796)

SCSL-04-14-T
(22021 — 22064)

22021

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

TRIAL CHAMBER I

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet	
Registrar:	Herman von Hebel	
Date:	9th of October 2007	
PROSECUTOR	**Against**	MOININA FOFANA ALLIEU KONDEWA (Case No.SCSL-04-14-T)

Public Document

JUDGEMENT ON THE SENTENCING OF MOININA FOFANA AND ALLIEU KONDEWA

<u>Office of the Prosecutor</u>:
Stephen Rapp
Christopher Staker
James C Johnson
Joseph Kamara
Kevin Tavener
Mohamed A Bangura
Adwoa Wiafe

<u>Court Appointed Counsel for Moinina Fofana:</u>
Victor Koppe
Arrow Bockarie
Michiel Pestman
Steven Powles

<u>Court Appointed Counsel for Allieu Kondewa:</u>
Charles Margai
Yada Williams
Ansu Lansana
Susan Wright

I. INTRODUCTION

1. The two Accused Persons, Moinina Fofana and Allieu Kondewa, were arrested and taken into custody on the 29th of May 2003 for allegedly committing serious offences, including crimes against humanity and war crimes as stipulated in the Statute of the Special Court for Sierra Leone ("Statute").

2. They were on trial before this Chamber on an eight-count Indictment which charged them with murder as a crime against humanity, violence to life, health and physical or mental well-being of persons, in particular murder, inhumane acts as a crime against humanity, violence to life, health and physical or mental well-being, in particular cruel treatment, pillage, acts of terrorism, collective punishments and enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

3. The Chamber, on the 2nd of August 2007, issued a Judgement which was subscribed to by The Presiding Judge, Honourable Justice Benjamin Mutanga Itoe, and the Honourable Justice Pierre Boutet.[1] The Honourable Justice Bankole Thompson signed the Judgement with the indication that he was issuing a Separate Concurring and Partially Dissenting Opinion.

4. In the Judgement, the Chamber found Moinina Fofana guilty on Counts 2, 4, 5 and 7 and found Allieu Kondewa guilty on Counts 2, 4, 5, 7 and 8 of the Indictment. In the same breath, we found Moinina Fofana not guilty on Counts 1, 3, 6 and 8 and Allieu Kondewa not guilty on Counts 1, 3 and 6. We accordingly acquitted them on those Counts.

5. In this regard, we understand that our colleague, Honourable Justice Bankole Thompson, dissents from the Majority only in respect of those Counts where we, unlike him, found the two Accused Persons guilty and convicted them accordingly, and that he was, on the other hand, concurring with the Majority Judgement on those Counts on which we found both Accused Persons not guilty.

6. Honourable Justice Bankole Thompson's Dissenting Opinion, which features as Annex C of the Judgement, found the two Accused Persons not guilty on all the 8 Counts of the Indictment

[1] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgement (TC), 2 August 2007 [Judgement].

and acquitted them accordingly on all the Counts. This Dissenting Opinion, like the Majority Opinion, was filed and published on the 2nd of August 2007.

7. After the issuance of the Dissenting Opinion on the 2nd of August 2007, it became apparent that the acquittal by the Honourable Justice Bankole Thompson in his Dissenting Opinion was based, inter alia, on the Defence of 'Necessity' and on what he characterized as 'Salus Civis Suprema Lex Est', in which he enunciated his conception of the nature and consequences of the said Defences.[2]

8. The Sentencing Judgement which the Chamber issues today is based on those Counts for which we have found the two Accused Persons guilty.

9. Following an Order from the Chamber,[3] the Prosecution and both Defence Teams filed their Sentencing Briefs within the prescribed time limits.[4] As scheduled, a Sentencing Hearing was held on the 19th of September 2007 where oral submissions were made by the Prosecution and Counsel for both Accused Persons.

10. At the Sentencing Hearing, The Presiding Judge announced that the Honourable Justice Bankole Thompson was absent for medical reasons. The Chamber consequently ordered that, pursuant to Rule 16(A) of the Rules of Procedure and Evidence ("Rules"), the proceedings would continue in his absence.[5] Indeed, we proceeded as we had ordered in the absence of our colleague.

II. PRELIMINARY CONSIDERATIONS

11. The Chamber, in this process, was seized of the Defence Request for Leave to Supplement the Fofana Sentencing Brief,[6] filed on the 14th of September 2007, in which the Fofana Defence

---

[2] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson filed Pursuant to Article 18 of the Statute, Judgement (TC), Annex C, 2 August 2007 [Dissenting Opinion], p. C-24.

[3] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Scheduling Order for Sentencing Hearing and Judgement, 2 August 2007.

[4] The Prosecution filed its Sentencing Submission Pursuant to Rule 100(A) of the Rules ("Prosecution Sentencing Brief") on 24 August 2007, the Defence for Fofana ("Fofana Defence"), filed its Sentencing Brief ("Fofana Sentencing Brief") on 31 August 2007, and the Defence for Kondewa ("Kondewa Defence"), filed its Sentencing Brief Pursuant to Rule 100(A) of the Rules ("Kondewa Sentencing Brief") on 31 August 2007.

[5] Transcript of 19 September 2007, p. 2.

[6] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Request for Leave to Supplement the Fofana Sentencing Brief, 10 September 2007.

requested leave to substitute a signed version of a statement given by Simon Arthy for the unsigned version of this statement that it had appended as Annex A of its Sentencing Brief. The Chamber grants this request.

