 --
2 721 little Roman nine and 809 (ii) is that Fofana provided the
3 commanders with logistics for the attacks on Tongo and Bo in
4 which, as I said, the Trial Chamber found that child soldiers
5 were used. We submit that where a person does something
6 knowingly to provide practical assistance or support for a
7 military operation knowing that crimes are going to be committed
8 in that military operation, the person aids and abets those
9 crimes even though the acts of practical assistance may have
10 been directed to the military operation rather than the crimes
11 specifically, if you assist the operation knowing the crimes
12 will be committed in that operation you aid and abet those
13 crimes.

14 We also submit that it's established case law that the
15 presence of a superior person in a position of authority may of
16 itself amount to aiding and abetting if it's showing to have a
17 significant legitimizing or encouraging effect on the principle.

18 As propositions -- as authority for that proposition, we
19 refer to ^ appeal judgment paragraphs 46 to 48. The ^ Trial
20 Judgement Paragraph 283. And the ^ Trial Judgment
21 Paragraph 517. And we submit that this principle applies no less
22 in a case such as the present where the crime of recruitment and
23 use of child soldiers was an ongoing continuous crime rather
24 than the case of presence at the scene of a one off incident of
25 a crime.

1 I turn briefly to Kondewa --

2 JUDGE KING: Kondewa-- I just want to ask you to help me
3 here. Reading through the record and transcripts, one finds
4 that children were recruited by the rebels and also there is
5 quite a list of atrocities allegedly committed by them. What
6 would be your position if the other side trained children to
7 defend themselves against those children who had been trained by
8 the rebels?

9 MR STAKER: If I've understood the question Your Honour,
10 the question is if the other side was recruiting child soldiers,
11 was it legitimate for the accused in this case or for the CDF in
12 this case to be involved in the recruitment of child soldiers,
13 the simple answer to that is -- -

14 MR KING: No, the question is this: That if, in fact, the
15 rebels had been recruiting children and using them to fight and
16 commit atrocities what would be your position if the CDF for
17 instance trained children to defend themselves against such
18 attacks by other children?

19 MR STAKER: I understand, the short answer to that Your
20 Honour is that, that is not the evidence in this case. We would
21 concede that if a person is not a combatant, they are not part
22 of an armed force, they take no part in hostilities they lead
23 there ordinary civilian lives doing whatever they do in civilian
24 life. Under international Humanitarian Law, you are a protected
25 person. The opposing armed force is not allowed to deliberately

1 harm you. But if they did and you defended yourself, that would
2 not be unlawful combat, that would be self-defense. But the
3 situation is different where children are recruited into an
4 armed force, they live together with others as a organised armed
5 force and they go into combat with others, armed with others as
6 an armed force and they perform attacks. That is being engage
7 in combat, that is being a soldier. It`s an entirely different--

8 MR KING: No I understand that position. I was just thinking
9 of the situation I have given to you. I understand the other.

10 MR STAKER: Yeah. Self-defense implies that the person in
11 question does absolutely nothing to participate in hostilities
12 --

13 MR KING: Not necessarily self-defense I'm just saying
14 training the children in case they were attacked, to defend
15 themselves.

16 MR STAKER: Again we submit, that was not the evidence.

17 MR KING: I'm not saying it was I'm just asking you
18 hypothetically.

19 MR STAKER: Again if the training happened in an organised
20 armed force, I mean, I think this example is hypothetical if you
21 took is a group of children to judo classes or Konfu or to
22 taikwando classes, that's not recruiting or using child soldiers
23 but it may be training them to defend themselves if they are
24 ever attacked. If children are inducted into an armed forced,
25 they are given military training. The training happened after

1 their initiations it happened for the purpose of them becoming
2 child soldiers. The training happened at a military base during
3 an armed conflict where all military operations were being
4 coordinated from. And -- well.

5 MR KING: Well develop it further. Suppose they were,
6 infact, recruited into an armed force and trained for the
7 primary purpose of defending themselves if attacked by other
8 children or other rebels, what would be your position?

9 MR STAKER: The prohibition in international law is on both
10 recruitment and use of child soldiers. If children under the
11 age of 15 are recruited into an armed force even if they are not
12 actively used in hostilities, that in itself is a crime under
13 international law. So the short answer is, if they

14 JUDGE KING: Suppose they were recruited into an armed
15 force for the singular purpose of defending themselves against
16 their like children who`d attack them. What would be the
17 position?

18 MR STAKER: The position in our submission is that, that's
19 irrelevant. Because they have nonetheless been recruited into an
20 armed force and there is a reason for that as well. As soon as
21 a child is recruited in to an armed force regardless whether of
22 they actively participate in hostilities, they become a target
23 of the enemy. If we had large numbers of children at base 0
24 even if they never participated in hostilities and were only
25 undergoing training, the fact is, they were exposed to to the

1 risk of being attacked, potentially killed, injured by enemy
2 forces who may have conducted a military attack on base 0 which
3 was a military target.

4 MR KING: Yes. But you see, in a practical situation forget
5 about the International Humanitarian Law consequences for a
6 while. Just imagine the situation itself, that in several places
7 in Sierra Leone according to the evidence, children had been
8 recruited and that were being allegedly used by the rebels to
9 attack several people, including children, now suppose the other
10 side the CDF for instance because we're dealing with them now
11 decided that in those circumstances and the evidence is they
12 were trying to restore the legitimate government of Sierra
13 Leone. Suppose infact they decided that they were going to get
14 as many children as possible, if you like, enlist them or
15 recruit them and train them to defend themselves against
16 possible attacks from those -- from the other side, the children
17 that were being trained by the rebels to attack people.

18 MR STAKER: Yes, our submission remains, once recruitment
19 has happened that is a crime. If use happens that's another
20 crime. Your Honours, I'm aware of the time. Our internal
21 division had been intended that i would speak for 20 minutes,
22 then Mr Kamara for 20 minutes and Mr Rapp for 20 minuites. My
23 own internally allotted time is up. But if I may be permitted
24 some leeway without eating into the--

25 JUDGE KING: I took some of your time you can adjust it

1 accordingly.

2 MR STAKER: I'm much obliged Your Honour.

3 JUDGE KING: All in the interest of justice.

4 MR STAKER: I`m obliged Your Honour. In the case of
5 Kondowa, we submit that the situation is similar to that of
6 Fofana--

7 JUDGE AYoola: Sorry, before you go onto Kondewa, is it your
8 submission that initiation is the same as recruitment?

9 MR STAKER: That infact is the subject of one of Kondewa`s
10 grounds of appeal and we'll be addressing that tomorrow. But the
11 short answer is that, initiation in and of itself is not
12 inherently the same thing as recruitment but on the specific
13 facts of this case considering the evidence as a whole the Trial
14 Chamber found that in this specific instance initiation amounted
15 to recruitment.

16 JUDGE AYoola: I suppose you'll also want to address us on
17 the standard of ability review in a situation in which the Trial
18 Chamber said it had reasonable doubt.

19 MR STAKER: Yes, I have in fact had the honor of addressing
20 that subject at some length before this appeals Chamber in the
21 AFRC case and our position has certainly not changed since then.
22 In relation to alleged errors of, fact, we freely concede that
23 the burden is on the appellant to show that on the evidence
24 before it or on the intermediate factual findings that the Trial
25 Chamber itself made that on that basis no reasonable trier of

1 fact could have come to the conclusion that the Trial Chamber
2 did. And we submit that this standard is met in relation to the
3 grounds of appeal that we're advancing alleging errors of fact.

4 JUDGE AYoola: Are you really alleging errors of fact I
5 thought when you come to a finding that the case had not been
6 proved beyond a reasonable doubt, that relates to evaluation by
7 the Trial Chamber.

8 MR STAKER: It's a matter for the Trial Chamber to evaluate
9 the evidence and to determine whether it is satisfied of guilt
10 beyond a reasonable doubt and the case law acknowledges that
11 there may be a range of discretion. It's the Trial Chamber that
12 hears the witnesses sees their demeanor in a much better
13 position to assess first-hand the reliability and credibility of
14 evidence, ^ that sees their demeanour, that--is in a much
15 better position to assess firsthand the reliability and
16 credibility of evidence.

17 So the Appeals Chamber is a little more removed from that
18 process and looking at the record may say well a reasonable
19 Trial Chamber may have found or proved or a reasonable Trial
20 Chamber may have found it not proved, but in that event the
21 appeals Chamber won't intervene. But in certain cases it's
22 possible for the appeals Chamber to say, that given the evidence
23 that was there, it`s-- no reasonable Trial Chamber could have
24 found what the Trial Chamber did. And for instance, the finding
25 that Fofana or the failure to find that Fofana had knowledge

1 that child soldiers were being recruited and used at base 0. We
2 say that on the evidence in the findings of the Trial Chamber,
3 that is an -- well, it's a finding that is just not reasonably
4 to make given the scale on which this was occurring, Fofana's
5 senior position and the fact that base 0 was a very small place.
6 If I can summarise very briefly to move on Your Honor, in the
7 case to Kondewa. As i've submitted, thousands of people came to
8 base 0 and large numbers of children. Initiations were
9 occurring at base 0, Kondewa was the chief initiator and he was
10 the head of all other initiators of Kamajors in Sierra Leone.
11 We submit that on that basis no reasonable trier of fact could
12 conclude that Kondewa only ever initiated one child and even in
13 relation to children that he may not have personally initiated
14 as the chief initiator in Sierra Leone, he certainly must have
15 had an encouraging effect on other initiators below him who were
16 under taking such initiations.

17 Further we submit that he aided and abetted the use of
18 child soldiers for reasons similar to the case of Fofana.
19 Perhaps the reasons are even stronger given the particular
20 admiration and or in which he was held at base 0 because of the
21 mystical powers he was perceived to possess. He performed the
22 initiations and at the January 1998 passing out parade he
23 addressed both the both the adults and the children who would be
24 involved in the fighting and he gave them their blessing. The
25 Trial Chamber found at Paragraph 345 to 347, that Kondewa would

1 decide which Kamajors would go to war on a particular day and
2 that none would go off to fight without Kondewa`s blessing. We
3 submit that, that inevidencebly had an encouraging effect and
4 that no reasonable trier of fact could conclude that he didn't
5 substantially contribute to the use of child soldiers.

6 I turn then to the Prosecution's six ground of appeal
7 concerning the acquittal of Fofana and Kondewa for terrorism.
8 Fofana first argues that the spreading of terror must be the
9 primary purpose of the acts of the accused, while in this case
10 the purpose was to control -- to take control of territory under
11 rebel control and to eliminate any opposition to this objective.
12 We submit that if this arguement were accepted, nobody would
13 ever be convicted of acts on terror. Again, if an attacker
14 attacks civilians, it will invariably be with some objective in
15 mind. Whether the objective is to win the war or to crush
16 opposition. The existence of such an ultimate objective does
17 not negate the existence of a specific intent to commit terror.
18 Our submission is that International Humanitarian law prohibits
19 the terrorisation of the civilian population as a weapon of war.
20 And that conduct that is deliberately and specifically intended
21 to terrorize the civilian population is illegal even if the
22 perpetrators hope to gain some military advantage from such
23 crimes. And the prohibition also applies regardless of the
24 justness of the accused cause.

25 As the Prosecution's argument that the Trial Chamber should

1 have considered burnings as acts of terror, we're content to
2 rely on our written submissions but note that our argument is
3 supported by paragraph 1438 of the AFRC trial judgment. The
4 next issue is whether acts of terror were, in fact, committed
5 again we submit that that is the only conclusion open to a
6 reasonable trier of fact. We emphasise that the crime of
7 terrorism is a war crime not a crime against humanity and
8 there's no need to prove a widespread or systematic attack. And
9 furthermore, the actus reus of the crime need not be an act
10 that would otherwise be criminal under some other provision of
11 the Statute. Mere threats of violence may amount to acts of
12 terror as the Trial Chamber itself acknowledged in paragraphs
13 170(i) and 172.

14 In Tongo, as the Trial Chamber found, those civilians who
15 were not killed by the CDF forces were warned that they would be
16 killed when the CDF next returned if they did not leave in the
17 meantime. That is clearly a threat of violence and we submit
18 that the only reasonable conclusion is that, that threat of
19 violence was intended to terrorize the civilian population into
20 leaving and we submit that this incident alone would be
21 sufficient to establish responsibility for acts of terror. But
22 in relation to the other crimes committed in those locations, we
23 submit the scale of the crimes, brutality and gruesomeness, the
24 fact that they were performed publicly, such as, disembowelling
25 victims and displaying their body parts. On that basis we

1 submit that the only conclusion open to a reasonable trier of
2 fact is that they were intended to terrorize the civilian
3 population.

4 We submit further that,, that the accused must have known
5 this, this is evident in the case of Tongo from the speech that
6 Norman gave at the December 1997 passing out parade. The
7 findings are at Paragraph 321 of the Trial Judgment. Norman
8 made comments that were interpreted as meaning, an eye for an
9 eye and not to spare the vulnerables. He said any junta you
10 capture, instead of wasting a bullet, chop off his hand as an
11 indelible mark. His comments were interpreted as meaning that
12 the fighters should not spare the house of the juntas. We
13 submit that no reasonable trier of fact could conclude that
14 attacking, vulnerables, chopping off hands and burning down
15 houses could be intended otherwise than to terrorize the
16 civilian population. In relation to Koribondo and Bo, the Trial
17 Chamber found that Fofana who was convicted under article 63 for
18 crime s in those locations was present at the commander's
19 meetings in January 1998, where Norman gave instructions in
20 relation to Koribondo, that the forces should not leave any
21 house or any living thing there except the mosque, the church
22 the barei and the school. And that anyone left in Koribondo
23 should be treated as a rebel and should be killed.

24 Again, in relation to Bo, instructions were given to kill
25 civilians and to burn houses. We submit that the only

1 reasonable inference is that, these acts were intended to commit
2 terror. In relation to Kondewa and the crimes that were
3 committed in Bonthe. The Bonthe attacks were part of the same
4 all out offensive as the attacks on the other locations and in
5 those circumstances we submit that it must have been clear to
6 him that the same modus operandi acts of terror in the same
7 nature would be committed. We further emphasize that in
8 relation to those locations where the accused were convicted
9 under article 63 rather than article 61, the Mens rea of article
10 63 does not require that the accused had actual knowledge of the
11 specific crimes committed or about to be committed. It's
12 sufficient that the accused had some information of a nature
13 sufficiently alarming to alert the accused of the risk of crimes
14 about to be committed by subordinates. Such as to justify
15 further enquiry.

16 We submit that both Kondewa and Fofana certainly had
17 sufficiently alarming information that acts of terror were about
18 to be committed or had been committed as to justify further
19 action for the purposes of article 63. And--

20 JUDGE AYoola: Where can we find that evidence? Was there
21 any finding to that effect by the Trial Chamber?

22 MR STAKER: The alarming information we submit, consist of
23 in particular, the statements made by Norman at the December
24 1997 passing out parade, the January 1998 passing out parade,
25 the first and second commanders meetings in January 1998

1 concerning the attacks on Koribondo and Bo and the remarks made
2 by Norman at the subsequent meeting with Nallo in relation to
3 the planning of the attacks. At these meetings, Norman made
4 clear for instance, in Koribondo, kill everyone and destroy
5 every house. I do not want to see a living thing not evening a
6 fowl or a farm and the only thing to be left standing were four
7 buildings. The church, the mosque, the barei and the school.
8 After the attack, Norman arrived in the town and complained that
9 his instructions had not been obeyed. He still saw some
10 buildings standing, he still saw some civilians alive. He said
11 to the CDF troops, why are you people afraid of killing? Now,
12 these are all findings of the Trial Chamber in which the Trial
13 Chamber does not expressly say Norman ordered that the civilian
14 population be terrorized. But we submit that there is no
15 requirement in law that an act to terrorize a civilian
16 population be given expressly. We submit that an intention to
17 commit act of terror can be inferred from all the circumstances
18 and we submit that from all of the evidence and the findings of
19 the Trial Chamber itself. The only reasonable inference is not
20 only that Norman intended that acts of terror would be
21 committed, but that those who were addressed by him at these
22 meetings understood that this is what he wanted and that Fofana
23 and Kondewa would've also understood that the intention was to
24 commit act of terror.

25 JUDGE AYoola: But that was not the finding of Trial

1 Chamber in paragraph 743.

2 MR STAKER: That is exactly the finding against which this
3 ground of appeal is directed. The Trial Chamber`s ultimate
4 findings was that although Norman may have intended acts of
5 terror to be committed, it's not the only possibility. And we
6 say when you look at all of the other findings of the Trial
7 Chamber, that conclusion is one that is not open to any
8 reasonable trier of fact.

9 JUDGE AYoola: If you are prosecuting the campaign of
10 violence in this armed conflict, in a terrifying manner. Would
11 you come to definite conclusion that there was specific intent
12 to perpetrate act of terrorism? Is it not a matter that is
13 capable of possible different interpretations that you were just
14 fighting a war in a nasty manner, that's different from specific
15 intent that is required for act of terrorism isn't it?

16 MR STAKER: We would submit that disembowelling people and
17 displaying there entrails publically, we would submit that
18 decapitating people and displaying their heads publicly, is not
19 fighting a war in a nasty manner. It goes beyond being a war
20 crime or a crime against humanity. The question is why would
21 you disembowel someone and display their organs publically. Why
22 would you decapitate a body and display their heads publically.

23 JUDGE AYoola: You see, that is the essence of the matter.
24 Now when you take the incident from-- this speech from Base 0,
25 could you infer from that that speech that you should perform

1 such atrocities-- like disembowelling people, does burning houses
2 translate to disembowelling people. How far can you relate the
3 incident that happened on the Charter of War to the Speech at
4 Base 0 without entertaining some reasonable doubt.

5 MR STAKER: Yes there are a number of different speeches
6 that were made. And they need to be looked at cumulatively.
7 There is what Norman said at the passing out parades, there is
8 also what he said at subsequent commanders meetings. But for
9 instance, an instruction that every living thing in a village is
10 to be killed and every building to be destroyed, goes beyond
11 fighting a war in a nasty manner. We submit that is intended to
12 terrorize the civilian population. The burning of houses was a
13 clear instruction. And the kind of language that Norman used to
14 expressly order that arms be chopped, off, to expressly order
15 dont spare--but to give an order that was understood by an
16 observer at the meeting as not to spare the vulnerable.
17 Vulnerable is not a threat in war. It goes beyond fighting a
18 war in a nasty manner. We submit the only reasonable inference
19 is that there was an intention to commit terror. There were
20 findings of the Trial Chamber of atrocities previously committed
21 by Kamajors, there had been complaints, a war council had been
22 established to deal with this, we go into this in our appeal
23 brief. In fact the findings of the Trial Chamber was that
24 Kondewa actively opposed the activities of the war council and
25 tried to prevent anyone dealing with complaints of atrocities

1 committed by the Kamajors. When all of the evidence and findings
2 is looked at as a whole, when you take a group against which
3 there had been concerns in the past of atrocities that they had
4 committed, to make these kinds of statements to them at passing
5 out parade, we submit in the circumstances, no reasonable
6 conclusion is possible other than it was knowing what result
7 this would lead to.

8 JUDGE KING: There is evidence is there not, that, in
9 fact, when Kondewa went with the third delegation to Bonthe, he
10 made a public statement that he had given out the orders that
11 Bonthe should not be attacked and those orders were disobeyed
12 and he apologise that infact, what had happened had happened.
13 What inference can one draw from that?

14 MR STAKER: We would submit that in light of the evidence
15 in a -- as a whole, this was merely a speach after the effect.
16 We would submit that this does not establish that he did in fact
17 do anything to prevent it, given especially the other findings
18 in fact that Kondewa had sought to shield the Kamajors from
19 efforts in the past to deal with complaints about their
20 misconduct. There were findings, for instance, about the
21 delegation that went to Bo. I don't have the exact wording
22 before me as to what he said, but a delegation came to complain
23 about the conduct of the Kamajors, and his response was
24 something to the effect that in war these things happen.

25 Your Honour, unless I could assist further, as I said, I

1 have taken considerably more time than was originally intended,
2 we had internally allowed 20 minutes for Mr Kamara and 20 for Mr
3 Rapp. I would be much obliged if that were to follow.

4 MR KING: Very well, Mr Chris Staker.

5 MR STAKER: Thank you, Your Honour.

6 MR KAMARA: May it please you, My Lords, I shall be arguing
7 Grounds 3, 4 and 7. My Lords, Ground 3 deals with failure to
8 find Fofana and Kondewa responsible for planning, ordering,
9 instigating or otherwise aiding and abetting the planning,
10 preparation for execution of certain criminal acts in Kenema
11 District.

12 My Lord, because of the commonality between the two
13 grounds, I intend to treat both of them in one submission, that
14 is Ground 3 and 4. Ground 4 deals with responsibility for
15 planning, ordering, instigating or otherwise aiding and
16 abetting in the planning, preparation or execution of certain
17 criminal acts in town of Tongo Field, Koribundu and the Bo
18 District.

