her.[2] It is, at this juncture, that I feel compelled to make a judicial detour from the path along which my distinguished learned colleagues and I have travelled in this matter.

5. It is noteworthy that in the sphere of international criminal justice, the acknowledgment of recognised defences to international criminal liability is still evolutionary. One learned author put the issue in context in these terms:[3]

> "Defences at first played only a marginal role in the practice of international and national courts. At the start, the greatest challenge for practical international criminal law consisted in finding a legal basis for individual criminal liability under international law. Thus no grounds for excluding criminal responsibility were provided for in the Nuremberg Charter; in consequence, the lawyers for defendants who found themselves in the sights of international criminal justice took aim, at first, primarily at the international community's authority to punish and the legitimacy of international justice as such."

Continuing, he observed:[4]

> "Only as the principle of individual criminal responsibility took firmer root in international law did various grounds for excluding criminal responsibility move to the centre of defence efforts. As early as the Nuremberg successor trials, but especially in the trials before the Yugoslavia and Rwanda Tribunals, defences played a greater role. The establishment of conditions for excluding criminal responsibility, however, remained up to the Courts....."

6. As a matter of principle, international criminal tribunals should not resile from their sacred responsibility, in dispensing even-handed justice, of acknowledging and applying recognised defences to criminal liability in municipal law systems. To this effect, I can do no better than adopt the observation of one learned author on Article 21 of the Rome Statute that:

> "In developing the international criminal law relating to defences, it is essential that the Court be permitted to draw on principles of criminal law

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[2] See the English case, *R v. Hopper* (1915) 2KB241; See also *R v. Palmer* (1971) AC 814 at 823, where Lord Morris authoritatively stated:

> "It is always the duty of the judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them."

[3] Gerhard Werle, *Principles of International Criminal Law*, (The Hague: T.M.C. Asser Press, 2005) p. 138.

[4] *Ibid.*

> derived from national legal systems.....which therefore enhances the Court's ability to fill *lacunae* in the international criminal law."[5]

7. In municipal criminal law, it is a fundamental rule of law that even where the Prosecution has proved that a person charged with a crime did the proscribed act with the requisite mental state, he can still be excused from criminal liability by reason of the proof of certain defences recognised by the law. The application of a different rule in the international criminal law domain would give rise to the spectre of crimes against humanity and war crimes being essentially crimes of strict liability or absolute prohibition, giving the criminal judicial process a profile reminiscent of the discredited English Court of Star Chamber. In my considered opinion, the case for the recognition of legal defences to crimes against humanity and war crimes rests solidly on "the principle of procedural fairness, this fairness being part of international due process."[6] On this issue, therefore, my disagreement with the Main Judgement is both profound and fundamental. It does not fully address this issue. I address the said issue extensively in Part Eight of this Opinion.

PART TWO: CHALLENGES TO FORM OF INDICTMENT

(A) CHALLENGES RAISED BY SECOND ACCUSED

I. Introduction

8. In this part of the Opinion, I address the preliminary issues raised by the Defence, on behalf of the Accused Moinina Fofana, as challenges to the form of the Indictment and also a grave irregularity as to the form of the Indictment arising out of the formulation of paragraph 28 of the said Indictment, though not raised by the Defence. The challenges raised on behalf of the Accused Moinina Fofana relate to the manner of the pleading of his alleged liability under Article 6(1) of the Statute as to individual criminal liability and joint criminal enterprise and under Article 6(3) as to command responsibility. It is a three-pronged attack on the form of the Indictment, to wit: (i) that the Prosecution should have pleaded the different heads of liability under Article 6(1) separately; (ii) that the Prosecution should have pleaded the identities of victims and co-

[5] Margaret McAuliffe de Guzman, "Commentary on the Rome Statute", in Otto Triffterer, ed., as cited in Geert-Jan G.J. Knoops, *Defenses in Contemporary International Criminal Law*, (New York: Transnational Publishers Inc, 2001) p. 31.

[6] Knoops, *ibid*, p. 268

perpetrators; (iii) and that the Prosecution should have pleaded his participation in the joint criminal enterprise with greater specificity.

II. Applicable Law and Analysis

9. With respect to these challenges, let me say that I do subscribe unreservedly to both the exposition of the applicable law and the judicial analysis of the Trial Chamber's reasoning in its previous decisions and as embodied in the Main Judgement.

III. Conclusion

10. I likewise concur with the Conclusion reached in the Main Judgement on the three-pronged challenge to the form of the Indictment brought by Defence for the Accused Moinina Fofana, namely, that the alleged forms of liability of the said Accused under Articles 6(1) and 6(3) of the Statute are pleaded in the Indictment with the requisite degree of specificity. I, accordingly, find the challenges to be devoid of merit.

(B) GRAVE DEFECT NOT RAISED PRELIMINARILY OR DURING CLOSING ARGUMENTS

I. Introduction

11. Let me now, *suo motu*, address here what, as I perceive it, is a grave irregularity in the form of the Indictment. It relates specifically to the formulation of paragraph 28. Paragraph 28 of the Indictment alleges as follows:

> "At all times relevant to this Indictment, the CDF, largely Kamajors, committed the crimes set forth in paragraphs 22 through 27 and charged in counts 1 through 5, including threats to kill, destroy and loot, as part of a campaign to terrorize the civilian populations of those areas and did terrorize those populations. The CDF, largely Kamajors, also committed the crimes to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces.
>
> By their acts or omissions in relation to these events, SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA, pursuant to Article 6.1 and, or alternatively, by Article 6.3 of the Statute, are individually criminally responsible for the crimes alleged below."

II. Legal Analysis

12. Paragraph 28 appears under Counts 6-7 which specifically charge the Accused with the offences of terrorizing the population and collective punishments respectively. As a matter of law, I opine that the legal effect of charging the Accused with the separate and distinct offences of terrorizing the population and collective punishments in separate and distinct counts is to notify the Accused with specificity and precision of the charges against them. This is the basic rule governing specificity as to the form of an indictment.[7]

13. Consistent with the foregoing consideration, it is clearly impermissible to charge an accused person in a general, vague and uncertain manner. The authorities make it clear that where within the count system of charging, allegations are framed in such a way as to create multiplicity, vagueness and uncertainty, the particular count or counts are accordingly defective.[8] A close examination of paragraph 28 discloses a multiplicity of allegations in the particulars of the alleged offences of terrorizing the civilian population and collective punishments. The paragraph charges, by a process of incorporation, the Accused in both Counts 6 and 7 with five additional offences, to wit: (i) Murder, a Crime Against Humanity; (ii) violence to life, health and physical or mental well-being of persons, in particular murder, as a War Crime; (iii) inhumane acts as a Crime Against Humanity; (iv) Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, as a War Crime; and (v) Pillage, as a War Crime.

14. Evidently, each of the said additional offences is given two new proscriptive aggravating dimensions, to wit, that each of the said crimes was allegedly committed "as part of a campaign to terrorize the civilian populations of those areas and did terrorize those populations", and "to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces", thus making them brand new species of criminality. The difficulty here is that of incorporating in a Particulars of Offence paragraph, references to Counts 1-5 which are separate and distinct offences separately charged.

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[7] See Rodney Dixon, et al (eds.), *Archbold International Criminal Courts, Practice Procedure and Evidence*, (London: Sweet & Maxwell, 2002) para 6.53.

[8] See an illuminating article on the subject by Professor Glanville Williams entitled, "The Count System and the Duplicity Rule", (1966) *Crim.L.R.*, pp. 255-265, (under whom I was privileged to study Criminal Law at the University of Cambridge).

15. Based on the above analysis, the foregoing five additional crimes are, each, separate and distinct offences from the two specific and distinct offences embodied in the Statement of Offences Section of Counts 6 and 7. This is the reason for charging them separately in Counts 1 - 5. In effect, the Indictment in either of Counts 6 and 7 has charged each Accused with six different offences. It clearly proliferates the issues for trial. This is a textbook example of an infringement of the rule governing the form of an indictment technically known as the rule against duplicity, multiplicity, or uncertainty. The problem is compounded by charging these additional crimes not in separate additional counts, each in its own separate Statement of Offence Section of the Indictment, but in the Particulars of Offence Section to the existing Counts 6 and 7. I opine that this is an unorthodox and convoluted way of laying charges in an indictment. It creates nothing short of a penumbra of uncertainty as to what specific charge or charges the Accused are called upon to answer and defend in respect of Counts 6 and 7. Even where cumulative charging is permissible, it must still not offend the rule against duplicity, multiplicity and uncertainty. In a landmark decision of the Sierra Leone Court of Appeal[9], applying leading English case-law authorities on duplicity, multiplicity and uncertainty as defects in the form of an indictment, it was authoritatively stated that:

> "The general rule is that for each separate count there should be only one act set out which constitutes the offence. If two or three offences are set out in the same count, separated by the disjunctive 'or' and the conviction should be quashed."[10]

16. Based on the foregoing analysis and applying the authorities cited, I come irresistibly to the conclusion that Counts 6 - 7 of the Indictment by incorporating the offences charged separately in Counts 1 - 5 in the said Counts 6 - 7 offend the rule against duplicity, multiplicity and uncertainty, and I so hold. As stated earlier, it should suffice for the purposes of my dissent that these observations are strictly *obiter*. Hence, I do not propose to take the analysis beyond this limited judicial focus.

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[9] *Lansana and Eleven Others v. Regina*, ALR SL. 186 (1970-1971), [Sierra Leone].
[10] *Ibid.*

PART THREE: BACKGROUND TO CONFLICT AND POLITICAL CONTEXT

I. Introduction

17. This Part of the Opinion relates to the Background to the Armed Conflict and Political Context in Sierra Leone.

II. Context

18. I endorse fully the narration contained in the Main Judgement on this aspect of the case.

PART FOUR: APPLICABLE LAW

I. Introduction

19. In this Part of the Opinion, I address three key aspects of the applicable law, *to wit*, jurisdiction, the law governing the crimes charged and the law governing the forms of liability charged, indicating my concurrences with, or divergences from, the Main Judgement.

