

which these events occurred, it is a reasonable inference that the screening for collaborators experienced by OC Bundu and TF2-001 caused serious mental suffering. Having considered the particular facts and circumstances of each of the incidents referred to in paragraph 835, the Chamber is also satisfied beyond reasonable doubt that the victims were persons not taking an active part in the hostilities at the time that the acts described above occurred and, furthermore, that the perpetrators knew that they were not taking an active part in the hostilities.

837. In light of the findings set out above, the Chamber is satisfied that both the general requirements of war crimes and the specific elements of cruel treatment have been met with respect to each incident described paragraph 835.

3.6.1.3.3. *Count 5: Pillage*

838. The Prosecution alleges that Fofana is individually criminally responsible, pursuant to Article 6(3), for the unlawful taking of civilian-owned property between about 1 November 1997 and 1 April 1998.<sup>1561</sup> These crimes are alleged to have occurred at various locations in Bo District, including the towns of Bo and the surrounding areas.<sup>1562</sup>

839. As set out above in the Factual Findings, the Chamber found that the following acts have been committed which are relevant for Count 5, Pillage:

- (i) On 15 February 1998, OC Bundu was forced to go to his house by Kamajors under the leadership of Nallo, Agbamu Murray and John Ngombeh. The Kamajors took ammunition which they found in OC Bundu's house.
- (ii) On 15 February 1998, Kamajors under the control of TF2-017 looted MB Sesay's hotel on Sewa Road.
- (iii) On 15 February 1998, Kamajors under command of TF2-017 looted medicine from two pharmacies in Bo.
- (iv) On 16 February 1998, on the order of Kamajor leaders including Agbamu Murray, TF2-001 was searched; the Kamajors took his watch and 15,000 leones.

<sup>1561</sup> The Chamber notes that while the Indictment charges "unlawful taking and destruction by burning of civilian-owned property" burning does not constitute the offence of pillage. See the section on Applicable Law for further discussion of this point.

<sup>1562</sup> Indictment, para. 27.

840. The Chamber has examined the facts surrounding each incident set out above in points (i)-(iv) and concludes that all of the perpetrators of these acts were Kamajors under the effective control of Fofana. The Chamber reiterates that the Kamajors entered Bo on 15 February 1998. Acts (i) through (iv), described immediately above, all occurred on the day the Kamajors entered Bo or on the day immediately following the capture of Bo. The Chamber recalls its findings that OC Bundu and TF2-001 were targeted by the Kamajors because of their status as police officers, a group the Kamajors considered to have collaborated with the juntas; similarly, the Chamber finds that MB Sesay and TF2-058 were targeted because they were considered collaborators. Having considered the evidence in the context of the armed conflict that was then taking place in Sierra Leone, and having regard to all of the evidence adduced, the Chamber is satisfied that each of the acts described in paragraph 835(i)-(iv) was sufficiently related to the armed conflict to satisfy the nexus requirement for war crimes. The Chamber is also satisfied that none of the victims were persons taking an active part in the hostilities at the time that the acts described above occurred and, furthermore, that the perpetrators knew that they were not taking an active part in the hostilities.

841. In light of the findings set out above, the Chamber is satisfied that both the general requirements of war crimes and the specific elements of pillage as a war crime have been established with respect to the looting of ammunition from OC Bundu's house; the looting of various objects at MB Sesay's hotel; the looting of medicine from two pharmacies; and the looting of TF2-001's watch and money.

3.6.1.3.4. *Count 7: Collective Punishments*

842. The Prosecution alleges that Fofana is individually criminally responsible, pursuant to Article 6(3), for committing the crimes alleged in Counts 1 through 5, including threats to kill, destroy and loot, to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces.<sup>1563</sup>

843. The Chamber reiterates that only those acts for which the Accused have been found to bear criminal responsibility under another count of the Indictment may form the basis of criminal

<sup>1563</sup> Indictment, para. 28.

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responsibility for acts of terrorism. In this regard, the Chamber recalls that it has found that Fofana bears criminal responsibility as a superior under Counts 2, 4 and 5 in Bo.

844. The Chamber finds that the evidence adduced proves beyond reasonable doubt that the acts described in paragraph 830 [Count 2], paragraph 835[Count 4] and in paragraph 839[Count 5] were perpetrated with the specific intent to punish the civilian population in Bo and the surrounding areas.

845. The Chamber is therefore satisfied, in relation to those acts described paragraph 830 [Count 2], paragraph 835[Count 4] and in paragraph 839 [Count 5], that both the general requirements of war crimes and the specific elements of collective punishments have been proved beyond reasonable doubt with respect to each incident.

#### 3.6.1.4. Conclusion

846. On the basis of the foregoing, the Chamber finds that it has been proved beyond reasonable doubt that Fofana is individually criminally responsible as a superior, pursuant to Article 6(3), for the crimes committed in Bo District as found under Counts 2, 4, 5 and 7 above.


#### 3.6.2. Responsibility of Kondewa

##### 3.6.2.1. Responsibility pursuant to Article 6(1)

847. The Chamber reiterates that Kondewa's speech at the passing out parade in early January 1998 does not constitute instigating the commission of the criminal acts by Kamajors which the Chamber found were committed in Bo District during the time frame charged in the Indictment. The Chamber also reiterates that this speech as well as the provision of the medicine by Kondewa, does not establish beyond reasonable doubt that Kondewa aided and abetted in the planning, preparation or execution of those criminal acts.

848. The Chamber finds that although Kondewa was present at the subsequent commanders' meeting where the attack on Bo was planned, this evidence does not establish beyond reasonable doubt that Kondewa planned the commission of any of the criminal acts in Bo.

849. The Chamber finds that mere presence by Kondewa at this commanders' meeting at which Norman gave orders to Nallo, James Kaillie, Joseph Lappia and TF2-017 to commit criminal acts


in Bo does not establish beyond reasonable doubt that Kondewa aided and abetted in the planning, preparation or execution of these criminal acts.

850. The Chamber further finds that no evidence has been adduced of Kondewa ordering or physically or otherwise directly perpetrating any of the criminal acts which we found were committed in Bo District during the time frame charged in the Indictment. Although on the basis of the evidence adduced it appears that Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt that they did so in order to further a common purpose, plan or design to commit criminal acts. There is no evidence proving beyond reasonable doubt such a purpose, plan or design.

851. On the basis of the foregoing the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing (including through a joint criminal enterprise) or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Chamber found were committed in Bo District during the time frame charged in the Indictment.

#### 3.6.2.2. Responsibility pursuant to Article 6(3)

852. The Chamber will now proceed to examine whether the evidence adduced has established beyond reasonable doubt that Kondewa is individually criminally responsible as a superior pursuant to Article 6(3) for any of the criminal acts which the Chamber found were committed in Bo District during the time frame charged in the Indictment.

##### 3.6.2.2.1. *Superior-subordinate relationship*

853. We find that Kondewa had no superior-subordinate relationship with any of the Kamajors involved in the commission of criminal acts in Bo District. Although he possessed command over all the Kamajors from every part of the country, this was, however, limited to the Kamajors' belief in mystical powers which Kondewa allegedly possessed. This evidence is inconclusive, however, to establish beyond reasonable doubt that Kondewa had an effective control over the Kamajors, in a sense that he had the material ability to prevent or punish them for their criminal acts. The

Chamber noted that Kondewa's *de jure* status as High Priest of the CDF gave him the authority over all the initiators in the country as well as put him in charge of the initiations. This authority did not give him the power to decide who should be deployed to go to the war front. He also never went to the war front himself. The evidence adduced, therefore, has not established beyond reasonable doubt that Kondewa had any superior-subordinate relationship with the Kamajors who operated in Bo District.

854. Since an essential element of a superior responsibility is not established, it is not necessary to examine the other remaining elements with respect to any of the criminal acts which the Chamber found were committed by Kamajors in Bo District during the time frame charged in the Indictment.

#### 3.6.2.3. Conclusion

855. On the basis of the foregoing, the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to either Article 6(1) or 6(3) for any of the criminal acts which the Chamber found were committed in Bo District during the time frame charged in the Indictment.

#### 3.7. Bonthe District

856. In addition to the facts, listed in paragraphs 721 (i) to (viii) and 765 (i) to (iii) above, the Chamber outlines below the facts as found in Sections V.2.2, V.2.6.2 and V.2.6.3 of the Factual Findings, upon which it will rely to make its legal findings on the individual criminal responsibility pursuant to Article 6(1) and 6(3) of Fofana and Kondewa:

- (i) On 16 August 1997, a delegation from Bonthe Town was sent to Kondewa at the Kamajor base at Tihun Sogbini to discuss the continuing harassment of civilians by soldiers and the security of the island. Kondewa was considered the supreme head of Kamajors.
- (ii) At Momaya Kamajors were shooting all around the delegation and threatening them. Kamajor Commander Sheku Kaillie ("Bombowai") pleaded on the delegation's behalf and led them, under his protection, to Kondewa, who by then was no longer in Tihun but in Talia. From Matru Jong the delegation was led to Talia by Ngobeh, the district grand Kamajor commander.

- (iii) The delegation arrived at Kondewa's house in Talia on 24 August 1997. A boy was playing guitar and percussion and singing about the greatness of Kondewa and the Kamajor society. Kamajors armed with rifles and guns were guarding the house. The delegation explained to Kondewa the dreadful effects of the war. In response Kondewa stated: "war means to know that you will die; to know that you have no control over your life; to know that you have no dignity; to know that your property is not yours". Kondewa then called a meeting at the Court Barri that was attended by all of the elders of the region, the paramount chiefs and Kamajor commanders. Kondewa said at the meeting that he was not going to give any of the areas under his control to a military government but to the democratically elected Government of President Ahmad Tejan Kabbah. Kondewa agreed on the cessation of hostilities between the Kamajors and the Soldiers, the stopping of the harassment of civilians and the free movement of boats, and wrote a letter to this effect to all Kamajor commanders around Bonthe. The agreement did not work.
- (iv) The delegation accompanied by Ngobeh was stopped in Tihun by a Kamajor who presented a letter, which he demanded to be read in the presence of Kondewa. The letter was written by a commander from Gambia and was accusing the delegation of bringing the soldiers to Bonthe. When the letter was read to Kondewa in Talia, he declared that if the information was true, all of the delegation would be killed; if it was not true, those responsible for the lie would experience a terrible death. In Gambia Kondewa ordered a court sitting and placed Pa Lewis, Ngobeh and Bombowai in charge of the investigation. Those responsible for the letter pleaded guilty. They were supposed to be killed, but the delegation pleaded with Kondewa to spare their lives and he agreed.
- (v) The Kamajors operating in Bonthe were of the Shebro tribe and were referred to as the Kassilla Battalion. Baigeh was the Battalion Commander of the Kassilla Battalion.
- (vi) On 15 February 1998 a group of approximately 300 to 500 Kamajors entered Bonthe. The Kamajors came from three chiefdoms, including Sittia and Nongoba Bullom.
- (vii) From 15 February 1998, Bonthe Town was under the control of the Kamajors, headed by the District Battalion Commander, Morie Jusu Kamara. Commander Julius Squire was the second in command to Morie Jusu Kamara and was from Bendu Cha.
- (viii) On 16 February 1998 Kamajors announced a meeting at the St. Patrick Parish's Compound. Morie Jusu Kamara, was present at the meeting together with Commander Julius Squire, the secretary and spokesman for the meeting.

