



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

WEDNESDAY, 28 MAY 2008
10.30 A.M.
APPEAL

APPEALS CHAMBER

Before the Judges:	George Gelanga King, President Emmanuel Ayoola Renate Winter Raja Fernando Jon M. Kamanda
For Chambers:	Mr Stephen Kostas Mr Kamran Choudry Ms Sophie Frediani Ms Rhoda Kargbo
For the Registry:	Mr Herman von Hebel Mr Thomas George
For the Prosecution:	Mr Stephen Rapp Mr James C Johnson Mr Joseph Kamara Mr Francis Banks-Kamara Ms Brigitte Osho Ms Regine Gashoud Ms Elizabeth Baumgartner
For the Principal Defender:	Ms Elizabeth Nahamya
For the accused Moini na Fofana:	Mr Davidson Bola-Carol
For the accused Allieu Kondewa:	Mr Yada Williams Mr Osman Jalloh

1 [CDF28APR08A-BP]
2 [Wednesday, 28 May 2008]
3 [Appeal Judgment]
4 [Open session]
5 [The appellants present]
6 [Upon commencing at 10.30 a.m.]

7 MR RAPP: Mr President, Your Honours, appearing for the
8 Prosecutor is myself Steven Rapp, Joseph Kamara, James Johnson,
9 Francis Banks-Kamara, Bridgette Osho, Regine Gachoud and
10 Elizabeth Baumgartner. Thank you.

11 JUSTICE KING: Thank you, Mr Chief Prosecutor.

12 MR BOLA-CAROL: May it please Your Lordships, I appear for
13 the first respondent, Bola-Carol.

14 JUSTICE KING: Thank you.

15 MR WILLIAMS: May it please your Lordships, for the -- for
16 accused Allieu Kondewa is Yada Williams and with me Osman Jalloh.

17 JUSTICE KING: Thank you.

18 Now this is the summary of the judgment of this Court.

19 Introduction

20 The Appeals Chamber of the Special Court for Sierra Leone
21 convenes today pursuant to its scheduling order issued on 9 May
22 2008 to deliver its judgment on appeal in the case of Prosecutor
23 v Moinina Fofana and Allieu Kondewa.

24 In today's session I shall only be reading out a summary of
25 the judgment and not the judgment itself. I shall briefly
26 discuss the issues raised by the parties in this appeal, and then
27 state the findings of the Appeals Chamber. I shall read out the
28 Appeals Chamber's disposition. This will then be followed by
29 reading out of dissenting opinions, and in this case there are at

1 least three dissenting opinions.

2 I would like to emphasise that this summary is not part of
3 the written judgment which is the only authoritative account of
4 the findings and reasoning of the Appeals Chamber. Copies of the
5 written judgment are available from the Registrar.

6 Background to the armed conflict in Sierra Leone, the
7 Kamajors and the Civil Defence Forces

8 The Kamajors

9 The term "Kamajor" originally referred to a "Mende" male
10 who possessed specialised knowledge of the forest and the use of
11 medicines associated with the bush.

12 When the civil conflict in Sierra Leone began in 1991, the
13 military decided to enlist Kamajors as vigilantes to scout the
14 terrain. Because the Kamajors were limited in number, the
15 community leaders and the chiefs made arrangements to encourage
16 the Kamajors to expand their defence by increasing their manpower
17 through initiation. The Kamajors were then placed by their
18 paramount chiefs at the disposal of government soldiers, and they
19 acted as allies in the defence of their areas against the rebels.
20 In 1996, paramount chiefs of the southern regions appointed
21 Regent Chief Samuel Hinga Norman as Chairman of the Kamajors for
22 that region.

23 The Civil Defence Forces

24 On 25 May 1997, President Ahmad Tejan Kabbah was overthrown
25 in a military coup. Upon President Kabbah's arrival in exile in
26 Conakry after the coup, the Organisation of African Unity, the
27 OAU, designated the Economic Community of West African States,
28 ECOWAS, to restore President Kabbah's government to power.
29 ECOWAS, in turn, mandated its Monitoring Group, ECOMOG, to carry

1 out the task.

2 In a bid to establish his government, President Kabbah
3 created the Civil Defence Forces, CDF, to coordinate the
4 activities within the various militia groups and with ECOMOG.

5 The CDF was a security force comprised mainly of Kamajors
6 who fought in the conflict in Sierra Leone between November 1996
7 and December 1999. The CDF supported the elected government of
8 Sierra Leone in its fight against the Revolutionary United Front,
9 RUF, and the Armed Forces Revolutionary Council, AFRC.

10 President Kabbah appointed the Vice-President Albert Joe
11 Demby as chairman of the CDF, and Samuel Hinga Norman as the
12 National Coordinator. In his capacity as National Coordinator,
13 Norman was responsible for coordinating the activities of the
14 CDF/Kamajors in supporting the military operations of ECOMOG to
15 reinstate President Kabbah's government.

16 The appellants

17 This case concerns the role of Moinina Fofana and Allieu
18 Kondewa in the events that occurred during the armed conflict in
19 Sierra Leone.

20 Following the May 1997, coup d'etat the appellants became
21 members of the CDF. Moinina Fofana was the CDF's "Director of
22 War" and Allieu Kondewa was its "High Priest." Together with
23 Samuel Hinga Norman they formed part of the High Command of the
24 CDF and were referred to as the "Holy Trinity."

25 The Prosecution charged Samuel Hinga Norman, Moinina Fofana
26 and Allieu Kondewa under Article 15 of the Statute in an
27 eight-count indictment with crimes against humanity, violations
28 of Article 3 common to the Geneva Conventions and of Additional
29 Protocol II and other serious violations of International

1 Humanitarian Law in violation of the Articles 2, 3 and 4 of the
2 Statute.

3 On 22 February 2007 Samuel Hinga Norman passed away.
4 Consequently, the Trial Chamber, on 21 May 2007, ruled that the
5 trial proceedings were terminated against him.

6 The Trial Chamber's verdict and sentence

7 On 2 August 2007, a majority of the Trial Chamber, Justice
8 Bankole Thompson dissenting, found Fofana and Kondewa guilty of
9 the following:

10 1. Count 2, charging violence to life, health and physical
11 or mental well-being of persons, in particular murder, a
12 violation of Article 3 common to the Geneva Conventions and of
13 Additional Protocol II, punishable under Article 3(a) of the
14 Statute.

15 2. Count 4, charging violence to life, health and physical
16 or mental well-being of persons, in particular, cruel treatment,
17 a violation of Article 3 common to the Geneva Conventions and of
18 Additional Protocol II, punishable under Article 3(a) of the
19 Statute.

20 3. Count 5, charging pillage, a violation of Article 3
21 common to the Geneva Conventions and of Additional Protocol II,
22 punishable under Article 3(f) of the Statute.

23 4. Count 7, charging collective punishments, a violation
24 of Article 3 common to the Geneva Conventions and of Additional
25 Protocol II, punishable under Article 3(b) of the Statute.

26 5. A majority of the Trial Chamber further found Kondewa
27 guilty of count 8, charging the enlistment of children under the
28 age of 15 years into an armed force or group, or using them to
29 participate actively in hostilities and other inhumane act,

1 punishable under Article 4(c) of the Statute, with Justice
2 Bankole Thompson dissenting.

3 Not guilty verdicts were entered in respect of:

4 1. Count 1, charging murder as a crime against humanity,
5 punishable under Article 2 of the Statute.

6 2. Count 3, charging other inhumane acts as a crime
7 against humanity, punishable under Article 2(i) of the Statute.

8 3. Count 6, charging acts of terrorism, a violation of
9 Article 3, common to the Geneva Conventions and of Additional
10 Protocol II, punishable under Article 3(d) of the Statute.

11 4. For Fofana only, count 8, charging the enlistment of
12 children under the age of 15 years into an armed force or group
13 or using them to participate actively in hostilities.

14 The Trial Chamber's sentence

15 On 9 October 2007, the Trial Chamber sentenced Fofana and
16 Kondewa to terms of imprisonment for all of the crimes for which
17 they were convicted.

18 Fofana was sentenced to six years' imprisonment on counts 2
19 and 4; three years' imprisonment on count 5; and four years'
20 imprisonment on count 7.

21 The Trial Chamber ordered that the sentences shall be
22 served concurrently and shall take effect as from 29 May 2003
23 when Fofana was arrested and taken into the custody of the
24 Special Court. Fofana was, therefore, sentenced to a total of
25 six years' imprisonment, effective from 29 May 2003.

26 Kondewa was sentenced to eight years' imprisonment on
27 counts 2 and 4; five years' imprisonment on count 5; six years'
28 imprisonment on count 7; and seven years' imprisonment on count
29 8.

1 The Trial Chamber ordered that the sentences shall be
2 served concurrently, and shall take effect as from 29 May 2003,
3 when Kondewa was arrested and taken into custody of the Special
4 Court. Kondewa was therefore sentenced to a total of eight
5 years' imprisonment, effective from 29 May 2003.

6 The appellants' grounds of appeal

7 Only Kondewa and the Prosecution appealed against the
8 judgment of the Trial Chamber and oral hearings on appeal took
9 place on 12 and 13 March this year.

10 I shall now briefly summarise the grounds of appeal.

11 1. Kondewa's grounds of appeal

12 Grounds 1, 2, 3 and 5 of Kondewa's grounds of appeal
13 complain that the majority of the Trial Chamber erred both in law
14 and in fact in finding that the Prosecution had proved, beyond
15 reasonable doubt:

16 (i) That he was individually criminally responsible as a
17 superior pursuant to Article 6.3 for the crimes committed in
18 Bonthe Town and the surrounding areas under counts 2, 4, 5 and 7.

19 (ii) That he was individually criminally responsible
20 pursuant to Article 6.1 for committing murder as a war crime as
21 charged under count 2 of the indictment in Talia Base Zero.

22 (iii) That he was individually criminally responsible as a
23 superior pursuant to Article 6.3 for pillage under count 5 in
24 Moyamba District.

25 (iv) That he was individually criminally responsible
26 pursuant to Article 6.1 for committing the crime of enlisting
27 children under the age of 15 years into an armed force or group
28 and/or using them to participate actively in hostilities.

29 (v) That he was individually criminally responsible

1 pursuant to Article 6.1 for aiding and abetting crimes committed
2 in Tongo under counts 2, 4 and 7.

3 (vi) That the Trial Chamber erred in law in entering
4 cumulative convictions under count 7 as well as under counts 2 to
5 5.

6 2. The Prosecution's grounds of appeal

7 The Prosecution by its grounds of appeal complained that
8 the Trial Chamber erred in law and in fact in failing to find:

9 (i) That the civilian population was the primary object of
10 the attack.

11 (ii) That Fofana and Kondewa were criminally responsible
12 under Article 6.1 of the Statute for the planning, instigating or
13 otherwise aiding and abetting in the planning, preparation or
14 execution of any of the criminal acts which the Trial Chamber
15 found were committed in Kenema District, the towns of Tongo Field
16 Kori bondo and Bo District.

17 (iii) That Fofana and Kondewa were criminally responsible
18 under Article 6.3 of the Statute for those crimes committed in
19 Kenema District.

20 (iv) That Fofana aided and abetted the crime of enlisting
21 children under 15 years into armed forces or groups and/or using
22 them to participate actively in hostilities.

23 (v) That Fofana and Kondewa were criminally responsible
24 for acts of terrorism.

25 (vi) That acts of burning could not amount to pillage.

26 In addition, in grounds 8 and 9, the Prosecution alleges
27 that the Trial Chamber erred in refusing it leave to amend the
28 indictment in order to add four new counts of sexual violence and
29 in preventing it from "leading, eliciting or adducing" evidence

1 of sexual violence.

2 Finally, in ground 10, the Prosecution appeals against the
3 sentence of Fofana and Kondewa.

4 I shall now turn to the Appeals Chamber's findings.

5 Appeals Chamber's findings: Issues arising in both appeals

6 The Appeals Chamber opines that although the grounds of
7 appeal filed by Kondewa and the Prosecution advance different
8 arguments, there are some grounds that raise similar issues.

9 This is the case for the Prosecution's third and fourth
10 grounds of appeal, and Kondewa's fourth ground of appeal.

11 The Appeals Chamber will accordingly consider these grounds
12 together.

13 1. Prosecution's third and fourth grounds of appeal and
14 Kondewa's fourth ground of appeal: Individual criminal
15 responsibility pursuant to Article 6.1 of the Statute

16 The Prosecution's third and fourth grounds of appeal and
17 Kondewa's fourth ground of appeal concern the individual criminal
18 responsibility of Fofana and Kondewa for crimes committed in
19 Tongo Town, Kori bondo, Bo District and Kenema District in January
20 and February 1998.

21 Kondewa submits that the majority of the Trial Chamber
22 erred in finding him responsible for aiding and abetting the
23 crimes committed during the attacks in Tongo Town. The
24 Prosecution submits that the Trial Chamber erred in not finding
25 Kondewa responsible for instigating and in not finding Fofana
26 responsible for instigating and planning.

27 The Prosecution submits that the Trial Chamber erred in not
28 finding Fofana liable for planning the crimes committed in
29 Kori bondo, Bo District and Kenema District. In the alternative,

1 the Trial Chamber erred in not finding Fofana and Kondewa liable
2 for aiding and abetting the crimes committed in those locations.

3 The Appeals Chamber hereby dismisses the Prosecution's
4 third and fourth grounds of appeal and Kondewa's fourth ground of
5 appeal .

6 Regarding Fofana's liability for instigating the commission
7 of crimes in Tongo, the Appeals Chamber finds that the Trial
8 Chamber did not err in finding that the causal link required for
9 instigating had not been demonstrated, given that the evidence
10 was insufficient to show how Fofana's speech, at the December
11 1997 passing out parade at Base Zero influenced the perpetration
12 of crimes in Tongo Town in January 1998. The Appeals Chamber
13 therefore concludes that the Trial Chamber was not in error in
14 finding that the requisite mens rea for instigating was not
15 satisfied.

16 Regarding Fofana's liability for planning the commission of
17 crimes in Tongo, the Appeals Chamber finds that it was open to a
18 reasonable tribunal of fact to conclude that Fofana's presence at
19 commanders' meetings in December 1997 did not amount to planning
20 criminal conduct in Tongo Town. The Trial Chamber's findings do
21 not indicate that Fofana participated in the planning of unlawful
22 acts. The Trial Chamber did not therefore err in failing to
23 convict Fofana for planning the commission of crimes in Tongo
24 Town.

25 Regarding Kondewa's liability for aiding and abetting the
26 commission of crimes in Tongo Town, the Appeals Chamber finds
27 that a reasonable tribunal of fact could have concluded that
28 Kondewa's blessings and speech at the first passing out parade
29 substantially contributed to the perpetration of the crimes in

1 Tongo Town.

2 The Appeals Chamber, Justice Gelaga King dissenting, is
3 satisfied that it was reasonable for the Trial Chamber to
4 conclude that Kondewa, by his words of encouragement, aided and
5 abetted the commission of criminal acts ordered by Norman in
6 Tongo.

7 Regarding Kondewa's liability for instigating the
8 commission of crimes in Tongo, the Appeals Chamber finds that the
9 Trial Chamber did not err in finding that instigation was not
10 proved because no evidence before it demonstrated a causal link
11 between Kondewa's speech at the passing out parade and the crimes
12 committed in Tongo.

13 Regarding Fofana's liability for planning the commission of
14 crimes in Koribondo, Bo District and Kenema District, the Appeal
15 Chamber finds that it was open to a reasonable tribunal of fact
16 to conclude that Fofana's presence at the January 1998
17 commanders' meetings did not amount to planning. The Trial
18 Chamber did not, therefore, err in finding Fofana not liable for
19 planning the commission of crimes in these locations.

20 Regarding Fofana's liability for aiding and abetting the
21 commission of crimes in Koribondo, Bo District and Kenema
22 District, the Appeals Chamber upholds the Trial Chamber's
23 findings that Fofana's speech at the January 1998 passing out
24 parade did not amount to urging, encouraging or prompting the
25 Kamajors to commit criminal acts. Fofana's, for the purpose
26 aiding and abetting the commission of crimes in these locations.

27 Finally, regarding Kondewa's liability for aiding and
28 abetting the commission of crimes in Koribondo, Bo District and
29 Kenema District, the Appeals Chamber upholds the Trial Chamber's

1 findings that his position as High Priest, his speech at the
2 second passing out parade, and his attendance at commanders'
3 meetings did not prove beyond reasonable doubt that Kondewa
4 encouraged or supported the criminal conduct for the purpose of
5 aiding and abetting the commission of crimes in these locations.

6 In view of the following, the Appeals Chamber by a
7 majority, Justice Gelaga King dissenting, dismisses the
8 Prosecution's third and fourth grounds of appeal. And by a
9 majority, Justice Gelaga King dissenting, dismisses Kondewa's
10 fourth ground of appeal.

11 Prosecution's fifth ground of appeal and Kondewa's fifth
12 ground of appeal: Enlisting children under the age of 15 years
13 into armed forces or groups and/or using them to participate
14 actively in hostilities

15 The Prosecution's and Kondewa's fifth grounds of appeal
16 concern the criminal responsibility of Fofana and Kondewa under
17 Article 6.1 for child enlistment or the use of children to
18 participate actively in hostilities. The Prosecution, in its
19 fifth ground of appeal, submits that:

20 (1) The Trial Chamber erred in failing to describe clearly
21 the full extent of Kondewa's responsibility because its finding
22 related to Kondewa's liability for enlistment only in respect of
23 one child, namely, witness TF2-021. The Prosecution submits that
24 Kondewa should be held responsible for committing or,
25 alternatively, aiding and abetting child recruitment by the
26 enlistment and/or use of children other than witness TF2-021.

27 (2) The Trial Chamber erred in acquitting Fofana and not
28 finding him criminally responsible under Article 6.1 for aiding
29 and abetting child enlistment.

1 Kondewa, on the other hand, in his fifth ground of appeal,
2 contends that the majority of the Trial Chamber, Justice Bankole
3 Thompson dissenting, erred in law and in fact in finding him
4 criminally responsible for enlisting children under the age of 15
5 years into an armed force or group and other serious violation of
6 International Humanitarian Law punishable under Articles 4(c) and
7 6.1 of the Statute.

