



Case No. SCSL-2004-14-A
THE PROSECUTOR OF
THE SPECIAL COURT
V.
MOINI NA FOFANA
ALLIEU KONDEWA

WEDNESDAY, 12 MARCH 2008
10.37 A.M.
APPEAL

APPEALS CHAMBER

Before the Judges:

George Gelanga King, President
Emmanuel Ayoola
Renate Winter
Raja Fernando
Jon M. Kamanda

For Chambers:

Ms Susanne Malmstrom
Mr Kamran Choudry
Mr Steven Kostas

For the Registry:

Mr Thomas George

For the Prosecution:

Mr Steven Rapp
Mr Christopher Staker
Mr Karim Agha
Mr Joseph Kamara
Ms Regine Gachoud
Ms Elisabeth Baumgartner
Ms Bridget Osho
Mr Francis Banks-Kamara

For the accused Moini na Fofana:

Mr Wilfred Davidson Bola-Carrol
Mr Mohamed Pa-Momo Fofana

For the accused Allieu Kondewa:

Mr Yada Williams
Mr Osman Jalloh

1 [CDF12MAR08A_2SGNGL]

2 Wednesday, 12 MARCH 2008

3 [Open Session]

4 [The accused present]

5 [Upon commencing at 10.41 a.m.]

6 MR GEORGE: Special Court for Sierra Leone Appeals Chamber.
7 Case Number SCSL-2004-14-A. The Prosecutor against, Moinina
8 Fofana and Allieu Kondewa for Hearing of Appeals.

9 JUDGE KING: Who appears?

10 MR STAKER: May it please the Chamber for the Prosecution,
11 Christopher Staker, with me, Stephen Rapp, Joseph Kamara, Karim
12 Agha, Regine Gachoud, Elisabeth Baumgartner, Bridget Osho and
13 Francis Banks-Kamara.

14 MR CARROL: May it please, Your Honour.

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

17 MR STAKER: Karim Agha, Regine Gachoud.

18 Judge King: Sorry?

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

20 JUDGE KING: Thank You.

21 MR STAKER: Elisabeth Baumgartner. It's Elisabeth with an
22 S.

23 JUDGE KING: Elisabeth?

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

25 JUDGE KING: That's not an English Elisabeth.

26 MR STAKER: That is a Swiss Elisabeth.

27 PRESIDING JUDGE: Swiss Elisabeth, I thought so. Thank
28 you.

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

1 JUDGE KING: That's a very formidable team, isn't it?

2 MR STAKER: Thank you, for what I take to be a complement,
3 Your Honour.

4 JUDGE KING: It couldn't be anything else. Thank you.
5 Yes, the Defence.

6 MR CARROL: May it please Your Lordships, I appear for the
7 respondent and with me is -- my name is Bola Carroll.

8 JUDGE KING: Is that so?

9 MR CARROL: That is so, Your Lordship. And with me is, my
10 I learned friend, Mr Mohammed Pa Momo Fofana. As Your Lordships
11 please.

12 JUDGE KING: Mr Bola Carroll and --

13 MR CARROL: Mohammed Pa Momo Fofana.

14 JUDGE KING: You are from Banjul, are you?

15 MR CARROL: Indeed, Your Lordships.

16 JUDGE KING: Mohammed Fofana?

17 MR CARROL: No, no. He's from Sierra Leone.

18 JUDGE KING: No. I said you.

19 MR CARROL: I am, Your Lordships.

20 JUDGE KING: Mohammed Pa---

21 MR CARROL: Pa Momo. M-0-M-0. Without an H. As Your
22 Lordship please.

23 JUDGE KING: That's a--- you are for who? You're for who,
24 Mr Carroll?

25 MR CARROL: For the first respondent, Your Lordships.

26 JUDGE KING: Yes.

27 MR WILLIAMS: May it please Your Lordships, for the second
28 respondent Yada Williams, and with me is Osman Jalloh, My Lords.

29 JUDGE KING: Thank you. Right. Are we ready to go?

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

4 JUDGE KING: Very well.

5 MR WILLIAMS: May it please Your Lordships. My Lord, it's
6 a small or slight amendment I wish to seek to Ground IV of our
7 Notice of Appeal, My Lords.

8 JUDGE KING: Yes.

9 MR WILLIAMS: My Lords, Ground IV of our Notice of Appeal
10 challenged the Trial Chamber Judgment on the basis that the
11 Chamber erred in failing to establish the correct Mens rea for
12 aiding and abetting in relation to the offences that occurred in
13 Tongo fields, My Lords. My Lord, Our appeals brief extensively
14 argued Ground IV that the Chamber also erred in failing to
15 establish the correct actus reus, My Lords. In Paragraph 5.8 of
16 it's response to the --

17 JUDGE KING: Just a minute, I want to follow you. Which
18 amendment do you wish to make?

19 MR WILLIAMS: To our Notice of Appeal, My Lord.

20 JUDGE KING: Yes. To Ground IV?

21 MR WILLIAMS: Yes, My Lord.

22 JUDGE KING: Read Ground IV then. Can you please read
23 Ground IV.

24 MR WILLIAMS: Just a second, My Lord.

25 JUDGE KING: Come on, hurry, because you should have your
26 Grounds ready.

27 MR WILLIAMS: My Lord, the amendment that --

28 JUDGE KING: I said read Ground IV.

29 MR WILLIAMS: Yes, My Lord.

1 That the majority of the Trial Chamber erred in failing to
2 establish the correct Mens rea requirement for aiding and
3 abetting and the determination of individual criminal
4 responsibility pursuant to Article 6.1 for Count II, IV and VII
5 in Tongo fields, My Lord.

6 JUDGE KING: Yes.

7 MR WILLIAMS: My Lord, the application -- the amendment is
8 seeking to add the words actus reus between the words Correct and
9 Mens rea on the second line, My Lord.

10 JUDGE KING: The charge is the correct.

11 MR WILLIAMS: It should now read if the amendment is
12 granted, My Lord.

13 JUDGE KING: Just state the amendment first.

14 MR WILLIAMS: Actus reus -- the three words Actus reus
15 and --

16 JUDGE KING: Just a minute. So what you wish to amend is
17 to insert the words.

18 Actus reus and after the word correct; is that right?

19 MR WILLIAMS: Exactly, My Lord.

20 JUDGE KING: Do you have any objections to that?

21 MR STAKER: In this particular instance, no, Your Honour.
22 We are aware that the Appeals Chamber is the instance of last
23 resort in this legal system and it is important that a party be
24 able to bring all relevant issues before the Appeals Chamber.
25 The Rules, of course, are there to ensure that adequate notice is
26 given and things are done in an orderly fashion. But, of course,
27 The Rules are meant to be the servant of justice and not vice
28 versa. And we concede that in this case the parties have fully
29 briefed this additional issue of the actus reus in their written

1 submissions, and we are prepared today to argue them orally, so
2 we don't oppose the application.

3 JUDGE KING: Thank you, Mr Staker. The application is
4 granted.

5 MR WILLIAMS: Most grateful, My Lords.

6 JUDGE KING: Thank you. Yes, Mr Staker.

7 MR STAKER: May it please the Chamber, all of the
8 Prosecution's Grounds of appeal in this appeal have been fully
9 argued in our written submission and we continue to rely fully on
10 those written submissions. In our oral submissions today, we
11 propose merely to highlight some of the salient points and to
12 assist the Bench with any matter, if called upon to do so. I
13 will be presenting the Prosecution's submissions on our first,
14 fifth, sixth, eighth and ninth Grounds of Appeal and I would then
15 invite the Appeals Chamber to call on Mr Kamara to address the
16 third, fourth and seventh Grounds of appeal and then on Mr Rapp
17 to address the tenth Ground of appeal. I have already provided
18 the Bench and the other parties with copies of a number of
19 authorities that I will be referring to in the course of my oral
20 arguments. In view of the limited time, I won't be taking you to
21 any of the specific passages but any case law that is cited in my
22 oral arguments, copies have been provided for reference. And
23 with that I turn to the Prosecution's first Ground of appeal,
24 which concerns the Trial Chambers failure to enter convictions
25 for crimes against humanity on Counts One and three for those
26 acts alleged in paragraphs 25 and 26 of the indictment for which
27 the Accused were found guilty of war crimes under Counts two and
28 four.

29 Now, the outset we would emphasise, that although the

1 Accused have already been convicted of this conduct as war
2 crimes, this Ground of appeal is not merely abstract or
3 fruitless. The case law of international criminal Tribunals is
4 quite clear that an accused can be convicted in respect of the
5 same conduct of both a war crime and a crime against humanity.
6 Such cumulative convictions serve to describe the full criminal
7 culpability of the Accused. For that proposition, I refer to
8 Krstic Appeal Judgement paragraph 217. The Naletilic Appeal
9 Judgement Paragraph 585. We submit that a failure to enter
10 cumulative convictions where both crimes have been proved is an
11 error that is appropriately corrected by the Appeals Chamber.
12 Perhaps more importantly, we submit that the Trial Chamber's
13 finding on this issue contains an error of law on an important
14 issue of legal principal, and we submit that it is in the
15 interest of justice, in the interest of international criminal
16 law, that this error not stand as the last word of the Special
17 Court on this issue but that it be corrected at the appellate
18 level.

19 What have happened is that the Trial Chamber found that the
20 attack in which these crimes were committed was indeed a
21 widespread attack. I refer to Paragraph 692. And it found that
22 this attack included the attacks on Tongo, Koribondu, Bo, Bonthe
23 and Kenema. The only thing we submit that the Trial Chamber
24 expressly found was not proved beyond a reasonable doubt, was
25 that the attack was one that was directed against a civilian
26 population. That relevant finding is in Paragraph 693.

27 The final sentence of that paragraph states, that the CDF
28 fought for the restoration of democracy. That we submit is
29 irrelevant, and to the extent that the Trial Chamber took it into

1 account, it erred in law. International Humanitarian Law applies
2 equally to all parties in a conflict regardless of the justness
3 of their cause. And an armed force that's fighting for the
4 restoration of democracy is just as capable as an armed force
5 seeking to overthrow democracy of committing crimes against
6 humanity.

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

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

24 Now, we submit that that's wrong in law. We do acknowledge
25 that in the Kunarac Appeal Judgment at paragraph 91, the Appeals
26 Chamber did say that the civilian population must be the primary
27 object of the attack. But at paragraph 92 it clarified that what
28 was meant was that the civilian population must be the primary
29 rather than an incidental target of the attack.

1 Now, we submit the correct approach is this: It must be
2 looked at, at whether civilians were deliberately attacked as a
3 civilian population. A crime against humanity is where a
4 civilian population as a civilian population was attacked. Now,
5 if it's the case that it's found that the few civilians who were
6 casualties were, in fact, the incidental or collateral effect of
7 a military attack, then it might be found that there was no
8 attack against a civilian population as such at all. The victims
9 were just isolated victims of military fighting. But we submit
10 that where it is clear that there was a deliberate attack on a
11 civilian population, and if that attack is widespread or
12 systematic, then the general requirement for crimes against
13 humanity is satisfied, even if that attack against the civilian
14 population occurred at the same time as a military attack or
15 immediately after a military attack, and even if that attack was
16 committed by the same people who were involved in the military
17 attack. The primary object test, we submit, is -- means that the
18 target of the attack must be the civilian population as such
19 rather than a limited and randomly selected number of
20 individuals. And for that proposition we refer to the Natic
21 Trial Judgment, paragraph 49.2 and I will also refer to the Galic
22 Appeal Judgment Paragraph 144, for the proposition that the
23 presence of combatants amongst the civilian population does not
24 alter the civilian character of the civilians.

25 There's two further points I would make. The first, is
26 that the purpose of the attack against the civilian population is
27 irrelevant. It can be presumed that the attackers wouldn't
28 attack the civilian population for no purpose at all. The
29 purpose may be to eliminate sympathizers or supporters of the

1 enemy, or the purpose may be to win the war, or the purpose may
2 simply be to inflict suffering on the civilian population because
3 the attackers have some political, religious or ethnic hatred
4 against them. We say it makes no difference. The elements of
5 crimes against humanity prohibit attacks against the civilian
6 population regardless of their purpose.

7 A second point is that it's irrelevant, if not every single
8 civilian in a civilian population is attacked. Quite typically
9 in the case of crimes against humanity, the attacking group will
10 only attack a selected part of the civilian population. An armed
11 force belonging to one political group may only attack those
12 members of the civilian population that are perceived to belong
13 to an opposing political group, or an armed force of one ethnic
14 group may only attack those civilians that belong to another
15 ethnic group. Again, this is still an attack against a civilian
16 population. The test is that an attack against any civilian
17 population, not an attack against the entire civilian population
18 of a country. For that refer to the Kunarac Appeal Judgment at
19 paragraph 90. We submit that in this case the findings of the
20 Trial Chamber are perfectly clear. The CDF forces deliberately
21 attacked on a large scale and in a most brutal way, civilians in
22 the whole area under attack in the belief that any civilian who
23 was in that area must be a rebel collaborator or sympathizer.
24 Even though the Trial Chamber found that the civilians were
25 unarmed and offering no resistance and not participating in
26 hostilities and that the crimes happened after the combat
27 activities had ceased. For that finding I need only refer to
28 paragraphs 46, 45 and 85 of the sentencing judgment. In the case
29 of Tongo, for instance, the Trial Chamber describes that

1 Paragraph 385 to 388, how the Kamajors made civilians form queues
2 according to their ethnicity. How all of the people on one queue
3 were then hacked to death, and how the other civilians were told
4 that they would be killed next time the CDF returned to town if
5 they did not leave in the meantime. Those civilians were clearly
6 deliberately targeted and were not incidental victims of a
7 military operation. In the case of Koribondu, the Trial Chamber
8 found at Paragraph 420 that the attack lasted 45 minutes. The
9 crimes described in the subsequent paragraphs 420 to 437 of the
10 trial judgment occurred well after the fighting had ceased in
11 Koribondu and the town had been captured. In the case of Bo, the
12 Trial Chamber found Paragraph 449, that by the time the CDF
13 forces arrived, the junta forces had pulled out and no resistance
14 was offered, that there was no fighting. Again, the crimes
15 against civilians were totally unconnected to any military
16 operation. The same is true in relation to Kenema. I refer to
17 paragraph 582 of the trial judgment. The rebels were not in
18 Kenema when the Kamajors arrived, and they captured it without
19 firing shots.

20 In Paragraph 2.27 of the Prosecution appeal brief, we quote
21 the factors identified in the Kunarac Appeals Judgment that can
22 be considered in determining whether an attack has been directed
23 against a civilian population. While this list is not exhaustive
24 or definitive, we submit that an application of these kinds of
25 factors leads inexorably to the conclusion that the attack was
26 one that was directed specifically against the civilian
27 population. The intention of the CDF, to specifically and
28 deliberately attack civilians, is clear in the various speeches
29 made by Norman before and after the attacks which are referred to

1 in paragraphs 2.44 to 2.48 of the Prosecution appeal brief. We
2 would note also the finding of Paragraph 321 of the trial
3 judgment, that Norman said at the December 1997 passing out
4 parade that if the International Community is condemning human
5 rights abuses then I take care of human left abuses.

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

9 JUDGE KING: Was -- was he speaking in English or in what
10 language?

11 MR STAKER: He was not speaking in English.

12 JUDGE KING: What language was he speaking?

13 MR STAKER: In Mende.

14 JUDGE KING: Thank you.

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

20 I turn then to the Prosecution's Fifth Ground of Appeal
21 concerning the recruitment and use of child soldiers. In this
22 Ground of appeal, the Prosecution request the Appeals Chamber to
23 consider separately the crime of enlistment and the crime of the
24 use of child soldiers. And I turn first to the case of Fofana.
25 At Paragraph 962, the Trial Chamber found that there was ample
26 evidence that the CDF as an organisation was involved in the
27 recruitment of children under the age of 15 and used them to
28 participate actively in hostilities. However, it held by
29 majority, with Judge Itoe dissenting, that it was not proved

1 beyond a reasonable doubt that Fofana was personally involved in
2 those crimes. We submit that the only conclusion open to any
3 reasonable trier of fact on the findings of the Trial Chamber on
4 the evidence it accepted, is that Fofana was responsible for
5 aiding and abetting both enlistment and use. The Trial Chamber
6 did not make any expressed finding as to whether Fofana actually
7 knew that the CDF was recruiting and using child soldiers, but it
8 equally never made any finding that he had no knowledge. In this
9 respect we refer to the Prosecution appeal brief paragraphs 4.5
10 and 4.6 and 4.20 -- 4.20 to 4.26. As well as the dissenting
11 opinion of Judge Itoe at paragraphs 56 to 59 and 71.

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

25 JUDGE AYoola: Sorry. Before you go further, that Fofana
26 did not know what? That they were being used or that they were
27 being enlisted?

28 MR STAKER: Both that they were being recruited and that
29 they were being used.

1 JUDGE AY00LA: 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 Zero where initiations
5 were being conducted. In that respect there are further findings
6 to which I can direct the Appeals Chamber. For instance, Judge
7 Itoe noted at paragraph 70(i) of his dissenting opinion that there
8 was evidence in Norman's absence Fofana deputized for him, this
9 relates to his senior position. At Paragraph 315, it found that
10 after the coup, initiations were no longer coordinated at the
11 local or Chiefdom level and that everyone came to Base Zero to be
12 initiated. At Paragraph 318, it found that anyone who'd wanted
13 to be a combatant had to undergo training at Base Zero.

14 JUDGE AY00LA: Those were minority findings?

15 MR STAKER: No. No. No. The finding that Fofana
16 deputized for Norman in his absence was a matter referred to
17 specifically in Judge Itoe's dissenting opinion but not in the
18 main judgment. The other findings to which I refer --

19 JUDGE AY00LA: How far can we rely on the findings in a
20 minority judgment?

21 MR STAKER: As I say Your Honours, the only finding in the
22 minority judgement to which I refer is the one that Fofana
23 deputized for Norman in his absence. There was a reference to
24 the evidence to that effect. It's not the most important piece
25 of evidence. The main point is that the majority of the Trial
26 Chamber found, in fact, not the majority I would say that there
27 wasn't a dissent on this particular factual finding, that after
28 the coup, initiations were no longer coordinated at the local or
29 Chiefdom level everyone came to Base Zero. And to be a

1 combatant, you had to undergo training at Base Zero. At
2 paragraph 303, the Trial Chamber found that thousands travelled
3 to Base Zero to undergo training and initiation. The Trial
4 Chamber found at Paragraph 388, that by mid August 1998, over 300
5 and some 315 to 350 children under the age of 15 had been
6 registered by the CDF in a demobilization programme. And that in
7 1999 the CDF registered over 300 children age less than 14 in a
8 disarmament programme in southern province. We submit that from
9 all of these findings it's clear that Fofana as a very senior
10 figure was present at Base Zero while child soldiers were being
11 recruited and used there on a large scale. In those
12 circumstances we submit that, it will not be open to a reasonable
13 trier of fact given the other matters to which I've referred. He
14 was at meetings where Norman expressly complained that the adults
15 weren't doing as well as the children. He was present at a
16 passing out parade when children who were about to participate in
17 the attacks were present at that meeting. We submit clearly he
18 knew.

19 And we submit that by his acts he directly encouraged the
20 commission of both recruitment and use. As I say, he was present
21 at the January 1998 passing out parade as a senior member of the
22 CDF and delivered a speech directed to both the adult and the
23 children fighters. He knew that they had undergone military
24 training. He knew that they were going to participate in the
25 attack. We submit that's the only reasonable inference. And at
26 Paragraph 234, it was found that Fofana said to the assembled,
27 including the children: The time has come for us to implement
28 what we've learned. We submit the only reasonable conclusion is
29 that this speech not only encouraged the Kamajors to use child

1 soldiers, but it also encouraged the children themselves to
2 participate as combatants and thereby rendered practical
3 assistance to the Kamajors who intended to use them.

4 We submit that Fofana also provided practical assistance
5 through the performance of his functions at Base Zero including
6 for the receipt and provision of logistics for the frontline. We
7 submit the only possible inference from Paragraph 322, 333, 721
8 ix and 809 ii, is that Fofana provided the commanders with
9 logistics for the attacks on Tongo and Bo in which, as I said,
10 the Trial Chamber found that child soldiers were used. We submit
11 that where a person does something knowingly to provide practical
12 assistance or support for a military operation knowing that
13 crimes are going to be committed in that military operation, the
14 person aids and abets those crimes. Even though the acts of
15 practical assistance may have been directed to the military
16 operation, rather than the crimes specifically, if you assist the
17 operation knowing the crimes will be committed in that operation,
18 you aid and abet those crimes.

19 We also submit that it's established case law that the
20 presence of a superior person in a position of authority may of
21 itself amount to aiding and abetting if it's showing to have a
22 significant legitimising or encouraging effect on the principle.

23 As propositions -- as authority for that proposition, we
24 refer to Blaskic Appeal Judgment paragraphs 46 to 48. The Orick
25 Trial Judgement Paragraph 283. And the Limaj Trial Judgment
26 Paragraph 517. And we submit that this principle applies no less
27 in a case such as the present where the crime of recruitment and
28 use of child soldiers was an ongoing continuous crime rather than
29 the case of presence at the scene of a one off incident of a

1 crime.

2 I turn briefly to Kondewa.

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

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

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

20 MR STAKER: I understand. The short answer to that, Your
21 Honour, is that, that is not the evidence in this case. We would
22 concede that if a person is not a combatant, they are not part of
23 an armed force, they take no part in hostilities, they lead their
24 ordinary civilian lives doing whatever they do in civilian life;
25 under international Humanitarian Law, you are a protected person.
26 The opposing armed force is not allowed to deliberately harm you.
27 But if they did and you defended yourself, that would not be
28 unlawful combat, that would be self-defense. But the situation
29 is different where children are recruited into an armed force.

1 They live together with others as a organised armed force and
2 they go into combat with others, armed with others as an armed
3 force and they perform attacks. That is being engage in combat,
4 that is being a soldier. It`s an entirely different --

5 JUDGE KING: No, I understand that position. I was just
6 thinking of the situation I have given to you. I understand the
7 other.

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

10 JUDGE KING: Not necessarily self-defense. I'm just saying
11 training the children in case they were attacked, to defend
12 themselves.

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

14 JUDGE KING: I'm not saying it was. I'm just asking you
15 hypothetically.

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

27 JUDGE KING: Well, develop it further. Suppose they were,
28 in fact, recruited into an armed force and trained for the
29 primary purpose of defending themselves if attacked by other

1 children or other rebels, what would be your position?