II. Jurisdiction

20. Beginning with jurisdiction, I subscribe wholly to and support the exposition of the law on the subject as found in the Main Judgement.

III. Law Governing Crimes Charged

21. On the subject of the law governing the crimes charged, there are no judicial differences between the exposition of the diverse facets of the law in the Main Judgement and my judicial appreciation of them.

IV. Law Governing the Forms of Liability Generally

22. As regards the law governing the three forms of liability charged, I diverge only from the Main Judgement on some controversial aspects of joint criminal enterprise as a form of international criminal liability. I now proceed to address these issues.

V. Joint Criminal Enterprise: The Unsettled State of the Law

23. As a preliminary matter, I do agree with the exposition of the law in the Main Judgement as to the juridical existence of joint criminal enterprise as a mode of liability "firmly established in customary international law" at the time of the alleged commission of the crimes laid in the Indictment. I also unreservedly subscribe to the view of the law expounded in the aforesaid Judgement that Article 6(1) of the Statute of the Special Court for Sierra Leone implicitly or impliedly provides for or incorporates the notion of joint criminal enterprise, as a mode of liability, and that it derives its juridical origins from customary international law.

24. However, I do not support the rather uncritical adoption of the existing jurisprudence on the subject, given the lack of judicial consensus on the scope of the doctrine and the unsettled state of the law.[11] Commenting on the judicial perils of applying incoherent, disparate and unsettled principles of law, I did observe elsewhere that:

> "It cannot be asserted with any degree of accuracy that there is, as at yet, at the level of international criminal adjudication, a settled and authoritative *corpus* of jurisprudence applicable in granting amendments to indictments. To seek to apply whatever disparate, incoherent and inconclusive general principles that exist in the form of an evolving jurisprudence *without constructive* adaptation is a logical mistake that may well make us, as judges, victims of the *fallacy of slippery precedents.*"[12]

25. By parity of reasoning, these are of some of the dangers of applying the existing law on joint criminal enterprise. The law, in its present state, is riddled with technicalities. Shorn of its technicalities, the existing law is that a person charged with the commission of a crime may be held liable for all crimes committed pursuant to the existence of a common plan or design which falls

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[11] To the same effect is this observation, to wit:

> "After ten years of the *ad hoc* Tribunals, joint criminal enterprise still remains one of the most contentious issues in their jurisprudential life and its contours have fluctuated a great deal over the years."

See Guenael Mettraux, *International Crimes and the Ad hoc Tribunals*, (New York: Oxford University Press, 2005) pp. 287-288.

[12] See Dissenting Opinion of Hon. Justice Bankole Thompson in *Prosecutor v. Brima, Kanu and Kamara*, SCSL-03-16-T, Motion for Leave to Amend Indictment Against Accused Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, 6 May 2004, paras 5-7.

within the proscriptive ambit of the statute if the accused participates in conjunction with others in the execution of the common design.

26. In its technical sense, the law is that a joint criminal enterprise is a mode of committing a crime by an accused person, acting jointly or in concert with others. The accused is liable as a co-perpetrator, each co-accused being criminally responsible for the alleged crime. A co-accused is not exonerated merely by reason of not having physically committed the crime. There are three distinct categories of this mode of liability, namely: (i) the "basic" form which requires an intent to perpetrate a certain crime, such intent being shared by all co-accused; (ii) the "systemic" form, the essence of which is personal knowledge of the system of ill-treatment as well as an intent to further the said system; and (iii) the "extended" form, which involves liability for participating in acts outside the criminal design as long as such acts are a natural and foreseeable consequence of the effecting of that common purpose.[13]

27. Judicially, I reckon it is not difficult to fathom that the present trifurcated nature of the doctrine of joint criminal enterprise as expounded in the jurisprudence is a judicial creation. It is, I again reckon, not difficult to discover that the rationale behind the third category of the doctrine is to create some form of implied criminal liability, under customary international law or treaty law, in respect of persons accused of crimes against humanity and war crimes where direct or circumstantial evidence of their participation in the alleged crimes may be lacking. One can also comprehend, in my considered judgement, that categories two and three seem to have grown out of the crimogenic, juridical and socio-cultural peculiarities of genocide as one major proscriptive conduct targeted by the indictments before the ICTY and the ICTR. Hence the need for judicial circumspection and vigilance in applying these two categories of this mode of liability to crimes that are emanations of a different crimogenic, juridical and socio-cultural settings.

28. I opine that the law, as presently formulated, is incomprehensively opaque on three main grounds. First, it is unclear as to how expansive the scope of liability envisaged by category three

[13] See *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement (TC), 15 March 2002, para 80; *Tadić* Appeal Judgement, paras 195-226; *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement (AC), 25 February 2004, paras 97-98; *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (TC), 26 June 2001, paras 24-27; *Prosecutor v. Mulutinović et al*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction: Joint Criminal Enterprises (TC), 21 May 2003, para 25, *Prosecutor v. Kvočka*, IT-98-30-IT, Judgement (TC), 2 November 2001, paras 309 and 311.

should be. Second, there is also lack of clarity as to how foreseeability in the context of the aforesaid category three should judicially be interpreted or construed. Third, the authorities are unclear as what principles are applicable in determining the impact of the said category three on existing two key due process guarantees for an accused person, namely, that a person charged with criminal wrongdoing can only be punished for his individual choice to engage in the alleged criminal wrongdoing, and that the attribution of criminal responsibility to a person charged with violation of the criminal law can only be predicated upon his own individual conduct.[14]

29. Equally problematic is the judicial tendency to equate the ***mode of liability*** with the ***criminal conduct*** itself. In my respectful opinion, this is anomalous. Likewise flawed is the disposition to describe the joint criminal enterprise as comprising an *actus reus* and a *mens rea*. In my considered view, the *mode of liability* cannot simultaneously constitute the proscribed conduct itself.

30. Furthermore, the existing jurisprudence depicts joint criminal enterprise and conspiracy as dichotomous. It is trite law that the proscriptive objective of complicity and conspiracy is that of penalising multiple or collective criminality. Hence, their doctrinal affinity with joint criminal enterprise as forms of accomplice liability.[15] To assert that the doctrine of joint criminal enterprise is not a form of accomplice liability perpetuates a judicial myth. It is trite knowledge that the rationale behind conspiracy is to criminalise the agreement as the prohibited act and nip it in the bud before it is consummated, whereas the rationale behind the joint criminal enterprise is to criminalise the objective of the design which is the prohibited act, rendering it punishable on consummation.

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[14] It is instructive to note that this rubric of joint criminal enterprise form of liability is acutely controversial because many national law systems do not, in the field of criminal law, recognize the liability of alleged offenders in a common plan for crimes falling outside the scope of the alleged common criminal design. For example, Germany, Netherlands, and Switzerland make no provision for this type of liability in their criminal codes. Under English and Canadian criminal laws, the doctrine does not penalise persons charged with a crime purportedly committed in pursuance of a joint criminal enterprise for crimes outside the scope of the common criminal design on the grounds of foreseeability. Why it has come to acquire such primacy in international criminal law seems rather intriguing and perilous.

[15] See an illuminating article on the subject by Allison Marstan Danner and Jenny S. Martinez entitled "Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law" in *California Law Review* [2005] pp. 77-169; See also Smith, K.J.M., *A Modern Treatise on the Law of Criminal Complicity*, (Oxford: Clarendon Press, 1991), for the view that the "common purpose doctrine known to English law, on which the doctrine of joint criminal enterprise is based, is used exclusively for acts that fall outside the main purpose of the agreement between co-conspirators".

31. To apply the existing principles in their present state without further legal clarity, precision and logical consistency is to compound the conceptual pitfalls and doctrinal uncertainties of the existing law governing this form of criminal liability.

PART FIVE: EVIDENTIARY PRINCIPLES

I. Introduction

32. In this Part of the Opinion I articulate, with much specificity, the principles of law that should guide an adjudicating body trying persons accused of crimes falling within the proscriptive ambit of international criminal law and that in fact guided the Trial Chamber throughout in evaluating the massive evidence presented by both the Prosecution and the Defence in this case. I do emphasize that these principles are deducible from the evolving jurisprudence, both case-law and textual authorities. Though I do subscribe to the general exposition of the said principles in the Main Judgement, I do feel judicially compelled to elaborate on them here so as to reinforce my concurrence with the factual findings and the legal findings in the Main Judgement in respect of the Counts on which 'not guilty' verdicts have been entered. It is of significance that the Chamber considers these principles to be of paramount importance in assessing the credibility of both testimonial and documentary evidence presented at the trial and in determining the ultimate question of the guilt or innocence of the Accused.

II. Evidentiary Principles: General Aspects

33. It is trite law that evidence, in legal terms, refers to "all legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation." As a preliminary point, it is noteworthy, given both the fact-intensive nature and legally complex features of this case, that nearly every category or type of evidence as a means of proving or disproving the facts in issue and the facts relevant to those in issue was implicated in this trial.