- (ix) Although Morie Jusu was a disciplinarian "in his own right", he did not punish his Kamajors. He promised that that no one else would be killed in Bonthe but demanded money from the civilians.
- (x) On 15 February, Kamajors looked for Lahai Ndokoi Koroma, a Chiefdom Speaker, in the Catholic mission who was accused of being a junta collaborator. They threatened to kill everyone if they did not produce this person. Two delegations were sent to Bonthe from Base Zero under Kondewa's instructions. On 1 March 1998, a third group of Kamajors came to Bonthe under the leadership of Kondewa. At a public meeting Kondewa said that he had not allowed his men to enter Bonthe, but that they had not listened to his advice and had done what they had done. Kondewa apologized on their behalf. Kondewa also told those assembled that they should forget about ECOMOG, as they were not responsible for Bonthe. Kondewa said that it was the Kamajors who were responsible for security in the area. He told Father Garrick that he was aware of the atrocities committed by the Kamajors and for this reason he wanted to get Lahai Ndokoi Koroma out of the country. After getting paid 600,000 leones Kondewa took Lahai Ndokoi Koroma to Talia and later to Bo. Only Kondewa had authority to release Lahai Koroma and claimed to kill without restraint and to send people to Mecca.
- (xi) Around 23 February 1998, Norman, accompanied by two ECOMOG officials, came to Bonthe. At a public meeting at the Bonthe town hall Norman said that any complaint against the Kamajors was useless as they had fought and saved the nation and that working with the Kamajors was like "working with the cutlass".
- (xii) In March 1998 a letter from Solomon Berewa addressed to the Kamajors in Bonthe requesting them to stop looting and killing, was given to Commander Morie Jusu Kamara, who passed it on to his second in command, Julius Squire. Julius Squire said that he did not recognise the authority of the Attorney-General; he refused to accept the instructions in the letter, unless they came from Norman or Kondewa. Morie Jusu Kamara told Father Garrick that he was not able to control the Kamajors.

### 3.7.1. Responsibility of Fofana

#### 3.7.1.1. Responsibility pursuant to Article 6(1)

857. The Chamber finds that it is a reasonable inference that the order to attack Bonthe Town was included in the instructions given by Norman at the passing out parade held at Base Zero in early January 1998, when he ordered to launch an "all-out offensive" in all the areas occupied by the juntas. This inference can be drawn on the basis of the fact that at the time of the parade Bonthe Town was one of those areas and furthermore because according to the evidence the attack on Bonthe Town took place on the same day as the attack on Bo and Kenema Towns, i.e. the 15<sup>th</sup>

of February 1998. However, the Chamber reiterates its earlier finding that Fofana's speech at this particular parade did not constitute instigating or ordering the commission of the criminal acts, or aiding and abetting in the planning, preparation or execution of the criminal acts, which the Chamber found were subsequently committed by Kamajors in Bonthe District.

858. The Chamber further finds that there is no evidence beyond reasonable doubt that Fofana was involved, either directly or otherwise, in the attack on Bonthe Town or in any of the criminal acts, which the Chamber found were committed by Kamajors in Bonthe District during the time frame charged in the Indictment. Although on the basis of the evidence adduced it appears that Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt that they did so in order to further a common purpose, plan or design to commit criminal acts. There is no evidence proving beyond reasonable doubt such a purpose, plan or design.

859. On the basis of the foregoing the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing (including through a joint criminal enterprise) or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Chamber found were committed in Bonthe District during the time frame charged in the Indictment.

### 3.7.1.2. Responsibility pursuant to Article 6(3)

860. The Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana had a superior-subordinate relationship with any of the Kamajors who operated in Bonthe District and committed criminal acts during and after the attack on Bonthe Town or elsewhere in Bonthe District as found by the Chamber above. The Chamber reiterates its finding above that there was a superior-subordinate relationship between Fofana and Nallo, who at the relevant time was the Director of Operations for the Southern Region, which included Bonthe District, and that Fofana exercised effective control over Nallo, in a sense of having the material ability to prevent Nallo's criminal acts or punish him for these acts.<sup>1564</sup>

<sup>1564</sup> See the Chamber's finding on Fofana's responsibility pursuant to Article 6(3) in Koribondo.



861. The Chamber finds, however, that the evidence adduced has not established beyond reasonable doubt whether there was a superior-subordinate relationship between Nallo and the Kamajors who operated in Bonthe District and committed criminal acts during the time frame charged in the Indictment. The evidence has not established beyond reasonable doubt that Nallo exercised effective control over all the Kamajors in Bonthe District. By Nallo's own admission, he could not exercise full or strict control over all of the Kamajors in Southern Region due to their large numbers.

862. Since an essential element of a superior responsibility is not established, it is not necessary to examine the other remaining elements with respect to any of the criminal acts which the Chamber found were committed by Kamajors in Bonthe District during the time frame charged in the Indictment.

#### 3.7.1.3. Conclusion

863. On the basis of the foregoing, the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to either Article 6(1) or 6(3) for any of the criminal acts which the Chamber found were committed in Bonthe District during the time frame charged in the Indictment.

#### 3.7.2. Responsibility of Kondewa

##### 3.7.2.1. Responsibility pursuant to Article 6(1)

864. The Chamber reiterates its earlier finding that Kondewa's conduct at the passing out parade at Base Zero in early January 1998 does not constitute instigating the commission of the criminal acts, or aiding and abetting in the planning, preparation or execution of the criminal acts, which the Chamber found were committed by Kamajors subsequently in Bonthe District.

865. Although on the basis of the evidence adduced it appears that Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt that they did so in order to further a common purpose, plan or design to commit criminal acts. There is no evidence proving beyond reasonable doubt such a purpose, plan or design.

866. On the basis of the foregoing the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing (including through a joint criminal enterprise) or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Chamber found were committed in Bonthe District during the time frame charged in the Indictment.

3.7.2.2. Responsibility pursuant to Article 6(3)

867. The Chamber will now proceed to examine whether the evidence adduced has established beyond reasonable doubt that Kondewa is individually criminally responsible as a superior pursuant to Article 6(3) for any of the criminal acts which the Chamber found were committed in Bonthe District during the time frame charged in the Indictment.

3.7.2.2.1. *Superior-subordinate relationship*

868. We find that on the evidence adduced there was a superior-subordinate relationship between Kondewa and Morie Jusu Kamara, District Battalion commander of Bonthe District, Julius Squire, Kamara's second in command and Kamajor Baigeh, Battalion commander of the Kassilla battalion. Kondewa had authority and control over the actions of these Kamajor commanders and the Kamajors under their immediate command. By virtue of his *de jure* status as High Priest Kondewa and his *de facto* status as a superior to these Kamajors in that District, Kondewa exercised effective control over them. Kondewa had the legal and material ability to issue orders to Kamara, both by reason of his leadership role at Base Zero, being part of the CDF High Command, and the authority he enjoyed in his position as High Priest in Sierra Leone and particularly so in Bonthe District.

869. Kondewa had exercised effective control over Kamajors in Bonthe District since before the establishment of Base Zero, as early as August 1997. As "the supreme head of Kamajors" in the area, the delegation from Bonthe chose to plead with him in order to cease hostilities between the Kamajors and the soldiers, stop the Kamajors from harassing civilians and from attacking Bonthe Town. At that time Kondewa had authority and power to issue oral and written directives to the Kamajors in that area, order investigations for misconduct and hold court hearings. He could threaten the imposition of sanctions of "a terrible death" on the Kamajors, if they lied to him. The

Kamajor commanders, who the delegation met on its way to Talia, all recognised Kondewa's authority. Kondewa himself acknowledged his control over this area as he publicly refused "to give any areas under his control to a military government but to the democratically elected Government of President Ahmad Tejan Kabbah." The authority and power of Kondewa is further demonstrated by the fact that it was only him who could "spare" lives of his own misbehaved Kamajors, to release Lahai Ndokoi, "to kill without restraint and to send people to Mecca".

870. The Chamber finds that Kondewa had both the legal and material ability to prevent the commission of criminal acts by his subordinate Morie Jusu Kamara and other subordinates and to punish them for those criminal acts.

871. Morie Jusu Kamara was the overall commander for the Bonthe attack. We find that Kamara exercised command over Julius Squire, Baigeh, Rambo Conteh, Lamina Gbokambama as well as the Kamajors under their immediate command. The Kamajors who arrived in Bonthe on 15 February 1998, indeed declared that from then on Bonthe Town was under the control of the Kamajors headed by Morie Jusu Kamara.

872. Finally, the effective control that Kondewa exercised over the Kamajors who operated in Bonthe Town during the attack is further demonstrated by the fact that Morie Jusu Kamara and Julius Squire refused to recognise the authority of the Attorney-General and to accept any instructions, unless they came from Norman or Kondewa.

873. The Chamber finds, however, that there is no evidence from which the Chamber can conclude beyond reasonable doubt that Kondewa did exercise the same degree of control over other Kamajor commanders and fighters who operated in the surrounding areas of Bonthe Town prior to the attack on Bonthe or subsequently.

3.7.2.2.2. *Knew or had reasons to know*

874. Kondewa knew that the attack on Bonthe Town involved the commission of criminal acts by the Kamajors under the command of Morie Jusu Kamara. On the basis of the evidence adduced it is not entirely clear when precisely Kondewa obtained the knowledge that his subordinates in fact were about to commit, were committing or had committed criminal acts.

875. The Chamber is satisfied, however, that Kondewa knew at least as of 15 February 1998, that the Kamajors were looking for Lahai Ndokoi Koroma in Bonthe Town, who was perceived to be a 'collaborator'. Kondewa was informed about it at Base Zero, in response to which he sent two delegations to Bonthe Town under his instructions. Therefore, the Chamber concludes that it has been established beyond reasonable doubt that Kondewa had reasons to know that the Kamajors under his effective control were about to commit or were committing criminal acts in Bonthe District, particularly that they were targeting suspected "collaborators".


876. Furthermore, the Chamber observes that on 1 March 1998, Kondewa came to Bonthe Town himself leading the third delegation. At the meeting held by Kondewa in Bonthe Town on the same day he publicly acknowledged that he had not allowed his men to enter Bonthe, but that they had not listened to his advice and had done what they had done. He also apologized on their behalf. When speaking to Father Garrick on the same day he also admitted that he was aware of the atrocities committed by the Kamajors during the attack and for this reason he wanted to get Lahai Ndokoi Koroma out of the country.

877. The Chamber, therefore, concludes that it has been established beyond reasonable doubt that at this stage Kondewa knew that the Kamajors under his effective control had in fact committed criminal acts in Bonthe District.

878. With respect to Count 7, the Chamber finds that it can reasonably be inferred from all the circumstances that Kondewa knew or had reasons to know that his subordinates were about to commit collective punishments or were committing them or had committed such acts in Bonthe Town.

879. With respect to Count 6, the Chamber finds, however, that while some of the criminal acts which were committed by the Kamajors in Bonthe Town might have been committed with the primary purpose of spreading terror among the civilian population, the Chamber finds on the totality of the evidence adduced that it has not been established beyond reasonable doubt that Kondewa knew or had reasons to know that such acts had been committed by his subordinates for the primary purpose of spreading terror.

3.7.2.2.3. *Measures to prevent or punish*



880. The Chamber finds that Kondewa as a superior had a duty to take necessary and reasonable measures to prevent the commission of the criminal acts by his subordinates or to punish them. His duty to prevent arose from the moment he learnt that his subordinates were about to commit criminal acts. He should have exercised his duty to punish when he learnt that his subordinates did in fact commit criminal acts in Bonthe Town during and subsequently to the attack. He did not properly exercise his duty to prevent the commission of the criminal acts as a superior simply by telling his subordinate Kamajors that they were not allowed to enter Bonthe. His duty was to ensure that an effective mechanism was in place so that his subordinates would in fact comply with his orders. We find that Kondewa did nothing to prevent the commission of these criminal acts nor did he punish his subordinates for other criminal acts once he had been informed that they indeed had committed such other criminal acts. Thus, we find that he failed as a superior in the exercise of his duties to prevent or to punish the commission of the criminal acts by his subordinates.

