able to find conclusive evidence only against the 3rd Accused, Allieu Kondewa under Article 6(1) and this, in relation to only two child soldiers. The evidence also reveals the use of children as 'Commanders', who danced in front of advancing CDF warriors as they went to battle[11] and furthermore, the revelation of their use in check points in an unidentified location or command structure that would clearly have established under whose command they were operating in order to facilitate the determination of responsibility for the offence so disclosed under Count 8.

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

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

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

THE AVONDO SOCIETY

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

[11] Exhibit 100.
[12] Transcript of 14 February 2005, TF2-035, pp. 49-50.
[13] Transcript of 14 February 2005, TF2-035, pp. 56-68.

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

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

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

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

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

[14] Transcript of 11 March 2004, TF-021, pp. 20-21 and 49.
[15] Transcript of 10 March 2005, Albert J Nallo, pp. 28-30
[16] Transcript of 10 March 2005, Albert J Nallo, pp. 28-30
[17] Transcript of 14 February 2005, TF2-001, pp. 77-78.
[18] TF2-EW2, 2005.06.16, pp. 21-22.

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

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

43. It is plausible to adopt as credible, the evidence that Father Garrick went to see Kondewa who was considered supreme head of the Kamajors in Tihun Sogbini[20]

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

45. In fact, he was so powerful and influential in the organisation that Father Garrick testified[22] that on the 24th of August when his delegation from Bonthe arrived in Talia to discuss the restoration of security issues with Kondewa who had command and control over the Kamajors in Bonthe. On reaching Kondewa's house, they met a young boy of 15 years of age playing a guitar outside the house and were singing about the greatness of Kondewa and the Kamajor society. The Kamajors were guarding the house, armed with rifles and guns.

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[19] Transcript of 8 June 2005, TF2-011, pp. 23-24 (CS).
[20] Transcript of 11 November 2004, TF2-071, pp. 50-52; Transcript of 18 February 2005, TF2-222, pp. 48-50; Transcript of 10 October 2006, JD Murana, pp. 23-33 and 45.
[21] Transcript of 17 February 2005, TF2-222, p. 119, line 24 - p. 120 line 11.
[22] Transcript of 10 November 2004, Father Garrick, p. 10.

46. On the strength of the evidence adduced which is credible, and which confirms his powers and the very high esteem and exaltation he enjoyed amongst the Kamajors and in the CDF as an organisation, it is said that Kondewa's job was to prepare herbs which the Kamajors smeared on their bodies to protect them from bullets.[23] Kondewa was not a fighter,[24] he himself never went to the war front[25] or into active combat,[26] but whenever a Kamajor was going to war, he would go to Kondewa for advice and blessing.[27] Kondewa's role was to decide whether a Kamajor could go to the war front that day. Before combat, the Kamajors would go in a line and Kondewa would say, "You go out of the line. You not go this time." Although, he could say, "don't go", it was similar to a fortune teller saying so.[28] Because of the mystical powers Kondewa possessed, he had command over the Kamajors from every part of the country. No Kamajor would go to war without Kondewa's blessing.[29] For example, he did this for the Kamajors leaving Base Zero for Tongo.[30]

47. Kondewa walked around Base Zero with his bodyguards[31] because of the importance of initiators within the hunters' society.[32] He also had a child soldier acting as one of his bodyguards at Base Zero.[33] Kondewa had a house in Nyandehun, which was about a quarter mile from Talia.[34]

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

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

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

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

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

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

51. Paragraph 50 of Exhibit 100 states as follows:

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

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

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

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

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

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

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

> Demobilisation of children associated with the Civil Defence Force (CDF) was also a major concern in child protection. The NCDDR [National Committee on Disarmament, Demobilization and Reintegration] also secured an agreement to ensure the non-recruitment of children by the CDF and to commence the demobilisation of children associated with their forces. The CDF, in collaboration with child protection agencies, carried out the pre-demobilisation registration of over 300 children in the Southern Province in 1999.
>
> These 300 children were registered as child combatants by the CDF themselves. UNICEF received CDF registration forms that included the child's name, individual age – all of which were under 14, and the name of commander [sic] that the child was under, the location where the child was based and the type of weapon that the child had been assigned.