12. During the Sentencing Hearing on the 19th of September 2007, the Chamber noted that it was seized of the Prosecutor's Response to Defence Request for Leave to Supplement the Fofana Sentencing Brief.[7] The Chamber gave the Parties the opportunity to make oral submissions on this issue, in which the Defence sought to have admitted six statements and to call one witness, Frances Fortune, to attest to the good character of Moinina Fofana.[8] The Prosecution objected to the admission of these statements on the basis that they introduced new evidence, much of which went to proof of the acts and conduct of the Accused, and that it would be prejudiced as it would have no opportunity to cross-examine the witnesses.[9] It also objected to the calling of Frances Fortune as a witness on the basis that her affidavit was taken from a bail application in 2004 and raised an issue of bias.[10] The Fofana Defence submitted that the statements related to the conduct of Fofana in promoting peace and reconciliation which occurred during the post mid-1998 era, and therefore after the commission of the crimes for which he has been convicted.[11]

13. The Chamber made an oral ruling that the documents annexed to both the Prosecution and Defence Briefs were to be admitted insofar as they assisted the Chamber to establish the character of the Accused. However, the Chamber further ruled that any statements included in those documents that go to the acts and conduct of the Accused, as they relate to the subject of the Judgement, were inadmissible and would be disregarded by the Chamber in the process of evaluating the said documents. The Chamber also ruled that it did not deem it necessary for witnesses to be called at this stage, and accordingly, denied the Fofana Defence application to call Frances Fortune.[12]

---

[7] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Prosecution Response to Fofana Request for Leave to Supplement the Fofana Sentencing Brief, 14 September 2007.
[8] Transcript of 19 September 2007, pp. 4-8.
[9] *Ibid.*, pp. 8-16.
[10] *Ibid.*, pp. 15-16.
[11] *Ibid.*, pp. 5-6.
[12] *Ibid.*, p. 19.

III. SUBMISSIONS OF THE PARTIES

1. Prosecution Submissions

14. The Prosecution submitted that the appropriate sentence for both Fofana and Kondewa is 30 years including time already served in detention.[13] The Prosecution drew attention to the severe sentences that would have been imposed on the Accused at the International Criminal Tribunal for Rwanda ("ICTR") and under Sierra Leonean law for similar offences.[14] It emphasized the gravity of the offences committed, focusing on their serious nature, the number and vulnerability of the victims, the impact of the crimes on victims and others, and the role and participation of the Accused in the crimes as leaders.[15]

15. The Prosecution submitted that there were no mitigating factors applicable to the Accused in this case, submitting that the personal circumstances of the Accused, such as lack of education and the chaotic situation in which they were operating, cannot be considered as mitigating.[16] The Prosecution further contended that the fact that the Accused were fighting for the restoration of democracy cannot be considered as mitigating.[17]

16. As aggravating factors, the Prosecution submitted that the Accused were willing and enthusiastic participants in the crimes and that the crimes were premeditated.[18] The Prosecution also emphasized the vulnerability of the victims, and in particular, drew attention to Kondewa's liability for the enlistment of child soldiers.[19] The Prosecution submitted that the leadership role

[13] Prosecution Sentencing Brief, para 183, Transcript of 19 September 2007, p. 50.
[14] Prosecution Sentencing Brief, paras 78-79 (Fofana), paras 138-139 (Kondewa), Transcript of 19 September 2007, pp. 28-29.
[15] Prosecution Sentencing Brief, paras 80-111 (Fofana), paras 141-155 (Kondewa), Transcript of 19 September 2007, pp. 35-39 (Fofana), pp. 46-48 (Kondewa).
[16] Prosecution Sentencing Brief, paras 129-137 (Fofana), paras 168-173 (Kondewa), Transcript of 19 September 2007, pp. 32-34.
[17] Prosecution Sentencing Brief, paras 135-136, Transcript of 19 September 2007, p. 35.
[18] Prosecution Sentencing Brief, paras 107-111, paras 119-121 (Fofana), paras 154-155 (Kondewa), Transcript of 19 September 2007, pp. 35, 41 (Fofana), pp. 47-48 (Kondewa).
[19] Prosecution Sentencing Brief, para 116 (Fofana), paras 161-162 (Kondewa), Transcript of 19 September 2007, p. 29 (Fofana), pp. 46, 96 (Kondewa).

of both Accused was an aggravating factor,[20] and submitted further that Fofana breached a position of trust in committing his crimes.[21]

2. Fofana Defence Submissions

17. The Fofana Defence submitted that a sentence of 4 years or less, amounting to time served, would be appropriate.[22] The Fofana Defence emphasized that Fofana was convicted solely on the basis of indirect modes of liability such as aiding and abetting and superior responsibility, and that consequently the gravity of the offences was considerably diminished. It therefore submitted that a sentence significantly lower than those imposed upon direct perpetrators was warranted in the circumstances.[23]

18. The Fofana Defence submitted that the Prosecution has failed to prove any aggravating circumstances with respect to Fofana beyond a reasonable doubt.[24] In particular, the Defence submitted that Fofana did not abuse his authority, nor did he actively participate in the crimes of his subordinates, and that his leadership role therefore, cannot be taken into account as an aggravating circumstance.[25] The Defence repeatedly emphasized that the Chamber never made a finding that Fofana was present at the scene of the crimes for which he was convicted.[26]

19. In mitigation, the Fofana Defence emphasized Fofana's good character, his exemplary behaviour in detention, and his conduct subsequent to the conflict in working towards the promotion of peace and reconciliation in Sierra Leone, which demonstrated his "capacity for rehabilitation and potential for further contribution to the Sierra Leonean society".[27]

---

[20] Prosecution Sentencing Brief, paras 123-124 (Fofana), paras 163-167 (Kondewa), Transcript of 19 September 2007, pp. 35-39 (Fofana), pp. 46-47 (Kondewa).
[21] Prosecution Sentencing Brief, paras 125-127, Transcript of 19 September, p. 39.
[22] Fofana Sentencing Brief, para 48, Transcript of 19 September 2007, p. 78.
[23] Fofana Sentencing Brief, para 21, Transcript of 19 September 2007, pp. 24, 52-53, 66-68.
[24] Fofana Sentencing Brief, paras 24-28.
[25] *Ibid.*, para 27, Transcript of 19 September 2007, pp. 52-53.
[26] Transcript of 19 September 2007, pp. 67-68.
[27] Fofana Sentencing Brief, paras 44-46, Transcript of 19 September 2007, pp. 58-64. The Defence relies upon the statements of Simon Arthy, Frances Fortune, Rashid Sandy, Foday Sesay and Shekou Tejan-Sankoh, which are annexed to the Fofana Sentencing Brief as Annexes A-E.