### 3.7.2.3. Counts - Bonthe District

881. The Chamber recognises that other criminal acts have been committed by Kamajors in Bonthe District during the time frame relevant to the Indictment. In the Chamber's opinion, having regard to all the evidence adduced, these criminal acts were either not charged in the Indictment or fall outside the time frame of the Indictment or there is no indication that the accused were involved in the commission of these crimes through any of the modes of liability alleged in the Indictment. Therefore, the Chamber will not examine these criminal acts for the purposes of making legal findings on the responsibility of each Accused.

#### 3.7.2.3.1. *Count 2: Murder*

882. The Prosecution alleges that Kondewa is individually criminally responsible, pursuant to Article 6(3), for the unlawful killing of an unknown number of civilians between October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town.<sup>1565</sup>

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<sup>1565</sup> Indictment, para. 25(f).

883. As set out above in the Factual Findings, the Chamber found that the following acts have been committed which are relevant for Count 2, Murder:

- (i) On 15 February 1998, Kpana Manso was killed by Beigeh, a Kamajor Commander subordinate to Morie Jusu Kamara.
- (ii) On 16 February 1998, Bendeh Battiana was accused of being a collaborator and was killed by a Kamajor named Rambo Conteh.
- (iii) On 17 February 1998, Abu Conteh was killed at St. Joseph's Secondary School by one of Mori Jusu's Kamajors.
- (iv) In early March 1998, a woman named Jitta was killed by a Kamajor named Beigeh between Sebongie and Bonthe.
- (v) TF2-087's uncle was killed in Gambia Village by Kondewa's deputy Sheku Kallie, after having reported to Kondewa the misconduct of some of his boys.
- (vi) During the same period of time, three pregnant women were killed in Gambia Village by Kondewa's boys before Norman's arrival in Gambia.

884. The Chamber has examined the facts and circumstances surrounding each incident set out above in points (i) through (vi) and concludes that all of the perpetrators were Kamajors under the effective control of Kondewa. We find that individuals were intentionally killed; in the majority of these cases they were specifically targeted because of the perpetrator's belief that they were "collaborators" or rebels. Having considered the evidence in the context of the armed conflict that was then taking place in Sierra Leone, and having regard to all of the evidence adduced, the Chamber is satisfied that each of the acts described in paragraph 883 was sufficiently related to the armed conflict to satisfy the nexus requirement for war crimes. Having considered the particular facts and circumstances of each of these incidents, referred to above in paragraph 883, the Chamber is also satisfied beyond reasonable doubt that the victims were persons not taking an active part in the hostilities at the time that they were killed and also that the perpetrator knew that the victims were not taking an active part in the hostilities.

885. In light of the above the Chamber is satisfied that the general requirements of war crimes have been established with respect to each incident described in paragraph 883.

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886. With respect to those incidents described in paragraph 883 (i)-(iv), the Chamber is satisfied that Kamajors under the effective control of Kondewa intentionally caused the deaths of Kpana Manso, Bendeh Battiamia, Abu Conteh and a woman named Jitta.

887. The Chamber is therefore satisfied not only that the general requirements of war crimes have been established but also that the specific elements of murder have been established with respect to the killing of Kpana Manso, Bendeh Battiamia, Abu Conteh and Jitta.

888. The Chamber finds, however, that the evidence adduced has not established beyond reasonable doubt that the killings described in paragraph 883 (v) and (vi) occurred during the time period set out in the Indictment. The Chamber finds that Kondewa is not guilty with respect to these killings.

3.7.2.3.2. *Count 4: Cruel Treatment*

889. The Prosecution alleges that Kondewa is individually criminally responsible, pursuant to Article 6(3), for the intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians by his subordinates in Bonthe District. These crimes are alleged to have occurred between November 1997 and December 1999, , through the following acts:

- screening for collaborators;
- unlawfully killing suspected collaborators, often in plain view of friends and relatives;
- illegal arrest and unlawful imprisonment of collaborators;
- the destruction of homes and other buildings;
- looting and threats to unlawfully kill, destroy or loot.<sup>1566</sup>

890. As set out above in the Factual Findings, the Chamber found that the following acts have been committed which are relevant for Count 4, Cruel Treatment:

- (i) On 15 February 1998, Kamajors captured Lahai Ndokoi Koroma. He was stripped naked and tied; three delegations came from Talia to investigate the matter.

<sup>1566</sup> Indictment, para. 26(b).

- (ii) On 16 February 1998, at a meeting at St. Patrick's Parish Compound in Bonthe Town, Julius Squire announced that the Kamajors were looking for three collaborators. At the same meeting TF2-116 was singled out and his life was threatened because of alleged collaboration with the juntas.
- (iii) At the same meeting, a boy named Bendeh Battiana was singled out and accused of being a collaborator. He was later killed by Rambo Conteh.
- (iv) In early March 1998, TF2-086 was detained by Kamajors, including Baigeh, along the road between Sebongie and Bonthe. The Kamajors threatened her life, saying, "Look how dead you are."

891. The Chamber has examined the facts and circumstances surrounding each incident set out above in points (i)-(ii) concludes that all of the perpetrators of these acts were Kamajors under the effective control of Kondewa. Having considered the evidence in the context of the armed conflict that was then taking place in Sierra Leone, and having regard to all of the evidence adduced, the Chamber is satisfied that each of the acts described in paragraph 889 (i)-(v) was sufficiently related to the armed conflict to satisfy the nexus requirement for war crimes. Having considered the particular facts and circumstances of each of the incidents referred to in paragraph 889, the Chamber is also satisfied that the victims were persons not taking an active part in the hostilities at the time that the acts described above occurred and, furthermore, that the perpetrators knew that they were not taking an active part in the hostilities.

892. The Chamber finds that, in light of the circumstances under which these events occurred, it is a reasonable inference that the screening for collaborators experienced by Lahai Ndokoi Koroma, TF2-116, Bendeh Battiana and TF2-086 caused serious mental suffering, particularly in the case of TF2-116 and TF2-086, whose lives were threatened at the same time.

893. In light of the findings set out above, the Chamber is satisfied that both the general requirements of war crimes and the specific elements of cruel treatment have been established with respect to the incidents described in paragraph 889 (ii)-(v).

894. By contrast, the Chamber finds that the specific elements of the crime of cruel treatment have not been established with respect to paragraph 889 (i), as it has not been proved beyond reasonable doubt that those people whose homes were burnt endured serious mental suffering or injury.





3.7.2.3.3. *Count 5: Pillage*

895. The Prosecution alleges that Kondewa is individually criminally responsible, pursuant to Article 6(3), for the unlawful taking of civilian-owned property between about 1 November 1997 and 1 April 1998.<sup>1567</sup> These crimes are alleged to have occurred at various locations in Bo District, including the towns of Talia (Base Zero), Bonthe Town, Mobayeh and the surrounding areas.<sup>1568</sup>

896. As set out above in the Factual Findings, the Chamber found that the following acts have been committed which are relevant for Count 5, Pillage:

- (i) On 15 February 1998, Lamina Gbokambama and his men looted household items and equipment from a number of locations in Bonthe Town.
- (ii) On 16 February 1998, Julius Squire and his troops looted a house in Bonthe and took 17,900,000 leones from TF2-116's house.
- (iii) In early March 1998, a group of Kamajors including Baigeh took 140,000 leones from TF2-086 and her business partner Jitta on the road between Seborgie and Bonthe.

897. The Chamber has examined the facts and circumstances surrounding each incident set out above in points (i)-(iii) and concludes that all of the perpetrators of these acts were Kamajors under the effective control of Kondewa. The Chamber reiterates that the Kamajors entered Bonthe on the 15<sup>th</sup> of February 1998. Having considered the evidence in the context of the armed conflict that was then taking place in Sierra Leone, and having regard to all of the evidence adduced, the Chamber is satisfied that each of the acts described in paragraph 896 (i)-(iii) was sufficiently related to the armed conflict to satisfy the nexus requirement for war crimes. Having considered the particular facts and circumstances of each of the incidents referred to in paragraph 896, the Chamber is also satisfied beyond reasonable doubt that the victims were persons not taking an active part in the hostilities at the time that the acts described above occurred and, furthermore, that the perpetrators knew that they were not taking an active part in the hostilities.

<sup>1567</sup> The Chamber notes that while the Indictment charges "unlawful taking and destruction by burning of civilian-owned property" burning does not constitute the offence of pillage. See the section on Applicable Law for further discussion of this point.

<sup>1568</sup> Indictment, para. 27.

898. In light of the findings set out above, the Chamber is satisfied that both the general requirements of war crimes and the specific elements of pillage as a war crime have been established with respect of the criminal acts described in paragraph 896 (i)-(iii).

3.7.2.3.4. *Count 7: Collective Punishments*

899. The Prosecution alleges that Kondewa is individually criminally responsible, pursuant to Article 6(3), for committing the crimes alleged in Counts 1 through 5, including threats to kill, destroy and loot, to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces.<sup>1569</sup>

900. The Chamber reiterates that only those acts for which the Accused have been found to bear criminal responsibility under another count of the Indictment may form the basis of criminal responsibility for acts of terrorism. In this regard, the Chamber recalls that it has found that Kondewa bears criminal responsibility as a superior under Counts 2, 4 and 5 in Bonthe.

901. The Chamber finds that the evidence adduced proves beyond reasonable doubt that the acts described in paragraph 883 [Count 2] and in paragraph 889 [Count 4] and paragraph 896 [Count 5] were perpetrated with the specific intent to punish the civilian population in Bonthe District.

902. The Chamber is therefore satisfied, in relation to those acts described in paragraph 883 [Count 2] and in paragraph 889 [Count 4] and paragraph 896 [Count 5], that both the general requirements of war crimes and the specific elements of collective punishments have been proved beyond reasonable doubt with respect to each incident.

3.7.2.4. Conclusion

903. On the basis of the foregoing, the Chamber finds that it has been proved beyond reasonable doubt that Kondewa is individually criminally responsible as a superior, pursuant to Article 6(3), for the crimes committed by Kamajors in Bonthe Town and the surrounding areas as found under Counts 2, 4, 5 and 7 above.

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<sup>1569</sup> Indictment, para. 28.