34. The first general applicable principle here is that the Special Court for Sierra Leone is mandated by its Statute to assess and evaluate evidence in cases brought before it in conformity with the doctrines and rules enunciated in the said Statute and Rules of Procedure and Evidence ("Rules"). To this end, the aforementioned Statute provides that::

> "1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.
>
> 2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone."[16]

35. Consistent with the foregoing observation, the first principle of which the Chamber took cognisance is the principle of the non-binding effect of national rules of evidence within the sphere of international criminal adjudication. In short, the Chamber attached no strict precedential value to them, primarily adhering to Rule 89 of the Court's Rules of Procedure and Evidence which states that:

> (A) The rules of evidence set forth in this section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.[17]

36. The Chamber was also mindful that where no guidance is provided by the stipulated sources, it is under a duty to evaluate the evidence in a way that "will best favour a fair determination of the case and which is consistent with the spirit of the Statute and the general principles of law." We were also pre-eminently aware throughout, that it is our duty to evaluate the evidence before us, primarily in the light of the presumption of innocence and the principle of reasonable doubt, which requires the resolution of a reasonable doubt in favour of the Accused, and secondly, having regard to general evidentiary principles of fairness.

37. The Chamber took cognisance of the fact that a criminal trial involves the ultimate adjudication or resolution of two key issues. The first is that the crimes charged in the Indictment

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[16] Statute of the Special Court for Sierra Leone, 2002 [Statute].
[17] Rule 89 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended on 27th May 2004.

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were indeed committed, as alleged. The second is the attribution of criminal responsibility to the accused for the commission of those crimes. In effect, there must be a nexus between the said crimes and the conduct of the accused. Where there is no such nexus, the crime has not been proven.

III. Evidentiary Principles[18]: The Presumption of Innocence

38. Recognising that the starting point in the process of criminal adjudication is the entitlement of the accused to a presumption of innocence as embodied in Article 17(3) of the Statute, the Chamber was mindful throughout that it is the duty of the Prosecution to establish the guilt of each of the Accused persons, the implication being that the Prosecution is obliged, in law, to prove all the facts and circumstances material and necessary to constitute the crimes charged and the criminal responsibility of each Accused person. We were equally mindful of the principle that the persuasive burden of proving the case against the Accused rests on the Prosecution throughout the entire trial; it does not shift, and that the standard required is that of proof beyond reasonable doubt and not any lower standard, fully realising this to be the cardinal principle of criminal liability that runs throughout the web of the criminal law. To this effect is the explicit provision of Article 17(3) of the Court's Statute to wit:

> "The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute."[19]

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[18] For this detailed analytical approach to evidentiary principles, I sought guidance from and adopted with necessary modifications, the version of the said principles in *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, Judgement (TC), 1 September 2004, para 20-36.

[19] Article 17(3). The universality of this presumption is now firmly established. It is entrenched in national criminal law systems (regardless of their legal tradition) regional human rights adjudicatory schemes and the international criminal law system. Under English common law, it was put succinctly by Viscount Sankey, L.C. in the celebrated case of *Woolmington v. D.P.P. (1935)* All England Law Reprint, p. 1 [England], where he declared:

> "Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the Prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exception..."

The presumption is recognized in French law, German law, and American law and by reason of the common law juridical legacy under Sierra Leone law. Likewise the African Charter on Human and Peoples' Rights, the European Convention on Human Rights, and the Universal Declaration of Human Rights enshrine the doctrine in clear and express language.

IV. Evidentiary Principles: Application

39. Consistent with the foregoing fundamental principles of criminal liability, the Chamber approached the resolution of the key issues in this trial from a dual perspective, namely, whether the ultimate result of the totality of the evidence, and the application of the relevant principles of law, thereto, is weighty and convincing enough to establish beyond reasonable doubt the facts, circumstances, intentions and purposes alleged in the Indictment and, ultimately the guilt of each Accused for the crimes as charged in the Indictment. In this regard, the Chamber kept in clear focus the Prosecution's three theories of liability: (i) individual criminal liability;[20] (ii) liability pursuant to a joint criminal enterprise;[21] and (iii) liability pursuant to the doctrine of command responsibility.[22].

40. In determining whether the Prosecution: (i) has discharged the burden of proving the case against each Accused; and (ii) has fulfilled the requisite standard of proof, namely, beyond reasonable doubt establishing the guilt of each Accused, as regards each particular Count as laid in the Indictment; the Chamber paid due regard to the existence or otherwise of any reasonable explanation of the evidence adduced before the Trial Chamber other than the guilt of each Accused,[23] mindful of the legal doctrine that any ambiguity that creates a reasonable doubt in the evidence must be resolved to the advantage and benefit of the Accused. To this end, We relied, persuasively, on the statement of the Appeals Chamber of the ICTY in the case of *Prosecutor v. Delalic*, et al, acknowledging that "if there is another conclusion which is also reasonably open from the evidence, and which is as consistent with the innocence of an Accused as with his or her guilt, he or she must be acquitted."[24] In such an eventuality, the Chamber acknowledged that the reasonable conclusion to come to is that the charges against the accused have not been established beyond reasonable doubt.

41. Consistent with first principles in the sphere of the criminal law, We also applied the principle that where the Defence has failed to challenge certain factual allegations, as laid in an Indictment, this does not imply that an adjudicating tribunal must assume or presume the

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[20] Statute, Article 6(1).
[21] *Ibid.*
[22] Statute, Article 6(3).
[23] See *Prosecutor v. Delalic , et al*, IT-96-21-A, Judgement (AC), 20 February 2001, para 458.
[24] *Ibid.* para 458.

allegations as proven. Any such implication, We realised, would be inconsistent with the cardinal principle that for each individual fact alleged the onus of proof rests squarely on the Prosecution. Pre-eminently, the Chamber took cognisance of the fact that the Statute of the Special Court guarantees to every person charged with a crime or crimes falling within the jurisdiction of the Court the right not to incriminate himself. To this effect is Article 17(4)(g) of the said Statute which states that:

> "In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality? Not to be compelled to testify against himself or herself or to confess guilt."[25]

42. Guided by this statutory provision, and recalling that in the course of this trial the two Accused persons now before the Court did not give any evidence or make statements but chose to remain silent, consistent with the law as established, the Chamber drew no adverse inferences from their decision not to testify. In essence, We, in conformity with general principles of law recognised by civilised nations, paid proper regard to the due process rights of the Accused, acknowledging that their decision to remain silent did not amount to guilt or an admission of guilt.

43. Again, in conformity with the law, in evaluating the evidence of the witnesses that testified *viva voce*, the Chamber, consistent with established jurisprudence, took into account of these factors: (a) their knowledge of the facts to which they testified; (b) their demeanour; (c) conduct; and (d) character to the extent possible.[26] As regards all the witnesses in this case, We also considered the probability, consistency and related features of their testimonies and the totality of the circumstances of the case.[27] The Chamber further recognised the complexity of the issue of the credibility of witnesses for an adjudicating forum. Hence, relying on established jurisprudence, We proceeded to assess the credibility of witnesses on the basis of: (i) their knowledge of the facts in respect of which they testified; (ii) their disinterestedness (especially in the case of those characterised as "insider witnesses"); (iii) their integrity; (iv) their veracity; and (v) their motivation

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[25] Statute.
[26] See *Brđanin*, *supra* note 15.
[27] *Ibid.*

to speak the truth consistent with their oath.[28] Equally important for the evaluation of evidence as to its probative value were these factors: (i) internal consistency and detail; (ii) strength under cross-examination; (iii) consistency against prior statements of the witness; (iv) credibility vis-à-vis other witness accounts or other evidence submitted in the case, to wit, corroboration; and (v) possible motives of the witness.[29]

44. The Chamber duly advised itself that evidence about facts which took place ten or more years prior to testifying may well involve inherent uncertainties due to the imperfections and vagaries of human perception and recollection.[30] Hence, We were mindful that the lack of particularity or specificity in respect of certain matters or events cannot, in general, justify the inference that the testimony in question is of minimal probative value or that it is worthless.[31]

45. In addition, the Chamber paid due regard to the principle of orality. This principle gives primacy to the evidence given orally by witnesses in Court as against statements made out-of-court on occasions prior to the testimony at trial. In effect, non-testimonial evidence should not be accorded primacy over testimonial evidence. We, accordingly, placed much reliance on a Decision of this Chamber entitled *Decision on Disclosure of Witness Statements and Cross-Examination*[32], where it was emphasized that:

> "The Special Court adheres to the principle of orality, whereby witnesses shall, in principle, be heard directly by the Court."[33]

46. Furthermore, We were guided by the principle that the extent of any material inconsistency between the oral testimony of a witness at a trial and his or her non-testimonial statement given prior to trial, if such a portion or portions thereof were admitted in evidence, must be factored into the evaluation equation, so as to determine what weight, if any, to be attached to the particular testimony. By parity of reasoning, We acknowledged that an inconsistency need not be fatal in that it depends on the circumstances, and may be explained by

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[28] *Ibid.*
[29] See Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (New York: Transnational Publishers, Inc., 2002) p. 167, [May and Wierda, *International Criminal Evidence*].
[30] *Ibid.*
[31] *Ibid.*
[32] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-PT, (TC), 16 July 2004.
[33] *Ibid.* para 25.

such factors as: (i) the fallibilities of human recollection; and (ii) the nature, scope and methodology of questioning of witnesses during interviews by the party calling them.[34]

47. Another basic principle that We applied is that the testimony of a single witness on a material fact does not require corroboration.[35] By this observation as to the law, We do not imply that a tribunal must not view the evidence of witnesses in the context of trials of such magnitude and complexity with caution, especially the testimonies of those characterised as "insider witnesses", (accomplices). In this regard, as already alluded to, the Chamber was supremely mindful of the need to treat the testimonies of such witnesses with utmost circumspection realising that though they may have offered to testify out of a conviction of public-spiritedness yet they invariably are witnesses with self-serving interest or motivations.