20. The Fofana Defence also drew attention to the prevailing circumstances and overall context of the conflict in which the crimes were committed,[28] and Fofana's lack of formal or military training.[29] In particular, the Fofana Defence submitted that the fact that Fofana had been fighting to restore democracy should be taken into account as a mitigating circumstance, pointing out that he had been decorated with a medal by President Kabbah for his contributions to this achievement.[30]

3. Kondewa Defence Submissions

21. In its Sentencing Brief, the Kondewa Defence submitted that separate concurrent sentences, rather than a global sentence, should be imposed, but that Kondewa's sentence be limited to the time he had already spent in custody.[31] In its oral submissions, however, the Kondewa Defence submitted that a sentence of 3 years in addition to the 4 years Kondewa had already spent in detention, would be appropriate.[32]

22. The Kondewa Defence submitted that the Prosecution had not proved any aggravating factors beyond a reasonable doubt.[33] As mitigating factors, the Kondewa Defence identified that Kondewa had shown remorse,[34] and emphasized the fact that he had provided assistance to vulnerable persons during the conflict.[35] It also emphasized his family and personal circumstances with 17 wives and 18 children, his age, his illiteracy, his lack of prior convictions, and his lack of formal education and military training.[36]

23. Moreover, it emphasized that Kondewa had been fighting to restore democracy, and had been fighting solely out of a sense of patriotism and without the hope of any reward.[37] During the Sentencing Hearing, Kondewa himself also chose to make a personal plea in mitigation after his Counsel, Mr. Margai, had done so on his behalf. He presented regrets and asked for pardon for

---

[28] *Fofana* Sentencing Brief, paras 30-37, Transcript of 19 September 2007, pp. 53-57.
[29] *Fofana* Sentencing Brief, para 36, Transcript of 19 September 2007, p. 70.
[30] Transcript of 19 September 2007, pp. 54, 58.
[31] Kondewa Sentencing Brief, paras 159-164, 166.
[32] Transcript of 19 September 2007, pp. 86-87.
[33] Kondewa Sentencing Brief, paras 46-47.
[34] Kondewa Sentencing Brief, paras 156-157, Transcript of 19 September 2007, p. 84.
[35] Kondewa Sentencing Brief, paras 117-121.
[36] *Ibid.*, paras 94-95, 101-102, 147-155.
[37] *Ibid.*, paras 159-164.

the deaths and suffering. He also reiterated that his motivation for participating in the conflict was to reinstate democracy and restore President Kabbah to power.[38]

24. The Trial Chamber has considered the written and oral submissions of the Prosecution and of Counsel for both Accused Persons in the determination of appropriate sentences to be handed down to Fofana and Kondewa.

IV. APPLICABLE LAW

1. Applicable Provisions

25. Article 19 of the Statute and Rules 100 and 101 of the Rules contain provisions relevant to guiding the Chamber in determining an appropriate sentence. They provide as follows:

> ***Article 19- Penalties***
>
> 1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.
>
> 2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> ***Rule 100 - Sentencing Procedure***
>
> (A) If the Trial Chamber convicts the accused or the accused enters a guilty plea, the Prosecutor shall submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence no more than 7 days after such conviction or guilty plea. The defendant shall thereafter, but no more that 7 days after the Prosecutor's filing submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.
>
> (B) Where the accused has entered a guilty plea, the Trial Chamber shall hear submissions of the parties at a sentencing hearing. Where the accused has been convicted by a Trial Chamber, the Trial Chamber may hear submissions of the parties at a sentencing hearing.

[38] Transcript of 19 September 2007, pp. 90-94.

(C) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Rule 102(B).

Rule 101 - Penalties

(A) A person convicted by the Special Court, other than a juvenile offender, may be sentenced to imprisonment for a specific number of years.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 19 (2) of the Statute, as well as such factors as:

(i) Any aggravating circumstances;

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

(iii) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the Statute.

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

(D) Any period during which the convicted person was detained in custody pending his transfer to the Special Court or pending trial or appeal, shall be taken into consideration on sentencing.

2. Sentencing Objectives

26. According to the jurisprudence of the International Criminal Tribunals on this subject, the primary objectives of sentencing are retribution, deterrence and rehabilitation.[39] In the context of international criminal justice, retribution should:

> not be understood as fulfilling a desire for revenge, but as duly expressing the outrage of the international community at these crimes.[...] Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in

[39] *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement (AC), 24 March 2000 [*Aleksovski* Appeal Judgement], para 185, *Prosecutor v. Delalic, Mucic, Delic and Landzo*, IT-96-21-A, Judgement (AC), 20 February 2001 [*Celibici* Appeal Judgement], para 806, *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Sentencing Judgement (TC), 19 July 2007 [AFRC Sentencing Judgement], para 14.

> question and show that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.[40]

27. The Chamber here refers and adopts the definition of retribution provided by Lamer J. of the Supreme Court of Canada, who held that:

> Retribution, in a criminal context, by contrast [to vengeance] represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the international risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.[41]

28. Although rehabilitation is considered as an important element in sentencing, it is of greater importance in domestic jurisdictions than in International Criminal Tribunals.[42]

29. The Chamber notes the content of Security Council Resolution No. 1315 (2000), which provides as follows:

> [...]in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.[43]

The Chamber takes these objectives into consideration in determining the sentences to be meted out to the Accused.