19 My Lords, to start with, in respect of crimes in the
20 location of Kenema District, Bo and Koribundu. The Trial
21 Chamber found that Fofana and Kondewa had no individual
22 responsibility for the planning, instigating, ordering or
23 otherwise aiding and abetting under article 61 of the statute
24 during the time frame of the indictment. It is the submission
25 of the Prosecution, My Lords, that the Trial Chamber are in law,

1 and in fact, in the approach that it took to the re-evaluation
2 of the evidence in the case.

3 In other words, My Lords, it failed to systematically
4 analyze or explicitly assess the evidence as presented by the
5 Prosecution with regards to the culpability of Fofana and
6 Kondewa within the context of the case as a whole. My Lords,
7 this is our argument: That the Trial Chamber compartmentalized
8 it's findings, failing to take the case as a whole in its
9 entirety as presented in the evidence. It is the submission of
10 the Prosecution, My Lord, that with the issue of the modes of
11 liability, particularly with planning, instigating and aiding
12 and abbedding, it is the same evidence as presented by the
13 Prosecution that is replicated in the other crime basis.

14 My Lords, we are saying that the evidence that we presented
15 for Koribundu is the same evidence for planning that is
16 replicated for the attacks in Bonthe and Kenema and Tongo Field.
17 My Lord, why has the Trial Chamber compartmentalized it's quest
18 into finding the evidence, looking for particularly in the case
19 of Tongo, for instance, it found the accused guilty under aiding
20 and abbedding for Tongo.

21 My Lord, I would take the Court through the course of
22 evidence where the Trial Chamber made such a finding because at
23 the end of the day we will be calling on this Appeals Chamber to
24 see through this course, and that it is the same evidence, if it
25 is good for Tongo it should be good for Koribundu and it should

1 be good for Bo and Kenema.

2 My Lord, there are different meetings which my learned
3 friend, Mr Staker, had already referred to. In the space and
4 span of time at Talia Base Zero which is the command of
5 operations of the CDF. We're looking at timeframe, My Lords,
6 between December 1997 and March 1998. Between the time frame at
7 least five important meetings were held at Base Zero in which
8 all the two accused persons were present and made contributions.
9 To start with the December 10 to 12, 1997 passing out parade
10 meeting. The Trial Chamber found that at the passing out parade
11 Norman said in the open that the attack on Tongo will determine
12 who wins the war, and that there is no place to keep captured or
13 war prisoners or like the junta, let alone their collaborators.
14 The Trial Chamber further found that Fofana also spoke at the
15 passing out parade, saying, now you heard the national
16 coordinator. Any commander failing to perform accordingly and
17 losing his own ground, just decide to kill yourself there and
18 don't come to report to us. Now, what do we have on the part of
19 the high priest, Kondewa. Kondewa was someone held in high
20 esteem. It was believed that he had mystical powers and
21 generation for such an individual within the context of the
22 culture of those that perpetrated the offences, My Lord, should
23 not be taken slightly. This is what the Trial Chamber found:
24 That all the fighters looked to Kondewa, admired him as a man
25 with mystical power and he gave the last comment saying, a rebel

1 is a rebel surrendered or not surrendered, they're all rebels.
2 The time for surrender has long been exhausted. What do we take
3 this to mean? My Lord, the Prosecution takes this to mean that
4 there is no room for prisoners of war, and that once you go out
5 to battle, how do you teach your enemies, eliminate them.

6 My Lords, having said that, further there was another
7 meeting which is in December in 1997 which was a commanders
8 meeting. My Lord, I'm going through this process so you could
9 be able to see the substantial participation of both Fofana and
10 Kondewa in the planning process of all these attacks, and the
11 gist of our submission in this -- on this ground of three and
12 four, is that it was an all out offensive. That it was a
13 general campaign of the CDF, and we will show the different
14 forms of participation and level of participation, and My Lord
15 so make the substantial participation of both Fofana and Kondewa
16 in this planning process, so that at the end on of the day, no
17 reasonable trial fact will conclude that these two did not
18 substantially participate in the planning of the offences.

19 The second meeting which was in December in 1997 was a
20 commanders meeting, and the Trial Chamber had this to say, My
21 Lords: That among those present were Fofana and Kondewa,
22 Mohammed Karim ^ Mussa and is some commanders from the Tongo
23 area. And Norman repeated that whosoever took Tongo would win
24 the war and therefore it should be taken at all costs; at all
25 costs. And My Lord, with regards to Kenema, it should be noted

1 that Tongo is part of the Kenema District, and in light of that
2 one of the -- one of the commanders, the top commanders for the
3 Tongo attack, you have a Defence witness, Mohammed ^ Bunico
4 Kumar, who testified on behalf of the Defence that that same
5 commander was also a commander that launched the attack in
6 Kenema. My Lord, you could see the picture and flow of
7 authority from Tongo on to Kenema, which is a few miles away.

8 My Lord, the Prosecution submits that even in that meeting,
9 that is the December 1997 commanders meeting, five of those
10 present in that meeting, My Lord, held leading Kamajor positions
11 in that ^ administration of Kenema immediately after it was
12 captured, and this ^ presence including Mohammed ^ Karim
13 Mussa, the deputy director of war, Mussa ^ Unisa who was the
14 director of operations for the eastern region.

15 My Lord, the crucial issue for us in this process is the
16 level of participation of the accused persons. The Prosecution
17 do not intend to challenge the factual findings of the Trial
18 Chamber. We do accept the findings of the Trial Chamber with
19 regards to each and every of the crime basis. Our argument, My
20 Lords, is that in the light of those findings, any reasonable
21 trial fact will conclude that Fofana and Kondewa planned or aid
22 and abbed or even instigated the commission of those offences.

23 My Lords, we will move onto the third meeting, which is the
24 all out offensive campaign by the finding of the Trial Chamber
25 and that was in January of 1998, that passing out parade. My

1 Lords, the Trial Chamber found that at that meeting which was
2 held at Base Zero again Norman, as usual, thanked the Kamajors
3 for their training that they had undergone, and also said that
4 whosoever knows that he has been fighting with the ^ cutless
5 this is the time for him to take up whatever he has. If it's a
6 gun, take up the gun. Whoever knows that he's used to fighting
7 with a stick, it is the time to take up that stick. This is the
8 time to fight. This speech was at a passing out parade after
9 the training of Kamajors at Base Zero, and this is what the
10 second accused, Fofana, had to say at that meeting:

11 The advice that Pa Norman had given to us that the training
12 that we underwent with for a long time, the time has come for us
13 to implement what we have learned. Now, that we have received
14 the order that we shall attack the various areas where the
15 juntas are located, My Lords, I draw your attention to the
16 various areas where the juntas are located and these areas
17 include Bonthe, Bo, Kenema and Koribundu. We should attack the
18 various areas where the juntas are located. They have done a
19 lot for the trainees. We have done a lot for the traniees.
20 They have spent a lot on them, and so any commander, if you are
21 given an area to launch an attack and you fail to accomplish
22 that mission, do not return to Base Zero. This speech is
23 crucial in the process, My Lords, as we look into this as being
24 described by the Trial Chamber as an all out offensive campaign,
25 and Norman mentioned that. My Lords, if this was an all out

1 offensive campaign, it beholds us to think otherwise, that if
2 you look at the sequence and pattern of attacks, on February the
3 thirteenth Koribundu was attacked; and on the fifteenth of
4 March, Bo was attacked; on the fifteenth of March, Kenema was
5 attacked; on the fifteenth of March, Bonthe was attacked. The
6 pattern of these attacks following from these all offensive
7 planning is clear indication that this was not an isolated event
8 and that each and every attack was not isolated. That there was
9 a system and pattern in place, and what is that source of system
10 and pattern in place is from the base of the planning. My
11 Lords, I entreat you to look at these different meetings and the
12 contributions of both Fofana and Kondewa to that meeting.

13 My Lords, is it instructive to note that the Trial Chamber
14 further found that Fofana told the fighters to attack the
15 villages where the juntas were located, and to destroy the
16 soldiers, finally, from where they were settled.

17 JUDGE KING: Maybe I can you there for a minute, you know,
18 I've been following you carefully, but I think it's impossible
19 not to take into consideration the whole circumstances of this
20 conflict. You, I will not say anything about the RUF at the
21 moment because that's still ^ [indiscernible]. I talk about the
22 AFRC. Now the AFRC are reputed to have been soldiers in the
23 recognised armed forces of Sierra Leone, and they, in fact, as
24 it turned out to have found to have, in fact, over thrown the
25 legitimate government of Sierra Leone. Now you have the hunters

1 who are in fact or were, in fact, the Kamajors, and they of
2 their own volition were trying to restore the legitimate
3 government of this country. Now it is in evidence that the AFRC
4 had been committing -- had been committing terrible atrocities,
5 not only against civilian population, but even against those
6 Kamajors who were fighting to restore the government of Sierra
7 Leone. Now, in any war there are bound to be conflicts.
8 Nobody's saying that if you are fighting to restore the
9 government you have ^ [indiscernible] to go and attack the
10 civilian population, but the reality of the situation must be
11 taken consideration. You see, they are not like the AFRC who
12 were acting illegally in toppling the government and committing
13 the atrocities for which they were sent to 50 and 45 years
14 imprisonment. These were people who had risked their lives
15 fighting on behalf of the legitimate government of Sierra Leone.
16 Is itn't that a relevant consideration?

17 MR KAMARA: In deed, My Lord. We will be coming to that.

18 MR KING: I want you to come to it now because you haven't
19 got much time.

20 MR KAMARA: Yes My Lord. I'll address it briefly. My Lord,
21 what we are saying here as prosecution is that, the offences
22 committed by the Kamajors, My Lord, these are offences against
23 it's own people they were meant to Protect. My Lord, we did not
24 charge them for offences of targeting the AFRC or killing the
25 RUF --

1 JUDGE KING: Just a minute you yourself had said various
2 areas where the juntas are located.

3 MR KAMARA: Yes My lord.

4 JUDGE KING: That was their target. Various areas where the
5 juntas are located. That was their purpose. That's what they
6 were determined to do. To go to those areas and dislodge these
7 juntas.

8 MR KAMARA: Yes My Lord. The evidence of junta, what is
9 junta My Lord, junta is not just the AFRC or the AFRC it
10 includes their collaborators and supporters. And My Lord, for
11 example, if we take the Koribondo attack, Koribondo is a town
12 filled with civilians. There was a small percentage of AFRC
13 soldiers there. That attack My Lord, from any military point of
14 view could easily be seen that any attack on Koribondo with the
15 direction and order that was given was bound to effect the
16 civilian population.

17 MR KING: Let me stop you there for a minuit, we have to be
18 realistic in probably some of our submissions. Take the history
19 of the word which I take judicial notice of. Take the first the
20 first world war, the second war, take even the present conflict
21 in various parts of the Middle East and so on. Take what
22 happened Bosnia if you like. I mean, there is some
23 inevitabilityd that the civilian population would be affected.

24 MR KAMARA: My Lord, --

25 JUDGE KING: You cannot say, look here, you stand aside,

1 your a civilian. You stand aside you are noncivilian and so on.
2 Because the -- the aim of the AFRC was to intermingle with the
3 civilians. There is evidence on that as well.

4 MR KAMARA: My Lord, I take your point, i take your point.
5 But My Lord let us take a step back, and look at what are the
6 dictates of International Humanitarian la. What is the
7 prohibitions entail therein? It is the protection of civilians
8 My Lords. If you take up weapons, you take up arms against the
9 very people you intend to protect they are bound under the law
10 to have recourse for redress.

11 JUDGE KING: If you go to the International Humanitarian
12 law, even the Conventions of Geneva, those rarely, primarily
13 relates to state. Not to this kind of conflict you have in the
14 bush of Sierra Leone, and that again is another consideration
15 you must have in mind.

16 MR KAMARA: My Lord I will take that consideration but I
17 beg to differ on that analysis. My Lord, coming back to the
18 issue of the role of the Kamajors and I don't want to pre empt
19 the learned Prosecutor who will be dealing with that on the
20 sentencing issue as to whether they were fighting for the
21 restore of democracy, and that does not give it a legitimate
22 right to go out and kill innocent civilians.

23 MR KING: I agree with that. Don't misunderstand me. I
24 mean, let's not stretch it that way. I'm merely saying that
25 there is a distinct difference between those who there is

1 evidence you cannot deny that, even you yourself cannot possibly
2 deny that. We're fighting to restore legitimacy to government
3 in Sierra Leone. And then you have the AFRC for instance who's
4 prime purpose was to defeat the government of Sierra Leone in
5 fact over throw the government of Sierra Leone, and were
6 carrying all sorts of brutalities. You talk about splitting
7 people's stomachs open. Didn't the AFRC do worse than that?
8 I'm not saying it's -- it is justified for the other side to do
9 it but when you're pulling the moth in your eye, you should
10 think of the other side as well. And you see the whole
11 circumstances of the conflict, should be borne in mind at each
12 time you are making submissions and you are trying to dispense
13 justice. You have to take the practicalities and the realities
14 of the situation into consideration. You see, it's alright to
15 talk about the Geneva conventions, the protocols, International
16 Humanitarian Law. But even in civilized societies where you
17 have this kind of conflicts going on, there are many, many many
18 problems, many many exceptions. Military necessity for
19 instance, they say you can bomb if it's a military necessity.
20 That's even allowable under International Humanitarian Law. So
21 all these circumstances must be taken into consideration.

22 MR KAMARA: Yes, My Lord. I take your point.

23 JUDGE AYoola: Your case as I understand it, is that the
24 meeting at Base 0 with the instructions given represented the
25 instructions that operated throughout all the campaigns. Is

1 that not your case?

2 MR KAMARA: My Lord, such of the first meeting which was
3 more or less like specific for Tongo, all the other meetings
4 will stand or will be sustained for the rest of the campagn.
5 The first meeting which was in December...

6 JUDGE AYoola: Yes but your case is that the same pattern
7 emanated from the first meeting.

8 MR KAMARA: Yes.

9 JUDGE AYoola: But along the line, there appeared to have
10 been some interventions like the meeting at which these people
11 were not present.

12 MR KAMARA: Which one is that My Lord they are present in
13 all the five meetings that I`ve indicated.

14 JUDGE AYoola: Were they?

15 MR KAMARA: Yes, My Lord.

16 JUDGE AYoola: I suppose there is along the line some
17 evidence that where Norman was giving instructions to Nallo or
18 is it?

19 MR KAMARA: Oh My Lord, My Lord you have this general
20 meetings where all of them were present and then you have
21 details of particulars of the planning which Norman will do on a
22 one to one with commanders and we do have occasions when I think
23 in that meeting you are referring to with Nallo, it was only
24 Fofana who was present. Kondewa was not present in that
25 meeting.

1 JUDGE AYoola: Furthermore isn't it the case that some of
2 these meetings, some places were targeted for attack. You refer
3 to some findings in which decision was taken to attack this
4 location and that location, but is it your case that decision to
5 attack contains criminality in itself?

6 MR KAMARA: My Lord, not basically in itself but where the
7 accused has knowledge that such an attack, criminal acts will
8 occur and with that knowledge still go and participate in the
9 planning of such criminal acts, My Lord I can see clearly the
10 results coming from there and this is why we're saying My Lord
11 that ones --

12 JUDGE AYoola: Knowledge what type of knowledge we talking
13 about is it suspicion or knowledge.

14 MR KAMARA: No, My Lord factual knowledge in this
15 instance. My Lord, if you look at the history of the cas. Ones
16 the Tongo has been attacked there were reports from the front
17 line to Base 0 and some of these reports My Lord were presented
18 to the first, to Fofana and later to Norman. And in these
19 reports it contain atrocities committed by Kamajors and in one
20 such report My Lord in which you have the -- there was a summary
21 execution of Paul Dynama and that was contained in that report.
22 My Lord, these are factual situations that were to the knowledge
23 of the accused persons. And from there, the Continuity of such
24 planning for such attacks clearly show that they knew what would
25 be the outcome of such attacks, because commanders keep oncoming

1 back to Base 0 on foot to report to the successs and the status
2 of the war.

3 If I may proceed My Lords. Just a minuit.
4

5 MR KAMARA: My Lord, we come to the commanders meeting of
6 January which I'll call January commander one. The Trial
7 Chamber in that case in that meeting found that -- the Trial
8 Chamber found that the commanders, that`s Koribondo. Coming to
9 what Justice Ayoola was saying. That specific meeting focused
10 on focused on Koribondo and Koribondo should be attacked at all
11 costs and indeed it was attacked. And following from there the
12 same Kamajors flowed onto Bo. Koribondo is about five miles from
13 Rabi so here Bo. They attacked Bo. And they will see the same
14 day Kamajors attacking Kenema then it has been identified in the
15 evidence that a commander that was in Tongo was also seen as one
16 of the same commanders that attacked Kenema and this was from a
17 Defence witness. My Lord we could see the consistency we could
18 see the system at play here. And again, My Lord, I am constrained
19 with time. If we were to look at the elements of planning which
20 I think, I believe I do not want to recite to the Lordships and
21 their Lordships know what the law is. But My Lord I take it
22 that all the elements for planning, instigating and ordering, My
23 Lord, are clearly clearly encapsulated in the evidence that the
24 Prosecution had presented and particularly for planning and
25 instigating, and the speeches which the Trial Chamber found to

1 have substantial influence on the Kamajors. My Lord, at the end
2 of the days, if at a point the Trial Chamber found that this
3 speeches had substantial influence or contribution to the
4 attacks, and then at the end of the day found otherwise, My Lord
5 I find that to be inconsistent. My Lord I'm drawing your
6 attention to that inconsistency, to see that if they found that
7 such speeches were so instrumental and had substantial influence
8 on the perpetrators of the attacks and at the end of the day
9 make a finding that is glaringly inconsistent with that finding.
10 My Lord, to leave enough time for the learned prosecutor on the
11 issue of Ground Seven, I'll rely on our submissionings. My Lord
12 that is a difficult one but I'll rely our submissions that we
13 already made before the Trial Chamber, this Appeals Chamber, and
14 avail myself for questions on that.

15 JUDGE KING: I have one more question.

16 MR KAMARA: Yes, My Lord.

17 MR KING: You plan to prepare and execute the past in
18 various areas where the juntas were located would that be a
19 criminal offence in the peculiar circumstances of this case, the
20 case of the CDF on the basis that they were repeated to have
21 been fighting to restore the legitimate Government of Sierra
22 Leone. To attack rebels in various areas where juntas are
23 located or were located. To plan to execute those attacks,
24 would that be a criminal offence?

25 MR KAMARA: My Lord, not necessarily but the evidence shows

1 otherwise.

2 MR KING: No no that's all right. I`m glad you said not
3 necessarily.I have said that. That's fair enough. It shows that
4 you are balanced. Don't waste your time it's okay. Thank you
5 so much. You've done very well.

6 MR KAMARA: Appreciate, My Lord.

7

8 MR RAPP: May it please the Chamber, I rise today to
9 present the Prosecution`s submission on the issue of sentencing.
10 As Your Honours stated just very recently in the AFRC appeals
11 judgment, that's standard review and it's a very formidable
12 standard review for an appellate to overcome. The determination
13 of a sentence is within the discretion of the Trial Chamber. It
14 will only be revised when there's discernible error and that
15 requires a showing one, that the Trial Chamber gave weight to
16 extraneous and irrelevant considerations or two that it failed
17 to give weight or sufficient weight to relevant considerations
18 or three, that it made a clear error to facts or four that the
19 decision was so unreasonable or plainly unjust that the appeals
20 Chamber is able to infer the Trial Chamber failed to exercise
21 its discretion properly. First I'd like to deal with mitigating
22 factors cited by the Trial Chamber. That we assert that were
23 either extraneous or irrelevant. The consideration of which is
24 a discernible error of the first category or were not proven
25 which is a discernible error of the third. The most significant

1 was the consideration of the justice of the cause or the
2 motivation of civic duty as mitigating factors. Though these
3 are the sixth and the seventh sub Grounds argued in this portion
4 of the brief, let me go to them first. We submit that these
5 considerations are not just extraneous and irrelevant but that
6 their consideration is also improper. Many of those involved in
7 armed conflict can argue that they fight on the right side.
8 Whether to support or to restore a legitimate and democratic
9 government or to over throw a corrupt or unresponsive one. They
10 may also argue that they are motivated by civic duty and have no
11 selfish or personal motive. One only has to look to history of
12 which the Honorable President has taken judicial notice to find
13 instances where great atrocities have been committed by those on
14 unselfish missions. To redress ethnic oppression, to spread the
15 dominion of religion or to establish a egalitarian. Of course,
16 a base or a selfish motive may be an aggravating factor but as
17 with other aggravating factors it does not follow that it's
18 absence is mitigating. Indeed, if the legitimacy of this factor
19 is upheld, it is dangerous for the victims that international
20 humanitarian law was developed to protect. Consider one of the
21 cruelest crimes for which these men were convicted. That was
22 the killing on the road of three women. Their names
23 were Amy, Jar nab about an and /ES at a. They apparently were
24 the wives of soldiers, soldiers who fought on the side of the
25 hundred at a. One was killed with a cutless but two of the

1 women were killed by having /STEUTs inserted through there vent
2 gals until they came out through the womens mouths. The
3 question that we ask is were these victims entitled to less
4 protection from those fighting on a purportedly just side then
5 they would be entitled from those fighting on the other side.
6 Because that is what allowing such a mitigating factor indeed is
7 doing. Now the Trial Chamber correctly rejected the ap/PHREUBG
8 ability of the Defence of necessity in this case but then they
9 allowed essentially that those arguments that supported that
10 Defence to come in through the back door. And as we've argued
11 earlier as the deputy prosecutor argued in regard to the crimes
12 against humanity standard, this is to confuse international law
13 to confuse the essentially use at bell /HRUPL the law on the
14 commencement of conflict where the justness of the cause may
15 play a role with use in elbow which applies automatically on out
16 break of hostilities to all sides. International humanitarian
17 law is largely reflected in the -- in the Geneva conventions and
18 in particularly in common article three and supplementing that
19 common article and those conventions were the additional
20 protocols proposed and enacted now part of customary
21 international law /SPWE giving in 19707. In those protocols it
22 state that is international humanitarian law applies without any
23 adverse distinction based on the origin or originating of the
24 armed conflict or the causes as posed by or attributed to the
25 parties. As the ICTY said in Court discircumstance /KUS in the

1 appeals Chamber judgment Paragraph 1082 that's the case cited
2 numerous occasions in our brief that he with did not quote this
3 particular paragraph I'd like to quote it now.