### 3.8. Kenema District

904. In addition to the facts, listed in paragraphs 721 (i) to (viii) and 765 (i) to (iii) above, the Chamber outlines below the facts as found in Sections V.2.2, V.2.7.2, V.2.7.3 and 2.7.8 of the Factual Findings, which it will rely to make its legal findings on the individual criminal responsibility pursuant to Article 6(1) and 6(3) of Fofana and Kondewa:

- (i) Mohamed Bhonie Koroma, a Battalion Commander, led the attack on SS Camp. Other Kamajors that participated in this attack included Mohamed Swaray, a Battalion Commander from Kenema, Fallah Bindi, a Commander, CO Sahr, a Section CO and Stephen Lahai Fassay. SS Camp was taken approximately one week before Kenema.
- (ii) Mohamed Bhonie Koroma left SS Camp to attack Kenema on 15 February 1998. When he left, Stephen Lahai Fassay replaced him as the Kamajor boss and maintained this position at least until May 1998.
- (iii) Kamajors entered Blama on Sunday, 15 February 1998. Key commanders in this attack included Alhaji Bockarie, Sau Vibbie and Foday Saidu.
- (iv) Kamajors took control of Kenema Town on Sunday, 15 February 1998. Mohamed Bhonie Koroma led the first battalion of Kamajors, which entered Kenema from the direction of SS Camp. Twenty to thirty units from different sections, comprising at least one thousand Kamajors, entered Kenema on the same day.
- (v) ECOMOG arrived in Kenema approximately on 18 February 1998.
- (vi) While at Base Zero Musa Junisa was the Director of Operations for the Eastern Region.
- (vii) In mid-February 1998, TF2-079 and TF2-201 traveled from Base Zero to Bo and Kenema on the orders of Norman to set up a CDF office. At that time the CDF commanders in Kenema were KBK Magonna, Eddie Massallay and Arthur Koroma. George Jambawai, the Regional Coordinator for the Eastern Region became the head of the new administration; TF2-079 was also part of the executive. Jambawai's administration lasted until June 1998. He was succeeded by the District Administrator, Arthur Koroma. During the administration of Arthur Koroma a base was opened at SS Camp where civilians were taken for detention.

#### 3.8.1. Responsibility of Fofana

##### 3.8.1.1. Responsibility pursuant to Article 6(1)





905. The Chamber finds that it is a reasonable inference that the order to attack Kenema Town was included in the instructions given by Norman at the passing out parade held at Base Zero in early January 1998, when he ordered to launch an "all-out offensive" in all the areas occupied by the juntas. This inference can be drawn on the basis of the fact that at the time of the parade Kenema Town was one of those areas and also because according to the evidence the attack on Kenema Town took place on the same day as the attack on Bo and Bonthe Towns, *i.e.* 15 February 1998. However, the Chamber reiterates its earlier finding that Fofana's speech at this particular parade did not constitute instigating or ordering the commission of the criminal acts, or aiding and abetting in the planning, preparation or execution of the criminal acts, which the Chamber found were subsequently committed by Kamajors in Kenema District.

906. The Chamber further finds that there is no evidence beyond reasonable doubt that Fofana was involved, either directly or otherwise, in the attacks on Kenema Town, SS Camp and Blama or in any of the criminal acts, which the Chamber found were committed by Kamajors during and after the attacks on those locations. The evidence shows that the existence of the plan to capture Kenema was known at Base Zero because Norman then ordered the War Council members to open the CDF office there but this evidence, even considered with the evidence as a whole, is not sufficient to conclude to any individual criminal liability of the accused beyond reasonable doubt.

907. Although on the basis of the evidence adduced it appears that Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt that they did so in order to further a common purpose, plan or design to commit criminal acts. There is no evidence proving beyond reasonable doubt such a purpose, plan or design.

908. On the basis of the foregoing the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing (including through a joint criminal enterprise) or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Chamber found were committed in Kenema District during the time frame charged in the Indictment.

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### 3.8.1.2. Responsibility pursuant to Article 6(3)

909. The Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana had a superior-subordinate relationship with any of the Kamajors who operated in Kenema District and committed criminal acts during and after the attacks on Kenema Town, SS Camp and Blama as found by the Chamber above. The Chamber found that Musa Junisa was appointed to a position of Director of Operations for the Eastern Region at Base Zero and as such was a *de jure* subordinate of Fofana, the Director of War, in the hierarchical structure of the CDF organisation. However, the evidence adduced has not established beyond reasonable doubt that there was any superior-subordinate relationship, either *de jure* or *de facto*, between Musa Junisa and the Kamajors who operated in Kenema District and committed criminal acts during the time frame charged in the Indictment, such as to conclude that he could or did exercise effective control over those Kamajors.

910. Since an essential element of a superior responsibility is not established, it is not necessary to examine the other remaining elements with respect to any of the criminal acts which the Chamber found were committed by Kamajors in Kenema District during the time frame charged in the Indictment.

### 3.8.1.3. Conclusion

911. On the basis of the foregoing, the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to either Article 6(1) or 6(3) for any of the criminal acts which the Chamber found were committed in Kenema District during the time frame charged in the Indictment.

## 3.8.2. Responsibility of Kondewa

### 3.8.2.1. Responsibility pursuant to Article 6(1)

912. The Chamber reiterates its earlier finding that Kondewa's conduct at the passing out parade at Base Zero in early January 1998 does not constitute instigating the commission of the criminal acts, or aiding and abetting in the planning, preparation or execution of the criminal acts, which the Chamber found were subsequently committed by Kamajors in Kenema District.

913. The Chamber further finds that there is no evidence beyond reasonable doubt that Kondewa was possibly involved, directly or otherwise, in the attacks on Kenema Town, SS Camp and Blama or in any of the criminal acts, which the Chamber found were committed by Kamajors during and after the attacks on those locations. The evidence shows that the existence of the plan to capture Kenema Town was known at Base Zero because Norman then ordered the War Council members to open the CDF office there but this evidence alone is not sufficient to attach individual criminal liability to the accused beyond reasonable doubt.

914. Although on the basis of the evidence adduced it appears that Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt that they did so in order to further a common purpose, plan or design to commit criminal acts. There is no evidence proving beyond reasonable doubt such a purpose, plan or design.

915. On the basis of the foregoing the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing (including through a joint criminal enterprise) or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Chamber found were committed in Kenema District during the time frame charged in the Indictment.

#### 3.8.2.2. Responsibility pursuant to Article 6(3)

916. The Chamber reiterates its earlier finding that although Kondewa had a *de jure* status as High Priest in the CDF and as such possessed command over all the Kamajors in the country, this was limited to the Kamajors' belief in mystical powers which Kondewa allegedly possessed. This evidence is inconclusive to establish beyond reasonable doubt that Kondewa had an effective control over the Kamajors, in a sense that he had the material ability to prevent or punish them for their criminal acts in Kenema District. The Chamber further finds that the evidence adduced has not established beyond reasonable doubt that Kondewa had any superior-subordinate relationship with any of the Kamajors who operated in Kenema District and committed criminal acts during and after the attacks on Kenema town, SS Camp and Blama as found by the Chamber above.



917. Since an essential element of a superior responsibility is not established, it is not necessary to examine the other remaining elements with respect to the criminal acts which the Chamber found were committed by Kamajors in Kenema District during the time frame charged in the Indictment.

3.8.2.3. Conclusion

918. On the basis of the foregoing, the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to either Article 6(1) or 6(3) for any of the criminal acts which the Chamber found were committed in Kenema District during the time frame charged in the Indictment.

3.8.3. Counts - Kenema District

919. The Chamber recognises that criminal acts have been committed by Kamajors in Kenema District during the time frame relevant to the Indictment. In the Chamber's opinion, having regard to all the evidence adduced, these criminal acts were either not charged in the Indictment or fall outside the time frame of the Indictment or there is no indication that the accused were involved in the commission of these crimes through any of the modes of liability alleged in the Indictment. Therefore, the Chamber did not examine these criminal acts for the purposes of making legal findings on the responsibility of each Accused.

3.9. Talia / Base Zero

920. In addition to the facts, listed in paragraphs 721 (i) to (viii) and 765 (i) to (iii) above, the Chamber outlines below the facts as found in Sections V.2.2 and V.2.8 of the Factual Findings, upon which it will rely to make its legal findings on the individual criminal responsibility pursuant to Article 6(1) and 6(3) of Fofana and Kondewa:

- (i) By late 1996 or early 1997 the Kamajors had taken over Talia from the rebels. The first Kamajor leaders who came to Talia were Ngobeh and Joe Tamidey. Kondewa, who was a herbalist, came two weeks later with his priests and was performing initiations in Mokusi. By the time of the coup the Kamajors were also in control of the surrounding villages around Talia.
- (ii) After the coup and before the arrival of Norman to Talia around 15 September 1997, Fofana and Kondewa were both in Talia. Around July-

August 1997 Kondewa was in Tihun performing initiations. At that time Kondewa was considered the supreme head of Kamajors in Bonthe District.

- (iii) Fofana and Kondewa stayed in Talia for the entire period of time of the existence of Base Zero.

921. As set out above in the Factual Findings, the Chamber found that the following criminal acts have been committed in Talia / Base Zero, which the Chamber will consider for the purposes of making its legal findings on the individual criminal responsibility pursuant to Article 6(1) and 6(3) of Fofana and Kondewa in this area:

- (i) TF2-134 was captured by Kamajors and forcefully brought to Talia. She was tied with FM rope and beaten until she vomited blood. She was then kept in a guardroom and released later in the day.
- (ii) TF2-109 was captured by Kamajors along with other women and three men in her village of Mattru Jong and was taken to Talia by Kamajor Kamoh Bonnie. She was held in Talia for three days. The Kamajors also looted her property in Mattru, including furniture, household items and clothing.
- (iii) Sometime towards the end of 1997, two "Town Commanders" were brought to Talia. Kondewa took a gun from Kamoh Bonnie, Kondewa's priest, shot and killed one of the town commanders. The next morning witness saw two graves where the bodies of the two town commanders were buried.
- (iv) TF2-133 was captured and taken to Talia, where she stayed for one month. During that time, TF2-133 saw Kamajors kill her mother in the palm oil plantation.
- (v) TF2-188 and her mother were captured and made to carry loads to Talia. In Talia, Kondewa told his boys to capture TF2-188's mother and kill her. TF2-188 saw the Kamajors kill her mother.
- (vi) During the rainy season of 1997, TF2-189 was captured by Kamajors and taken to Talia. While in Talia, TF2-189's husband was captured, his throat was cut by Kamajors and he was decapitated.
- (vii) Jusu Shalley, Baggie Vaiey and Lahai Lebbie were captured together and brought to Talia. They were killed in front of a large group of Kamajors and civilians. All three men were civilians. Next morning the Kamajors summoned civilians to a parade, which had Norman and Kondewa in attendance.

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- (viii) Sometime after 13 February 1998, a surrendered soldier, named Sgt. Kamanda was brought to Talia from Koribondo. Sgt. Kamanda was killed.
- (ix) Kondewa's bodyguards Kafi Jini, Jahman, Junisa and Bokindeh accused TF2-096's friend, who was selling cassava, to be a rebel. Jahman reported TF2-096's friend to Kondewa and she was arrested and taken to Nyandehun. She was held in a cage and was not released until 40,000 leones were paid to Kondewa.
- (x) Sometime between January and March 1998, Mustafa Fallon was killed at the Poro Bush in Talia as part of a Kamajor ritual. Mustafa Fallon was a fighting Kamajor who had been enlisted by Bobor Tucker. Norman, Fofana and Kondewa and many other Kamajors were present.
- (xi) Sometime between December 1997 and January 1998, Alpha Dauda Kanu was killed in the palm oil plantation near Talia as part of a Kamajor ritual. Kanu was one of about 40 Kapras from Gbonkolenken Chiefdom in Tonkolili District who had come to Talia for training. Norman, Fofana and Kondewa approved the killing.
- (xii) A truck carrying cocoa and coffee arrived in Talia. It was unloaded and the contents were given to the Director of War, Fofana and the High Priest, Kondewa. The truck was detained in Talia.