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

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

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

22 JUDGE KING: Yes, but you see, in a practical situation
23 forget about the International Humanitarian Law consequences for
24 a while. Just imagine the situation itself, that in several
25 places in Sierra Leone, according to the evidence, children had
26 been recruited and were being allegedly used by the rebels to
27 attack several people, including children. Now suppose the other
28 side, the CDF, for instance because we're dealing with them now,
29 decided that in those circumstances and the evidence is they were

1 trying to restore the legitimate government of Sierra Leone.
2 Suppose, in fact, they decided that they were going to get as
3 many children as possible, if you like, enlist them or recruit
4 them and train them to defend themselves against possible attacks
5 from those -- from the other side, the children that were being
6 trained by the rebels to attack people.

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

14 JUDGE KING: I took some of your time you can adjust it
15 accordingly.

16 MR STAKER: I'm much obliged, Your Honour.

17 JUDGE KING: All in the interest of justice.

18 MR STAKER: I'm obliged, Your Honour. In the case of
19 Kondewa, we submit that the situation is similar to that of
20 Fofana --

21 JUDGE AYoola: Sorry. Before you go onto Kondewa, is it
22 your submission that initiation is the same as recruitment?

23 MR STAKER: That, in fact, is the subject of one of
24 Kondewa's Grounds of appeal and we'll be addressing that
25 tomorrow, But the short answer is that, initiation in and of
26 itself is not inherently the same thing as recruitment, but on
27 the specific facts of this case, considering the evidence as a
28 whole, the Trial Chamber found that in this specific instance
29 initiation amounted to recruitment.

1 JUDGE AY00LA: I suppose you'll also want to address us on
2 the standard of appellate review in a situation in which the
3 Trial Chamber said it had reasonable doubt.

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

15 JUDGE AY00LA: Are you really alleging errors of fact I
16 thought when you come to a finding that the case had not been
17 proved beyond a reasonable doubt, that relates to evaluation by
18 the Trial Chamber.

19 MR STAKER: It's a matter for the Trial Chamber to evaluate
20 the evidence and to determine whether it is satisfied of guilt
21 beyond a reasonable doubt, and the case law acknowledges that
22 there may be a range of discretion. It's the Trial Chamber that
23 hears the witnesses, that sees their demeanour, that is in a much
24 better position to assess first-hand the reliability and
25 credibility of evidence. So the Appeals Chamber is a little more
26 removed from that process and looking at the record may say, well
27 a reasonable Trial Chamber may have found or proved or a
28 reasonable Trial Chamber may have found it not proved, but in
29 that event the Appeals Chamber won't intervene. But in certain

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

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

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

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

26 As the Prosecution's argument that the Trial Chamber should
27 have considered burnings as acts of terror, we're content to rely
28 on our written submissions but note that our argument is
29 supported by paragraph 1438 of the AFRC trial judgment.

1 The next issue is whether acts of terror were, in fact,
2 committed. Again, we submit that is the only conclusion open to
3 a reasonable trier of fact. We emphasise that the crime of
4 terrorism is a war crime not a crime against humanity and there's
5 no need to prove a widespread or systematic attack. And
6 furthermore, the actus reus of the crime need not be an act that
7 would otherwise be criminal under some other provision of the
8 Statute. Mere threats of violence may amount to acts of terror
9 as the Trial Chamber itself acknowledged in paragraphs 170(i) and
10 172.

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

26 We submit further that the Accused must have known this,
27 this is evident in the case of Togo from the speech that Norman
28 gave at the December 1997 passing out parade. The findings are
29 at Paragraph 321 of the Trial Judgment. Norman made comments

1 that were interpreted as meaning, an eye for an eye and not to
2 spare the vulnerables. He said any junta you capture, instead of
3 wasting a bullet, chop off his hand as an indelible mark. His
4 comments were interpreted as meaning that the fighters should not
5 spare the house of the juntas. We submit that no reasonable
6 trier of fact could conclude that attacking vulnerables, chopping
7 off hands and burning down houses could be intended otherwise
8 than to terrorize the civilian population. In relation to
9 Koribondu and Bo, the Trial Chamber found that Fofana, who was
10 convicted under Article 6.3 for crimes in those locations, was
11 present at the commander's meetings in January 1998, where Norman
12 gave instructions in relation to Koribondu, that the forces
13 should not leave any house or any living thing there except the
14 mosque, the church, the Barre and the school. And that anyone
15 left in Koribondu should be treated as a rebel and should be
16 killed.

17 Again, in relation to Bo, instructions were given to kill
18 civilians and to burn houses. We submit that the only reasonable
19 inference is that, these acts were intended to commit terror. In
20 relation to Kondewa and the crimes that were committed in Bonthe,
21 the Bonthe attacks were part of the same all out offensive as the
22 attacks on the other locations and in those circumstances we
23 submit that it must have been clear to him that the same modus
24 operandi acts of terror in the same nature would be committed.
25 We further emphasize that in relation to those locations where
26 the Accused were convicted under Article 6.3 rather than Article
27 6.1, the Mens rea of Article 6.3 does not require that the
28 Accused had actual knowledge of the specific crimes committed or
29 about to be committed. It's sufficient that the Accused had some

1 information of a nature sufficiently alarming to alert the
2 Accused of the risk of crimes about to be committed by
3 subordinates, such as to justify further enquiry.

4 We submit that both Kondewa and Fofana certainly had
5 sufficient alarming information that acts of terror were about to
6 be committed or had been committed as to justify further action
7 for the purposes of Article 6.3. And --

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

10 MR STAKER: The alarming information, we submit, consist
11 of, in particular, the statements made by Norman at the December
12 1997 passing out parade, the January 1998 passing out parade, the
13 first and second commanders meetings in January 1998 concerning
14 the attacks on Koribondu and Bo and the remarks made by Norman at
15 the subsequent meeting with Nallo in relation to the planning of
16 the attacks. At these meetings, Norman made clear, for instance,
17 in Koribondu: Kill everyone and destroy every house. I do not
18 want to see a living thing, not evening a fowl or a farm, and the
19 only thing to be left standing were four buildings; the church,
20 the mosque, the Barré and the school. After the attack, Norman
21 arrived in the town and complained that his instructions had not
22 been obeyed. He still saw some buildings standing, he still saw
23 some civilians alive. He said to the CDF troops: Why are you
24 people afraid of killing? Now, these are all findings of the
25 Trial Chamber in which the Trial Chamber does not expressly say
26 Norman ordered that the civilian population be terrorized. But
27 we submit that there is no requirement in law that an act to
28 terrorize a civilian population be given expressly. We submit
29 that an intention to commit acts of terror can be inferred from

1 all the circumstances, and we submit that from all of the
2 evidence and the findings of the Trial Chamber itself, the only
3 reasonable inference is not only that Norman intended that acts
4 of terror would be committed, but that those who were addressed
5 by him at these meetings understood that this is what he wanted
6 and that Fofana and Kondewa would have also understood that the
7 intention was to commit acts of terror.

8 JUDGE AYoola: But that was not the finding of the Trial
9 Chamber in paragraph 743.

10 MR STAKER: That is exactly the finding against which this
11 Ground of appeal is directed. The Trial Chamber's ultimate
12 findings was that, although Norman may have intended acts of
13 terror to be committed, it's not the only possibility. And we
14 say, when you look at all of the other findings of the Trial
15 Chamber, that conclusion is one that is not open to any
16 reasonable trier of fact.

17 JUDGE AYoola: If you are prosecuting the campaign of
18 violence in this armed conflict, in a terrifying manner, would
19 you come to definite conclusion that there was specific intent to
20 perpetrate act of terrorism? Is it not a matter that is capable
21 of possible different interpretations that you were just fighting
22 a war in a nasty manner, that's different from specific intent
23 that is required for acts of terrorism, isn't it?

24 MR STAKER: We would submit that disembowelling people and
25 displaying their entrails publicly. We would submit that
26 decapitating people and displaying their heads publicly, is not
27 fighting a war in a nasty manner. It goes beyond being a war
28 crime or a crime against humanity. The question is why would you
29 disembowel someone and display their organs publicly? Why would

1 you decapitate a body and display their heads publicly?

2 JUDGE AY00LA: You see, that is the essence of the matter.
3 Now when you take the incident from-- this speech from Base Zero,
4 could you infer from that speech that you should perform such
5 atrocities, like disembowelling people? Does burning houses
6 translate to disembowelling people? How far can you relate the
7 incidents that happened on the Charter of War to the Speech at
8 Base Zero without entertaining some reasonable doubt.

9 MR STAKER: Yes. There are a number of different speeches
10 that were made, and they need to be looked at cumulatively.
11 There is what Norman said at the passing out parades. There is
12 also what he said at subsequent commanders meetings. But, for
13 instance, an instruction that every living thing in a village is
14 to be killed and every building to be destroyed, goes beyond
15 fighting a war in a nasty manner. We submit that is intended to
16 terrorize the civilian population. The burning of houses was a
17 clear instruction, And the kind of language that Norman used to
18 expressly order that arms be chopped off; to expressly order dont
19 spare -- well, not expressly order, but to give an order that was
20 understood by an observer at the meeting as not to spare the
21 vulnerables. Vulnerable is not a threat in war. It goes beyond
22 fighting a war in a nasty manner. We submit the only reasonable
23 inference is that there was an intention to commit terror. There
24 were findings of the Trial Chamber of atrocities previously
25 committed by Kamajors, there had been complaints. A war council
26 had been established to deal with this, we go into this in our
27 appeal brief. In fact, the findings of the Trial Chamber were
28 that Kondewa actively opposed the activities of the war council
29 and 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 known what result this
7 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, in fact, 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 of the whole -- as a whole, this was merely a speech after the
16 effect. We would submit this does not establish that he did, in
17 fact, do anything to prevent it, given especially the other
18 findings, in fact, that Kondewa had sought to shield the Kamajors
19 from 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 something
24 to the effect that in war these things happen.

25 Your Honour, unless I could assist further, as I said, I
26 have taken considerably more time than was originally intended.
27 We had internally allowed 20 minutes for Mr Kamara and 20 for Mr
28 Rapp. I would be much obliged if that were to follow.

29 JUDGE KING: Very well, Mr Chris Staker.

1 MR STAKER: Thank you, Your Honour.

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

8 My Lord, because of the commonality between the two
9 Grounds, I intend to treat both of them in one submission, that
10 is Ground III and IV. Ground IV deals with responsibility for
11 planning, ordering, instigating or otherwise aiding and abetting
12 in the planning, preparation or execution of certain criminal
13 acts in town of Tongo Field, Koribondu and the Bo District.

14 My Lords, to start with, in respect of crimes in the
15 location of Kenema District, Bo and Koribondu, the Trial Chamber
16 found that Fofana and Kondewa had no individual responsibility
17 for the planning, instigating, ordering or otherwise aiding and
18 abetting under Article 6.1 of the Statute during the time frame
19 of the indictment. It is the submission of the Prosecution, My
20 Lords, that the Trial Chamber erred in law, and in fact in the
21 approach that it took to the evaluation of the evidence in the
22 case.

23 In other words, My Lords, it failed to systematically
24 analyse or explicitly assess the evidence as presented by the
25 Prosecution with regards to the culpability of Fofana and Kondewa
26 within the context of the case as a whole. My Lords, this is our
27 argument: That the Trial Chamber compartmentalized it's
28 findings, failing to take the case as a whole in its entirety as
29 presented in the evidence. It is the submission of the

1 Prosecution, My Lord, that with the issue of the modes of
2 liability, particularly with planning, instigating and aiding and
3 abetting, it is the same evidence as presented by the Prosecution
4 that is replicated in the other crime basis.

5 My Lords, we are saying that the evidence that we presented
6 for Koribondu is the same evidence for planning that is
7 replicated for the attacks in Bonthe and Kenema and Tongo Field.
8 My Lord, whilst the Trial Chamber compartmentalized its quest
9 into finding the evidence, looking for particularly in the case
10 of Tongo, for instance, it found the Accused guilty under aiding
11 and abetting for Tongo.

12 My Lord, I would take the Court through the course of
13 evidence where the Trial Chamber made such a finding because at
14 the end of the day we will be calling on this Appeals Chamber to
15 see through this course, and that it is the same evidence, if it
16 is good for Tongo, it should be good for Koribondu and it should
17 be good for Bo and Kenema.

18 My Lord, there are different meetings which my learned
19 friend, Mr Staker, had already referred to. In the space and
20 span of time at Talia Base Zero which is the command of
21 operations of the CDF. We're looking at timeframe, My Lords,
22 between December 1997 and March 1998. Between that time frame at
23 least five important meetings were held at Base Zero in which all
24 the two accused persons were present and made contributions. To
25 start with the December 10 to 12, 1997 passing out parade
26 meeting. The Trial Chamber found that at the passing out parade
27 Norman said in the open, that the attack on Tongo will determine
28 who wins the war, and that there is no place to keep captured or
29 war prisoners or like the junta, let alone their collaborators.

1 The Trial Chamber further found that Fofana also spoke at the
2 passing out parade, saying, now you've heard the national
3 coordinator. Any commander failing to perform accordingly and
4 losing his own ground, just decide to kill yourself there and
5 don't come to report to us. Now, what do we have on the part of
6 the high priest, Kondewa? Kondewa was someone held in high
7 esteem. It was believed that he had mystical powers and
8 generation for such an individual within the context of the
9 culture of those that perpetrated the offences, My Lord, should
10 not be taken slightly. This is what the Trial Chamber found:
11 That all the fighters looked to Kondewa, admired him as a man
12 with mystical power and he gave the last comment saying: A rebel
13 is a rebel, surrendered or not surrendered, they're all rebels.
14 The time for surrender has long been exhausted. What do we take
15 this to mean? My Lord, the Prosecution takes this to mean that
16 there is no room for prisoners of war, and that once you go out
17 to battle, how do you teach your enemies, eliminate them.

18 My Lords, having said that, further there was another
19 meeting which is in December in 1997 which was a commander's
20 meeting. My Lord, I'm going through this process so you could be
21 able to see the substantial participation of both Fofana and
22 Kondewa in the planning process of all these attacks, and the
23 gist of our submission in this -- on this Ground of III and IV,
24 is that it was an all out offensive. That it was a general
25 campaign of the CDF, and we will show the different forms of
26 participation and level of participation and, My Lord, we submit,
27 the substantial participation of both Fofana and Kondewa in this
28 planning process, so that at the end on of the day, no reasonable
29 trier of fact will conclude that these two did not substantially

1 participate in the planning of the offences.

2 The second meeting which was in December in 1997 was a
3 commander's meeting, and the Trial Chamber had this to say, My
4 Lords: That among those present were Fofana and Kondewa,
5 Mohammed Orinko Musa and some commanders from the Tongo area.
6 And Norman repeated that whosoever took Tongo would win the war
7 and therefore it should be taken at all costs; at all costs.
8 And, My Lord, with regards to Kenema, it should be noted that
9 Tongo is part of the Kenema District, and in light of that one of
10 the -- one of the commanders, the top commanders for the Tongo
11 attack, you have a Defence witness, Mohammed Boni Koroma, who
12 testified on behalf of the Defence that that same commander was
13 also a commander that launched the attack in Kenema. My Lord,
14 you could see the picture and flow of authority from Tongo on to
15 Kenema, which is a few miles away.

16 My Lord, the Prosecution submits that even in that meeting,
17 that is the December 1997 commanders meeting, five of those
18 present in that meeting, My Lord, held leading Kamajor positions
19 in the administration of Kenema immediately after it was
20 captured, and these persons include Mohammed Orinko Musa, the
21 deputy director of war, Musa Junisa, who was the director of
22 operations for the eastern region.

23 My Lord, the crucial issue for us in this process is the
24 level of participation of the Accused persons. The Prosecution
25 do not intend to challenge the factual findings of the Trial
26 Chamber. We do accept the findings of the Trial Chamber with
27 regards to each and every of the crime basis. Our argument, My
28 Lords, is that in the light of those findings, any reasonable
29 trier fact would conclude that Fofana and Kondewa planned or aid

1 and abet or even instigated the commission of those offences.

2 My Lords, we would move onto the third meeting, which is
3 the all out offensive campaign by the finding of the Trial
4 Chamber and that was in January of 1998, that passing out parade.
5 My Lords, the Trial Chamber found that at that meeting which was
6 held at Base Zero again Norman, as usual, thanked the Kamajors
7 for their training that they had undergone, and also said that
8 whosoever knows that he has been fighting with a cutlass, this is
9 the time for him to take up whatever he has. If it's a gun, take
10 up the gun. Whoever knows that he's used to fighting with a
11 stick, it is the time to take up that stick. This is the time to
12 fight. This speech was at a passing out parade after the
13 training of Kamajors at Base Zero, and this is what the second
14 accused, Fofana, had to say at that meeting:

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

1 otherwise, that if you look at the sequence and pattern of
2 attacks, on February the thirteenth, Kori bondu was attacked; and
3 on the fifteenth of March, Bo was attacked; on the fifteenth of
4 March, Kenema was attacked; on the fifteenth of March, Bonthe was
5 attacked. The pattern of these attacks following from these all
6 offensive planning is clear indication that this was not an
7 isolated event and that each and every attack was not isolated.
8 That there was a system and pattern in place, and what is that
9 source of system and pattern in place is from the base of the
10 planning. My Lords, I entreat you to look at these different
11 meetings and the contributions of both Fofana and Kondewa to that
12 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 because you
18 see, you know, I've been following you carefully, but I think
19 it's impossible not to take into consideration the whole
20 circumstances of this conflict. You, I will not say anything
21 about the RUF at the moment because that's not still sub
22 judicio, I'll talk about the AFRC. Now the AFRC are reputed to
23 have been soldiers in the recognised armed forces of Sierra
24 Leone, and they, in fact, as it turned out to have found to have,
25 in fact, over thrown the legitimate government of Sierra Leone.
26 Now you have the hunters who are, in fact, or were, in fact, the
27 Kamajors, and they of their own volition were trying to restore
28 the legitimate government of this country. Now, it is in
29 evidence that the AFRC had been committing -- had been committing

1 terrible atrocities, not only against civilian population, but
2 even against those Kamajors who were fighting to restore the
3 government of Sierra Leone. Now, in any war there are bound to
4 be conflicts. Nobody's saying that if you are fighting to
5 restore the government you have card blanche, to go and attack
6 the civilian population, but the reality of the situation must be
7 taken into consideration. You see, they are not like the AFRC
8 who were acting illegally in toppling the government and
9 committing the atrocities for which they were sentenced to 50 and
10 45 years imprisonment. These were people who had risked their
11 lives fighting on behalf of the legitimate government of Sierra
12 Leone. Isn't that a relevant consideration?

13 MR KAMARA: In deed, My Lord. We will be coming to that
14 when --

15 JUDGE KING: I want you to come to it now because you
16 haven't got much time.

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

23 JUDGE KING: Just a minute. You, yourself, had said
24 various areas where the juntas are located.

25 MR KAMARA: Yes, My Lord.

26 JUDGE KING: That was their target. Various areas where
27 the juntas are located. That was their purpose. That's what
28 they were determined to do. To go to those areas and dislodge
29 these juntas.

1 MR KAMARA: Yes, My Lord. The evidence of junta, what is
2 junta, My Lord. Junta is just not the AFRC or the AFRC. It
3 includes their collaborators and supporters. And, My Lord, for
4 example, if we take the Koribondu attack, Koribondu is a town
5 filled with civilians. There was a small percentage of AFRC
6 soldiers there. That attack, My Lord, from any military point of
7 view could easily be seen that any attack on Koribondu with the
8 direction and order that was given was bound to effect the
9 civilian population.

10 JUDGE KING: Let me stop you there for a minute. We have
11 to be realistic in probably some of our submissions. Take the
12 history of the world which I take judicial notice of. Take the
13 first the first world war, the second world war, take even the
14 present conflicts in various parts of the Middle East and so on.
15 Take what happened Bosnia if you like. I mean, there is some
16 inevitability that the civilian population would be affected.

17 MR KAMARA: My Lord --

18 JUDGE KING: You cannot say, look here, you stand aside,
19 you're a civilian. You stand aside you are a non civilian and so
20 on. Because the -- the aim of the AFRC was to intermingle with
21 the civilians. There is evidence on that as well.

22 MR KAMARA: My Lord, I take your point. I take your point,
23 but, My Lord, let us take a step back, and look at what are the
24 dictates of International Humanitarian law? What is the
25 prohibition entailed therein? It is the protection of civilians,
26 My Lords. If you take up weapons, you take up arms against the
27 very people you intend to protect, My Lord, they are bound under
28 the law to have recourse for redress.

29 JUDGE KING: If you go to the International Humanitarian

1 law, even the Conventions of Geneva, those really, primarily
2 relates to states, not to this kind of conflict you have in the
3 bush of Sierra Leone, and that again is another consideration you
4 must have in mind.

5 MR KAMARA: My Lord, I will take that consideration, My
6 Lord, but I beg to differ on that analysis. My Lord, coming back
7 to the issue of the role of the Kamajors, and I don't want to
8 pre-empt the learned Prosecutor who will be dealing with that on
9 the sentencing issue as to whether they were fighting for the
10 restore of democracy, and that does not give it a legitimate
11 right to go out and kill innocent civilians.

12 JUDGE KING: I agree with that. I'm not saying that --
13 don't misunderstand me. I mean, let's not stretch it that way.
14 I'm merely saying that there is a distinct difference between
15 those who there is evidence you cannot deny that, even you
16 yourself cannot possibly deny that, were fighting to restore
17 legitimacy to government in Sierra Leone. And then you have the
18 AFRC, for instance, who's prime purpose was to defeat the
19 government of Sierra Leone. In fact, overthrow the government of
20 Sierra Leone, and were carrying all sorts of brutalities. You
21 talk about splitting people's stomachs open. Didn't the AFRC do
22 worse than that? I'm not saying it's -- it is justified for the
23 other side to do it, but when you're pulling the moth in your
24 eye, you should think of the other side as well. And you see the
25 whole circumstances of the conflict, should be borne in mind at
26 each time you are making submissions and you are trying to
27 dispense justice. You have to take the practicalities and the
28 realities of the situation into consideration. You see, it's all
29 right to talk about the Geneva conventions, the protocols,

1 International Humanitarian Law. But even in civilized societies
2 where you have this kind of conflicts going on, there are many,
3 many, many, problems, many, many exceptions. Military necessity,
4 for instance, they say you can bomb if it's a military necessity.
5 That's even allowable under International Humanitarian Law. So
6 all these circumstances must be taken into consideration.

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

8 JUDGE AYoola: Your case as I understand it, is that the
9 meeting at Base Zero with the instructions given represented the
10 instructions that operated throughout all the campaigns. Is that
11 not your case?