4 The unfortunate legacy of law shows until today many
5 perpetrators believed that violations of binding international
6 norms can be lawfully committed because they are fighting for a
7 just cause. Those people have to understand that international
8 law is applicable to everybody in particular during time of war
9 thus the sentences rendered by the international Tribunals have
10 to demonstrate the tall /TPAEU of the old Roman of
11 [indiscernible]. Amid the arms of war the laws are silent in
12 relation to the crimes under the international Tribunals
13 jurisdiction. It does not matter that the other side may have
14 committed more horrendous atrocitys because as noted by the Lee
15 my Trial Chamber judgment international humanitarian law does
16 not lay down obligations based on res procy but obligations egg
17 /TKPWA oh mis designed to safeguard fundamental human values
18 there for must be complied with by each party regardless of the
19 conduct of the other party or parties.

20 Another mitigating factor considered by the trial -- by the
21 -- by the Trial Chamber in the sentencing in this case was
22 remorse or empathy. This was an argument submitted as I believe
23 the second sub ground of our appeal. And of course, the law in
24 that area from the other international Tribunals which I know we
25 do not follow as authority but we find as pervasive that's the

1 /*EUBGS decision in sited in our brief held that in order to be
2 a factor in mitigation the more remorse expressed by an accused
3 must be real and sincere. In discussing the remorse issue I
4 think it's instructive to recall the AFRC so recently decided on
5 appeal. In that case the first accused Mr Brima stated at the
6 sent tenting hearing I stand for peace and recollection
7 sillation I pray to bring peace and recollectionation to the
8 people soft Sierra Leone. I show remorse to the victims of this
9 situation and Mr call ma are /RA stated in his oral submission
10 for all those that suffered in the war who lost their lives I'm
11 sorry for them My Lord. Mr Kanu said we're coming back to ask
12 the Sierra Leone people to forgive us. We ask formercy. The
13 Trial Chamber in that case did not /TPHAOEUPBD those statements
14 to be genuine and sincere and did not provoid a mitigating
15 factor that was appealed and of course in that particular case
16 the accused faced the high standard of on the appellate level
17 and the appeals Chamber found that they had not sustained that
18 challenge. And of course, today we're approaching this matter
19 from the other direction. From a Prosecution appeal but it's
20 interesting to note that in this case Mr Fofana's lawyers said
21 in his allocution Mr Fofana like all fair minded and decent
22 people in Sierra Leone deposition ly regrets all the unnecessary
23 suffering that has occurred in this country. He was -- the
24 judges twice asked Mr Fofana if he wanted to say anything and he
25 finally said well what he said is what I asked him to say that

1 is what I have to say. Mr Kondewa said Sierra Leoneans those of
2 you who lost your relations within the war I plead for mercy
3 today and remorse and even for yourselves. May God continue to
4 sustain this nation. Now, reading that language he's pleading
5 for mercy and remorse but not expressing it of course he was
6 speaking Mende as Your Honours might ask. We've checked the
7 original Mende and I invite the Court to do as well but I don't
8 find that that translation or the people that looked at it is
9 unfair one.

10 Nonetheless, the Trial Chamber found that the accused did
11 clearly expressed empathy with the victim of the crime and that
12 it was real and sincere. We submit under these circumstances
13 that that was a clear error of fact and at any case the remorse
14 expressed or the empathy expressed is not so great as to provide
15 for any kind of substantial mid /TKPWAEUGS. Indeed this
16 question of remorse and it's express is admitly a complex and a
17 bit of a tricky one for an accused who is standing on his not
18 guilty plea and on tending his innocence. Many Trial Chambers
19 like the [indiscernible] Trial Chamber at the ICTY have held
20 basically the individual does not admit to responsibility
21 there's not really any remorse. They are not saying I'm
22 responsible. On the other hand, vice appeals Chamber disagreed
23 with that finding but nonetheless upheld the sentence found in
24 that particular case. We would submit very simply that whatever
25 you're talking about here whether it's empathy or remorse it

1 must be more complete and more sincere than that presented by
2 these accused.

3 Another factor found as a mitigating one by the judges was
4 a -- the fact or the essentially the argument that lenient
5 sentence would contribute to reconciliation. Now, I want to say
6 in fairness in dealing with our sub ground of appeal on this
7 which is our 8th sub ground of appeal, we did not list this
8 specific sub ground in our notice of appeal. We generally
9 appealed and then later -- and for the reasons of the errors of
10 law and the errors of fact and on the appropriate legal standard
11 we listed some particular errors but we didn't list this one but
12 we would submit that it's appropriate for the Trial Chamber to
13 consider it. It's something that's been now fully argued by the
14 Court. It is to some extent a novel argument. The essence of
15 which is that -- that reconciliation can be established by
16 providing when /KWREPBT sentences to those that are accused and
17 then convicted in these war crimes or international human tar
18 /KWRAPB Tribunal Court's. The -- this in our submission runs
19 counter to all of the founding documents that have established
20 this Court and the other add hospital Tribunals and specifically
21 I would refer to United States -- United Nations console
22 resolution 1315 called for the establishment of this Court.
23 Stated that a credibility system of justice and accountable for
24 serious crimes would end impunity and contribute to the process
25 of reconciliation. Accountability thus contributes to

1 reconciliation not the absent of accountability. Not the
2 minimization of accountability. We would note that to the
3 extent one could say that there are values in when /KWREPBT
4 sentences or evening /SKWRAEUGSS of individual's escaping
5 criminal responsibility following a conflict those are generally
6 accompanied by much more contrite expressions of regret by
7 individual's appear before truth and recreation and fully
8 confess to their responsible. Through that process establish
9 reconciliation. That is not occurred here. These individual's
10 have been found responsible for very, very serious offences
11 including more than 200 murders multiple acts of cruel
12 treatment, pillage, collective punishment and in the case of one
13 of them for child soldier the use and recruitment of child
14 soldiers. If one is going to have an end to impugned to
15 those crimes it's important they be held accountable those are
16 the principals established in each of the finding Statutes of
17 the international Tribunals and of the special Court.

18 Now, let me proceed to a third issue or a fourth issue and
19 that involves the mitigation given to the fact or to the
20 recognition of a fact that these individual's had no effective
21 training and were inexperienced and there for entitled
22 to some consideration under those facts. We would note that the
23 Trial Chamber sided no authority on that though Mr Fofana cited
24 some ICTY Trial Chamber decisions or has cited some SREUPF we
25 would note that those particular cases are not really on point.

1 Or rich received mitigations for being young and inexperienced.
2 This snot the case with these individual's. H H was in a newly
3 created unit only days after it's establishment and at the time
4 these crimes were committed the CDF was not that new. There's
5 really no showing though that the absence of training to the
6 extent there was an absence of training affected the ability of
7 the accused to comply with international humanity law from
8 appreciating the criminalty of murder and acts of cruelty
9 against noncombatants. I would pass over quickly two of the
10 other mitigating factors that were the fourth and fifth sub
11 grounds of our appeal. Subsequent conduct or -- and lack of
12 prior convictions and rely on the submissions in our brief but I
13 would note that Kondewa did not present any evidence of such
14 subsequent conduct and like Mr Fofana and of course he would
15 have had to establish the mitigating factor by the balance of
16 probabilitys and in the absence of such -- of factual
17 submissions it's submitted that it be impossible to grant him
18 such a mitigating factor.

19 Now let me go another category of, in our view, of
20 discernable errors on the part of Court and that's where they
21 did not consider factors that they should have, and the most
22 important one there is, of course, Article ^ 19-1 of the
23 statute of the Court that mandates the Trial Chamber to
24 consider, where appropriate, the sentencing practices of Sierra
25 Leone domestic Courts. I have to ^ point out that this appeals

1 Chamber noted in its recent AFRC appeals judgment that even
2 though the word shall appears, the words were appropriate, gives
3 the Trial Chamber discretion in this matter. However, we would
4 submit that the Trial Chamber abused that discretion by stating
5 that it would never consider Sierra Leone law unless the accused
6 were convicted of crimes under Article 5. The cruelty to
7 children and want and destruction of property sections of Sierra
8 Leone law that are incorporated in our Statute. At the ICTY
9 and ICTR there are similar provisions mandating recourse the
10 sentencing practices in the former Yugoslavia and Rwanda
11 without --

12 JUDGE KING: Are they really similar? The provision
13 in ICTR is different because in ICTR there is no -- the
14 provisions the similar provision did not include as appropriate
15 and the ICTY there is no provision specifying as appropriate.

16 MR RAPP: As I note they are similar but the word as
17 appropriate does not exist in either the ICTR or ICTY statute.

18 JUDGE KING: And doesn't that make all the difference
19 because I think that -- that phrase, as appropriate, was put in
20 there deliberately. Now, you are trying -- we are trying some
21 of these people on speaker king speaker on offences against
22 international humanitarian law as far as I'm aware Sierra
23 Leone's law does not cater for those offences. The offences as
24 regards crimes in Sierra Leone that we found in Article 5 of the
25 statute, and I think appropriate refers to that

1 ^ [indiscernible] where were charged with offences on Article 5.
2 Then, as appropriate, you could refer to Sierra Leonean law. I
3 think that's why the phrase was put in there. Otherwise, it
4 doesn't make sense because we don't all this regulations that
5 you have in international and humanitarian law here.

6 MR RAPP: Well, we would say in Sierra Leone law you could
7 commit a murder, an intentional killing with malice and
8 forethought and premeditation, and that's a crime here but then
9 here you have to prove that and then you also have to prove the
10 ^ annexes to armed convict or to an attack on a civilian
11 population. So in a sense we have to prove a crime that's more
12 difficult to prove, but yet how can we then provide a penalty
13 that is dramatically less. We notice, in this case, Mr Kondewa
14 was found guilty of directly committing the shooting of this
15 town official, and obviously if that had been tried under Sierra
16 Leone law, he would have been guilty of murder, a very serious
17 offence, carrying maximum penalties in the law that exceed the
18 maximum penalties we have available. How could it be that when
19 these basic crimes carry such high penalties under national law,
20 that when you try them at the international law in Freetown,
21 they bring penalties that are so much lower. That would seem
22 inconsistent with logic and it's inconsistent with what the
23 other Tribunals do they look because they actually look at the
24 penalties for the ordinary crimes.

25 JUDGE AYoola: In Rwanda in the case of the ICTR, Rwanda as

1 a nation, as a state, has provisions for crime against humanity
2 and genocide. In Sierra Leone we do not have provision for
3 crimes against humanity, and that is why I believe in the IC --
4 Special Court Statute it was deliberately put there that we take
5 into consideration the practices in Rwanda because Rwanda has
6 provisions for crime against humanity and it -- it -- if you
7 look at the ICTR Statute, it says that the -- the Tribunal, the
8 Rwanda Tribunal, would take -- will be guided by sentencing
9 practices in Rwanda, and that is because Rwanda has provisions
10 for international crimes. So when ^ asked that you say as
11 appropriate it means in relation to crimes against humanity and
12 war crimes you look at Rwanda. In relation to crimes which are
13 peculiar, peculiar ^ national crimes in Sierra Leone, you look
14 at Sierra Leone. That's the meaning of as appropriate.

15 MR RAPP: Well, I could accept that's a way that it be
16 interpreted, but the effect of interpreting it that way is to
17 essentially provide for dramatically lower sentences here for
18 the same crimes, the same killings, whether they are tried in
19 this Court or down the road at the high Court of Sierra Leone.

20 JUDGE AYoola: I don't think it would be fair to all
21 parties concerned to carry -- to look at one side of the coin.
22 Because the level of responsibility will not be the same. There
23 is no responsibility for superior responsibility in Sierra
24 Leonean law, but you have it in crimes against humanity. So
25 there is burden on one side and maybe if they had been tried for

1 murder under national laws maybe -- maybe there would have been
2 no responsibility based on superior responsibility.

3 MR RAPP: Well, obviously, it is, as we indicated, a more
4 difficult to prove these cases at the international level but I
5 note simply the case of the single direct perpetration murder
6 and that obviously does trouble us on the side of the
7 Prosecution that we're dealing with a crime that -- with a much
8 lesser penalty and that in our view is why this provision is in
9 the -- is in the Statute, but I'll depart that issue. I think
10 we've made our argument there. I would note additionally in
11 terms of issues -- something that the Trial Chamber should have
12 considered and did not is the totality of the criminal conduct
13 here. Certainly, the Trial Chamber was within it's rights to
14 enter individual sentences for each of the counts of conviction
15 as opposed to a single sentence as occurred in the AFRC case,
16 but we submit that the way that was done then without providing
17 any kind of aggregation without any of the time being
18 consecutive, with all of the time being concurrent, minimizes
19 the totality of the offence and the totality was something that
20 Your Honours emphasized in your appeals Chamber decision, that
21 one has to look at that totality. Basically, what we have here
22 is a situation where if these individuals had been convicted
23 only of cruel treatment, they would have received in a ^ year
24 in a six-year sentence. The fact that they were then also
25 convicted of more than 200 murder based upon more than 200

1 killings adds really nothing to that sentence, and that, we
2 submit, is -- that factor to totality is something that should
3 have been considered by the Trial Chamber.

4 I think this also relates to really our final submission
5 which has to do -- which is essentially that this sentence was
6 so unreasonable and plainly unjust that it can be inferred that
7 the Trial Chamber failed to exercise its discretion properly.
8 More than 200 murders, including impaling of two women, there
9 was large scale killings and brutalities cited by the Trial
10 Chamber. The fact that the victims included unarmed and
11 innocent civilians, including women and children was physical
12 and psychological impact on the victims, their relatives and the
13 broader community were also cited by the Trial Chamber. And
14 certainly under the standard you repeated in the AFRC appeals
15 judgment there is great gravity to these crimes. As to
16 individual culpability, though some of the criminal
17 responsibility was based on 6.3 command responsibilities, the
18 Trial Chamber found their responsibility as commanders was
19 greater than that of the actual perpetrators. While 6.1
20 individual responsibility was based largely on aiding and
21 abetting, as we know Kondewa was held responsible for the
22 direct perpetrating of some acts, including the shooting of the
23 town commander. In the end the Trial Chamber's sentence was, as
24 stated, significantly impacted by mitigating factors. And given
25 that those mitigating factors should not have been considered or

1 to the extent that they could have been considered, the
2 Prosecution submits that no reasonable trier of fact given --
3 could have given such weight to those factors as to reduce these
4 sentences to six and eight years. As stated by the Appeals
5 Chamber ICTY in [^] Golic the sentences in this case were simply
6 taken from the wrong shelf. We would respectfully ask the
7 Appeals Chamber to revise the sentences upward to reflect the
8 gravity and the established culpability of these individuals.
9 Thank you very much, Your Honours.

10 MR KING: One small question for you. I think you
11 mentioned something about Kondewa, you know, expressing empathy
12 and remorse but no admission of guilt. Did I understand you
13 correctly that he did not express any admission of guilt?

14 MR RAPP: Clearly he represent -- he expressed empathy.

15 MR KING: Now he used the word I asked for mercy and
16 remorse. I questioned whether he, in fact, expressed remorse.
17 The issue that I was alluding to is for an individual to express
18 remorse, does an individual have to stand in front and say I'm
19 remorseful for what I've done and essentially accept
20 responsibility for his crimes. That, of course, is a difficult
21 thing for an accused individual to do, has the right to stand on
22 a not guilty plea and to challenge his convictions, but there's
23 certainly authority to the effect that you don't get the remorse
24 mitigating factor unless you actually admit to some
25 responsibility of factual and you deny legal responsibility, but

1 I submit that at least according to Appeals Chamber law, it
2 appears that one can get a mitigating factor here, Appeals
3 Chamber law from the ICTY if you express sincere empathy without
4 admitting responsibility.

5 JUDGE KING: Good afternoon again. Mr Kamara, I believe
6 you've finished your submissions.

7 MR KAMARA: Yes, My Lord.

8 JUDGE KING: It's okay, thank you. Right. Who's on next?

9 MR CARROL: I'm on next, My Lord. With the leave of this
10 Court, Your Lordship, I would seek to argue by grounds of appeal
11 not in the way they came, but by grounds one, first.

12 JUDGE KING: You seek to argue?

13 MR CARROL: By grounds of appeal, in a different sequence.

14 JUDGE KING: You have grounds of appeal?

15 MR CARROL: Sorry. The reply is the grounds of the answer.
16 Sorry, My Lord. The answer. I'm sorry, My Lord. I'll seek to
17 answer the grounds of appeal by sick leave. Having ground ten
18 first, then first then one, seven, three, and four, and six,
19 five, eight and nine, with the leave of this Court.

20 JUDGE KING: Could you say that again, please.

21 MR CARROL: I'm seeking the leave of this Court, Your
22 Lordship, to answer the grounds of appeal by arguing ground ten
23 first, the longest ground. Then ground one, ground seven, three
24 and four, six, five, and eight and nine.

25 JUDGE KING: Thank you. So I take it in fact that you are

1 going to respond --

2 MR CARROL: Respond. My Lordship, yes.

3 JUDGE KING: - to the grounds of the appeal of the
4 Prosecution.

5 MR CARROL: That is correct, Your Lordship.

6 JUDGE KING: All right. Do you have any objections to
7 those proposals?

8 MR STAKER: None, whatsoever, Your Honour.

9 JUDGE KING: All right. Very well.

10 MR CARROL: Your Lordships, we'll start with ground ten --
11 -sorry. In this ground of appeal found on page one -- page 15
12 of the Prosecution's address of appeal, the Trial Chamber erred
13 in law and in fact according to the Prosecution and they said
14 that they committed a precedural error in the sense that there's
15 been a discernible error in the Trial Chamber sentence and
16 discretion, in imposing sentences that you did in the case of
17 the accused persons. The Prosecution then ventured out -- they
18 also went on to say that if this was so because the Prosecution
19 ventured out, ventured -- they then went out to venture -- set
20 out the errors. They then went on to venture to set out the
21 errors, the errors that is in this particular fashion. First of
22 all, they said the errors were one:

23 1. Refusal to consider sentencing practices of the Sierra
24 Leonean Courts.

25 2. Treating sentence statements of the accused at the

1 sentencing hearing as mitigating factors.

2 3. Treating lack of adequate training as a mitigating
3 factor.

4 4. Treating subsequent conduct of the accused as
5 mitigating factor.

6 5. Treating lack of prior conviction as a mitigating
7 factor.

8 6. Treating the just cause of the accused as a mitigating
9 factor.

10 7. Treating motive of civic duty as a mitigating factor.

11 8. Treating the purpose of a consideration of a
12 mitigating factor.

13 9. Deciding that the sentences should be concurrent
14 without adequate consideration and;

15 10. Manifest inadequacy of the sentence.

16 I shall start Your Lordship with the first error submitted
17 by the Prosecution. That is refusal to consider sentencing
18 practices of the Sierra Leonean Courts. In the Prosecution's
19 Appeal Brief, the Prosecution submits the Trial Chamber erred in
20 law when it found that it would be inappropriate to rely on the
21 sentencing practices in Sierra Leonean Courts in determining the
22 punishment to be imposed on the grounds that One: The accused
23 were not indicted or convicted for any offence to Article 5 of
24 the statute. It confers to the jurisdiction of the Special
25 Court over Sierra Leonean law. Sierra Leonean offences and

1 two, the Statute of the -- of the Special Court and two of the
2 Special Court does not provide for either capital punishments or
3 imposition of life sentences which are the punishment that are
4 most serious offences under Sierra Leone laws would attract.
5 Now we are submitting Your Lordship, in the first place, the
6 Prosecution never refused to consider the sentencing practice in
7 Sierra Leone. It did consider this practices in paragraph 40 of
8 the sentencing judgment.