8 The Appeals Chamber shall consider in turn the submissions
9 of the parties starting with the Prosecution.

10 1. Prosecution's fifth ground of appeal

11 The Appeals Chamber notes that the Trial Chamber relied
12 solely on the evidence of witness TF2-021 in determining
13 Kondewa's responsibility for child enlistment. The Trial Chamber
14 found that witness TF2-021 was initiated by Kondewa into the
15 Kamajor society at the age of 11. According to witness TF2-021,
16 there were approximately 400 initiates, 20 of whom he estimated
17 to be almost the same age group as himself.

18 The Appeals Chamber finds by a majority, Justice Winter
19 dissenting, that in view of the lack of evidence of the ages of
20 boys who were initiated along with witness TF2-021, as well as
21 the absence of evidence indicating that Kondewa was involved in
22 the initiations of witness TF2-140 and witness TF2-004, that the
23 Trial Chamber did not err in not finding Kondewa liable for
24 committing or aiding and abetting the crime of enlistment of
25 children.

26 The Appeals Chamber further finds that in view of the Trial
27 Chamber's decision not to consider evidence relating to Kondewa's
28 responsibility for using children it cannot consider any
29 evidence, or pronounce a verdict, on the alternative charge of

1 use of children below the age of 15 to participate actively in
2 hostilities.

3 The Appeals Chamber will now turn to the question of
4 whether the Trial Chamber erred in acquitting Fofana of child
5 enlistment and/or their use to participate actively in
6 hostilities.

7 The Appeals Chamber finds that on appeal, the Prosecution
8 merely proffered arguments based on evidence which the Trial
9 Chamber had already considered and rejected. The Appeals Chamber
10 emphasises that on appeal, a party cannot merely repeat arguments
11 which did not succeed at trial in the hope that the Appeals
12 Chamber will consider them afresh, unless that party can
13 demonstrate that rejecting them constituted an error which
14 warrants the intervention of the Appeals Chamber.

15 The Appeals Chamber therefore finds by a majority, Justice
16 Winter dissenting, that the Prosecution has failed to demonstrate
17 that no reasonable tribunal of fact could have found that Fofana
18 was not responsible for aiding and abetting child recruitment.

19 The Appeals Chamber, Justice Winter dissenting, therefore
20 dismisses the Prosecution's fifth ground of appeal in its
21 entirety.

22 I shall now address Kondewa's fifth ground of appeal and
23 the question whether Kondewa is criminally responsible under
24 Article 6.1 for committing the crime of enlisting a child under
25 the age of 15 years into an armed force or group.

26 2. Kondewa's fifth ground of appeal

27 On the particular facts of this case, it is clear that the
28 enlistment of witness TF2-021 had taken place before he was
29 initiated by Kondewa. The evidence shows that the witness had

1 first been captured by rebels in 1995 and was later captured by
2 the CDF in 1997. Upon his capture by the CDF, witness TF2-021
3 was forced to carry looted property by the CDF. This act, in the
4 opinion of the Appeals Chamber, Justice Winter dissenting,
5 constituted enlistment.

6 The Appeals Chamber, Justice Winter dissenting, therefore
7 grants Kondewa's fifth ground of appeal and reverses the verdict
8 of guilt and substitutes a verdict of not guilty on count 8.

9 I shall now turn to the remaining grounds of appeal for
10 each party, beginning with Kondewa's appeal.

11 Kondewa's Appeal

12 Kondewa's first ground of appeal, superior responsibility,
13 pursuant to Article 6.3 of the Statute in relation to Bonthe
14 District

15 Ground 1 of Kondewa's appeal alleges that the Trial
16 Chamber, Justice Bankole Thompson dissenting, erred in law and in
17 fact in finding him criminally responsible as a superior pursuant
18 to Article 6.3 of the Statute for crimes committed during the
19 attack on Bonthe District.

20 Kondewa complains that the Trial Chamber failed to apply
21 correctly the test of effective control necessary to establish
22 the existence of a superior/subordinate relationship and argues
23 that the evidence did not establish any form of relationship
24 between him and Kamajor commanders alleged to have perpetrated
25 crimes in Bonthe District.

26 Kondewa requests the Appeals Chamber to reverse the Trial
27 Chamber's finding that he was individually criminally responsible
28 as a superior under counts 2, 4, and 5, for crimes committed
29 during the attack in Bonthe District.

1 At the outset, the Appeals Chamber recalls that the test
2 for establishing the existence of a superior/subordinate
3 relationship is effective control for both military and civilian
4 superiors.

5 The Appeals Chamber finds that the Trial Chamber considered
6 several facts such as: Kondewa's position as High Priest; his
7 power to issue oral and written directives; other investigations
8 for misconduct and hold court hearings, in arriving at its
9 conclusion. Furthermore, Kondewa himself acknowledges authority
10 and control over Bonthe by stating publicly that he refused "to
11 give any areas under his control to a military government, but to
12 the democratically elected government of President Ahmad Tejan
13 Kabbah."

14 The Appeals Chamber therefore finds that it was open to a
15 reasonable tribunal of fact to conclude that Kondewa had
16 effective control over the Kamajors who committed crimes in
17 Bonthe, and in this Justice Gelaga King dissents. The Appeals
18 Chamber, Justice Gelaga King dissenting, accordingly dismisses
19 ground 1 of Kondewa's appeal.

20 Kondewa's second ground of appeal: Alleged error in
21 finding Kondewa responsible for committing murder at Talia Base
22 Zero

23 In his second ground of appeal, Kondewa submits that the
24 Trial Chamber erred in finding him individually criminally
25 responsible pursuant to Article 6.1 for the murder of two town
26 commanders in Talia Base Zero charged under count 2 of the
27 indictment. He complains that the evidence relied on by the
28 Trial Chamber, in finding that a town commander actually died,
29 was skeletal at best and did not establish that the town

1 commander was dead.

2 The Appeals Chamber finds that this ground of appeal
3 concerns the Trial Chamber's evaluation of witness TF2-096's
4 testimony. The Trial Chamber found that witness TF2-096 saw
5 Kondewa shoot one of the town commanders. Immediately after
6 witnessing this incident, the witness ran away. The next morning
7 witness TF2-096 also saw two graves and was told that the town
8 commanders were buried in them.

9 The Appeals Chamber finds that witness TF2-096 did not
10 herself witness the death of the town commander, and her
11 testimony did not establish the death of any town commander.

12 The Appeals Chamber therefore finds that no reasonable
13 tribunal of fact could have found that the only reasonable
14 inference was that Kondewa killed the town commander and
15 accordingly grants Kondewa's second ground of appeal.

16 Kondewa's third ground of appeal: Superior responsibility
17 pursuant to Article 6.2 of the Statute in relation to Moyamba
18 District

19 In his third ground of appeal, Kondewa submits that the
20 Trial Chamber erred in law and fact in finding him individually
21 criminally responsible as a superior pursuant to Article 6.1 for
22 pillage in Moyamba District charged under count 5 of the
23 indictment. As in ground 1 of his appeal, Kondewa challenges the
24 Trial Chamber's application of the effective control test and
25 further argues that the only evidence relied on by the Trial
26 Chamber, in establishing a superior/subordinate relationship, was
27 his acceptance of the looted car after the offence had been
28 committed.

29 The Appeals Chamber finds that the evidence relied on by

1 the Trial Chamber, namely, that the Kamajors said they were
2 "Kondewa's Kamajors" from surrounding villages, including Talia
3 and Tihun and that the looted car, previously in Norman's
4 possession, was subsequently given to Kondewa, who was seen
5 driving the car in Bo, is insufficient to establish the existence
6 of a superior/subordinate relationship beyond reasonable doubt.

7 The Appeals Chamber therefore grants Kondewa's third ground
8 of appeal and reverses the verdict of guilt on count 5 and
9 substitutes a verdict of not guilty.

10 Kondewa's sixth ground of appeal: Cumulative convictions
11 and collective punishments

12 In his sixth ground of appeal, Kondewa submits that the
13 majority of the Trial Chamber erred in law in entering a
14 conviction for collective punishments under count 7. He argues
15 that count 7 is impermissibly cumulative and based on the same
16 conduct as his convictions under counts 2, 4 and 5 charging
17 murder, cruel treatment, and pillage respectively. He further
18 complains that the Trial Chamber impermissibly widened the
19 interpretation of punishment for the purposes of collective
20 punishment.

21 The Appeals Chamber finds that the correct definition of
22 collective punishments is:

23 (1) The indiscriminate punishment imposed collectively on
24 persons for omissions or acts for which some or none of them may
25 or may not have been responsible; and

26 (2) The specific intent of the perpetrator to punish
27 collectively.

28 In light of this definition, it is the view of the Appeals
29 Chamber that convictions are permissible for collective

1 punishments in addition to murder, cruel treatment, and pillage,
2 because the crime of collective punishments requires proof of
3 materially distinct elements from the crimes charged under counts
4 2, 4 and 5.

5 The Appeals Chamber, Justice Winter dissenting, opines that
6 in the light of the definition of the elements of collective
7 punishments, it must re-examine the Trial Chamber's factual
8 findings.

9 The Trial Chamber relied on numerous factual findings
10 concerning murder, cruel treatment, and pillage to support its
11 convictions of Fofana and Kondewa for the commission of
12 collective punishments in the various locations mentioned above.

13 The Appeals Chamber's examinations of these findings reveal
14 that the victims of murder, cruel treatment, and pillage were
15 being targeted in these places because of the identities or the
16 locations at the time of the Kamajors attacks. In particular,
17 the Kamajors targeted individuals who were identified or accused
18 of being rebels and collaborators or were related to rebels.

19 In addition, the Kamajors targeted Loko, Limba, and Temne
20 tribe members, policemen and civilians, in close proximity to the
21 National Diamond Mining Company, NDMC, headquarters in Tongo.
22 Finally, many other civilians appeared to have been targets of
23 murder, cruel treatment, and pillage merely by chance, due to the
24 indiscriminate nature of the attacks in these locations.

25 The Trial Chamber's factual findings indicate that the
26 individuals who came under attack in Tongo, Kori bondo, Bo
27 District, and Bonthe District, were being targeted due to the
28 perceived identities, their locations, or by sheer chance. The
29 Trial Chamber's factual findings do not, however, indicate that

1 these individuals were objects of attack because of perceived
2 acts or omissions for which the Kamajors sought to punish them.

3 The Appeals Chamber, Justice Winter dissenting, therefore
4 finds that the Trial Chamber's factual findings do not prove
5 beyond a reasonable doubt that the perpetrators of these crimes
6 were attacking protected persons in these areas with the intent
7 to collectively punish them for the perceived acts or omissions.

8 The Appeals Chamber, Justice Winter dissenting, finds
9 therefrom the requisite mens rea for collective punishment has
10 not been proved. Consequently the Appeals Chamber, Justice
11 Winter dissenting, reverses the Trial Chamber's convictions of
12 Fofana and Kondewa for collective punishments under count 7 and
13 substitutes a verdict of not guilty.

14 I shall now turn to the Prosecution's grounds of appeal.

15 Prosecution's Appeal

16 Prosecution's first ground: Crimes against humanity

17 In its first ground of appeal, the Prosecution challenges
18 the Trial Chamber's acquittal of Fofana and Kondewa under count
19 1, murder as a crime against humanity, and count 3, inhumane acts
20 as a crime against humanity. The Trial Chamber found the
21 following general requirements of crimes against humanity as
22 follows:

23 (1) There must be an attack;

24 (2) The attack must be widespread or systematic;

25 (3) The attack must be directed against any civilian
26 population;

27 (4) The acts of the accused must be part of the attack;

28 and

29 (5) The accused knew or had reason to know that his or her

1 acts constitute part of a widespread or systematic attack
2 directed against any civilian population.

3 The Trial Chamber held that the first and second of these
4 elements were satisfied in this case; however, with respect to
5 the third element it held:

6 "The evidence adduced does not prove beyond reasonable
7 doubt that the civilian population was the primary object
8 of the attack. By contrast, there is evidence that these
9 attacks were directed against the rebels or juntas that
10 controlled towns, villages, and communities throughout
11 Sierra Leone. In this regard, the Chamber recalls the
12 admission of the Prosecutor that the CDF and the Kamajors
13 fought for the restoration of the democracy."

14 The Prosecution in its first ground of appeal alleges that
15 the Trial Chamber erred in law and in fact in a number of
16 respects.

17 With regard to the Prosecution's submission that the Trial
18 Chamber erred in law in finding that the fact that the CDF fought
19 for democracy was a relevant factor, the Appeals Chamber
20 emphasises that Rules of International Humanitarian Law apply
21 equally to both sides of the conflict. It is, therefore, no
22 justification that the perpetrators of a crime against humanity
23 were fighting for the restoration of democracy.

24 The Appeals Chamber, Justice Gelaga King dissenting, is
25 further unable to find that references by the Trial Chamber to
26 the purpose for which the CDF was fighting was a decisive
27 consideration in its determination of the general requirements
28 for crimes against humanity.

29 With regard to the Prosecution's submission that the Trial

1 Chamber erred in finding that it incorrectly considered that, as
2 a matter of law, an attack is not directed against a civilian
3 population if civilians are targeted in the course of an attack
4 against opposing forces, the Appeals Chamber is unable to
5 conclude that the Trial Chamber considered that as a matter of
6 law, a military attack cannot coexist with an attack directed
7 against a civilian population.

8 The Prosecution has further alleged that the Trial Chamber
9 erred in fact in finding that the evidence did not prove beyond
10 reasonable doubt that the attacks were directed against a
11 civilian population.

12 As a preliminary issue, the Appeals Chamber considers that
13 "perceived collaborators" as well as police officers who have
14 been subject to murder and mistreatment are civilians for the
15 purpose of crimes against humanity. The Appeals Chamber, Justice
16 Gelaga King dissenting, further holds that, as a matter of law,
17 perceived or suspected collaborators are part of a civilian
18 population.

19 In determining whether the Trial Chamber committed an error
20 of fact, the Appeals Chamber has examined the Trial Chamber's
21 factual findings in regard to the attacks in Tongo, Kori bondo, Bo
22 Town, Bonthe, and Kenema.

23 There is no doubt from these findings that the Trial
24 Chamber was satisfied beyond reasonable doubt that civilians were
25 attacked in various ways by the Kamajors and that the attacks
26 were in fact specifically directed against a civilian population
27 within the meaning of Article 2 of the Statute, and in this
28 Justice Gelaga King is dissenting. Had the Trial Chamber tested
29 these findings against actual situation in the various locations,

1 it would have found that there were locations where the rebels
2 and junta had already withdrawn before the attack on the civilian
3 population by the Kamajors occurred.

4 The Appeals Chamber, Justice Gelaga King dissenting, is
5 further of the view that the criminal conduct against these
6 civilians was neither random, nor isolated acts, but was rather
7 perpetrated pursuant to a common pattern of targeting the
8 civilian population.

9 The Trial Chamber therefore erred, Justice Gelaga King
10 dissenting, in fact in concluding that it had not been proved
11 beyond reasonable doubt that the attacks were directed against a
12 civilian population.

13 The Appeals Chamber, Justice Gelaga King dissenting,
14 further agrees with the submission of the Prosecution that the
15 remaining elements of crimes against humanity are satisfied.

16 The Appeals Chamber, Justice Gelaga King dissenting,
17 therefore sets aside the verdict of not guilty against Fofana and
18 Kondewa by the Trial Chamber under counts 1 and 3 and substitutes
19 a verdict of guilty on these counts.

20 Turning now to the Prosecution sixth ground of appeal:
21 Fofana's and Kondewa's acquittals for acts of terrorism charged
22 under count 6 of the indictment.

23 Prosecution's sixth ground of appeal: Fofana's and
24 Kondewa's acquittals for acts of terrorism

25 In the sixth ground of appeal, the Prosecution requests the
26 Appeals Chamber to reverse the Trial Chamber's findings and find
27 Fofana and Kondewa criminally responsible for the crime acts of
28 terrorism charged under count 6 of the indictment.

29 As a preliminary issue, the Appeals Chamber agrees with the

1 Prosecution that the Trial Chamber erred in adopting a limited
2 interpretation of count 6 of the indictment.

3 In considering the Prosecution's request to reverse the
4 Trial Chamber's findings, the Appeals Chamber makes the following
5 findings:

6 (1) For aiding and abetting acts of terrorism in Tongo, a
7 reasonable tribunal of fact could have found that Fofana and
8 Kondewa may not have been aware of the specific intent to commit
9 acts of terrorism;

10 (2) For Fofana's superior responsibility under Article 6.3
11 of the Statute, for acts of terrorism in Koribondo, the
12 Prosecution has not demonstrated that Fofana knew or had reason
13 to know that acts of terrorism would be or were committed there;
14 and

15 (3) For Kondewa's superior responsibility under Article
16 6.3 of the Statute, for acts of terrorism in Bonthe District, the
17 Prosecution has not demonstrated that Kondewa knew or had reason
18 to know that acts of terrorism would be or were committed there.

19 The Appeals Chamber therefore finds no reason to disturb
20 the Trial Chamber's findings with respect to the criminal
21 responsibility of Fofana and Kondewa for acts of terrorism under
22 Article 6.1 and/or Article 6.3 of the Statute. The Appeals
23 Chamber rejects the Prosecution's sixth ground of appeal in its
24 entirety.

25 Prosecution seventh ground of appeal: Burning as pillage

26 In its seventh ground of appeal, the Prosecution submits
27 that the Trial Chamber erred as a matter of law in holding that
28 the crime of pillage, a violation of Article 3 common to the
29 Geneva Conventions, and of Additional Protocol II, punishable

1 under Article 3(f) of the Statute, cannot include acts of
2 burning.

3 The distinction between the prohibitions against pillage
4 and destruction, not justified by military necessity, which is
5 perceived throughout applicable conventional international law,
6 and the drafting history of the Statute of the Special Court,
7 leads the Appeals Chamber to find that a necessary element of the
8 crime of pillage is the unlawful appropriation of property.

9 Consequently, burning and other acts of destruction of
10 property not amounting to appropriation as a matter of law cannot
11 constitute pillage under International Criminal Law.