30. The Chamber also endorses the principle that:

> One of the main purposes of a sentence imposed by an international Tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced.

---

[40] *Aleksovski* Appeal Judgement, para 185. See also *Prosecutor v. Kambanda*, ICTR-97-23-S, Judgement and Sentence (TC), 4 September 1998 [*Kambanda* Trial Judgement], para 28 and *Prosecutor v. Momir Nikolic*, IT-02-60/1-S, Sentencing Judgement (TC), 2 December 2003, para 86.

[41] *R. v. M.* (C.A.), [1996] 1 S.C.R. 500, para 80.

[42] *Celibici* Appeal Judgement, para 806, *Prosecutor v. Deronjic*, IT-02-61-A, Judgement on Sentencing Appeal (AC), 20 July 2005 [*Deronjic* Sentencing Appeal], paras 136-137.

[43] UN Sec Res. 1315(2000), 14 August 2000, para 7.

> Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be accepted by everyone.[44]

31. In fact, the sentence imposed must be individualized and proportionate to the conduct of the Accused.[45]

3. Sentencing Factors

32. The Chamber notes that Article 19 and Rule 101(B) stipulate that certain factors have to be considered in determining an appropriate sentence. These include the gravity of the offence, the individual circumstances of the Accused, any aggravating and mitigating factors, and where appropriate, the general sentencing practices of the ICTR and of the national courts of Sierra Leone.

3.1. Gravity of the Offence

33. The Chamber is of the view that the "gravity of the offence" is an important principle in determining the sentence to be imposed by the Court. The determination of the gravity of the offence, which has been regarded as the "litmus test for the appropriate sentence",[46] requires a "consideration of the particular circumstances of the case, as well as the form and degree of participation of the Accused in the crime".[47] In considering the gravity of the offence, the Chamber has taken into account such factors as the scale and brutality of the offences committed,[48] the role played by the Accused in their commission,[49] the degree of suffering or

---

[44] *Prosecutor v. Dragan Nikolic*, IT-94-2-S, Sentencing Judgement (TC), 18 December 2003, para 139.

[45] *Prosecutor v. Tadic*, IT-94-1-A, Judgement in Sentencing Appeals (AC), 26 January 2000 [*Tadic* Sentencing Appeal], para 22, *Prosecutor v. Todorovic*, IT-95-9/1-S, Sentencing Judgement (TC), 31 July 2001, para 29, *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic*, IT-95-16-A, Judgement (AC), 23 October 2001 [*Kupreskic* Appeal Judgement], para 445, *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement (AC), 21 July 2000 [*Furundzija* Appeal Judgement], para 249.

[46] *Prosecutor v. Delalic, Mucic, Delic and Landzo*, IT-96-21-T, Judgement (TC), 16 November 1998 [*Celibici* Trial Judgement], para 1225, *Aleksovski* Appeal Judgement, para 182.

[47] *Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic*, IT-95-16-T, Judgement (TC), 14 January 2000 [*Kupreskic* Trial Judgement], para 852, *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Judgement (AC), 17 December 2004, para 1061, *Prosecutor v. Stakic*, IT-97-24-A, Judgement (AC), 22 March 2006 [*Stakic* Appeal Judgement], para 380.

[48] *Stakic* Appeal Judgement, para 380, *Prosecutor v. Oric*, IT-03-68-T, Judgement (TC), 30 June 2006 [*Oric* Trial Judgement], para 729.

[49] *Celibici* Appeal Judgement, para 847, *Prosecutor v. Blagojevic*, IT-02-60-T, Judgement (TC), 17 January 2005, para 833.

impact of the crime on the immediate victim, as well as its effect on relatives of the victim,[50] and the vulnerability and number of victims.[51]

34. In assessing the role of the Accused in the crime, the Chamber has taken into account the mode of liability under which the Accused was convicted, as well the nature and degree of his participation in the offence. In particular, the Chamber has considered whether the Accused was held liable as an indirect or a secondary perpetrator.[52] In assessing the gravity of offences for which the Accused was convicted as a superior, the Chamber has considered the gravity of the underlying offence and the gravity of the conduct of the Accused in failing to prevent or punish the crimes committed by the subordinate.[53]

35. The Chamber is of the opinion however, that the factors it has taken into account in assessing the gravity of the offence, cannot, in addition, be taken into account as aggravating circumstances.[54] Similarly, the Chamber takes the view that factors which it considers and accepts to lessen the gravity of the offence, cannot be taken into account as mitigating circumstances.

3.2. Aggravating Factors

36. Aggravating factors must be shown to have been established by the Prosecution beyond a reasonable doubt.[55] Only circumstances directly related to the commission of the offence charged, and for which the Accused has been convicted, can be considered to be aggravating.[56] If a

---

[50] *Prosecutor v. Blaskic*, IT-95-14-A, Judgement (AC), 29 July 2004 [*Blaskic* Appeal Judgement], para 683, *Stakic* Appeal Judgement, para 380, *Oric* Trial Judgement, para 729.

[51] *Blaskic* Appeal Judgement, para 683, *Prosecutor v. Babic*, IT-03-72-S, Sentencing Judgement (TC), 29 June 2004 [*Babic* Sentencing Judgement], para 47. The Chamber notes that the Prosecution has discussed some of these factors, including the vulnerability and age of victims and the humiliating and degrading nature of the acts, as aggravating factors (Prosecution Sentencing Brief, para 56). The Chamber is of the view that these are more appropriately considered in relation to its determination of the gravity of the offence.