[38] Transcript of 14 September 2004, TF2-140, p. 96.
[39] Transcript of 14 September 2004, TF2-140, pp. 97-98.
[40] Transcript of 14 September 2004, TF2-140, pp. 97-98.
[41] Transcript of 14 September 2004, TF2-140, pp. 97-98.
[42] Transcript of 14 September 2004, TF2-140, pp. 118-119.

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

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

> As the war effort intensified in 1998, child protection agencies started to receive reports of children being initiated into the CDF and actually joining the older fighters in battle. With the evidence gathered and due to the fact that the CDF were a pro-government group, this practice was given special attention by Mr Olara Otunnu during his visit to Sierra Leone in July 1998. The President, His Excellency Dr. Ahmed Tejan-Kabbah and the Deputy Minister of Defence Honourable Hinga Norman, agreed to halt all recruitment of children into the CDF as part of their commitments to Mr Olara Otunnu, SRSG for Children and Armed Conflict in May.
>
> Following this meeting, the CDF registered child combatants. Over 300 children in the Southern Province under the CDF were registered. However, these 300 children were not provided with the agreed disarmament and demobilization as per the national DDR plan and the earlier commitment that had been made to the SRSG. Despite these agreements and efforts, UNICEF continued to receive reports from across the country of the increase in the initiation and the arming of children among the CDF.

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

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

[43] Exhibit 100, paras 29-30.

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

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

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

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

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

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

THE DEMOBILISED 300 CHILD SOLDIERS

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

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

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

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

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

CIRCUMSTANTIAL EVIDENCE

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

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

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

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

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

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

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

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

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

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[44] [1952] AC 480 at p. 489 (PC).
[45] See Archbold, *Criminal Pleadings Evidence and Practice*, 1997 Edition, p. 1138, para 10.3 on circumstantial evidence.
[46] Transcript of 4 November 2004, TF2-201, pp. 97-98 (CS).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[49] Richard Card, Criminal Law, 15th Ed., p. 20.02-20.03.
[50] [1993] 2 ALL ER, 955, p. 126.

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

77. TF-EW2[51] testified that as the war effort intensified in 1998, Child Protection Agencies started to receive reports of children being initiated into the CDF and actually joining the older fighters in battle. This practice was given special attention by Mr. Olara Otunnu during his visit to Sierra Leone in July 1998 when President Kabbah and the Deputy Minister of Defence, the deceased 1st Accused, agreed in an open meeting, to halt all recruitment of children into the CDF.

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

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

79. In paragraph 54 the Report says:

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

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

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

PRESIDENT KABBAH'S ROLE IN THE CONFLICT

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

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

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

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

SOME DETAILS ABOUT STRATEGIC EVENTS

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

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

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

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

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

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

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

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

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[53] Transcript of 10 February 2006, Albert Joe Demby, pp. 22-23; Transcript of 24 January 2006, Norman, pp. 80-83.
[54] Transcript of 8 February 2006, Peter Penfold, pp. 9-13.
[55] Transcript of 21 November 2004, TF2-071, pp. 82-83.

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

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

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

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

96. Late Norman testified that in October 1998, President Kabbah assigned Norman and the Vice-President to Kenema to assist ECOMOG to finally put an end to rebel activities in the entire Eastern province. Following this assignment, Norman spent almost 1.5 months in Kenema[60] to fulfil that Presidential assignment.