9 JUDGE KING: Mr Carrol, I don't think we need a response on
10 that.

11 MR CARROL: Much obliged, Your Lord. I'll move on. Okay.
12 Number two is treating statement of the accused at the
13 sentencing hearing as a mitigating factor. The Trial Chamber
14 noted that at the sentencing hearing in this case, counsel for
15 Fofana had said that Mr Fofana accepts the crimes are committed
16 by the CDF in the conflicts of the Sierra Leone. Mr Fofana
17 deeply regret all the unnecessary suffering that has occurred in
18 the country. The Trial Chamber then held that although Fofana by
19 this statement does not expressly acknowledge through this
20 personal participation in the crimes for which the Chambers
21 convicted him, the Chamber finds that he clearly express empathy
22 with the victims of the crime. In paragraph 64 of the
23 sentencing judgement. The first contention of the Prosecution
24 under this particular ground, is that it found that -- it
25 contended that normally under international law expressions of

1 empathy are not usually regarded as mitigating factors. And
2 secondly it argued that the expression of empathy made during
3 the course of trial as in the other case, should be given more
4 weight than one made in the sentencing stage, as in the case of
5 Fofana and the top contention was that at the expression of
6 empathy for victims cannot be equated to genuine remorse. First
7 of all, we will submit straightaway that empathy has been
8 considered as a mitigating factor in the case of ^ Orick.
9 Orick sentencing judgement, paragraph 65. And subsequently in
10 the ^ *baseljelic* appeal judgment Paragraph 177. And secondly,
11 as regards to the argument that more weight should be given to
12 this mitigating factor, if is made during the course of trial,
13 we submit that the sentencing part of the proceedings that's the
14 appropriate moment for raising mitigating factors. And thirdly,
15 that empathy cannot be genuinely with remorse. We are sub
16 mitigating that genuine remorse is not a matter of words or
17 syntax or meaning, it is an expression of the feeling of
18 repentance from the Accused persons. And empathy actually
19 conveys the feeling of one, putting one sufferings of another
20 person, and we are submitting that in this case, this is exactly
21 what Fofana did, he felt the suffering of the people concerned.
22 We are submitting, Your Lordship, that the Court was right to
23 consider empathy as a mitigating factor. And what weight has to
24 be given to such a factor lies within the discretion of the
25 Trial Chamber as Paragraph three, five, three, nine, five. So

1 we submit finally Lordship on this error, alleged error, that
2 the Prosecution has failed to prove that the Trial Chamber has
3 committed any error not to talk of a discernible error in the
4 exercise of discretion by considering empathy as a mitigating
5 factor.

6 The next alleged error was treating lack of adequate
7 training as a mitigating factor. The Prosecution contends under
8 this rubrick that the Trial Chamber gave no factual basis to
9 justify, taking lack of training into account as a mitigating
10 factor, and that the cases of the *Orick* Trial judgment and the
11 *Basenovic Trial* judgment that Defence counsel sought to rely on
12 were distinguishable from this case. We are submitting that
13 there indeed is a factual basis for the Trial Chamber taking
14 lack of training as a mitigating factor. Because firstly, the
15 Trial Chambers stated in paragraph 66 of the Sentencing Brief
16 that it was aware that both men were propelled in a relatively
17 short period of time with no adequate training from civilian
18 life to effective positions of authority in a very brutal and
19 bloody conflict. Your Lordship, the Trial Chamber was aware
20 because there was evidence adduced to this effect. It is
21 because of this -- it is also clear from the factual finding in
22 this case which are not disputed by the Prosecution that
23 combatants were trained for only two weeks, and other who were
24 not fighting like Fofana were trained for only four days to
25 learn the cork and fire technique, and this is found in

1 Paragraph 319 of the Trial Chamber judgment. Is it also a
2 factual finding that Base Zero was established in
3 September 1997. And very shortly afterwards, Fofana was
4 appointed as director of war. And this is found in paragraphe
5 302 of the Trial Chambers actual findings. This shows that
6 Fofana was propelled from civic life to an effective position of
7 authority within a very short time. It is because of this
8 adduced evidence that the Trial Chamber said that it was aware.
9 As regards to the case of *Orick* Trial judgment and *Hasanovic*
10 judgment, we are submitting that these cases are on all force
11 with this particular case. Because just like with those cases,
12 Fofana with lack of adequate training had to perform roles that
13 he was not qualified for and in a desperate situation, desperate
14 and difficult situation. So we are submitting that these
15 particular authorities are nearly on all force with the Fofana's
16 case.

17 JUDGE KING: Which one of them is your client.

18 MR CARROL: My client is Mr Fofana.

19 JUDGE KING: Would you stand up please.

20 MR CARROL: Yes, Your Lordship please.

21 JUDGE KING: Thank you, sit down.

22 MR CARROL: As your Lordship pleases. And the next alleged
23 -- error was treating subsequent

24 PRESIDING JUDGE: Before you leave the training aspect
25 training in what, because do you need any special training to

1 know that you must not commit or support crime against humanity.

2 Do you need any training for that.

3 MR CARROL: No, My Lord, it was military training I meant,
4 they had no special military training. And they were manning
5 military tasks.

6 PRESIDING JUDGE: Military tasks consist of several things.
7 You have to address us with particular relevance to the crime
8 they were alleged to have committed.

9 MR CARROL: Yes, My Lord. Well, from the evidence of the
10 Prosecution they have been alleging that they have been
11 criminally responsible for two crimes aid and abetting and
12 superior responsibility. And aid and abetting was imputed on
13 the accused person by virtue of knowledge that these crimes were
14 going to be committed through military attacks. That were
15 carried out by the Kamajors, that was the argument. But we are
16 submitting that, we should submit later on to show these attacks
17 really were not directed at the civilians or were not intended
18 to execute as criminal acts later on. As Your Lordship
19 pleases. The next alleged error is treating subsequent conduct
20 of the accused as a mitigating factor. The Prosecution
21 contended under this Ground that although, although Fofana did
22 involve himself in activities in at the peace and reconciliation
23 but in the absence of more detail or specific evidence only
24 limited weight should be given to this evidence by a reasonable
25 Trial Chamber. They are saying that the evidence was not

1 detailed or specific. We submit straightaway that very detailed
2 evidence was given in the five witness statements containing 15
3 pages which showed the way and manner in which the accused
4 person engage himself in post, in subsequent, in post war
5 activities. He held workshops. The contributions he made, the
6 contributions he did. So we are submitting that really -- that
7 really -- that, that submission has no moment actually. And we
8 are, we further submit that, in fact, as regards this -- as
9 regards subsequent conduct what, is important is not the details
10 of what he has done or the specifics but the mere fact that he
11 has done it and done it voluntarily. Because this shows a
12 change of mentality. A complete of his -- of his mentality. A
13 change of attitude, a complete transformation of his mentality
14 from somebody who was fighting, from somebody who was fighting I
15 think for peace. And this and of course ultimately this was to
16 promote, was this would work towards his capacity for
17 rehabilitation.

18 And we further submit as well, Your Lordships, that
19 subsequent conduct has always been taken as a mitigating factor
20 in international law. This is clear from the *Babic* Appeal
21 judgment paragraph 56 to 59. Where *Babics* conduct subsequent to
22 the conflict, particularly with respect to promoting peace and
23 reconciliation was treated by the ICTY as a mitigating factor.
24 So we submit finally and of course he was also director of peace
25 as well. He became director of peace. This shows -- these are

1 matters that shows a change in attitude and mentality. But we'd
2 like to submit that the Prosecution has failed again to show
3 how. How the Trial Chamber erred -- how it erred by virtue of
4 its discretionary framework. And so we urge the Court to
5 dismiss the Ground. With your leave Your Lordship, the next
6 alleged error was treating the fighting of a just cause of the
7 accused as a mitigating factor. The Prosecution contends that
8 -- that the fact that the Trial Chamber took the consideration,
9 the accused were fighting a just and legitimate cause, it was
10 the restoration of democracy of the democratically elected
11 government of President Kabbah and the -- and contributing
12 essentially to the re-establishment of rule and order in Sierra
13 Leone, where criminality, anarchy and lawlessness had become the
14 order of the day, is found in paragraphs 83-87 of the Sentencing
15 Judgement, My Lord. The Trial Chamber erred in law in treating
16 this fighting a just cause as mitigating factor.

17 JUDGE AYoola: Paragraphs what?

18 MR CARROL: Paragraphs 83 to 87 of the sentencing,
19 judgment, My Lord. The Prosecution then went on to argue at
20 length that the Trial Chamber recognising the Accused were
21 fighting the just cause men that were fighting on the right
22 side. First of all, we are submitting straightaway that that
23 was a total misinterpretation of this part of the judgment. And
24 it is speculative, because nowhere in the judgment is the
25 question of -- is the term a right side were use. And we have

1 also never used in our submissions. Because if there was any --

2 JUDGE KING: Just one minute. Are you saying then that the
3 -- your client fighting for the restoration of the legitimate
4 government, they were fighting on the wrong side. Of course,
5 they were fighting on the right side.

6 MR CARROL: I'm not saying that, My Lord.

7 JUDGE KING: Well, why are you complaining then if they
8 said they were fighting on the right side. Of course they were
9 fighting on the right side.

10 MR CARROL: I won't complain anymore, My Lord, as Your
11 Lordship pleases. The law is in Your Lordships bosom, I stoop
12 to your penancy My Lord. Your Lordship, we are therefore -- we
13 want to submit that the fighting of a just cause, what it really
14 shows is that the cause that motivated the accused person to
15 fight was a just cause, in that they wanted to restore democracy
16 to bring back the government and to bring and to defend their
17 land, specifically. So and of course it is the law -- the law
18 has always, international law has always considered this as a
19 mitigating factor. Like in the case of *^ Movic* sentencing
20 judgment paragraph 46 it was considered as a mitigating factor.
21 So --

22

23 JUDGE AYoola: How was it considered in that case.

24 MR CARROL: Yes, in that case it was considered that it
25 should not be considered as a significant mitigating factor.

1 JUDGE AYoola: It should not be considered as a
2 significant mitigating factor.

3 MR CARROL: That is so. That is what they say in that
4 case. But then we have two other cases, Your Lordship, on
5 appeal which they didn't have the type of qualification to it.
6 But -- sorry.

7 JUDGE AYoola: Did you have any case to show that he shall
8 be fighting what you describe as a just cause.

9 MR CARROL: Yes.

10 JUDGE AYoola: That should be a mitigating factor. That is
11 the type of authority you should be looking for.

12 MR CARROL: As Your Lordship pleases. Yes, Your Lordship,
13 I've got on authority. The authority of the *Simba* appeal, The
14 *Simba* appeal judgment in Paragraph 318. It held that the Trial
15 Chamber had not erred in taking into account as a mitigating
16 factor that the possibility of the appellant acted out of
17 patriotism and government allegiance. It was similar to this
18 case in that an allegiance rather than esteemism or ethnic
19 hatred. I think that is not exactly on the point but it shows
20 that these type of situations which you show love for your
21 country and fight because of that, is out of a civic duty. Just
22 cause, it is a mitigating factor. It shows the goodness in the
23 accuse person. And this cannot decrease the crime but it may
24 mitigate the punishment, that's why I feel that this Trial
25 Chamber in its discretion has used as such. As Your Lordship

1 pleases. Your Lordship, the next alleged error was treating the
2 purposes of reconciliation as a mitigating factor. Well, Your
3 Lordship, this Ground of appeal is not found in the notice of
4 appeal, but notwithstanding, we shall move on. But normally
5 where -- where submissions are made that are not given notice of
6 -- in notice of appeal, they go to no issue but we will not be
7 -- we will prefer to go and argue -- argue this particular
8 submission. Prosecution contended that the Trial Chamber erred
9 in law and in -- or erred in the exercise of discretion, when it
10 treated the purpose of this reconciliation as a mitigating factor
11 because it argued that the sentences were too lenient to promote
12 reconciliation. And the need to promote reconciliation did not
13 warrant the position of very lenient sentences. We are
14 submitting straightaway that due regard been had to the
15 secondary mode of commission of the offences that the accused
16 was charged with that is aiding and abetting article 61 and
17 superior responsibility contrary to article 63. And also the in
18 directness of their participation. Normally such situations
19 warrant much less offences and we would submit that these --
20 these sentences are not lenient at all.

21 JUDGE KING: What do you mean by secondary participation.

22 MR CARROL: It means they were not the actual perpetrators
23 of the offence.

24 MR KING: All the offences they convicted him of.

25 MR CARROL: Exactly.

1 MR KING: He was not directly responsible.

2 MR CARROL: Exactly. All the offence he was convicted with
3 he was not directly involved.

4 MR KING: I'm sorry, would you please put that in the form
5 of submission, so that it is clear what you are saying with
6 regard to secondary participation and vis-a-vis mitigation.

7 MR CARROL: As Your Lordship pleases. As regards Fofana,
8 he was only convicted of secondary modes of criminal[^] under
9 article 61 and 63. He had no direct commission of offences
10 which he was convicted for. Your Lordship, we are submitting
11 that looking at the sentences that were imposed for similar
12 offences under international law, that these sentences are not
13 lenient at all, because Your Lordship, in the case of the *Orick*
14 trial judgment at paragraph seven *Orick* was convicted of
15 secondary mode of commissional offence which is articles --
16 article 63 but article 73 under the ICTY for failing to prevent
17 and punish occurrence of murder and cruel treatment and
18 ultimately he's sentence of two years was ultimately imposed on
19 him affecting his overall criminal [^] ability. Also, this very
20 same offence was offence that *Hasenovic* was also charged with.
21 And in his sentence at pages 632 to 638 he was sentenced for
22 five years for the same offences failure to prevent and
23 punishment murder and other cruel -- other act of cruelty
24 according to article three war crimes. Your Lordship, we are
25 submitting that if these two sentences, two and five years were

1 sufficient for similar offences. I cannot see how six years can
2 be excessive. The sentences we're submitting are not lenient
3 but due regard to all the factors and circumstances of this case
4 particularly the prevailing circumstances mitigating factors,
5 and the mode of commission. We submit, Your Lordship, that six
6 years is not lenient but it affects the overall ^ ability of the
7 accused person.

8 JUDGE AYoola: Assuming that that instigation was properly
9 found as the mode of committing, you say that is evokes less
10 responsibility than the actual perpetrator that the instigator
11 has less responsibility in terms of punishment than the actual
12 perpetrator.

13 MR CARROL: I will say so My Lord, I would agree, I would
14 say so, indeed. Because he would definitely receive less than
15 an actual perpetrator, but he would receive more than somebody
16 who is an abett, because of the constant relationship that must
17 exist between the instigation of the crime and its perpetration.
18 I would say yes. And furthermore, it is an inquest offence.
19 Which I believe would warrant lesser punishment than the
20 substantive offender. As Your Lordship pleases. Your Lordship,
21 the next alleged error is that the submission of -- is the error
22 alleged error of treating prior conviction as a mitigating
23 factor. Lack of prior conviction we are submitting, has been
24 always been treated as a mitigating factor in the international
25 law. And we will site the *Blaskic* appeal judgment paragraph 69

1 is one incident and also *Celebici* appeal judgment paragraph 788.
2 In these cases it confirmed -- in these cases it was clearly --
3 the Court clearly used this particular lack of prior conviction
4 as a mitigating factor, so there is no error of law in using it
5 in this case as a mitigating factor. And so we say again, the
6 Prosecution has failed to show how, how the Trial Chamber has
7 erred by so using it as a mitigating factor. Your Lordship, the
8 next alleged error is that treating the purposes of
9 reconciliation as a mitigating factor. Sorry. You just missed
10 that one. Sorry, My Lord.

11 JUDGE AYoola: It's concurrent.

12 MR CARROL: Yes, it's concurrent. Yeah. Sorry, My Lord.
13 The next argument was the Prosecution argued -- yes, the
14 Prosecution submits that the Trial Chamber erred in law by
15 deciding that the sentences should be served concurrently
16 without giving adequate consideration to this. We submit that
17 definitely before stating that this sentences should be served
18 concurrently the Trial Chamber took in consideration every
19 single factor relating to mitigation of offences. They consider
20 the gravity of the crimes, the personal circumstances of the
21 accused person, the aggravating factors, the mitigating factors
22 and everything. So this was -- that was very clear from the
23 sentences judgment at page -- it was from page --

24 Before you go further what are the legal principals involve
25 when a Trial Chamber decides to pass sentences concurrently or

1 consecutively what are the legal principals involved speaker
2 king.

3 MR CARROL: The main legal principle involved Your Lordship
4 at the end of the day the final aggregate sent and punishment
5 penalty should reflect the overall criminal coupe ability of the
6 accused person.

7 MR KING: What do you mean.

8 MR CARROL: That if the Court pass sentence of let's say on
9 one count six years, on another count 12 years, then they should
10 be served concurrently --

11 MR KING: That's not what I mean. Concurrently as distinct
12 from consecutively. Obviously, the Chamber has a discretion
13 what will the principles involved in exercising such discretion.

14 MR CARROL: The principles involved Your Lordship, as far
15 as I know is that the Court will take some -- certain facts into
16 consideration like for example, the person has been a first
17 offender and the gravity of the offends the mode of the
18 commission of the offences etcetera. These are the ones the
19 Court will look at. Another factor is that whether that the
20 imposition of such either of them will not work in justice at
21 the end of the day.

22 MR KING: In what way is the Trial Chamber's discretion
23 unfettered as regards person concurrent sentences if any. If it's
24 in any way affected.

25 MR CARROL: Yes, I would say it would be affected at the

1 end of the day or it promotes injustice.

2 MR KING: That is if it passes concurrent sentences.

3 MR CARROL: If it passes one which does not reflect the two
4 situations it will be -- the discussion would not have been
5 judiciously exercised in the circumstances.

6 MR KING: So it should reflect what.

7 MR CARROL: Justice in the first place and overall
8 concurability of the Accused person. It should be just
9 appropriate and effect the come ability of the accused person.

10 MR KING: Otherwise, consecutive.

11 MR CARROL: Exactly.

12 MR KING: What principle is that. What's your authority
13 for that.

14 MR CARROL: As I'm standing, I must confess I do not have
15 it here.

16 MR KING: I ask that question if I'm right probably will
17 correct me I thought that overall the Trial Chamber has and dis
18 cussion in that regard. Isn't that correct.

19 MR CARROL: I believe so, My Lord. Much obliged, My Lord,
20 for the information.

21 MR KING: That's all right.

22 MR CARROL: Okay. Your Lordship. And for Your Lordship
23 there's also another case which makes it clear a case of the
24 *Orick* trial judgment it was said it was laid down that the Trial
25 Chamber is not obliged to give an explanation for every decision

1 it takes as long as it is shown that the decision is reasonable
2 with regard to the evidence and the circumstances. So we are
3 saying that going by that particular principle, the Trial
4 Chamber is not obliged to explain why the sentences are
5 curcurrent or consecutive.

6 MR KING: [Indiscernible].

7 MR CARROL: As Your Lordship. Your Lordship, and finally
8 the last Ground of all.

9 JUDGE AYoola: Before you leave that point.

10 MR CARROL: As Your Lordship pleases.

11 JUDGE AYoola: If in a curcurrent sentence the highest
12 because the -- the newer sentence is also assumed in the highest
13 in this case the highest will be say eight years if looking at
14 the overall conduct of the convict you can come to the
15 conclusion that the sentences are unreasonably low wouldn't that
16 be a factor to take into consideration.

17 MR CARROL: Yes. Yes, My Lord. Because in the sentences
18 are reasonably low will definitely not effect the overall
19 concurrablity of the Accused person.

20 JUDGE AYoola: Yes, that is the submission of the
21 Prosecutor.

22 MR CARROL: Well, Lordship, I don't think -- is that his
23 submission? Well, what I'm saying Your Lordship, immediately
24 Your Lordship, I mean that in that -- in the -- take it into
25 consideration the peculiar facts and circumstance of this

1 particular situation it's not applicable. As I shown My Lord, in
2 my last Ground.

3 MR KING: I have always -- I could be wrong that in --
4 sorry. Thank you. I have always thought probably wrongly that
5 in imposing consecutive or concurrent sentences that discretion
6 was unfettered they are.

7 MR CARROL: I think so. I believe so. I believe so.

8 MR KING: That is a very important because my brother is
9 pointing out the Prosecution think otherwise I thought you might
10 be able to help me here.

11 MR CARROL: I know it is unfete they ared we have a case I
12 just sited that the discussion is wide at the same time the
13 weight attached to it is also discretionary putting two and two
14 together it confirms with, My Lordship says. I agree entirely.

15 MR KING: Being mathematical if they sentence somebody to
16 eight years for one and one count and six years for another and
17 he says those sentences to run concurrently instead of 14 years
18 that person will do eight years. Now is there any fetter on
19 such a discretion. It's a very important point so that will
20 guide us.