12 The Prosecution's seventh ground of appeal, therefore,
13 fails.

14 Prosecution's eighth ground of appeal: Denial of leave to
15 amend the indictment in order to charge sexual crimes

16 Under its eighth ground of appeal, the Prosecution alleges
17 that the Trial Chamber erred in law and/or fact and procedure in
18 dismissing, by decision of 20 May 2004, the Prosecution's motion
19 for leave to amend the indictment to include charges of sexual
20 violence.

21 The relief sought by the Prosecution is limited to a
22 reversal by the Appeals Chamber of the legal reasoning employed
23 by the Trial Chamber to arrive at the erroneous decision and a
24 declaration to that effect. The Prosecution does not request the
25 Appeals Chamber to substitute any additional conviction or to
26 order any further trial proceedings.

27 In view of the foregoing, the Appeals Chamber, Justice
28 Winter dissenting, finds that the consideration of this ground of
29 appeal would be an academic exercise.

1 The Prosecution's eighth ground of appeal, therefore, fails
2 in its entirety.

3 Prosecution's ninth ground of appeal: Alleged error
4 concerning admissibility of evidence of sexual violence

5 In the Prosecution's ninth ground of appeal, the
6 Prosecution alleges that the Trial Chamber erred in finding that
7 evidence of a sexual nature was inadmissible at trial in relation
8 to counts 3 and 4 of the indictment.

9 Specifically, the Prosecution alleges that the Trial
10 Chamber erred in dismissing its admissibility of evidence motion
11 on the ground that acts of sexual violence were not pleaded under
12 counts 3 and 4 of the indictment.

13 The Appeals Chamber notes that the Prosecution's ninth
14 ground of appeal does not raise an error of law that invalidates
15 a decision; however, it exercises its discretion, Justice Gelaga
16 King dissenting, and considers this ground of appeal guidance to
17 the Trial Chamber.

18 The Appeals Chamber, Justice Gelaga King dissenting, finds
19 that the Trial Chamber erred in denying the hearing of evidence
20 of acts of sexual violence on the basis that such acts had not
21 been alleged in the indictment. Evidence of sexual violence was
22 relevant to charges in the indictment, and the Trial Chamber was
23 in error in prospectively denying the admittance of such
24 evidence.

25 Furthermore, the Appeals Chamber, Justice Gelaga King
26 dissenting, finds that Fofana and Kondewa were put on notice of
27 such evidence and had timely, clear, and consistent information
28 indicating that acts of sexual violence were being charged in
29 relation to counts 3 and 4 of the indictment.

1 Turning now to the Prosecution's tenth ground of appeal,
2 which concerns the Trial Chamber's sentencing judgment.

3 Prosecution's tenth ground of appeal: Sentencing
4 In its tenth ground of appeal, the Prosecution submitted
5 that the Trial Chamber erred in considering seven factors as
6 mitigating circumstances for the purposes of sentencing. These
7 factors were Fofana's and Kondewa's:

- 8 (1) Statement of regret;
- 9 (2) Lack of training;
- 10 (3) Conduct subsequent to the conflict;
- 11 (4) Lack of previous convictions;
- 12 (5) Fofana's and Kondewa's motive of civic duty;
- 13 (6) The purpose of reconciliation; and
- 14 (7) The CDF's alleged "just cause".

15 The Prosecution also alleged that the Trial Chamber erred
16 in imposing concurrent sentences and complained of the "manifest
17 inadequacy of the sentence."

18 In regard to the CDF's alleged just cause, and Fofana's and
19 Kondewa's motive of civic duty, the Appeals Chamber, Justice
20 Gelaga King dissenting, finds, as a general principle, a
21 convicted person's motive can be considered as a mitigating
22 factor. However, political motives, and particularly the
23 justness of a party's cause, have been specifically removed from
24 consideration in International Criminal Law. These political
25 motives, even where they are considered by the Chamber to be
26 meritorious, undermine the purposes of sentencing rather than
27 promoting them. Therefore, the Appeals Chamber, Justice Gelaga
28 King dissenting, upholds the Prosecution's submissions in this
29 respect.

1 The Appeals Chamber further re-emphasises that it is an
2 international court with responsibility to protect and promote
3 the norms and values of the international community, expressed
4 not only as part of customary international law but also in
5 several international instruments.

6 In assessing the appropriate sentence, the obligation of
7 the Appeals Chamber, Justice Gelaga King dissenting, is therefore
8 to impose sentences that reflect the revulsion of the
9 international communities to such crimes as those for which the
10 accused persons have been convicted, after taking into
11 consideration all factors that can be considered legitimately in
12 mitigation, as well as in aggravation.

13 For the foregoing reasons, and taking all the circumstances
14 of the case into consideration, the Appeals Chamber, Justice
15 Gelaga King dissenting, and Justice Jon Kamanda also dissenting,
16 revises the sentences on Fofana and Kondewa in respect of counts
17 2, 4 and 5 and imposes sentences on Fofana and Kondewa on counts
18 1 and 3.

19 For the reasons discussed, I shall now read out the Appeals
20 Chamber's disposition in full.

21 Disposition

22 For the foregoing reasons, the Appeals Chamber, pursuant to
23 Article 20 of the Statute and Rule 106 of the Rules of Procedure
24 and Evidence, noting the written submissions of the parties and
25 their oral arguments presented at the hearings on 12 and 13 March
26 2008, sitting in open session, with respect to Kondewa's grounds
27 of appeal: Dismisses, Justice Gelaga King dissenting, ground 1,
28 and upholds the conviction of Kondewa pursuant to Article 6.3 of
29 the Statute for murder, cruel treatment, and pillage committed in

1 Bonthe; allows ground 2 and reverses the verdict of guilty for
2 Kondewa pursuant to Article 6.1 of the Statute for murder
3 committed in Talia Base Zero; allows ground 3 and reverses the
4 verdict of guilty for Kondewa pursuant to Article 6.3 of the
5 Statute for pillage committed in Moyamba District; dismisses,
6 Justice Gelaga King dissenting, ground 4, and upholds the
7 conviction of Kondewa for aiding and abetting pursuant to Article
8 6.1 of the Statute for the crimes committed in Tongo Fields;
9 allows, Justice Winter dissenting, ground 5, and reverses the
10 verdict of guilty for Kondewa for enlisting children under the
11 age of 15 into armed forces or groups and/or using them to
12 participate actively in hostilities; allows ground 6 and holds,
13 Justice Winter dissenting, that the Trial Chamber erred in
14 respect of the convictions of Fofana and Kondewa for collective
15 punishments.

16 With respect to the Prosecution's grounds of appeals:
17 Allows, Justice Gelaga King dissenting, ground 1, and sets aside
18 the verdict of not guilty against Fofana and Kondewa for crimes
19 against humanity; notes that ground 2 has been abandoned by the
20 Prosecution; dismisses ground 3, and does not enter convictions
21 for Fofana and Kondewa for the crimes committed in Kenema
22 District; dismisses ground 4 and does not enter additional
23 convictions for Kondewa for instigating crimes committed in Tongo
24 Fields or for aiding and abetting crimes committed in Kori bondo,
25 Bo District, and Kenema District, and does not enter additional
26 convictions for Fofana for instigating and planning the crimes in
27 Tongo Fields, or for planning or aiding and abetting the crimes
28 committed in Kori bondo, Bo District, and Kenema District;
29 dismisses, Justice Winter dissenting, ground 5, and does not

1 enter additional convictions for Kondewa and convictions for
2 Fofana for enlisting children under the age of 15 into armed
3 forces or groups and/or using them to participate actively in
4 hostilities; dismisses ground 6 and does not enter convictions of
5 Fofana and Kondewa for acts of terrorism; dismisses ground 7 and
6 holds the destruction of property not amounting to appropriation
7 does not constitute the crime of pillage; dismisses, Justice
8 Winter dissenting, ground 8, and holds that the Prosecution has
9 not showed that the alleged error relating to the amendment of
10 the indictment constitutes an error of law invalidating the
11 decision; allows, Justice Gelaga King dissenting, ground 9, and
12 holds that the Trial Chamber erred in denying the hearing of
13 evidence of acts of sexual violence; allows ground 10 and holds,
14 Justice Gelaga King dissenting, that the Trial Chamber erred in
15 finding that "just cause" can be a mitigating factor, although
16 rejecting all other arguments raised by the Prosecution, Justice
17 Winter dissenting, with respect to accepting the expression of
18 remorse and the purpose of reconciliation in mitigation.

19 Consequently revises, and in this Justice Gelaga King and
20 Justice Jon Kamanda dissent, the sentences in respect of counts
21 2, 4, and 5 as follows:

22 In respect of Moinina Fofana, the sentences of six years
23 imposed by the Trial Chamber on each of counts 2 and 4 are
24 increased to fifteen years' imprisonment on each of those counts,
25 and the sentence of three years imposed on counts 5 is increased
26 to five years' imprisonment;

27 In respect of Allieu Kondewa, the sentences of eight years
28 imposed by the Trial Chamber on each of counts 2 and 4 are
29 increased to twenty years' imprisonment on each of those counts,

1 and the sentence of five years imposed on count 5 is increased to
2 seven years' imprisonment.

3 I repeat: Justice Gelaga King and Justice Jon Kamanda
4 dissent from these increases in sentence.

5 Consequently, will Mr Fofana and Mr Kondewa now rise.

6 Count 1: Murder, a crime against humanity punishable under
7 Article 2(a) of the Statute, guilty by majority of aiding and
8 abetting under Article 6.1 of the Statute the murders committed
9 in Tongo Field and of superior responsibility under Article 6.3
10 of the Statute for the murders committed in Koribondo and Bo
11 District and sentences Fofana to fifteen years of imprisonment.

12 Count 2: Violence to life, health and physical or mental
13 well-being of persons, in particular murder, punishable under
14 Article 3(a) of the Statute, guilty, Justice Gelaga King
15 dissenting, of aiding and abetting under Article 6.1 of the
16 Statute, the murders committed in Tongo Fields and of superior
17 responsibility under Article 6.3 of the Statute for the murders
18 committed in Koribondo and Bo District, and sentences Fofana to
19 fifteen years' imprisonment, Justice Gelaga King and Justice Jon
20 Kamanda dissenting.

21 Count 4: Violence to life, health and physical or mental
22 well-being of persons, in particular cruel treatment, punishable
23 under Article 3(a) of the Statute, guilty, Justice Gelaga King
24 dissenting, of aiding and abetting under Article 6.1 of the
25 Statute the cruel treatment committed in Tongo Fields and of
26 superior responsibility under Article 6.3 of the Statute for the
27 cruel treatment committed in Koribondo and Bo District, and
28 sentences Fofana to fifteen years of imprisonment. And here
29 again, Justice Gelaga King and Justice Jon Kamanda are

1 dissenting.

2 Count 5: Pillage, a violation of Article 3 common to the
3 Geneva Conventions and of Additional Protocol II punishable under
4 Article 3(f) of the Statute, guilty, Justice Gelaga King
5 dissenting, of superior responsibility under Article 6.3 of the
6 Statute for the crimes committed in Bo District and sentences
7 Fofana to five years of imprisonment.

8 Count 6: Acts of terrorism, a violation of Article 3
9 common to the Geneva Conventions and of Additional Protocol II
10 punishable under Article 3(d) of the Statute, not guilty.

11 Count 7: Collective punishments, a violation of Article 3
12 common to the Geneva Conventions and of Additional Protocol II
13 punishable under Article 3(b) of the Statute, not guilty by
14 majority.

15 Count 8: Conscripting or enlisting children under the age
16 of 15 years into armed forces or groups or using them to
17 participate actively in hostilities, and other serious violation
18 of International Humanitarian Law punishable under article 4(c)
19 of the Statute, not guilty by a majority.

20 Finds in respect of Allieu Kondewa:

21 Count 1: Murder, a crime against humanity punishable under
22 Article 2(a) of the Statute, guilty by majority, Justice Gelaga
23 King dissenting, of aiding and abetting under Article 6.1 of the
24 Statute the murders committed in Tongo Field and of superior
25 responsibility under Article 6.3 of the Statute for the murders
26 committed in Bonthe District, and sentences Kondewa to 20 years
27 of imprisonment, and on this term of imprisonment Justice Gelaga
28 King and Justice Jon Kamanda dissent.

29 Count 3: Other inhumane acts, a crime against humanity

1 punishable under Article 2(i) of the Statute, guilty by majority
2 of aiding and abetting under Article 6.1 of the Statute the other
3 inhumane acts committed in Tongo Fields, and of superior
4 responsibility under Article 6.3 of the Statute for the other
5 inhumane acts committed in Bonthe District, and sentences Kondewa
6 to twenty years of imprisonment. In this again Justice Gelaga
7 King and Justice Kamanda, as regards the sentence, dissent.

8 Count 4: Violence to life, health, and physical or mental
9 well-being of persons, in particular cruel treatment, punishable
10 under Article 3(a) of the Statute, guilty by majority, Justice
11 Gelaga King dissenting, of aiding and abetting under Article 6.1
12 of the Statute the cruel treatment committed in Tongo Fields, and
13 of superior responsibility under Article 6.3 of the Statute for
14 the cruel treatment committed in Bonthe District, and sentences
15 Kondewa to twenty years of imprisonment. And in this again
16 Justice Gelaga King and Justice Jon Kamanda both dissent.

17 Count 5: Pillage, a violation of Article 3 common to the
18 Geneva Conventions and of Additional Protocol II punishable under
19 Article 3(f) of the Statute, not guilty of superior
20 responsibility under Article 6.3 of the Statute for the crimes
21 committed in Moyamba District and guilty by majority, Justice
22 Gelaga King dissenting, of superior responsibility under Article
23 6.3 of the Statute for the crimes committed in Bonthe District,
24 and sentences Kondewa to seven years of imprisonment, and again
25 here Justice Gelaga King and Justice Kamanda dissent.

26 Count 6: Acts of terrorism, a violation of Article 3
27 common to the Geneva Conventions and of Additional Protocol II
28 punishable under Article 3(d) of the Statute, not guilty.

29 Count 7: Collective punishments, a violation of Article 3

1 common to the Geneva Conventions and of Additional Protocol II,
2 punishable under Article 3(b) of the Statute, not guilty by a
3 majority.

4 Count 8: Conscripting or enlisting children under the age
5 of 15 years into armed forces or groups or using them to
6 participate actively in hostilities and other serious violation
7 of International Humanitarian Law punishable under Article 4(c)
8 of the Statute, not guilty by a majority, Justice Winter
9 dissenting.

10 The Appeals Chamber hereby orders that the sentences shall
11 run concurrently.

12 Orders that Moïni Na Fofana shall serve a term of
13 imprisonment of 15 years, subject to credit being given under
14 Rule 101(D) of the Rules of Procedure and Evidence for the period
15 for which he has already been in detention;

16 Orders that Allieu Kondewa shall serve a total term of
17 imprisonment of 20 years, subject to credit being given under
18 Rule 101(D) of the Rules of Procedure and Evidence for the period
19 for which he has already been in detention;

20 Rules that this judgment shall be enforced immediately
21 pursuant to Rule 119 of the Rules of Procedure and Evidence;

22 Orders, in accordance with Rule 102 of the Rules of
23 Procedure and Evidence, that Moïni Na Fofana and Allieu Kondewa
24 remain in the custody of the Special Court for Sierra Leone
25 pending the finalisation of arrangements to serve their
26 sentences.

27 I shall now ask Honourable Justice Jon Kamanda to read out
28 his partially dissenting opinion as regards the increase in
29 sentence.

1 JUSTICE KAMANDA: My Lords, I have in this judgment
2 concurred with the majority view of my distinguished colleagues
3 in the main judgment in this case. We nonetheless have not
4 agreed on the question of sentence. I have, in consequence, had
5 recourse to write a partially dissenting opinion, the summary of
6 which I am now reading.

7 Briefly stated, my position is that the sentences imposed
8 by the Trial Chamber are fair and adequate, because it is my view
9 that the said Chamber considered all the relevant parameters in
10 arriving at fair and just sentences, all the circumstances
11 considered. Except in those areas where I have joined my learned
12 colleagues to overturn the sentences or the verdicts pronounced
13 by the Trial Chamber, I have left the sentences undisturbed.

14 The two accused, Moinina Fofana and Allieu Kondewa, were
15 each charged on eight counts of offences pursuant to crimes that
16 could broadly be categorised under three heads. That is:

- 17 (a) Crimes against humanity, counts 1 and 3;
18 (b) War crimes, counts 2, 4, 5, 6 and 7;
19 (c) Other serious violations of International Humanitarian
20 Law, count 8.

21 The accused were charged pursuant to Article 6.1 and/or
22 6(3) of the Statute for the Special Court for Sierra Leone.

23 Article 6.1 provides:

24 "That a person who planned, instigated, ordered, committed
25 or otherwise aided and abetted in the planning,
26 preparation, or execution of a crime referred to in
27 Articles 2 to 4 of the present Statute shall be
28 individually responsible for the crime."

29 Article 6.3 provides:

1 "The fact that any of the acts referred to in Articles 2
2 and 4 of the present Statute was committed by a subordinate
3 does not relieve his or her superior of criminal
4 responsibility if he or she knew or had reason to know that
5 the subordinate was about to commit such acts or had done
6 so, and the superior had failed to take the necessary and
7 reasonable measures to prevent such acts of punishment" --
8 "of punishing the perpetrators thereof."

9 I have quoted these articles in extenso to show that the
10 accused were not charged as persons who themselves committed
11 these acts directly. Criminal responsibility was thrust upon
12 them by the operation of the Statute. I don't quarrel with that.
13 I have mentioned the import of this assumed criminality because
14 it is my considered view that this factor must be viewed from the
15 perspective that these lowly-placed men could be clothed with the
16 garment of major players in a very confused warfare who were
17 fighters, who were, more often than not, on frolics of their own.

18 Since the law holds them culpable in any case, it is my
19 strong view that that same law should, in an even-handed manner,
20 operate also as a mitigating factor on the question of sentence
21 on their behalf.

22 The Trial Chamber found Fofana guilty on counts 2, 4, 5, 7,
23 with respective prison terms of six, six, three and four years
24 passed on him to run concurrently. This, in effect, gave Fofana
25 a maximum prison term of six years, inclusive of the time he had
26 spent in the custody of the Special Court. He was found not
27 guilty on counts 1, 3, 6 and 8.