12 MR KAMARA: My Lord, such of the first meeting which was
13 more or less like specific for Tongo, all the other meetings will
14 stand or will be sustained for the rest of the campaign. The
15 first meeting which was in December --

16 JUDGE AYoola: Yes, but your case is that the same pattern
17 emanated from the first meeting.

18 MR KAMARA: Yes.

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

22 MR KAMARA: Which one is that, My Lord? They are present
23 in all the five meetings that I've indicated.

24 JUDGE AYoola: Were they?

25 MR KAMARA: Yes, My Lord.

26 JUDGE AYoola: I suppose there is along the lines some
27 evidence that where Norman was giving instructions to Nallo or is
28 it?

29 MR KAMARA: Oh, My Lord. My Lord, you have this general

1 meetings where all of them were present, and then you have
2 details of particulars of the planning which Norman will do on a
3 one to one with commanders, and we do have occasions when I think
4 in that meeting you are referring to with Nallo, it was only
5 Fofana who was present. Kondewa was not present in that meeting.

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

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

17 JUDGE AYoola: Knowledge, what type of knowledge we talking
18 about? Is it suspicion or knowledge?

19 MR KAMARA: No, My Lord, factual knowledge in this
20 instance. My Lord, if you look at the history of the case. Once
21 the Tongo has been attacked there were reports from the frontline
22 to Base Zero and some of these reports, My Lord, were presented
23 to the first, to Fofana and later to Norman. And in these
24 reports it contain atrocities committed by Kamajors and in one
25 such report, My Lord, in which you have the -- there was a
26 summary execution of Paul Danema and that was contained in that
27 report. My Lord, these are factual situations that were to the
28 knowledge of the Accused persons. And from there, the continuity
29 of such planning for such attacks clearly show that they knew

1 what would be the outcome of such attacks, because commanders
2 keep on coming back to Base Zero on foot to report the success
3 and the status of the war.

4 If I may proceed, My Lords.

5 JUDGE KING: Just a minute.

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

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

14 JUDGE KING: I have one more question.

15 MR KAMARA: Yes, My Lord.

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

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

26 JUDGE KING: No. No. That's all right. I'm glad you said
27 not necessarily. I accept that. That's fair enough. It shows
28 that you are balanced.

29 MR KAMARA: Yes, My Lord. We are in fact --

1 JUDGE KING: No, don't waste your time. It's okay.

2 MR KAMARA: Thank you.

3 JUDGE KING: Not necessary. I accept that. Thank you so
4 much. You've done very well.

5 MR KAMARA: Appreciate, My Lord.

6 MR RAPP: May it please the Chamber, I rise today to
7 present the Prosecution's submission on the issue of sentencing.
8 As Your Honours stated just very recently in the AFRC appeals
9 judgment, there's a standard review and it's a very formidable
10 standard review for an appellate to overcome. The determination
11 of a sentence is within the discretion of the Trial Chamber. It
12 will only be revised when there's discernible error and that
13 requires a showing: One, that the Trial Chamber gave weight to
14 extraneous and irrelevant considerations or two, that it failed
15 to give weight or sufficient weight to relevant considerations or
16 three, that it made a clear error to facts or four, that the
17 decision was so unreasonable or plainly unjust that the Appeals
18 Chamber is able to infer the Trial Chamber failed to exercise its
19 discretion properly.

20 First, I'd like to deal with mitigating factors cited by
21 the Trial Chamber that we assert that were either extraneous or
22 irrelevant. The consideration of which is a discernible error of
23 the first category or were not proven which is a discernible
24 error of the third. The most significant was the consideration
25 of the justice of the cause or the motivation of civic duty as
26 mitigating factors. Though these are the sixth and the seventh
27 sub Grounds argued in this portion of the brief, let me go to
28 them first. We submit that these considerations are not just
29 extraneous and irrelevant but that their consideration is also

1 improper. Many of those involved in armed conflict can argue
2 that they fight on the right side. Whether to support or to
3 restore a legitimate and democratic government or to overthrow a
4 corrupt or unresponsive one. They may also argue that they are
5 motivated by civic duty and have no selfish or personal motive.
6 One only has to look to history of which the Honourable President
7 has taken judicial notice to find instances where great
8 atrocities have been committed by those on unselfish missions; to
9 redress ethnic oppression; to spread the dominion of religion or
10 to establish a egalitarian utopia. Of course, a base or a
11 selfish motive may be an aggravating factor, but as with other
12 aggravating factors, it does not follow that it's absence is
13 mitigating. Indeed, if the legitimacy of this factor is upheld,
14 it is dangerous for the victims that International Humanitarian
15 Law was developed to protect. Consider one of the cruellest
16 crimes for which these men were convicted. That was the killing
17 on the Blama Road in Koribondu of three women. Their names were
18 Amy, Jeneba and Esther. They apparently were the wives of
19 soldiers, soldiers who fought on the side of the junta. One was
20 killed with a cutlass but two of the women were killed by having
21 sticks inserted through their genitals until they came out
22 through the women's mouths. The question that we ask is: Were
23 these victims entitled to less protection from those fighting on
24 a purportly just side then they would be entitled from those
25 fighting on the other side because that is what allowing such a
26 mitigating factor indeed is doing. Now, the Trial Chamber
27 correctly rejected the applicability of the Defence of necessity
28 in this case but then they allowed essentially that those
29 arguments that supported that Defence to come in through the back

1 door. And as we've argued earlier as the deputy Prosecutor
2 argued in regard to the crimes against humanity standard, this is
3 to confuse international law, to confuse the essential adduced at
4 Bellum, the law on the commencement of conflict where the
5 justness of the cause may play a role, [indiscernible] which
6 applies automatically on the outbreak of hostilities to all
7 sides. International Humanitarian Law is largely reflected in
8 the -- in the Geneva Conventions and in particularly in common
9 Article III and supplementing that common Article and those
10 conventions were the additional protocols proposed and enacted
11 now part of customary international law beginning in 1977. In
12 those protocols it states that International Humanitarian Law
13 applies without any adverse distinction based on the origin or
14 origins of the armed conflict or the causes ascribed by or
15 attributed to the parties. As the ICTY Appeals Chamber said in
16 Court [indiscernible] in the Appeals Chamber judgment at
17 Paragraph 1082, that's the case that cited that numerous
18 occasions in our brief that we did not quote this particular
19 paragraph and I'd like to quote it now.

20 The unfortunate legacy of war shows that until today many
21 perpetrators believed that violations of binding international
22 norms can be lawfully committed because they are fighting for a
23 just cause. Those people have to understand that international
24 law is applicable to everybody, in particular, during time of
25 war; thus the sentences rendered by the international Tribunals
26 have to demonstrate the fallacy of the old Roman principle of
27 *inter arma* [indiscernible] Amidst the arms of war, the laws are
28 silent in relation to the crimes under the international
29 Tribunal's jurisdiction. It does not matter that the other side

1 may have committed more horrendous atrocities because as noted by
2 the Limai Trial Chamber Judgment, International Humanitarian Law
3 does not lay down obligations based on reciprocity but
4 obligations [indiscernible] which were designed to safeguard
5 fundamental human values and therefore must be complied with by
6 each party regardless of the conduct of the other party or
7 parties.

8 Another mitigating factor considered by the trial -- by the
9 -- by the Trial Chamber in the sentencing in this case was
10 remorse or empathy. This was an argument submitted, as I
11 believe, the second sub Ground of our appeal. And of course, the
12 law in that area from the other international Tribunals which I
13 know we do not follow as authority but we find as persuasive and
14 that's the ICTY Appeals Chamber decision in Blaskic case, cited
15 in our brief has held that in order to be a factor in mitigation
16 the more remorse expressed by an accused must be real and
17 sincere. In discussing the remorse issue I think it's
18 instructive to recall the AFRC case so recently decided on
19 appeal. In that case the first accused, Mr Brima, had stated at
20 the sentencing hearing: I stand for peace and recollection, and
21 I pray that the Honourable Judges of this Chamber will use their
22 wisdom to bring peace and reconciliation to the people of Sierra
23 Leone. I show remorse to the victims of this situation. And Mr
24 Kamara, the second accused, stated in his oral submission: For
25 all those that suffered in the war who lost their lives, I'm
26 sorry for them, My Lord. Mr Kanu, the third accused, said:
27 We're coming back to ask the Sierra Leone people to forgive us.
28 We ask for mercy.

29 The Trial Chamber in that case did not find those

1 statements to be genuine and sincere and did not provide a
2 mitigating factor, that was appealed and of course, in that
3 particular case, the Accused faced the high standard on appellate
4 level and the Appeals Chamber found that they had not sustained
5 that challenge. And of course, today we're approaching this
6 matter from the other direction. From a Prosecution appeal, but
7 it's interesting to note that in this case Mr Fofana's lawyers
8 said in his allocution: Mr Fofana, like all fair minded and
9 decent people in Sierra Leone, deeply regrets all the unnecessary
10 suffering that has occurred in this country. He was -- the
11 judges twice asked Mr Fofana if he wanted to say anything, and he
12 finally said: Well, what he said is what I asked him to say,
13 that is what I have to say. Mr Kondewa said: Sierra Leoneans,
14 those of you who lost your relations within the war, I plead for
15 mercy today and remorse and even for yourselves. May God
16 continue to sustain this nation.

17 Now, reading that language, he's pleading for mercy and
18 remorse but not expressing it. Of course, he was speaking Mende
19 as Your Honours might ask. We've checked the original Mende and
20 I invite the Court to do as well, but I don't find that that
21 translation or the people that looked at it is an unfair one.

22 Nonetheless, the Trial Chamber found that the Accused did
23 clearly expressed empathy with the victims of the crime and that
24 it was real and sincere. We submit, under these circumstances,
25 that that was a clear error of fact and at any case the remorse
26 expressed or the empathy expressed is not so great as to provide
27 for any kind of substantial mitigation. Indeed this question of
28 remorse and it's expression is admittedly a complex and a bit of a
29 tricky one for an accused who is standing on his not guilty plea

1 and is contending his innocence. Many Trial Chambers, like the
2 Vaseljevic Appeal, Vaseljevic Trial Chamber at the ICTY, have
3 held basically where the individual does not admit to
4 responsibility, there's not really any remorse. They are not
5 saying I'm responsible. On the other hand, the Vaseljevic
6 Appeals Chamber disagreed with that finding but nonetheless
7 upheld the sentence found in that particular case. We would
8 submit, very simply, that whatever you're talking about here,
9 whether it's empathy or remorse, it must be more complete and
10 more sincere than that presented by these accused.

11 Another factor found as a mitigating one by the judges was
12 a -- the fact or essentially the argument that lenient sentence
13 would contribute to reconciliation. Now, I want to say in
14 fairness in dealing with our sub Ground of appeal on this, which
15 is our 8th sub Ground of appeal, we did not list this specific
16 sub Ground in our Notice of Appeal. We generally appealed and
17 then later -- and for the reasons of the errors of law and the
18 errors of fact and on the appropriate legal standard, we listed
19 some particular errors, but we didn't list this one, but we would
20 submit that it's appropriate for the Trial Chamber to consider
21 it. It's something that's been now fully argued by the Court.
22 It is, to some extent, a novel argument. The essence of which is
23 that -- that reconciliation can be established by providing
24 lenient sentences to those that are accused and then convicted in
25 these war crimes or international humanitarian Tribunal
26 Courts'. The -- this, in our submission, runs counter to all of
27 the founding documents that have established this Court and the
28 other Adhoc Tribunals and, specifically, I would refer to United
29 States -- United Nations console resolution 1315 that called for

1 the establishment of this Court. Where it stated that a
2 credibility system of justice and accountability for very serious
3 crimes would end impunity and contribute to the process of
4 reconciliation. Accountability thus contributes to
5 reconciliation, not the absent of accountability, not the
6 minimization of accountability. We would note that to the extent
7 one could say that there are values in lenient sentences or even
8 of individuals escaping criminal responsibility following a
9 conflict, those are generally accompanied by much more contrite
10 expressions of regret, by individuals who appear before truth and
11 reconciliation commissions and basically have fully confess to
12 their responsibility, and through that process establish
13 reconciliation. That has not occurred here. These individuals
14 have been found responsible for very, very serious offences,
15 including more than 200 murders, multiple acts of cruel
16 treatment, pillage, collective punishment and of course, in the
17 case of one of them for child soldier; the use and recruitment of
18 child soldiers. If one is going to have an end to impunity to
19 those crimes, it's important they be held accountable and that's
20 the principals that are established in each of the founding
21 Statutes of the international Tribunals and of the Special Court.

22 Now, let me proceed to a third issue or I should say a
23 fourth issue and that involves the mitigation given to the fact
24 or to the recognition of a fact that these individuals had no
25 effective training and were inexperienced and therefore were
26 entitled to some consideration under those facts. We would note
27 that the Trial Chamber cited no authority on that, though Mr
28 Fofana cited some ICTY Trial Chamber decisions in Orick and
29 Hadzahasanovic, we would note that those particular cases are not

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

19 Now, let me go to another category of, in our view, of
20 discernable errors on the part of Court and that's where they did
21 not consider factors that they should have. And the most
22 important one there is, of course, Article 19.1 of the Statute of
23 the Court that mandates the Trial Chamber to consider, where
24 appropriate, the sentencing practices of Sierra Leone domestic
25 Courts. And I have to indifference, point out, that this Appeals
26 Chamber noted in its recent AFRC appeals judgment that even
27 though the word shall appears, the words were appropriate, gives
28 the Trial Chamber discretion in this matter. However, we would
29 submit that the Trial Chamber abused that discretion by stating

1 that it would never consider Sierra Leone law unless the Accused
2 were convicted of crimes under Article 5, the cruelty to children
3 and want and destruction of property sections of Sierra Leone law
4 that are incorporated in our Statute. At the ICTY and ICTR there
5 are similar provisions mandating recourse to the sentencing
6 practices in the former Yugoslavia and Rwanda without --

7 JUDGE AYoola: Are they really similar? The
8 provision in ICTR is different because in ICTR there is no -- the
9 provisions the similar provision did not include as appropriate.

10 MR RAPP: That is correct, Your Honour.

11 JUDGE KING: And the ICTY there is no provision
12 specifying as appropriate.

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

15 JUDGE KING: And doesn't that make all the difference
16 because I think that -- that phrase "as appropriate" was put in
17 there deliberately. Now, you are trying -- we are trying some of
18 these people on offences against international humanitarian law.
19 As far as I'm aware, Sierra Leone's law does not cater for those
20 offences. The offences as regards crimes in Sierra Leone that we
21 found in Article V of the Statute, and I think appropriate refers
22 to that phrase were they charged with offences under Article V
23 and as appropriate you can refer to the Sierra Leonean law. I
24 think, that's where the phrase was putting in there. Otherwise,
25 it doesn't make sense because we don't have all these regulations
26 that you have in international and humanitarian law here.

27 MR RAPP: Well, we would say in Sierra Leone law you could
28 commit a murder, an intentional killing with malice and
29 forethought and premeditation, and that's a crime here but then

1 here you have to prove that and then you also have to prove the
2 nexus to armed conflict or to an attack on a civilian population.
3 So in a sense, we have to prove a crime that's more difficult to
4 prove, but yet, how can we then provide a penalty that is
5 dramatically less. We notice, in this case, Mr Kondewa was found
6 guilty of directly committing the shooting of this town official,
7 and obviously if that had been tried under Sierra Leone law, he
8 would have been guilty of murder, a very serious offence,
9 carrying maximum penalties in this law that exceed the maximum
10 penalties that we have available. How can it be that when these
11 basic crimes carry such high penalties under national law, that
12 when you try them at the international level in Freetown, they
13 bring penalties that are so much lower. That would seem
14 inconsistent with logic, and it's inconsistent with what the
15 other Tribunals do because they actually look at the penalties
16 for the ordinary crimes.

17 JUDGE AYoola: In Rwanda, in the case of the ICTR, Rwanda
18 as a nation, as a state, has provisions for crime against
19 humanity and genocide. In Sierra Leone we do not have provision
20 for crimes against humanity, and that is why I believe in the IC
21 -- Special Court Statute it was deliberately put there that we
22 take into consideration the practices in Rwanda because Rwanda
23 has provisions for crime against humanity and it -- it -- if you
24 look at the ICTR Statute, it says that the -- the Tribunal, the
25 Rwanda Tribunal, would take -- will be guided by sentencing
26 practices in Rwanda, and that is because Rwanda has provisions
27 for international crimes. So when asked that you say as
28 appropriate, it means, in relation to crimes against humanity and
29 war crimes you look at Rwanda. In relation to crimes which are

1 peculiar, peculiarly national crimes in Sierra Leone, you look at
2 Sierra Leone. That's the meaning of as appropriate.

3 MR RAPP: Well, I can accept that that's a way that it can
4 be interpreted, but the effect of interpreting it that way is to
5 essentially provide for dramatically lower sentences here for the
6 same crimes, the same killings, whether they are tried in this
7 Court or down the road at the high Court of Sierra Leone.

8 JUDGE AYoola: I don't think it would be fair to all
9 parties concerned to carry -- to look at one side of the coin.
10 Because the level of responsibility will not be the same. There
11 is no responsibility for superior responsibility in Sierra
12 Leonean law, but you have it in crimes against humanity. So
13 there is burden on one side and maybe if they had been tried for
14 murder under national laws maybe -- maybe there would have been
15 no responsibility based on superior responsibility.

16 MR RAPP: Well, obviously, it is, as we indicated, a more
17 difficult to prove these cases at the international level, but I
18 note simply the case of the single direct perpetration murder and
19 that obviously does trouble us on the side of the Prosecution
20 that we're dealing with a crime that -- with a much lesser
21 penalty and that, in our view, is why this provision is in the --
22 is in the Statute, but I'll depart that issue. I think we've
23 made our argument there. I would note additionally in terms of
24 issues -- something that the Trial Chamber should have considered
25 and did not is the totality of the criminal conduct here.
26 Certainly, the Trial Chamber was within its rights to enter
27 individual sentences for each of the Counts of conviction as
28 opposed to a single sentence as occurred in the AFRC case, but we
29 submit that the way that was done then without providing any kind

1 of aggregation without any of the time being consecutive, with
2 all of the time being concurrent, minimizes the totality of the
3 offence and the totality was something that Your Honours
4 emphasized in your Appeals Chamber decision, that one has to look
5 at that totality. Basically, what we have here is a situation
6 where if these individuals had been convicted only of cruel
7 treatment, they would have receiving a year and six sentence.
8 The fact that they were then also convicted of more than 200 --
9 murder based upon more than 200 killings adds really nothing to
10 that sentence, and that, we submit, is -- that factor of totality
11 is something that should have been considered by the Trial
12 Chamber.

13 I think this also relates to really our final submission
14 which has to do -- which is essentially that this sentence was so
15 unreasonable and plainly unjust that it can be inferred that the
16 Trial Chamber failed to exercise its discretion properly. More
17 than 200 murders, including impaling of two women, there was
18 large scale killings and brutalities cited by the Trial Chamber.
19 The fact that the victims included unarmed and innocent
20 civilians, including women and children, was physical and
21 psychological impact on the victims, their relatives and the
22 broader community were also cited by the Trial Chamber. And
23 certainly under the standard that you repeated in the AFRC
24 appeals judgment there is great gravity to these crimes. As to
25 individual culpability, though some of the criminal
26 responsibility was based on 6.3 command responsibility, the Trial
27 Chamber found that their responsibility as commanders was greater
28 than that of the actual perpetrators. While 6.1 individual
29 responsibility was based largely on aiding and abetting, as we

1 know Kondewa was held responsible for the direct perpetrating of
2 some acts, including the shooting of the town commander. In the
3 end the Trial Chamber's sentence was, as stated, significantly
4 impacted by mitigating factors. And given that those mitigating
5 factors should not have been considered or to the extent that
6 they could have been considered, the Prosecution submits that no
7 reasonable trier of fact given -- could have given such weight to
8 those factors as to reduce these sentences to six and eight
9 years. As stated by the Appeals Chamber at the ICTY in *Garlic*
10 the sentences in this case were simply taken from the wrong
11 shelf. We would respectfully ask the Appeals Chamber to revise
12 the sentences upward to reflect the gravity and the established
13 culpability of these individuals. Thank you very much, Your
14 Honours.

15 JUDGE KING: One small question for you. I think you
16 mentioned something about Kondewa, you know, expressing empathy
17 and remorse but no admission of guilt. Did I understand you
18 correctly that he did not express any admission of guilt?

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

20 JUDGE KING: Yes.

21 MR RAPP: Now he used the word, "I asked for mercy and
22 remorse". I questioned whether he, in fact, expressed remorse.
23 The issue that I was alluding to is for an individual to express
24 remorse, does an individual have to stand in front and say I'm
25 remorseful for what I've done and essentially accept
26 responsibility for his crimes. That, of course, is a difficult
27 thing for an accused individual to do, has the right to stand on
28 a not guilty plea and to challenge his convictions, but there's
29 certainly authority to the effect that you don't get the remorse

1 mitigating factor unless you actually admit to some
2 responsibility of factual or maybe deny legal responsibility, but
3 I submit that at least according to Appeals Chamber law, it
4 appears that one can get a mitigating factor here, Appeals
5 Chamber law from the ICTY, if you express sincere empathy without
6 admitting responsibility.

7 JUDGE KING: That's fine. You see that's the point of the
8 question. Because now he is here appealing against his
9 conviction, and he should have otherwise, in my mind, got up from
10 this mitigation plea to say, I admit I committed all these
11 offences for which I have been found guilty. I mean, it would be
12 really foolish to me in my opinion anyway, but I take the point
13 you've made, thank you.

14 MR RAPP: Thank you very much, Your Honours.

15 JUDGE KING: Well, I want to thank the Prosecution for
16 their assistance to this Court. Some of us are not as young as
17 you, so it's about time we had some lunch. And I think this is
18 an appropriate stage at which we should adjourn and refresh
19 ourselves. Mr Kamara, what time do we come back?

20 So we'll take an adjournment now and come back at 2.30 to
21 continue. Thank you very much.

22 MR GEORGE: All rise.

23 [Break taken at 12.35 p.m.]

24 [Court resumes at 2.40 p.m.]

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

27 MR KAMARA: Yes, My Lord.

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

29 MR CARROL: I'm on next, My Lord. With the leave of this

1 Court, Your Lordship, I would seek to argue my Grounds of appeal
2 not in the way they came, but by Grounds I, first.

3 JUDGE KING: You seek to argue?

4 MR CARROL: By Grounds of appeal, in a different sequence.

5 JUDGE KING: You have Grounds of appeal?

6 MR CARROL: Sorry. The reply is the Grounds of the answer.
7 Sorry, My Lord. I'm sorry. I'll seek to answer the Grounds of
8 appeal by seek leave. Having Ground X first, then first then I,
9 VII, III, and IV, and VI, V, VIII and IX, with the leave of this
10 Court.