48. In addition, as to the admissibility of hearsay testimony, the Chamber followed the operative principle in the sphere of international criminal adjudication, namely, that hearsay evidence is admissible and not *per se* inadmissible. We clearly kept in mind that where such evidence is admitted to prove the truth of its contents, a tribunal ought to be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, and that both its context and the circumstances under which it arose should be considered.[36] In this regard, We adhered to the principle that the absence of the opportunity to cross-examine the maker of a hearsay statement or whether it was "first-hand" or more removed are factors to be taken into account when considering the probative value of the evidence. Consistent with the Statute, the Rules of Procedure and Evidence and established international criminal jurisprudence, We acknowledged that the fact that evidence is hearsay in character does not necessarily deprive it of probative value, holding that the weight or probative value to be attached to such evidence will

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[34] See May and Wierda, *International Criminal Evidence*, para 6:09 at page 167.

[35] See *Prosecutor v Aleksovski*, IT-95-25-T, Judgement (TC), 24 March 2000, para 62.

[36] For this approach, see May and Wierde, *International Criminal Evidence*, *supra* note at p. 117, where it is stated as follows:

> "At an early stage in the history of the modern tribunals, hearsay was held to be admissible. Thus, the Trial Chamber in *Tadić* decided to admit hearsay evidence. The Chamber commented that the international tribunal was an amalgam of civil and common law features and did not strictly follow either jurisdiction. Judge Stephen pointed out that the relevant evidence is not affected by the fact that it is hearsay and such evidence is not necessarily without probative value."

usually be less than that attributed to that given by a witness under oath who has been subjected to cross-examination, depending on the totality of the circumstances.[37]

49. With respect to documentary evidence, the Trial Chamber did, on several occasions throughout this trial, admit documentary evidence. In this regard, as in the case of other kinds of evidence, the Chamber adopted the flexible approach now established by the existing jurisprudence of "extensive admissibility of evidence, leaving questions of credibility or authenticity" to be "determined according to the weight given to each of the materials by the Chamber at the appropriate time."[38] When admitting documentary evidence during the course of this trial, We repeatedly indicated that despite the flexibility of the Chamber's approach to the admissibility issue, the reliability of such documentary evidence was not thereby automatically established and that it would be one of the factors to be considered during the evaluation of probative value of the totality of the evidence in the case.

50. When admitting direct evidence of a witness testifying to events, incidents and episodes he actually witnessed, the Chamber was guided by the doctrine that where the witness is testifying truthfully, direct evidence of a fact in issue or, of a fact actually perceived by a witness, is the most reliable form of proof, that is to say, the best evidence.

51. Throughout the trial the evidence adduced was largely circumstantial. Circumstantial evidence is evidence of circumstances surrounding an event, episode, incident, from which a fact at issue may be reasonably inferred.[39] The Chamber's approach to circumstantial evidence was that though the individual ingredients of circumstantial evidence may, in a particular case, be insufficient to establish a fact, yet taken conjunctively and cumulatively their effect may be revealing and sometimes decisive.[40] We also clearly reminded ourselves, as a matter of law, that where the Prosecution's case is substantially based on circumstantial evidence the evidence must be

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[37] See *Prosecutor v. Blaškic*, IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability (TC), para 12.
[38] See May and Wierda, *supra* note 21.
[39] See Colin Tapper (ed.) *Cross and Tapper on Evidence*, (London: Butterworths, 1995) p. 22.
[40] Exall (1866) Vol. 4 F&F922 at 929 [England], is one English case-law authority for this proposition: "Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of."

such as to satisfy the tribunal that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion.[41]

52. The Chamber also admitted expert evidence at the trial, guided by recognised and established principles in this area of the law. As to (a) the admissibility:[42] (i) that the subject matter of the proposed expert testimony is a proper topic for expert evidence and not a matter within the knowledge and experience of the court; (ii) that where the subject matter is a proper one for expert evidence, it must be relevant in the sense of assisting the court to determine an issue in dispute; (iii) that the expert must possess the necessary qualifications and credentials in the professed field of expertise; (iv) that the reasoning or methodology underlying the testimony must be valid and properly applicable to the facts in issue; and (v) that the expert must be independent.[43]

53. As to (b) the weight or probative value of the expert testimony, the Chamber took guidance from these principles: (i) that the expert must not determine the ultimate issue, that is, draw inferences or conclusions as to the guilt or innocence of the accused; (ii) that the expert must not usurp the function of the Court in assessing the credibility or truthfulness of a witness; (iii) that the expert's role is to express opinion or opinions on findings of fact but not to make those findings of fact; (iv) that the Court is not bound to accept the evidence of an expert; (v) that the criteria for evaluating the probative value of expert testimony includes mainly: (a) the professional competence of the expert; (b) the methodologies or reasoning underlying the expert evidence; (c)

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[41] See *Mogroy v. Director of Public Prosecutions*, (1973), 1 All ER. 503, [England].

[42] See May and Wierda, *International Criminal Evidence*, pp. 199-200.

[43] These principles are based, with certain modifications, on the principles operative within national law systems. In this regard, it is noteworthy that the recent jurisprudence of Canada on the subject of expert evidence bears striking resemblance to the approach adopted by international criminal tribunals. The new "principled approach" to hearsay allows such evidence to be admitted if it is both necessary and reliable, for example, if the circumstances surrounding the evidence sufficiently assures the Court of its trustworthiness. Where expert evidence contains hearsay, this fact will diminish the weight to be attached to such expert evidence. By comparison, the Australian law is close to its Canadian counterpart. In Australia, it is explicitly required that when experts use hearsay information as a basis for their opinions, their reliance on such information must be reasonable. The formula is that the greater the hearsay remainder of an opinion's basis, the less reliable it will be. In the United States, the approach to expert evidence is a two-pronged one: reliability and relevance. In determining reliability, the Court must engage in a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether the reasoning can properly be applied to the facts in issue. In addition, when determining scientific reliability, the trial judge should consider: (a) whether the proffered knowledge can be or has been tested, (b) whether the theory or technique has been subjected to peer review, (c) the known or potential rate of error, and (d) whether the theory or technique has gained general acceptance in the relevant scientific discipline. See *Daubert v. Merrel Dow Pharmaceuticals Inc.* (113) S.Ct. 2786 (1993) [United States of America], a leading decision in the U.S.A.; see also the earlier case of *Frye v. United States*, 293 F. 1013 (DC.Cir.) (1923).

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the credibility of the findings made in the light of (a) and (b) and other evidence accepted by the Court.

54. The Chamber also throughout, exercised due judicial vigilance against the possibility of using inferences to fill gaps in the evidence of both Prosecution and Defence, without prejudice to the application of commonsense in drawing reasonable inferences where necessary, especially as required for the purposes of proof by circumstantial evidence.

PART SIX: FINDINGS OF FACT

I. Introduction

55. In this Part of the Opinion, I direct my attention to the major feature of the case, to wit, the findings of fact.

II. Findings of Fact

56. Recalling my earlier observation as to the extremely fact-intensive nature of this case and recalling the application of the evidentiary principles set out in Part Five of this Opinion in arriving at the findings of fact, I endorse the entire findings of fact embodied in the Main Judgement, subject to what I have already stated in Part One, paragraph 3 of this Opinion in relation to the small segment of findings of fact on the issue of ritual killings and the initiation process. I also endorse fully the findings of fact as to the structure and organisation of the CDF and the Kamajors as contained in the Main Judgement.

III. Factual Guilt

57. In this Part of the Opinion, I take the view that the facts as established by the Prosecution's evidence indeed do prove beyond reasonable doubt the factual guilt of the Accused in respect of the charges as laid in the several Counts of the Indictment. However, It is trite learning that proof of factual guilt does not entirely dispose of the ultimate question of whether either Accused is guilty or not of the offences charged. In short, in elementary legal vocabulary, proof of the *actus reus* alone is not sufficient to constitute criminal liability. Hence, in Part Six of this Opinion, I address briefly the issue of legal guilt as found in the Main Judgement and reserve for a comprehensive analysis in Part Eight, the issue of possible valid defences open to the Accused on a

reasonable interpretation of the totality of the evidence and their entitlement in accordance with the doctrine of fundamental fairness, to a consideration of the merits or otherwise of such defences.

PART SEVEN: LEGAL FINDINGS

I. Introduction

58. In this Part of the Opinion, while concurring with certain legal findings in the Main Judgement as a key aspect of the determination of the ultimate question of guilt or innocence, I deem it appropriate to emphasize the importance of the distinction between factual guilt and legal guilt as part of the analytical foundation of the latter segment of my dissenting stance in this case.

II. Distinction Between Factual Guilt and Legal Guilt

59. The distinction between factual guilt and legal guilt has long been recognised in the domain of the criminal law. Findings of fact essentially point to and prove the factual guilt of the accused; findings of law are predicated upon the notion of legal guilt. Despite their importance in the liability-equation, findings of fact are not sufficient to establish legal guilt; there must be findings of law also. I reiterate therefore that findings of law entail a determination whether the law, when applied to the facts, show that the accused is both factually and legally guilty. Where he is only factually guilty, it is not sufficient as a basis for a conviction. He must also be legally guilty, a key element of which is proof of the criminal intent. It is settled law that, generally, proof of criminal intent is by circumstantial rather than by positive or direct evidence.

60. Convinced that the Trial Chamber was thus guided, and proceeded accordingly, I endorse unreservedly the legal findings in the Main Judgement on this aspect of the case in respect of Counts 1, 3, 6 and 8 as regards Accused Moinina Fofana and Counts 1, 3, and 6 as regards Accused Allieu Kondewa.

61. Moreover, for the sake of completeness, it thus seems to me that it ought to be emphasized that the Chamber adhered scrupulously to the exacting and stringent criteria meticulously crafted by the international community for determining the criminal liability of persons charged with crimes against humanity and war crimes. Besides, remaining vigilant throughout about the

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obligation of the Prosecution to prove beyond reasonable doubt the charges brought, the Chamber kept in focus that to discharge this burden, the Prosecution must satisfy conjunctively two layers of requirements, namely, the *chapeaux* elements and the constitutive or specific elements of each crime. In effect, a conviction in law cannot be obtained where the Prosecution proves only the *chapeaux* elements without proving the specific elements of the crime and *vice versa*. By parity of reasoning, where the evidence in respect of any *chapeaux* or specific element does not measure up to proof, no liability attaches to an accused.