[52] *Prosecutor v. Ntagerura, Bagambiki and Iminishimwe*, ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004, para 813, *Prosecutor v. Vasiljevic*, IT-98-32-A, Judgement (AC), 25 February 2004 [*Vasiljevic* Appeal Judgement], para 182.

[53] *Celibici* Appeal Judgement, para 732.

[54] *Deronjic* Sentencing Appeal, para 106.

[55] *Celibici* Appeal Judgement, para 763, *Blaskic* Appeal Judgement, para 688.

[56] *Prosecutor v. Kunarac, Kovac and Vokovic*, IT-96-23-T and IT-96-23/1-T, Judgement (TC), 22 February 2001, para 850, *Prosecutor v. Hadsahasanovic*, IT-01-47-T, Judgement (TC), 15 March 2006, para 2069.

particular circumstance is an element of the underlying offence, it cannot be taken into account as an aggravating factor.[57]

37. We observe that since the Statute and the Rules do not exhaustively list the circumstances that the Chamber may consider to be aggravating, the courts have, through their Decisions and Judgements, developed jurisprudence on the factors that may be considered as aggravating. These include the leadership role of the Accused,[58] premeditation and motive,[59] a willing and enthusiastic participation in the crime,[60] and the length of time during which the crime was committed.[61]

38. The Chamber is of the view that the position of leadership of an Accused held criminally responsible for a crime under Article 6(1) of the Statute, can be considered to be an aggravating circumstance.[62] However, if an Accused has been found liable under Article 6(3), his leadership position cannot be considered by the Chamber as an aggravating factor as it is in itself a constitutive element of the offence.[63] Where the Accused has actively abused his position of command or participated in the crimes of his subordinates however, such conduct can be considered to be aggravating.[64]

39. Breach of trust or authority, where the Accused was in a position that carries with it a duty to protect or defend the victims, such as in the case of a government official, police chief or commander, can be an aggravating factor, and even where the Accused held no official position of

---

[57] *Blaskic* Appeal Judgement, para 693, *Vasiljevic* Appeal Judgement, paras 172-173, *Prosecutor v. Ndindabahizi*, ICTR-01-71-A , Judgement (AC), 16 January 2007, para 137.

[58] *Prosecutor v. Jokic*, IT-01-42/1-A, Judgement on Sentencing Appeal (AC), 30 August 2005 [*Jokic* Sentencing Appeal], paras 28-29, *Prosecutor v. Obrenovic*, IT-02-60/2-S, Sentencing Judgement (TC), 10 December 2003 [*Obrenovic* Trial Judgement], para 99, *Prosecutor v. Babic*, IT-03-72-A, Judgement on Sentencing Appeal (AC), 18 July 2005 [*Babic* Sentencing Appeal], para 80.

[59] *Blaskic* Appeal Judgement, para 686.

[60] *Ibid.*

[61] *Blaskic* Appeal Judgement, para 686. As noted, the Chamber has considered certain factors, such as the vulnerability and age of victims, and the humiliating or degrading nature of the acts, that are sometimes considered as aggravating factors, as part of the gravity of the offence (see n. 51).

[62] *Jokic* Sentencing Appeal, paras 28-29, *Obrenovic* Trial Judgement, para 99, *Babic* Sentencing Appeal, para 80.

[63] *Obrenovic* Trial Judgement, para 99, *Deronjic* Sentencing Appeal, para 67, *Jokic* Sentencing Appeal, para 28, *Babic* Sentencing Judgement, para 60.

[64] *Celibici* Appeal Judgement, para 736, *Aleksovski* Appeal Judgement, para 183.

authority, it is an aggravating factor, if he held a position of prominence or trust in the community.[65]

3.3. Mitigating Factors

40. Mitigating factors must be established by the Defence on a balance of probabilities.[66] Under Rule 101(B), the only mitigating circumstance that the Chamber is required to consider is the substantial cooperation of the Accused with the Prosecutor. The Chamber, however, has the discretion to consider other factors or circumstances in mitigation, such as the expression of remorse,[67] good character with no prior convictions,[68] personal and family circumstances,[69] behaviour and conduct subsequent to the conflict, particularly with respect to promoting peace and reconciliation,[70] good behaviour in detention,[71] and assistance to detainees or victims.[72] The Chamber has also considered the prevailing circumstances operating at the time of the commission of the crimes, and the motive of the Accused in determining whether there should be a mitigation of the sentence.

4. Sentencing Practice of Other International Tribunals

41. Article 19(1) directs the Chamber to consider, where appropriate, the sentencing practices adopted at the ICTR. In their written and oral submissions, the Parties also drew the Chamber's attention to jurisprudence from the International Criminal Tribunal for the Former Yugoslavia ("ICTY").[73] The Chamber is of the view that the sentencing practice of both international

---

[65] *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement (TC), 15 May 2003, para 573, *Prosecutor v. Kamuhanda*, ICTR-99-54A-A, Judgement (AC), 19 September 2005, para 347, *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003, para 499, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, para 563.

[66] *Blaskic* Appeal Judgement, para 697.

[67] *Babic* Sentencing Judgment, paras 81-84, *Oric* Trial Judgement , para 752.

[68] *Blaskic* Appeal Judgement, para 696, *Prosecutor v. Erdemovic*, IT-96-22-Tbis, Sentencing Judgement (TC), 5 March 1998, para 16(i), *Celibici* Appeal Judgment, para 788, *Prosecutor v. Deronjic*, IT-02-61-S, Sentencing Judgement, 30 March 2004 [*Deronjic* Sentencing Judgement], para 156.

[69] *Prosecutor v. Kunarac, Kovac and Vokovic*, IT-96-23- & IT-96-23/1-A (AC), Judgement (AC), 12 June 2002 [*Kunarac* Appeal Judgement], para 362, *Blaskic* Appeal Judgement, para 708.