21 MR CARROL: I feel that if eight years will reflect the
22 overall --

23 MR KING: No I'm talking about concurrency as distained
24 from consecutive sentences.

25 MR CARROL: I believe it's un fete they ared it's /PHREFT

1 entirely to the Courts discretion. Finally Your Lordship, the
2 last alleged error. I've argue has gone in the other grounds
3 already. My Lordship, we therefore submit on Ground 10, the
4 Prosecution has failed the test of showing any discernible error
5 that should enable this Court to substitute any other sentence
6 for that of the Trial Chamber. And also a reply on the case of
7 the *Kayishema* -- in the *Kayishema* appeal judgment Paragraph 337
8 says that the Trial Chamber will not substitute it's sentence
9 for the Trial Chamber sentence unless it believes that the Trial
10 Chamber has committed an error in its discretion or failed to
11 follow applicable law. We therefore submit Your Lordship, that
12 this has not been approval we oh this Court to dismiss the
13 Ground of appeal. Your Lordship pleases. My Lordship, I will
14 now seek to argue Ground one. Principle in Ground one the
15 Prosecution appeal brief, the Prosecution contends that the
16 Trial Chamber erred in law, and in fact in finding that the
17 Shapo elements, namely the general requirements of crimes
18 against humanity were not satisfied in the case against the
19 Accused persons, including the first respondent called Fofana
20 herein. In familiar the Prosecution argues that the Trial
21 Chamber erred in law and in fact in holding in his judgment that
22 the evidence adduced does not prove beyond a reasonable doubt
23 that the population was the primary of the attack. This is
24 found in paragraph 69 of Trial Chamber's judgment. Based on
25 this finding the Trial Chamber held there was lack of proof of

1 the essential requirement as a general he element of crimes
2 against human nitty. Fofana and Kondewa on count one murder as
3 a crime against human nitty and count three other inhumane acts
4 against human nitty. The first submission of the -- of the --
5 of the Prosecution in their reply brief was that -- was that
6 since -- since Fofana was convicted under murder as a war crime
7 they should have been convicted also as a -- of murder as a
8 crime against human nitty. We are submitting straightaway that
9 the elements are different. Murder as a war crime does not
10 contain the element of attacking the civilian population as a
11 primary object of the attack. So to that argument with all due
12 respect doesn't hold any water. The Prosecution Your Lordship
13 submitted a lot to show that the -- that the civilian population
14 was targeted to satisfy that element of war of crimes against
15 humanitarian. Your Lordship but we are submitting that in all
16 the arguments that the Prosecution has advanced today there has
17 been a fundamental misunderstanding they have been equating
18 civilians with the civilian population. The collaborators. We
19 are submitting that that there's a difference between civilians
20 and civilian population because to consider a population the --
21 there must be a large number so as to make it a population and
22 we rely on the case of the case of the *Kunarac et al* judgment on
23 page, on Paragraph 19. Of the Trial Chamber which says the
24 Chamber conquers with the interpretation the use of the word
25 population does not mean the entire population or the entire

1 entity in which the attack has taken place must have dislodge
2 the attack. However, targeting a select group of civilians for
3 example in terms of political opponents cannot satisfy the
4 requirements of article two. It will there for be not sufto
5 show enough individual's were targeted in the course of the
6 attack or that they were attacked in such a way as to satisfy
7 the chamber that the attack was against civilian population
8 rather than against limited and randomly set of individuals.
9 Your Lordship, a particular significance is the example at
10 Talama, where there were 1000 people and 150 were selected --
11 Yes, Talama, is near Panguma in Tongo region they were selected
12 and killed because of their political affiliations the limbos
13 the locos and the Temnes were killed. Your Lordship, we are
14 submitting it shows a selection a limited number of people that
15 cannot constitute a population. A population is an in cases of
16 extermination again side but these numbers are not large number
17 to constitute a population there's been a fundamental
18 misinterpretation throughout the arguments of the Prosecution.
19 That is why we -- that is why we submit that the Trial Chamber
20 was correct was right in holding that the civilian population
21 was never targeted as such. But the targets -- the -- the
22 actual targets of the attacks were not the civilian pop
23 egglations but the juntas and the --

24 JUDGE WINTER: Sorry, I have a question, again side is to
25 be committed against a whole population then it is not again

1 side. If it is committed against one or two persons it's not
2 again side. You're wrong.

3 MR CARROL: My submission with my own point against two
4 people. There must be a large people of people to constitute a
5 population.

6 JUDGE WINTER: Thank you.

7 MR CARROL: As Your Lordship pleases. Your conception of
8 what is ment by civilian population needs a little bit more
9 elaboration because some may think that the civilian -- the
10 entire population the civilian population excluding those who
11 artery beer arms, those who are fighters and so on.

12 MR CARROL: Yes, that is, Your Lordship. Clear of
13 authorities which show that even if there are soldiers in the
14 mist of the civilian population that does not change the -- if
15 -- as long as there are so many -- civilians likely out number
16 these soldiers we are four civilians in about 3000 -- it would
17 still be called civilian population. And the Prosecution
18 decided that authority which we argued about. What we are
19 saying here. What is important is the massiveness of the
20 numbers and not random five people here one there three there.
21 I think that's what I've argument.

22 JUDGE AYoola: Your learned friends contend that going
23 back to Base Zero the action plan was to just kill anybody at
24 random and that that shows the intention to attack the civilian
25 population not only people who are fighting but anybody there.

1 MR CARROL: No, Your Lordship. I disagree with that. What
2 happened was that before any time that Norman would give an
3 order like for example, Koribundu we would say, we -- we have to
4 get -- we have to capture Koribundu at all costs. We've spent
5 so much money. We lost to three or four times. This showed that
6 the primary object was the capture of Koribundu. It was. And
7 it was and then these attacks of the population became
8 incidental because we found out that some Kamajors acted on
9 their own there's a factual finding that the chain of command
10 was not as uniform as you have in the regular arm. As Your
11 Lordship pleases. Your Lordship the Prosecution -- -- sorry My
12 Lord I apologise. Your Lordship, we submit that to show that it
13 was never the intention it was never the policy of of the -- of
14 the accused people the accused person or the Kamajors to get at
15 the civilian population. Because in circumstances like at
16 initiation at initiation they were told not to attack people and
17 that they would be punished for it. We also saw the the
18 equation was telling them don't harass the don't harass the
19 civilians. And we also have the other situations happened in
20 when BJC, also warned them. So, you see, Your Lordships, we are
21 submitting that definitely even in the indictment filed by the
22 Prosecution they admitted in the indictment were against the war
23 infractions. They were the primary object of the attack. That
24 is definitely not the -- not the -- not the civilian population.
25 So we are submitting, Your Lordship, that -- that the

1 Prosecution could not prove either by direct evidence --

2 MR KING: The indictment seven maybe on this point don't
3 just gloss of them. Let us have it in the record exactly what
4 part of the indictment or what count it is so we can follow you
5 properly. You have an assistant don't you.

6 MR CARROL: Yes, he already done his work yesterday
7 properly. It's found on -- it is nineteenth it's found in the
8 trial judgment the indictment is found in the back of the
9 judgment. It is found -- attached to the trial judgment Your
10 Lordship, it is the nineteenth clause, it says: The plan
11 purpose, or desire of Samuel Hinga Norman, Moinina Fofanah,
12 Allieu Kondewa of the CDF was to use means therefore to defeat
13 the RUF and the AFRC forces and to gain access control over the
14 territory of Sierra Leone. They themselves had said these were
15 the targets. So we are submitting Your Lordship that -- that
16 neither directly or indirectly by Prosecution -- by
17 circumstantial evidence could the Prosecution prove that the
18 civilian population was the primary object of the attack.

19 JUDGE AYoola: If you are referring to Paragraph 19, read
20 further.

21 MR CARROL: Sorry, My Lord. I thought it was pertinent to
22 my argument. This included gaining complete control over the
23 population of the Sierra Leone it's supporters anyone who did
24 not activities the RUF AFRC of Sierra Leone. Even accused
25 individually and in concert with subordinates to try to carry

1 out the said plans or purpose of design.

2 MR KING: I think he is referring to his supporters and
3 what else.

4 MR CARROL: Yes. Yes.

5 JUDGE AYoola: In that paragraph won't supporters
6 sympathizers and anyone who did not active see the RUF AFRC
7 constitute the civilian population.

8 MR CARROL: According to them but we disagree with that
9 Your Lordship. We disagree with that entirely that's why we
10 argued against that.

11 JUDGE AYoola: So the position there for is that
12 Paragraph 9teen is not contrary to the case they were making.

13 MR CARROL: Your Lordship, I'm submitting with respect part
14 of paragraph 19 which is the recognition of the fact that the
15 fighting was -- was waged against the Revolutionary United Front
16 and the AFRC with the intention to gain control of the
17 territories is not supportive of their case.

18 JUDGE AYoola: But in any case supporters and sympathizers,
19 They are a limited number of persons.

20 MR MR CARROL: Yes.

21 JUDGE AYoola: I mean if they are fighting against the --
22 well, you mentioned the RUF and the AFRC and they have
23 supporters and sympathizers in inference and presumption is that
24 all of them are fighting against the CDF.

25 MR MR CARROL: That's correct.

1 JUDGE AYoola: But that does not necessarily mean that they
2 are fighting against the entire population. Why don't you make
3 that distinction then.

4 MR CARROL: I agree with you entirely Your Lordship. The
5 distinction here is that the smallness of the number of the
6 sympathizers the slop lateres can not constitute a civilian
7 population.

8 JUDGE AYoola: If you referred to the conventions and the
9 protocol it would be difficult to accept that submission
10 wouldn't it? Because if you read the conventions and the
11 additional protocol the distinction is between the rest and
12 those who are bearing arms. My understanding is that those who
13 are not bearing arms amongst the population belong to the group
14 of civilian population.

15 MR CARROL: Agreed.

16 JUDGE AYoola: Whether they are sympathizers or others --

17 MR MR MR MR CARROL: I agree, with that Your Lordship, the
18 point I'm making this sympathizers and collaborators the -- the
19 -- theal low never defined -- nobody defined what the
20 collaborator Sr . In this case. Means -- they were -- my i --
21 nobody defined. There's no factual finding as to who was the
22 collaborator. The point I'm making is because of these
23 situations, right, and the number, the proportion of these
24 sympathizers in numbers it cannot constitute. It's not -- it's
25 not large enough massive enough. That's my argument Your

1 Lordship.

2 MR KING: What is the position when the supporters and
3 sympathizers carry arms.

4 MR CARROL: The moment they carry arms they are no longer
5 civilians they are soldiers they are fighters.

6 MR KING: I'm talking vis-a-vis the combatants the AFRC and
7 the RUF you have them as a group as a warring group as an arm
8 for like and then you have some supporters and from the evidence
9 it will seem that some of the supporters and the sympathizers
10 also carried arms. What is the position in that circumstance.

11 MR CARROL: In that circumstance Your Lordship we would say
12 that the civilians were acting in self-defense.

13 MR KING: [Indiscernible] vis-a-vis the question of
14 population that's the topic we're discussing.

15 MR CARROL: No. No. No, not in that sense if they carry
16 arms they are combatants.

17 MR KING: I said vis-a-vis acting the population.

18 MR CARROL: Attacking the population.

19 MR KING: The civilian population.

20 MR CARROL: Yes, attacked by who by the collaborators who
21 were armed.

22 MR KING: No, I'm talking now about your clients and
23 others.

24 MR CARROL: Yes.

25 MR KING: Who want to get rid of these AFRC/RUF and their

1 supporters and sympathizers. I take it in the context of the
2 civilian population. Suppose those sympathizers are carrying
3 arms, what would be the position vis-a-vis the general civilian
4 population.

5 MR CARROL: People carrying arms are who My Lord.

6 MR KING: Let me assist you.

7 MR CARROL: Yes.

8 JUDGE AYoola: If they were carrying arms then there will
9 be reasonable doubt whether they belong to the group of civilian
10 population.

11 MR CARROL: Okay, that's correct.

12 JUDGE AYoola: But you must have evidence that these people
13 were carrying arms. You must have evidence they have not laid
14 down their arms.

15 MR CARROL: That's correct. That's correct. I've got it
16 now.

17 JUDGE AYoola: Do we have any evidence that way.

18 MR CARROL: There is no. Non. No.

19 JUDGE AYoola: Was it part of the Defence at the trial
20 that these people were not civilian population because they were
21 armed.

22 MR CARROL: No, it wasn't part of the Defence.

23 JUDGE AYoola: So.

24 MR KING: Did you [indiscernible] of the trial. You are
25 making general statements in agreement and you were not at the

1 trial because so many peaces of evidence came out the trial. It
2 is very difficult to say who was who. They did not wear
3 uniforms as far as I could see to distinguish one from the
4 other. . That's right okay. We have to take the practicalities
5 into consideration the reality this was not a conventional war
6 when you have this arm in the uniform. These were all people
7 who were in various clothing, pieces, of clothing so on and
8 intermingling among themselves. Of course you had the groups we
9 call themselves the AFRC if you like and the RUF, but you also
10 had people who were not necessarily in that group of AFRC or RUF
11 who were distinctly collaborators sympathizers and so on. So
12 the distinction is blurred.

13 MR CARROL: Blurred it is very blurred. I've seen it now.
14 As Your Lordship. I'm grateful Your Lordship for that
15 [indiscernible]. Your Lordship, we are finally submittint Your
16 Lordship, that the Prosecution has not proved proven either
17 directly or by circumstance shall evidence that there on doubt
18 that the civilian population was the primary object of the
19 attack. That is why the Trial Chamber was right to hold that
20 the element that element of crime against human nitty was not
21 satisfied. As Your Lordship pleases. To leave Your Lordship I
22 would now proceed to argue ground seven. Your Lordship, on this
23 ground the Prosecution contends that the Trial Chamber heard in
24 law in refusing to consider act of destruction by burning of
25 property as charged under count five of the indictment. This

1 error allegations resulted from the Trial Chambers narrow view
2 of limiting pillage to the unlawful appropriation of property.
3 In the sense it does not encompass in the context of an armed
4 conflict essentially though entirely looting in burning the
5 offence charged is pillage. And --

6 You need not go with that go on.

7 MR CARROL: As your Lordship pleases, as Your Lordship
8 pleases. Much obliged. As we should now go on grounds three
9 and four. Your Lordship grounds three and four of the
10 Prosecution's appeal brief were argued together by the
11 Prosecution and the said grounds specifically provided as
12 follows. Ground three failure by the Trial Chamber to find
13 superior responsibility and other responsibility for planning
14 ordering instigating or otherwise aiding and abetting in the
15 planning preparation or execution of certain criminal acts in
16 Kenema district. And Ground 4, failure by the Trial Chamber to
17 find responsibility for planning ordering instigating or
18 otherwise aiding and abetting in the planning, preparation or
19 execution of certain criminal acts in terms of Tongo field,
20 Koribundu and Bo district.

21 Your Lordship, as regards to these offences, the
22 Prosecution could not find any, any, could not prove any of it's
23 offences by direct evidence. And they note that. So they now
24 sought to prove these offences from circumstance evidence. But
25 then Your Lordship we would like to submit that the law as

1 regards proving criminal come ability from circumstance shall
2 evidence is that the guilt of the accused person should be the
3 only inference that could be drawn from the totality of the
4 circumstance evidence. Where any other inference can be drawn,
5 then that offence has not been proven beyond reason reasonable
6 doubt but --

7 JUDGE KING: I understand what you are saying in fact if
8 I'm wrong, correct me. I want to be very correct about it.
9 You're saying in fact if they were relying on circumstance shall
10 evidence then that circumstance shall evidence must point like a
11 gun in one direction and one direction only.

12 MR CARROL: Exactly.

13 MR KING: If it pointed in two directions that was not good
14 enough is that what you are saying.

15 MR CARROL: Exactly, Your Lordship. That is what the Trial
16 Chamber has used to grant these findings that these -- these
17 offences were not proven by circumstance shall evidence. Your
18 Lordship some of the circumstance shall evidence they sought to
19 rely on for different crimes are for example, I found in
20 paragraph 39 for example. In the presence of Fofana at the
21 commanders meeting were the second and third attacks of Tongo
22 were discussed series of meeting that my learned friend Mr
23 Kamara referred to today. But Your Lordship the Trial Chamber
24 found that the mere presence of the accused of this meeting
25 enough was not sufficient to show that he aided and abetted or

1 he planned and that this was not the only inference that could
2 be drawn from the circumstances. So in all the meetings that he
3 attended in some of them -- you don't evening know the adding of
4 the meetings. So multiple inference can be drawn that is why
5 the Chamber held that it was not proven. Your Lordship the
6 presence of Fofana with Norman andal low on the attacks as well
7 ass the finding of Trial Chamber of the attack and then
8 submitted the plan to Fofana. Your Lordship as regards to this
9 particular situation circumstance it fell flat on it's face in
10 the light of factual findings to the effect that plan B -- the
11 plans that were carried out by narrow and Fofana did not involve
12 the killing of civilians, the raping of women and the looting
13 and burning of property. Furthermore, the Trial Chamber also
14 found that from the [indiscernible] of the circumstance it was
15 not only the guilt of the accused person that could be drawn
16 from this -- from the circumstance shall evidence. And then the
17 other one was the -- the -- that Fofana was not the key
18 [indiscernible] structure and was part of the holy trinity. And
19 we showed in arguments Your Lordship that being a member of the
20 key components doesn't say much because we new his of taking
21 position was very limited. Then -- and the [indiscernible] that
22 you are -- you are to be on the leadership structure doesn't
23 mean that you know of the offence to be committed and that you
24 took part in them. But [indiscernible] the Trial Chamber held
25 that one inference could not be drawn for all the sines. So

1 where I submit Your Lordship that for all the offences under
2 this three and four the reason why the Trial Chamber held and
3 rightly held was that more than one inference could be drawn
4 from all these circumstances. We submit there for that the
5 Prosecution failed to put the offences beyond A reasonable
6 doubt.

7 JUDGE AYoola: Can you suggest any other inference that
8 can be drawn from these findings because the -- the Prosecutor
9 says that it's un reasonable -- it's an unreasonable conclusion
10 having regards to the findings that have been made to say that
11 those findings did not point to only one conclusion and that
12 that conclusion leads to participation in the crime.

13 MR CARROL: Yes.

14 JUDGE AYoola: Now, unfortunately the Trial Chamber did
15 not elaborate by stating reasons. But you are now submitting
16 that there are other reasonable inferences. What are those
17 reasonable inferences.

18 MR CARROL: Yes Your Lordship, as I suggest the meetings
19 for example, the inference can be drawn that Fofana was present
20 but did not contribute anything in the meetings. And this
21 particular inference is more supportive of the evidence because
22 we've seen that in the meeting he had withal low. Al low was
23 meant for [indiscernible] spoke and they gave him instructions
24 and he was not even given instructions he didn't say anything.
25 So the inference that can be drawn which is more possible is

1 that -- he can be at the meeting without contributing or taking
2 part in the planning or the decisions. As Your Lordship
3 pleases. Your Lordship, I now want to move to ground five Your
4 Lordship acquittal of Fofana on enlisting of the active use in
5 hostilities. The Prosecution submits that the in fact in
6 acquitting mainly enlistment of children in to armed forces.
7 The Prosecution fully submits that on the findings of the Trial
8 Chamber and evidence accepted the only conclusion open to any
9 reasonable of fact that Fofana was responsible in article 600 of
10 the Statute for aiding and abetting the enlistment of underage
11 children armed forces to participate actively in those who'ss.
12 The Prosecution does not however dispute the fact fall findings
13 of the -- the Trial Chamber found that the evidence adduced has
14 not proved beyond reasonable doubt that Fofana planned order and
15 or committed the crime of enlisting child soldiers into a --
16 again Your Lordship as regards this particular offence there was
17 no direct evidence. There was no direct evidence to the effect
18 to prove your reasonable doubt that the accused person aid and
19 abeddinged the enlistment or the use of children. So again, the
20 Prosecution sought to rely on so many circumstance evidence and
21 we submit and we have argued this extensively in our appeal
22 brief in all the circumstance evidence that they sure to rely on
23 each of them led to more than one inference or -- exclusively to
24 the guilt of the accused person. So we will rely entirely on --
25 on -- on submissions to that effect. And we submit finally that

1 the Prosecution had failed again in that situation to show that
2 Fofana was involved -- was comeable of aid and abedding the
3 enlistment and the use of children in hostilitys.

4 I now move to ground six. Sorry yes Your Lordship.

5 MR KING: I'll ask a similar question I earlier asked the
6 prosecution. That is with regard to these child soldiers. Of
7 course there is a prohibition against the recruitment and use of
8 child soldiers but I gave a hypothetical situation where in fact
9 there is this kind of conflict that we've seen and where one
10 side deliberately had been recruiting child soldiers and using
11 them in armed conflict. Now, as far as the CDF is concerned, if
12 they themselves now got children got them into their groups if
13 you even consider that but for the specific purpose -- I'm not
14 saying there is evidence of that but for the specific purpose of
15 defending themselves what is the legal position what the legal
16 position, the lega situation?

17 MR CARROL: The legal situation My Lord would take as
18 self-defense.

19 MR KING: Vis-a-vis the offence itself.

20 MR CARROL: Exactly.

21 MR KING: Would that be liable under the recruitment of the
22 child soldiers.

23 MR CARROL: No they wouldn't be under those circumstances.

24 MR KING: [Indiscernible]. If I remember rightly I think
25 he did say not necessarily. That was your phrase Mr Kamara is

1 that correct.

2 MR KAMARA: My Lord that was in response to a different
3 question.

4 >>: You are right. But it is [indiscernible].