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[56] Transcript of 30 January 2006, Norman, pp. 10-12.
[57] Transcript of 30 January 2006, Norman, pp. 10-12.
[58] Transcript of 17 February 2006, Osman Vandi, pp. 99-101.
[59] Transcript of 17 February 2006, Osman Vandi, pp. 99-101.
[60] Transcript of 2 February 2006, Samuel Hinga Norman, pp. 70-71

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

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

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

NO REBUTTAL EVIDENCE WAS ADDUCED BY THE PROSECUTION

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

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

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[61] Transcript of 2 February 2006, Norman, pp. 44-45, See Exhibit 123.
[62] Transcript of 25 January 2006, Samuel Hinga Norman, pp.25-27; Transcript of 10 February 2006, Joe Demby, pp.17-18; Transcript of 8 February 2006, Peter Penfold, pp. 27-28.
See Exhibit 120 the letter from the Presidency creating the NCC, defining its composition and functions.
[63] Transcript of 7 June 2005, TF2-218, pp. 17-19 (CS).

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

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

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

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

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[64] Father Garrick, Transcript of 10 November 2004, pp. 21-22.
[65] Transcript of 6 February 2006, Samuel Hinga Norman, p. 26.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CRIMINALITY OF SOME ACTS OF THE ACCUSED PERSONS

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

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

117. Paragraph 6 of the Indictment states that:

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

118. Paragraph 7 of the Indictment states:

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

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

120. Paragraph 18 of the Indictment alleges:

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

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

> "The plan, purpose or design of Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa and subordinate members of the CDF was to use any means necessary to defeat the RUV/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathisers and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone. Each Accused acted individually and in concert with subordinates to carry out the said plan, purpose or design."

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

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

like the AFRC had done, to also, after defeating the AFRC, take over power as well[66] and rule for 3 years before inviting President Kabbah back to power.

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

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

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

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

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

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

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[66] Transcript of TF2-014; TF2-017, TF2-079.
[67] Transcript of 21 February 2006, David Richards, p. 31, lines, 21-23, pp. 36, 103 and 105.
[68] Transcript of 21 February 2006, David Richards, pp. 34-36
[69] Transcript of 21 February 2006, David Richards, p. 105.
[70] Transcript of 24 January 2006, Norman, pp. 80-83; Transcript of 8 February 2006, Peter Penfold, pp. 9-13; Transcript of 10 February 2006, Albert Joe Demby, pp. 22-23.

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

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

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

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

CONCLUSION ON COUNT 8

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

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

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

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

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge

[Seal of the Special Court for Sierra Leone]

21382.

ATTACHMENT TO ANNEX A

780)

SCSL-04-14-T
(21024 – 21037)

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SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER I

Before:	Hon. Justice Bankole Thompson, Presiding Judge Hon. Justice Pierre Boutet Hon. Justice Benjamin Mutanga Itoe	
Registrar:	Herman von Hebel, Acting Registrar	
Date:	22nd of June 2007	
PROSECUTOR	Against	MOININA FOFANA ALLIEU KONDEWA (Case No.SCSL-04-14-T)

Public Document

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

Office of the Prosecutor:
Stephen Rapp
James C. Johnson
Joseph Kamara

Court Appointed Counsel for Moinina Fofana:
Victor Koppe
Arrow Bockarie
Michiel Pestman
Steven Powles

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yada Williams
Ansu Lansana
Susan Wright

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

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

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

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

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

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

> I, Moinina Fofana, accused before the Special Court of Sierra Leone, hereby give my unequivocal consent for my assigned counsel, Mr. Steven Powles, to act in proceedings before the Special Court of Sierra Leone on behalf of the accused Mr. Charles Taylor.[1]
>
> I give this consent on the understanding that, should there be an appeal (against either conviction/sentence or acquittal) in my case, and in the event that I would like Mr. Steven Powles

[1] Emphasis in original.

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

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

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

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

THE TRIAL CHAMBER

DENIES the application.

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

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

Hon. Justice Benjamin Mutanga Itoe | Hon. Justice Bankole Thompson, Presiding Judge, Trial Chamber I | Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

[2] Memo, Annex III.