922. The Chamber notes that the allegations advanced by the Prosecution in relation to the alleged crimes in Talia / Base Zero include the following time frames: for Count 2 – between about October 1997 and December 1999, for Count 4 – between November 1997 and December 1999, for Count 5 – between about 1 November 1997 and about 1 April 1998 and for Counts 6 and 7 – as charged in the previous counts. These allegations are particularised in paragraphs 882, 889, 895, 899 above.<sup>1570</sup>

923. The Chamber finds that based upon the evidence adduced in support of the acts listed above under paragraph 921 (i), (iv), (v) and (ix) it cannot conclude beyond reasonable doubt what the timing of the occurrence of these incidents was. The incident described in paragraph 921 (vi) may have occurred any time during "the rainy season of 1997" which could have been between the months of June through September 1997. The Chamber also recalls that Kondewa arrived at Talia by late 1996 or early 1997. Both Kondewa and Fofana were in Talia before the arrival of Norman and the establishment of Base Zero around 15 September 1997. Therefore, the Chamber concludes that the evidence has not established beyond reasonable doubt that the incidents listed

<sup>1570</sup> These allegations are identical for Fofana.

under paragraph 921 (i), (iv), (v), (vi) and (ix) had taken place within the time frame charged in the Indictment.

924. We find that the incident listed under paragraph 921 (viii) involves the killing of “a surrendered soldier” from Koribondo. While the Chamber recognises that this act may have constituted an unlawful killing, it holds that the Prosecution has limited the allegations in Count 2 for Talia / Base Zero to the unlawful killing of “an unknown number of civilians” only and not that of “captured enemy combatants”.<sup>1571</sup>

925. The Chamber further finds that the incidents listed under paragraph 921 (x) and (xi) do not constitute a war crime since both Fallon and Kanu fighters and members of the CDF. Here the Chamber particularly recalls the final position of the Prosecution in respect of these two killings made during their closing arguments as follows:

[T]he best approach is simply to see these two men’s deaths as examples of where the three accused stood in the hierarchy, their ability to do acts without sanction from anyone else. In fact, it demonstrates that they were in absolute control of the CDF. That is, we would say, how the deaths of those two men fit into the Prosecution case.<sup>1572</sup>

### 3.9.1. Responsibility of Fofana

926. The Chamber will now proceed to examine whether the evidence adduced has established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(1) or 6(3) for the acts listed by the Chamber above under paragraph 921 (ii), (iii), (vii) and (xii).

927. In relation to the acts described under paragraph 921 (ii), (iii) and (vii) above the Chamber finds that the presence of Fofana at Base Zero when these incidents took place is not sufficient by itself to establish beyond reasonable doubt that Fofana had any involvement in the commission of these criminal acts under any of the modes of liability charged in the Indictment.

928. In relation to the incident described under paragraph 921 (xii) the Chamber finds that the fact that a truck was brought to Talia and the contents of it was given to Fofana is not sufficient to establish beyond reasonable doubt that either the truck might have been looted or that Fofana knew or had reasons to know that the truck might have been looted.

<sup>1571</sup> Indictment, para. 25(f).

<sup>1572</sup> Transcript of 28 November 2006, pp. 104-107.

929. On the basis of the foregoing, the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing (including through a joint criminal enterprise) or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Chamber found were committed in Talia / Base Zero during the time frame charged in the Indictment.

930. Likewise, the Chamber concludes that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(3) as a superior for any of the criminal acts which the Chamber found were committed in Talia / Base Zero by Kamajors during the time frame charged in the Indictment.

### 3.9.2. Responsibility of Kondewa

931. The Chamber will now proceed to examine whether the evidence adduced has established beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to Article 6(1) or 6(3) for the incidents listed by the Chamber above under paragraph 921 (ii), (iii), (vii) and (xii).

932. In relation to the incidents described under paragraph 921 (ii) and (vii) above the Chamber finds that the presence of Kondewa at Base Zero when these incidents took place is not in itself sufficient to establish beyond reasonable doubt that Kondewa had any involvement in the commission of these criminal acts under any of the modes of liability charged in the Indictment. On the basis of the evidence adduced it cannot be established beyond reasonable doubt that there existed a superior-subordinate relationship between Kondewa as High Priest and the said Bonnie who was said to be a "Kondewa's priest".<sup>1573</sup>

933. In relation to the incident described under paragraph 921 (xii) the Chamber finds that the fact that a truck was brought to Talia and the contents of it was given to Kondewa is not sufficient to establish beyond reasonable doubt that either the truck might have been looted or that Fofana knew or had reasons to know that the truck might have been looted.

<sup>1573</sup> See paragraph 220 (iii).

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934. The Chamber finds that the incident listed under paragraph 921 (iii) constitutes an intentional killing perpetrated by Kondewa. The Chamber further finds that these two men were killed because they were considered to be “collaborators”, after having been appointed to the position of “Town Commanders” by the rebels, these men organized civilians from their town to assist the rebels. In the context of the widely-held Kamajor belief that anyone who assisted the rebels was a “collaborator”, the Chamber finds that the unlawful killing of the two “Town Commanders” was sufficiently related to the armed conflict to satisfy the nexus requirement for war crimes.

935. In light of the particular facts and circumstances of each of the events referred to above, the Chamber is also satisfied both that neither of the victims was taking an active part in the hostilities at the time that they were killed and, furthermore, finds that Kondewa knew that the victims were not taking an active part in the hostilities.

936. In light of the above, the Chamber is satisfied that both the general requirements of war crimes and the specific elements of murder have been established with respect to each incident described in paragraph 921 (iii).

937. On the basis of the foregoing, the Chamber finds that it has been proved beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to Article 6(1) for committing murder as a war crime as charged under ~~Count 2~~ of the Indictment and as found above.

### 3.10. Moyamba District

### 3.11. Moyamba District

938. In addition to the facts, listed in paragraphs 721 (i) to (viii) and 765 (i) to (iii), (viii) and (ix) and 809 (vi) above, the Chamber outlines below the facts as found in Sections V.2.2 and V.2.9 of the Factual Findings, upon which it will rely to make its legal findings on the individual criminal responsibility pursuant to Article 6(1) and 6(3) of Fofana and Kondewa:

- (i) Sometime after August 1997, the Kamajors returned to Moyamba in full strength under the leadership of Mustapha Ngobeh. Kenci Torma was the second-in-command to Mustapha Ngobeh. Sometime after Ngobeh's death, Torma became the first in command. In late 1997 and early 1998,

Kenei Torma and Chuck Norris were in control of the Kamajors in Moyamba town.

- (ii) Albert J Nallo in late 1997 was the Director of Operations for the Southern Province, which included Moyamba District. In this capacity Albert J Nallo had control over Moyamba District. When Albert J Nallo went to Moyamba Town he learned from Mustapha Ngobeh that four days earlier Abu Bawote, the Commander in the Ribbi area, had killed the Chiefdom Speaker. Mustapha Ngobeh related that he had seen Abu Bawote in Bradford with the severed hand of the Chiefdom Speaker; Bawote had dried the hand and tied to his neck as a necklace. Albert J Nallo reported this incident to Fofana and Norman and told Norman that this Chiefdom Speaker was a collaborator. Norman responded: "Well, a Collaborator deserves that. That was the standing order. You know that was the standing order I passed long ago."

### 3.11.1. Responsibility of Fofana

#### 3.11.1.1. Responsibility pursuant to Article 6(1)

939. The Chamber finds that there is no evidence beyond reasonable doubt that Fofana was possibly involved, directly or otherwise, in the attack on Moyamba town by Kamajors or in any of the criminal acts, which the Chamber found were committed by Kamajors in Moyamba District during the time frame charged in the Indictment. Although on the basis of the evidence adduced it appears that Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt that they did so in order to further a common purpose, plan or design to commit criminal acts. There is no evidence proving beyond reasonable doubt such a purpose, plan or design.

940. On the basis of the foregoing the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing (including through a joint criminal enterprise) or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Chamber found were committed in Moyamba District during the time frame charged in the Indictment.

#### 3.11.1.2. Responsibility pursuant to Article 6(3)

941. The Chamber will now proceed to examine whether the evidence adduced has established beyond reasonable doubt that Fofana is individually criminally responsible as a superior pursuant





to Article 6(3) for any of the criminal acts which the Chamber found were committed in Moyamba District during the time frame charged in the Indictment.

3.11.1.2.1. *Superior-subordinate relationship*

942. The Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana had any direct superior-subordinate relationship with any of the Kamajors who operated in Moyamba District and committed criminal acts as found by the Chamber above during the time frame charged in the Indictment.

943. The Chamber reiterates its finding above that there was a superior-subordinate relationship between Fofana and Nallo, who was Director of Operations for the Southern Region, which included Moyamba District, and that Fofana exercised effective control over Nallo, in a sense of having the material ability to prevent the commission of criminal acts by Nallo or punish him for these acts when he learnt of their commission.<sup>1574</sup> The evidence has established beyond reasonable doubt that this relationship between Fofana and Nallo existed at least from the time of the appointment of Nallo at Base Zero to the position of Deputy National Director of Operations for the CDF and Director of Operations for the Southern Region, until the dissolution of Base Zero. Although the Chamber found that Nallo had control over Moyamba District at least in late 1997, the evidence has not established beyond reasonable doubt that at that time Nallo's control was such as to be considered to be effective over all the Kamajors in Moyamba District. By Nallo's own admission, he could not exercise full or strict control over all of the Kamajors in Southern Region due to their large numbers.

944. In relation to the incident involving the killing of the chiefdom speaker the Chamber finds that the evidence has not established beyond reasonable doubt when exactly the killing took place. Furthermore as we found, the fact that Bawote was seen with a "dried" hand would indicate that the killing had taken place some time earlier but is not sufficient to conclude beyond reasonable doubt as to the timing of the occurrence of this killing. While noting that Nallo was informed of this killing sometime in late 1997, there is no evidence as to the timing of the killing itself. The Chamber takes the view that this evidence has not established beyond reasonable doubt that the

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<sup>1574</sup> Finding on 6(3) for Fofana in Koribondo.

killing took place either within the time frame of the Indictment or at the time when Nallo was in control of Moyamba District.

945. The evidence also does not establish beyond reasonable doubt whether there was any superior-subordinate relationship between Ngobeh and Bawote at the time when Ngobeh saw Bawote with a dried hand. The Chamber further finds that there is no evidence beyond reasonable doubt that the killing of the chiefdom speaker was done by a person who at the time of the commission of the killing was a subordinate of Fofana.

946. The Chamber therefore finds that the evidence adduced has not established beyond reasonable doubt that Fofana had a superior-subordinate relationship with all the Kamajors who operated in Moyamba District and who committed criminal acts as found by the Chamber above during the time frame charged in the Indictment.

947. Since an essential element of a superior responsibility is not established, it is not necessary to examine the other remaining elements with respect to any of the criminal acts which the Chamber found were committed in Moyamba District by the Kamajors during the time frame charged in the Indictment.

#### 3.11.1.3. Conclusion

948. On the basis of the foregoing, the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(1) or 6(3) for any of the criminal acts which the Chamber found were committed in Moyamba District during the time frame charged in the Indictment.

#### 3.11.2. Responsibility of Kondewa

##### 3.11.2.1. Responsibility pursuant to Article 6(1)

949. The Chamber finds that there is no evidence beyond reasonable doubt that Kondewa was possibly involved, directly or otherwise, in the attack on Moyamba town by Kamajors or in any of the criminal acts, which the Chamber found were committed by Kamajors in Moyamba District during the time frame charged in the Indictment. Although on the basis of the evidence adduced it appears that Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt

that they did so in order to further a common purpose, plan or design to commit criminal acts. There is no evidence proving beyond reasonable doubt such a purpose, plan or design.

950. On the basis of the foregoing the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing (including through a joint criminal enterprise) or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Chamber found were committed in Moyamba District during the time frame charged in the Indictment.