PART EIGHT: POSSIBLE DEFENCES RAISED BY THE TOTALITY OF THE EVIDENCE

I. Divergence from Main Judgement

62. Having agreed with the legal findings in the Main Judgement, in respect of the aforesaid Counts, one crucial issue remains for my judicial determination. It is whether, on a reasonable interpretation of the evidence, the facts and circumstances do raise, in favour of the Accused, any possible defence or defences to criminal liability whether under Article 6(1) or Article 6(3) of the Statute. This is where, as stated in Part One of this Opinion, I significantly depart from the verdict of the Main Judgement in respect of Accused Moinina Fofana on Counts 2, 4, 5 and 7 and in respect of Accused Allieu Kondewa on Counts 2, 4, 5, 7 and 8. It is, to my mind, a liability rather than a post-trial issue.

63. In this connection, I am guided by two key principles in the sphere of criminal adjudication. The first is that "to establish criminal liability the prosecution must prove that the accused or defendant did the act which is the target of the criminal law's prohibition and that he had the requisite mental state."[44] The second is that even where the prosecution has proved the *actus reus* and the *mens rea* of the offences charged, this "does not imply that criminal liability automatically attaches to the accused or defendant. His conduct may well have been, in the eyes of the law, justifiable or excusable."[45] Stated slightly differently, it has been long established law , firstly, that in all criminal cases the prosecution has the burden of proof, and secondly, that even

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[44] Bankole Thompson, *The Criminal Law of Sierra Leone*, (Maryland: University Press of America Inc., 1999) p. 259, [Thompson, *The Criminal Law of Sierra Leone*]

[45] *Ibid*. p. 259.

when the prosecution has proved the elements of the crime beyond reasonable doubt, the accused persons may still be exonerated from criminal liability by reason of certain defences.[46]

64. These fundamental principles were concisely stated by Professor Glanville Williams in these terms:

> "That a person does a forbidden act, even intentionally, does not mean that he is necessarily guilty of the offence. Various defences are recognised, quite apart from the defence of absence of the requisite element or degree of fault. Among the circumstances of justification or excuse are self-defence, duress, and (in some cases) the consent of the person affected. A verdict of "not guilty" does not necessarily mean that the defendant did not do the forbidden act. It may mean that he did not have the requisite mental state or other fault element, or else had some justification or excuse."[47]

65. I reiterate that it is precisely this question as to whether, on a reasonable interpretation of the totality of the evidence adduced before the tribunal, the Accused are entitled to some recognised defence or defences to criminal liability that is the anchor and bedrock of my Opinion. This is where my main judicial divergence from the Main Judgement originates and rests. In my considered judgement, a close examination and interpretation of the totality of the evidence adduced before the Court in this case, do reasonably raise certain defences to wit, necessity and the doctrine of *salus civis suprema lex est*, in favour of the Accused. And, I so find, significantly, as a preliminary issue.

66. Based on the foregoing significant preliminary finding, the proper judicial inquiry now is whether in applying the principles of law governing the said defences, there is cogent, compelling and conclusive evidence to justify a conclusion or conclusions of law that the Accused are entitled to be exonerated from criminal liability under Articles 6(1) and 6(3) in respect of the offences charged by reason of the said defence or defences. In determining this key issue, it is necessary, in this Part of the Opinion, (a) to explore the state of the law governing the said defences in both the municipal law systems and the international law system and (b) to apply the principles of law to the facts and circumstances of the case, as disclosed by the evidence adduced before the tribunal so as

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[46] Joel Samaha, *Criminal Law*, (Wadsworth Thomson Learning Inc., Belmont, 2001) p. 212, [Samaha, *Criminal Law*].
[47] *Textbook of Criminal Law*, (London: Stevens & Sons Ltd, 1978) pp. 38-39.

to determine whether these defences do, as a matter of law, avail the Accused herein in respect of the crimes as laid in the Indictment.

67. It is settled law in national criminal law jurisdictions that even where an accused person does not plead or raise a specific or special defence in answer to the charge yet, if on a reasonable interpretation of the evidence, the facts and circumstances do raise certain possible defences to the alleged crimes, it is incumbent on the adjudicating body to, at least, consider the merits or otherwise, of such a defence or defences. It matters not whether the defence is raised directly, indirectly, obliquely, or implicitly. There is absolutely no ground of principle why the same doctrine should not apply in the sphere of international criminal justice. It is pre-eminently a matter of dispensing even-handed justice.

(A) NECESSITY

II. Introduction

68. An examination of the totality of the evidence adduced before the Trial Chamber amply reveals, in my considered judgement, a claim by the Accused that the CDF and the Kamajors were fighting to restore the lawful and democratically elected Government of President Kabbah to power after the May 25, 1997 *coup* by the Armed Forces Revolutionary Council (AFRC). The records indicate that the Prosecution admitted that the Kamajors were fighting for the restoration of democracy.[48]

69. Based on the foregoing, it is evident that the defence of necessity is implicated in the facts of this case. Consistent with this reasoning, on a reasonable interpretation of the evidence, as a whole, I strongly opine that the defence of "necessity" is open to the Accused as an answer to the charges in the Indictment on the grounds that the preservation of democratic rule is a vital interest worth protecting at all cost in the face of rebellion, anarchy and tyranny. As I comprehend it, the position taken throughout the trial by the Accused and their witnesses is that the military efforts of the CDF and the Kamajors in the war were dictated by the overwhelming and compelling necessity of restoring the lawful and democratically elected Government of President Kabbah to power

[48] See Transcript of Trial dated 8th May 2006, Statement of Desmond de Silva (now Sir Desmond), Counsel for the Prosecution, p. 2, lines 23-26.

following the overthrow of the said Government on May 215, 1997 by the Armed Forces Revolutionary Counsel (AFRC).

70. It is not my comprehension, and there is no supporting evidence to this effect, that they were acting under the orders of President Kabbah. Logically, therefore, Article 6(4) of the Statute of the Court does not apply. As a matter of both logic and practicality, the facts and circumstances of the case, as gathered from the totality of the evidence, reasonably speak to necessity as a possible defence in the context of determining the question of the guilt or innocence of the Accused. I shall now proceed to examine the merits or otherwise of necessity as a defence to the case against the Accused. Before doing so, let me postulate that the relevant authorities (case-law and textual), ancient and modern, agree that necessity, as a principle, can provide a defence to conduct that is in violation of the law.

III. Legal Analysis

71. Analytically, it is important to note that despite the existence of clearly-defined principles or propositions of law on the defence of necessity found in the jurisprudence of municipal law systems and international law, yet necessity, as a principle, remains acutely controversial and continues to be fraught with subtleties of legal interpretation. Writing elsewhere[49] on this theme, I put the issue in context in these terms:

> "From the historical perspective of the English common law, the evolution of the defence of necessity bristles with conceptual and doctrinal difficulties. These controversies are still unsettled. According to Stephen (1950, 216), the defence of necessity is 'a subject on which the law of England is so vague' and is essentially a matter of judicial expediency. It is this kind of reasoning that crystallised into the notion today that necessity is nothing more than a dispensing power exercised by judges to remove the stigma of illegality from acts that are manifestly illegal, and that it is not a true defence to criminal liability. Hence, the characterization in Latin: *Necessitas facit licitum quod alias non est licitum*, meaning necessity makes that lawful which otherwise is not lawful. Providing some relief from this scepticism about the doctrine's true nature is a submission of Williams (1961, 724) that necessity is recognised by English law, and particularly by the criminal law, conceding that the 'peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision' (1953, 218). In so far as its application within the domain of the criminal law is concerned, necessity has always been

[49] See Thompson, *The Criminal Law of Sierra Leone*, *supra*, pp. 267-268.

> depicted as a choice between two evils, one of which involves contravening the law and the other the infliction of some serious harm on the action of another person, infringing the law always being perceived as the lesser and justifiable option."[50]

72. As a principle, the conceptual origins of necessity can be traced back to a practical example given by Aristotle to which the principle can properly apply. It is that of the jettisoning of cargo from a ship in distress.[51] According to Aristotle, "any sensible man" would do so for the safety of both himself and his crew. Hobbes summed up his view of the doctrine in these terms:

> "If a man by the terrour of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation. And supposing such a Law were obligatory: yet a man would reason presently thus, if I doe it not, I die presently: If I doe it, I die afterwards; therefore by doing it, there is time of life gained; nature therefore compells him to the fact."[52]

73. Pondering on the action of a person who sacrifices the life of another person so as to save his own life, Kant wrote:

> "A penal law applying to such a situation could never have the effect intended, for the threat of an evil that is still uncertain (being condemned to death by a judge) cannot outweigh the fear of an evil that is certain (being drowned). Hence, we must judge that, although an act of self-preservation through violence is not inculpable, it still is unpunishable."[53]

74. In its articulation of the rationale behind necessity, as a principle, the Canadian Law Reform Commission noted thus:

> "The rationale of necessity, however, is clear. Essentially it involves two factors. One is the avoidance of greater harm or the pursuit of some greater good, the other is the difficulty of compliance with the law in emergencies. From these two factors emerge two different but related principles. The first is a utilitarian principle to the effect that, within certain limits, it is justifiable in an emergency to break the letter of the law if the breaking the law will avoid a greater harm than obeying it. The second is a humanitarian principle to the effect that, again within limits, it

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[50] *Ibid.*

[51] See D. Ross (trans) *Aristotle's Nichomachean Ethics, Book III*, (Oxford: Oxford World Classics, 1975) p. 49.