28 Kondewa was found guilty on counts 2, 4, 5, 7 and 8, with
29 respective prison terms of eight years, eight years, five years,

1 six years, and seven years passed on him to run concurrently, his
2 maximum prison term being eight years.

3 Kondewa appealed his conviction; Fofana did not. The
4 Prosecution, among other grounds, appealed against the grounds on
5 which the accused were acquitted.

6 At the completion of the hearing, the Appeals Chamber, by a
7 majority, overturned the not guilty verdict on the two accused on
8 grounds 1 and 3 -- on counts 1 and 3 rather, entered a conviction
9 on both counts, and imposed sentences in excess of the highest
10 imposed on any count by the Trial Chamber. The rest of the
11 convictions passed by the Trial Chamber were confirmed and
12 sentences raised upwards.

13 Having taken all the circumstances of the case into
14 consideration, I, on my own, pass the following sentences:

15 With respect to Fofana's conviction on counts 1, 2, 3, 4, 5
16 and 7, I pass sentences of six years, six years, five years, six
17 years, three years, and six years respectively, the terms to run
18 concurrently, maximum term to be served being six years, taking
19 effect from 29 May -- when the accused was arrested and taken
20 into custody of the Special Court of Sierra Leone.

21 With respect to Kondewa's convictions on counts 1, 2, 3, 4,
22 5, 7 and 8, I hereby pass sentences of eight years, eight years,
23 five years, eight years, five years, six years, and seven years,
24 the terms again to run concurrently, maximum term to be served
25 being eight years.

26 I have, in my full dissenting opinion appended to the
27 judgment, given reasons why I have found no reason to have these
28 prison terms imposed by the Trial Chamber revised or disturbed.
29 Thank you, My Lords.

1 JUSTICE KING: Thank you very much, Justice Jon Kamanda. I
2 shall now read my partially dissenting opinion.

3 I append a dissenting opinion in respect of counts 1, 2, 3
4 and 4 of the indictment, for which the majority of my
5 distinguished colleagues found the accused Moinina Fofana and the
6 appellant Allieu Kondewa guilty, and concur with them in finding
7 him not guilty under counts 5, 6, 7 and 8. It will be recorded
8 that the Trial Chamber unanimously found Fofana and Kondewa not
9 guilty under counts 1 and 3 of crimes against humanity. Count 1
10 charges both accused with murder, a crime against humanity
11 punishable under Article 2(a) of the Statute and count 3, with
12 "inhumane acts" punishable under Article 2(i) of the Statute.
13 The indictment further charges that each of the accused is
14 individually criminally responsible for the crimes alleged
15 pursuant to Article 6.1, and, alternatively, Article 6.3 of the
16 Statute.

17 The Trial Chamber, by a majority, Justice Bankole Thompson
18 dissenting, found both accused guilty of violence to life,
19 health, and physical or mental well-being of persons, in
20 particular murder, a violation of Article 3 common to the Geneva
21 Conventions and of Additional Protocol II under count 2 and under
22 count 4 of violence to life, health, and physical or mental
23 well-being of persons, in particular, cruel treatment, a
24 violation of Article 3 common to the Geneva Conventions and of
25 Additional Protocol II. Both crimes are punishable under Article
26 3(a) of the Statute.

27 I shall deal with counts 1 and 3 together and then counts 2
28 and 4.

29 Background

1 In arriving at the verdict of not guilty in respect of
2 counts 1 and 3, the Trial Chamber made the following finding:

3 "That the evidence adduced does not prove beyond reasonable
4 doubt that the civilian population was the primary object
5 of the attack. By contrast, there is evidence that these
6 attacks were directed against the rebels or juntas that
7 controlled towns, villages and communities throughout
8 Sierra Leone. In this regard, the Chamber recalls the
9 admission of the Prosecutor that the CDF and the Kamajors
10 fought for the restoration of democracy."

11 The Prosecution's first ground of appeal states:

12 "Acquittal of Moinina Fofana and Allieu Kondewa of murder and
13 other inhumane acts as crimes against humanity."

14 It alleges that: "The Trial Chamber erred in law in
15 holding that the evidence adduced does not prove beyond
16 reasonable doubt that the civilian population was the primary
17 object of the attack."

18 It contends that the Trial Chamber erred in law and in fact
19 in finding that the chapeau elements of crimes against humanity
20 were not satisfied.

21 The relief sought by the Prosecution in respect of counts 1
22 and 3 is that the Appeals Chamber should find that all the
23 general elements of crimes against humanity, in particular
24 attacks directed against the civilian population, were
25 established in "relation to all the crimes charged in the
26 indictment" and that convictions be entered against Fofana and
27 Kondewa for the two counts.

28 The chapeau elements are what the Trial Chamber refers to
29 in its legal findings as the general requirements which must be

1 proved to show the commission of a crime against humanity. They
2 are as follows:

3 (1) There must be an attack;

4 (2) The attack must be widespread or systematic;

5 (3) The attack must be directed against any civilian
6 population;

7 (4) The acts of the accused must be part of the attack;
8 and

9 (5) The accused knew or had reason to know that his or her
10 acts constitute part of a widespread or systematic attack
11 directed against any civilian population.

12 The Trial Chamber found that requirements (1) and (2) had
13 been proved by the Prosecution. With regard to (3), it held that
14 the Prosecution did not prove that requirement beyond reasonable
15 doubt as stated in paragraph (5) supra. It consequently did not
16 make any findings on (4) and (5), the two remaining requirements.

17 In coming to the conclusion in respect of (3), which
18 requires that the attack must be directed against any civilian
19 population, the Trial Chamber considered the dictum of the ICTY
20 Appeals Chamber in *Kunarac et al* and that: "The expression
21 'directed against' is an expression which specifies that in the
22 context of a crime against humanity, the civilian population is
23 the primary object of the attack."

24 The Trial Chamber was persuaded by the dictum, adopted it,
25 and concluded that the expression "directed against any civilian
26 population" requires that "the civilian population be the primary
27 rather than an incidental target of the attack."

28 It is to be noted in the indictment, that in the indictment
29 the Prosecution explains its terminology in terms of civilians or

1 civilian population as follows:

2 "The words civilian or civilian population used in this
3 indictment refer to persons who took no active part in the
4 hostilities, or were no longer taking an active part in the
5 hostilities."

6 The Prosecution argues that:

7 "It is apparent from the finding that the Trial Chamber
8 considered, as a matter of law, that an attack will not be
9 one that is 'directed against' the civilian population if
10 civilians are attacked in the course of attacks directed
11 against opposing forces."

12 It submits that:

13 "If a force in an armed conflict attacks the civilian
14 population in a widespread or systematic manner in the
15 course of attacks against opposing forces, that force will
16 have undertaken a widespread or systematic attack against a
17 civilian population."

18 The Prosecution refers to the Trial Chamber's finding that
19 the CDF "fought for the restoration of democracy" and submits
20 that "the Trial Chamber erred in finding that this was in any way
21 a material consideration in determining whether the general
22 requirements for crimes against humanity existed in this case.
23 International Humanitarian Law applies equally to all parties in
24 a conflict."

25 The Defence for Fofana contends that the attacks, whether
26 random or selective, were never directed against the civilian
27 population, but against military targets. It argues further that
28 the Trial Chamber found that many acts of the Kamajors were
29 isolated, random, and unauthorised by the CDF. It refers to the

1 Chamber's finding that "although the CDF was a cohesive force
2 under one central command, there were some fighters who acted on
3 their own without the knowledge of central command." It submits
4 that it was never the policy of the CDF to terrorise civilians,
5 since the Kamajors could not be said to be terrorising the very
6 civilians they sought to protect.

7 The Defence for Kondewa submits that the Trial Chamber
8 applied the correct legal standard in concluding that the attack
9 was not directed against any civilian population, since the
10 civilian population was not the primary object of the attacks,
11 and that the Prosecution misconstrued the legal concept of crimes
12 against humanity. It argues that having regard to the
13 Prosecution's statement that the aim and objective of the CDF and
14 Kamajors was the restoration of democracy, that statement was
15 evidentially relevant in establishing that the civilian
16 population was not the specific target of the attacks.

17 Analysis: Crimes against humanity

18 1. Historical Facts

19 I deem it necessary, in adjudicating on the issues arising
20 from the various submissions and arguments in respect of the
21 counts, to refer summarily to some historical facts found by the
22 Trial Chamber relating to the Kamajors, the CDF, the Organisation
23 of African States, OAU, President Ahmad Tejan Kabbah, President
24 Sani Abacha of Nigeria (now deceased), the Ambassadors of the
25 United States of America, Great Britain, and Nigeria, the UNDP
26 representative and ECOMOG, and the part they played in the armed
27 conflict which raged in Sierra Leone during the period 1991 to
28 2001. Those facts, I believe, are instructive, relevant, and
29 informative, not only in evaluating the totality of the evidence

1 adduced by the Trial Chamber, but also in deciding whether the
2 Prosecution had proved its allegations in paragraph 19 of the
3 indictment, which I will deal with specifically later in this
4 opinion.

5 2. The Kamajors

6 "Kamajor" is a Mende word meaning "hunter." He is male, a
7 traditional hunter, has specialised knowledge of the forest in
8 his locality, is supposed to be an expert in the use of "bush"
9 medicines, is well skilled in navigating the forest, and is
10 reputed to be able and in a position to protect and defend his
11 village community from natural and supernatural threats. The
12 evidence discloses that when the civil conflict began in
13 Sierra Leone in 1991, the government ordered the Sierra Leone
14 Army to muster and mobilise the Kamajors for use as vigilantes
15 and as allies in Defence of the areas in which they lived. The
16 soldiers accordingly trained Kamajors for that purpose.

17 The Kamajor Society was formed in 1991 under the
18 chairmanship of the late Dr Lavalie, whose wife later became
19 Deputy Speaker of the Sierra Leone Parliament, with Dr Albert Joe
20 Demby, who in 1996 became Vice-President of the Republic of
21 Sierra Leone as Treasurer. Chief Lebbie of Komboya Chiefdom was
22 the head, and after his death in 1996 the Paramount Chiefs of the
23 Southern Districts appointed Region Chief Samuel Hinga Norman,
24 now deceased, as the Kamajors' Chairman.

25 3. Coup d'etat in Sierra Leone in 1997

26 On 25 May 1997, around 5.30 in the morning, a coup d'etat
27 took place in Sierra Leone. President Ahmad Tejan Kabbah and his
28 elected government were overthrown by some dissident members of
29 the Sierra Leone Army who then called themselves the "Armed

1 Forces Revolutionary Council" (AFRC) and in a speech broadcast by
2 Major Johnny Paul Koroma, invited the Revolutionary United Front
3 (RUF) rebels, led by one Foday Sankoh, to join them. President
4 Kabbah and some members of his government sought refuge in
5 neighbouring Guinea. Following the coup, the Kamajors went into
6 the bush. One Eddie Massally broadcast a rallying call over the
7 British Broadcasting Corporation summoning the Kamajors and other
8 traditional hunters, including the Kapras, the Gbethis, Tamboros
9 and the Donsos to assemble in Pujehun District to take up arms
10 against the AFRC and the rebels.

11 4. Meeting of the Ambassadors of the United States of
12 America, Great Britain, Nigeria, and the UNDP representative
13 His Excellency, Mr Peter Penfold, who was the High
14 Commissioner of Great Britain to Sierra Leone, testified before
15 the Trial Chamber on 8 February 2006. He said that with the
16 accredited ambassadors to Sierra Leone from the United States of
17 America, Great Britain, the Republic of Nigeria, and the UNDP
18 representative, a meeting was arranged with President Kabbah and
19 Hinga Norman in Conakry. At the meeting they offered assistance
20 from their respective governments to the ousted government on
21 condition that President Kabbah and Norman agreed to work
22 together in the interests of Sierra Leone. President Kabbah was
23 informed that President General Sani Abacha of Nigeria, who is
24 now deceased, but was then Chairman of the Economic Communities
25 of WEST African States (ECOWAS) was ready to support him and
26 would prevail on the rest of the ECOWAS member states to assist
27 Sierra Leone, but only if he was convinced that the people of
28 Sierra Leone were not prepared to accept the military regime that
29 had seized power.

1 President Kabbah assured the meeting that the people of
2 Sierra Leone would welcome the support of the traditional hunters
3 of Sierra Leone, the Kamajors, and others, in their quest to
4 reject the dissident military regime that had ousted his
5 democratically elected government. About three weeks after the
6 military coup on, 17 June 1997, Eddie Massally briefed Hinga
7 Norman on the availability and preparedness of the Kamajors.
8 Consequently, a meeting was held between Norman, Eddie Massally,
9 and Borbor Tucker (the two leaders of the Kamajors), General
10 Victor Malu, and other senior military officers of the Nigerian
11 Armed Forces. As a result of that meeting, Norman was mandated
12 to mobilise as much Kamajor manpower as he possibly could and was
13 charged with the responsibility of coordinating the supply and
14 distribution of arms and ammunition. Soon after, a
15 helicopter-load of arms and ammunition was flown to Gendema in
16 the Southern Province of Sierra Leone.

17 5. Creation of the Civil Defence Force

18 President Kabbah created and established the Civil Defence
19 Force (CDF) from his exile in Guinea. The raison d'être for the
20 formation of the CDF was to have a tangible follow-up to the
21 decisions taken at the Ambassadors' meeting. The CDF was
22 empowered to link up the various militia groups in Sierra Leone,
23 organise the Kamajors and other civil defence forces, and
24 coordinate the activities with those of the Economic Community Of
25 West African States Monitoring Group (ECOMOG) for the purpose of
26 conducting military operations to reinstate the democratically
27 elected government. In a conjoint manner, the CDF was to
28 exercise power and control over efforts in Sierra Leone to
29 reestablish President Kabbah's democratically elected government

1 and, in the ensuing armed struggle, to use their best endeavours
2 to defeat the dissident military regime and those who would
3 cooperate and were cooperating with that illegal regime.

4 President Kabbah appointed Hinga Norman, who is now deceased,
5 National Coordinator of the CDF.

6 6. Economic Community Of West African States Monitoring
7 Group (ECOMOG)

8 His Excellency, Peter Penfold revealed in evidence that
9 while President Kabbah was exiled in Conakry, the capital of
10 Guinea, the OAU designated ECOWAS to use its efforts to restore
11 President Kabbah's government to power. ECOWAS, in turn, called
12 on ECOMOG to use its military might for that purpose. He said
13 that the British Government itself assisted in the struggle by
14 providing necessary equipment to ECOMOG.

15 ECOMOG made the following contributions to the Kamajors and
16 the CDF: In July 1997 it donated logistics, including a truck
17 and two Mitsubishi pick-up vans, together with food and materials
18 needed for a guerrilla fighting force; in August 1997, 430 arms
19 and ammunitions (G3, FNRPG and GMPG), together with US\$10,000 for
20 rations and other incidental expenses.

21 On 13 August 1997, President Kabbah forwarded a plan to
22 ECOMOG detailing joint action between ECOMOG and CDF with Hinga
23 Norman as coordinator. The Nigerian contingent also supplied
24 arms, ammunition, fuel, food, cash, and other essentials to the
25 CDF, as well as sharing intelligence and medical care with them.

26 On 8 October 1997, the United Nations Security Council
27 adopted a resolution on Sierra Leone which introduced sanctions
28 against the military government in Sierra Leone.

29 7. Issues raised on appeal

1 (A) Whether CDF fighting for the restoration of democracy
2 is a material consideration

3 The Prosecution posits that "the Trial Chamber stated in
4 paragraph 693 of its judgment, when finding that it had not been
5 established that the attacks were directed against the civilian
6 population, that the alleged perpetrators 'fought for the
7 restoration of democracy' and submits that 'the Trial Chamber
8 erred in finding that this was in any way a material
9 consideration in determining whether the general requirements for
10 crimes against humanity existed in this case. International
11 Humanitarian Law equally applies to all parties in a conflict'."
12 It further submits that "it would be contrary to the most
13 fundamental principles of International Humanitarian Law to
14 suggest that certain conduct is a crime against humanity if
15 committed by the 'wrong side' in a conflict, but that the same
16 conduct is legitimate if committed by the 'right side.'" It is
17 true that International Humanitarian Law applies equally to all
18 parties in a conflict. But it is not true to suggest that
19 because the Trial Chamber stated that the CDF were fighting to
20 restore the democratically elected government it becomes a
21 question of a right or wrong side vis-à-vis the CDF and the
22 rebels. I opine that the Trial Chamber was referring to the fact
23 that the CDF were fighting the AFRC and the rebels in order to
24 defeat them and restore the elected government, and had the full
25 backing of the international community; that is to say, the
26 United States, Great Britain, the Republic of Nigeria, ECOWAS,
27 the UNDP, the United Nations Security Council, sanction
28 resolution of 8 October 1997, in that regard.

29 The Trial Chamber certainly did not state in paragraph 693

1 what the Prosecution alleges. What the Trial Chamber in fact
2 said in that paragraph is as follows:

3 "The Chamber finds that the evidence adduced does not prove
4 beyond reasonable doubt that the civilian population was
5 the primary object of the attack. By contrast, there is
6 evidence that these attacks were directed against the
7 rebels and juntas that controlled towns, villages and
8 communities throughout Sierra Leone. In this regard, the
9 Chamber recalls the admission of the Prosecutor that "the
10 CDF and the Kamajors fought for the restoration of
11 democracy."

12 It is crystal clear, therefore, that the Prosecution not
13 only misquoted the Trial Chamber but also misquoted it out of
14 context. The fact that the CDF and Kamajors fought for the
15 restoration of democracy is, to my mind, one of the relevant and
16 material factors for the Trial Chamber to consider in determining
17 whether or not attacks were directed against any civilian
18 population.

19 In my opinion, when all the historical facts referred to in
20 paragraphs 16 to 25 supra are considered, there is no doubt that
21 the fact that the Kamajors and CDF were "fighting for the
22 restoration of democracy" was a material consideration for the
23 Trial Chamber when it was evaluating the totality of the evidence
24 as to whether the attacks were directed against the civilian
25 population rather than against the rebels and juntas.