### 3.11.2.2. Responsibility pursuant to Article 6(3)

951. The Chamber reiterates its earlier finding that although Kondewa had a *de jure* status as High Priest in the CDF and as such possessed command over all the Kamajors in the country, this was limited to the Kamajors' belief in mystical powers which Kondewa allegedly possessed. This evidence is inconclusive to establish beyond reasonable doubt that Kondewa had an effective control over the Kamajors, in a sense that he had the material ability to prevent or punish them for their criminal acts in Moyamba District. The only incident in the Factual Findings made by the Chamber in Moyamba District and which could be attributable to Kondewa for Count 5, Pillage, is set out below as follows:

- (i) In November 1997, Kamajors under the control of Kondewa took TF2-073's Mercedes Benz from his home in Sembchun. The Kamajors said that they were Kondewa's Kamajors and that they had come from Talia, Tihun, Gbangbatoke and other surrounding villages. Three of them introduced themselves as Steven Sowa, Moses Mbalacolor and Mohamed Sankoh. Mohamed Sankoh said he was Deputy Director of War under Norman. The car was eventually given to Kondewa, who kept the car and used it without permission.
- (ii) On the same occasion these Kamajors also took a generator, car tires and other gadgets from TF2-073.

952. The Chamber has examined the facts surrounding each incident set out in both points above and is satisfied that, having regard to all the evidence adduced, each incidence of pillage is sufficiently related to the armed conflict to satisfy the nexus requirement for war crimes. The Chamber further finds, given the circumstances surrounding the occurrence of pillage as set out above, that the victims were persons not taking a direct part in the hostilities at the time of the



commission of the crimes. The Chamber is additionally satisfied that the perpetrator knew that the victims were not taking an active part in the hostilities.

953. In the light of the above, the Chamber is satisfied that both the general requirements of war crimes and the specific elements of pillage have been met with respect to each incident described in paragraph 951.

954. This incident demonstrates that the looting was done by the Kamajors who operated under the direct orders of Kondewa. Kondewa's knowledge that his subordinates committed crimes of pillage can be established on the basis that the looted car was then given to him to be driven around. The Chamber finds that Kondewa not only failed in the exercise of his duties to punish his subordinates for looting, but chose to support their actions by using the looted vehicle himself.

#### 3.11.2.3. Conclusion

955. On the basis of the foregoing, the Chamber finds that it has been proved beyond reasonable doubt that Kondewa is individually criminally responsible as a superior, pursuant to Article 6(3), for pillage as charged under Count 5 on the Indictment and as found by the Chamber above.

#### 3.11.3. Counts - Moyamba District

956. The Chamber recognises that other criminal acts have been committed by Kamajors in Moyamba District during the time frame relevant to the Indictment. In the Chamber's opinion, having regard to all the evidence adduced, these criminal acts were either not charged in the Indictment or fall outside the time frame of the Indictment or there is no indication that the accused were involved in the commission of these crimes through any of the modes of liability alleged in the Indictment. Therefore, the Chamber did not examine these criminal acts for the purposes of making legal findings on the responsibility of each Accused.

#### 3.12. Count 8

957. The Prosecution alleges that Fofana and Kondewa are individually criminally responsible, pursuant to Article 6(1) or 6(3), for enlisting children under the age of 15 years ("child soldiers")

into armed forces or groups or using them to participate actively in hostilities at all times relevant to the Indictment throughout the Republic of Sierra Leone.<sup>1575</sup>

958. In addition to the facts, listed in paragraph 721 (i) to (viii) and 809(i) (iii) above, the Chamber outlines below the facts as found in Sections V.2.2 and V.2.10 of the Factual Findings, upon which it will rely to make its legal findings on the individual criminal responsibility pursuant to Article 6(1) and 6(3) of Fofana and Kondewa with respect to Count 8.

- (i) A commanders' meeting was held by Norman after the passing out parade at Base Zero in early January 1998, which had in attendance, among others, Fofana, Kondewa and commanders for the Bo attack. Norman added that the adult fighters were doing less than the children, and just eating and looting.
- (ii) Child fighters were present at various times at Base Zero.

### 3.12.1. Responsibility of Fofana

#### 3.12.1.1. Responsibility pursuant to Article 6(1)

959. The Chamber finds that the evidence adduced has not proved beyond reasonable doubt that Fofana planned, ordered or committed the crime of enlisting child soldiers into an armed group, or using them to participate actively in hostilities.

960. Specifically regarding the commanders' meeting, the Chamber finds that Fofana's mere presence does not demonstrate beyond reasonable doubt that he encouraged anyone to make use of child soldiers. Neither does it demonstrate beyond reasonable doubt that he aided and abetted in the planning, preparation or execution of either the enlistment of child soldiers into the armed forces or the use of child soldiers to participate actively in hostilities anywhere in the Republic of Sierra Leone during the time frame specified in the Indictment.

961. The Chamber further finds that the presence of Fofana at Base Zero where child soldiers were also seen is not sufficient by itself to establish beyond reasonable doubt that Fofana had any involvement in the commission of these criminal acts under any of the modes of liability charged in the Indictment.

<sup>1575</sup> Indictment, para. 29.

962. The trial record contains ample evidence that the CDF as an organisation was involved in the recruitment of children under the age of 15 to an armed group, and used them to participate actively in hostilities, however this does not demonstrate beyond a reasonable doubt that Fofana was personally involved in such crimes.

963. On the basis of the foregoing, the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing (including through a joint criminal enterprise) or otherwise aiding and abetting in the planning, preparation or execution of enlistment of child soldiers into armed forces or groups or use of child soldiers to participate actively in hostilities.

#### 3.12.1.2. Responsibility pursuant to Article 6(3)

964. In addition to the facts, listed above in paragraph 958 the Chamber outlines below the fact upon which it will rely to make its legal findings on the individual criminal responsibility pursuant to Article 6(3) of Fofana with respect to Count 8:

- (i) In February 1998 TF2-140 passed through the town of Koribondo, he saw Joe Tamidey, a Kamajor commander [under the command of Fofana] being guarded by four small boys. The Witness estimated the boys to be younger than he was.

965. TF2-140 was 15 years old when he witnessed this event. The Chamber has accepted the credibility of TF2-140's statement on this event, however there is room for doubt that the boys referred to were actually younger than 15 years of age. It is conceivable that the boys were younger than the witness, but still older than 15 years. It is also conceivable that TF2-140 may have been incorrect in his estimation that the boys were younger than he. Aside from that, the evidence does not establish that Fofana was aware of the situation regarding his subordinate Joe Tamidey. In conclusion, the Chamber finds that the evidence adduced does not prove beyond reasonable doubt the criminal liability of the Accused.

966. The Chamber finds that the evidence adduced does not prove beyond a reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(3) as a superior for the enlistment or use of child soldiers to participate actively in hostilities anywhere in the Republic of

Sierra Leone during the time frame specified in the Indictment. Proof of knowledge alone is insufficient to establish the individual criminal responsibility of an Accused, and the Chamber is unable to conclude that Fofana's presence alone at this or other such meetings has either a condoning or encouraging effect upon the commission of any crimes by his subordinates relating to the enlistment or use of child soldiers.

### 3.12.1.3. Conclusion

967. On the basis of the foregoing, the Chamber finds that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to either Article 6(1) or 6(3) for Count 8.

### 3.12.2. Responsibility of Kondewa

#### 3.12.2.1. Responsibility pursuant to Article 6(1)

968. In addition to the facts, listed in paragraph 958 above, the Chamber outlines below the fact upon which it will rely to make its legal findings on the individual criminal responsibility pursuant to Article 6(1) of Kondewa with respect to Count 8:

- (i) TF2-021 was nine years old when he was abducted by rebels. In 1997, when the witness was eleven years old he was captured by Kamajors and forced to carry looted property. The Kamajors subsequently took him to Base Zero for initiation.
- (ii) At Base Zero, the witness was initiated along with around 20 other young boys. Kondewa performed the initiation and told the boys that they would be made powerful for fighting. He gave them a potion to rub on their bodies before going into battle.
- (iii) After receiving training, TF2-021 was sent on his first mission to Masiaka, where he shot a woman in the stomach and left her there on the ground. On subsequent missions, he fought with the Kamajors at Kenema, SS Camp, Joru and Daru. In 1999 TF2-021 was flown by helicopter into Freetown with three other small boys and their commanders where they were given guns and sent to support ECOMOG who were fighting the rebels at Congo Cross.
- (iv) In 1999, when TF2-021 was thirteen years old, he was initiated into the Avondo Society, a group of Kamajors led by Kondewa. He received a certificate (Exhibit 18) which proved his membership in this group. The certificate bears details showing the place of initiation (Bumpeh), the

initiate's name, photograph and age. It also bears Kondewa's name, signature and stamp.

969. The Chamber understands from the evidence that initiation into the Kamajor Society does not necessarily amount to enlistment in an armed force or group.<sup>1576</sup> Some parents put their children through initiation for other reasons. Thus, the Chamber has looked at the details of the actual initiation ceremony, the circumstances surrounding initiation, as well as the subsequent events, to determine whether in fact a child could be said to have been enlisted in an armed force or group.

970. Having considered the evidence outlined above, that during the first initiation of TF2-021 initiates were given potions to rub on their bodies before going into battle, were told that they would be made strong for fighting, were subsequently given military training, and soon afterwards were sent into battle, the evidence is absolutely clear that on this occasion, the initiates had taken the first step in becoming fighters. It is beyond reasonable doubt that Kondewa, in these circumstances, when initiating the boys, was also performing an act analogous to enlisting them for active military service. TF2-021 was eleven years old when Kondewa enlisted him. In the Chamber's view, there can be no mistaking a boy of eleven years old for a boy of fifteen years or older, especially for a man such as Kondewa who regularly performed initiation ceremonies. Kondewa knew or had reason to know that the boy was under fifteen years of age, and too young to be enlisted for military service. Although the Chamber found this evidence entirely sufficient to establish enlistment beyond a reasonable doubt, TF2-021 was given a second initiation, into the Avondo Society, headed by Kondewa himself, when he was thirteen years old. Exhibit 18, dated 10 June 1999, bears Kondewa's signature and stamp of approval and lists the boy's age (incorrectly) as twelve.

971. Thus, the Chamber concludes that this evidence has established beyond reasonable doubt that Kondewa committed the crime of enlisting a child under the age of 15 into an armed force or group.

972. The Indictment charges use of child soldiers as an alternative to enlistment. Therefore, having found that Kondewa is individually criminally responsible for enlisting child soldiers, the

<sup>1576</sup> Expert Witness TF2-EW2 testified that in her belief, initiation was a stepping stone to recruitment as a soldier. Transcript of 16 June 2005, p.17 (CS).

Chamber need not consider the evidence in relation to their use actively participating in armed hostilities.

### 3.12.2.2. Responsibility pursuant to Article 6(3)

973. Having found the Accused liable under Article 6(1) of the Statute, the Chamber need not consider the Accused's liability under Article 6(3) of the Statute.

## VI. CUMULATIVE CONVICTIONS

### 1. Applicable Law

974. The issue of cumulative convictions arises when more than one conviction is imposed for the same criminal conduct. The Chamber is of the view that an Accused may only be convicted of multiple criminal convictions under different statutory provisions, but based on the same conduct, "if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other."<sup>1577</sup> In other words, multiple convictions may only be upheld if both of the provisions require proof of an element that is not required by the other provision. If an additional element is only required for one of the provisions, then the Accused will be convicted on that count, but not on the other count for which no distinct element is required.