5 MR CARROL: Yes Your Lordship ground six on the indictment
6 charges the accused with ac of terrorism as a serious as article
7 three article three D of the statute. This accuse allege
8 responsibility for crimes charged in counts one through five.
9 Including threats to kill, destroy plot and loot as part of a
10 campaign to terrorize the population. Article three D of the
11 statute it is is taken to article four D. Prohibiting acts of
12 terrorism as a violation of the guarantees of humane treatment.
13 This prohibition is in turn based -- based -- sorry My Lord on
14 article three of the fourth convention which all measures of
15 intimidation of terrorism. The actus reus and Mens rea of
16 terrorism were clearly done in the case of the ICTY that is in
17 paragraphs -- paragraphs 87 to 90. The of terrorism consists of
18 doing violence directed against persons or property or the
19 accused acted in the reasonable knowledge that these acts would
20 occur and the menace of terrorism is that such acts of threats
21 of violence are committed with the primary purpose or intend to
22 spread terror amongst persons. Your Lordship as regards to this
23 particular ground again there was no direct evidence. The
24 Prosecution gave a lot of circumstance evidence which sought to
25 show that -- show sacks of error like mentioned in this Court

1 today. Yes, they were as such but acts -- acts that looked
2 horrific and terrific acts do not satisfy the requirements of
3 the -- of this particular offence. There must be a specific
4 intention to spread terror amongst the civilian population. And
5 this is where all the circumstantial all the -- all the circumstance
6 shall evidence that were brought up they couldn't prove that. I
7 will go through a few of them for example, --

8 What are you saying. What are you saying about the
9 circumstances. Repeat what you said.

10 MR KING: You need not know.

11 MR CARROL: That's what I'm saying My Lordship. More than
12 one inference can be drawn.

13 MR KING: That's it you could go to your next round.

14 MR CARROL: As Your Lordship pleases. Okay. Yes Lordship,
15 the next -- in the next two grounds grounds eight and nine the
16 Prosecution has said that they are not seeking any remedies on
17 these grounds but I should go to them briefly in summary manner.
18 The contention of the Prosecution in this ground is that the
19 Trial Chamber heard in law factual procedure in dismissing for
20 leave to amend to add sexual violation,s including rape sexual
21 rape. . It on the twentieth of name 2004. The Chamber he guys
22 h dismissed the of the Prosecution on 9th February inter alia.
23 On the following grounds that ^ due regard of the Special Court.
24 To which the prosecution sought bring first two years of the and
25 that the trial date was imminent. Granting application

1 prejudice the right of the accused person and secondly that the
2 ^ at this stage staying amount to the of abuse of process
3 bring this to the appeal. The the Prosecution couldn't tended
4 that it can move a motion for any time at any time in the Court
5 of trial for an amendment. When that is correct. But then the
6 Trial Chamber has a discretion to refuse such an application if
7 it is found that it is dirt advertise it will cause and that is
8 what happened in this situation. Exactly that. And so that we
9 submit that the Trial Chamber was right in refusing to allow and
10 an amendment at that of the proceedings. And the -- in ground
11 nine procollusion of evidence of unlaw recall conduct on this
12 ground the prosecution contended the Trial Chamber erred in law
13 fact and or procedure in forbidding the Prosecution from
14 leading and an of sexual even though such evidence was relevant
15 to material issues in the case including evidence in support of
16 other charges of criminal conduct.

17 Q. Against the mind concerns count three. As of count
18 three. Etcetera. We are submitting that the Trial Chamber was
19 right to preclude the -- preclude the evidence of because one it
20 would -- it would bring in the four sexual offenses that were
21 rejected at the trial to the back door. Secondly, if as the
22 Prosecution contended these crimes are already dark are already
23 inherent in the -- in the general crimes then there was no need
24 for an amendment. If you -- if the -- if the Fofana offences in
25 the war climbs life health etcetera. In this is the Prosecution

1 should not have -- okay we've done that. The Lordship the third
2 reason for the procollusion of such evidence they violate the
3 right of the accused person because it would cause undually it
4 would to the contradiction of fundamental fairness and respect
5 for judicial he can addition if it is granted it would be as if
6 the Trial Chamber is in entirety overturning it decision
7 decision. That respectful judicial decision prohibits that.
8 The Prosecution show to argue that even when you have a
9 defective indictment -- go on -- when you have a defective
10 indictment further information however it can cure this
11 defective indictment. It then sought to give examples from the
12 ICTY and the ICTR cases but in these particular -- in those
13 particular Court, they have what they call a concise statement
14 of facts that goes with the indictment. This -- the marrys we
15 could but in this Court there is no Cirque of facts. And
16 furthermore we have saying that I think it's article 407 article
17 407 -- 407 of the -- of this statute your lords sorry. It
18 spells out what is needed in an indictment. Particulars of
19 place, time, circumstance of commission etcetera. We are saying
20 Your Lordship that the trial chiefs they wanted to rely on do
21 not concede -- the trial briefs they sought to rely on were very
22 vague. They only said that there daughters were taken and wives
23 but they give no particulars of names, addresses, time, place
24 commission so we submit Your Lordship that pretrial could not
25 cure that defect. We therefore submit finally Your Lordship that

1 the Trial Chamber was right to put evidence as Your Lordship
2 please. I am almost available for any further questions Your
3 Lordship.

4 MR KING: I think this is a convenient stage -- I want to
5 thank you very much Mr balance for your assistance this is a
6 convenient stage to take a five or ten minutes adjournment.

7 MR CARROL: As Your Lordship pleases.

8 MR KING: Well, I think Mr Bola Carol, you finished your
9 submissions.

10 MR CARROL: That is so My Lord.

11 MR KING: It's 4 o'clock now I think one hour is assigned
12 to Kondewa. So you can start now and we'll give you an hour to
13 finish up. So we can finish that assignment today. So that the
14 target is that we can complete everything by tomorrow.

15 MR FOFANAH: My Lords, counsel is relying on every bit of
16 the response filed in answer to the Prosecution appeal brief. I
17 intend to use the one hour allocated to emphasise on a few areas
18 and make some references to case law and transcript of the
19 proceedings, trial proceedings which were not previously
20 referred to. Counsel will seek to respond to the Prosecution's
21 submissions in the order in which they appear in the
22 Prosecution's appeal -- appeal brief. So My Lord, I'll start
23 with Ground One. Ground One. My Lord, in Ground one, the
24 Prosecution contends that the Trial Chamber erred in law and
25 fact in finding that the ^ . Element of crimes against humanity

1 were not satisfied in this case. Specifically, the prosecution
2 argues that the Trial Chamber erred in concluding that the
3 evidence adduced does not prove beyond reasonable doubt that
4 the civilian population was the primary object of the attack and
5 as a result of the third of the ^ . Elements of crimes against
6 humanity was not satisfied. Counsel submit firstly, that the
7 Trial Chamber applied the correct legal standard in concluding
8 that the attack was not directed against any civilian population
9 as the civilian population was not the primary object of the
10 attack. There for, the third ^ requirement for crimes against
11 humanity was not satisfied. Secondly, that the evidence does
12 not demonstrate --

13 MR KING: That's your submission.

14 MR FOFANAH: Yes, My Lord that's my submission.

15 MR KING: Could you repeat that. I was thinking of the
16 other side .

17 MR FOFANAH: Yes. Firstly that the Trial Chamber applied
18 the correct legal standard in concluding that the attack was not
19 directed against any civilian population, as the civilian
20 population was not the primary object of the attack. Secondly
21 My Lords, that the evidence does not demonstrate a pattern of
22 victimization of civilians. And thirdly, that the Prosecution
23 misconstrued the legal concept of crimes against humanity. My
24 Lords, the Trial Chamber concluded that the evidence did not
25 prove beyond reasonable doubt, that the civilian population was

1 the primary object of the attack. The Trial Chamber further
2 found in Paragraph 693 that there was evidence that the attacks
3 were directed against rebels or juntas. Based on the Trial
4 Chamber's finding, the Prosecution states that it is apparent
5 that the Trial Chamber considered as a matter of law that an
6 attack would not be one that is directed against a civilian,
7 population, if civilians are attacked in the course of attacks
8 directed against opposing forces. The Prosecution submits based
9 on the reasoning of the ^ Appeal Judgment which the Trial
10 Chamber relied on, that the civilian population must be the
11 primary not the incidental target of an attack. Counsel
12 concurs that this is the correct legal standard for determining
13 that the third ^ element and agrees with the Prosecution that
14 the question is not whether attacks against civilians coincided
15 against military target. The question whether the civilian
16 population was the primary -- the question is whether the
17 civilian population was the primary target of the attack. The
18 Prosecution also submits that the Trial Chamber erred in failing
19 to consider whether there were additionally, simultaneously or
20 subsequently, attacks directed against the civilian population.
21 Counsel submits that the Trial Chamber did not...

22 MR KING: When you say counsel submits can you tell me
23 [indiscernible].

24 MR FOFANAH: I take the Q ^ My Lord. I submit that the
25 Trial Chamber did consider whether the attacks were directed

1 against the civilian population and correctly concluded in
2 Paragraph 693 of it's judgment that evidence adduced does not
3 prove beyond reasonable doubt that the civilian population was
4 the primary object of the attack. In reaching it's finding the
5 Trial Chamber also stated at Paragraph 693 of it's judgment that
6 in quotes My Lords. The Trial Chamber recalls the admission of
7 the Prosecutor that the CDF and the Kamajors fought for the
8 restoration of democracy unquote. The Trial Chamber also refers
9 to statements of Prosecution witnesses and Defence witnesses to
10 this same effect. Counsel also draws your attention to
11 Paragraph eighteen of the Prosecution pre trial brief where the
12 Prosecution itself stated that the CDF gained momentum in an
13 attempt to defend the civilian population and restore the
14 legitimate and democratic government. Colonel ^ the military
15 expert called by the Prosecution when he testified on the 14th
16 of June 2005 at page 34 line 5 of the trial transcript said
17 that, in, quote, all CDF operations as far as I can see, appear
18 to have been driven by the central strategic idea of the CDF.
19 Which was to defend their homelands. My Lord, all CDF
20 operations as far as I can, see, appear to have been driven by
21 the central strategic idea of the CDF which was to defend their
22 homelands. My Lord, I submit that the Prosecution is therefore
23 incorrect to suggest that the Trial Chamber erred in finding
24 that the CDF fought for the restoration of democracy was a
25 material consideration for the determination of the existence of

1 crimes against humanitarian. The Defence submits that the Trial
2 Chamber correctly made reference to the objective of the CDF in
3 making it's legal finding. It is submitted that in this
4 instance, the statement of the Prosecutor a number of
5 Prosecution witnesses and others, that the aim and objective of
6 the CDF and the Kamajors was the restoration of democracy are
7 evidently relevant to establishing that the civilian population
8 was not a specific target of attacks. Further, not one
9 Prosecution witness articulated or identified any CDF policy or
10 objective of attacking the civilian population. Nor is it clear
11 how the Prosecutor can reconcile further evidence from it's own
12 witnesses of the CDF warning civilians of attacks. Evidence
13 that those warnings had been effective and evidence that
14 Kamajors were often instructed specifically to be careful of the
15 civilians with their arguement that the only conclusion open to
16 any reasonable trier of fact, is that attacks committed by the
17 CDF forces were specifically intended to target the civilian
18 population. My Lord it is submitted that the statement in the ^
19 Appeal Judgment to the effect that the civilian population must
20 be the primary object of the attack and other similar statements
21 in other judgment must be read in context. For these reasons it
22 is submitted that the Trial Chamber applied the correct legal
23 reasoning in assessing the evidence, in concluding that the
24 evidence did not demonstrate beyond reasonable doubt that the
25 civilian population was the primary target of attack, the Trial

1 Chamber did not as the Prosecution argues erroneously interpret
2 the law as meaning that an attack targeting an opposing force
3 negates the possibility of the finding -- of finding a
4 concurrent or subsequent target attack against the civilian
5 population. The Trial Chamber simply found that the evidence
6 did not demonstrate beyond A reasonable doubt that the civilian
7 population was the primary target of the attack.

8 JUDGE KING: I think the Prosecution on this one has
9 submitted that while it is clear that there was a deliberate
10 attack on the civilian population, then according to the
11 Prosecution that is a crime against humanity.what is your
12 response to that?

13 MR WILLIAMS: My Lord, that is a mis statement of the law
14 My Lord. It`s-- tantamount to war crime My Lords, but not
15 crimes against humanity. The Trial Chamber actually found the
16 accused persons guilty of war crimes but not crimes against
17 humanity --

18 JUDGE KING: I know that. But you see, the Prosecution were
19 this morninging saying, if it is clear that there was a
20 deliberate attack on the civilian population then that is a
21 crime against humanity.

22 MR WILLIAMS: My Lord, my understanding of the law is that,
23 the civilian population must be the primary target of the attack
24 which was not the case -- which was not the case in the CDF
25 trial. Not the primary -- I've mentioned what Colonel ^

1 Said, the strategic goal of the CDF was to defend their
2 homelands My Lord. So it could not have been the case that the
3 primary target of the CDF was the civilian population.

4 JUDGE AYoola: I was wondering, what's the relevance of
5 that evidence to determining whether the attack was directed at
6 civilian population. If one were to draw that type of
7 submission to it's logical conclusion, then the the military
8 will never commit crime against humanity because they will be
9 fighting for the country. The fact that the CDF was defending
10 the nation, how is that an excuse for crimes against humanity?

11 MR WILLIAMS: My Lord, in the sense that the civilian
12 population would not be the primary target. The primary target
13 -- I mean, is an essential element that has to be proven My
14 Lord. That the civilian population was the primary target of a
15 -- of attacks My Lord.

16 JUDGE AYoola: You mean a legitimate army, an army
17 fighting for the nation cannot direct it's attack to a civilian
18 population.

19 MR WILLIAMS: No My Lord, it can My Lord. It can. As was
20 in the case in Croatia and Shrebenica which I shall be referring
21 Your Lordships to My Lord.

22 JUDGE AYoola: If that is so, how can the evidence that
23 they were defending a cause be a -- lead to an inference that
24 the attack was not directed at a civilian population.

25 MR WILLIAMS: Because it is an element that ought to be

1 proven and we're saying that the Prosecution did not discharge
2 that burden. They did not discharge that burden.

3 JUDGE KING: The Prosecution also said this morning which
4 I'd like a response. That the purpose of the attack, of such an
5 attack is irrelevant. What is your response to that?

6 MR WILLIAMS: That the purpose is.

7 JUDGE KING: Of the attack.

8 MR WILLIAMS: On the civilian population?

9 Judge KING: Yes.

10 MR WILLIAMS: My Lord --

11 JUDGE KING: In other words for instance if the purpose was
12 to restore the legitimate government, that is irrelevant.
13 According to their submissions I hope you got you right Mr
14 Staker.

15 MR STAKER: Yes that is correct Your Honour we --

16 JUDGE KING: Thank you. I thought I was right. What do you
17 respond to that?

18 MR WILLIAMS: That I disagree My Lord.

19 JUDGE KING: Why? What's your reason.

20 MR WILLIAMS: Sorry My Lord?

21 JUDGE KING: What is your reason or what are your reasons.

22 MR WILLIAMS: My Lord, because the -- the motivation there
23 would be fundamentally different My Lord. I mean the motive
24 would -- if you're seeking to eliminate the civilian population
25 is different from the motive in seeking to restore democracy.

1 How can you restore democracy by killing all the Citizens My
2 Lord.

3 MR KING: I don't understand you. Because you see what he
4 was trying to say that under the International Humanitarian law
5 the purpose of an attack on the civilian population is
6 irrelevant. What they're concerned with is whether or not there
7 was a deliberate attack on the civilian population. That is the
8 response I want you to give to those submissions.

9 MR WILLIAMS: I didn't quite get the question I'm sorry My
10 Lord.

11 MR KING: It was submitted this morning, that where there is
12 a deliberate attack on the civilian, population, that is a crime
13 against humanity and the Prosecution went onto submit that the
14 purpose of such an attack is irrelevant for the purposes of
15 International Humanitarian law that is correct?

16 MR STAKER: That is correct. If the civilian population is
17 attacked as a Population, then the reason for it is irrelevant
18 whether it's to win the war, whether it's to crush resistance,
19 whether it is to inflict suffering.

20 JUDGE KING: Thank you. I just wanted to have your
21 specific response on that.

22 MR WILLIAMS: I agree with the proposition My Lord.

23 JUDGE KING: You agree. Alright. Thank you.

24 MR WILLIAMS: Yes.

25 JUDGE KING: And how do you apply it to your defense?

1 MR WILLIAMS: Sorry My Lord?

2 JUDGE KING: You agree with that proposition, how do you
3 relate it to your defense?

4 MR WILLIAMS: My Lord, that the civilian population was
5 never a target of the CDF. It was not -- I mean the primary
6 target of the CDF at any point in time My Lord.

7 MR KING: So I understand you to be saying in fact, there
8 was no deliberate attack on the civilian population by your
9 client?

10 MR WILLIAMS: Correct My Lord.

11 JUDGE KING: All right.

12 MR WILLIAMS: But counsel submits that the evidence as
13 presented by the Prosecution --

14 JUDGE AYoola: I have some difficulty with this question
15 of whether it was deliberate or not. We are not talking of a
16 situation in which sophisticated weaponry was used, and you can
17 talk of the fall out from a bombing raid, or an area raid or
18 things like that. We are talking of hand to hand combat. How
19 can we be talking of incidental attack in such situation?

20 MR WILLIAMS: My Lord, it was incidental in the sense that
21 in all the crime basis My Lord, that the CDF attacked, the
22 primary objective was to get rid of the AFRC/RUF troops My Lor.
23 And the I believe my learned friend the Deputy Prosecutor made
24 use of the word collateral this morning My Lords. That the
25 deaths or offences are crimes that were committed against the

1 civilian population or the -- the -- against civilians
2 collaborators and sympathizers were collateral -- in other
3 words. That is our submission that it was not the direct or
4 primary aim of -- of the -- of primary target of the CDF forces.
5 Counsel submitted the evidence as presented by the Prosecution
6 -- sorry My Lord.

7 JUDGE KING: Which counsel.

8 MR WILLIAMS: I submit, My Lords.

9 JUDGE KING: Exactly. Dont forget that. Always I. First
10 person please. otherwise I might think you're talking about the
11 Prosecution.

12 .

13 MR WILLIAMS: I agree My Lord.

14 JUDGE KING: Very well.

15 MR WILLIAMS: I submit that the evidence as presented by
16 the Prosecution and as accepted by the Trial Chamber demonstrate
17 the reason for each of the attacks as accepted by the Trial
18 Chamber was the presence of rebels and junta. The Prosecution
19 itself presented evidence for each of the crime bases which
20 demonstrated that the main reason why the CDF attacked those
21 towns in Sierra Leone was because they were held by the rebels
22 and junta and suspected collaborators. The Prosecution did not
23 present any evidence to suggest that the CDF attacked those
24 towns because the civilian population was also the object of the
25 attack. . My Lord, I agree that civilians were deliberately and

1 directly attacked as the Prosecution suggests. There were
2 evidence of CDF targeting perceived RUF and junta collaborators,
3 and a number of killings that the Prosecution inflate into a
4 pattern on of victimization. The Trial Chamber expressly
5 affirmed in paragraph 47 that the crimes were committed against
6 unarmed civilian solely on the basis that they were
7 unjustifiably perceived as and branded as rebel collaborators.

8 JUDGE KING: Paragraph 47 of what.

9 Mr williams: Of the Trial Chamber judgment My Lord.

10 JUDGE KING: Thank you.

11 MR WILLIAMS: My Lord, I agree that perceived collaborators
12 are accorded civilian status under International law. I further
13 concede that there were isolated crimes against these
14 individual's that -- that they were isolated crimes against
15 these individual's a proved beyond reasonable doubt may
16 constitute war crimes. But in the absence of evidence to
17 demonstrate that the civilian population was targeted these
18 crimes cannot be elevated to crimes against humanity. It is
19 submitted that those perceived as suspected collaborators
20 whether correctly identified or not they were targeted as
21 individual's rather than as members of a larger civilian
22 population. However, there was no evidence to demonstrate that
23 these Kamajors were acting in accordance with any order or
24 direction or in furtherance of any CDF goal or plan to target
25 the civilian population. On the contrary there is abundance of

1 evidence adduced by the Prosecution to show that a key objective
2 of the CDF was a protection of civilian lives and property. The
3 Chamber is referred to the evidence TF2-190 particularly page 91
4 of the trial transcript of the 10th of February 2005. That
5 witness was asked the following questions by counsel. In quote;

6 Q. `And even though it was a very serious and fierce war,
7 you the Kamajors had rules of engagement. In other words you
8 had a code of conduct to go by. Yes. His answer was yes there
9 were laws.

10 Q. Yes thank you and please listen to me carefully. One
11 of the rules was that you must avoid arming civilians, you would
12 agree with me. The witness answered yes, sir. Yes. The law
13 said that unquote.

14 JUDGE AYoola: Sorry who's evidence is that?

15 MR WILLIAMS: My Lord the evidence of TF2-190.

16 JUDGE AYoola: TF2-190. Prosecution witness?

17 MR WILLIAMS: Yeah Prosecution witness My Lord. Page 91
18 10th February 2005.

19 JUDGE AYoola: Thank you.

20 MR WILLIAMS: My Lord, the witness quite clearly said there
21 were rules of engagement which prevented or sought to avoid
22 arming civilians. Counsel -- My Lord I submit that a militia
23 with such a provision in it's code of conduct, cannot be said to
24 have the civilian population as the primary object of it's
25 attacks. My Lords, the Prosecution also adduced evidence that

1 Kondewa intervened on behalf of the civilians that saved their
2 lives and their families lives during the war. Which we say are
3 in incongruent to the assertion, that Kondewa should be held
4 guilty for crimes against humanity. My Lords, evidence was
5 adduced by the Prosecution that Mr Kondewa saved the lives of
6 individuals even those who were known to be collaborators with
7 the rebels. Sorry My Lord.