26 The contention of the Prosecution with regard to the
27 question whether the accused, the CDF and allies were fighting to
28 reinstate the democratically elected government, which premise
29 the Prosecution dismisses as immaterial, can further be examined

1 for the avoidance of doubt by reference to paragraph 19 of the
2 Prosecution's indictment, where the Prosecution alleges something
3 directly contrary to wit, that the accused and the CDF were
4 fighting to gain and exercise control over the territory of
5 Sierra Leone. It reads:

6 "The plan, purpose and design of Samuel Hinga Norman,
7 Moinina Fofana, Allieu Kondewa, and subordinate members of
8 the CDF was to use any means necessary to defeat the
9 RUF/AFRC forces and to gain and exercise control over the
10 territory of Sierra Leone. This included gaining complete
11 control over the population of Sierra Leone, and the
12 complete elimination of the RUF/AFRC, its supporters,
13 sympathisers and anyone who did not actively resist the
14 RUF/AFRC recognition of Sierra Leone" -- occupation,
15 sorry, occupation of Sierra Leone. " Each accused acted
16 individually and in concert with subordinates to carry out
17 the said plan, purpose or design."

18 These allegations are not supported by the evidence. On
19 the contrary, there is abundant evidence that the accused and
20 subordinate members of the CDF were fighting at great personal
21 sacrifice to restore the democratically elected Government of
22 Sierra Leone. The evidence reveals that they were fighting to
23 completely eliminate the RUF/AFRC, restore the constitutionally
24 elected government but not to gain complete control over the
25 population of Sierra Leone.

26 The historical facts referred to, that I have referred to
27 in paragraph 16 to 25 inclusive, put this conclusion beyond
28 argument and beyond all reasonable doubt. The ghost of a
29 so-called "materiality" must be laid to rest once and for all.

1 (B) Whether the attack was directed against any civilian
2 population

3 Article 2 of the Statute which has as its subheading
4 "Crimes against humanity" provides:

5 "2 The Special Court shall have the power to prosecute
6 persons who committed the following crimes as part of a
7 widespread or systematic attack against any civilian population:

8 (a) murder..."

9 The Appeals Chamber expresses the view that in Tongo, Bo,
10 Bonthe, Kenema and Kori bondo the Kamajors and the CDF engaged in
11 attacks directed against the civilian population. With respect,
12 I do not accept my colleagues' view on this issue because I am
13 not persuaded that the Trial Chamber's conclusion was in error
14 and would therefore not overturn its finding.

15 C: Whether the attacks on Tongo, Kori bondo, Bo Town,
16 Bonthe and Kenema had military objectives

17 The Trial Chamber specifically examined the attacks on
18 Tongo Town, Kori bondo, Bo, Bonthe and Kenema to determine whether
19 crimes against humanity were committed in the context of those
20 attacks. The Kamajors attacked each of the locations for
21 military objectives. The Trial Chamber found that Kamajors
22 launched numerous armed operations "against the rebels in an
23 attempt to regain control over Tongo." According to the Trial
24 Chamber, Tongo was a key military objective. Norman thought:
25 "That possession of Tongo would determine the outcome of the
26 war."

27 1. Kori bondo.

28 Kori bondo was a Sierra Leone Army stronghold. It served as
29 a company-sized military base until 1997. There were no barracks

1 so the soldiers and the civilians had to live together. Before
2 the coup, Koribondo and its surrounding villages were occupied
3 and controlled by rebels. The RUF and the AFRC had a battalion
4 stationed there and for this reason, after the coup, the Kamajors
5 wanted to capture the town and flush out the AFRC and RUF rebels.
6 The capture of Koribondo was expected to facilitate the movement
7 of ECOMOG troops from Pujehun to Bo. The Kamajors had attacked
8 the Sierra Leone Army on "numerous occasions." Between July and
9 October 1997, all attacks by the Kamajors were repelled by the
10 soldiers. Finally, on 13 February 1998, in an attack that lasted
11 for about 45 minutes, Koribondo was captured by the Kamajors.
12 The Trial Chamber did not find that there were civilian
13 casualties during the attack. It found that there were only 11
14 civilian casualties during the days following the capture.

15 2. Bo Town

16 Bo Town was occupied by Rebels and junta forces until 14
17 February 1998, but they dispersed before the Kamajors entered the
18 next day. These three days later Kamajor forces repelled a rebel
19 attack on Bo. In the days immediately following after the rebel
20 attack the Kamajors were obliged to search for and kill those
21 they believed to be junta forces in the guerrilla war that was
22 raging, and the enemy forces not being in uniform, those
23 suspected to be rebels and junta members were attacked and
24 killed.

25 3. Bonthe District

26 Bonthe District had been occupied by the Sierra Leone Army
27 and Navy since 1991 because rebels were threatening to invade it.
28 The Kamajors went to Bonthe for the first time in 1994.
29 Immediately after the overthrow of the Kabbah government, the

1 Kamajors retreated to the surrounding villages. On 15 September
2 1997 Kamajors entered Bonthe District aiming to seize a gunboat.
3 They were repelled. The soldiers, however, left Bonthe about
4 five months later on 14 February 1998 in a gunboat. Bonthe was
5 captured by the Kamajors on 15 February 1998. The soldiers had
6 fled the previous day but, inevitably, the Kamajors carried out
7 what, in the circumstances, can be described as "mopping-up"
8 operations.

9 It is important to note here that in respect of Bonthe
10 District my colleagues had this to say:

11 "Because the Prosecutions concluding arguments include no
12 mention of Bonthe District, the Appeals Chamber finds that
13 the Prosecution has not met its burden of advancing the
14 reasons for the alleged error and the Appeals Chamber will
15 therefore not examine whether the Trial Chamber erred in
16 relation to Bonthe District."

17 I agree and I will not consider whether the Trial Chamber
18 erred in relation to Bonthe District.

19 4. Kenema

20 Prior to February 1998, the AFRC was in control of Kenema
21 and were working with the rebels. Before the coup Kamajors and
22 soldiers worked together at SS Camp about five miles from Kenema
23 on the main highway between Kenema and Liberia. Twelve miles
24 from Kenema is Blama, the headquarters town of Small-Bo Chiefdom
25 in the Kenema District. After the coup, the rebels took control
26 of Blama and under death threats forced the police to do the
27 junta's work. The Kamajors attacked and took control of Kenema
28 on 15 February 1998 but on 16 and 18 February 1998 soldiers and
29 rebels attacked Kenema and were repelled.

1 The Trial Chamber found that in the days following the
2 Kamajors killed those fighting with the rebels including some
3 police, suspected juntas and rebels. During this fighting the
4 Kamajors came under fire from the police barracks indicating that
5 the police had taken up arms against the CDF.

6 I have viewed the facts to which I have just referred in a
7 realistic and practical perspective and come to the conclusion
8 that the primary object of the attacks was military. The AFRC,
9 the rebels and the juntas, and not the civilian population, and I
10 agree with the Trial Chamber's findings.

11 7. The Trial Chamber's consequent factual findings and the
12 role of this Appeals Chamber

13 The Trial Chamber found that the attacks by Kamajors on
14 Tongo, Kori bondo, Bo Town, Bonthe District and Kenema constituted
15 part of a widespread attack. I opine that the Chamber was
16 correct in coming to that conclusion, from the totality of the
17 evidence, that such widespread attacks were not primarily
18 directed against a civilian population but against the AFRC, the
19 RUF juntas and other military targets. The Trial Chamber decided
20 that having found that the attack was widespread it would not
21 consider whether it was systematic because the expression
22 "widespread or systematic" is disjunctive.

23 My colleagues in the Appeals Chamber then went on to
24 consider: "Whether the remaining legal requirements for crimes
25 against humanity are satisfied in this case" even though they
26 have themselves held that while the Trial Chamber, after
27 adjudicating on one of two alternative charges, fails to consider
28 the other then the Appeals Chamber: "Cannot consider any
29 evidence or pronounce a verdict on the alternative charge." I

1 therefore assume that when my colleagues in this instance, went
2 on to consider the remaining legal requirements they must have
3 done so per incuriam.

4 I reiterate my view expressed elsewhere in this opinion
5 that the Appeals Chamber ought not to assume the power conferred
6 on the Trial Chamber by purporting itself to enter findings of
7 fact in the first instance. It has not heard the evidence and it
8 might select pieces of evidence which tend to support its
9 findings of fact whereas countervailing evidence may, in the
10 circumstance, not be given the weight that the Trial Chamber
11 which saw and heard the witnesses give to it.

12 The reason for this, the reasons for the deference to the
13 factual findings of a Trial Chamber are well explained by the
14 ICTY Appeals Chamber in the Kupreskic appeal judgment which
15 dictum I accept and adopt:

16 "The Trial Chamber has the advantage of observing witnesses
17 in person and so is better positioned than the Appeals
18 Chamber to assess the reliability and credibility of the
19 evidence. Accordingly, it is primarily for the Trial
20 Chamber to determine whether a witness is credible and to
21 decide which witness's testimony to prefer without
22 necessarily articulating every step of the reasoning in
23 reaching a decision on these points."

24 This is why I dissent from my learned colleagues on this
25 point. It is important for me to observe at this juncture that
26 when the Prosecution is appealing against an acquittal, as in
27 this case, it has a more onerous duty and more difficult task
28 than an accused who is appealing against a conviction. Where the
29 Prosecution alleges that errors of fact have been committed by

1 the Trial Chamber the Prosecution must show that all reasonable
2 doubt as to the accused's guilt has been eliminated.

3 (A) Whether the expression directed against was given its
4 correct meaning

5 As stated earlier, the Trial Chamber found "that the
6 evidence adduced does not prove beyond reasonable doubt that the
7 civilian population was the primary objective of the attack." In
8 deliberating on the expression "directed against any civilian
9 population" the Chamber deemed it a requirement that the civilian
10 population "be the primary rather than an incidental target of
11 the attack."

12 In arriving at that criterion the Chamber was guided by the
13 following dictum of the Appeals Chamber in Kunarac et al :

14 "The expression 'directed against' is an expression which
15 'specifies that in the context of a crime against humanity,
16 the civilian population is the primary object of the
17 attack.' In order to determine whether the attack may be
18 said to be so directed, the Trial Chamber will consider,
19 inter alia, the means and method used in the course of the
20 attack, the status of the victims, their number, the
21 discriminatory nature of the attack, the nature of the
22 crimes committed in its course, the resistance to the
23 assailants at the time and the extent to which the
24 attacking force may be said to comply with the
25 precautionary requirements of the laws of war. To the
26 extent that the alleged crimes against humanity were
27 committed in the course of an armed conflict, the laws of
28 war provide a benchmark against which the Chamber may
29 assess the nature of the attack and the legality of the

1 acts committed in its midst."

2 The Trial Chamber considered all those stated factors in
3 interpreting the expression "directed against any civilian
4 population." It also had those factors in mind when it found
5 that the following events constituted part of a widespread attack
6 in the named locations by the Kamajors, and came to the
7 conclusion that despite the attacks which it had found to be
8 widespread the civilian population was not the primary object.

9 1. Attacks by Kamajors in Tongo in late November 1997 and
10 in January 1998;

11 2. Attack by Kamajors in Koribondo between 13 and 15
12 February 1998;

13 3. Attack by Kamajors in Bo Town between 15 and 23
14 February 1998;

15 4. Attack by Kamajors in Bonthe on 15 February 1998; and

16 5. Attacks by Kamajors in Kenema between 15 and 18
17 February 1998.

18 The Trial Chamber, having considered all those factors and
19 having found that the attacks, even though they were widespread
20 by reason of the fact that they occurred over a broad
21 geographical area, were not directed against the civilian
22 population.

23 After evaluating the totality of the evidence adduced by
24 the Prosecution, the Trial Chamber arrived at its crucial legal
25 finding and stated as follows:

26 "The Chamber finds, however, that the evidence adduced does
27 not prove beyond reasonable doubt that the civilian
28 population was the primary object of the attack."

29 It then went on to pronounce:

1 "Having thus found that the essential requirement of an
2 attack against the civilian population has not been
3 satisfied beyond reasonable doubt, the Chamber find that
4 Fofana and Kondewa are not guilty of crimes against
5 humanity as charged in count 1, murder as a crime against
6 humanity, and count 3, other inhumane acts as a crime
7 against humanity."

8 It can be seen from all I have recounted that the Trial
9 Chamber went to great lengths to examine relevant legal
10 authorities on the issue, to assess the factual evidence of the
11 attacks in specified locations to find out whether or not the
12 civilian population was the primary object. It then applied the
13 stated legal principle to those facts before coming to the
14 conclusion that the third of the chapeau elements had not been
15 proved. I therefore, with respect, dissent from my learned
16 colleagues when they aver:

17 "That the Trial Chamber's conclusion in regard to the third
18 element of the crimes against humanity is devoid of
19 articulation of its reasoning... the Appeals Chamber is of
20 the opinion," "is of the view that in the interest of
21 justice, a Trial Chamber should endeavour to provide
22 reasons for its conclusion."

23 As it is in the interest of justice that the Trial Chamber
24 provides reasons for its conclusion, a fortiori it is even more
25 in the interests of justice that both accused, who were
26 unanimously found not guilty and acquitted by a Bench of three
27 Trial Chamber judges, should not have that verdict overturned by
28 the Appeals Chamber, which is the final appellate tribunal, and
29 verdict of guilty substituted, unless no reasonable tribunal

1 would have acquitted. The dictum in the Kunarac et al appeal
2 judgment, that my colleagues highlighted on the issue, was itself
3 thoroughly scrutinised by the Trial Chamber in the process of
4 deciding the issue. That is an example of the articulation of
5 the Trial Chamber's reasoning in arriving at its conclusion. It
6 is for all the reasons I have given that I disagree with my
7 learned colleagues and I would uphold the Trial Chamber's
8 conclusion.

9 I do not accept the Prosecution's contention that it is
10 apparent from the Trial Chamber's findings that the Trial Chamber
11 considered, as a matter of law, that an attack will not be one
12 that is "directed against a civilian population if civilians are
13 attacked in the course of attacks directed against opposing
14 forces." That point of view cannot be attributed to the Trial
15 Chamber. The pith and substance of the matter is that the Trial
16 Chamber, after considering and evaluating all the relevant
17 evidence, came to the clear and unambiguous conclusion that the
18 evidence adduced by the Prosecution did not prove beyond
19 reasonable doubt that the civilian population was the primary
20 object of the attack.

21 I will now refer to the Trial Chamber's factual findings
22 that support its decision that the civilian population was not
23 the primary but, rather, the incidental object of the attacks.

24 1. Factual findings that civilian population was not the
25 primary object of the attack

26 (A) The Kamajors launched a third attack on Tongo in the
27 afternoon of 14 January 1998. Many civilians had received
28 warnings that the Kamajors were planning to attack and most of
29 those that were able to leave had done so.

1 (B) Before the coup Koribondo and the surrounding villages
2 were controlled by rebels. The RUF and AFRC had a battalion
3 stationed at Koribondo. For this reason the Kamajors wanted to
4 capture Koribondo and flush out the AFRC and RUF rebels from
5 Koribondo. After the coup arrangements were put in place at Base
6 Zero for the RUF and AFRC military unit in Koribondo to be
7 captured. The capture and control of Koribondo was expected to
8 facilitate the movement of ECOMOG troops from Pujehun to Bo.

9 (C) Witness testified that when they arrived at the NDMC
10 headquarters they saw hundreds of corpses of men, women and
11 children at the entrance. There were also corpses at the
12 football field inside where the civilians were guarding inside
13 the NDMC headquarters. There was an exchange of fire between the
14 Kamajors and the rebels. The fighting continued until the rebels
15 were eventually overpowered and began to retreat; many of the
16 rebels changed into civilian clothing as they ran.

17 (D) After the rebels retreated the Kamajors began singing
18 in Mende that they had captured the NDMC headquarters. TF2-027,
19 a witness who was hiding in a mosque in town during the attack,
20 was taken at gunpoint to the NDMC headquarters. When he arrived
21 there civilians were being guarded at the football field. BJK
22 Sei entered the field with Siaka Lahai. BJK Sei told the
23 Kamajors that he would dismiss anyone who he saw killing people.
24 He then left the headquarters and went to the Labour Camp
25 repeating his order to: "Please be careful about the civilians."
26 Shortly after this a group of Kamajors went to barri inside the
27 headquarters. One Kamajor reported to Norman on a wireless
28 communication set. He said: "Chief, chief, we've captured
29 Tongo, we've captured Tongo, and we're now in Tongo."

1 It is clear from the portions that I have underlined above,
2 and from the findings in respect of these locations specifically
3 referred to by the Trial Chamber in paragraph 33 supra, and
4 having regard to and applying the legal principles evinced from
5 the decisions of the Appeals Chamber in Kunarac et al, the Trial
6 Chamber was correct in law to conclude that the Prosecution had
7 not proved beyond reasonable doubt that the civilian population
8 was the primary object of the attacks.

9 My learned colleagues are of the view that:

10 "The Trial Chamber appears to have misdirected itself when
11 applying the principle it had already stated by confusing
12 the target of the attack with the purpose of the attack.
13 When the target of the attack is the civilian population
14 the purpose of the attack is immaterial."

15 With respect, I do not agree that the Trial Chamber is
16 guilty of any such alleged, or any confusion. It is my learned
17 colleagues who are, in fact, saying that the civilian population
18 was the target of the attack, while the Trial Chamber is saying
19 the contrary, that is, that the Prosecution had not proved beyond
20 reasonable doubt that civilian population was the primary object
21 of the attack. Furthermore, the Trial Chamber made it abundantly
22 clear in its decision that the primary object of the attacks was
23 the AFRC and its allies and not the civilian population. Where
24 then is the Trial Chamber's so-called confusion?

25 I am satisfied that in determining whether the Prosecution
26 had discharged its burden of proving the guilt of each of the
27 accused beyond reasonable doubt with regard to counts 1 and 3,
28 the Trial Chamber paid due regard to the totality of the evidence
29 adduced, bearing in mind the guiding legal principle that any

1 evaluation that raises a reasonable doubt in the evidence must be
2 resolved in favour of the accused.