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

12 MR CARROL: I'm seeking the leave of this Court, Your
13 Lordships, to answer the Grounds of appeal by arguing Ground X
14 first, the longest Ground.

15 JUDGE KING: Yes.

16 MR CARROL: Then Ground I, Ground VII, III and IV, VI, V,
17 and VIII and IX.

18 JUDGE KING: Thank you. So I take it, in fact, that you
19 are going to respond --

20 MR CARROL: Respond. My Lordship, yes.

21 JUDGE KING: -- to the Grounds of the appeal of the
22 Prosecution.

23 MR CARROL: That is correct, Your Lordship.

24 JUDGE KING: All right. Do you have any objections to
25 those proposals?

26 MR STAKER: None, whatsoever, Your Honour.

27 JUDGE KING: All right. Very well.

28 MR CARROL: Your Lordships, we'll start with Ground X --
29 [Indiscernible] Sorry. In this Ground of appeal found on page

1 one -- page 15 of the Prosecution's address of appeal, the Trial
2 Chamber erred in law and in fact according to the Prosecution,
3 and they said that they committed a procedural error in the sense
4 that there's been a discernible error in the Trial Chamber
5 sentence and discretion, in imposing sentences that they did in
6 the case of the Accused persons, Accused persons. The
7 Prosecution then ventured out -- they also went on to say that if
8 this was so because the Prosecution ventured out, ventured --
9 they then went out to venture to set out the errors. They then
10 went on to venture to set out the errors, the errors that in this
11 particular fashion. First of all, they said the errors were:

12 1. Refusal to consider sentencing practices of the Sierra
13 Leonean Courts.

14 2. Treating sentence statements of the Accused at the
15 sentencing hearing as mitigating factors.

16 3. Treating lack of adequate training as a mitigating
17 factor.

18 4. Treating subsequent conduct of the Accused as
19 mitigating factor.

20 5. Treating lack of prior conviction as a mitigating
21 factor.

22 6. Treating the just cause of the Accused as a mitigating
23 factor.

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

25 8. Treating the purpose of a consideration as a mitigating
26 factor.

27 9. Deciding that the sentences should be concurrent
28 without adequate consideration and;

29 10. Manifest inadequacy of the sentence.

1 I shall start, Your Lordship, with the first error
2 submitted by the Prosecution. That is refusal to consider
3 sentencing practices of the Sierra Leonean Courts. In the
4 Prosecution's Appeal Brief, the Prosecution submits the Trial
5 Chamber erred in law when it found that it would be inappropriate
6 to rely on the sentencing practices in Sierra Leonean Courts in
7 determining the punishment to be imposed on the Grounds that one:
8 The Accused were not indicted or convicted for any offence to
9 Article 5 of the Statute. It confers to the jurisdiction of the
10 Special Court over Sierra Leonean law, Sierra Leonean offences.
11 And two: The Statute of the -- of the Special Court -- and two
12 of the Special Court does not provide for either capital
13 punishments or imposition of life sentences which are the
14 punishment that are most serious offences under Sierra Leonean
15 laws would attract. Now, we are submitting, Your Lordship, in
16 the first place, the Prosecution never refused to consider the
17 sentencing practice in Sierra Leone. It did consider this
18 practices in paragraph 40 of the sentencing judgment.

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

21 MR CARROL: Much obliged, Your Lord. I'll move on. Okay.
22 Number two is treating statement of the Accused at the sentencing
23 hearing as a mitigating factor. The Trial Chamber noted that at
24 the sentencing hearing in this case, counsel for Fofana had said
25 that Mr Fofana accepts the crimes are committed by the CDF in the
26 conflicts of Sierra Leone. Mr Fofana deeply regrets all the
27 unnecessary suffering that has occurred in the country. The
28 Trial Chamber then held that although Fofana by this statement
29 does not expressly acknowledge through his personal participation

1 in the crimes for which the Chamber has convicted him, the
2 Chamber finds that he clearly express empathy with the victims of
3 the crime, In paragraph 64 of the sentencing judgement. The
4 first contention of the Prosecution under this particular Ground,
5 is that it found that -- it contended that normally under
6 international law expressions of empathy are not usually regarded
7 as mitigating factors. And secondly, it argued that the
8 expression of empathy made during the course of trial as in the
9 other case, should be given more weight than one made in the
10 sentencing stage, as in the case of Fofana and the top contention
11 was that at the expression of empathy for victims cannot be
12 equated to genuine remorse. First of all, we will submit
13 straightaway that empathy has been considered as a mitigating
14 factor in the case of Orick, Orick sentencing judgement,
15 paragraph 65, and subsequently in the Vasiljevic Appeal Judgment
16 Paragraph 177. And secondly, as regards to the argument that
17 more weight should be given to this mitigating factor, if is made
18 during the course of trial, we submit that the sentencing part of
19 the proceedings that's the appropriate moment for raising
20 mitigating factors. And thirdly, that empathy cannot be equated
21 with genuine remorse. We are submitting that genuine remorse is
22 not a matter of words or syntax or meanings, it is an expression
23 of the feeling of repentance from the Accused persons. And
24 empathy actually conveys the feeling of one putting one
25 [Indiscernible] of another person, and we are submitting that in
26 this case, this is exactly what Fofana did. He felt the
27 suffering of the people concerned. We are submitting, Your
28 Lordship, that the Court was right to consider empathy as a
29 mitigating factor. And what weight has to be given to such a

1 factor lies within the discretion of the Trial Chamber as was
2 found in the case of Musema Appeals Judgement at Paragraph 35395.
3 So we submit finally, Your Lordship, on this error, alleged
4 error, that the Prosecution has failed to prove that the Trial
5 Chamber has committed any error not to talk of a discernible
6 error in the exercise of discretion by considering empathy as a
7 mitigating factor.

8 The next alleged error was treating lack of adequate
9 training as a mitigating factor. The Prosecution contends under
10 this rubric that the Trial Chamber gave no factual basis to
11 justify, taking lack of training into account as a mitigating
12 factor, and that the cases of the Orick Trial judgment and the
13 Blaskovic Trial judgment that Defence counsel sought to rely on
14 were distinguishable from this case. We are submitting that
15 there indeed is a factual basis for the Trial Chamber taking lack
16 of training as a mitigating factor. Because firstly, the Trial
17 Chambers stated in paragraph 66 of the Sentencing Brief that it
18 was aware that both men were propelled in a relatively short
19 period of time with no adequate training from civilian life to
20 effective positions of authority in a very brutal and bloody
21 conflict. Your Lordship, the Trial Chamber was aware because
22 there was evidence adduced to this effect. It is because of this
23 -- it is also clear from the factual finding in this case, which
24 are not disputed by the Prosecution, that combatants were trained
25 for only two weeks, and other who were not fighting, like Fofana,
26 were trained for only four days to learn the cork and fire
27 technique, and this is found in Paragraph 319 of the Trial
28 Chamber judgment. Is it also a factual finding that Base Zero
29 was established in September 1997. And very shortly afterwards,

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

14 JUDGE KING: Which one of them is your client?

15 MR CARROL: My client is Mr Fofana.

16 JUDGE KING: Would you stand up please.

17 MR CARROL: Yes, Your Lordship please.

18 JUDGE KING: Thank you, sit down.

19 MR CARROL: As your Lordship pleases.

20 And the next alleged -- error was treating subsequent.

21 JUDGE AYoola: Before you leave the training aspect,
22 training in what, because do you need any special training to
23 know that you must not commit or support crime against humanity?
24 Do you need any training for that?

25 MR CARROL: No, My Lord. It was military training I meant.
26 That he had no special military training, and they were manning
27 military tasks.

28 JUDGE AYoola: Military tasks consist of several things.

29 MR CARROL: Yes, My Lord.

1 JUDGE AYOOOLA: You have to address us with particular
2 relevance to the crime they were alleged to have committed.

3 MR CARROL: Yes, My Lord. Well, from the evidence of
4 the -- of the Prosecution they have been alleging that they have
5 been criminally responsible for two crimes; aiding and abetting
6 and superior responsibility. And they were -- aiding and
7 abetting was imputed on the Accused person by virtue of knowledge
8 that these crimes were going to be committed through military
9 attacks that were carried out by the Kamajors, that was the
10 argument. But we are submitting -- we shall submit later on to
11 show these attacks really were not directed at the civilians or
12 were not intended to execute as criminal acts later on. As Your
13 Lordship pleases.

14 The next alleged error is treating subsequent conduct of
15 the Accused as a mitigating factor. The Prosecution contended
16 under this Ground that although, although Fofana did involve
17 himself in activities aimed at the peace and reconciliation, but
18 in the absence of more detail or specific evidence only limited
19 weight should be given to this evidence by a reasonable Trial
20 Chamber. They are saying that the evidence was not detailed or
21 specific. We submit straightaway that very detailed evidence was
22 given in the five witness statements containing 15 pages which
23 showed the way and manner in which the Accused person engaged
24 himself in post -- in subsequent -- in post war activities. He
25 held workshops. The place they were held. The contributions he
26 made, the contributions he did. So we are submitting that really
27 -- that really -- that, that submission has no moment actually.
28 And we are, we further submit that, in fact, as regards this --
29 as regards subsequent conduct, what is important is not the

1 details of what he has done or the specifics, but the mere fact
2 that he has done it and done it voluntarily because this shows a
3 change of mentality, a change of attitude, a complete
4 [indiscernible] transformation of his mentality from somebody who
5 was fighting, from somebody who was fighting and somebody asking
6 for peace. And this and of course ultimately this was to
7 promote, was this would work towards his capacity for
8 rehabilitation.

9 And we further submit as well, Your Lordships, that
10 subsequent conduct has always been taken as a mitigating factor
11 in international law. This is clear from the Babic Appeal
12 judgment paragraph 56 to 59. Where Babic's conduct subsequent to
13 the conflict, particularly with respect to promoting peace and
14 reconciliation was treated by the ICTY as a mitigating factor.
15 So we submit, finally, and of course he was also director of
16 peace as well. He became director of peace. This shows -- these
17 are matters that shows a change in attitude and mentality. But
18 we'd like to submit that the Prosecution has failed again to show
19 how. How the Trial Chamber erred -- how it erred by venturing
20 out of its discretionary framework. And so we urge the Court to
21 dismiss the Ground. With your leave, Your Lordship, the next
22 alleged error was treating the fighting of a just cause of the
23 Accused as a mitigating factor. The Prosecution contends that --
24 that the fact that the Trial Chamber took the consideration, the
25 Accused were fighting a just and legitimate cause, it was the
26 restoration of democracy of the democratically elected government
27 of President Kabbah and the -- and contributing essentially to
28 the re-establishment of rule and order in Sierra Leone, where
29 criminality, anarchy and lawlessness had become the order of the

1 day. It is found in paragraphs 83-87 of the Sentencing
2 Judgement. The Trial Chamber erred in law in treating this
3 fighting a just cause as mitigating factor.

4 JUDGE AYoola: Paragraphs what?

5 MR CARROL: Paragraphs 83 to 87 of the sentencing judgment,
6 My Lord. The Prosecution then went on to argue at length that
7 the Trial Chamber recognising the Accused were fighting the just
8 cause meant that they were fighting on the right side. First of
9 all, we are submitting straightaway that that was a total
10 misinterpretation of this part of the judgment, And it is
11 speculative because nowhere in the judgment is the question of --
12 is the term a right side were use. And we have also never used
13 in our submissions because if there was any --

14 JUDGE KING: Just one minute. Are you saying then that the
15 -- your client fighting for the restoration of the legitimate
16 government, they were fighting on the wrong side.

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

19 JUDGE KING: Well, why are you complaining then if they
20 said they were fighting on the right side. Of course they were
21 fighting on the right side.

22 MR CARROL: I won't complain anymore, My Lord. As Your
23 Lordship pleases. The law is in Your Lordships bosom, I stoop to
24 your clemency, My Lord.

25 Your Lordship, we are therefore -- we want to submit that
26 the fighting of a just cause, what it really shows is that the
27 cause that motivated the Accused person to fight was a just
28 cause, in that they wanted to restore democracy to bring back the
29 government and to bring -- and to defend their land, basically.

1 So and of course it is the law -- the law has always,
2 international law, has always considered this as a mitigating
3 factor. Like in the case of Hadzi movi c Sentencing Judgment
4 paragraph 46 it was considered as a mitigating factor. So --

5 JUDGE AY00LA: How was it considered in that case?

6 MR CARROL: Yes. In that case it was considered that it
7 should not be considered as a significant mitigating factor.

8 JUDGE AY00LA: It should not be considered as a significant
9 mitigating factor?

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

14 JUDGE AY00LA: Did you have the case to show that if you
15 were fighting what you described as a just cause.

16 MR CARROL: Yes.

17 JUDGE AY00LA: That should be a mitigating factor. That is
18 the type of authority you should be looking for?

19 MR CARROL: As Your Lordship pleases. Yes, Your Lordship,
20 I've got on authority. The authority of the Simba appeal, The
21 Simba appeal judgment in Paragraph 318. It held that the Trial
22 Chamber had not erred in taking into account as a mitigating
23 factor that the possibility of the appellant acted out of
24 patriotism and government allegiance. It was similar to this
25 case in that an allegiance rather than extremism or ethnic
26 hatred. I think that is not exactly on the point but it shows
27 that these type of situations which you show love for your
28 country and fight because of that, is out of a civic duty, just
29 cause, it is a mitigating factor. It shows the goodness in the

1 accuse person. And this cannot decrease the crime, but it may
2 mitigate the punishment. That's why I feel that this Trial
3 Chamber in its discretion has used as such. As Your Lordship
4 pleases.

5 Your Lordship, the next alleged error was treating the
6 purposes of reconciliation as a mitigating factor. Well, Your
7 Lordship, this Ground of appeal is not found in the Notice of
8 Appeal, but notwithstanding, we shall move on. But normally
9 where -- where submissions are made that are not given notice of
10 -- in Notice of Appeal, they go to no issue but we will not be --
11 we will prefer to go and argue -- argue this particular
12 submission. The Prosecution contended that the Trial Chamber
13 erred in law or erred in the exercise of its discretion when it
14 treated the purpose on leave reconciliation as a mitigating
15 factor because it argued that the sentences were too lenient to
16 promote reconciliation. And the need to promote reconciliation
17 did not warrant the imposition of very lenient sentences. We are
18 submitting straightaway that but due regard been had to the
19 secondary mode of commission of the offences that the Accused was
20 charged with, that is aiding and abetting, contrary to Article
21 6.1, and superior responsibility contrary to Article 6.3 and also
22 the indirectness of their participation. Normally such
23 situations warrant much lesser offences, and we would submit that
24 these tendencies are not lenient at all.

25 JUDGE KING: What do you mean by secondary participation?

26 MR CARROL: It means that they were not the actual
27 perpetrators of the offence. They were not the primary
28 perpetrators of the offence.

29 JUDGE KING: To all the counts made and charges, of this

1 case--

2 JUDGE KING: He was not directly the perpetrator.

3 MR CARROL: Exactly, so, all the offences he was convicted
4 with, he was not directly involved.

5 JUDGE KING: That is quite distinct.

6 MR CARROL: I'm sorry, I was saying, would you please put
7 that in the form of a submission.

8 MR CARROL: As Your Lordship please, .

9 JUDGE KING: So that it's clear what you are saying, with
10 regard to secondary participation and vis-a-vis mitigation.

11 MR CARROL: As Your Lordship please. As regards Fofana,
12 he was only convicted of secondary modes of culpability, criminal
13 culpability under Article 6.1 and 6.3, he had no direct
14 commission of offences which he was convicted for. Your
15 Lordship, we are submitting that looking at the sentences that
16 were imposed for similar offences under international law, that
17 these sentences are not lenient at all because, Your Lordship, in
18 the case of the Orick Trial Judgement, at paragraph 7, Orick was
19 convicted of a secondary mode of commission offence which is
20 Article 6.3, but Article 7.3 under the ICTY for failing to
21 prevent and punish occurrence of murder and cruel treatment and
22 ultimately, a sentence of two years was ultimately imposed as
23 effecting his overall criminal culpability. And also, and this
24 very same offence was the offence of Hadzi hasanovic was also
25 charged with. And the sentence at page 633-638, the sentence --
26 he was sentence for five years, for the same offences failing to
27 prevent and punish murder and other acts cruelty. According to
28 Article 3 war crimes. Your Lordship, we are submitting that if
29 these two sentences, two and five years were sufficient for

1 similar offences, I cannot see how six years can be excessive.
2 The sentences we are submitting are not lenient, but due regard
3 been had to all the facts and circumstance of this case,
4 particularly the prevailing circumstances mitigating
5 factors, [indiscernible] factors and the mode of commission. We
6 submit, Your Lordship, that six years is not lenient but it
7 affects the overall criminal culpability of the Accused person.

8 JUDGE AY00LA: Assuming that instigation was properly found
9 as the mode of committing, you say that it 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 an
15 actual perpetrator, but he would receive more than somebody who
16 is an abett, because of the causal relationship that must exist
17 between the instigation of the crime and its perpetration. I
18 would say 'yes'. And furthermore, it is an inquate 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 cite the Blaskic Appeal Judgment paragraph 69
26 is one incident and also Celebici Appeal Judgment paragraph 788.
27 In these cases it confirmed -- in these cases it was clearly --
28 the Court clearly used this particular lack of prior conviction
29 as a mitigating factor, so there is no error of law in using it

1 in this case as a mitigating factor. And so we say again, the
2 Prosecution has failed to show how, how the Trial Chamber has
3 erred by so using it as a mitigating factor. Your Lordship, the
4 next alleged error is that treating the purposes of
5 reconciliation as a mitigating factor. Sorry. You just missed
6 that one. Sorry, My Lord.

7 JUDGE AYoola: It's concurrent.

8 MR CARROL: Yes, it's concurrent. Yeah. Sorry, My Lord.

9 The next argument was the Prosecution argued -- yes, the
10 Prosecution submits that the Trial Chamber erred in law by
11 deciding that the sentences should be served concurrently without
12 giving adequate consideration to this. We submit that definitely
13 before stating that this sentences should be served concurrently
14 the Trial Chamber took in consideration every single factor
15 relating to mitigation of offences. They consider the gravity of
16 the crimes, the personal circumstances of the Accused person, the
17 aggravating factors, the mitigating factors and everything. So
18 this was -- that was very clear from the sentences judgment at
19 page -- it was from page --

20 JUDGE KING: Before you go further what are the legal
21 principals involve when a Trial Chamber decides to pass sentences
22 concurrently or consecutively what are the legal principals
23 involved.

24 MR CARROL: The main legal principle involved, Your
25 Lordship, is that at the end of the day the final aggregate sent
26 and punishment penalty should reflect the overall criminal
27 culpability of the Accused person.

28 JUDGE KING: What do you mean.

29 MR CARROL: That if the Court pass sentence of let's say on

1 one Count six years, on another Count 12 years, then they should
2 be served concurrently --

3 JUDGE KING: That's not what I mean. Concurrently as
4 distinct from consecutively. What are the legal principles
5 involved? Obviously, the Chamber has a discretion what are the
6 principles involved in exercising such discretion.

7 MR CARROL: The principles involved Your Lordship, as far
8 as I know is that the Court will take some -- certain factors
9 into consideration like for example, the person has been a first
10 offender and the gravity of the offences the mode of the
11 commission of the offences etcetera. These are the ones the
12 Court will look at. Another factor is that whether that the
13 imposition of such either of them will not work in justice at the
14 end of the day.

15 JUDGE KING: In what way is the Trial Chamber's discretion
16 fettered as regards passing concurrent sentences if any. If it's
17 in any way fettered.

18 MR CARROL: Yes, I would say it would be fettered, it would
19 at the end of the day, not affect the overall culpability of the
20 Accused person or if it promotes injustice.

21 JUDGE KING: That is if it passes concurrent sentences.

22 MR CARROL: If it passes one which does not reflect the two
23 situations it will be fettered, then the discussion would not
24 have been judiciously exercised in the circumstances.

25 JUDGE KING: So it should reflect what.

26 MR CARROL: It should reflect justice in the first place
27 and secondly the overall culpability of the Accused person. It
28 should be just appropriate and reflect the overall culpability of
29 the Accused person.

1 JUDGE KING: Otherwise, consecutive?

2 MR CARROL: Exactly.

3 JUDGE KING: What principle is that. What's your authority
4 for that.

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

7 JUDGE KING: I ask that question if I'm right probably, the
8 Prosecution will correct me, I thought that overall the Trial
9 Chamber has an unfettered discretion in that regard. Isn't that
10 correct.

11 MR CARROL: I believe so, My Lord. Much obliged, My Lord
12 for the information.

13 JUDGE KING: That's all right.

14 MR CARROL: Okay. Your Lordship. And for Your Lordship
15 there's also another case which makes it clear a case of the
16 Orick trial judgment it was said it was laid down that the Trial
17 Chamber is not obliged to give an explanation for every decision
18 it takes as long as it is shown that the decision is reasonable
19 with due regard to the evidence and the circumstances. So we are
20 saying that going by that particular principle, the Trial Chamber
21 is not obliged to explain why the sentences are concurrent or
22 consecutive.

23 JUDGE KING: [Indiscernible].

24 MR CARROL: As Your Lordship. Your Lordship, and finally
25 the last Ground of all.

26 JUDGE AYoola: Before you leave that point.

27 MR CARROL: As Your Lordship please.

28 JUDGE AYoola: If in a concurrent sentence the highest
29 because the -- the lower sentences are subsumed in the highest in

1 this case the highest will be say eight years if looking at the
2 overall conduct of the convict you can come to the conclusion
3 that the sentences are unreasonably low wouldn't that be a factor
4 to take into consideration.

5 MR CARROL: Yes. Yes, My Lord. Because if the sentences
6 are unreasonably low then it will definitely not reflect the
7 overall culpability of the Accused person.

8 JUDGE AYoola: Yes, that is the submission of the
9 Prosecutor.

10 MR CARROL: Well, Lordship, I don't think -- is that his
11 submission? Well, what I'm saying Your Lordship, immediately
12 Your Lordship, I mean that in that -- in the -- taking it into
13 consideration the peculiar facts and circumstance of this
14 particular situation it's not applicable. As I've shown My Lord,
15 in my last Ground.