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

Before:	Hon. Justice Bankole Thompson, Presiding Judge Hon. Justice Pierre Boutet Hon. Justice Benjamin Mutanga Itoe
Registrar:	Mr. Herman von Hebel, Acting Registrar
Date:	22nd June 2007

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

DISSENTING OPINION OF HON. JUSTICE BENJAMIN MUTANGA ITOE ON THE MAJORITY DECISION TO DELETE THE NAME OF THE FIRST ACCUSED, SAMUEL HINGA NORMAN (NOW DECEASED) FROM THE COVER SHEETS OF CHAMBER RULINGS, DECISIONS, COURT PROCESS AND RECORDS

Office of the Prosecutor:

Stephen Rapp
James C. Johnson
Joseph Kamara

Court Appointed Counsel for Samuel Hinga Norman:

Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Alusine Sani Sesay

Court Appointed Counsel for Moinina Fofana:

Victor Koppe
Arrow Bockarie
Michiel Pestman
Steven Powles

Court Appointed Counsel for Allieu Kondewa:

Charles Margai
Yada Williams
Ansu Lansana
Susan Wright

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

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

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

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

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

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

JUSTIFICATION FOR THIS ARGUMENT

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

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

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

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

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

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

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

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

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

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

[1] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues, 21 May 2007, Order No. 1, p. 8 ["Norman Decision"].
[2] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Registrar's Submissions Pursuant to Rule 33(B) Relating to the Death of Mr. Sam Hinga Norman, 6 March 2007, para 5.

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

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

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

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

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

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[3] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Order for Extended Filing, 7 March 2007, p. 2.
[4] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Norman Defence Team Submissions on his Death, 22 March 2007, para 28.
[5] *Ibid.*, para 29.
[6] *Ibid.*
[7] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Further Fofana Submissions on the Death of the First Accused, 29 March 2007, para 1.
[8] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Prosecution Submissions Pursuant to Order for Extended Filing, 16 March 2007, para 27.

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

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

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

DELIBERATION

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

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

[9] Ibid., para 28.

22. On the issue relating to deleting or in seeking to delete the name of Samuel Hinga Norman from the records of the Chamber and of the Court on the grounds of his death, it is necessary to point out, as I have indicated earlier, that this Chamber was not seized of such a request by any of the Parties, nor did we call on them to make submissions on this issue as we did in our Order for Extended Filing of the 7th of March 2007, following the Registrar's application of the 6th of March 2007. In fact, not even the Prosecution made an application to this effect under the provisions of Rule 51(C) of the Rules of Procedure and Evidence as it did with the indictment, not only against the Late Accused, Foday Saybana Sankoh[10] but also that against the Late Accused, Sam Bockarie[11].

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

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

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

[10] *Prosecutor v. Foday Saybana Sankoh*, SCSL-03-02-I, Prosecution Request for Appearance before the Trial Chamber to Withdraw the Indictment, Pursuant to Rule 51(B), 14 November 2003.
[11] *Prosecutor v. Sam Bockarie*, SCSL-03-04-I, Prosecution Request for Appearance before the Trial Chamber to Withdraw the Indictment, Pursuant to Rule 51(B), 14 November 2003.

25. There is no such Order in the Chamber or in Court records. The decision is only made by inference from our unanimous decision of the 21st of May 2007, where we held the "*the trial proceedings against Accused Samuel Hinga Norman are terminated by reason of his death.*" We ended there. We did not go further to order that the indictment against him, like we did with those of Late Sankoh[12] and Late Bockarie[13] on the initiative and application of the Prosecution, be withdrawn. This is because it was for the Prosecution to initiate this course of action like they did in the Sankoh and Bockarie cases. In this one, it did not. Not even in the entirety of its submissions following our Order for Extended Filing, did the Prosecution canvass or suggest this course of action.