3 I refer to the dictum which I, accept, and adopt of the
4 Appeals Chamber of the ICTY in the case of Delalic et al:

5 "If there is another conclusion which is also reasonably
6 open from the evidence, and which is consistent with the
7 innocence of the accused, as with his guilt, he or she must
8 be acquitted."

9 I must re-state and emphasise that it is the primary duty
10 of the Trial Chamber to hear and evaluate the evidence brought
11 before it. The Appeals Chamber ought, as a general rule, to
12 defer to the findings of the Trial Chamber:

13 "It is only where the evidence relied on by the Trial
14 Chamber could not reasonably have been accepted by any
15 reasonable person that the Appeals Chamber can substitute
16 its own finding for that of the Trial Chamber."

17 As was said by the Appeals Chamber in Furunzija: "This
18 Chamber (that is to say the Appeals Chamber) does not operate as
19 a second Trial Chamber."

20 As I dissent from my distinguished colleagues, let me, with
21 respect, reiterate unequivocally that fundamental and
22 well-established principle: That it would always be profoundly
23 wrong for an Appeals Chamber, particularly an Appeals Chamber
24 that is the final appellate tribunal, to assume the power
25 accorded by law to a Trial Chamber to decide, inter alia,
26 questions of fact, to purport to operate itself as if it were a
27 second Trial Chamber.

28 The Trial Chamber found that the third general requirement
29 for crimes against humanity, that is the attack must be directed

1 against any civilian population, had not been proved beyond
2 reasonable doubt by the Prosecution. The Trial Chamber
3 consequently and correctly, in my opinion, did not consider the
4 fourth and fifth general requirements of the offence of crimes
5 against humanity, nor the specific elements of the crimes
6 mentioned in counts 1 and 3.

7 The Prosecution, however, argues in its appeal brief that
8 it had proved the specific elements of the crimes in counts 1 and
9 3, and that the Appeals Chamber should grant the relief it seeks
10 in paragraph 2 of the Prosecution's notice of appeal. Since I
11 have held that the Trial Chamber was correct in law in finding
12 that the third general requirement to prove the offence of crimes
13 against humanity had not been met, I see no reason to consider
14 the specific elements in respect of those crimes in counts 1 and
15 3. It follows, therefore, that ground 1 of the Prosecution
16 grounds of appeal is untenable. I accordingly dismiss it and
17 uphold the Trial Chamber's acquittal and finding of not guilty of
18 Fofana and Kondewa on counts 1 and 3 of the indictment.

19 (B) War crimes

20 I shall now consider counts 2 and 4 of the indictment for
21 which the majority of my learned colleagues have found the Trial
22 Chamber's finding of guilt in respect of Fofana and the appellant
23 Kondewa, Fofana not appealing, under Article 6.3 for crimes
24 against, committed by Kamajors in Bonthe District. Counts 2 and
25 4 of the indictment charge both Fofana and Kondewa with murder
26 and cruel treatment respectively as war crimes punishable under
27 Article 3(a) of the Statute.

28 It will be recalled that the Trial Chamber, Justice Bankole
29 Thompson dissenting, found Kondewa individually criminally

1 responsible as a superior pursuant to Article 6.3 for crimes
2 committed by Kamajors in Bonthe District under counts 2, 4, 5 and
3 7. As the Appeals Chamber has found Kondewa not guilty of counts
4 5 and 7, I shall only deal with counts 2 and 4.

5 Articles 6.3 and 3(a) of the Statute of the Special Court
6 Article 6.3 of the Statute reads:

7 "The fact that any of the acts referred to in Articles 2 to
8 4 of the present Statute was committed by subordinate does
9 not relieve his or her superior of criminal responsibility
10 if he or she knew or had reason to know that the
11 subordinate was about to commit such acts or had done so
12 and the superior had failed to take the necessary and
13 reasonable measures to prevent such acts or to punish the
14 perpetrators thereof."

15 Article 3 of the Statute referred to above states:

16 "The Special Court shall have the power to prosecute
17 persons who committed or ordered the commission of serious
18 violations of Article 3 common to the Geneva Conventions of
19 12 August 1949 for the protection of war victims and of
20 Additional Protocol II thereto of 8 June 1977. These
21 violations shall include:

22 (a) Violence to life, health and physical or mental
23 well-being of persons, in particular murder, as well as cruel
24 treatment such as torture, mutilation or any form of corporal
25 punishment."

26 I turn to Kondewa's status.

27 It is important to stress, in limini, that Kondewa was
28 found guilty of having personally committed -- I start that
29 again. It is important to stress in limini that Kondewa was not

1 found guilty of having personally committed any of the crimes
2 stated in Article 3(a). "He never went to war front himself."
3 He was found guilty because both the Trial Chamber and the
4 majority of the Appeals Chamber found "that a
5 superior/subordinate relationship existed between him and his
6 alleged subordinates in Bonthe District."

7 That is to say, although he himself was not physically
8 present and did not personally commit the crimes, he is deemed to
9 have done so because of an alleged superior/subordinate
10 relationship with the actual perpetrators of the crimes. I agree
11 with the Appeals Chamber's articulation of the law with respect
12 to the concept of superior responsibility but I differ from them
13 in the application of the principle of effective control.

14 Kondewa's grounds of appeal

15 Kondewa's first ground of appeal challenges his conviction
16 for crimes committed by Kamajors in Bonthe District on the basis
17 of superior responsibility. He challenges the Trial Chamber's
18 application of the "effective control" test and the existence of
19 a superior/subordinate relationship. He contends that the Trial
20 Chamber erroneously misapplied the "effective control" test in
21 determining whether a superior/subordinate relationship existed
22 between him and the alleged perpetrators of crimes in Bonthe
23 District.

24 1. The existence of superior/subordinate relationship

25 It is now settled law that in interpreting Article 6.3 a
26 superior is one who possesses the power and authority in either a
27 de jure or de facto form to prevent a subordinate from committing
28 a crime or to punish the subordinate after the crime is
29 committed. I agree that the test for establishing the existence

1 of a superior/subordinate relationship is effective control of
2 both military and civilian superiors. This means that where the
3 relationship is proved to exist, the superior will be held
4 criminally responsible if he fails to punish the actual
5 perpetrators of the crime.

6 It follows, therefore, that:

7 "As long as a superior has effective control over
8 subordinates, to the extent that he can prevent them from
9 committing crimes or punish them after they committed the
10 crimes, he will be held responsible for the commission of
11 the crimes if he failed to exercise such abilities of
12 control."

13 The superior must have the material ability of a superior
14 to prevent or punish his subordinates' crimes. "Substantial
15 influence" or "persuasive ability" does not constitute effective
16 control for the purpose of command responsibility.

17 2. The Trial Chamber's finding of Kondewa's de jure status

18 The Trial Chamber held with respect to Bonthe District that
19 Kondewa could, "by virtue of his de jure status as High Priest.
20 ..and his de facto status as a superior to those Kamajors in that
21 district, Kondewa exercised effective control over them." It is
22 evident from the Trial Chamber's findings that it relies
23 significantly on Kondewa's de jure status as "High Priest" in
24 finding effective control and consequently, his criminal
25 responsibility as a superior under Article 6.3. Specifically, I
26 refer to the Trial Chamber's finding that: "Kondewa had the
27 legal and material ability to issue orders to Kamara, both by
28 reason of his leadership role at Base Zero, being part of the CDF
29 High Command, and the authority he enjoyed in his position as

1 High Priest in Sierra Leone, and particularly so in the Bonthe
2 District."

3 According to the evidence and the findings of the Trial
4 Chamber:

5 "Kondewa, in his capacity as High Priest, was in charge of
6 the initiations at Base Zero and was the head of all the
7 CDF initiators in the country. The Kamajors believed in
8 mystical powers of the initiators, especially Kondewa, and
9 that the process of the initiation and immunisation would
10 make them "bullet-proof." The Kamajors looked up to
11 Kondewa and admired the man with such powers. They
12 believed that he was capable of transferring his powers to
13 them to protect them. By virtue of these powers Kondewa
14 had command over the Kamajors in the country. He never
15 went to war himself, but whenever a Kamajor was going to
16 war, Kondewa would give his advice and blessings, as well
17 as the medicine which the Kamajors believed would protect
18 them against bullets. No Kamajor would go to war without
19 Kondewa's blessing."

20 The Appeals Chamber seems to have given undue credence to
21 that passage from the Trial Chamber's finding when adumbrating on
22 Kondewa's alleged superior/subordinate relationship. I am
23 impelled, therefore, to analyse that finding if only to dismiss
24 it as of no evidential or credential value.

25 I start with "High Priest." The evidence shows that
26 Kondewa was not a priest, let alone a "high" one. A priest, in
27 the non-metaphorical sense, is an ordained minister or a person
28 who performs religious ceremonies and duties in a non-Christian
29 religion. Kondewa was none of these. He was, in fact, a "juju

1 man", or a "medicine man." In local parlance, "merisin man." He
2 was a "masked dancer" or, in local parlance, "deble dancer," a
3 "gorboi dancer." It is ludicrous to say that Kondewa so-called
4 High Priest appellation is analogous to "chaplain" in an army.
5 One Dr Hoffman testified that Kondewa would have knowledge of the
6 forest, supernatural or superhuman knowledge which
7 anthropologists prefer to call "occult," and could protect the
8 village from witches and bush devils.

9 It boggles the imagination to think that on the basis of
10 purporting to have occult powers, on the basis of his fanciful
11 mystical powers, Kondewa could be said to qualify as a
12 "commander" in a superior/subordinate relationship context.
13 Without remarking on the novelty of its finding, the Appeals
14 Chamber majority opinion, for the first time in the history of
15 international criminal law, has concluded that a civilian
16 Sierra Leonean juju man, or witch doctor, who practiced fetish,
17 had never been a soldier, had never been engaged in combat, but
18 was a farmer and a so-called herbalist, who had never before
19 smelt military service, "he never went to the war front himself,"
20 can be held to be a commander of subordinates in a bush and
21 guerrilla conflict in Sierra Leone, "by virtue" of his reputed
22 superstitious, mystical, supernatural and such-like fictional and
23 fantasy powers.

24 In my opinion, the roles found to have been performed by
25 Kondewa as "High Priest" are so ridiculous, preposterous and
26 unreal as to be laughable and not worthy of serious consideration
27 by right-thinking persons in civilised society.

28 If the Kamajors believed in the mystical power of Kondewa
29 as an initiator his imaginary immunisation powers, as if it was

1 scientific, do the Chambers of the Special Court also believe
2 that Kondewa could make Kamajors "bullet-proof" and that
3 Kondewa's "blessings" would make them impervious to machine-gun
4 bullets? And on that basis find him to be a commander?
5 Obviously not.

6 On these ground alone I opine that there is no foundation
7 for the Trial Chamber's finding and its endorsement by my erudite
8 colleagues that "Kondewa had both the legal and material ability
9 to prevent the commission of criminal acts by Kamajors or to
10 punish them for those criminal acts."

11 The Trial Chamber accepted evidence from Prosecution
12 witness Albert Nallo who testified that Kondewa did not at any
13 time during the war command any troops. It will be recalled that
14 the Trial Chamber found Nallo to be "the single-most important
15 witness in the Prosecution's evidence on the alleged superior
16 responsibility of the accused..."

17 Third, the Trial Chamber found that Kondewa's de jure
18 status as High Priest of the CDF gave him authority over all the
19 initiators in the country and put him in charge of initiations.
20 This authority, according to the Trial Chamber, did not give
21 Kondewa the power to decide who should be deployed to go to the
22 war front. Kondewa also never went to the war front himself and
23 yet he is deemed to have a superior/subordinate relationship with
24 subordinates.

25 From the foregoing, I opine that the Trial Chamber
26 committed an error of fact in relying on Kondewa's status as a
27 so-called "High Priest" in the CDF as a factor in determining the
28 existence of a superior/subordinate relationship in Bonthe
29 District.

1 3. The Trial Chamber's finding of Kondewa's de facto
2 status

3 The Trial Chamber found that in Tongu, Koribondo, Bo
4 District, Kenema District and Talia Base Zero it was not
5 established beyond reasonable doubt that there was a
6 superior/subordinate relationship, either de jure or de facto,
7 between Kondewa and all the Kamajors. These findings were made
8 despite the Trial Chamber's finding that Kondewa as the High
9 Priest was a key and essential component of the leadership
10 structure and organisation and that, by virtue of his power as a
11 High Priest, Kondewa had command over the Kamajors in the
12 country.

13 The facts relied on, to establish a superior/subordinate
14 relationship in Bonthe District must be carefully scrutinised
15 having regard in particular to the fact that the CDF was a
16 militia guerrilla fighting force or an "irregular army" which
17 although it had a hierarchical command structure, was
18 comparatively less trained, resourced, organised and staffed than
19 a regular army.

20 The Trial Chamber, in establishing Kondewa's effective
21 control on the basis of his de facto command appears to rely on
22 the following factors:

23 (1) Testimony that in Bonthe District Kondewa was regarded
24 as the "supreme head" of the Kamajors;

25 (2) Kondewa's ability to release Lahai Ndokci;

26 (3) Kondewa's statement that "he was not going to give any
27 of the areas under his control to a military government but to
28 the democratically elected government of President Ahmad Tejan
29 Kabbah";

1 (4) Kondewa's ability to stop the Kamajors from harassing
2 civilians from attacking Bonthe District and his power to issue
3 oral and written directives, order investigation for misconduct
4 and threaten imposition of sanctions;

5 (5) Kondewa's legal and material ability to prevent the
6 commission of criminal acts by Morie Jusu Sherri f -- by Morie
7 Jusu Kamara, and Kamajors under the command of Morie Jusu Kamara;

8 (6) Morie Jusu Kamara and Julius Squire's refusal to
9 recognise the authority of the Attorney-General and not to accept
10 any instructions unless they came from Norman or Kondewa.

11 In evaluating the above evidence I find that no reasonable
12 tribunal could conclude that Kondewa was a de facto superior for
13 the purpose of establishing a superior/subordinate relationship
14 in Bonthe District.

15 First, the Trial Chamber's finding that Kondewa was
16 criminally responsible as a superior in Bonthe District because
17 he was regarded as the "supreme head" of the Kamajors in the area
18 directly conflicts with the Trial Chamber's failure to find
19 Kondewa responsible as a superior in Talia at Base Zero. This
20 contradiction is highlighted by the fact that Talia Base Zero is
21 in Bonthe District and was at all material times the headquarters
22 of the Kamajors.

23 While the Trial Chamber and my Learned Appeals Chamber
24 colleagues are of the opinion that Kondewa had "substantial
25 influence" as a "High Priest" over the Kamajors, which I rejected
26 earlier, this is not the same as demonstrating that Kondewa had
27 "the material ability to prevent or punish subordinates for the
28 commission of crimes." It does not necessarily follow that
29 ability to secure the release of an individual, or to stop the

1 Kamajors from harassing civilians, necessarily demonstrates a
2 capability to prevent or punish criminal activity in a
3 superior/subordinate context.

4 The Trial Chamber, in arriving at its conclusion, held that
5 based on the evidence adduced, there was a superior/subordinate
6 relationship between Kondewa and Morie Jusu Kamara, district
7 battalion commander of Bonthe District, Julius Squire, Kamara's
8 second in command and Kamajor Baigeh, battalion commander of the
9 Kassilla Battalion. According to the Trial Chamber, Kondewa had
10 authority and control over the actions of these Kamajor
11 commanders and the Kamajors under their immediate command.

12 In my view, such conclusion is fallacious. Kondewa, in his
13 appeal brief, submits, rightly in my opinion, that there is no
14 direct evidence of any relationship between him and either Morie
15 Jusu Kamara, Julius Squire or Baigeh "the three commanders." If
16 anyone had a superior/subordinate relationship with the
17 perpetrators it must be according to the evidence those three
18 commanders and not Kondewa. Furthermore, there is no credible
19 indirect evidence of any relationship between the three
20 commanders and Kondewa. The Trial Chamber in concluding that the
21 superior/subordinate relationship existed appeared to have
22 engaged in a speculative exercise. Even assuming, arguendo, that
23 a superior/subordinate relationship did exist it is still my view
24 that no reasonable tribunal would conclude that Kondewa had
25 authority and control over the actions of the Kamajors who were
26 not under his command or control, but under the immediate and
27 direct command of the three commanders. It is important to note
28 that the Trial Chamber expressly found that in March 1998, Morie
29 Jusu Kamara, who in fact was the commander and superior of the

1 Kamajors at all materials times in Bonthe District, and not
2 Kondewa, was not able to control the Kamajors:

3 "When Father Garrick returned to Bonthe from Freetown in
4 March 1998 battalion commander Morie Jusu Kamara told
5 Father Garrick that he would stop the Kamajors from
6 mistreating Chief George Brandon, one of the people hidden
7 at Father Garrick's mission. However, he was not able to
8 control the Kamajors."

9 4. Whether Kondewa's statements had a substantial effect
10 on crimes committed in Tongo

11 The Trial Chamber found Kondewa criminally responsible
12 under Article 6.1 of aiding and abetting war crimes in Tongo, in
13 particular murder under count 2, and cruel treatment under count
14 4. It is not disputed that Kondewa himself did not commit these
15 crimes. It is not disputed that Kondewa himself did not commit
16 the crimes. The Kamajors attacked Tongo at least three times
17 from late November, or early December 1997, to late January 1998.
18 The Trial Chamber also found that Kondewa's speech at the
19 December 1997 passing out parade had a substantial effect, in my
20 opinion wrongly, on the perpetration of crimes by Kamajors in
21 Tongo.

22 It held that Kondewa was liable for aiding and abetting
23 crimes in Tongo despite the fact that his statements were made
24 more than a month before the crimes were committed and when
25 Kondewa spoke in Talia. The Trial Chamber found that Kondewa had
26 the requisite mens rea for aiding and abetting because he was
27 aware that Kamajors would commit crimes such as murder and cruel
28 treatment, based on his knowledge of Norman's orders and his
29 knowledge that Kamajors had committed crimes in Tongo in the

1 past.