16 JUDGE KING: I have always -- I could be wrong that in --
17 sorry. Thank you. I have always thought probably wrongly that
18 in imposing consecutive or concurrent sentences that discretion
19 was unfettered.

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

21 JUDGE KING: That is a very important because as my brother
22 is pointing out the Prosecution think otherwise I thought you
23 would be able to help me here.

24 MR CARROL: Your Lordship, because I know it is
25 unfettered, , we have the case I just cited that the discretion is
26 wide at the same time the weight attached to it is also
27 discretionary putting the two together it confirms with, what
28 Your Lordship says. I agree with Your Lordship on that entirely.

29 JUDGE KING: The mathematical if they sentence somebody to

1 eight years for one Count and six years for another and he says
2 those sentences to run concurrently instead of 14 years that
3 person will do eight years. Now is there any fetter on such a
4 discretion. It's a very important point so that will guide us.

5 MR CARROL: I feel that if eight years will reflect the
6 overall criminal culpability of --

7 JUDGE KING: No. I'm talking about concurrency as distinct
8 from consecutive sentences.

9 MR CARROL: I believe it's unfettered. It's left entirely
10 to the Courts discretion. Finally Your Lordship, the last
11 alleged error was the manifest inadequacy of the sentences. I've
12 argued this Ground indirectly in the other Grounds already. My
13 Lordship, we therefore submit on Ground 10, the Prosecution has
14 failed the test of showing any discernible error that should
15 enable this Court to substitute any other sentence for that of
16 the Trial Chamber. And also a reply on the case of the Kayishema
17 -- in the Kayishema appeal judgment Paragraph 337 says that the
18 Trial Chamber will not substitute its sentence for the Trial
19 Chamber sentence unless it believes that the Trial Chamber has
20 committed an error in its discretion or failed to follow
21 applicable law. We therefore submit Your Lordship, that this has
22 not been proven, so we urge this Court to dismiss the Ground of
23 appeal. As Your Lordship pleases. My Lordship, I will now, with
24 your leave seek to argue Ground one. Principally in Ground one
25 the Prosecution appeal brief, the Prosecution contends that the
26 Trial Chamber erred in law, and in fact in finding that the
27 chapeau elements, namely the general requirements of crimes
28 against humanity were not satisfied in the case against the
29 Accused persons, including the first respondent called Fofana

1 herein. In particular, the Prosecution argues that the Trial
2 Chamber erred in law and in fact in holding in judgment that the
3 evidence adduced does not prove beyond a reasonable doubt that
4 the population was the primary of the attack. This is found in
5 paragraph 69 of Trial Chamber's judgment. Based on this finding
6 the Trial Chamber held there was lack of proof of the essential
7 requirement as a general element of crimes against humanity,
8 which necessarily resulted in the acallittal of an attack against
9 the civilian population Fofana and Kondewa on count one murder as
10 a crime against humanity and Count III other inhumane acts
11 against humanity. The first submission of the -- of the -- of
12 the Prosecution in their reply brief was that -- was that since
13 -- since Fofana was convicted under murder as a war crime they
14 should have been convicted also as a -- of murder as a crime
15 against humanity. We are submitting straightaway that the
16 elements are different. Because murder as a war crime does not
17 contain the element of attacking the civilian population as a
18 primary object of the attack. So to that argument with all due
19 respect to the Prosecution, doesn't hold any water. The
20 Prosecution Your Lordship submitted a lot to show that the --
21 that the civilian population was targeted to satisfy that element
22 of war of crimes against humanity. Your Lordship, but we are
23 submitting that in all the arguments that the Prosecution has
24 advanced today there has been a fundamental misunderstanding in
25 which they have been equating civilians with the civilian
26 population. The collaborators taken as civilians. We are
27 submitting that there's a difference between civilians and
28 civilian population because to consider a population the -- there
29 must be a large number so as to make it a population and we rely

1 on the case of the case of the Kunarac et al judgment on page, on
2 Paragraph 19. Of the Trial Chamber which says the Chamber
3 concurs with the interpretation that the use of the word
4 population does not mean that the entire population or the
5 geographical entity in which the attack has taken place must have
6 dislodge the attack. However, targeting a select group of
7 civilians for example the targeting a number of political
8 opponents cannot satisfy the requirements of Article two. It
9 will therefore be sufficient enough to show that enough
10 individuals were targeted in the course of the attack or that
11 they were attacked in such a way as to satisfy the chamber that
12 the attack was in fact against civilian population rather than
13 against limited and randomly set of individuals. Your Lordship,
14 a particular significance is the example at Talama, where there
15 were 1000 people and 150 were selected -- Yes, Talama, is near
16 Panguma in Tongo region they were selected and killed because of
17 their political affiliations. They were the Limbas the Lokos and
18 the Temnes were killed. Your Lordship, we are submitting that it
19 shows a selection, a limited number of people, and that cannot
20 constitute a population. A population is envisaged in a
21 situation where like in cases of extermination, genocide but
22 these numbers are not large enough to constitute a population, so
23 I think that there's been a fundamental misinterpretation of that
24 particular --- throughout the arguments of the Prosecution. That
25 is why we -- and there furthermore, that is why we submit that
26 the Trial Chamber was correct was right in holding that the
27 civilian population was never targeted as such. But the targets
28 -- the -- the actual targets of the attacks were not the civilian
29 population but the juntas and the rebels --

1 JUDGE WINTER: Sorry, I have a question, genocide is to be
2 committed against a whole population then it is not genocide? If
3 it is committed against one or two persons it's not genocide?
4 You are wrong of view.

5 MR CARROL: My submission is that you cannot commit
6 genocide, with my own point of view against two people. There
7 must be a large number of people large enough to constitute a
8 population.

9 JUDGE WINTER: Thank you.

10 MR CARROL: As Your Lordship pleases.

11 JUDGE AYoola: Your conception of what is meant by civilian
12 population needs a little bit more elaboration because some may
13 think that the civilian -- the entire population, the civilian
14 population excluding those who bear arms, those who are fighters
15 and so on.

16 MR CARROL: Yes, that is, Your Lordship. In fact there are
17 clear authorities which show that even if there are soldiers in
18 the midst of the civilian population, that does not change the --
19 if -- as long as there are so many -- as long as the civilians
20 likely outnumber the soldiers let's say you have four civilians
21 in about 3000 -- it would still be called civilian population.
22 And the Prosecution cited that authority which we argued about.
23 What we are saying here is that what is important is the
24 massiveness of the numbers and not random five people here, one
25 there, and III there. I think that's what I've
26 argued. [i ndi scerni bl e]

27 JUDGE AYoola: Your learned friends contend that going back
28 to Base Zero, the action plan was to just kill anybody at random
29 and that that shows the intention to attack the civilian

1 population not only people who are fighting but anybody there.

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

29 JUDGE KING: The indictment seven maybe on this point,

1 don't just gloss of them. Let us have it in the record exactly
2 what part of the indictment or what count or whatever it is, so
3 we can follow you properly. You have an assistant, don't you.

4 MR CARROL: Yes, he's already done his work yesterday
5 properly. It's found on -- it is nineteenth, it's found in the
6 trial judgment. No, no, this is not the judgement, the indictment
7 is found in the back of the judgment. It is found -- attached to
8 the Trial judgment Your Lordship, it is the nineteenth clause,
9 which says: The plan purpose, or desire of Samuel Hinga Norman,
10 Moinina Fofana, Allieu Kondewa and subordinate men to the CDF was
11 to use any means to defeat the RUF and the AFRC forces and to
12 gain and exercise control over the territory of Sierra Leone.
13 They themselves had knowledge that these were the targets. So we
14 are submitting Your Lordship, that -- that neither directly nor
15 indirectly by Prosecution -- by circumstantial evidence could the
16 Prosecution prove that the civilian population was the primary
17 object of the attack.

18 JUDGE AYoola: If you are referring to Paragraph 19, why
19 don't you read to the end. Read further.

20 MR CARROL: Sorry, My Lord. [indiscernible] I thought it
21 was pertinent to my argument. This included gaining complete
22 control over the population of Sierra Leone, and the complete
23 elimination of the RUF, AFRC, it's supporters, its sympathizers,
24 anyone who did not actively resist the the RUF AFRC operation in
25 Sierra Leone. Each accused acted individually and in concert with
26 subordinates to try to carry out the said plans or purpose of
27 design.

28 JUDGE KING: I think he is referring to his supporters and
29 what else.

1 MR CARROL: Yes. Yes.

2 JUDGE AYoola: In that paragraph won't supporters
3 sympathizers and anyone who did not actively receive the RUF AFRC
4 constitute the civilian population.

5 MR CARROL: According to them but we disagree with that,
6 Your Lordship. That was there indictment, but we disagree with
7 that entirely that's why we argued against that.

8 JUDGE AYoola: So the position therefore is that
9 Paragraph 19 is not contrary to the case they were making.

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

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

17 MR CARROL: Yes.

18 JUDGE KING: I mean if they are fighting against the --
19 well, you mentioned the RUF and the AFRC and they have supporters
20 and sympathizers the inference and presumption is that all of
21 them are fighting against the CDF.

22 MR CARROL: That's correct.

23 JUDGE KING: But that does not necessarily mean that they
24 are fighting against the entire population. Why don't you make
25 that distinction then.

26 MR CARROL: I agree with you entirely, Your Lordship.
27 Because the distinction here is that the smallness of the number
28 of the sympathizers, the collaborators cannot constitute a
29 civilian population.

1 JUDGE AYoola: If you referred to the conventions and the
2 protocol it would be difficult to accept that submission wouldn't
3 it? Because if you read the conventions and the additional
4 protocol, the distinction is between the rest and those who are
5 bearing arms. My understanding is that those who are not bearing
6 arms amongst the population belong to the group of civilian
7 population.

8 MR CARROL: Agreed.

9 JUDGE AYoola: Whether they are sympathizers or supporters,
10 they are civilian population.

11 MR CARROL: I agree, with that Your Lordship, but the point
12 I'm making this so-called sympathizers and collaborators the --
13 the --

14 JUDGE AYoola: If you agree --

15 MR CARROL: Was never defined -- nobody defined what the
16 collaborators, in this case, means. They were -- my -- nobody
17 defined. There's no factual finding as to who was the
18 collaborator. The point I'm making is because of these
19 situations, right, and the number, the proportion of these
20 sympathizers in numbers it cannot constitute. It's not -- it's
21 not large enough, massive enough, to constitute a population.
22 That's my argument, Your Lordship.

23 JUDGE KING: What is the position when the supporters and
24 sympathizers carry arms.

25 MR CARROL: The moment they carry arms they are no longer
26 civilians they are soldiers they are fighters.

27 JUDGE KING: I'm talking vis-a-vis the combatants, the AFRC
28 and the RUF you have them as a group as a warring group as an arm
29 for like and then you have some supporters and from the evidence

1 it will seem that some of the supporters and the sympathizers
2 also carried arms. What is the position in that circumstance.

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

5 JUDGE KING: Vis-a-vis, attacking the population that's the
6 topic we're discussing.

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

9 JUDGE KING: I said vis-a-vis attacking the population.

10 MR CARROL: Attacking the population.

11 JUDGE KING: The civilian population.

12 MR CARROL: Yes, attacked by the collaborators who were
13 armed.

14 JUDGE KING: No, I'm talking now about your clients and
15 others.

16 MR CARROL: Yes.

17 JUDGE KING: Who want to get rid of these AFRC/RUF and
18 their supporters and sympathizers. Now take it in the context of
19 the civilian population. Suppose those sympathizers are carrying
20 arms, what would be the position vis-a-vis the general civilian
21 population.

22 MR CARROL: People carrying arms are who, My Lord.

23 JUDGE AYoola: Let me assist you.

24 MR CARROL: Yes.

25 JUDGE AYoola: If they were carrying arms then there will
26 be reasonable doubt whether they belong to the group of civilian
27 population.

28 MR CARROL: Okay, that's correct.

29 JUDGE AYoola: But of course, you must have evidence that

1 these people were carrying arms. You must also have evidence
2 that they have not laid down their arms.

3 MR CARROL: That's correct. That's correct. I've got it
4 now.

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

6 MR CARROL: There is none. Absolutely, My Lord, in the
7 circumstances. None. No.

8 JUDGE AYoola: And was it part of the Defence at the trial
9 that these people were not civilian population because they were
10 armed?

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

12 JUDGE AYoola: So.

13 JUDGE KING: Did you conduct the trial.

14 MR CARROL: No.

15 JUDGE KING: Because you are making general statements in
16 agreement and you were not at the trial because so many pieces of
17 evidence came out in the trial and the chaos that happened. It
18 is very difficult to say who was who. They did not wear uniforms
19 as far as I could see to distinguish one from the other.

20 MR CARROL: That's right, okay.

21 JUDGE KING: You had many groups, we have to take the
22 practicalities into consideration, the reality, this was not a
23 conventional war, when you have this army in their distinct
24 uniform, from another one, wearing various clothing, pieces of
25 clothing so on and intermingling among themselves, of course you
26 had the AFRC if you like and the RUF, but you also had people who
27 were not necessarily in that group of AFRC or RUF who were
28 distinctly collaborators, sympathizers and so on. So the
29 distinction is blurred.

1 MR CARROL: Blurred, it is very blurred. I've seen it now.
2 As Your Lordship. I'm grateful, Your Lordship, for that
3 [i ndiscernible]. Your Lordship, we are finally submitting Your
4 Lordship, that the Prosecution has not proved, proven either
5 directly or by circumstantial evidence beyond reasonable doubt
6 that the civilian population was the primary object of the
7 attack. That's our final submission on that Ground, and that is
8 why the Trial Chamber was right to hold that the element that
9 element of crime against humanity was not satisfied. As Your
10 Lordship pleases. With Your leave Your Lordship, I would now
11 proceed to argue Ground VII. Your Lordship, under this Ground
12 the Prosecution contends that the Trial Chamber erred in law in
13 refusing to consider act of destruction by burning of property
14 for purposes of the war crime of pillage as charged under count
15 five of the indictment. This error, it alleges resulted from the
16 Trial Chambers narrow view of limiting pillage to the unlawful
17 appropriation of property. In the sense that, it does not
18 encompass malicious act of destruction of properties such as
19 arson, in the context of an armed conflict essentially though
20 Count V for the indictment entirely looting and burning the
21 offence charged is pillage, a violation of Article III Common to
22 the Geneva Convention. and --

23 JUDGE KING: You need not go with that go on with that
24 point.

25 MR CARROL: As your Lordship pleases, as Your Lordship
26 pleases. Much obliged. We shall now go on to Grounds III and
27 IV. Your Lordship, Grounds III and IV of the Prosecution's
28 appeal brief were argued together by the Prosecution and the said
29 Grounds specifically provided as follows. Ground III failure by

1 the Trial Chamber to find superior responsibility and or
2 responsibility for planning, ordering, instigating or otherwise
3 aiding and abetting in the planning preparation or execution of
4 certain criminal acts in Kenema district. And Ground 4, failure
5 by the Trial Chamber to find responsibility for planning ordering
6 instigating so, otherwise aiding and abetting in the planning,
7 preparation or execution of certain criminal acts in the towns of
8 Tongo field, Koribondu and Bo district.

9 Your Lordship, as regards these offences, the Prosecution
10 could not find any, could not prove any of these offences by
11 direct evidence. And they acknowledged that. So they now sought
12 to prove these offences from circumstantial evidence. But then
13 Your Lordship, we would like to submit that the law as regards
14 proving criminal culpability from circumstantial evidence is that
15 the guilt of the Accused person should be the only inference that
16 could be drawn from the totality of the circumstantial evidence.
17 Where any other inference can be drawn, then that offence has not
18 been proven beyond reasonable doubt by virtue of the
19 circumstantial evidence.

20 JUDGE KING: If I understand what you are saying, in fact
21 if I'm wrong, correct me, because I want to be very picturesque
22 about it. You're saying in fact that if they were relying on
23 circumstantial evidence, then that circumstantial evidence must
24 point like a gun in one direction and one direction only.

25 MR CARROL: Exactly.

26 JUDGE KING: If it pointed in two directions that was not
27 good enough, is that what you are saying?

28 MR CARROL: Exactly that, Your Lordship. That is what the
29 Trial Chamber has used to grant these findings that these --

1 these offences were not proven by circumstantial evidence. Your
2 Lordship, some of the circumstantial evidence that they sought to
3 rely on for different crimes are for example, are found in
4 paragraph 39 for example. Like that the presence of Fofana at the
5 commanders meeting were the second and third attacks of Tongo
6 were discussed at series of meeting, that my learned friend Mr
7 Kamara referred to today, but Your Lordship, the Trial Chamber
8 found that the mere presence of the Accused at this meeting
9 enough was not sufficient to show that he aided and abetted or he
10 planned and that this was not the only inference that could be
11 drawn from the circumstances. So in all the meetings that he
12 attended in some of them -- you know, he did not even know the
13 agenda of the meetings. So multiple inference could be drawn
14 that is why the Chamber held that it was not proven. And Your
15 Lordship, the presence of Fofana with Norman and Nallo in which
16 the attacks on Koribondu and Bo were further discussed as well as
17 the finding of Trial Chamber that Nalo initially did the
18 Koribondu attack and then submitted the plan to Fofana. Your
19 Lordship, as regards this particular situation and circumstance,
20 it fell flat on it's face in the light of factual findings to the
21 effect that plan B -- the plans that were carried out by Nallo
22 and Fofana did not involve the killing of civilians, the raping
23 of women and the looting and burning of property. Furthermore,
24 the Trial Chamber also found that from this circumstance it was
25 not only the guilt of the Accused person that could be drawn from
26 this -- from the circumstantial evidence. And then the other one
27 was the -- the -- that Fofana was not the key component of the
28 leadership structure and was part of the Holy trinity. And we
29 showed in our arguments, Your Lordship, that being a member of

1 the key components doesn't say much because we knew that his
2 powers of taking decision was very limited. And then -- the fact
3 -- you are to be on the leadership structure, doesn't mean that
4 you know of the offence to be committed and that you also took
5 part in them, especially the planning instigation etcetera. But
6 at the end of the day, the Trial Chamber held that one inference
7 could not be drawn for all the circumstances. So we are
8 submitting, Your Lordship, that for all the offences under this
9 III and IV the reason why the Trial Chamber held and rightly held
10 was that more than one inference could be drawn from all these
11 circumstances. And we submit therefore that the Prosecution had
12 failed to prove the offences beyond a reasonable doubt.

13 JUDGE AYoola: Can you suggest any other inference that can
14 be drawn from these findings because the -- the Prosecutor says
15 that it's unreasonable -- it's an unreasonable conclusion having
16 regards to the findings that have been made to say that those
17 findings did not point to only one conclusion and that that
18 conclusion leads to participation in the crime.

19 MR CARROL: Yes.

20 JUDGE AYoola: Now, unfortunately the Trial Chamber did not
21 elaborate by stating reasons. But you are now submitting that
22 there are other reasonable inferences. What are those reasonable
23 inferences.

24 MR CARROL: Yes, Your Lordship, as regards the meetings for
25 example, the inference can be drawn that Fofana was present but
26 did not contribute anything in the meetings. And this particular
27 inference is more supportive of the evidence because we've seen
28 that like -- in the meeting he had with Nallo. The meeting was
29 meant for Nallo, Nallo spoke and they gave him instructions and

1 he was not even given instructions he didn't say anything. So
2 the inference that can be drawn which is more possible is that --
3 he can be at the meeting without contributing or taking part in
4 the planning or taking part in the decisions. As Your Lordship
5 pleases. Your Lordship, I now want to move to Ground V Your
6 Lordship, acquittal of Fofana of enlisting of their children into
7 the armed forces or groups active use in hostilities. The
8 Prosecution submits that the Trial Chamber erred in law and in
9 fact in acquitting Fofana on Count VIII namely mainly enlistment
10 of children in to armed forces. The Prosecution further submits,
11 that on the findings of the Trial Chamber and evidence accepted
12 the only conclusion open to any reasonable trier of fact, is that
13 Fofana is individually responsible under Article 6.1 of the
14 Statute for aiding and abetting the enlistment of underage
15 children into armed forces or groups and their active use to
16 participate actively in hostilities. The Prosecution does not
17 however dispute the factual findings of the Trial Chamber, in
18 reply that the Trial Chamber found that the evidence adduced has
19 not proved beyond reasonable doubt that Fofana planned ordered
20 and or committed the crime of enlisting child soldiers into an
21 armed group or using them to participate in hostilities. Again
22 Your Lordship as regards this particular offence there was no
23 direct evidence. There was no direct evidence to the effect to
24 prove beyond reasonable doubt that the Accused person aided and
25 abetted the enlistment or the use of children. So again, the
26 Prosecution sought to rely on so many circumstantial evidence and
27 we submit and we have argued this extensively in our appeal brief
28 showing that in all the circumstantial evidence that they've
29 sought to rely on each of them led to more than one inference or

1 -- exclusively to the guilt of the Accused person. So we will
2 rely entirely on -- on -- on submissions to that effect. And we
3 submit finally that the Prosecution had failed again in that
4 situation to show that Fofana was involved -- was culpable of
5 aiding and abetting the enlistment and the use of children in
6 hostilities. I now move to Ground VI. Sorry, yes, Your
7 Lordship.

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

20 MR CARROL: The legal situation, My Lord would tilt to a
21 self-defense.

22 JUDGE KING: Vis-a-vis the offence itself.

23 MR CARROL: Exactly.

24 JUDGE KING: Would they be liable under the recruitment of
25 the child soldiers, or not?

26 MR CARROL: No, they wouldn't be liable under those
27 circumstances.

28 JUDGE KING: [Indiscernible] if I remember rightly I think
29 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 JUDGE KING: You are right. But it is.

5 MR CARROL: Yes, Your Lordship Ground VI on the indictment
6 charges the Accused with acts of terrorism as a serious violation
7 of Common Article III and of Additional Protocol II pursuant to
8 Article III (d) of the Statute. This Count relates to the
9 Accused alleged responsibility for crimes charged in Counts one
10 through five. Including threats to kill, destroy property and to
11 loot, as part of a campaign to terrorize the civilian population
12 in those areas. The prohibition against acts of terrorism is
13 found in Article 3(d) of the Statute, and it is taken from
14 Article 4(d) of the Additional Protocol II which prohibit acts of
15 terrorism as a violation of "the fundamental guarantees" of
16 humane treatment under the Additional Protocol. This prohibition
17 is in turn based -- I'm sorry, My Lord, on Article 33 of the
18 Fourth Geneva Convention which prohibited "all measures of
19 intimidation of terrorism" against protected persons. The actus
20 reus and Mens rea of Terrorism were clearly down in the Galic
21 case of the ICTY. That is in paragraphs 87-90. The actus reus
22 of terrorism consists of doing acts or threats of violence
23 directed against persons or property or that the Accused acted in
24 the reasonable knowledge that these acts would occur, and the
25 mens rea of terrorism is that such acts of threats or violence
26 are committed with the primary purpose or intent to spread terror
27 amongst persons. Your Lordship, as regards to this particular
28 Ground again there was no direct evidence. The Prosecution gave
29 a lot of circumstantial evidence which sought to show that --

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

10 JUDGE KING: What are you saying. What are you saying
11 about the circumstantial evidence. Do you repeat what you've
12 said. You need not go on.