8 JUDGE KING: Specify -- sorry my microphone. Specify the
9 evidence that you refer to.

10 MR WILLIAMS: The evidence of Father Garrick My Lord. That
11 Kondewa traveled from.

12 JUDGE KING: That Kondewa saved the lives of...

13 MR WILLIAMS: Civilians My Lord.

14 JUDGE KING: Well identify the evidence.

15 MR WILLIAMS: My Lord, I refer to the transcript of
16 Reverend father Garrick, John Garrick. Prosecution witness My
17 Lord. It was on protected. 11 November 2004 at page 24.

18 JUDGE KING: 2004 at page 24. Could you read the relevant
19 page what? 24?

20 MR WILLIAMS: Yes.

21 JUDGE KING: Could you read it please, so that we can hear
22 it.

23 MR WILLIAMS: Page 24 My Lords. The message was sent to Mr
24 Kondewa that chief Dokwe Koroma was being harassed. The
25 Kamajors were asking the witness that is Father Garrick to

1 release him to them. Mr Kondewa dispatched two delegations from
2 Talia to Bonthe to investigate the issue of Lahai Dokwe Koroma.
3 Mr Kondewa personally traveled to Bonthe, to Bonthe and removed
4 --Lahai Dokwe Koroma, his four children and his son out of
5 safety My Lord. Sorry My Lord? No I paraphrased the evidence My
6 Lord.

7 JUDGE KING: You don't have the transcript.

8 Mr williams: No, I don't My Lord. My Lord it is the
9 Prosecution contention that the attacks were deliberately
10 directed against the civilian population in view of the
11 instructions, directions and incitement which the Kamajor
12 leaders explicitly gave to the Kamajor prior to these attacks
13 against civilians. My Lord, I submit that this evidence only
14 points to at most evidence of instruction about particular
15 suspected individual collaborators rebels and juntas. This
16 evidence enforces my submission that atmost only rebel -- only
17 rebels juntas and collaborators were targeted not the civilian
18 population. I there for submit that the evidence of the
19 collaborators being targeted and of random Kamajors committed
20 crimes does not provide either the type of evidence not the
21 skill of evidence required to demonstrate that a civilian
22 population was indeed the primary target of CDF attacks.
23 Counsel I submit that in attending to argue that the alleged
24 crimes of the CDF and the accused fall within the perers of the
25 crimes within humanity. The produce has misconstrued of crimes

1 against humanity. My Lords, a review of the case law from the
2 ICTY and ICTR is relevant to demonstrating that a -- that for a
3 civilian population to be targeted to establish crimes against
4 human nitty it must be shown that civilians are targeted because
5 of some distinguishable characters of a civilian population.
6 The law of on the ICTY centres around conflicts that were
7 essentially ethnic in nature and a civilian population was
8 targeted solely because of the distinguishing of ethnicity. For
9 example,, crimes committed in Kosovo were part of a deliberate
10 and widespread campaign of violence directed at Kosovo
11 Albanians. Sorry Kosovo Albanians civilians and included the
12 mother of hundreds of civilians destruction and looting of
13 property and the foreseeable transfer and deportation of 800000
14 Kosovo Albanians. Crimes in Croatia relate to the objective of
15 Serbia to remove the majority of the coherts.

16 Q. Other nonserpopulation from approximately 130 of the
17 territory of the republic of Croatia. As part of the campaign
18 against non Serbs hundreds were murdered thousands and prisoned
19 and tortured and homes and cultural mononew men's destroyed.
20 Crimes committed in Bosnia relate to the force seeable removal
21 of Bosnian Muslims and Bosnian Kroats from large areas of the
22 territory. This was accomplished to widespread killings
23 detentions possible deportation plunder and destruction of
24 property. For example, in the appeal judgment when the Serbians
25 attacked civilians they did so because of an individual

1 character of a civilian that is ethnicity. Attacks were clearly
2 directed at the civilian population most slim houses were burnt.
3 All signs of Muslim culture systematically destroyed. Muslims
4 were held in detention for months and Muslim women were detained
5 and subjected to systematic rape. The Chamber is referred to
6 the judgments paragraphs 573 to 575. Clearly in the context of
7 that context individual civilians were targeted solely because
8 they were Muslims. In the I CT R My Lords the factual base is
9 inched on the extermination and again side of one group of
10 civilians. The tootcy and the majority of those civilians
11 killed were killed because they where are toot sits. Clearly, a
12 civilian population distinguishable because they were tootcy was
13 targeted. In the particular circumstances of this case under
14 review by this Chamber civilians were attacked because they were
15 rightly or wrongly suspected of being rebels juntas or
16 collaborateers there for the attacks were directed at destroying
17 military groups and individual's associated with those groups
18 not because they were a part of the civilian population. In
19 concluding my arguments on ground one I submit that the
20 Prosecution in attempting to argue that the attacks by the CDF
21 were targeted at the civilian population as mis characterized
22 the entire essence of crimes against human nitty and because of
23 these the Chamber is deployed to dismiss the said ground. Lord
24 I would argue grounds three and four together. In it's third
25 and fourth grounds.

1

2 JUDGE AYoola: Sorry before you go further if you go
3 further in your last proposition then that makes the principal
4 that when you lie your weapon of warfare let's talk of using
5 Bombs you should be careful that civilian population will not be
6 affected.

7 MR WILLIAMS: I'm great My Lords.

8 Yes but in that situation you are not talking of ethnicity
9 you're talking of civilian population generally not determined
10 by whatever group they delonged to.

11 MR WILLIAMS: My Lord, I believe the -- the difference here
12 is in discriminate killing of civilians as opposed to in this
13 particular case -- I mean the -- the -- the distinguishing
14 factor between the CDF case and the ones I've referred to My
15 Lord is that in those cases they were in discriminate killing of
16 civilians because those people are either Muslims Tutsi`s or
17 Serbs My Lord which is quite different in this case. My Lord in
18 this case they did not go about killing each and every civilian
19 that came across. The target -- the crimes that were purpose
20 straighted against civilians were limited very limited to a
21 distinguishable part of the civilian population.

22 JUDGE AYoola: In this case.

23 MR WILLIAMS: Yes in the CDF case My Lord. You were a
24 rebel collaborator you were found with combatant fatigues you
25 were found with military I D cards they were told that you are

1 you -- a rebel was living in your compound this is completely
2 different whilst for in the Bosnia situation chased all about
3 the place irrespective of your association or or what you
4 believe in mill.

5 JUDGE AYoola: Of course we don't have those exacts in the
6 judgment.

7 MR WILLIAMS: In which judgment mill. Mill we do I
8 referred Your Lordship to a bit of the Trial Chamber judgment.
9 Yes. It's actually detailed in a brief My Lord why Trial
10 Chamber held that the -- the civilian population was not the
11 primary target in this case.

12 JUDGE AYoola: Thank you.

13 MR WILLIAMS: Thank you, My Lord.

14 MR KING: This morning also I think it was alleged that
15 limb about as as an ethnic group were targeted what did you say
16 to that.

17 MR WILLIAMS: Mill, the -- I -- I -- the -- I think in
18 respect of one particular -- they were targeted because they
19 were -- because they were perceived as junta collaborators My
20 Lord not because they were limb about as My Lord.

21 MR KING: On the submission of the Prosecution was that
22 they were attacked because they were limb about as.

23 MR WILLIAMS: No, My Lord.

24 MR KING: Didn't you hear them this morning wasn't that the
25 submission.

1 MR STAKER: We concede the argument was that they were
2 attacked because they were perceived collaborators that's why
3 everyone was attacked. There was no evidence that specified
4 individual's with were targeted because specifically that
5 individual was taught to be a collaborator it was assumed if you
6 were a limb about an in that village you were a collaborator.

7 MR KING: That's what I was saying what do you say to that.

8 MR WILLIAMS: I would love my learned friend to refer to
9 the evidence of the trial evidence mill which I am see so mill.
10 My recollection of what the evidence that was adduced was that
11 these individual's were targeted because they were perceived as
12 collaborateers.

13 JUDGE AYoola: Look at the finding in paragraph 750 the
14 second finding by the Trial Chamber CHECK speaker this is.

15 JUDGE AYoola: CHECK.

16 MR WILLIAMS: Yes, My Lord. . You say that doesn't
17 represent civilian population.

18 MR WILLIAMS: Mill that is a contention mill.

19 JUDGE AYoola: A contention a finding of fact how could
20 that be a contention.

21 MR WILLIAMS: Mill I mean mill based on the Trial Chamber
22 the finding of the Trial Chamber itself mill there that the
23 evidence did not disclose that the -- there was crimes against
24 humanity were perpetrated mill.

25 JUDGE AYoola: That's the entire basis of the

1 Prosecution's case the way I understand it the Prosecution
2 proseats on the footing that taking these findings of fact as
3 given the conclusion is unreasonable.

4 MR WILLIAMS: Mill --

5 MR KING: Furthermore before you go onto answer that
6 question. Look at paragraph 749 small two. It says there in
7 earlier --

8 MR WILLIAMS: Sorry My Lord.

9 MR KING: Seven five zero. 750 small two in early January
10 1998 150 Loko, Limba and Temne and tribe members were separated
11 from members of other tribes and were killed in tell lama.
12 That's a fact tall finding isn't it.

13 MR WILLIAMS: Yes, it is mill. That's what the Prosecution
14 was saying this morning.

15 MR WILLIAMS: Yes, My Lord.

16 MR KING: What's your response to that.

17 MR WILLIAMS: Again, we would say mill that the the killing
18 or the /KEULGS mill were not extensive enough to qualify for
19 crimes against humanity.

20 What number amounts to extensive because the Trial Chamber
21 did find it was widespread. What else are you looking for in
22 terms of extensiveness and if you look at the -- at paragraph
23 750 starting from small three to small six on a single day you
24 have attacks on civilians. In a single day 40th of January 1998
25 that was the finding of the Trial Chamber.

1 MR WILLIAMS: My Lord, in respect of the finding on on 750
2 Roman four mill it was because those two individual's were
3 considered to be collaborators.

4 MR KING: Let's go on again to the same paragraph paragraph
5 750 small 13 I think it is speaker this should be king speaker.
6 Shortly after the third attack on Tongo a group of 65 civilians
7 was separated into two lines in Kamboma. The Kamajors shot the
8 first 57 people and rolled the bodies into a swamp behind a
9 house. The last eight people were hacked in the neck with
10 machetes and rolled into the swamp with the other bodies. Only
11 one man survived. What's your response to that factual finding.

12 MR WILLIAMS: My Lord, my response would be that that would
13 constitute war crimes but not crimes against humanity.

14 Why do you say that.

15 MR WILLIAMS: Because the primary the element an essential
16 element was not provement mill that the civilian population was
17 the primary target mill.

18 JUDGE AYoola: When you're talking of circumstance
19 evidence you don't take them in bits and pieces you take them
20 cumulatively and that's why we referred you to the findings in
21 respect to fourteenth January, in respect of several places the
22 findings in respect of the events of fifteenth January taking
23 all those cumulatatively. How can you come to that conclusion
24 you have to satisfy us that it is a conclusion that is
25 available.

1 MR WILLIAMS: My Lord I didn't get the question mill.

2 JUDGE AYoola: Looking at the circumstance evidence you
3 have the findings of the events the killings on fourteenth
4 January 1998 you also find the finding of fact in regard to
5 killings in fifteenth January 1998 when you take those events
6 cumulatetively how can you suggest that the -- it's not the only
7 inference. You have to satisfy us that it is an unreasonable
8 inference to say that that was really an attack on civilian
9 population. The Trial Chamber itself described those people who
10 were killed as civilians and they were killed in large numbers
11 within a space of two days in several locations within the same
12 place.

13 MR WILLIAMS: My Lord, I would more or less -- I would
14 basically rely on other pieces of evidence My Lord which that
15 were at deuced My Lord. I mean pointing to the fact that the
16 CDF had as it's goal mill the protection of the civilian
17 population and the -- none of the Prosecution witnesses mill
18 articulated an -- an objective which points to the CDF having as
19 it's primary target the elimination of the civilian population.

20 MR KING: You see, I have referred you to paragraph 70
21 small two and small 13.

22 MR WILLIAMS: Yes.

23 MR KING: You know about the Temnes the locos and so on
24 being separated this one again in Tongo where everybody was
25 killed accept one. Those were actual findings of facts by the

1 Trial Chamber. Now, you are not disputing those findings of
2 facts are you.

3 MR WILLIAMS: No, My Lord.

4 MR KING: What's your response then.

5 MR WILLIAMS: That these individual's were killed because
6 not -- not because they were civilians mill but because they
7 were perceived as collaborators mill.

8 MR KING: Excuse me was your client a party to this killing
9 isn't that your primary stand to tell us whether or not your
10 client was privy to these killings. Isn't that the fundamental
11 submission you have to concentrate on.

12 MR WILLIAMS: Yes mill.

13 MR KING: Why haven't you done so.

14 MR WILLIAMS:

15 MR. MILLER the mill it was not the Prosecution is not
16 arguing that it should be found guilty under 61 mill. The
17 contention is that it was involved in the planning of those
18 attacks sorry it was involved as a some fearier My Lord and we
19 have addressed the issue of subordinate superior relationship
20 between Kondewa and the Kamajors lengthy in our brief.

21 MR KING: I'm not asking you about briefs I'm asking you to
22 complement as it stands now what is your reaction to that and
23 having regard to the submissions made by the Prosecution this
24 morning and just a minute and the actual finding of fact
25 relevant to the submissions made by the Prosecution this morning

1 vis-a-vis your client Kondewa.

2 MR WILLIAMS: We would submit that he was not involved.

3 MR KING: It's as simple as that I just want to hear your
4 views on this you are appealing on behalf of the your client you
5 make those submissions which you think are in his favor and in
6 Defence of him.

7 MR WILLIAMS: As My Lord pleases.

8 MR KING: Go on. What is your submission then.

9 MR WILLIAMS: My Lord that Mr Kondewa in relation to the
10 killings at Tongo My Lord I submit that Kondewa a was not
11 involved in any way in those killings not directly -- neither
12 directly nor indirectly My Lord.

13 MR KING: Thank you.

14 JUDGE AYoola: That would be -- you are still on ground
15 one are you.

16 MR WILLIAMS: No no I moved.

17 JUDGE AYoola: Owe you moved.

18 MR WILLIAMS: In this in it's third and fourth grounds of
19 appeal the Prosecution request that the Chamber revise the Trial
20 Chamber's finding and find firstly that Kondewa is individually
21 responsible under article 61 of the Statute for instigating all
22 of the crimes which the Trial Chamber found were committed
23 during the second and third attacks on Tongo and secondly that
24 Kondewa was individually responsible under article 61 of the
25 statute for aiding and abetting in the planing preparation or

1 execution of all the crimes which the Trial Chamber found were
2 committed during the attacks on Bo and Kenema. On the Tongo
3 crime base I submit that the evidence fails to establish beyond
4 reasonable doubt that Kondewa is individually responsible under
5 article 61 of the Statute. For instigating all of the crimes
6 committed in Tongo. One, a casual relationship between the
7 alleged alleged instigation and the physical perpetration of the
8 crimes.

9 MR KING: [Indiscernible].

10 MR WILLIAMS: Sorry My Lord.

11 MR KING: You said just now that Kondewa had not for
12 instigating are you saying he instigated.

13 MR WILLIAMS: No that is what the Prosecution is saying.
14 We are saying he did not My Lord.

15 MR KING: Very lord.

16 MR WILLIAMS: My Lord, this is because casual relationship
17 between the alleged instigation and the physical perpetration as
18 required to satisfy the element has not been established and two
19 Kondewas action acts do not meet the standard of having direct
20 and substantial contribution to satisfy the act of serious
21 element required for individual available responsibility for
22 instigating. I submit that the elements of instigating as found
23 by the Trial Chamber in it's judgment are the correct elements.
24 Counsels I submit that for instigating a key element of proof is
25 demonstrating a casual relationship between in instigation and

1 the perpetration of the crime. Instigating means prompting
2 another person to commit an offence. The Chamber is referred to
3 a judgment Paragraph 482 trial judgment Paragraph 280. I submit
4 that there is no evidence proof of a casual connection between
5 the actions of Kondewa and the crimes perpetrated in the last
6 two attacks on Tongo and there for there can be no liability
7 under article 61 of the Statute for instigating. The
8 Prosecution stated or states that the Trial Chambers finding in
9 Paragraph 321 of his judgment that at the passing out parade in
10 December 1997 Kondewa made a statement which was in quote then
11 all the fighters looked at Kondewa admired him as a man with
12 Mystic power again the last commenting a rebel is a rebel
13 surrendered not surrendered they are rebels. The time has long
14 been exhausted we don't need any surrendered rebel. I give you
15 my blessings go boys go. Unquote. The Prosecution is
16 contending that this statement amounted to instigating those
17 claims. I submit that the actus reus requires a clear
18 contribution by the accused to the act of the other person.
19 This evidence far from -- far from satisfies this element. There
20 is not an iota of evidence of there being any casual
21 relationship between this one statement by Kondewa and the
22 perpetration of any crime in Tongo. Firstly there is no
23 evidence to show that any of the Kamajors who were present at
24 the passing out parade are were the same Kamajors who were
25 subsequently involve in the Tongo attacks or the same Kamajors

1 that committed any crime. Secondly there is no evidence that
2 any Kamajor was prompted to commit any crime on the basis of
3 these ambiguously phrased twenty eight words uttered six weeks
4 before and. I there for submit that in failing to establish any
5 casual relationship between the words spoken by Kondewa and the
6 submission of any crimes in Tongo the Prosecution has failed to
7 fulfill the first part of the acts of serious requirement of
8 that form of individual responsibility.

9 What's you just read that passage quoting the exact words
10 of your client. Now what interpretation do you give to those
11 words speaker king. [Indiscernible].

12 MR WILLIAMS: My Lord.

13 MR KING: What's the inference to be drawn from those
14 words.

15 MR WILLIAMS: You know that rebels should be killed My Lord
16 that rebels should be killed.

17 MR KING: Yes is that instigation or not.

18 MR WILLIAMS: My Lord, we are saying that there is no
19 evidence was adduced that these people -- there could be a
20 casual relationship between in instigation and the commission of
21 the crime.

22 MR KING: My question is a simple one is that an
23 instigation or not.

24 MR WILLIAMS: No mill it's not.

25 MR KING: Thank you.

1 MR WILLIAMS: But under ground four the Prosecution submits
2 that on the evidence accepted by the Trial Chamber --

3 JUDGE AYoola: Before you go on if it's not an instigation
4 what is it.

5 MR WILLIAMS: My Lord, it's a -- My Lord basically what
6 something -- something that you would say to combatants I mean
7 before they go out fighting My Lord. These are legitimate
8 targets I mean we're talking about a rebel My Lord and it's --
9 it goes without saying that that -- I mean, that is what is
10 expected of you know somebody on the opposing side.

11 JUDGE AYoola: That you are supposed to kill them whether
12 they surrendered or not.

13 MR WILLIAMS: No, My Lord in combatant you're suppose to
14 kill them.

15 JUDGE AYoola: But you are not supposed to kill combatants
16 who have surrendered.

17 MR WILLIAMS: No you're not My Lord.

18 JUDGE AYoola: What does this speech say.

19 MR WILLIAMS: My Lord, it says -- mill it merely defining
20 what a rebel is. That's a mere definition of what a rebel is.
21 A rebel is a rebel. Surrendered not surrendered there all
22 rebels.

23 MR KING: Yes there for the |- consequence what should be
24 done then.

25 MR WILLIAMS: When you -- when you come by rebel in

1 combatant or still it is you kill him CHECK.

2 MR KING: Exactly given the reason why that is so they were
3 fighting against rebels and there for the target the enemy was
4 rebels not civilians that's a perfectly good interpretation.

5 MR WILLIAMS: Legitimate target My Lord.

6 MR KING: Why didn't you say that. ^ rebel. It's not
7 defining rebel what he is, in fact, saying there is a fight
8 going on we're fighting the rebels. If they surrender or not
9 surrender they are rebels. In other words he was instigating
10 him to say these are targets if you come an across you know what
11 to do.

12 MR WILLIAMS: Yes, My Lord.

13 MR KING: That's the only reasonable interpretation
14 explanation.

15 MR WILLIAMS: Yes mill.

16 JUDGE AYoola: Why did he say surrender to rebels. Why
17 did he classify them together. Fighting rebels surrender
18 rebels. What is the need for the distinction if they were not
19 to be treated a like by killing all of them.

20 MR WILLIAMS: My Lord, the -- my short answer to that would
21 be My Lord that he was not -- firstly he was not given he was
22 not instigating anybody My Lord it was a mere statement of fact
23 that a rebel is a rebel. Sorry My Lord.