[52] *Leviathan*, (Pelican ed., 1968) p. 157.

[53] John Ladd (trans), *The Metaphysical Elements of Justice*, by Immanuel Kant, (Indianapolis: Bobbs-Merrill, 1965) p. 41.

> is excusable in an emergency to break the law if compliance would impose an intolerable burden on the accused."[54]

75. With that historical overview of the doctrine of necessity, it needs to be emphasized that the conceptualisation of necessity in excusatory and justificatory terms is a matter of much legal subtlety and theoretical complexity. This view is reinforced by the observation that, as a defence, necessity:

> "rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience."[55]

76. This perspective of the defence is further underscored in these terms:

> "The rationale of the necessity defence is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires. Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law."[56]

77. Having set out the rationale of the principle of necessity, I shall now proceed to survey the municipal law principles applicable to the defence. Firstly, the English law principles governing the defence of necessity derive their origin from what may be described as the seminal case of *R v. Dudley and Stephens*. There, Lord Coleridge, CJ, cited a key passage from the learned persons who formed the Commission for preparing the Criminal Code, as follows:

> "We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."[57]

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[54] See Working Paper 29 of the Law Reform Commission of Canada at p. 93.
[55] *Perka v. The Queen*, (1989) 2 SCR.234 at p. 248.
[56] See W.R. LaFave and A.W. Scott, *Handbook On Criminal Law*, (St. Paul: West Publishing Company, 1972) p. 382.
[57] (1884) 14 QBD 273 at p. 286, [England]. The facts in that case were that D and S, seamen, and the deceased, a boy aged between 17 years and 18 years, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean, and was probably more than 1000 miles from land that on the 18th day,

The learned Chief Justice then went on to say:

> "Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances, an absolute, unqualified, and permanent duty, we exclude from our consideration all the incidents of war."

Sir James Stephen suggests:

> "It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand."[58]

78. According to the learned editors of *Archbold*, the test that should be satisfied for the defence of necessity to succeed is: Was what the accused did actually necessary to avoid the evil in question?[59]

79. The Canadian law on necessity may be summarised thus: The defence must be grounded either on excuse or justification. The act of the accused must have been done in the interest of self-preservation, characterised not by reference to its voluntariness but by its unpunishable nature. Mere negligence or involvement in criminal or immoral activity when the emergency arose will not disentitle an accused from relying upon the defence. Where sufficient evidence is placed before the court to raise the issue of necessity, the onus rests with the Prosecution to rebut the defence and prove beyond reasonable doubt that the act of the accused was voluntary. At a minimum the situation must be so imminent and the peril so pressing that normal human instincts cry out for action and make counsel of patience unreasonable.[60]

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when they had been 7 days without food and 5 days without water, D proposed to S that lots should be cast as to who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the 20th day D, with the assent of S killed the boy, and both of them fed on his flesh for 4 days; that at the time of the act there was no sail in sight nor any reasonable prospect of relief, and that under these circumstances there appeared to them every probability that unless they then or very soon fed on the boy, or one of themselves, they would die of starvation. Later, they were rescued. Upon those facts, they were indicted for murder and convicted. It was held that upon the said facts, there was no proof of any such necessity justifying the killing of the boy; See also *Morgentaler v. The Queen* (1976) 1 SCR 616, [Canada].

[58] See Sir James Stephens, *A History of the Criminal Law of England*, (London: MacMillan, 1883) p. 109.

[59] P.J. Richardson et al., *Archbold, Criminal Pleading, Evidence and Practice*, (London: Sweet and Maxwell, 1997), para 17-132.

[60] See *Perka v. The Queen* (1984) 2 SCR 234 per Wilson J, [Canada].

80. In the United States of America, the principle of necessity is also known as the "choice - of - evil" defence. The gist of the defence is making the right choice, namely, choosing the lesser of two evils. The defence is provided for in Section 3.02 of the *Model Penal Code* which states that:

> 1. Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence.[61]

The application of the law in the U.S. requires three steps: (i) identification of the evils; (ii) ranking of the evils; and (iii) choosing the lesser.

81. Two key principles of law emanate from the municipal case-law authorities on the subject of the defence of necessity. The first is that necessity is a defence to criminal liability. The second is that whether a defence of necessity succeeds or not will depend upon the particular facts and circumstances of each case.

82. In the international law sphere, the first reference to the defence is found in the writings of Grotius. He noted that:

> "a people may sometimes be engaged in war against their will, where they cannot be justly charged with entertaining hostile intentions." [62]

83. In line with the tradition of Grotius on the subject, Weiden observed that:

> "....The doctrine has been approved by the early classic writers of International Law. It has supporters and adversaries - not only among German and other Continental writers, but even among English authorities. It has been recognised by the practice of most Great Powers. The doctrine, it is submitted, is not subversive, but contributory to an effective working of International Law."[63]

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[61] See Samaha, *Criminal Law*, p. 261-262. In the U.S., 21 States have enacted necessity defence statutes that have followed the *Model Penal Code* provisions.

[62] A.C. Campbell (trans), *On the Law of War and Peace, De Jure Belli ac Pacis*, Book III, [London: Kessinger Publishing Co., 1814] chapter 11. It is also noteworthy that in one of Euripides tragedies, there is the proverb which says that "to kill a public enemy, or an enemy in war is no murder."

[63] Paul Weiden, "Necessity in International Law", *Transactions of Grotius Society*, Vol. 24 Problems of Peace and War Papers (1938) pp. 105-132.

84. Modern support for the recognition of the defence in international law derives from the *Gabcikovo - Nagymaros Project* Case between Hungary and Slovakia[64]. There, it was acknowledged by the International Court of Justice that necessity does exist as a defence under international law, but that by reason of international practice and case-law it has been strictly circumscribed. In that case, the Court clearly expressed the view that the defence of necessity was in fact recognised by customary international law and it was a ground available to States in order to evade international responsibility for wrongful acts.

85. Relying on the foregoing exposition of the law governing the defence of necessity in both municipal law and international law, the next judicial inquiry is whether the defence is legally sustainable as an answer to the charges against the Accused. In my considered view, the gist of the defence inferred from the totality of the evidence derives from the compelling and overwhelming preoccupation of the CDF and the Kamajors, to prevent the State of Sierra Leone from further destabilisation and disintegration, restore the democratically elected Government of Sierra Leone to power thereby regaining constitutional legitimacy, a fact admitted by the Prosecution

86. Predicated on this premise, I shall now proceed to consider whether the facts of the case, as gathered from the totality of the evidence, are so compelling as to justify reasonably a conclusion of law that necessity does provide an excuse for the crimes of the Accused, due regard being paid to the principle found in municipal law systems and international law that whether a defence of necessity succeeds or not will depend upon the particular facts and circumstances of each case, an issue that is not determinable beforehand.

87. In addressing this issue and based on the authorities, I postulate judicially as follows:

> (1) The defence of necessity is a free-floating, residual excuse that attaches to every crime (although in some jurisdictions, not to homicide);[65]
>
> (2) Where the evil sought to be avoided by the criminal act is greater than the act would cause, the actor is permitted to choose the criminal act;[66]

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[64] ICJ Rep. 1997, See also *the Construction of a Wall Case (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)* ICJ Adv. Op. 9 July 2004.

[65] See Larry Alexander in Jules Coleman and Shapiro, Scott (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, [Oxford: Oxford University Press, 2004] p. 844. Note, however, that this author views the defence in justificatory terms.

(3) (a) What counts as a lesser evil is not legislatively specified but is left for case by case development;[67]

(b) The categories of what may count as a lesser evil are not fixed;

(4) The defence of necessity can avail an accused standing trial for crimes against humanity and war crimes where it is a reasonable inference from the totality of evidence adduced before the court that his non-compliance with the law was the lesser evil;

(5) The restoration of democracy to a country where there has been a violent overthrow of the lawful and democratically elected government is a supreme end or a good worth pursuing even if effected through launching military attacks to dislodge a usurping regime, where this is the only reasonable and viable option;

(6) The preservation of democratic rule in the contemporary world setting with its emphasis on a global culture that espouses freedom and human dignity as key values of modern civilisation is a vital interest of individual states and the international community in general worthy to be defended at all costs in the face of rebellion and anarchy.

88. Bearing in mind the foregoing legal exposition, I have given due consideration to the principles of law governing the defence of necessity articulated herein, and applying them to the facts and circumstances of this case, as gathered from the totality of the evidence, I have, on a reasonable interpretation of the said evidence, come irresistibly to the conclusion that the defence of necessity is clearly legally sustainable to excuse both Accused from liability in respect of the offences for which they have been found guilty. Accordingly I hold that, in the uniquely peculiar circumstances of this case, necessity succeeds as a valid defence. In effect, to plead in answer to charges of criminal conduct that took place during military encounters to suppress a rebellion against the legitimate government of a State and to restore the said democratically elected government to power is certainly not, in my judicial thinking, a fanciful defence.

89. Admittedly, cases of such bizarre factual dimensions and legal complexity do present judges with the agonising dilemma of reconciling two conflicting interests, to wit, the need for "the law to promote the achievement of higher values at the expense of lesser values", realising that

[66] *Ibid.*
[67] *Ibid.*

"sometimes the greater good for society will be accomplished by violating the literal language of the criminal law", of which the judges are themselves the assigned custodians.

90. Predicated upon these premises, there can be little doubt that in the context of the intensely conflictual situation prevailing at the material time in Sierra Leone dominated by utter chaos, fear, alarm and despondency, fighting for the restoration of democracy and constitutional legitimacy could be rightly perceived as an act of both patriotism and altruism, overwhelmingly compelling disobedience to a supranational regime of proscriptive norms.