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

15 JUDGE KING: That's it you could go to your next Ground.

16 MR CARROL: As Your Lordship pleases. Okay. Yes, Your
17 Lordship, the next -- in the next two Grounds, Grounds eight and
18 IX the Prosecution has said that they are not seeking any
19 remedies on these Grounds but I shall go through them briefly in
20 summary manner. The contention of the Prosecution in this Ground
21 is that the Trial Chamber erred in law fact and of procedure in
22 dismissing the Prosecution's Motion of 9 February 2004, for leave
23 to amend the Indictment in order to add IV new Counts on sexual
24 violations, including rape, sexual offences etc. On 20 May 2004,
25 the Chamber dismissed the said motion, by the Prosecution of 9th
26 February inter alia on the following Grounds. That it was tardy,
27 with due regard to the temporal jurisdiction of the Special
28 Court. To which the Prosecution sought to bring first charges
29 two years after investigations had commenced and that the trial

1 date was imminent. Granting the application at this stage would
2 prejudice the rights and interests of the Accused person and
3 secondly, that the if they grant the application at this stage,
4 will also amount to the abuse of process, it will bring the
5 administration of justice into disrepute. The Prosecution
6 contended that it can move a motion because any time, at any time
7 in the cause of trial for an amendment. Well, that is correct.
8 But then the Trial Chamber has a discretion to refuse such an
9 application if it tardy, is found that it will cause injustice,
10 and all these factors that are outlined here, and that is exactly
11 what happened in this situation. Exactly, that. And so we
12 submit that the Trial Chamber was right in refusing to allow an
13 amendment at that stage of the proceedings. And the -- in Ground
14 IX this preclusion of unlawful conduct of a sexual nature under
15 this Ground the Prosecution contended that the Trial Chamber
16 erred in law, fact and /or procedure in forbidding the
17 Prosecution from leading, eliciting and adducing evidence of
18 sexual violence even though such evidence was relevant to
19 material issues in the case including evidence in support of
20 other charges of criminal conduct, against the mind, body which
21 concerns Count III etcetera. We are submitting that the Trial
22 Chamber was right to preclude the -- preclude the evidence of
23 unlawful conduct of sexual offences because one it would -- it
24 would bring in the 4 sexual offence that were rejected at the
25 trial to the back door. Secondly, if as the Prosecution
26 contended these crimes are already -- already inherent in the --
27 in the general crimes then there was no need for an amendment.
28 If you -- if the -- if the four new offences are encapsulated in
29 the global offences of war crimes or violence, life, health,

1 etcetera. If this is so, the Prosecution should not have sought
2 a corrigendum.

3 JUDGE KING: Okay.

4 MR CARROL: Your Lordship, the third reason for the
5 preclusion of such evidence is that they also violate the right
6 of the Accused person to a fair trial because it would cause
7 undue delay it would contrary to the doctrine of fundamental
8 fairness, and respect for judicial decision, because if it is
9 granted, it would be as if the Trial Chamber is in entirety
10 overturning its decision. And respect for that judicial decision
11 prohibits that, and then the Prosecution showed to argue that
12 even when you have a defective indictment --

13 JUDGE KING: Go on.

14 MR CARROL: That even where you have a defective
15 indictment, if you have further information however it can cure
16 this defective indictment. And it then sought to give examples
17 from the ICTY and the ICTR cases but in these particular -- in
18 these particular Courts, they have what they call a concise
19 statement of facts that goes with the indictment, and this --
20 contains particulars, you can cure a defect. But in this Court
21 there is no circumstantial fact. And furthermore, we are saying
22 that, I think it's Article 47 Article 47 -- 47 of the -- of this
23 statute Your Lords, sorry. It spells out what is needed in an
24 indictment. Particulars of place, time, circumstance of
25 commission etcetera. And we are saying Your Lordship, that the
26 pre-trial briefs that they wanted to rely on, do not concede --
27 the pre-trial briefs that they sought to rely on were very vague.
28 They only said that, you know, like their daughters were taken
29 and their wives but they give no particulars of names, addresses,

1 time, place commission so we submit, Your Lordship, that
2 pre-trial brief could not cure that defect. We therefore submit
3 finally, Your Lordship, that the Trial Chamber was right to
4 [indiscernible] evidence as Your Lordship please. I am most
5 available for any further questions, Your Lordship.

6 JUDGE KING: I think this is a convenient stage -- I want
7 to thank you very much Mr Bola-Carrol for your assistance. I
8 think this is a convenient stage to take a five or ten minutes
9 adjournment.

10 MR CARROL: As Your Lordship pleases.

11 MR GEORGE: Court rise.

12 JUDGE KING: Well, I think Mr Bola Carrol, you've finished
13 your submissions.

14 MR CARROL: That is so My Lord.

15 JUDGE KING: It's 4 o'clock now, I think one hour is
16 assigned to Kondewa. So you can start now and we'll give you an
17 hour to finish up. So we can finish that assignment today. So
18 that the target is that we can complete everything by tomorrow.

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

1 satisfied in this case. Specifically, the Prosecution argues
2 that the Trial Chamber erred in concluding that the evidence
3 adduced does not prove beyond reasonable doubt that the civilian
4 population was the primary object of the attack and as a result
5 of the third of the chapeau elements of crimes against humanity
6 was not satisfied.

7 MR WILLIAMS: Firstly, that the Trial Chamber applied the
8 correct legal standard in concluding that the attack was not
9 directed against any civilian population, as the civilian
10 population was not the primary object of the attack. Therefore
11 that the third chapeau element of the crimes were not satisfied
12 under crimes against humanity. Secondly My Lords, that the
13 evidence does not demonstrate a pattern of victimization of
14 civilians. And thirdly, that the Prosecution misconstrued the
15 legal concept of crimes against humanity. My Lords, the Trial
16 Chamber concluded that the evidence did not prove beyond
17 reasonable doubt, that the civilian population was the primary
18 object of the attack, the Trial Chamber further found in
19 Paragraph 693 that there was evidence that the attacks were
20 directed against rebels or juntas. Based on the Trial Chamber's
21 finding, the Prosecution states that it is apparent that the
22 Trial Chamber considered as a matter of law that an attack would
23 not be one that is directed against a civilian, population, if
24 civilians are attacked in the course of attacks directed against
25 opposing forces. The Prosecution submits based on the reasoning
26 of the Kunarac Appeal Judgment which the Trial Chamber relied on,
27 that the civilian population must be the primary not the
28 incidental target of an attack. Counsel concurs that this is the
29 correct legal standard for determining that the third chapeau

1 element and agrees with the Prosecution that the question is not
2 whether attacks against civilians coincided against military
3 target. The question was whether the civilian population was the
4 primary -- the question is whether the civilian population was
5 the primary target of the attack. The Prosecution also submits
6 that the Trial Chamber erred in failing to consider whether there
7 were additionally, simultaneously or subsequently, attacks
8 directed against the civilian population. Counsel submits that
9 the Trial Chamber did not...

10 JUDGE KING: When you say counsel submits, can you tell me.

11 MR WILLIAMS: I take the queue, My Lord. I submit that the
12 Trial Chamber did consider whether the attacks were directed
13 against the civilian population and correctly concluded in
14 Paragraph 693 of its judgment, that evidence adduced does not
15 prove beyond reasonable doubt that the civilian population was
16 the primary object of the attack. In reaching its finding the
17 Trial Chamber also stated at Paragraph 693 of its judgment that,
18 My Lords. "The Trial Chamber recalls the admission of the
19 Prosecutor that the CDF and the Kamajors fought for the
20 restoration of democracy". The Trial Chamber also refers to
21 statements of Prosecution witnesses and Defence witnesses to this
22 same effect. Counsel also draws your attention to
23 Paragraph eighteen of the Prosecution pre-trial brief where the
24 Prosecution itself stated that the CDF gained momentum in an
25 attempt to defend the civilian population and restore the
26 legitimate and democratic government. Colonel Iron, the military
27 expert called by the Prosecution, when he testified on the 14
28 June 2005, at page 34 line 5 of the trial transcript said that,
29 in, "all CDF operations as far as I can see, appear to have been

1 driven by the central strategic idea of the CDF. Which was to
2 defend their homelands". My Lord, all CDF operations as far as I
3 can, see, appear to have been driven by the central strategic
4 idea of the CDF which was to defend their homelands. My Lord, I
5 submit that the Prosecution is therefore incorrect to suggest
6 that the Trial Chamber erred in finding that the CDF fought for
7 the restoration of democracy was a material consideration for the
8 determination of the existence of crimes against humanitarian.
9 The Defence submits that the Trial Chamber correctly made
10 reference to the objective of the CDF in making its legal
11 finding. It is submitted that in this instance, the statement of
12 the Prosecutor a number of Prosecution witnesses and others, that
13 the aim and objective of the CDF and the Kamajors was the
14 restoration of democracy are evidently relevant to establishing
15 that the civilian population was not a specific target of
16 attacks. Further, not one Prosecution witness articulated or
17 identified any CDF policy or objective of attacking the civilian
18 population, nor is it clear how the Prosecutor can reconcile
19 further evidence from its own witnesses of the CDF warning
20 civilians of attacks. Evidence that those warnings had been
21 effective and evidence that Kamajors were often instructed
22 specifically to be careful of the civilians with their argument
23 that the only conclusion open to any reasonable trier of fact, is
24 that attacks committed by the CDF forces were specifically
25 intended to target the civilian population. My Lord it is
26 submitted that the statement in the Kunarac Appeal Judgment, to
27 the effect that the civilian population must be the primary
28 object of the attack and other similar statements in other
29 judgment must be read in context. For these reasons it is

1 submitted that the Trial Chamber applied the correct legal
2 reasoning in assessing the evidence, in concluding that the
3 evidence did not demonstrate beyond reasonable doubt that the
4 civilian population was the primary target of attack, the Trial
5 Chamber did not as the Prosecution argues erroneously interpret
6 the law as meaning that an attack targeting an opposing force
7 negates the possibility of the finding -- of finding a concurrent
8 or subsequent target attack against the civilian population. The
9 Trial Chamber simply found that the evidence did not demonstrate
10 beyond a reasonable doubt that the civilian population was the
11 primary target of the attack.

12 JUDGE KING: I think the Prosecution this morning submitted
13 that where it is clear that there was a deliberate attack on the
14 civilian population, then according to the Prosecution that is a
15 crime against humanity. What is your response to that?

16 MR WILLIAMS: My Lord that is a mis statement of the law My
17 Lord. It's -- tantamount to war crimes, My Lords, but not crimes
18 against humanity. The Trial Chamber actually found the Accused
19 persons guilty of war crimes but not crimes against humanity --

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

24 MR WILLIAMS: My Lord my understanding of the law is that,
25 the civilian population must be the primary target of the attack
26 which was not the case -- which was not the case in the CDF
27 trial. Not the primary -- I've mentioned what Colonel Iron said,
28 the strategic goal of the CDF was to defend their homelands My
29 Lord. So it could not have been the case that the primary target

1 of the CDF was the civilian population.

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

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

14 JUDGE AYoola: You mean a legitimate army, an army fighting
15 for the nation cannot direct its attack to a civilian population.

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

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

22 MR WILLIAMS: Because it is an element that ought to be
23 proven and we're saying that the Prosecution did not discharge
24 that burden. They did not discharge that burden.

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

28 MR WILLIAMS: That the purpose is.

29 JUDGE KING: Of the attack.

1 MR WILLIAMS: On the civilian population?

2 Judge KING: Yes.

3 MR WILLIAMS: My Lord --

4 JUDGE KING: In other words for instance, if the purpose
5 was to restore the legitimate government, that is irrelevant.
6 According to their submissions, I hope you got you right, Mr
7 Staker.

8 MR STAKER: Yes, that is correct, Your Honour we --

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

11 MR WILLIAMS: That I disagree, My Lord.

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

13 MR WILLIAMS: Sorry, My Lord?

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

15 MR WILLIAMS: My Lord because the -- the motivation there
16 would be fundamentally different, My Lord. I mean the motive
17 would -- if you're seeking to eliminate the civilian population
18 is different from the motive in seeking to restore democracy.
19 How can you restore democracy by killing all the citizens, My
20 Lord.

21 JUDGE KING: I don't understand you. Because you see what
22 he was trying to say that under the International Humanitarian
23 law the purpose of an attack on the civilian population is
24 irrelevant. What they're concerned with is whether or not there
25 was a deliberate attack on the civilian population. That is the
26 response I want you to give to those submissions.

27 MR WILLIAMS: I didn't quite get the question, I'm sorry,
28 My Lord.

29 JUDGE KING: It was submitted this morning, that where

1 there is a deliberate attack on the civilian, population, that is
2 a crime against humanity and the Prosecution went on to submit
3 that the purpose of such an attack is irrelevant for the purposes
4 of International Humanitarian Law that is correct?

5 MR STAKER: That is correct. If the civilian population is
6 attacked as a Population, then the reason for it is irrelevant
7 whether it's to win the war, whether it's to crush resistance,
8 whether it is to inflict suffering.

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

11 MR WILLIAMS: I agree with the proposition, My Lord.

12 JUDGE KING: You agree. All right. Thank you.

13 MR WILLIAMS: Yes.

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

15 MR WILLIAMS: Sorry, My Lord?

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

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

21 JUDGE KING: So I understand you to be saying in fact,
22 there was no deliberate attack on the civilian population by your
23 client?

24 MR WILLIAMS: Correct, My Lord.

25 JUDGE KING: All right.

26 MR WILLIAMS: But counsel submits that the evidence as
27 presented by the Prosecution --

28 JUDGE AYoola: I have some difficulty with this question of
29 whether it was deliberate or not. We are not talking of a

1 situation in which sophisticated weaponry was used, and you can
2 talk of the fall out from a bombing raid, or an area raid or
3 things like that. We are talking of hand to hand combat. How
4 can we be talking of incidental attack in such situation?

5 MR WILLIAMS: My Lord it was incidental in the sense that
6 in all the crime basis My Lord that the CDF attacked, the primary
7 objective was to get rid of the AFRC/RUF troops, My Lord. And I
8 believe my learned friend the Deputy Prosecutor made use of the
9 word collateral this morning, My Lords. That the deaths or
10 offences are crimes that were committed against the civilian
11 population or the -- the -- against civilians collaborators and
12 sympathizers were collateral -- in other words. That is our
13 submission that it was not the direct or primary aim of -- of the
14 -- of primary target of the CDF forces. Counsel submitted the
15 evidence as presented by the Prosecution -- sorry, My Lord.

16 JUDGE KING: Which counsel.

17 MR WILLIAMS: I submit, My Lords.

18 JUDGE KING: Exactly. Dont forget that. Always I. First
19 person please. Otherwise I might think you're talking about the
20 Prosecution.

21 MR WILLIAMS: I agree, My Lord.

22 JUDGE KING: Very well.

23 MR WILLIAMS: I submit that the evidence as presented by
24 the Prosecution and as accepted by the Trial Chamber demonstrate
25 the reason for each of the attacks as accepted by the Trial
26 Chamber was the presence of rebels and junta. The Prosecution
27 itself presented evidence for each of the crime bases which
28 demonstrated that the main reason why the CDF attacked those
29 towns in Sierra Leone was because they were held by the rebels

1 and junta and suspected collaborators. The Prosecution did not
2 present any evidence to suggest that the CDF attacked those towns
3 because the civilian population was also the object of the
4 attack. My Lord I agree that civilians were deliberately and
5 directly attacked as the Prosecution suggests. There were
6 evidence of CDF targeting perceived RUF and junta collaborators,
7 and a number of killings that the Prosecution inflate into a
8 pattern of victimization. The Trial Chamber expressly affirmed
9 in paragraph 47 that the crimes were committed against unarmed
10 civilian solely on the basis that they were unjustifiably
11 perceived as and branded as rebel collaborators.

12 JUDGE KING: Paragraph 47 of what.

13 Mr Williams: Of the Trial Chamber judgment, My Lord.

14 JUDGE KING: Thank you.

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

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

6 Q. "And even though it was a very serious and fierce war,
7 you the Kamajors had rules of engagement. In other words
8 you had a code of conduct to go by, 'Yes'. His answer
9 was 'yes' there 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
12 would agree with me. The witness answered yes, sir. Yes.
13 The law said that."

14 JUDGE AY00LA: Sorry, whose evidence is that?

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

16 JUDGE AY00LA: TF2-190. Prosecution witness?

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

19 JUDGE AY00LA: 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 its code of conduct, cannot be said to
24 have the civilian population as the primary object of its
25 attacks. My Lords, the Prosecution also adduced evidence that
26 Kondewa intervened on behalf of the civilians that saved their
27 lives and their families lives during the war. Which we say are
28 incongruent to the assertion, that Kondewa should be held
29 guilty for crimes against humanity. My Lords, evidence was

1 adduced by the Prosecution that Mr Kondewa saved the lives of
2 individuals even those who were known to be collaborators with
3 the rebels. Sorry, My Lord.

4 JUDGE KING: Specify -- sorry, my microphone. Specify the
5 evidence that you refer to.

6 MR WILLIAMS: The evidence of Father Garrick, My Lord.
7 That Kondewa travelled from --

8 JUDGE KING: That Kondewa saved the lives of --

9 MR WILLIAMS: Civilians, My Lord.

10 JUDGE KING: Well, identify the evidence.

11 MR WILLIAMS: My Lord I refer to the transcript of Reverend
12 father Garrick, John Garrick. Prosecution witness My Lord. It
13 was unprotected. 11 November 2004 at page 24.

14 JUDGE KING: 2004 at page 24. Could you read the relevant
15 page what? 24?

16 MR WILLIAMS: Yes.

17 JUDGE KING: Could you read it please, so that we can hear
18 it.

19 MR WILLIAMS: Page 24, My Lords. The message was sent to
20 Mr Kondewa that chief Dokwe Koroma was being harassed. The
21 Kamajors were asking the witness, that is Father Garrick to
22 release him to them. Mr Kondewa dispatched two delegations from
23 Talia to Bonthe to investigate the issue of Lahai Dokwe Koroma.
24 Mr Kondewa personally travelled to Bonthe, to Bonthe and removed
25 --Lahai Dokwe Koroma, his IV children and his son out of safety,
26 My Lord. Sorry, My Lord? No. I paraphrased the evidence, My
27 Lord.

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

29 Mr williams: No, I don't, My Lord. My Lord it is the

1 Prosecution's contention that the attacks were deliberately
2 directed against the civilian population in view of the
3 instructions, directions and incitement which the Kamajor leaders
4 explicitly gave to the Kamajor prior to these attacks against
5 civilians. My Lord I submit that this evidence only points to at
6 most evidence of instruction about particular suspected
7 individual collaborators rebels and juntas. This evidence
8 enforces my submission that at most only rebel -- only rebels
9 juntas and collaborators were targeted not the civilian
10 population. I therefore submit that the evidence of the
11 collaborators being targeted and of random Kamajors committing
12 crimes does not provide either the type of evidence nor the scale
13 of evidence required to demonstrate that a civilian population
14 was indeed the primary target of CDF attacks. Counsel, I submit
15 that in attempting to argue that the alleged crimes of the CDF
16 and the Accused fall within the parameters of crimes against
17 humanity. The Prosecution has significantly misconstrued the
18 legal conceptualization of crimes against humanity. My Lords, a
19 review of the case law from the ICTY and ICTR is relevant to
20 demonstrating that a -- that for a civilian population to be
21 targeted to establish crimes against humanity it must be shown
22 that civilians are targeted because of some distinguishable
23 characters of a civilian population. The law of on the ICTY
24 centres around conflicts that were essentially ethnic in nature
25 and a civilian population was targeted solely because of the
26 distinguishing characteristics of ethnicity. For example, crimes
27 committed in Kosovo were part of a deliberate and widespread
28 campaign of violence directed at Kosovo Albanians. Sorry,
29 Kosovo, Albanians, civilians and included the murder of hundreds

1 of civilians, destruction and looting of property and the
2 forcible transfer and deportation of 800000 Kosovo Albanians.
3 Crimes in Croatia relate to the objective of Serbia to remove the
4 majority of the -- and other non ser population from
5 approximately one third of the territory of the republic of
6 Croatia. As part of the campaign against non Serb hundreds were
7 murdered thousands imprisoned and tortured in detention centres
8 and homes and cultural monuments destroyed. Crimes committed in
9 Bosnia and Esse Govina relates to the forcible removal of Bosnian
10 Muslims and Bosnian cohorts from large areas of the territory.
11 This was accomplished to widespread killings detentions possible
12 deportation plunder and destruction of property. For example, in
13 the Kunarac Appeal Judgment when the Serbians attacked civilians
14 they did so because of an individual characteristics of a
15 civilian that is ethnicity. Attacks were clearly directed at the
16 civilian population, muslim houses were burnt. All signs of
17 Muslim culture systematically destroyed. Muslims were held in
18 detention for months and Muslim women were detained and subjected
19 to systematic rape. The Chamber is referred to the Kunarac
20 Judgments paragraphs 573 to 575. Clearly in the context of that
21 conflict individual civilians were targeted solely because they
22 were muslims. In the ICTR, My Lords, the factual base is hinged
23 on the extermination and genocide of one group of civilians. The
24 Tutsi and the majority of those civilians killed were killed
25 because they where are Tutsis. Clearly, a civilian population
26 distinguishable because they were Tutsi was targeted. In the
27 particular circumstances of this case under review by this
28 Chamber, civilians were attacked because they were rightly or
29 wrongly suspected of being rebels juntas or collaborators

1 therefore the attacks were directed at destroying military groups
2 and individuals associated with those groups not because they
3 were a part of the civilian population. In concluding my
4 arguments on Ground 1, I submit that the Prosecution in
5 attempting to argue that the attacks by the CDF were targeted at
6 the civilian population as mischaracterized the entire essence of
7 crimes against humanity and because of these the Chamber is
8 implored to dismiss the said Ground. Lord I would argue Grounds
9 III and IV together. In its third and fourth Grounds.