[70] *Babic* Appeal Judgement, paras 56-59, *Prosecutor v. Plavsic*, IT-00-39- & 40/1-S, Sentencing Judgement (TC), 27 February 2003 [*Plavsic* Sentencing Judgement], paras 85-93.

[71] *Blaskic* Appeal Judgement, para 696.

[72] *Blaskic* Appeal Judgement, para 696, *Babic* Appeal Judgement, para 43, *Deronjic* Sentencing Judgement, para 156.

[73] The Parties have also submitted that the jurisprudence of the ICTY, as well as that of the ICTR, should be considered (Prosecution Sentencing Brief, para 31, Fofana Sentencing Brief, para 7, Kondewa Sentencing Brief, para

tribunals is instructive, and has considered these practices where appropriate. However, it is also aware of the limitations of the use that can be made of the sentencing practices of these tribunals. In particular, it notes that the practice of imposing global sentences at both tribunals makes it difficult to ascertain the sentence imposed for each individual crime. Moreover, the Chamber notes that many of the sentences at the ICTR were imposed in relation to the crime of genocide, which is not an offence within the jurisdiction of the Special Court.

5. Sentencing Practice of Sierra Leonean Courts

42. Article 19(1) authorizes the Trial Chamber to consider, where appropriate, the sentencing practices of Sierra Leonean domestic courts. The Prosecution contends that in determining the gravity of the offence, the Chamber should consider that the offences for which the Accused have been found guilty, would attract the death penalty or life imprisonment under Sierra Leonean law.[74] Both Fofana and Kondewa submit that given that the Accused were not convicted of any offences under Article 5 of the Statute which incorporates offences under Sierra Leonean legislation, the court should not consider Sierra Leonean sentencing practice.[75]

43. In this regard, the Chamber notes that the Accused were neither indicted nor convicted for any of the offences enumerated under Article 5 of the Statute. Furthermore, the Statute of the Special Court does not provide for either capital punishment or imposition of a "life sentence", which are the punishments that the most serious crimes under Sierra Leonean law attract. For these reasons, the Chamber finds that it would be inappropriate to rely on the sentencing practices of Sierra Leonean Courts in determining the punishment to be imposed on either Fofana or on Kondewa.

V. DELIBERATIONS

44. The Chamber has considered both the Parties' written briefs and their oral submissions, made in court during the Sentencing Hearing, as they relate to the gravity of the offence, as well as

---

16). See also AFRC Sentencing Judgement, where the Chamber held that the sentencing practice of the ICTY should also be considered, as "its statutory provisions are analogous to those at the Special Court and the ICTR" (para 33).

[74] Prosecution Sentencing Brief, paras 78, 139-140.

[75] Fofana Sentencing Brief, para 7 and Kondewa Sentencing Brief, para 14. See also AFRC Sentencing Judgement, where the Chamber held that "it is not appropriate to adopt the practice in the present case since none of the Accused was indicted for, nor convicted of, offences under Article 5 of the Statute" (para 32).

any aggravating or mitigating circumstances. Only those factors that the Chamber has found to be relevant in the determination of sentence, however, have here been explicitly discussed by the Chamber.

1. Gravity of the Offence

1.1. Fofana

45. Fofana was convicted on the basis of Article 6(1) and Article 6(3). Specifically, the Chamber found him guilty of the following:

1. Aiding and abetting pursuant to Article 6(1) of the Statute for Counts 2, 4 and 7 for the Tongo Crime Base;
2. Failure to prevent pursuant to Article 6(3) of the Statute for Counts 2, 4 and 7 for the Koribondo Crime Base; and
3. Failure to prevent pursuant to Article 6(3) of the Statute for Counts 2, 4, 5 and 7 for the Bo District Crime Base.[76]

46. With respect to the crimes for which Fofana was found liable under Article 6(3), the Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, as described in the Judgement, were of a very serious nature, and were committed against innocent civilians. The Chamber considers actions such as the mutilation and the targeted killing of Limba civilians[77] and the killing and mutilation of Chief Kafala (whom the CDF/Kamajors considered a collaborator) in Koribondo,[78] to be indicative of the brutality of the offences committed by Fofana's subordinates. The Chamber also notes the gruesome murder of two women in Koribondo who had sticks inserted and forced into their genitals until they came out of their mouths. The women were then disembowelled, and while their guts were used as checkpoints, parts of their entrails were eaten.[79]

47. The Chamber also finds that many of the offences for which Fofana was convicted under Article 6(1) were committed on a large scale and with a significant degree of brutality. In particular, the Chamber notes the murder of 150 Loko, Limba and Temne tribe members in

[76] Fofana Sentencing Brief, para 3.
[77] Judgement, para 786(i) and (ii).
[78] *Ibid.*, para 786(iv).
[79] *Ibid.*, paras 423-424.

Talama,[80] the killings of 20 men on the 15th of January 1998 at the NDMC Headquarters in Tongo, who were hacked to death with machetes,[81] and the killing of 64 civilians in Kamboma, who were placed in two separate lines and killed, after which their corpses were rolled into a swamp,[82] as indicative of the scale and brutality of the crimes that Fofana was found to have aided and abetted in the Tongo Field area. Furthermore, the Chamber finds that the crimes were particularly serious insofar as they were committed against unarmed and innocent civilians, solely on the basis that they were unjustifiably perceived and branded as "rebel collaborators".