24 MR KING: It did not end there.

25 MR WILLIAMS: Yes.

1 MR KING: Talked about surrendered and you know and so on.

2 MR WILLIAMS: Yes. Yes. That we don't need any

3 surrendered rebels.

4 JUDGE AYoola: Can you refer to the paragraph again.

5 MR WILLIAMS: Mill.

6 JUDGE AYoola: Not in the judgment.

7 MR WILLIAMS: Trial Chamber judgment I think Paragraph 321

8 My Lord. The last four lines of Paragraph 321 it's on page 103

9 My Lord.

10 Yes you read a portion of the speech. Why don't you just

11 read everything so that we could put everything in proper

12 context.

13 MR WILLIAMS: A rebel is a rebel surrendered not

14 surrendered they are all rebels. The time for their surrender

15 had lost since been exhausted so we don't need any surrendered

16 rebel.

17 How do you understand that.

18 MR WILLIAMS: Mill that rebels were to be killed My Lord.

19 Yes exactly so surrendered or not surrendered even when

20 they surrendered kill them. We don't need surrendered rebels

21 just wipe all of them away.

22 MR WILLIAMS: The statement is unambiguous My Lord sorry

23 it's ambiguous My Lord it's very ambiguous.

24 JUDGE AYoola: Is it ambiguous when you put it in the

25 context of preceding statement by all parties present. This was

1 said -- he was not the only person addressing the group. There
2 have been Norman had addressed the group. Then Fofana fan in a
3 had addressed the group then he addressed the group. Where you
4 put altogether what inference can you draw from that.

5 MR WILLIAMS: My Lord, the last -- the last seven words My
6 Lord. I give you my blessings. Go my boys go My Lord.

7 No start from the beginning of 321.

8 MR WILLIAMS: The first.

9 You see it says quite clearly Norman said in the open that
10 the attack on Tongo will determine who the winner or the loser
11 of the war will be and that quote there is no place there is no
12 place to keep captured or prisoners like the juntas or I don't
13 knowers some would call let alone there collaborators end of
14 quotes. Felt uncomfortable with this commander. Giving such
15 90 percent illiterate who had been wronged is like telling them
16 an eye for an eye and meant telling them not to spare the
17 vulnerables Norman also said that quote the international
18 community is condemning human rights then I take care of the
19 human left abuses in quote. You see you have to read the whole
20 of that paragraph and then at the end your client was saying
21 what he said there.

22 MR WILLIAMS: Yes, My Lord. My Lord why I say the
23 statement by Kondewa is ambiguous and does not point to, you
24 know, an instruction or order that surrendered Kamajors were to
25 be killed is because of the last seven words of his statement My

1 Lord. It says I give you my blessings go my boys go.

2 What difference does that make.

3 There's evidence that Kondewas instructions were that
4 civilians and even sure rendered soldiers were not to be killed
5 My Lord.

6 MR KING: He was, in fact, blessing them for going to do
7 just that. Don't take any surrendered people. Just do a way
8 with them.

9 MR WILLIAMS: No mill. Mill that would be taking that
10 statement out of context mill.

11 MR KING: Why would it be taken out of context when you
12 read the hole of the paragraph Norman down to condemn ma don't
13 forget he was supposed to be the high priest.

14 MR WILLIAMS: My.

15 MR. MILLER the magic or whatever it is that it was believed
16 went with Kondewas could only work if civilians and surrendered
17 -- there's an abundant evidence of that that this magic would
18 only work if civilians and surrendered rebels were not hurt My
19 Lord. That's why I say if it's taken out of context it might
20 have a different interpretation. The context in which he said
21 this is quite clear. It followed in what Norman said they
22 should not take any prisoners. This is precisely what he meant.
23 An eye for an eye. A truth for a truth. I thought probably in
24 the case of your client I don't know but probably one
25 interpretation might be otherwise. You have not given us that

1 interpretation of the words he used. You would know as the
2 client as the lawyer representing that client.

3 MR WILLIAMS: My Lord My Lord that is a --

4 MR KING: I don't know what language you used what the
5 interpretation was these are all relevant considerations how it
6 was interpreted but you say as was said there, you know, it's
7 quite clear that it would seem as if there was an instigation to
8 go and kill all of those surrendered or not surrendered to do
9 away with them. Unless he was trying to say that don't trust
10 these people they have surrendered don't believe them because
11 they might be pretending to surrender then attack us something
12 like that this is mere speculation that's possible
13 interpretation. You said nothing.

14 MR WILLIAMS: I said it's ambiguous mill.

15 MR KING: It's everything but ambiguous.

16 MR WILLIAMS: As My Lord pleases.

17 MR KING: Go on.

18 MR WILLIAMS: Yes mill the Prosecution under grounds four
19 the Prosecution submit that on the evidence accepted by the
20 Trial Chamber the only conclusion for a reasonable trier of fact
21 was that Kondewa gave encouragement and moral support to the
22 planners of the attacks and the crimes and there for he aided
23 and abbetted in the planning of those crimes in Koribondo Bo and
24 Kenema. I submit there was no to prove aiding and abbedding I
25 don't understand reasonable doubt the evidence must demonstrate

1 that the acts of the accused had a substantial effect upon the
2 perpetration of a crime. Counsel I submit that the evidence
3 accepted by the Trial Chamber and relied upon by the Prosecution
4 in it's appeals in it's appeal falls well below this standard.
5 It is submitted that on the evidence no reason trier of fact
6 could conclude that attending two meetings at which the attacks
7 on Bo and Koribondo were discussed were the only evidence of
8 Kondewa actually saying anything was to give his blessing and
9 met sure the Kamajors satisfied the substantial effectives that
10 is well established in the ad doctor Tribunals jurisprudence.
11 My Lords the Prosecution wants this Court to convict Kondewa for
12 planning ordering and other aid and abedding the civilians at Bo
13 and Kenema just because he attended a meeting in which he made
14 no contribution to the deliberations. The only statement that
15 was attributed to one in those present at the meeting from
16 arming civilians. T F 201 at page one 13 lines 16 to 21 of the
17 trial transcript of the fourth of November 2004. After Norman
18 given instructions to burn loot and kill then Kondewa gave
19 gallons of liquid solution and said I'm going to give you my
20 blessings I'm going to give you medicines which you would --
21 which would made you to be fearless if you did not spoil the
22 law. I gave it to you I prepare you unquot. This I submit is
23 in sub board on the part of Kondewa but prepared to take the
24 risk against arming civilians. There were specific instructions
25 of kill and loot there was Kondewa advising these Kamajors to go

1 out there that they had his blessing provided that they adhere
2 to the laws My Lord and as I indicated the laws were that you
3 should not kill or arm civilians.

4 Where do we find that in the judgment that those were the
5 laws.

6 MR WILLIAMS: I would refer Your Lordships to portions of
7 bits of evidence as we adds deuced which are quite clear and
8 unequivocal. . Yes. That the T F 2201 testified that Norman
9 dismissed Kondewa by saying well he spoke too late Lamin. It is
10 clear that the laws Kondewa gave to Kamajors whether they should
11 not kill loot harass or distress civilians and the consequences
12 of reaching those laws was that the fighting will die in combat.
13 This came out of witnesses called by the Prosecution. One such
14 witness was T F 2005 who said in his testimony at page 82 and 83
15 of the trial transcript of the fifteenth February 2005 that some
16 of the laws of the Kamajors were you should not kill or harass
17 civilians that they were meant to defend. While I do not
18 dispute that the Kamajor had great respect for Kondewa and they
19 looked up to him his mere presence at meetings in the absence of
20 evidence that Kondewa actually did anything other than fulfill
21 his role as high priest in giving the Kamajors a blessing does
22 not meet the evidential standard required to demonstrate aid and
23 abedding beyond A reasonable doubt. Your time is up but we'll
24 give you a few more minutes to -- because we gave the
25 Prosecution sometime this morning. We'll give you a few more

1 minutes to finish your argument.

2 MR WILLIAMS: Yes on ground five My Lord the issue of child
3 soldiers My Lord the Prosecution on this under this ground the
4 Prosecution is containing that the Trial Chamber failed to
5 clearly describe the full extent of Kondewas responsibility for
6 the crime of enlisting children under the age of 15 into armed
7 forces or groups. The Trial Chamber convicted Kondewa under
8 article 61 of committing the crime of enlistment of a child
9 under 15 into an armed force or group. However the Prosecution
10 requests the appeal Chamber to find that Kondewa bears
11 individual responsibility on count eight of the indictment of
12 enlistment of an unknown number of children into armed forces or
13 groups or using them to participate actively in hostilities.
14 The Trial Chamber found based on the evidence of T F 2021 that
15 in the circumstances of a particular situation described by the
16 witness in quote it is beyond reasonable doubt that Kondewa was
17 also performing an act to enlisting them for active military
18 service. The Prosecution submit s that Kondewa is also liable
19 of the offence of aiding and abetting the enlistment of more
20 than one child. Of more than one child soldier. Counsel
21 submits that the evidence on which Kondewa was found
22 individually responsible for enlisting of -- for enlisting of
23 one child into an armed force or group was so flawed that it is
24 impossible from that evidence to reach the further conclusion
25 that Kondewa enlisted more than one child or that he aided and

1 abbedded enlistment of more than one child. Secondly that the
2 immunation does not equate to enlistment.

3 I submit that the Prosecution has failed to show that
4 Kondewa made a substantial contribution to the crime of
5 enlistment specifically in the case of the -- specifically in
6 the case of the 20 other boys initiated with T F 2021 as the
7 Prosecution has argued. The evidence with respect to T F 2021
8 is deeply flawed and the Prosecution fails to establish how
9 [indiscernible] substantially contributed to enlistment. Mill
10 there is abundance of evidence from both Prosecution and Defence
11 witnesses that Kondewa did not have cervical or command over
12 initiate ones they left the [indiscernible]. I invite Your
13 Lordships to pay particular attention to the following bit of
14 evidence. Firstly the evidence of Albert night low who
15 testified on the fifteenth of March 2005. At page nine lines
16 ten to 13. Record this was the witness that was described by
17 the Trial Chamber as the single most important Prosecution
18 witness My Lord. My Lord, that witness in answer to this
19 question in quote My Lord but you do agree with me, Mr Witness
20 that ination into the Kamajor traditional society is completely
21 different for military recruitment.

22 A. Will Yes, My Lord. This was the biggest of the
23 singularly most important witness in the Prosecution's case.

24 JUDGE AYoola: Sorry what date was that evidence given.

25 MR WILLIAMS: Fifteenth March 2005 My Lord.

1 JUDGE AYoola: Transcript.

2 MR WILLIAMS: Page nine lines ten to 13.

3 JUDGE AYoola: Thank you.

4 MR WILLIAMS: My Lord, another Prosecution witness T F 2082
5 who testified on the seventeenth of September 2004 T F 2082
6 seventeenth September 2004 page 48 -- sorry page 42 sorry My
7 Lords lines seven to ten. Now the question that was posed to
8 the witness was this My Lord. So you would agree with me that
9 immunation was not the same as recruitment for fighting.

10 Half say that again.

11 MR WILLIAMS: So you would agree with me that immune
12 aniation that was what was done.

13 Immunation.

14 MR WILLIAMS: Immunation My Lord was not the same as
15 recruitment for fighting. Immunation is what was alleged
16 Kondewa did at initiations My Lord.

17 [Indiscernible].

18 What did that intail. I'll leave it on now.

19 MR WILLIAMS: That you will be kept in a shrine for one or
20 two days some aps will be applied to your body and that makes
21 the initiated perrous to bullet My Lord.

22 MR KING: Was it in the evidence that it made them I'm
23 pervious to.

24 MR WILLIAMS: We did not have volunteers. Yes yes several
25 Prosecution. Said they were shot is an ^ exactly My Lord.

1 MR WILLIAMS: Sorry mill. Mill I would -- I can provide it
2 subsequently mill.

3 MR KING: All right.

4 JUDGE AYoola: That was to satisfy curiosity.

5 MR WILLIAMS: Yes and the question was so you would agree
6 with me that immunation was not to say --

7 MR KING: Excuse me so all those who were killed on the
8 side of the CDF are you saying that they had no immunation.

9 MR WILLIAMS: No.

10 JUDGE AYoola: Or maybe they broke the law.

11 MR WILLIAMS: Exactly My Lord exactly My Lord that it won't
12 kill or arm civilians My Lord so that is the theory that was
13 presented by Prosecution witnesses My Lord.

14 MR KING: But you have invested immunation had no effect.

15 MR WILLIAMS: That's --

16 MR KING: That's what I'm saying all those who were killed
17 must not have had immunization.

18 MR WILLIAMS: They were in breach of the laws My Lord.

19 JUDGE AYoola: Of I'mation.

20 MR KING: It's just like saying the money is the sun.

21 MR WILLIAMS: My Lord, the answer to that question the
22 question was so you would agree with me that I'mation was not
23 the same as recruitment for fighting. Answer. Yes, it was it
24 was different from recruitment into the military. Yes, it was.
25 So even from Prosecution witnesses My Lord the evidence quite

1 clearly reveal that immunation was completely different from
2 recruitment or enlistment mill.

3 JUDGE AYoola: With all this evidence what was the
4 conclusion arrived at by the Trial Chamber.

5 MR WILLIAMS: Mill that the accused mill the second
6 respondent was only found guilty in respect to the I'mation or
7 enlistment of or recruitment of just one child. Mill we are
8 questioning the evidence that led to the Trial Chambers finding
9 mill.

10 [Indiscernible].

11 MR WILLIAMS: Sorry My Lord.

12 What did the relevant count in indictment charge
13 [indiscernible] enlistment My Lord that he enlisted several
14 children My Lord hundreds or so children.

15 MR KING: From the indictment. These are relevant issues
16 that were specifically because they have to do before direct to
17 come CHECK on that recruit [indiscernible] and if you are --
18 sorry. That you enlisted several children. Did they prove
19 that, in fact, it did enlist several children. This is the sort
20 of thing that should be deliberating on it's much better if you
21 would just in fact address us in fact of reading from your notes
22 most of the time.

23 MR WILLIAMS: Yes, My Lord.

24 MR WILLIAMS: Count eight him use of child soldiers at all
25 times relevant to this indictment civil Defence forces did

1 throughout the public of Sierra Leone enlist children under the
2 age of 15 years into armed groups. Into armed forces or groups
3 and in addition or in the alternative used them to participate
4 actively in hostilities My Lord.

5 MR KING: What do you say that now having regard to the
6 evidence.

7 MR WILLIAMS: Yes, My Lord that the Prosecution failed to
8 prove the elements of that offence My Lord.

9 MR KING: What element.

10 MR WILLIAMS: My Lord, that that of initiating children and
11 getting them involved in in military activities My Lord.

12 MR KING: I was directing my question to what is actually
13 stated in the count enlisting children one child is not children
14 is it.

15 MR WILLIAMS: It's not My Lord.

16 MR KING: You miling. I mean these are the points you
17 should address us on. I would like to know the legal
18 consequences if, in fact, the Trial Chamber came to the finding
19 that Kondewa enlisted only one child whether in fact they have
20 proved what they allege in the count. I just want to be guided
21 that's a very important point.

22 MR WILLIAMS: My Lord, we appeal against the conviction.

23 MR KING: I'm not saying what you appeal against. Itment
24 asking you for this particular point fur to answer as best you
25 can. They were saying that your client enlisted children. The

1 Trial Chamber found that he enlisted one child. Now how do you
2 interpret this vis-a-vis the allegation in the count.

3 MR WILLIAMS: My Lord we would say the elms were not proven
4 My Lord.

5 MR KING: The elms.

6 MR WILLIAMS: The allegation.

7 MR KING: When you think of elements you think of the
8 crime. I'm talking now one and many. What is your own
9 submission with regard to that if any.

10 MR WILLIAMS: My Lord, I would submit that the Prosecution
11 or the fact that the Trial Chamber only convicted Mr Kondewa for
12 enlisting one child.

13 MR. MILLER was -- mill if I may just confer with my learned
14 counsel.

15 MR KING: Carry on.

16 MR WILLIAMS: Mill I submit that the allegations made by
17 the Prosecution in the indictment were not proven My Lord.

18 MR KING: Exactly that's what you should be dealing with
19 when you come to appeal in this Chamber. You are representing
20 your client. These matters come to the end substance on it or
21 not. I mean if he says children one is not children. And tell
22 us the legal consequences if any when what the Trial Chamber
23 found that Kondewa enlisted only one child evening though the
24 allegation was that children were enlisted. You could make your
25 missing and say enlistment of one is not enlistment of seven.

1 We will look at it. These are the important points you should
2 deal with. It's better for you to make your notes then address
3 us instead of reading from your notes most of the time. You
4 make a better impression.

5 JUDGE AYoola: I don't know how you can come to that
6 conclusion with confidence if you read Paragraph 968 the
7 findings of fact in 968. Small one, 12 small four. Those
8 findings did not relate to a single child or to several children
9 and when you now flip over and go to Paragraph 972 where the
10 Trial Chamber said having found that Kondewa is individually
11 criminally responsible for enlisting child soldiers not just one
12 person.

13 MR WILLIAMS: Mill, the -- the that is the case mill but
14 the final disposition of the Chamber was that the evidence only
15 proves that or approved that it was one child that was enlisted
16 mill that was T F 2021.

17 JUDGE AYoola: Going back to the evidence or to the part
18 of the Trial Chambers judgment speaker is king speaker where
19 condemn ma was found guilty of enlisting one child. Could you
20 refer to that. Page 2 eighty seven. 287. Oh. Where is that
21 [indiscernible].

22 MR WILLIAMS: '971 My Lord.

23 MR KING: So announcing that question should be also to
24 Paragraph 971.

25 MR WILLIAMS: Yes, My Lord. Not that -- the -- it's '971

1 is where the Trial Chamber held that it was only one child
2 soldier that.

3 MR KING: But my learned brother on my right pointed out
4 that the use of child soldiers an alternative to enlistment.
5 There for having found the for enlivening child soldiers. Is that
6 the same as what they said in '971. What is your submission on
7 the apparent contradiction.

8 MR WILLIAMS: That the Trial Chamber was wrong to reach the
9 conclusion in Paragraph two -- '972 based on what they -- what
10 the --

11 MR KING: Well that's what you should have been doing in
12 answering the question that was posed to you.

13 MR WILLIAMS: Yes, My Lord.

14 MR KING: You refer to '971 a specific finding there with
15 regard to your client Kondewa that he and the exact words that
16 he had -- does the child -- the Chamber concludes that this
17 evidence has established beyond reasonable doubt that Kondewa
18 committed the crime of enlisting a child into armed forces so so
19 so. The alternative to enlistment there for having found that
20 Kondewa is individual criminal responsible for enlisting child
21 soldiers now where did that balance was guilty of enlisting
22 child soldiers.

23 MR WILLIAMS: Nowhere My Lord.

24 JUDGE AYoola: You will find it in 968. Of course,
25 contradict you but you never theless you will find it in 968.

1 MR WILLIAMS: Mill that in respect of just one child sold
2 My Lord.

3 JUDGE AYoola: If you look at small 21 witness giving
4 evidence of 20. Yes neveruation My Lord which is different from
5 enlistment or recruitment. T F 2021 was part of that 20. And
6 Trial Chamber said that Kondewa was only guilty in respect to
7 the I'mation of that particular initiate My Lord and not the
8 other 19.

9 JUDGE AYoola: 20 were initiated.

10 MR WILLIAMS: Yes mill.

11 MR KING: See your point as I take it should be this that
12 as far as proof is concerned the Trial Chamber came to a finding
13 of fact that your client is only guilty of recruiting one child
14 the evidence led there was beyond reasonable doubt. There might
15 be other pieces of evidence as far as the Trial Chamber was
16 concerned it's only respect to the recruitment of one child
17 soldier that they proved their case beyond reasonable doubt.
18 Isn't that the position. Well say that.

19 MR WILLIAMS:

20 MR. MILLER the Trial Chamber found mill that though several
21 -- that though -- the accused mill the respondent the second
22 respondent was responsible for several for initiating several
23 children under the age of 15 the evidence led only approved that
24 the immunation of T F 2021 was sufficient enough -- that was the
25 only evidence that was stand amount to enlistment mill.

1 That was the on that was something beyond reasonable doubt
2 isn't it.

3 MR WILLIAMS: Yes, sir.

4 MR KING: Exactly that's the whole point. Then the
5 question -- just one second. My original question was this and
6 I just want guidance. You red the relevant count where the
7 Prosecution were alleging that Kondewa recruited child soldiers.
8 The evidence that was believed by the Trial Chamber and approved
9 beyond reasonable doubt is the recruitment of just one child
10 soldier. Now how do you relate that in proof of the allegation
11 that your client recruited child soldiers what is your
12 submission on that. Guide me.

13 MR WILLIAMS: Mill that the evidence an adduced by the
14 Prosecution failed to prove the allegations in count eight in
15 the sense that Kondewa was not found guilty of recruiting
16 children but only TF2-21 a single child.

17 JUDGE AYoola: To make your submission complete for my own
18 benefit how many children must you recruit before you commit the
19 offence of committing child soldiers.

20 MR KING: More than one.

21 JUDGE AYoola: Where do you find that.

22 MR WILLIAMS: In the indictment my Honours.

23

24

25