10 JUDGE AY00LA: Sorry, before you go further, if you go
11 further in your last proposition then that makes the principle
12 that when you lie your weapon of warfare let's talk of using
13 Bombs you should be careful that civilian population will not be
14 affected.

15 MR WILLIAMS: I'm grateful, My Lords.

16 JUDGE AY00LA: Yes, but in that situation you are not
17 talking of ethnicity you're talking of civilian population
18 generally not determined by whatever group they belong to.

19 MR WILLIAMS: My Lord I believe the -- the difference here
20 is in discriminate killing of civilians as opposed to in this
21 particular case -- I mean the -- the -- the distinguishing factor
22 between the CDF case and the ones I've referred to My Lord is
23 that in those cases they were in discriminate killing of
24 civilians because those people are either Muslims Tutsi's or
25 Serbs My Lord which is quite different in this case. My Lord in
26 this case they did not go about killing each and every civilian
27 that came across. The target -- the crimes that were perpetrated
28 against civilians were limited very limited to a distinguishable
29 part of the civilian population.

1 JUDGE AYoola: In this case.

2 MR WILLIAMS: Yes, in the CDF case, My Lord. You were a
3 rebel collaborator, you were found with combatant fatigues you
4 were found with military ID cards they were told that you are you
5 -- a rebel was living in your compound this is completely
6 different whilst for in the Bosnia situation muslims were chased
7 all about the place irrespective of your association or what you
8 believe in, My Lord.

9 JUDGE AYoola: Of course, we don't have these facts in the
10 judgment.

11 MR WILLIAMS: In which judgment, My Lord. My Lord we do, I
12 referred Your Lordship to a bit of the Trial Chamber judgment.
13 Yes. It's actually detailed in a brief, My Lord why the Trial
14 Chamber held that the -- the civilian population was not the
15 primary target in this case.

16 JUDGE AYoola: Thank you.

17 MR WILLIAMS: Thank you, My Lord.

18 JUDGE KING: This morning also I think it was alleged that
19 Limbas as an ethnic group, were targeted. What did you say to
20 that.

21 MR WILLIAMS: My Lord I -- the -- I think in respect of one
22 particular -- they were targeted because they were -- because
23 they were perceived as junta collaborators My Lord not because
24 they were Limbas, My Lord.

25 JUDGE KING: The submission of the Prosecution was that
26 they were attacked because they were Limbas.

27 MR WILLIAMS: No, My Lord.

28 JUDGE KING: Didn't you hear them this morning, wasn't that
29 the submission.

1 MR STAKER: We concede the argument is that they were
2 attacked or the finding is that they were attacked because they
3 were perceived collaborators that's why everyone was attacked,
4 but the point is there was no evidence that specific individuals
5 were targeted, because specifically that individual was thought
6 to be a collaborator, it was assumed if you were a Limba in that
7 village, you were a collaborator.

8 JUDGE KING: That's the point, I was asking for your
9 response. That's what was said this morning. What do you say to
10 that?

11 MR WILLIAMS: I would love my learned friend to refer to
12 the evidence of the trial evidence My Lord, which I say so, My
13 Lord, my recollection of what the evidence that was adduced was
14 that these individuals were targeted because they were perceived
15 as collaborators.

16 JUDGE AYoola: Look at the finding in paragraph 750, the
17 second finding by the Trial Chamber.

18 MR WILLIAMS: Yes, My Lord.

19 JUDGE AYoola: You say that doesn't represent civilian
20 population.

21 MR WILLIAMS: My Lord that is a contention, My Lord.

22 JUDGE AYoola: A contention, a finding of fact, how can
23 that be a contention.

24 MR WILLIAMS: My Lord, I mean, My Lord, based on the Trial
25 Chamber the finding of the Trial Chamber itself, My Lord, they
26 held that the evidence did not disclose that the -- there was
27 crimes against humanity were perpetrated My Lord.

28 JUDGE AYoola: That's the entire basis of the Prosecution's
29 case the way I understand it the Prosecution proceeds on the

1 footing that, taking these findings of fact as given the
2 conclusion is unreasonable.

3 MR WILLIAMS: My Lord --

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

7 MR WILLIAMS: Sorry, My Lord.

8 JUDGE KING: Seven, five, zero. 750, small two, in early
9 January 1998, 150 Loko, Limba and Temne tribe members were
10 separated from members of other tribes and were killed in Talama.
11 That's a factual finding isn't it.

12 MR WILLIAMS: Yes, it is, My Lord.

13 JUDGE KING: That's what the Prosecution was saying this
14 morning.

15 MR WILLIAMS: Yes, My Lord.

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

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

20 JUDGE AYoola: What number amounts to extensive because the
21 Trial Chamber did find that it was widespread. What else are you
22 looking for in terms of extensiveness and if you look at the --
23 at paragraph 750 starting from small III to small six on a single
24 day you have attacks on civilians. In a single day 14 January
25 1998, that was the finding of the Trial Chamber.

26 MR WILLIAMS: My Lord, in respect of the finding on 750 of
27 the -- IV, My Lord, was because those two individuals were
28 considered to be collaborators.

29 JUDGE KING: Let's go on again to the same paragraph

1 paragraph 750 small 13, I think it is. Shortly after the third
2 attack on Tongo a group of 65 civilians was separated into two
3 lines in Kamboma. The Kamajors shot the first 57 people and
4 rolled the bodies into a swamp behind a house. The last eight
5 people were hacked in the neck with machetes and rolled into the
6 swamp with the other bodies. Only one man survived. What's your
7 response to that factual finding.

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

10 JUDGE AYoola: Why do you say that.

11 MR WILLIAMS: Because the primary, the element an essential
12 element was not proven My Lord, that the civilian population was
13 the primary target, My Lord.

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

21 MR WILLIAMS: My Lord, I didn't get the question, My Lord.

22 JUDGE AYoola: Looking at the circumstantial evidence you
23 have the findings of the events the killings on fourteenth
24 January 1998 you also find the finding of fact in regard to
25 killings in fifteenth January 1998 when you take those events
26 cumulatively, how can you suggest that the -- it's not the only
27 inference. You have to satisfy us that it is an unreasonable
28 inference to say that that was really an attack on civilian
29 population. The Trial Chamber itself described those people who

1 were killed as civilians and they were killed in large numbers
2 within a space of two days in several locations within the same
3 place.

4 MR WILLIAMS: My Lord, I would more or less -- I would
5 basically rely on other pieces of evidence My Lord, which that
6 were at adduced, My Lord. I mean pointing to the fact that the
7 CDF had as it's goal My Lord, the protection of the civilian
8 population and the -- none of the Prosecution witnesses My Lord,
9 articulated an -- an objective which points to the CDF having as
10 it's primary target the elimination of the civilian population.

11 JUDGE KING: You see, I have referred you to paragraph 70
12 (ii) and (xiii).

13 MR WILLIAMS: Yes.

14 JUDGE KING: You know about the Temnes the Lokos and so on
15 being separated, and that this one again in Tongo where everybody
16 was killed except one. Those were actual findings of facts by
17 the Trial Chamber. Now, you are not disputing those findings of
18 facts, are you?

19 MR WILLIAMS: No, no, My Lord.

20 JUDGE KING: What's your response then.

21 MR WILLIAMS: My Lord, that these individuals were killed
22 because -- not because they were civilians, My Lord, but because
23 they were perceived as collaborators, My Lord.

24 JUDGE KING: Excuse me, was your client a party to these
25 killings, isn't that your primary stand, to tell us whether or
26 not your client was privy to these killings. Isn't that the
27 fundamental submission that you have to concentrate on.

28 MR WILLIAMS: Yes, My Lord.

29 JUDGE KING: Well, why haven't you done so.

1 MR WILLIAMS: My Lord, the -- My Lord, I was -- it was not
2 -- the Prosecution is not arguing that he should be found guilty
3 under 6.1, My Lord. That the contention is that he was involved
4 in the planning of those attacks. Sorry, he was involved as a
5 superior My Lord, and we have addressed the issue of subordinate
6 superior relationship between Kondewa and the Kamajors lengthily
7 in our brief and -- -

8 JUDGE KING: I'm not asking you about brief, I'm asking you
9 to comment as it stands now.

10 MR WILLIAMS: Yes, My Lord.

11 JUDGE KING: What is your reaction to that and having
12 regard to the submissions made by the Prosecution this morning,
13 and just a minute and the actual findings of fact relevant to the
14 submissions made by the Prosecution this morning vis-a-vis your
15 client Kondewa.

16 MR WILLIAMS: My Lord, we would submit, My Lord, that he
17 was not involved.

18 JUDGE KING: Well, exactly. It's as simple as that, I
19 mean, I just want to hear your views on that.

20 MR WILLIAMS: As My Lord pleases.

21 JUDGE KING: I mean, don't just gloss over these things, I
22 mean, you are defending and you are appealing on behalf of your
23 client. And you make those submissions which you think are in
24 his favor and in defence of him.

25 MR WILLIAMS: As My Lord pleases.

26 JUDGE KING: Go on. What is your submission then.

27 MR WILLIAMS: My Lord, that Mr Kondewa in relation to the
28 killings at Tongo, My Lord, I submit that Kondewa was not
29 involved in any way in those killings, not directly -- neither

1 directly nor indirectly, My Lord.

2 JUDGE KING: Thank you.

3 JUDGE AYoola: Would that be -- you are still on Ground one
4 are you.

5 MR WILLIAMS: No. No, I've moved to --

6 JUDGE AYoola: Oh, you've moved.

7 MR WILLIAMS: Yes, My Lord, in this, in its third and
8 fourth Grounds of appeal, the Prosecution request that the
9 Chamber revise the Trial Chamber's finding and find firstly that
10 Kondewa is individually responsible under Article 6.1 of the
11 Statute for instigating all of the crimes which the Trial Chamber
12 found were committed during the second and third attacks on
13 Tongo. And secondly that Kondewa is individually responsible
14 under Article 6.1 of the Statute for aiding and abetting in the
15 planning, preparation or execution of all the crimes which the
16 Trial Chamber found were committed during the attacks on
17 Koribondu, Bo and Kenema. On the Tongo crime base, I submit that
18 the evidence fails to establish beyond reasonable doubt that
19 Kondewa is individually responsible under Article 6.1 of the
20 Statute. For instigating all of the crimes committed in Tongo.
21 This is because one, a causal relationship between the alleged
22 instigation and the physical perpetration of the crimes.

23 JUDGE KING: You said just now --

24 MR WILLIAMS: Yes, My Lord, sorry, My Lord.

25 JUDGE KING: You said just now that Kondewa was not
26 responsible for instigating.

27 MR WILLIAMS: Yes, My Lord.

28 JUDGE KING: Are you saying he instigated.

29 MR WILLIAMS: No, My Lord, that is what the Prosecution is

1 saying.

2 JUDGE KING: I'm asking you what you are saying?

3 MR WILLIAMS: My Lord, we are saying, he did not, My Lord.

4 JUDGE KING: Oh, very well.

5 MR WILLIAMS: My Lord, this is because one: A causal
6 relationship between the alleged instigation and the physical
7 perpetration of the crimes as is required to satisfy the actus
8 reus element has not been established, and two, Kondewa's actions
9 do not meet the standard of having direct and substantial
10 contribution to satisfy the actus reus element required for
11 individual responsibility for instigating. I submit that the
12 elements of instigating as found by the Trial Chamber in its
13 judgment are the correct elements. Counsel s, I submit that for
14 instigating a key element of proof is demonstrating a casual
15 relationship between the instigation and the perpetration of the
16 crime. Instigating means prompting another person to commit an
17 offence. The Chamber is referred to Akayesu Judgment
18 Paragraph 482, Blaskic Trial Judgment Paragraph 280. I submit
19 that there is no evidentiary proof of a casual connection between
20 the actions of Kondewa and the crimes perpetrated in the last two
21 attacks on Tongo, and therefore there can be no liability under
22 Article 6.1 of the Statute for instigating. The Prosecution
23 stated or states that the Trial Chambers finding in Paragraph 321
24 of his judgment that at the Passing Out Parade in December 1997,
25 Kondewa made a statement which was "then all the fighters looked
26 at Kondewa admiring him as a man with mystic power, and he gave
27 the last comment saying a rebel is a rebel, surrendered or not
28 surrendered, they are all rebels. The time for their surrender
29 has long since been exhausted, so we don't need any surrendered

1 rebel. He then said, I give you my blessings, go, boys go". The
2 Prosecution is contending that this statement amounted to
3 instigating those crimes. I submit that the actus reus for
4 instigation requires a clear contribution by the Accused to the
5 act of the other person. This evidence far from -- far from
6 satisfies this element. There is not an iota of evidence of
7 there being any causal relationship between this one statement by
8 Kondewa and the perpetration of any crime in Tongo. Firstly,
9 there is no evidence to show that any of the Kamajors who were
10 present at the Passing Out Parade were the same Kamajors who were
11 subsequently involved in the Tongo attacks, or the same Kamajors
12 that committed any crime. Secondly, there is no evidence that
13 any Kamajor was prompted to commit any crime on the basis of
14 these ambiguously phrased twenty eight words uttered six weeks
15 before hand. I therefore submit that, in failing to establish
16 any casual relationship between the words spoken by Kondewa and
17 the commission of any crimes in Tongo, the Prosecution has failed
18 to fulfill the first part of the actus reus requirement of that
19 form of individual responsibility.

20 JUDGE KING: Now, you've just read that passage quoting the
21 exact words of your client. Now what interpretation do you give
22 to those words.

23 MR WILLIAMS: My Lord.

24 JUDGE KING: What's the inference to be drawn from those
25 words.

26 MR WILLIAMS: My Lord, that rebels should be killed, My
27 Lord, that rebels should be killed.

28 JUDGE KING: Yes, and is that instigation or not.

29 MR WILLIAMS: My Lord, we are saying that there is no -- no

1 evidence was adduced that these people -- there should be a
2 causal relationship between the instigation and the commission of
3 the crime. Firstly, there is no evidence --

4 JUDGE KING: My question is a simple one, is that an
5 instigation or not.

6 MR WILLIAMS: No, My Lord, it's not.

7 JUDGE KING: Thank you.

8 MR WILLIAMS: My Lord, under Ground IV the Prosecution
9 submits that on the evidence accepted by the Trial Chamber --

10 JUDGE AYoola: Sorry, before you go on, if it's not an
11 instigation, what is it?

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

18 JUDGE AYoola: That you are supposed to kill them --

19 MR WILLIAMS: Yes, I mean --

20 JUDGE AYoola: Whether they surrendered or not.

21 MR WILLIAMS: No, My Lord, I mean, in combat you're suppose
22 to kill them.

23 JUDGE AYoola: But you are not supposed to kill combatants
24 who have surrendered?

25 MR WILLIAMS: No, you're not, My Lord.

26 JUDGE AYoola: But what does this speech say.

27 MR WILLIAMS: My Lord, it says -- My Lord, it's merely
28 defining what a rebel is. That's a mere definition of what a
29 rebel is.

1 JUDGE KING: Read it again for --

2 MR WILLIAMS: It say: A rebel is a rebel.

3 JUDGE KING: Yes.

4 MR WILLIAMS: Surrendered not surrendered there all rebels.

5 JUDGE KING: Yes, and therefore the consequence on the --
6 what should be done then.

7 MR WILLIAMS: My Lord, that -- when you -- when you come by
8 rebel in combat or in hostilities, you kill him.

9 JUDGE KING: Well, exactly, [indiscernible] and then given a
10 reason why that is so, that they were fighting against rebels.

11 MR WILLIAMS: Yes.

12 JUDGE KING: And therefore, the target, the enemy was
13 rebels, not civilians.

14 MR WILLIAMS: Yes.

15 JUDGE KING: That's a perfectly good interpretation.

16 MR WILLIAMS: Legitimate target, My Lord.

17 JUDGE KING: Well, why didn't you say that?

18 MR WILLIAMS: My Lord, I was --

19 JUDGE KING: I was not expecting you to say defining rebel.
20 He is not defining rebel, what he is in fact saying, there is a
21 fight going, on we're fighting the rebels. If they surrender or
22 not surrender they are rebels. In other words, he was
23 instigating them to say these are legitimate targets. These are
24 the people we are fighting. And if you come across them during
25 the fighting, you know what to do.

26 MR WILLIAMS: Yes, My Lord.

27 JUDGE KING: That's the only reasonable interpretation or
28 explanation.

29 MR WILLIAMS: Yes, My Lord.

1 JUDGE AYoola: Why did he say surrender to rebels. Why did
2 he classify them together. Fighting rebels, surrendered rebels.
3 What is the need for the distinction, if they were not to be
4 treated alike by killing all of them.

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

9 JUDGE KING: It did not end there.

10 MR WILLIAMS: Yes.

11 JUDGE KING: Talked about surrendered and some, you know,
12 and so on.

13 MR WILLIAMS: Yes. That we don't need any surrendered
14 rebels.

15 JUDGE AYoola: Sorry, can you refer to the paragraph again.

16 MR WILLIAMS: My Lord.

17 JUDGE AYoola: Not in your -- in the judgment.

18 MR WILLIAMS: Trial Chamber Judgment, I think
19 Paragraph 321, My Lord. The last four lines of Paragraph 321
20 it's on page 103 My Lord.

21 JUDGE AYoola: Yes, you've read a portion of the speech.
22 Why don't you just read everything, so that we could put it in
23 proper context.

24 MR WILLIAMS: A rebel is a rebel, surrendered not
25 surrendered, they are all rebels. The time for their surrender
26 had lost since been exhausted, so we don't need any surrendered
27 rebel.

28 JUDGE AYoola: Well, how do you understand that.

29 MR WILLIAMS: My Lord, that the rebels were to be killed,

1 My Lord.

2 JUDGE AYoola: Yes, exactly so, surrendered or not
3 surrendered, even when they surrendered, kill them.

4 MR WILLIAMS: My Lord, I --

5 JUDGE AYoola: We don't need surrendered rebels, just wipe
6 all of them away.

7 MR WILLIAMS: My Lord, the statement is unambiguous, My
8 Lord, .

9 JUDGE KING: It's --

10 MR WILLIAMS: Sorry it's ambiguous. My Lord, it's very
11 ambiguous.

12 JUDGE AYoola: Is it ambiguous when you put it in the
13 context of the preceding statements by all parties present. This
14 was said -- he was not the only person addressing the group.
15 There have been Norman who had addressed the group. Then Fofana
16 had addressed the group, then he addressed the group. When you
17 put altogether, what inference can you draw from that?

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

20 JUDGE AYoola: No. Start from the beginning of 321. The
21 first --

22 JUDGE KING: You see it says quite clearly, Norman said in
23 the open, that the attack on Tongo will determine who the winner
24 or the loser of the war will be, and that "there is no place,
25 there is no place to keep captured or war- prisoners, like the
26 juntas or yontas, as some would call it, let alone their
27 collaborators ". TFT2-222 felt uncomfortable with this command,
28 because "giving such a command to a group that was 95 percent
29 illiterate, who had been wronged, is like telling them, an eye

1 for an eye and meant telling them not to spare the vulnerables"
2 Norman also said that: "The international community is
3 condemning human rights abuses then I take care of the human left
4 abuses". You see, you have to read the whole of that paragraph
5 and then at the end, your client was saying what he said there.

6 MR WILLIAMS: Yes, My Lord. My Lord, why I say the
7 statement by Kondewa is ambiguous and does not point to, you
8 know, an instruction or order that surrendered Kamajors were to
9 be killed is because of the last seven words of his statement, My
10 Lord. It says I give you my blessings, go, my boys go.

11 JUDGE KING: Well, why are you saying because of that, what
12 difference does that make?

13 MR WILLIAMS: My Lord, there's evidence that Kondewa's
14 instructions were that civilians and even surrendered soldiers
15 were not to be killed, My Lord.

16 JUDGE KING: He said I'm giving my blessings, he was, in
17 fact, con -- you know, blessing them for going to do just that.
18 You know, don't take any surrendered people. Just do away with
19 them.

20 MR WILLIAMS: No, My Lord. My Lord, that would be taking
21 that statement out of context, My Lord.

22 JUDGE KING: Why would it be taken out of context, when you
23 read the whole of the paragraph, of what they are saying from
24 Norman right down to Kondewa, and don't forget also Kondewa was
25 supposed to be the high priest.

26 MR WILLIAMS: Yes, My Lord, My Lord but -- My Lord, the
27 magic or whatever it is that it was believed went with Kondewa's
28 initiation, could only work if civilians and surrendered
29 combatant -- there's an abundant evidence of that, My Lord, that

1 this magic would only work if civilians and surrendered rebels
2 were not hurt, My Lord. So, that's why I say, if it's taken out
3 of context, it might have a different interpretation.

4 JUDGE KING: But the context in which he said this is quite
5 clear.

6 MR WILLIAMS: It followed on what Norman had said in fact,
7 they should not take any prisoners. And they go on to say, this
8 is precisely what he meant. An eye for an eye. A tooth for a
9 tooth. I mean, I would have thought that probably in the case of
10 your client, I don't know, but probably one interpretation might
11 be otherwise. I don't -- you have not given us that
12 interpretation of the words he used. You would know as the
13 client -- as the lawyer representing that client.

14 MR WILLIAMS: My Lord, hmm -- My Lord, that is a --

15 JUDGE KING: You see, I don't know what language he used,
16 what the interpretation was, these are all relevant
17 considerations.

18 MR WILLIAMS: My Lord --

19 JUDGE KING: How it was interpreted, but to say as was
20 said there, you know, it's on the table, it's quite clear that it
21 would seem as if there was an instigation to go and kill all
22 those surrendered, or not surrendered, to just do away with them.
23 Unless he was trying to say that don't trust these people but
24 even if they have surrendered, don't believe them because the
25 time they surrendered, they might be pretending to surrender and
26 then attack us, something like that, this is mere speculation.
27 That's probably another possible interpretation.