IV. Significant Legal Findings

91. In the light of the foregoing considerations, I find specifically as follows:

> (i) that the emergency or peril to which the Accused as members of the Kamajor's group or CDF were responding was a real one;
>
> (ii) that the aforesaid emergency or peril indeed constituted an immediate threat of harm purportedly feared, to wit, fear, utter chaos, widespread violence of immense dimensions resulting from the *coup*, and intense discomfiture, locally and nationally;[68]
>
> (iii) that the response to the emergency was indeed proportionate, to wit, the use of military force to counter the overthrow of the lawful and democratically elected by military means;
>
> (iv) that acquiescence in the violent overthrow of the lawful government could certainly not have been a reasonable alternative open to the Kamajors or CDF at the material times;
>
> (v) that fighting for the restoration of the lawful and democratically elected government to power was indeed vital to the survival of the State of Sierra Leone;
>
> (vi) that the collective defensive response was supported by President Kabbah, the *de jure* sovereign, vested with the supreme executive authority of the Republic.

92. In sum, I cannot judicially see my way clear to holding the Accused liable for their acts as charged in the Counts of the Indictment. I hold that, on a reasonable interpretation of the evidence, as a whole, their legal guilt in respect of Counts on which they have been convicted is excusable in the eyes of the law on the grounds of the defence of necessity. I recognise that there

[68] Creating an atmosphere depicting Shakespeare's portrayal of "fair is foul and foul is fair", (Macbeth, Act I, scene 1).

may be valid legal reasons for adopting a restrictive approach to the application of the defence of necessity in the context of international humanitarian law transgressions but it is equally valid that to adopt a hyper-restrictive approach may lead to injustice.

(B) *SALUS CIVIS SUPREMA LEX EST*

I. Introduction

93. By parity of reasoning, I find that, on a reasonable interpretation of the evidence adduced before the Chamber, another defence seems open to the Accused. It is what is compendiously referred to in Larin as *Salus civis suprema lex est*, meaning the safety of the state is the supreme law.

II. Legal Analysis

94. This defence bears some conceptual and doctrinal affinity to the defence of necessity when applied to emergencies threatening the vital or essential interests of the State. In his celebrated writing *The Science of Right*, Kant put it in perspective in these terms:

> "It is by the co-operation of these three powers - the legislative, the executive, and the judicial - that the state realizes its autonomy. This autonomy consists in its organizing, forming, and maintaining itself in accordance wit the laws of freedom. In their union the welfare of the state is realized. *Salus rei publicae suprema lex*. By this is not to be understood merely the individual well-being and happiness of the citizens of the state; for as Rosseau asserts - this and may perhaps be more agreeably and more desirably attained in the state of nature, or even under a despotic government. But the welfare of the state, as its own highest good, signifies that condition in which the greatest harmony is attained between its constitution and the principles of right - a condition of the state which reason by a categorical imperative makes it obligatory upon us to strive after."[69]

95. Salmond in his classical work on *Jurisprudence*[70] observes that:

> "Of all forms of human society the greatest is the State. It has immense wealth and performs functions which in number and importance are beyond those of all other associations."

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[69] W. Hastie (trans), *The Science of Right*, (Germany: Eris Etext Project, 1790)
[70] (1937) 9th ed., (London: Sweet and Maxwell, 1937),p. 443.

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96. In the celebrated case of *Venn v. The State*[71], the Sierra Leone Supreme Court noted that:

> "Authorities agree on certain essential attributes of a State - population, territory, a government clothed with a monopoly of force for the preservation of peace and order and having a plenitude of authority within its territory independent of external control."

III. Significant Legal Finding

97. Based on the foregoing legal analysis, I find that the evidence, in its totality, points irresistibly to the conclusion that the CDF and Kamajor resistance efforts were directed at the preservation of the safety of the State of Sierra Leone which, at the material time, was threatened by the forces of rebellion and anarchy.

PART NINE: CONCLUSION

98. By any objective reckoning, it seems to me that in the cruel world of military combat, irrespective of the socio-cultural context, human actions, impelled as they are by the primordial instinct of self-survival, do fall short of the anthropomorphic conception of justice which we judges are accustomed to apply in determining the permissibility or impermissibility of such actions from the proscriptive perspective. This is particularly so when it is acknowledged that even international criminal law which seeks to punish deviant conduct of international law dimensions does recognise the reality that every "armed conflict is made up of criminal and non-criminal use of force"[72], a distinction, invariably indiscernible depending on the nature and complexity of the evidence adduced by the Prosecution especially where such evidence seeks to establish and attach liability for collective criminality.

99. In this regard, let me observe that one rather disturbing feature of the Prosecution's evidence as it unfolded was that of a veiled indication that the Prosecution's case was based on some further extended version of the notion of joint criminal enterprise approximating to the doctrine of guilt by association, requiring attribution of culpability to the entire Kamajor society for atrocities committed by some or rogue Kamajors. It is a fact that the Kamajor society is a distinct local cultural entity, indigenous to a specific geographical area of Sierra Leone whose

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[71] (1974-82) 1 SLBALR 172 at p. 181, [Sierra Leone].
[72] See Gerhard Werle, *Principles of International Criminal Law*, (The Netherlands: T.M.C. Asser Press, 2005) p. 29.

purpose is not to engage in criminality. It is not an organisation "institutionally intent upon actions contrary to international humanitarian law."[73] Guilt by association, in contemporary juristic thinking, is a "thoroughly discredited doctrine"[74]. It is an established principle of international criminal law that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[75]

100. Based on the legal analyses and considerations in Part Eight, and predicated upon the totality of the evidence in this case, I reiterate and hold that it is a reasonable conclusion that the CDF and the Kamajors' involvement in the hostilities that took place in Sierra Leone culminating in the charges in the Indictment which has been the subject of this trial was primarily dictated by these considerations of necessity:

> (i) self-preservation as citizens of the Republic whose essential interests, individually and collectively, had been gravely imperilled by the prevailing state of affairs at the time;
>
> (ii) preventing the further destabilisation and eventual disintegration of the State resulting from the military takeover;
>
> (iii) restoring the lawful and democratically elected government of President Kabbah, the *de jure* sovereign, to power;
>
> (iv) restoring constitutional legitimacy thereby upholding the supremacy of the Constitution of Sierra Leone and the President as its guardian;
>
> (v) preventing further and continuing breakdown of law and order, characteristic of "failed States".

101. The evidence also reasonably shows that the safety of the State of Sierra Leone, as the supreme law, became for the CDF and the Kamajors the categorical imperative and paramount obligation in their military efforts to restore democracy to the country. I entertain more than serious doubts whether in the context of the uniquely peculiar facts and circumstances of this case

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[73] Antonio Cassesse, *International Criminal Law*, (Oxford: Oxford University Press, 2003) p 245.
[74] *Uphaus v. Wyman*, (1959) 360 US 72, 79 [United States].
[75] Instructively, see International Military Tribunal, Judgement, in the Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - October 1, 1946 (1947) 171 at p. 223.

a tribunal should hold liable persons who volunteered to take up arms and risk their lives and those of their families to prevent anarchy and tyranny from taking a firm hold in their society, their transgressions of the law notwithstanding.

102. Finally, from my judicial perspective, the issue is not one of the moral guilt of the Accused herein, reprehensible though some of the proven atrocities are from that viewpoint. Were moral guilt deemed to be co-extensive with criminal liability, then the Accused persons would clearly be criminally liable pursuant to Article 6(1) and Article 6(3) in respect of the Counts for which they have been adjudged guilty in the Main Judgement. I take it as granted that in the context of modern operative criminal justice systems, nationally and internationally, moral guilt bears no conceptual equivalence to legal guilt, a view reinforced by the express statutory mandate of the international community to pay due regard to the principle of legality rather than moral or political considerations in international criminal adjudication. Hence, the importance of this legal distinction for the purposes of this Opinion. It is true, in language reminiscent of Martin Luther King, Jr., that it is not always that "the arc of the moral universe bends toward justice".

103. Given, therefore, the uniquely peculiar facts and circumstances of this case coupled with the legal complexities posed thereby, in the context of armed hostilities where one of the fighting groups was engaged in defensive military action to restore the lawful and democratically elected government to power, I hold that the crimes in respect of which the Accused, as members of the CDF or Kamajors, have been found guilty are, in the circumstances, excusable by reason of the defences discussed in Part Eight of this Opinion.

PART TEN: DISPOSITION

104. Having considered the totality of the evidence adduced before the Trial Chamber, the arguments of both the Prosecution and the Defence, the factual and legal findings as determined by the Chamber in the Main Judgement, and concurring with the findings of not guilty in favour of the Accused Moinina Fofana in respect of Counts 1, 3, 6 and 8 and in favour of the Accused Allieu Kondewa respect of Counts 1, 3 and 6 and based on the several considerations, analyses, and significant legal findings in Part Eight of this Opinion, I, Hon. Justice Bankole Thompson, one of the judges of Trial Chamber I of the Special Court for Sierra Leone, hereby decide as follows:

(1) That Second Accused, MOININA FOFANA is found NOT GUILTY and accordingly ACQUITTED on the following Counts:

COUNT 2

COUNT 4

COUNT 5

COUNT 7

(2) That Third Accused, ALIEU KONDEWA is found NOT GUILTY and accordingly ACQUITTED on the following Counts:

COUNT 2

COUNT 4

COUNT 5

COUNT 7

COUNT 8

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

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

ANNEX D: CONSOLIDATED INDICTMENT

003

SCSL-2004-14-PT
C11-215

21438

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL – 03 – 14 – I

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

INDICTMENT

The Prosecutor, Special Court for Sierra Leone, under Article 15 of the Statute of the Special Court for Sierra Leone (the Statute), charges:

SAM HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

with **CRIMES AGAINST HUMANITY, VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, and OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW in violation of Articles 2, 3 and 4 of the Statute**, as set forth below:

THE ACCUSED

1. **SAMUEL HINGA NORMAN**, was born on 1 January 1940, in Ngolala Village, Mongeri (or Monghere), Valunia Chiefdom, Bo District, in the Southern Province of the Republic of Sierra Leone. He served in the Armed Forces of the Republic of Sierra Leone from about 1959 to 1972 rising to the rank of Captain. In 1966 he

graduated from the Mons Officer Cadet School in Aldershot, United Kingdom. He has served as the Liaison Representative and Chiefdom Spokesman, Mongeri, Valunia Chiefdom, as Regent Chief of Jaiama Bongor Chiefdom, and as Deputy Minister of Defence for Sierra Leone. He is currently serving as the Minister of the Interior for Sierra Leone.