48. The Chamber notes that many of the victims of these crimes were young children and women, and therefore belong to a particularly vulnerable sector of society. For instance, we note our findings of the hacking to death by the CDF/Kamajors of a boy named Sule at a checkpoint in the Tongo area,[83] the murder of a 12 year old boy in Talama[84], the murder of an unidentified woman who was alleged to have cooked for the rebels in Bo, and the atrocious murder of the two women in Koribundo as described earlier.[85]

49. The Chamber considers these crimes to have had a significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community. The testimony of witnesses heard by the Chamber during the trial, and appended to the Prosecution Brief in Annex D, indicates the impact which events such as amputations and the loss of family members have had on the lives of victims and witnesses.[86] As appropriately described and summarized by our sister Trial Chamber II, "victims who had their limbs hacked off not only endured extreme pain and suffering, if they survived, but lost their mobility and capacity to earn a living or even to undertake simple daily tasks. They have been rendered dependent on others for the rest of their lives".[87] In particular, the Chamber notes the lasting effect of these crimes on victims such as TF2-015, who was the only survivor of an attack on 65 civilians who were hacked

[80] *Ibid.*, para 750(ii).
[81] *Ibid.*, para 750(vii).
[82] *Ibid.*, para 750(xiii)
[83] *Ibid.*, para 750(xi)
[84] *Ibid.*, para 750(i).
[85] *Ibid.*, para 830(i).
[86] Prosecution Sentencing Brief, Annex D.
[87] AFRC Sentencing Judgement, para 46.

to death by machetes or shot, and who was himself hacked with a machete and rolled into a swamp on top of the dead bodies in the belief that he was dead.[88]

50. With respect to the form and degree of Fofana's participation, the Chamber notes that he was found liable for the crimes in Tongo Field as an aider and abettor under Article 6(1) of the Statute. The jurisprudence of the ICTY and ICTR indicates that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation.[89] The Chamber also notes that while Fofana was found liable for aiding and abetting, he was not present at the scenes of the crimes and that the degree of his participation amounted only to encouragement.[90]

51. With respect to the crimes for which Fofana was convicted under Article 6(3), the Chamber has considered the gravity of Fofana's conduct in failing to prevent the crimes. It finds that the gravity of the offence committed by Fofana given his leadership role as a superior who failed to prevent his subordinates from committing crimes, is greater than that of the actual perpetrators of the crimes.[91] In this case, the fact that Fofana's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to

---

[88] Judgement, para 406.

[89] *Vasiljevic* Appeal Judgement, para 182. See also *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgement and Sentence (TC), 28 April 2005, para 593 and *Prosecutor v. Krstic*, IT-98-33-T, Judgement and Sentence (TC), 2 August 2001 [*Krstic* Trial Judgement], para 714. The Prosecution has submitted that "the fact that an accused is found liable as an indirect co-perpetrator does not entitle him to a lower sentence (Prosecution Sentencing Brief, para 40), citing the *Stakic* Appeal Judgement. In *Stakic*, while the ICTY Appeals Chamber did claim that "the fact that an accused is found guilty as an 'indirect co-perpetrator' does not necessarily lead to a lower sentence" (para 380), it discussed this specifically in relation to Stakic's case, where he was a crucial member of a joint criminal enterprise, and had a "uniquely pivotal role in co-ordinating the persecutory campaign carried out by the military, police and civilian government in Prijedor" (para 380). The Chamber stressed the need to consider the form and degree of participation of the Accused in the crime. Stakic's role was thus very different than the type of "indirect co-perpetration" (i.e. aiding and abetting) that Fofana was held liable for.

[90] Fofana Sentencing Brief, para 40, Transcript of 19 September 2007, pp. 67-68.

[91] *Prosecutor v. Blaskic*, IT-95-14-T, Judgement (TC), 3 March 2000 [*Blaskic* Trial Judgement], where the Court held that if a commander "fails in his duty to prevent the crime or punish the perpetrator thereof he should receive a heavier sentence than the subordinates who committed the crime insofar as the failing conveys some tolerance or even approval on the part of the commander towards the commission of crimes by his subordinates and thus contributes to encouraging the commission of new crimes" (para 789). In the *Blaskic* Appeal Judgement, the Appeals Chamber reduced Blaskic's sentence on the basis of factual errors made by the Trial Chamber, but did not comment on this aspect of the law.

believe that they could commit further crimes with impunity. This factor therefore, in our opinion, increases the seriousness of the crimes for which he has been convicted.[92]

1.2. Kondewa

52. Kondewa was convicted under Article 6(1) and under Article 6(3). Specifically, the Chamber found him guilty of the following:

4. Aiding and abetting pursuant to Article 6(1) of the Statute for Counts 2, 4 and 7 for the Tongo Crime Base;
5. Failure to prevent pursuant to Article 6(3) of the Statute for Counts 2, 4, 5 and 7 for the Bonthe and Moyamba Crime Bases;
3. Commission (murder) pursuant to Article 6(1) of the Statute for Count 2 for the Talia/Base Zero Crime Base;
4. Commission (enlisting child soldiers) pursuant to Article 6(1) of the Statute for Count 8.

53. With respect to the crimes for which Kondewa was found liable under Article 6(3), the Chamber has examined the gravity of the crimes committed by the subordinates under his effective control. Many of these crimes, as described in the Judgement, were of a serious nature. The Chamber notes, in particular, that the CDF/Kamajors in Bonthe stripped Lahia Ndokoi Koroma naked and tied him,[93] a particularly humiliating and degrading act. With respect to Kondewa's liability under Article 6(1), he was convicted for the same crimes as Fofana in the Tongo area; the scale and the barbaric nature of such crimes has been described above.[94]

54. As is the case with Fofana, the Chamber notes that many of the victims of these crimes were young children and women, and were therefore particularly vulnerable. It notes, in particular, the two incidents involving children in the Tongo area described above with respect to Fofana,[95] and the killing of a boy called Bendeh Battiama by Rambo Conteh in Bonthe.[96]

55. With respect to the offence of the enlistment of child soldiers for which Kondewa was convicted, the Chamber notes the particular vulnerability of TF2-021, who was eleven years old when he was captured by the CDF/Kamajors and forcibly trained to kill and to commit crimes