28 MR WILLIAMS: My Lord, that's why I said the statement is
29 ambiguous.

1 JUDGE KING: That's why you say, you said nothing.

2 MR WILLIAMS: My Lord, I said it's ambiguous, My Lord.

3 JUDGE KING: But go on, it's not ambiguous at all.

4 JUDGE KING: It's everything but ambiguous.

5 MR WILLIAMS: As My Lord pleases.

6 JUDGE KING: Go on.

7

8 MR WILLIAMS: Yes, My Lord, the Prosecution under Grounds
9 IV, the Prosecution submit that on the evidence accepted by the
10 Trial Chamber, the only conclusion for a reasonable trier of
11 fact, was that Kondewa gave encouragement and moral support to
12 the planners of the attacks and the crimes and that therefore he
13 aided and abetted in the planning of those crimes in Koribondu,
14 Bo and Kenema. My Lord, I submit that no -- there was no --
15 that to prove aiding and abetting beyond reasonable doubt, the
16 evidence must demonstrate that the acts of the Accused had a
17 substantial effect upon the perpetration of a crime. Counsel -- I
18 submit that the evidence accepted by the Trial Chamber and relied
19 upon by the Prosecution in its appeals falls well below this
20 standard. It is submitted that on the evidence no reasonable
21 trier of fact could conclude that attending two meetings at which
22 the attacks on Bo and Koribondu were discussed were the only
23 evidence of Kondewa actually saying anything was to give his
24 blessing and medicine to the Kamajors satisfied the substantial
25 effect test that is well established in the ad hoc Tribunals
26 jurisprudence. My Lords, the Prosecution wants this Court to
27 convict Kondewa for planning, ordering and otherwise aiding and
28 abetting the killing of civilians at Koribondu, Bo and Kenema
29 just because he attended a meeting in which he made no

1 contribution to the deliberations. The only statement that was
2 attributed to Kondewa was one dissuading those present at the
3 meeting from harming civilians. TF2-201 at page 113 lines 16 to
4 21 of the Trial Transcript of 4 November 2004, said after Norman
5 had given instructions to burn, loot and kill then Kondewa gave
6 gallons of liquid solution made out of Koranic writings and said,
7 I'm going to give you my blessings, I'm going to give you the
8 medicines which you would -- which would make you to be fearless
9 if you did not spoil the law. " I gave it to you, I prepare you
10 ". My Lord, this I submit was insubordination on the part of
11 Kondewa but it was prepared to take the risk and advice against
12 arming civilians. My Lord, there, there were specific
13 instructions to kill and loot. And there was Kondewa advising
14 these Kamajors to go out there, that they would give -- they had
15 his blessing provided that they adhere to the laws, My Lord. And
16 as I indicated, the laws were that you should not kill or harm
17 civilians. So the --

18 JUDGE AYoola: Where do we find that in the judgment that
19 those were the laws.

20 MR WILLIAMS: My Lord, the -- I would refer Your Lordships
21 to portions of bits of evidence as were adduced, My Lord, which
22 are quite clear and unequivocal. Yes. My Lord, this I submit --
23 yes, that the TF2-201 testified that Norman dismissed Kondewa by
24 saying well he spoke too late Lamin. It is clear that the laws
25 Kondewa gave to Kamajors were that they should not kill, loot,
26 harass or distress civilians and the consequences of breaching
27 those laws was that the fighter would die in combat. This came
28 out of witnesses called by the Prosecution. One such witness was
29 TF2-005, who said in his testimony at page 82 and 83 of the trial

1 transcript, of 15 February 2005, that some of the laws of the
2 Kamajors were that you should not kill or harass civilians, and
3 that they were meant to defend. While I do not dispute that the
4 Kamajor had great respect for Kondewa and they'd looked up to
5 him, his mere presence at meetings in the absence of evidence
6 that Kondewa actually did anything other than fulfill his role as
7 high priest in giving the Kamajors a blessing, does not meet the
8 evidential standard required to demonstrate aiding and abetting
9 beyond a reasonable doubt.

10 JUDGE KING: All right. Your time is up, but we'll give
11 you a few more minutes to --

12 MR WILLIAMS: To wrap up, My Lord.

13 JUDGE KING: We had to because we gave the Prosecution some
14 time this morning. We'll give you a few more minutes to finish
15 your argument.

16 MR WILLIAMS: Yes, My Lord, the issue on Ground V, My Lord,
17 the issue of child soldiers, the Prosecution on this -- under
18 this Ground, the Prosecution is contending that the Trial Chamber
19 failed to clearly describe the full extent of Kondewa's
20 responsibility for the crime of enlisting children under the age
21 of 15 into armed forces or groups. The Trial Chamber convicted
22 Kondewa under Article 6.1 of committing the crime of enlisting --
23 of enlistment of a child under 15 into an armed force or group.
24 However the Prosecution requests the appeal Chamber to find that
25 Kondewa bears individual responsibility on Count VIII of the
26 indictment of enlistment of an unknown number of children into
27 armed forces or groups or using them to participate actively in
28 hostilities. The Trial Chamber found based on the evidence of
29 TF2-021, that in the circumstances of a particular initiation

1 described by the witness, " it is beyond reasonable doubt that
2 Kondewa was also performing an act analogous to enlisting them
3 for active military service. The Prosecution submits that
4 Kondewa is also liable of the offence of aiding and abetting the
5 enlistment of more than one child, of more than one child
6 soldier. Counsel submits firstly that the evidence on which
7 Kondewa was found individually responsible for enlisting of --
8 for enlisting of one child into an armed force or group was so
9 flawed that it is impossible from that evidence to reach the
10 further conclusion that Kondewa enlisted more than one child or
11 that he aided and abetted enlistment of more than one child. And
12 secondly, that the initiation does not equate to enlistment. My
13 Lord, I submit that the Prosecution has failed to show that
14 Kondewa made a substantial contribution to the crime of
15 enlistment specifically in the case of the -- specifically in the
16 case of the 20 other boys initiated with TF2-021, as the
17 Prosecution has argued. The evidence with respect to TF2-021 is
18 deeply flawed and the Prosecution fails to establish how
19 initiation substantially contributed to enlistment. My Lord,
20 there is abundance of evidence from both Prosecution and Defence
21 witnesses that Kondewa did not have control or command over
22 initiates, when once they had left the initiation shrines. I
23 invite Your Lordships to pay particular attention to the
24 following bits of evidence. Firstly, the evidence of Albert
25 Nallo, who testified on the 15 March 2005. At page nine, lines
26 10 to 13. My Lord, this was the witness that was described by
27 the Trial Chamber as the single most important Prosecution
28 witness, My Lord. My Lord, that witness in answer to this
29 question, My Lord, "but you do agree with me, Mr Witness, that

1 initiation into the Kamajor traditional society is completely
2 different from military recruitment".

3 A. Yes, My Lord. My Lord, this was the biggest of the
4 singularly most important witness in the Prosecution's case.

5 JUDGE AYoola: Sorry, on what date was that evidence given.

6 MR WILLIAMS: Fifteenth March 2005. My Lord.

7 JUDGE AYoola: Transcript.

8 MR WILLIAMS: Page nine, lines 10 to 13.

9 JUDGE AYoola: Thank you.

10 MR WILLIAMS: My Lord, another Prosecution witness TF2-082,
11 who testified on 17 September 2004, TF2-082, 17 September 2004,
12 page 48 -- sorry, page 42, sorry, My Lords, lines seven to 10.
13 My Lord, the question that was posed to the witness was this, My
14 Lord. So you would agree with me that immunization was not the
15 same as recruitment for fighting. So you would agree with me
16 that immunization, that was what was done.

17 JUDGE AYoola: What was done?

18 MR WILLIAMS: Immunization, My Lord, was not the same as
19 recruitment for fighting. Immunization was what it was alleged
20 Kondewa did at initiations, My Lord.

21 JUDGE KING: What did that entail. I'll leave it on now.

22 MR WILLIAMS: My Lord, that you will be kept in a shrine
23 for one or two days, some herbs will be applied to your body and
24 that makes the initiate impervious to bullet, My Lord.

25 JUDGE KING: Was there any evidence that it made them
26 impervious to bullets.

27 MR WILLIAMS: My Lord, we did not have volunteers, My Lord.

28 JUDGE KING: I said, was there any evidence.

29 MR WILLIAMS: Yes. Yes, yes, My Lord.

1 JUDGE KING: That made them impervious to bullets.

2 MR WILLIAMS: Yes, several Prosecution witnesses, My Lord.

3 JUDGE KING: So they were shot and they were impervious.

4 MR WILLIAMS: Exactly, My Lord.

5 JUDGE KING: Well, where is that to be found.

6 MR WILLIAMS: Sorry, My Lord. My Lord, I would -- I can
7 provide it subsequently, My Lord.

8 JUDGE KING: All right.

9 JUDGE AYoola: That was just to satisfy curiosity.

10 MR WILLIAMS: Yes, and the question was, so you would agree
11 with me that immunization was not to say --

12 JUDGE KING: Well, excuse me, so all those who were killed
13 on the side of the CDF are you saying that they had no
14 immunization?

15 MR WILLIAMS: No.

16 JUDGE AYoola: Or maybe they broke the law.

17 MR WILLIAMS: Exactly, My Lord. Exactly, My Lord, that it
18 won't work or harm civilians. My Lord, so that is the theory
19 that if you kill was presented by Prosecution witnesses, My Lord.

20 JUDGE KING: But you have endorsed it, you said when they
21 had this immunization, you know, bullets had no effect.

22 MR WILLIAMS: Yes, My Lord, that's --

23 JUDGE KING: Well, that's what I'm saying, I'm developing
24 it, all those who were killed must necessarily not have had
25 immunization.

26 MR WILLIAMS: Or they were in breach of the laws, My Lord.

27 JUDGE AYoola: Of immunization.

28 MR WILLIAMS: Yes.

29 JUDGE KING: It's just like saying that the moon is the

1 sun.

2 MR WILLIAMS: As My Lord pleases. My Lord, the answer to
3 that question, the question was so you would agree with me that
4 immunization was not the same as recruitment for fighting, the
5 answer, yes, it was, it was different from recruitment into the
6 military. Yes, it was. So even from Prosecution witnesses, My
7 Lord, the evidence quite clearly reveal that initiation was
8 completely different from recruitment or enlistment, My Lord.

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

11 MR WILLIAMS: My Lord, that the Accused, My Lord, the
12 second respondent was only found guilty in respect of the
13 initiation or enlistment of, or recruitment of just one child.
14 My Lord, and we are questioning the evidence that led to the
15 Trial Chambers finding, My Lord.

16 JUDGE KING: What did the --

17 MR WILLIAMS: I'm sorry, My Lord.

18 JUDGE KING: What did the relevant count in indictment
19 charge.

20 MR WILLIAMS: Enlistment, My Lord, that he enlisted several
21 children, My Lord, hundreds or so children.

22 JUDGE KING: From the indictment. These are relevant
23 issues that were specific because they have to do before direct
24 to come on that recruitment [indiscernible] and if you are --
25 sorry. That he enlisted several children. Did they prove that,
26 in fact, he did enlist several children. This is the sort of
27 thing that you should be deliberating on, and it's much better if
28 you would in fact just address us in fact, instead of reading
29 from your notes most of the time.

1 MR WILLIAMS: Yes, My Lord. Count VIII, My Lord, use of
2 child soldiers at all times relevant to this indictment, civil
3 defence forces did throughout the Republic of Sierra Leone
4 initiate or enlist children under the age of 15 years into armed
5 groups. Into armed forces or groups and in addition or in the
6 alternative used them to participate actively in hostilities, My
7 Lord.

8 JUDGE KING: What do you say to that now, having regard to
9 the evidence.

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

12 JUDGE KING: What element.

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

15 JUDGE KING: I was directing my question to what is
16 actually stated in the Count, enlisting children one child is not
17 children is it.

18 MR WILLIAMS: It's not, My Lord.

19 JUDGE KING: Well, you're smiling. I mean these are the
20 points that you should address us on. Because, I would like to
21 know the legal consequences if, in fact, the Trial Chamber came
22 to the finding that Kondewa enlisted only one child, whether in
23 fact they have proved what they allege in the count. I just want
24 to be guided and that's a very important point.

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

26 JUDGE KING: I don't -- I'm not saying what you appeal
27 against. I'm asking you about this particular point for you to
28 answer as best you can.

29 MR WILLIAMS: Yes, My Lord.

1 JUDGE KING: That they were saying that your client
2 enlisted children. The Trial Chamber found that he enlisted one
3 child. Now how do you interpret this vis-a-vis the allegation in
4 the Count.

5 MR WILLIAMS: My Lord, we would say that the elements were
6 not proven My Lord.

7 JUDGE KING: The elements.

8 MR WILLIAMS: The allegation.

9 JUDGE KING: Why do you say elements, when you think of
10 element, you think of the crime.

11 MR WILLIAMS: Yes.

12 JUDGE KING: I'm talking now one and many. And what is
13 your own submission with regard to that, if any.

14 MR WILLIAMS: My Lord, I would submit that the Prosecution
15 or the fact that the Trial Chamber only convicted Mr Kondewa for
16 enlisting one child. My Lord, was -- My Lord, if I may just
17 confer with my learned counsel.

18 JUDGE KING: Carry on.

19 MR WILLIAMS: My Lord, I would submit that the allegations
20 made by the Prosecution in the indictment were not proven, My
21 Lord.

22 JUDGE KING: Well, exactly that's what you should be
23 dealing with when you come to appeal in this Chamber. You are
24 representing your client. These matters submit it, and then
25 we'll come in the end and decide whether there is substance on it
26 or not. I mean, if he says children, one is not children. And
27 tell us the legal consequences if any, when the Trial Chamber
28 found that Kondewa enlisted only one child even though the
29 allegation was that children were enlisted. You could make your

1 submission and say look one, enlistment of one is not enlistment
2 of several. We will look at it and then come to a -- these are
3 the important points you should deal with. That's why I say,
4 it's better for you to make your notes and then address us
5 instead of reading from your notes most of the time. It makes a
6 better impression.

7 MR WILLIAMS: As My Lord pleases.

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

15 MR WILLIAMS: My Lord, the -- the that is the case, My
16 Lord, but the final disposition of the Chamber was that the
17 evidence only proves that or proved that it was one child that
18 was enlisted, My Lord, that was TF2-021.

19 JUDGE KING: Going back to the evidence or to the part of
20 the Trial Chambers Judgment, where Kondewa was found guilty of
21 enlisting one child. Could you refer to that please. Page 287.
22 287. Thank you.

23 JUDGE AYoola: Where is that

24 MR WILLIAMS: 971, My Lord.

25 JUDGE KING: So in answering that question you should refer
26 also to Paragraph 29 -- 971.

27 MR WILLIAMS: Yes, My Lord.

28 JUDGE KING: [Indiscernible].

29 MR WILLIAMS: My Lord, that -- it's '971 is where the Trial

1 Chamber held that it was only one child soldier that.

2 JUDGE KING: Yes, but my learned brother on my right has
3 pointed out to you that they said that the indictment charges the
4 use of child soldiers as an alternative to enlistment. Therefore
5 having found that Kondewa is individually criminally responsible
6 for enlisting child soldiers. Is that the same as what they said
7 in '971?

8 MR WILLIAMS: It's not, My Lord.

9 JUDGE KING: Well, what is your submission on the
10 contradiction, apparent contradiction.

11 MR WILLIAMS: My Lord, that the Trial Chamber was wrong to
12 reach the conclusion in Paragraph two --

13 JUDGE KING: In paragraph what?

14 MR WILLIAMS: In paragraph '972, .

15 JUDGE KING: Yes.

16 MR WILLIAMS: Based on what they -- what the --

17 JUDGE KING: Well, Mr Yadda Williams, that's what you
18 should have been doing in answering the question that was posed
19 to you.

20 MR WILLIAMS: Yes, My Lord. I could --

21 JUDGE KING: You see, you refer to '971, a specific finding
22 there with regard to your client Kondewa, that he and the exact
23 words are there. Thus the Trial Chamber -- the Chamber
24 concludes, that this evidence has established beyond reasonable
25 doubt that Kondewa committed the crime of enlisting a child under
26 the age of 15 into armed forces so, so, so, so, so. The
27 indictment charges use of child soldiers as an alternative to
28 enlistment, therefore having found that Kondewa is individual
29 criminal responsible for enlisting child soldiers, now where did

1 the child -- Trial Chamber found that the -- Kondewa was guilty
2 of enlisting child soldiers?

3 MR WILLIAMS: My Lord, nowhere, My Lord.

4 JUDGE AYoola: Now, you will find it in 968. Of course,
5 that's contradictory but you nevertheless, you will find it in
6 968.

7 MR WILLIAMS: My Lord, that is in respect of just one child
8 soldier, My Lord, TF2-021

9 JUDGE AYoola: No, if you look at ii, one witness giving
10 evidence of 20.

11 MR WILLIAMS: Yes, initiated My Lord, which is different
12 from enlistment or recruitment. The TF2-021, was part of that
13 20. And Trial Chamber said that Kondewa was only guilty in
14 respect of the initiation of that particular initiate, My Lord,
15 and not the other 19.

16 JUDGE AYoola: 20 were initiated.

17 MR WILLIAMS: Yes, My Lord.

18 JUDGE KING: You see your point as I take it should be
19 this: That as far as proof is concerned the Trial Chamber came
20 to a finding of fact that your client is only guilty of
21 recruiting one child, the evidence led there was beyond
22 reasonable doubt. There might be other pieces of evidence, but
23 as far as the Trial Chamber was concerned, it's only with respect
24 of the recruitment of one child soldier, that they proved their
25 case beyond reasonable doubt. Isn't that the position.

26 MR WILLIAMS: Yes, My Lord.

27 JUDGE KING: Well, say that.

28 MR WILLIAMS: My Lord, that -- My Lord, the Trial Chamber
29 found My Lord, that though several -- that though -- the Accused,

1 My Lord, the respondent the second respondent was responsible for
2 several for initiating several children under the age of 15 the
3 evidence led only proved that the initiation of TF2-021, was
4 sufficient enough, or that was the only evidence that was
5 tantamount to enlistment, My Lord.

6 JUDGE KING: That was something beyond reasonable doubt,
7 isn't it.

8 MR WILLIAMS: Yes, sir.

9 JUDGE KING: Well, exactly that's the whole point. And
10 then the question -- just one second. My original question was
11 this and I just want guidance, you know, you've read the relevant
12 count, where the Prosecution were alleging that Kondewa recruited
13 child soldiers. The evidence that was believed by the Trial
14 Chamber and approved beyond reasonable doubt is the recruitment
15 of just one child soldier.

16 MR WILLIAMS: Yes, My Lord.

17 JUDGE KING: Now, how would you relate that in proof of the
18 allegation that your client recruited child soldiers, what is
19 your submission on that, guide me.

20 MR WILLIAMS: My Lord, that the evidence adduced by the
21 Prosecution failed to prove the allegations in Count VIII, in the
22 sense that Kondewa was not found guilty of recruiting children
23 but only TF2-021, a single child.

24 JUDGE AYoola: To make your submission complete for my own
25 benefit, how many children must you recruit before you commit the
26 offence of recruiting child soldiers? How many?

27 MR WILLIAMS: My Lord, they are --

28 JUDGE KING: More than one.

29 MR WILLIAMS: Yes, more than one, My Lord.

1 JUDGE AYoola: And where do you find that.

2 MR WILLIAMS: In the indictment, My Lords.

3 JUDGE KING: As simple as that Mr Yada Williams.

4 MR WILLIAMS: Yes, My Lord.

5 JUDGE KING: If the Count said including child soldiers, it
6 means more than one, of course, sometimes you can argue that the
7 one includes the plural, but in this instance, there was a
8 specific finding beyond reasonable doubt, by the Trial Chamber,
9 that your client had included only one child soldier, when in
10 fact the Count itself was saying that he recruited child
11 soldiers, more than one.

12 MR WILLIAMS: My Lord, I agree with you, My Lordship.

13 JUDGE KING: You agree with me?

14 MR WILLIAMS: Yes, My Lord.

15 JUDGE KING: You don't have to agree with me.

16 MR WILLIAMS: I know, My Lord. My Lord, I do not wish to
17 address Your Lordship on the -- on Count VII. My Lord, I -- As
18 My Lord please.

19 MR WILLIAMS: My Lord, Count VII deals with the issue of
20 burning as pillage and taking the queue from the Bench, I
21 wouldn't want to address.

22 JUDGE KING: We agree with you, thank you.

23 MR WILLIAMS: My Lord, I now move on to Count, no, Ground
24 X. And again, My Lord, I would't -- taking the queue, I would'n't
25 address Your Lordship, on the issue of the refusal of the Trial
26 Chamber to consider sentencing practices in Sierra Leone. Your
27 Judgement in the AFRC case, My Lord, determines the issue, that
28 they have their discretion, whether to apply or not. So that is
29 settled, My Lord. My Lord, your mic is not on.

1 JUDGE KING: I thought that you could hear me without the
2 mic. Oh you have that thing in your ear. Now, it is the
3 discretion of the Trial Chamber in ordering a consecutive or
4 concurrent sentence fettered.

5 MR WILLIAMS: Yes, My Lord.

6 JUDGE KING: Thank you. All right go on.

7 JUDGE AYoola: When you say it's not fettered, I thought
8 the law particularly in regard to consecutive sentences, is that
9 it is not a proper exercise of discretion, is by ordering
10 consecutive sentences, You overshoot what would have been
11 excessive.

12 MR WILLIAMS: I'm sorry, My Lord.

13 JUDGE AYoola: It's fettered in one way, which is, of
14 course not relevant to this case, if you exercise your discretion
15 to order consecutive sentences, and the total would be excessive.
16 We don't want to hide behind your discretion, to enter a greater
17 sentence then would have entered, to that extent, it is fettered.
18 But whether it is fettered in the sense that when you make it
19 concurrent, you've exercise your discretion to impose an
20 inadequate sentence. The Court cannot examine it, I think.
21 Notwithstanding that you have exercised your discretion, to make
22 the sentences concurrent, if the total is inadequate, in the
23 judgement of the Appellate Chamber, the Appellate Chamber, if the
24 point is raised, can consider it.

25 MR WILLIAMS: My Lord, I would want to reply.

26 JUDGE KING: But my brother has told you that it is not
27 relevant in this case. Why don't you accept what he says and
28 move on.

29 MR WILLIAMS: My Lord --

1 JUDGE KING: Always -- don't argue for the sake of
2 argument. I mean, you accept what my learned brother had said
3 and say: Thank you, My Lord, and then go on.

4 MR WILLIAMS: Thank you very much, My Lord.

5 JUDGE AYoola: Not relevant, in relation to -- consecutive
6 sentences, but not in relation to concurrent sentences.

7 MR WILLIAMS: Yes, My Lord, My Lord, I am taking the queue
8 from the Presiding Judge. My Lord, there is nothing more I wish
9 to address Your Lordships on.

10 JUDGE KING: Well, you tried your best, I interrupted you
11 several times, just to hear what you are saying, and you
12 certainly gave up your best, as one of my students in the law
13 school, and also Joseph Kamara, it's a good day for me to see my
14 students in this appeal doing so well, and I think this is a
15 convenient stage to go back and reflect on your performances, and
16 we'll now adjourn till tomorrow.

17 MR WILLIAMS: As My Lord pleases.

18 JUDGE KING: Thank you very much for your assistance.

19 MR GEORGE: Court rise.

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