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

THE NAME OF SAMUEL HINGA NORMAN ON THE RECORDS

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

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

> "Paragraph 20. As already noted, the entirety of the trial proceedings against the three Accused were completed before the death of the Accused Norman. The trial proceedings were conducted in full respect of the right to a fair trial of each of the Accused.
>
> Paragraph 21. On the issue of the legal effect of the death of Norman on the case against the other two Accused, the Chamber finds that it is neither

[12] *Prosecutor v. Foday Saybana Sankoh*, SCSL-03-02-I, Withdrawal of Indictment, 8 December 2003.
[13] *Prosecutor v. Sam Bockarie*, SCSL-03-04-I, Withdrawal of Indictment, 8 December 2003.

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

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

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

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

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

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

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

[14] *Norman* Decision, paras 20, 21, Order No. 3.

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

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

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

CONCLUSION

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

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

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

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current status as a deceased Accused will of course be acknowledged and commented on in the 21396 Judgement that will be rendered by this Chamber in due course in the case concerning the two surviving Co-Accused Persons in this matter.

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

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

2. THAT THIS ORDER BE CARRIED OUT.

Done at Freetown this 22nd day of June, 2007

Hon. Justice Benjamin Mutanga Itoe

[Seal of the Special Court for Sierra Leone]

ANNEX B: SEPARATE AND CONCURRING OPINION OF JUSTICE BOUTET

1. The Chamber has chosen to consider whether President Kabbah's alleged role forms the basis of a possible independent defence available to the Accused. In my opinion, President Kabbah's role in the conflict should not have received the degree of prominence it did in the Judgement, as it is very much a collateral matter. It is my view that a Trial Judgement should instead focus on what is the central issue in the trial – the liability of Fofana and Kondewa.

2. In my view, the only relevance of the role of President Kabbah and the fact that Fofana and Kondewa acted with the aim of restoring democracy and ensuring the return of the Kabbah government is in assessing the liability of the Accused with respect to the specific Counts with which they have been charged. The Chamber has considered these issues in that context. The Chamber found, for example, that the attacks were directed against rebels with the aim of restoring democracy, and thus that the civilian population was not the primary target of these attacks. It therefore dismissed the Counts of Crimes against Humanity (Counts 1 and 3).

3. The role of Kabbah was also not raised by either Fofana or Kondewa in their final submissions as an independent defence. Rather, President Kabbah's role in the conflict and the fact that the acts of Fofana and Kondewa were done with the aim of restoring democracy and ensuring the return of the Kabbah government was used by Counsel for the Accused only to demonstrate that certain elements of the crimes as pleaded had not been proven beyond reasonable doubt.

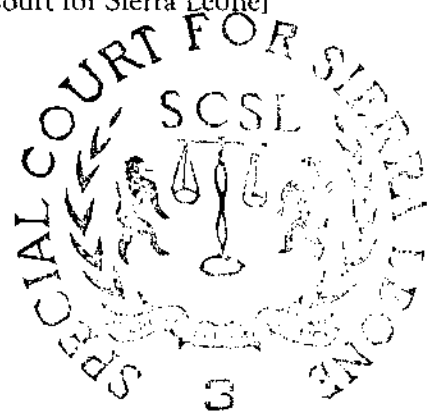
4. Insofar as the Chamber has chosen to consider the alleged role of President Kabbah as forming part of several possible independent defences, however, I concur with my learned brother, Hon. Justice Benjamin Mutanga Itoe, in dismissing them. However, I do not subscribe to all of the facts as they are presented in this section in support of his conclusion, nor do I subscribe to his reasoning in reaching such a conclusion.

B

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

Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]



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

PART ONE: KEY ISSUES OF DISAGREEMENT

I. Introduction

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

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

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

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

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

II. Disagreement with Main Judgement: First Key Issue

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

III. Disagreement with Main Judgement: Second Key Issue

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