### 2. Findings on Cumulative Convictions

975. For all of the reasons discussed above, the Chamber has found that the elements of the offences of murder (Count 2), cruel treatment (Count 4) and collective punishments (Count 7) have been established against the Fofana and the Kondewa in Tongo District. It has also found that the elements of the offences of murder (Count 2), cruel treatment (Count 4) and collective punishments (Count 7) have been established against the Fofana in Bonthe District, and that the elements of the offences of murder (Count 2), cruel treatment (Count 4), pillage (Count 5) and collective punishments (Count 7) were established against him in Bo. It has also has found that the elements of the offences of murder (Count 2), cruel treatment (Count 4), pillage (Count 5) and collective punishments (Count 7) were established against the Kondewa in Bonthe.

<sup>1577</sup> *Celebici* Appeal Judgement, para. 412. See also: *Prosecutor v. Musema*, ICTR-96-13-A, Judgement (AC), 16 November 2001 [*Musema* Appeal Judgement], paras 361-363; *Naletilic and Martinovic* Appeal Judgement, paras 584-585.

976. Given that the Accused, in some instances, were found liable in each District for collective punishments (Count 7) on the basis of the same underlying conduct for which they were found liable for Counts 2, 4 and 5, the Chamber must consider whether it is possible to convict them both for Counts 2, 4 and 5, as well as for Count 7.

977. The offence of collective punishment under Article 3(b) of the Statute requires two materially distinct elements from those required by Counts 2, 4 and 5. First, the offence of collective punishment requires a specific intent to punish collectively. Second, punishment must be imposed on multiple persons.

978. The Chamber is also of the view that the offences of murder and cruel treatment (under Article 3(a) of the Statute) and pillage (under Article 3(f) of the Statute) have material elements not required by the offence of collective punishment. In the Indictment, the Prosecution has pleaded "punishments" that consist only of crimes enumerated in Counts 1-5. However, the Chamber has held that the term "punishment" for this offence should be understood in its broadest sense, and refers to all types of punishments, not only those imposed by penal law.<sup>1578</sup> Punishment can therefore be imposed collectively by means of a variety of different acts, not all of which are crimes under the Statute. The *actus reus* of the offence of collective punishment therefore does not necessarily include the commission of the *actus reus* of any of the crimes of murder, pillage or cruel treatment. Nor is it required, in order to find liability for collective punishments, that the *mens rea* of any of these offences needs to be satisfied.<sup>1579</sup> The Chamber therefore finds that the material elements for each of these crimes are distinct from those that need to be proved to find liability for the offence of collective punishment. It is therefore permissible, in the Chamber's view, to enter convictions under Count 7 as well as under Counts 2-5 even where the underlying facts for the convictions are the same.

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<sup>1578</sup> See para. 181.

<sup>1579</sup> See *Prosecutor v. Brima, Kamara and Kanu*, SCSL04-16-T, Judgement (TC), 20 June 2007, where the Chamber held that it is permissible to convict an accused person for collective punishments under Article 3(b) of the Statute or acts of terrorism under Article 3(d) of the Statute, as well as for underlying crimes such as murder and mutilation (under Article 3(a) of the Statute) or outrages upon personal dignity (under Article 3(e) of the Statute) (para. 2108). See also *Kordic and Cerkez* Appeal Judgement, paras 1041-1043 and *Naletilic and Martinovic* Appeal Judgement, para. 590 where the Appeals Chamber held that it was permissible to convict the accused both for the offence of "persecution" (which also requires a specific intent) as well as for the underlying offences of "murder", "inhumane acts", "torture" and "imprisonment".



## VII. DISPOSITION

FOR THE FOREGOING REASONS, having considered all the evidence along with the arguments of the Parties, the Trial Chamber finds with respect to the Accused, **Moinina Fofana**, as follows:

Count 1: *Unanimously* - Murder, a Crime against Humanity; **NOT GUILTY**

Count 2: *By a majority, Hon. Justice Bankole Thompson dissenting* - Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **GUILTY**

Count 3: *Unanimously* - Other Inhumane Acts, a Crime Against Humanity; **NOT GUILTY**

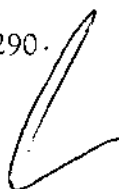
Count 4: *By a majority, Hon. Justice Bankole Thompson dissenting* - Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **GUILTY**

Count 5: *By a majority, Hon. Justice Bankole Thompson dissenting* - Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **GUILTY**

Count 6: *Unanimously* - Acts of Terrorism, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **NOT GUILTY**

Count 7: *By a majority, Hon. Justice Bankole Thompson dissenting* - Collective Punishments, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **GUILTY**

Count 8: *By a majority, Hon. Justice Benjamin Mutanga Itoe dissenting* - Enlisting children under the age of 15 years into an armed forces or groups or using them to participate actively in hostilities, an other serious violation of international humanitarian law; **NOT GUILTY**





FOR THE FOREGOING REASONS, having considered all the evidence along with the arguments of the Parties, the Trial Chamber finds with respect to the Accused, **Allieu Kondewa**, as follows:

Count 1: *Unanimously* - Murder, a Crime against Humanity; **NOT GUILTY**

Count 2: *By a majority, Hon. Justice Bankole Thompson dissenting* - Violence to life, health and physical or mental well-being of persons, in particular murder, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **GUILTY**

Count 3: *Unanimously* - Other Inhumane Acts, a Crime Against Humanity; **NOT GUILTY**

Count 4: *By a majority, Hon. Justice Bankole Thompson dissenting* - Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **GUILTY**

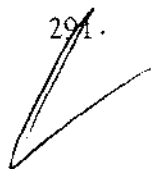
Count 5: *By a majority, Hon. Justice Bankole Thompson dissenting* - Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **GUILTY**

Count 6: *Unanimously* - Acts of Terrorism, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **NOT GUILTY**

Count 7: *By a majority, Hon. Justice Bankole Thompson dissenting* - Collective Punishments, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; **GUILTY**

Count 8: *By a majority, Hon. Justice Bankole Thompson dissenting* - Enlisting children under the age of 15 years into an armed groups and/or using them to participate actively in hostilities, an other serious violation of international humanitarian law; **GUILTY**

For the purposes of clarity in the record, the Chamber would like to summarise its findings as follows: Fofana has been held to be guilty and convicted on Counts 2, 4, 5 and 7 of the Indictment; Kondewa has been held to be guilty and convicted on Counts 2, 4, 5, 7 and 8 of the Indictment.



Hon. Justice Benjamin Mutanga Itoe appends his "Separate and Partially Dissenting Opinion Only on Count 8" to the written Judgement;

Hon. Justice Pierre Boutet appends his "Separate Concurring Opinion" to the written Judgement;

Hon. Justice Bankole Thompson appends his "Separate Concurring and Partially Dissenting Opinion" to the written Judgement; Hon. Justice Bankole Thompson acquitting both Accused on all Counts of the Indictment.

Done in Freetown, Sierra Leone, this 2<sup>nd</sup> day of August 2007.

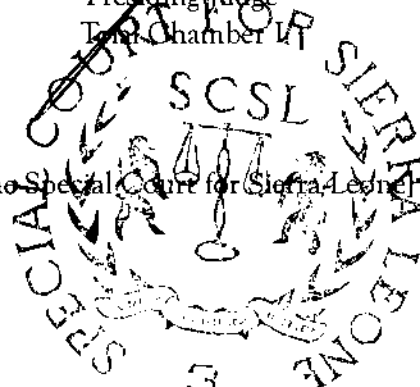
Hon. Justice Bankole Thompson

Hon. Justice Benjamin Mutanga Itoe

Hon. Justice Pierre Boutet

Presiding Judge  
Trial Chamber I

[Seal of the Special Court for Sierra Leone]



## LIST OF ANNEXES

- Annex A: Separate and Partially Dissenting Opinion Only on Count 8 of Hon. Justice Benjamin Mutanga Itoe (including attachment)
- Annex B: Separate and Concurring Opinion of Hon. Justice Pierre Boutet
- Annex C: Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson
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- Annex E: Judicially Noted Facts
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ANNEX A - SEPARATE AND PARTIALLY DISSENTING OPINION ONLY ON  
COUNT 8 OF HON. JUSTICE BENJAMIN MUTANGA ITOE, PRESIDING JUDGE  
OF THE CHAMBER ON THE JUDGEMENT OF THE LEARNED JUSTICES OF  
TRIAL CHAMBER I IN THE CASE OF MOININA FOFANA AND ALLIEU  
KONDEWA

I, Hon. Justice Benjamin Mutanga Itoe, Presiding Judge of Trial Chamber I;

MINDFUL of the Chamber Majority Decision issued this 2<sup>nd</sup> day of August 2007 in this case;

DO HEREBY ISSUE THE FOLLOWING SEPARATE AND PARTIALLY DISSENTING  
OPINION BUT ONLY ON COUNT 8

1. The remark I make before submitting this Opinion to the records is that it indeed would not have been necessary if the Chamber were in accord on certain issues which We could not, for a lack of a consensus, agree on.
2. This concerned particularly, the applicability of the notion of circumstantial evidence in International Criminal law and particularly, in the context of the case whose judgement We have just rendered. It relates to determining the liability of the two Accused for offences under Count 8 for the 300 child soldiers under the age of 15 years who Norman, acting on behalf of the CDF, handed over to the DDR programme as CDF former combatants, after negotiations with Child Protection Agencies.
3. The Majority Chamber Opinion was that neither Fofana nor Kondewa could be held criminally responsible under Count 8 for this contingent of 300 child soldiers and that it was only Norman who handed them over, that could have been held responsible for this offence.
4. The other issue of disagreement relates to my perspective which I presented to the Chamber on the basis of the responsibility of the Accused Persons for the serious war crimes and crimes against humanity which they committed even though they state, and rightfully so, that they were fighting to restore President Kabbah and his democratically elected Government to power.
5. This said, may I indicate that my Learned Brothers and my humble self, for the most part, have shared common positions on the benchmarks that have characterised these proceedings and

unanimity excepting on certain issues where each Judge has opted to treat and dispose of a particular issue in the manner that he best conceives and appreciates.

6. I would also like to reiterate here in this Separate Opinion, the fact, as was mentioned in the Introduction of Our Judgement, that I did not and still do not, with all due deference and respect which my Brothers always deserve, agree or accept the deletion of the name of the deceased 1<sup>st</sup> Accused, Samuel Hinga Norman from this Judgement and from other processes relating to this case.

7. For these reasons I would still like to reiterate My Dissenting Opinion which I filed in this regard on the 22<sup>nd</sup> of June, 2007 and for the records, do again attach a record of it to this Separate Concurring Opinion on the Final Judgement in this case that we are delivering today.

8. In our usual judicial traditions however, I consider myself, at this point in time, bound and guided by this majority position which has had the effect of deleting late Samuel Hinga Norman's name from the records and from this decision; a reality which I treat with equal deference, respect and esteem in which I hold my Distinguished Brothers and Colleagues.

#### ENLISTING AND USE OF CHILD SOLDIERS

9. The offence of use of Children under the age of 15 years for combat activities is defined in Article 4(c) of the Statute as follows:

The Special Court shall have power to prosecute persons who committed the following serious violations of international humanitarian law:

- (c) Conscripting or enlisting children under the age of 15 years into armed forces or armed groups or using them to participate actively in hostilities.

10. In the light of the above elements it is clear that Article 4(c), criminalises not only conscripting or enlisting, but also using children under the age of 15 years to participate actively in hostilities. The Chamber will therefore, as far as the concept of use of this category of children is concerned, want to make the following categorisation of acts which amount to active participation in hostilities categories which include:

1. A direct involvement in combat activities in the frontlines by carrying a weapon and using it to exchange fire to the extent that his life or existence is, as a result, exposed to peril and jeopardy.