2 I disagree with the majority opinion that a reasonable
3 tribunal of fact could have found that Kondewa's conduct had a
4 substantial effect on the crimes committed by Kamajors during the
5 attack on Tongo for the following reasons: First, from the
6 evidence accepted by the Trial Chamber Kondewa made a speech at a
7 passing out parade sometime between 10 January and 12 December
8 1997 at Base Zero Talia. The passing out parade was witnessed by
9 many civilians and Kamajors. Kondewa spoke after Norman and
10 Fofana and according to the Trial Chamber:

11 "Then all the fighters looked at Kondewa, admiring him as a
12 man with mystical power, and he gave the last comment
13 saying, 'A rebel is a rebel; surrendered not surrendered,
14 they are all rebels...the time for their surrender had long
15 since been exhausted, so we don't need any surrendered
16 rebel.' He then said, 'I give you my blessings; go my
17 boys, go.'"

18 The Trial Chamber's paraphrasing of TF2-222's evidence does
19 not, in my opinion, accurately accord with what is actually said
20 on reading the transcript of the evidence. The transcript
21 mentions "command" but, in fact, what Kondewa said was not a
22 command but a rallying cry and a statement of fact and that is "A
23 rebel is a rebel; surrendered not surrendered, they are all
24 rebels..." that, in my opinion, is an innocuous statement of
25 fact. How can those words be reasonably said to aid and abet the
26 crimes alleged to have been committed in Tongo? The opinion
27 evidence of "admiring" and "a man who had mystical powers" is of
28 no evidentiary value and confirms that both the Trial Chamber and
29 my learned colleagues misdirected themselves by drawing the wrong

1 inference.

2 The Trial Chamber relied entirely upon these comments made
3 by Kondewa as his actus reas for aiding and abetting the crimes
4 later committed in Tongo, finding that this statement had a
5 substantial effect on the crimes committed.

6 There are, I opine, at least two errors in the Trial
7 Chamber's evaluation of this evidence. First, the Trial Chamber
8 made no finding whatsoever that any of the Kamajors that
9 committed, actually committed the crimes in Tongo, that is the
10 physical perpetrators, were actually present at the passing out
11 parade to hear Kondewa's statements in Talia in mid-December
12 1997. The passing out parade was witnessed by "many civilians
13 and Kamajors," but it does not say that those who committed the
14 crimes, whose names are known, but who have never been charged or
15 prosecuted, were present.

16 Approximately a month later, another group of Kamajors met
17 in Panguma and planned the second attack on Tongo with BJK Sei.
18 Kondewa was not present and there is no evidence that his
19 previous statements were mentioned at the planning. On a morning
20 in early January 1998, a group of approximately 47 Kamajors, led
21 by one Kamabote attacked Tongo and, in the course of the attack
22 against rebels, they killed some civilians.

23 In the circumstances, I opine that it would be unreasonable
24 to suggest that anyone hearing Kondewa's words, which were
25 clearly directed against the rebels and not against the
26 civilians, could be taken as encouragement to murder civilians.

27 This error is compounded by the fact that the Trial
28 Chamber's paraphrasing does not portray the import of the words
29 and the meaning of Kondewa's statement. The relevant portion of

1 the transcript states, after a question was asked the answer was:

2 "Answer: That A rebel is a rebel; surrendered, not
3 surrendered, they are all rebels. The time for their surrender.

4 "Question: Apart from Moinina Fofana did anyone else speak
5 at the meeting again?

6 "Answer: The only person who spoke was the High Priest.
7 He at that time gave the last command.

8 "Question: Sorry, I didn't get that.

9 "Answer: He, after all other command had been given, we
10 all looked at him to admire the man who had a mystic power, that
11 he will be the one to give the last command.

12 "Question: The last command?

13 "Answer: Yes, My Lord.

14 "Question: Was that last command given:

15 "Answer: He did, yes, My Lord.

16 "Question: What was the last command:

17 Answer: The time for his surrender had long been since
18 exhausted, so we don't need any surrendered rebel.

19 "Question: Is that all:

20 "Answer: Finally, 'I give you my blessing; go my boys,
21 go.'

22 "Question: Finally gave his blessings?

23 "Answer: Yes, My Lord."

24 The words I have quoted from the transcript speak for
25 themselves and do not support my learned colleagues' conclusion.
26 In any event, there is no evidence that those who actually and
27 personally committed the crimes were present when Kondewa made
28 his speech. How can Kondewa, by his words, aid and abet those
29 who did not hear his speech?

1 I repeat that the names of those who committed atrocities
2 were given in evidence before the Trial Chamber, and Kondewa was
3 not one of them who actually committed the atrocities. If
4 Kondewa was, I would have not the slightest hesitation to hold
5 him accountable.

6 For the reasons I have given, I have come to the conclusion
7 that no reasonable tribunal of fact could have found that
8 Kondewa's statement had a substantial effect on the crimes in
9 Tongo.

10 Accordingly, I would reverse the convictions under Article
11 6.1 for aiding and abetting murder, under count 2 and cruel
12 treatment under count 4, and enter a finding of not guilty under
13 counts 2 and 4. Let me end up.

14 Let me end up by asking the question: Having regard to the
15 historical facts in this case, could it also be said that those
16 of the international community as Great Britain, the United
17 States and the Republic of Nigeria, who mandated Kondewa, ECOMOG,
18 the Civil Defence Forces and their allies to fight for the
19 restoration of the democratically elected government, and are,
20 apparently in a superior/subordinate relationship with Kondewa
21 and the others, are they guilty of war crimes?

22 Likewise, did the ICTY investigate allegations made by
23 western academics and Serb politicians, who accused NATO
24 officials of war crimes during the 1999 bombing of a Serb TV
25 station killing journalists, and the lethal bombing of a railway
26 bridge whilst a train was passing over it? If it's a question of
27 victor's justice, then, in my opinion, it must first be
28 experimented with or practised in a developed state like Kosovo
29 and not in a developing and young country as Sierra Leone.

1 Otherwise, it is a sure and certain recipe to undermining the
2 stability and security of the Republic of Sierra Leone. And
3 accusations of double standards might arise.

4 As Charles Margai, counsel for Kondewa, eruditely put it in
5 his plea for leniency to the Trial Chamber, and I quote him, I
6 quote:

7 "We thank God, My Lords, that the war is over. But this
8 war was described and has been described as the most brutal
9 known to mankind. We should not lose sight of that. If it
10 were not for the sacrifice of the CDF, God knows whether
11 some of us, including my learned friend Kamara" -- and I
12 see Kamara in Court today -- "would be here today. That, I
13 submit, My Lords, is a factor to be considered because,
14 otherwise, if a sentence is severe and there occurs a rebel
15 war, whether in Sierra Leone or elsewhere, government
16 militias are going to ask themselves the question: 'Is it
17 advisable for us to intervene? If we do, might we not be
18 treated in the same manner as Allieu Kondewa and others?'"

19 I understand and appreciate his concerns, not only for his
20 client, but a fortiori for the overriding interests of his
21 country Sierra Leone.

22 As the Trial Chamber judges put it also eruditely, and I
23 quote them:

24 "The contribution of the two accused persons to the
25 establishment of the much desired peace in Sierra Leone,
26 and the difficult, risky, selfless and for a very sizable
27 number of the CDF/Kamajors, the supreme sacrifices that
28 they made to achieve this through a bloody conflict is, in
29 itself, a factor that stands significantly in mitigation in

1 their favour. In fact, the medal awarded to Moinina Fofana,
2 after the restoration, by the reinstated President Kabbah is a
3 testimony, of gratitude and appreciation of Sierra Leonean
4 society which the President incarnates. "

5 I agree, without any reservation whatsoever. The learned
6 Trial Chamber judges made it abundantly clear that the mitigating
7 factor was the fight for the restoration of the democratically
8 elected government and not any far-fetched thesis about an
9 unwarranted allegation of a so-called "just war."

10 And my disposition is this:

11 I would grant Kondewa's appeal in its entirety and enter a
12 verdict of not guilty on all the counts for which my colleagues
13 have found him guilty and acquit him on counts 1, 2, 3 and 4.

14 In other words, I found Kondewa not guilty on all the eight
15 counts charged in the indictment.

16 Now I give my dissenting opinion as regards sentence.

17 Introduction

18 On 28 May 2008 the Appeals Chamber by a majority, Justice
19 Gelaga King dissenting, allowed the Prosecution's appeal in
20 respect of counts 1 and 3, reversed the Trial Chamber's decision
21 and found Fofana and Kondewa guilty on those counts. It
22 affirmed, Justice Gelaga King dissenting, the Trial Chamber's
23 verdict of guilty of counts 2 and 4.

24 On the same date, the Appeals Chamber, Justices Gelaga King
25 and Judge Kamanda dissenting, delivered a sentencing judgment
26 against both accused in respect of the counts for which they were
27 convicted and increased the sentences.

28 It will be recalled that in my partially dissenting
29 opinion, which I have just read, I came to the conclusion that

1 Kondewa was not guilty of any of the eight counts charged in the
2 indictment. It will be recalled also that Fofana did not appeal.
3 It is my misfortune to have to dissent, once again, from my
4 learned colleagues. With respect, I believe that they went
5 outside the ambit of the relevant statutory provisions relating
6 to penalties and sentencing and, in my opinion, interfered
7 unjustifiably with the unfettered discretion given by law to the
8 Trial Chamber.

9 The applicable law

10 The Statute of the Special Court, which is the primordial
11 binding source of the Rules of Procedure and Evidence provides as
12 follows:

13 "Article 19: Penalties

14 1. The Trial Chamber shall impose upon a convicted person
15 other than a juvenile offender imprisonment for a specified
16 number of years. In determining the terms of imprisonment, the
17 Trial Chamber shall, as appropriate, have recourse to the
18 practice regarding prison sentences in the International Criminal
19 Tribunal for Rwanda and the National Courts of Sierra Leone.

20 2. In imposing sentences, the Trial Chamber should take
21 into account such factors as the gravity of the offence and the
22 individual circumstances of the convicted person."

23 I emphasise the words "the individual circumstances of the
24 convicted person."

25 Rule 101 of our Rules of Procedure and Evidence provides:

26 "(B) In determining the sentence, the Trial Chamber shall
27 take into account the factors mentioned in Article 19.2 of the
28 Statute as well as factors as:

29 (i) Any aggravating circumstances;

1 (ii) Any mitigating circumstances including the substantial
2 cooperation with the Prosecutor by the convicted person before or
3 after the conviction;...

4 (C) The Trial Chamber shall indicate whether multiple
5 sentences shall be served consecutively or concurrently."

6 I go on now to the sentences.

7 The Trial Chamber, Justice Bankole Thompson dissenting,
8 imposed multiple sentences to run concurrently for both accused:
9 Fofana, a total term of imprisonment of six years and Kondewa
10 eight years.

11 The Appeals Chamber, Justice Gelaga King and Kamanda
12 dissenting, has revised the Trial Chamber's sentences as follows:

13 Fofana, a total term of imprisonment for multiple offences
14 to run concurrently -- I think this morning they said 15 years.
15 I only got it as I was coming to Court. And Kondewa 20 years.
16 Because it's XX in my brief. I read that again.

17 The Appeals Chamber, Justice Gelaga King dissenting and
18 Justice Kamanda dissenting, has revised the Trial Chamber's
19 sentences as follows:

20 Fofana, a total term of imprisonment for multiple offences
21 to run concurrently 15 years and Kondewa 20 years.

22 Prosecution's ground 10: Sentencing.

23 The Prosecution's ground 10 is on sentencing and it is
24 stated as in the subheading 3. It then goes on to contend:

25 "That the Trial Chamber erred in law and in fact, and
26 committed a procedural error in the sense that there has
27 been a discernible error in the Trial Chamber's sentencing
28 discretion in imposing the sentences that it did, in the
29 case of both accused. The errors in sentencing judgment

1 are set out below."

2 Alleged errors of the Trial Chamber

3 The Prosecution alleged ten errors of the Trial Chamber.

4 In errors 2 and 10, the Prosecution did not state whether they
5 are errors in law or in fact. This infringes the provisions of
6 Article 20.1 of the Statute which states that grounds of appeal
7 should be on an error on a question of law invalidating the
8 decision, and/or an error of fact which has occasioned a
9 miscarriage of justice. I, therefore, will not consider errors 2
10 and 10.

11 The Appeals Chamber considered the remaining eight errors
12 alleged by the Prosecution and dismissed all of them except one,
13 and the increase in sentence is based on that one only that they
14 did not dismiss. The sixth which reads: "Treating the 'just
15 cause' of the accused as a mitigating factor."

16 Now I go on to the question whether the so-called just
17 cause is a mitigating factor.

18 The Appeals Chamber states that "The Trial Chamber was in
19 error in taking into consideration 'just cause' and motive of
20 civic duty in exercising its sentencing discretion." I disagree.
21 It states further that the Trial Chamber proceeded on an
22 erroneous basis and that it is entitled to revise the sentences
23 handed down by the Trial Chamber. I disagree.

24 I turn now whether so-called just cause was pleaded in
25 mitigation by Kondewa.

26 With the greatest respect to my learned colleagues, at no
27 time did the Trial Chamber take into consideration "just cause"
28 in the way my colleagues put it in exercising its sentencing
29 discretion. This is palpably and factual incorrect. What in

1 fact the Trial Chamber took into account as a mitigating factor
2 is the plea that, and I am going to quote the whole thing:

3 "The acts of the accused and those of the Kamajors for
4 which they have respectively been found guilty, did not
5 emanate from a resolve to destabilise the established
6 Constitutional Order. Rather, and on the contrary, the
7 CDF/Kamajors was a fighting force that was mobilised and
8 was implicated in the conflict in Sierra Leone to support a
9 legitimate cause which, as we have already seen, was to
10 secure the democratically elected Government of President
11 Kabbah, which had been illegally ousted through a
12 coup d'etat orchestrated and carried out on 25 May 1997 by
13 a wing of the Sierra Leone Armed Forces that later
14 constituted and baptised itself as the Armed Forces
15 Revolutionary Council, AFRC."

16 That's from the Trial Chamber."

17 In the above quote, there is no mention of "just cause"
18 which only appears when the Trial Chamber was commenting,
19 commenting on the defence of "necessity," which had been
20 propounded by the Honourable Mr Justice Bankole Thompson in his
21 dissenting opinion. This is in fact what the Trial Chamber said:

22 "The Chamber further opines that validating the defence of
23 necessity in International Criminal Law would create a
24 justification for what offenders may term and plead as a
25 "just cause," or a "just war," even though serious
26 violation of International Humanitarian Law would have been
27 committed. This, we observe, would negate the resolve and
28 determination of the international community to combat
29 those crimes which have the common characteristics of being

1 heinous, gruesome or degrading of innocent victims of the
2 civilian population that it intends to protect."

3 At the trial, the accused persons did not put forward a
4 defence of necessity - it was raised by Justice Bankole Thompson
5 in his dissenting opinion. In any event, it is my considered
6 opinion that it was wrong for the majority of the Trial Chamber
7 to purport to sit as if it were an Appeals Chamber, in judgment
8 of Justice Thompson's opinion as to necessity as a defence. That
9 right and privilege belongs exclusively to the Appeals Chamber.
10 All the judges of the Trial Chamber are of coeval jurisdiction
11 and they are, therefore, not competent to pass judgment on each
12 other's opinion.

13 Let me give another example of what the Trial Chamber deems
14 to be a mitigating circumstance, if only to prove that it was not
15 "just cause" as my colleagues, with respect, erroneously held to
16 be the case. The passage is referred to by my colleagues as
17 well. The Trial Chamber held that:

18 "Although the commission of these crimes transcends
19 acceptable limits, albeit in defending a cause that is
20 palpably just and defensible, such as acting in defence of
21 constitutionality, by engaging in a struggle or a fight
22 that was geared towards the restoration of the ousted
23 democratically elected Government of President Kabbah, it
24 certainly, in such circumstances, constitutes a mitigating
25 circumstance in favour of the two accused persons."

26 That's what the Trial Chamber said.

27 I go on now to discuss whether recourse was had to
28 individual circumstances of the accused. Early on, I pointed out
29 Article 19.2 of the Statute which said that the Trial Chamber

1 should have recourse to the gravity -- the factors of gravity and
2 the individual circumstances of the accused.

3 In paragraph 98 supra, I referred to 19.1 and 19.2 of the
4 Statute. The Trial Chamber, in determining the terms of
5 imprisonment shall, as appropriate, have recourse to the practice
6 regarding prison sentences in the International Criminal Tribunal
7 for Rwanda, and National Courts of Sierra Leone. It should take
8 into account not only the gravity of the offence, but also the
9 individual circumstances of the convicted person, and I stress
10 the words "the individual circumstances of the convicted
11 persons."

12 Significantly, unlike Article 20 subarticle (3) of the
13 Statute, which provides that Appeals Chambers shall be guided by
14 the decisions of the Appeals Chamber of the International
15 Criminal Tribunal for Yugoslavia and the International Criminal
16 Tribunal for Rwanda, there is no requirement in Article 19.1 that
17 the Trial Chamber shall have recourse to the practice regarding
18 prison sentences in the International Criminal Tribunal for
19 Yugoslavia.

20 It follows, therefore, that in exercising its sentencing
21 discretion the Trial Chamber shall have recourse not to ICTY but
22 to ICTR and Sierra Leone National Courts where appropriate and
23 consider, inter alia, the individual circumstances of the
24 accused.

25 Having considered the individual circumstances of the
26 accused such as remorse, lack of formal education or training,
27 subsequent conduct, lack of prior convictions, and historical
28 background, the Trial Chamber found as follows:

29 "(1) There is nothing in the evidence which demonstrates

1 that either Fofana or Kondewa joined the conflict in Sierra Leone
2 for selfish reasons. In fact, we have found both Fofana and
3 Kondewa were among those who stepped forward in the efforts to
4 restore democracy to Sierra Leone and for the main part they
5 acted from a sense of civic duty rather than for personal
6 aggrandisement or gain. This factor, in addition to others that
7 have been raised in this judgment has, for each of them,
8 significantly impacted to influence the reduction of the sentence
9 to be imposed for each count.

10 "(2) The acts of the accused and those of the
11 CDF/Kamajors for which they have respectfully been found guilty
12 did not emanate from a resolve to destabilise the established
13 Constitutional Order.