2. **MOININA FOFANA,** is believed to have been born in 1950, in Nongoba Bullom Chiefdom, Bonthe District, in the Republic of Sierra Leone. He currently resides in the town of Gbap, Nongoba Bullom Chiefdom, Bonthe District and is the Chiefdom Speaker for the Nongoba Bullom Chiefdom.

3. **ALLIEU KONDEWA, also known as (aka) King Dr Allieu Kondewa, (aka) Dr Allieu Kondewa,** is believed to have been born in the Bo District, in the Republic of Sierra Leone. He currently resides in the Bumpeh Chiefdom, Bo District, and his occupation is that of a farmer and herbalist.

GENERAL ALLEGATIONS

4. At all times relevant to this Indictment, a state of armed conflict existed in Sierra Leone. For the purposes of this Indictment the organized 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).

5. A nexus existed between the armed conflict and all acts or omissions charged herein as Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and as Other Serious Violations of International Humanitarian Law.

6. The CDF was an organized armed force comprising various tribally-based traditional hunters. The Kamajors were comprised mainly of persons from the Mende tribe resident in the South and East of Sierra Leone, and were the predominant group within the CDF. Other groups playing a less dominant role were the Gbethis and the Kapras, both comprising mainly of Temnes from the north; the Tamaboros,

comprising mainly of Korankos also from the north; and the Donsos, comprising mainly of Konos from the east.

7. The RUF was founded about 1988 or 1989 in Libya and began organized 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'état 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.

8. The **ACCUSED** and all members of the CDF were required to abide by International Humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions, to which the Republic of Sierra Leone acceded on 21 October 1986.

9. All offences charged herein were committed within the territory of Sierra Leone after 30 November 1996.

10. All acts or omissions charged herein as Crimes Against Humanity were committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone.

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

INDIVIDUAL CRIMINAL RESPONSIBILITY

12. Paragraphs 4 through 11 are incorporated by reference.

13. At all times relevant to this Indictment, **SAMUEL HINGA NORMAN** was the National Coordinator of the CDF. As such he was the principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF. He was also the leader and Commander of the Kamajors and as such had *de jure* and *de facto* command and control over the activities and operations of the Kamajors.

14. At all times relevant to this Indictment, **MOININA FOFANA** was the National Director of War of the CDF and **ALLIEU KONDEWA** was the High Priest of the CDF. As such, together with **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA** were seen and known as the top leaders of the CDF. **MOININA FOFANA** and **ALLIEU KONDEWA** took directions from and were directly answerable to **SAMUEL HINGA NORMAN**. They took part in policy, planning and operational decisions of the CDF.

15. **MOININA FOFANA** acted as leader of the CDF in the absence of **SAMUEL HINGA NORMAN** and was regarded as the second in command. As National Director of War, he had direct responsibility for implementing policy and strategy for prosecuting the war. He liaised with field commanders, supervised and monitored operations. He gave orders to and received reports about operations from subordinate commanders, and he provided them with logistics including supply of arms and ammunition. In addition to the duties listed above at the national CDF level, **MOININA FOFANA** commanded one battalion of Kamajors.

16. **ALLIEU KONDEWA,** as High Priest had supervision and control over all initiators within the CDF and was responsible for all initiations within the CDF, including the initiation of children under the age of 15 years. Furthermore, he frequently led or directed operations and had direct command authority over units within the CDF responsible for carrying out special missions.

17. **SAMUEL HINGA NORMAN,** as National Coordinator of the CDF and Commander of the Kamajors knew and approved the recruiting, enlisting, conscription, initiation, and training of Kamajors, including children below the age of 15 years. **SAMUEL HINGA NORMAN; MOININA FOFANA,** as the National Director of War of the CDF; and **ALLIEU KONDEWA,** as the High Priest of the CDF, knew and approved the use of children to participate actively in hostilities.

18. In the positions 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.

19. 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 RUF/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, sympathizers, 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.

20. **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, by their acts or omissions are individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this indictment, which crimes each of them planned, instigated, ordered, committed, or in whose planning, preparation or execution each **Accused** otherwise aided and abetted, or which crimes were within a common purpose, plan or design in which each **Accused** participated or were a reasonably foreseeable consequence of the common purpose, plan or design in which each **Accused** participated.

21. In addition, or alternatively, pursuant to Article 6.3. of the Statute, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, while holding positions of superior responsibility and exercising command and control over their subordinates, are individually criminally responsible for the crimes referred to in Articles 2, 3, and 4 of the Statute. Each **Accused** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each **Accused** failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

CHARGES

22. Paragraphs 4 through 21 are incorporated by reference.

23. The CDF, largely Kamajors, engaged the combined RUF/AFRC forces in armed conflict in various parts of Sierra Leone – to include the towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas and the Districts of Moyamba and

Bonthe. Civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were termed **"Collaborators"** and specifically targeted by the CDF. Once so identified, these "Collaborators" and any captured enemy combatants were unlawfully killed. Victims were often shot, hacked to death, or burnt to death. Other practices included human sacrifices and cannibalism.

24. These actions by the CDF, largely Kamajors, which also included looting, destruction of private property, personal injury and the extorting of money from civilians, were intended to threaten and terrorize the civilian population. Many civilians saw these crimes committed; others returned to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property. Typical CDF actions and the resulting crimes included:

a. Between 1 November 1997 and about 1 April 1998, multiple attacks on Tongo Field and surrounding areas and towns during which Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors screened the civilians and those identified as **"Collaborators,"** along with any captured enemy combatants, were unlawfully killed.

b. On or about 15 February 1998 Kamajors attacked and took control of the town of Kenema. In conjunction with the attack and following the attack, both at and near Kenema and at a nearby location known as SS Camp, Kamajors continued to identify suspected **"Collaborators,"** unlawfully killing or inflicting serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors also entered the police barracks in Kenema and unlawfully killed an unknown number of Sierra Leone Police Officers.

c. In or about January and February 1998, the Kamajors attacked and took control of the towns of Bo, Koribondo, and the surrounding areas. Thereafter, the practice of killing captured enemy combatants and suspected **"Collaborators"** continued and as a result, Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and enemy

combatants. Also, as part of these attacks in and around Bo and Koribondo, Kamajors unlawfully destroyed and looted an unknown number of civilian owned and occupied houses, buildings and businesses.

d. Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembehun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected **"Collaborators"** and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.

e. Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bembay, and the island town of Bonthe. As a result of these actions Kamajors identified suspected **"Collaborators"** and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property.

f. In an operation called "Black December," the CDF blocked all major highways and roads leading to and from major towns mainly in the southern and eastern Provinces. As a result of these actions, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants.

COUNTS 1 – 2: UNLAWFUL KILLINGS

25. Unlawful killings included the following:

a. between about 1 November 1997 and about 30 April 1998, at or near Tongo Field, and at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;

b. on or about 15 February 1998, at or near the District Headquarters town of Kenema and at the nearby locations of SS Camp, and Blama, Kamajors

unlawfully killed an unknown number of civilians and captured enemy combatants;

c. on or about 15 February 1998, at or near Kenema, Kamajors unlawfully killed an unknown number of Sierra Leone Police Officers;

d. in or about January and February 1998, in locations in Bo District including the District Headquarters town of Bo, Kebi Town, Koribondo, Kpeyama, Fengehun and Mongere, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;

e. between about October 1997 and December 1999 in locations in Moyamba District, including Sembehun, Taiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed an unknown number of civilians;

f. between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians;

g. between about 1 November 1997 and about 1 February 1998, as part of Operation Black December in the southern and eastern Provinces of Sierra Leone, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 1: Murder, a **CRIME AGAINST HUMANITY,** punishable under Article 2.a. of the Statute of the Court;

In addition, or in the alternative:

Count 2: Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA**

CONVENTIONS AND OF ADDITIONAL PROTOCOL II, punishable under Article 3.a. of the Statute.

COUNTS 3 – 4: PHYSICAL VIOLENCE AND MENTAL SUFFERING

26. Acts of physical violence and infliction of mental harm or suffering included the following.

a. between about 1 November 1997 and 30 April 1998, at various locations, including Tongo Field, Kenema Town, Blama, Kamboma and the surrounding areas, the CDF, largely Kamajors, intentionally inflicted serious bodily harm and serious physical suffering on an unknown number of civilians;

b. between November 1997 and December 1999, in the towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas, and the Districts of Moyamba and Bonthe, the intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians by the actions of the CDF, largely Kamajors, including screening for **"Collaborators,"** unlawfully killing of suspected **"Collaborators,"** often in plain view of friends and relatives, illegal arrest and unlawful imprisonment of **"Collaborators"**, the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA,** pursuant to Article 6.1. and, or alternatively, Article 6.3.of the Statute, are individually criminally responsible for the crimes alleged below:

Count 3: Inhumane Acts, a **CRIME AGAINST HUMANITY,** punishable under Article 2.i. of the Statute;

In addition, or in the alternative:

Count 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.a. of Statute.