2. The participation in military activities or duties such as guarding military establishments or equipment belonging to a warring faction in times of hostilities and in the defence of occupied territory or of persons against threats of aggression from enemy forces, either by defending military installations or garrisons; mounting of checkpoints or acting as body guards to Commanders, indeed, being employed to assume roles which place them in a permanent state of alert and readiness for combat.

3. Participation in the transportation to the frontlines, of supplies of a strategic military nature and importance such as arms, ammunitions and other lethal weapons or equipment that are destined for use in sustaining combat activities.

11. In order therefore to prove a charge of using children under the age of 15 years to participate actively in hostilities, I am of the opinion that the elements embodied in any of the categories that I have outlined above, must be established beyond reasonable doubt.

12. From the foregoing analysis and having regard to the statutory provisions of Article 4(c), the conclusion to be drawn here is that the law as it is worded, allows for the participation of children under 15 years of age in activities that do not amount to an 'active participation' in hostilities, in other words activities that are remote from those defined in the three categories that I have outlined.

13. It stands to reason therefore, that a line of demarcation has to be drawn between acts which amount to participating actively in hostilities and those which, even though they may have a semblance of this connection to active participation, are considered as remote from, and not falling under the ambit of the phrase 'active participation in hostilities'. These would include children who are involved in performing in the homes or camps of combatants who are actively involved in hostilities in the frontlines, domesticated jobs of a purely civilian character like cooking, food finding, laundry or running routine errands.

14. I am of the view that even if this could be interpreted to amount to logistic support to a warring faction, it does not attain the threshold of what, in a strict legal sense, is or could be

considered as amounting to an active participation in hostilities. The situation will however, be different if this same child is used by his master, a combatant, to convey combat equipment or weapons to the war front for purposes of his master to sustain the hostilities because such conduct will come under the purview of criminality under Article 4(c) of the Statute.

15. In this regard, it is pertinent to refer to the comments in the *travaux préparatoires* on consultations during the establishment the International Criminal Court where it was said that:

“The word ‘using’ and ‘participate’ have been adopted in order to cover both participation in combat and also active participation in military activities linked to combat such as scouting spying, sabotage and use of children as decoys, couriers or at military check points.”

16. In the light of the potential difficulty in drawing the line and distinction as to when such conduct is culpable or when it is not, a Court would, in such circumstances, only be able to make a determination on a case by case basis and on the strength of the evidence adduced by the Parties.

17. The Chamber recalls here that the Prosecution in Count 8, charges the 3 Accused Persons for initiating or enlisting children under the age of 15 years into armed forces or groups, or in the alternative, for using them to participate actively in hostilities at all times relevant to this indictment<sup>1</sup> which alleges in addition, that they took part in policy, planning and operational decisions of the CDF.<sup>2</sup>

18. The Indictment further alleges that each Accused acted individually and in concert with subordinates, to carry out the said plan, purpose or design<sup>3</sup> and in addition, that the crimes were within a common purpose, plan or design in which each Accused participated,<sup>4</sup> a statement which alleges Accomplice or Co-Accused responsibility or liability under Article 6(1) of the Statute.

19. The Prosecution, in the Indictment,<sup>5</sup> also alleges that the 3 Accused persons knew and approve the use of children under the age of 15 years to participate actively in hostilities and that

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<sup>1</sup> The Indictment, para 29.

<sup>2</sup> The Indictment, para 14.

<sup>3</sup> The Indictment, para 19.

<sup>4</sup> The Indictment, para 20.

<sup>5</sup> The Indictment, para 17.

all Accused acted individually and in concert with subordinates to carry out the said plan, purpose or design.<sup>6</sup>

20. The common purpose here and the design which the Prosecution is imputing on all the Accused for all the Counts charged, and in this particular Count, is to enlist in the armed group of combatants of the CDF Kamajors, children under the age of 15 years, with a view to using them to participate actively in hostilities in order to defeat the combined forces of the RUF and of the AFRC as alleged in paragraph 19 of the Indictment.

21. The Chamber has already defined the specific elements that are required to establish the offence of enlisting as defined in Article 4(c) of the Statute and charged under count 8 of the Indictment and which include:

- (i) The accused enlisted one or more persons into an armed force or into an armed group;
- (ii) Such person or persons were under the age of 15 years;
- (iii) The accused knew or had reason to know that such person or persons were under the age of 15 years; and
- (iv) The accused intended to enlist the said persons into the armed force or group.

22. We have also defined the specific elements which are constitutive of the offence of using children under the age of 15 years to participate actively in hostilities as defined in Article 4(c) of the Statute and charged under Count 8 of the Indictment and which include:

- (i) The accused used one or more persons to actively participate in hostilities;
- (ii) Such person or persons were under the age of 15 years;
- (iii) The accused knew or had reason to know that such person or persons were under the age of 15 years; and
- (iv) The accused intended to use the said persons to actively participate in hostilities.

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<sup>6</sup> The Indictment, para 19.



### THE CDF KAMAJOR POLICY OF ENLISTING COMBATANTS

23. Having regard to the evidence that has been adduced by both the Prosecution and the Defence which I consider credible, I find that tradition and policy for the recruitment of combat forces into the CDF armed groups required these fighters called Kamajors, to first of all, to go through the initiation ritual followed by the ritual of immunisation.

24. These rituals which were conducted in Talia and in other locations by the High Priest, Allicu Kondewa, the 3<sup>rd</sup> Accused, were intended, again as confirmed by the evidence adduced by the Parties which I consider credible, to render the Kamajor combatants bullet proof and invulnerable in the course of participating in hostilities or in any combat activities.

25. It is the quest for the acquisition of this combat protection that attracted the influx of thousands of Kamajors and other non initiates on a pilgrimage to Talia to undergo these rituals that in Talia were conducted by the 3<sup>rd</sup> Accused. In fact, before the conflict intensified, initiation and immunisation were distinct rituals, the former proceeding the latter. As the conflict intensified however, the 3<sup>rd</sup> Accused merged the two rituals appear to have been merged. This allowed the 3<sup>rd</sup> Accused to turn out many more immunised Kamajors. It is also revealed in the evidence that there was also at that time, a Military Training Centre which had been created in Talia by the late 1<sup>st</sup> Accused for purposes of training Kamajors. The evidence adduced also reveals that thousands of Kamajors were trained there by one M.S. Dumbuya, a Sierra Leonean Police retiree of what was then known as the Special Security Division (SSD), today known as the Operational Support Division (OSD).

26. In the light of the foregoing, it is my finding that no enlistment children under the age of 15 years into the Kamajor armed group could take place, nor could they be used to participate actively in hostilities, if they were not initiated into the Kamajor society and immunised by the 3<sup>rd</sup> Accused or by any of the other Kamajor Initiators<sup>7</sup> who in hierarchy, were subordinate to the 3<sup>rd</sup> Accused who, for this reason, was referred to as the High Priest.

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<sup>7</sup> Mama Munda Fortune, Siaka Sheriff Mualimu, K. Saddam, Kamara Kaneh Brima, Kamoh Lahai Bangura, Moalem Sessay: Transcript of 22 February 2006, DW Ishmael Koroma, p. 29-35; Transcript of 31 May 2006, Lansana Bockarie, p. 17; Transcript of 10 March 2005, Albert Nallo, p. 9; Transcript of 15 February 2005, 1F2-001, pp. 80-85 (CS); Transcript of 10 February 2006, Joe Demby, p. 13

27. I find, based on the evidence that has been adduced, that the culture of the Kamajor Society, like that of any other traditional society or cult, is based on absolute secrecy in their beliefs, their practices, their rituals and their traditional mysticism as manifested by the initiation process itself and the post initiation rituals and laws they would have gone through and were constrained to observe. This was the case in order to conserve the bullet proof armour which they strongly believed was bestowed and mystically clad on them by Kondewa the 3<sup>rd</sup> Accused, through the instrumentality of traditional herbs and the Tevie<sup>8</sup> which were rubbed on their bodies and which, they were very strongly convinced, effectively made them bullet proof. Some Defence Witnesses proudly professed this belief and affirmed that if they survived in combat, it was because the immunisation from bullets.

28. This belief, which I find, featured in the testimony of both Prosecution and Defence witnesses, constituted a strong galvanising force and motivation for the Kamajors to face the enemy bravely in battle and to endure the process with a spiritually motivated and propelled inspiration and determination. There is no doubt in my mind that this psychological belief in their invincibility that they owe to their initiation and immunisation, contributed largely and decisively and to a very considerable extent, to the indomitable morale of Kamajor combatants. They believed in it and were ritually and resolutely committed to it.

29. In a pitched battle at the Congo Cross Bridge in Freetown, between the Kamajors and the Rebels, General Richards who witnessed the combat was so impressed with the bravery and tenacity of the CDF militia, not too well equipped or organised, and wished he could have elements of that calibre of bravery and tenacity in the rank and file of his western and sophisticated army.

#### INITIATION AS AN OFFENCE

30. It is my finding that the Prosecution erred and misconceived the purport of the ritual by alleging and charging initiation as one of the elements of the offence of enlisting as spelt out in Article 4(c) of the Statute, because initiation, per se, which the Chamber characterises as a

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<sup>8</sup> Tevie in Mende means to mark the initiates bodies. The initiator uses the tevie, together with some herbs to mark the bodies of Kamajors joining the society. Transcript of 10 March 2005, Albert Nallo, pp. 25-26.

traditional cult and ritual, does not constitute an offence as defined under the Statute. It would indeed, therefore, be a misconception and a mis-statement of the law to hold otherwise.

31. However, given the processes that were involved in enlisting fighters into the Kamajor CDF armed group for combat, I find that even if initiation did not automatically give rise to enlistment into the CDF Kamajor fighting forces, it provided an evidentiary element and a preparatory stage for purposes of proving the offence of enlistment.

32. As I have already indicated, there was a massive and sustained influx of people from other Chiefdoms to Talia to undergo the ritual of initiation which was being conducted exclusively, as has been said earlier, by the 3<sup>rd</sup> Accused, Allieu Kondewa. From the available evidence, it is clear from the record that every initiate had to pay a fee to Kondewa for this exercise. In fact, the communities were so actively mobilised to undergo the process that wealthy elites had to contribute funds to pay for the initiation of people from their communities.<sup>9</sup>

**WHAT FACTUAL CONCLUSION CAN BE DRAWN FROM THE PROCESS OF INITIATION**

33. The evidence discloses that Kondewa carried out the ritual on thousands of people in ceremonies that he conducted in bush called Mokossi.<sup>10</sup> The Chamber finds as we have indicated earlier, that there was a military training base in Base Zero that was fully operational at the same time that Kondewa was conducting his initiations in Talia. The Chamber has already found that Kondewa, in the presence of the late 1<sup>st</sup> Accused, Norman and the 2<sup>nd</sup> Accused, Moinina Fofana, addressed the assembly of Kamajors who had graduated from their training in Base Zero. Kondewa told them that they had his spiritual benediction to go to war.

**DIRECT EVIDENCE**

34. In view of the secrecy and mythology that characterised Kamajor activities in the enlistment of children under the age of 15 into the armed group of the CDF and or their use by the Accused Persons to participate actively in hostilities, the direct oral evidence to prove Count 8 of the indictment against the 2 remaining Accused Persons is rare. In this regard, the Chamber has been

<sup>9</sup> Transcript of 10 February 2006, Albert Joe Demby, pp. 13-14.

<sup>10</sup> Transcript of 10 March 2005, Albert J Nallo, p. 31.