14 "(3) These historically traditional hunters, from the
15 evidence adduced, were comrades in arms with the regular
16 Sierra Leone Armed Forces as early as from the outbreak of the
17 rebel war. They acted as guides to the regular army and
18 facilitated the war against the rebels. Indeed, even the
19 military regime of the National Provisional Ruling Council, NPRC,
20 that seized power in a military coup in 1992, used them to fight
21 against the rebels, and to protect the constitutional
22 institutions of Sierra Leone. In this process, and in defence of
23 their communities, the local chiefs mobilised, enlisted and
24 initiated their young and fit ones into the Kamajor society with
25 the sole objective of combating the rebels and preventing the
26 brutal killings of their kith and kin, and other atrocities, in
27 addition to protecting their land and their properties."

28 A fourth example.

29 "It should be recognised, however, that the crimes for

1 which the Chamber has convicted them are grave and very serious
2 but what in a sense atones for this vice is the fact that the
3 CDF/Kamajors fighting forces of the accused persons, backed and
4 legitimised by the internationally deployed force, the ECOMOG,
5 defeated and prevailed over the rebellion of the AFRC that ousted
6 the legitimate government. This achievement, the Chamber notes,
7 contributed immensely to re-establishing the rule of law in this
8 country where criminality, anarchy and lawlessness, which the
9 United Nations sought to end, and was determined to achieve in
10 adopting Security Council Resolution 1315(2000) had become the
11 order of the day."

12 I opine that the passages quoted, that from the passages
13 quoted a reasonable person will inevitably come to the conclusion
14 that the Trial Chamber meticulously, exhaustively,
15 comprehensively, justifiably and even-handedly "took into
16 account," not only the gravity of the offence but the "individual
17 circumstances" of the convicted persons.

18 The Trial Chamber, in my opinion, correctly applied the
19 provision of Article 19 of the Statute. This is why it is
20 impossible for me to agree with my learned colleagues when they
21 say:

22 "In view of the findings that the Trial Chamber has taken
23 into consideration factors which it should not have
24 considered in the exercise of its sentencing discretion,
25 the Appeals Chamber will substitute its own discretion
26 without the need to pronounce on the Prosecution's
27 complaint that the sentence was manifestly inadequate."

28 With respect, I do not agree that the Trial Chamber did any
29 such thing. On the contrary, having regard to the provisions of

1 Article 19.1 of the Statute it is my learned colleagues who,
2 contrary to those provisions, went on to conduct, "examination of
3 several legal traditions" in Australia, United Kingdom and
4 Canada. In effect, what my learned colleagues have done is, with
5 respect, to usurp the discretionary powers of the Trial Chamber
6 when the Appeals Chamber says it will substitute its own
7 discretion for that of the Trial Chamber's.

8 It follows from all I have said that I find the
9 Prosecution's ground of appeal against sentence untenable and I
10 dismiss it.

11 In disposition, I accordingly disagree with the decision of
12 the majority to increase the terms of imprisonment of Fofana and
13 Kondewa, and I concur with my learned colleague, the Honourable
14 Mr Justice Jon Kamanda, in his statement that he will keep to the
15 sentences imposed by the Trial Chamber.

16 I thank you.

17 I will now call on Justice Winter for her partially
18 dissenting opinion.

19 JUSTICE WINTER: I will now come back to purely legal
20 issues and not to overstretch the audience, it is very late
21 already. I will read only a short summary. My complete
22 partially dissenting opinion is appended to the judgment.

23 I shall summarise my reasons for disagreeing with the
24 majority, with respect to some of the issues raised in this
25 appeal.

26 A key function of an Appeals Chamber is to clarify legal
27 issues, to provide guidance where appropriate to the Trial
28 Chambers, and to remedy errors of facts in the interest of the
29 parties as well as in the interest of justice. In so doing, an

1 indictment, a decision and a judgment have to be looked at as a
2 whole. I cannot accept that evidence and findings relevant for
3 one ground of appeal cannot be taken into consideration, if
4 relevant, when evaluating another ground of appeal, on the basis
5 that such evidence and finding have not been properly raised by a
6 party.

7 The Special Court of Sierra Leone, being a "hybrid"
8 International Criminal Court, must never look into the
9 "righteousness" of any particular political cause. It cannot
10 accept either cultural considerations as excuses for criminal
11 conduct. The principle of individual criminal responsibility
12 requires that an accused be held responsible for his acts or
13 omissions, whatever his status. With this consideration in mind,
14 I dissent from the majority's decision in several respects. I
15 shall discuss each in turn.

16 I shall commence by discussing Kondewa's fifth ground which
17 concerns the crime of conscripting or enlisting children under
18 the age of 15 years into armed forces or groups or using them to
19 participate actively in hostilities.

20 First, I do not agree with the majority in acquitting
21 Kondewa for liability under Article 6.1 of the Statute for
22 "committing" the crime of enlisting witness TF2-021, a child
23 under the age of 15, into an armed group force or group. The
24 majority, in my view misapplies the concept of enlistment as it
25 relates to the circumstances surrounding the CDF recruitment of
26 children under the age of 15.

27 Enlistment, as the majority recognises, includes any
28 conduct accepting the child as a part of an armed force or group.
29 The key test in determining whether a given act constitutes

1 enlistment is whether the act substantially furthers the process
2 of a child's enrolment and acceptance into an armed force or
3 group.

4 In the situation where there are no formal or informal
5 processes for enlisting individuals, especially children, the
6 "use" of a child to participate in active hostilities may amount
7 to enlistment. However, where the evidence demonstrates the
8 existence of a process that contributes to the enrolment and
9 acceptance of a child into an armed force or group, logic
10 dictates that "use" of a child cannot constitute enlistment.
11 Accordingly, the types of acts which constitute the crime of
12 enlistment must necessarily depend on the particular
13 circumstances of each case.

14 The Trial Chamber's findings show that the CDF had
15 demonstrated a clearly defined enlistment process which consisted
16 of a child receiving ritualised initiation and military training.

17 Furthermore, it found that Kondewa knew or had reason to
18 know that he was initiating an 11-year old boy into the CDF. He
19 even signed his certificate personally. This initiation was
20 required before witness TF2-021 could be enrolled into the CDF
21 forces. I find that it was, therefore, reasonable for the Trial
22 Chamber to conclude that when Kondewa was initiating the boys "he
23 was also performing an act analogous to enlisting them for active
24 military service."

25 I further disagree with the majority's finding that the act
26 of carrying looted property constituted enlistment. In this
27 case, there is no evidence that the child carrying looted
28 property did so for the purposes of participating in active
29 hostilities.

1 I therefore dismiss Kondewa's fifth ground of appeal and
2 affirm the Trial Chamber's conviction of Kondewa for committing
3 the crime of enlistment of witness TF2-021 into the CDF,
4 punishable under Articles 4(c) and 6.1 of the Statute.

5 Turning now to the Prosecution's fifth ground of appeal,
6 and specifically Kondewa's responsibility for enlisting more than
7 one child under age of 15 in armed forces or groups.

8 The Trial Chamber found that Kondewa initiated witness
9 TF2-021 along with around 20 other young boys. This witness
10 testified that he estimated the boys to be in almost the same age
11 group as him; that means slightly younger than him.

12 In addition, given that witness TF2-021 was 11 when Kondewa
13 initiated him, it is logical and reasonable to conclude that the
14 other 20 boys were younger than 15.

15 In light of the fundamental principle that a Trial Chamber
16 is in the best position to evaluate and assess the evidence, I
17 find the majority's conclusion that no reasonable trier of fact
18 could have found the testimony of witness TF2-021 sufficient to
19 establish the age of the 20 young boys is without merit.

20 Given that Kondewa, the spiritual leader of the entire CDF
21 organisation, accepted initiation fees for everyone, which is not
22 departure for personal gain in my view, including fees of
23 children under the age of 15, was the head of all CDF initiators,
24 performed initiations at Base Zero and the fact that no Kamajor
25 would go to war without his blessings, Kondewa must have either
26 personally, or through initiators subordinate to him, enlisted
27 many children under age of 15 into the CDF.

28 In light of this evidence, I find that no reasonable trier
29 of fact could have failed to conclude that the only reasonable

1 inference from the evidence was that Kondewa enlisted many
2 children under the age of 15 into the armed forces.

3 I, therefore, grant the Prosecution's fifth ground of
4 appeal and enter a conviction for Kondewa for enlisting many
5 children into the CDF forces.

6 Turning now to Kondewa's responsibility for aiding and
7 abetting the use of child soldiers.

8 The majority found that it cannot consider any evidence or
9 pronounce a verdict on whether Kondewa was liable for the "use"
10 of child soldiers because the Trial Chamber declined to examine
11 this issue. This statement is misplaced. The standard of
12 appellate review requires the Appeals Chamber to consider
13 existing evidence.

14 The Trial Chamber's findings show that Kondewa was aware
15 that he was performing initiations for children for the purpose
16 of preparing them to become fighters. He himself told initiators
17 that the initiation would make them powerful for fighting.

18 I am satisfied that evidence as applied to the law merits
19 granting the Prosecution's fifth ground of appeal. I accordingly
20 enter a conviction against Kondewa for aiding and abetting the
21 use of children under the age of 15 to participate actively in
22 hostilities.

23 Turning to Fofana's responsibility for enlistment and use
24 of child soldiers.

25 I disagree with the majority's refusal to address the
26 merits of the Prosecution's argument because of a lack of
27 supporting arguments. On the contrary, I find that the
28 Prosecution set out the grounds of appeal clearly and
29 exhaustively and provided supporting arguments.

1 Fofana was the "Director of War" for the CDF and part of
2 the High Command. He made decisions along with Norman and
3 Kondewa and was responsible for the receipt and provisions of
4 logistics to the frontline, including the provision of manpower.
5 Although Fofana did not enlist or use child soldiers personally,
6 I am satisfied that his high position within the CDF command
7 structure, and his physical presence at meetings where child
8 soldiers were either present or were discussed, constituted tacit
9 approval, encouragement and moral support to the commanders and
10 Kamajors to continue to enlist and use children under the age of
11 15 to participate actively in hostilities.

12 I, therefore, grant the Prosecution's fifth ground of
13 appeal and find Fofana responsible under Article 6.1 for aiding
14 and abetting the crimes of enlistment of children under the age
15 of 15 into armed forces or groups, and the use of children under
16 the age of 15 to participate actively in hostilities, crimes
17 punishable under Article 4(c) of the Statute.

18 I shall now discuss Kondewa's sixth ground of appeal:
19 Cumulative convictions and collective punishments.

20 As has been discussed by the majority, Kondewa's sixth
21 ground of appeal concerns cumulative convictions. I agree with
22 the majority that "because each of these crimes requires proof of
23 materially distinct elements, cumulative convictions are
24 permissible in this instance."

25 As there is no appeal against the finding of guilt for
26 collective punishments as such, Kondewa's sixth ground of appeal
27 should be rejected on this basis alone.

28 The majority, however, nonetheless, examined the Trial
29 Chamber's findings of fact with respect to collective

1 punishments. The majority concludes "that the individuals who
2 came under attack were being targeted due to their perceived
3 identities, their locations, or by sheer chance," and not due to
4 omissions or act which they may or may not have committed. I
5 disagree with this approach.

6 The Kamajors distinguished collaborators from other
7 civilians on the basis of the perceived support they gave to
8 rebels. To target protected persons for murder, cruel treatment
9 or pillage because they are perceived to support the rebels is
10 exactly the same as intentionally punishing them as a group for
11 omissions or acts for which they may or may not have been
12 responsible.

13 Furthermore, I find that the Trial Chamber's findings prove
14 beyond reasonable doubt that both the principal perpetrators and
15 Fofana and Kondewa had the requisite mens rea to support
16 convictions for collective punishments.

17 For these reasons, I uphold Fofana's and Kondewa's
18 convictions under Article 6.1 and Article 6.3 for collective
19 punishments under count 7.

20 Turning now to the Prosecution's eighth ground of appeal
21 which concerns the denial of leave to amend the indictment in
22 order to charge sexual crimes.

23 I concur with the majority in rejecting Kondewa's
24 submission that the Appeals Chamber lacks jurisdiction to
25 entertain this ground of appeal and that the principle of res
26 judicata prevents the Appeals Chamber from entertaining this
27 ground of appeal on the merits.

28 I disagree, however, with the majority's decision to
29 summarily dismiss this ground of appeal on the basis that it

1 falls outside the scope of the appellate review.

2 The majority considered that the alleged errors had no
3 chance to affect the verdict because they do not relate to any
4 count contained in the indictment upon which the verdict was
5 issued. The majority further considered that "denying the
6 amendment did not preclude the Prosecution from charging the
7 accused with these crimes, since it is within the Prosecution's
8 discretion to bring, alongside the original indictment, a
9 separate indictment regarding the new allegations it intended to
10 bring in the case."

11 It seems that the Prosecution did not ask for the case to
12 be remitted for retrial because it "accepted that this would not
13 be practicable." Such pragmatism, given the limited lifespan of
14 the Court, should not prejudice the Prosecution.

15 With regard to the substance of the Prosecution's appeal it
16 is my view that there are two main issues, namely, whether the
17 Trial Chamber abused its discretion in finding that the
18 Prosecution failed to act with due diligence; and whether in the
19 exercise of its discretion the Trial Chamber correctly balanced
20 Fofana's and Kondewa's rights to a fair trial against other
21 factors.

22 With respect to whether the Prosecution failed to act with
23 due diligence, I find that the Prosecution could only have
24 brought new charges in the indictment when sufficient material
25 facts would have sustained a prima facie case. The Prosecution
26 submitted that in June 2003 there were "indications" of
27 gender-based crimes; only in October 2003 did it obtain solid
28 "evidence" capable of confirmation, meaning "evidence that is
29 sufficient to prove the crimes alleged" and to secure the

1 cooperation of witnesses. I wish to underscore in this respect
2 that victims of gender-based violence generally express greater
3 reluctance to report and testify on those events than victims of
4 other crimes. I note the Prosecution's assertion that "in some
5 instances, it was the existence of the indictment and subsequent
6 incarceration of the accused that created the conditions for
7 these potential witnesses to come forward and to give evidence,
8 whereas before they were unwilling to do."

9 Accordingly, I find that the Prosecution did not fail to
10 act with due diligence.

11 With respect to the question of whether the Trial Chamber
12 correctly balanced Fofana and Kondewa's right to a fair trial
13 against other factors, it is well-established that "the
14 timeliness of the Prosecutor's request for leave to amend the
15 indictment must be measured within the framework of the overall
16 requirement of the fairness of the proceedings."

17 In this case I find that the proposed amendments to the
18 indictment would not have resulted in an unfair trial as Fofana
19 and Kondewa have been adequately and timely informed of the
20 potential new charges.

21 With respect to the possibility of filing a new indictment
22 two months after the start of the trial against the accused, I
23 find it would have been neither reasonable nor appropriate for
24 the Prosecution, given the limited lifespan of the Court, to
25 choose to file a new indictment rather than to take measures to
26 amend the indictment.

27 Finally, the approach adopted by the majority of the Trial
28 Chamber prevented victims of gender-based violence from seeing
29 their case adjudicated before the Special Court. I consider that

1 when an international forum is established to adjudicate gross
2 violations of human rights it has an inherent duty to fulfil its
3 mandate by providing the victims with proper access to justice.
4 This consideration is particularly relevant in the context of the
5 Prosecution of crimes committed in Sierra Leone during an armed
6 conflict, since the victims might be prevented to seek remedy
7 before the national courts in view of the amnesty included in the
8 Lome agreement.

9 Denying the Prosecution to prosecute acts of gender-based
10 violence, therefore, impeded the Special Court's fulfillment of
11 its mandate.

12 For the foregoing reasons I grant the Prosecution's eighth
13 ground of appeal.

14 I finally turn to the Prosecution's tenth ground of appeal
15 which concerns sentencing. In this regard I agree with aspects
16 of the majority's decision on sentencing. I shall therefore only
17 address those parts with which I disagree.

18 I agree with the majority that, in principle,
19 reconciliation can be a mitigating circumstance. Some basic
20 conditions connecting the purpose of reconciliation to the
21 perpetrator of the crime must be met, however, in order to make
22 it possible that the members of the same society can live again
23 together in peace. These are:

24 First: The perpetrator must admit guilt or at least
25 acknowledge responsibility for what he/she has done.

26 Two: The perpetrator must submit excuses for what he/she
27 has done to the individual victims if possible, in general if
28 not.

29 Three: The perpetrator must be prepared to assist in the

1 reconciliation or peace process of the given community.

2 Kondewa submits that the Trial Chamber correctly held that
3 "a repressive sentence against him would be counterproductive"
4 and that calls for justice by victims as well as the call of the
5 international community to end impunity would not have been
6 answered by a harsh sentence.

7 First, a sentence which adequately reflects the harm caused
8 to victims is not "harsh" and will not be perceived as such. A
9 sentence that adequately reflects the harm caused to victims is a
10 just sentence. Second, an extremely lenient sentence fails to
11 demonstrate to putative subsequent criminals that impunity will
12 end. This principle of affirmative prevention cannot be
13 outweighed by any purpose of reconciliation.

14 I further find no remorse in the statements of Fofana and
15 Kondewa made through his -- lawyers of Fofana and Kondewa. They
16 expressed global regret for the situation in Sierra Leone without
17 connecting this situation to themselves or accepting any kind of
18 responsibility.

19 In my view, Fofana and Kondewa's statements were simply
20 calculated at the end, after they have been convicted, to achieve
21 a reduced sentence and were neither real, nor sincere.

22 On the other hand, I find that mitigating circumstances,
23 albeit to a very limited amount, can be credited to Fofana
24 because of his commitment to and observance of the Lome peace
25 agreement and because he worked without any pay with the NGO
26 community in ensuring that members of the CDF remained committed
27 to the peace process within Sierra Leone.

28 Not having found anything similar in this regard concerning
29 Kondewa, I hold that reconciliation cannot be a reason to reduce

1 his sentence. This concludes my dissenting opinion.

2 Thank you.

3 JUSTICE KING: That is the end of the delivery of the
4 judgments. I have given instructions, as the Presiding Judge,
5 that the majority decision and all the dissenting opinions must
6 be published today and they should be readily available.

7 I will now rise.

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