---

[92] See Prosecution Sentencing Brief, para 49. See also *Celibici* Appeal Judgement, para 739.
[93] Judgement, para 890(i).
[94] See *supra*, para 47.
[95] See *supra*, para 48.
[96] Judgement, para 883(ii).

against innocent civilians.[97] At the age of eleven, Witness TF2-021 was initiated into the Kamajor society and, at the age of thirteen, he was initiated by Kondewa into the "Avondo Society", a notorious group of Kamajors.[98] The Chamber notes the commentary of the ICRC that "child soldiers are deprived of a family, deprived of an education and all the advantages that would otherwise help them be children and prepare them for adulthood [...] In the end, child soldiers will suffer deep trauma, which persists long after the fighting has stopped".[99]

56. Further, as noted by the Chamber with respect to Fofana, it considers these crimes to have had a significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community.[100]

57. With respect to the form and degree of Kondewa's participation in the crimes committed, the Chamber finds that while he was held liable on the basis of aiding and abetting under Article 6(1) and as a superior under Article 6(3), he was also held liable for the direct perpetration of some acts, including the shooting of a town commander in Talia/Base Zero, and for committing the offence of the enlistment of child soldiers.

58. Furthermore, with respect to his liability under Article 6(3), the Chamber finds, as it did with Fofana, that given his leadership role as a superior who failed to prevent his subordinates from committing crimes, the gravity of the offence committed by Kondewa is greater than that of the actual perpetrators of the crimes. The Chamber finds that in this case, the fact that Kondewa's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity, and therefore increases the seriousness of the crimes for which he has been convicted.

---

[97] *Ibid.*, paras 968-970.
[98] Transcript of 2 November 2004, TF2-021, pp. 87-89 & 91-94, Transcript of 14 February 2005, TF2-001, pp. 77-78.
[99] *Child Soldiers* (Geneva: ICRC, 2003), available at http://www.icrc.org.
[100] See *supra*, para 49.

2. Aggravating Factors

2.1. Prominence in the Community/Breach of Trust

2.1.1. Fofana

59. The Chamber has found that Fofana played a central role in the CDF organization.[101] In his capacity as Director of War at Base Zero, he planned war strategies, selected commanders to go to battle, and on occasion, issued orders to such commanders. He also received frontline reports, which went through him before he passed them to Norman. He was also responsible for the receipt and provision of ammunition at Base Zero.[102] The Chamber has found that Fofana was seen as having power and authority at Base Zero and to be the "overall boss of the commanders".[103]

60. The Chamber considers that, given his role as a former Chiefdom Speaker, a community elder and the CDF National Director of War, Fofana breached a position of trust in committing the offences for which he has been convicted.

2.1.2. Kondewa

61. The Chamber has found that, as the High Priest of the CDF organization, Kondewa played an essential role in the leadership of the CDF.[104] He was in charge of initiations, and was held in respect and fear by the Kamajors, who believed that he could protect them from harm. The Chamber has found that no Kamajor would go to war without his blessing.[105] He was one of those who made decisions determining when and where to go to war. He also attended passing out parades and signed the certificates of trainees.[106]

62. The Chamber finds that given the cultural context, Kondewa, in his role as High Priest who blessed the CDF/Kamajors before they went to battle, and as someone widely respected for his mystical powers and abilities to immunize people against harm, held a unique and prominent

---

[101] Judgement, para 337.
[102] *Ibid.*, paras 338-343.
[103] *Ibid.*, para 341.
[104] *Ibid.*, para 337.
[105] *Ibid.*, paras 344-346.
[106] *Ibid.*, paras 721(iii) and (viii).

position in the community. The Chamber therefore finds that he also breached a position of trust in committing the crimes for which he was convicted.

3. Mitigating Factors

3.1. Remorse

3.1.1. Fofana

63. During the Sentencing Hearing, Counsel for Fofana stated, at the specific request and on behalf of his client:

> [...] Mr Fofana accepts that crimes were committed by the CDF during the conflict in Sierra Leone. Indeed, at least one witness was called on behalf of the Fofana defence, Joseph Lansana, accepting and attesting to crimes committed by the CDF. Mr Fofana deeply regrets all the unnecessary suffering that has occurred in this country.[107]

64. Although Fofana by this statement does not expressly acknowledge his personal participation in the crimes for which the Chamber has convicted him, the Chamber finds that he has clearly expressed empathy with the victims of those crimes.[108]

3.1.2. Kondewa

65. During the Sentencing Hearing, Kondewa addressed the court and the public in the following terms, "Sierra Leoneans, those of you who lost your relations within the war, I plead for mercy today, and remorse, and even for yourselves."[109] The Chamber finds that although Kondewa did not expressly recognise his own participation in the crimes for which he has been found guilty, the empathy he has shown is real and sincere.

---

[107] Transcript of 19 September 2007, p. 64.

[108] See *Oric* Trial Judgement, where the Chamber held that "the Appeals Chamber has held that an accused can express sincere regrets without admitting his participation in a crime, and that this is a factor which may be taken into account. This can be done without an accused having to give evidence or being cross-examined by the Prosecution. In this case, the Accused made no such statement, but throughout the trial, there were a few instances when Defence counsel on his behalf expressed compassion to witnesses for their loss and suffering. The Trial Chamber does not doubt the sincerity of the Accused in expressing empathy with the victims for their loss and suffering, and has taken this sincerity into consideration as a mitigating factor"(para 752). See also *Vasiljevic* Appeal Judgement, para 177.

[109] Transcript of 19 September 2007, p. 91.

3.2. Lack of Formal Education or Training

66. The Chamber does not consider lack of formal education per se, to be an excuse which would mitigate the severity of punishment. However, the Chamber is aware that both men were propelled in a relatively short period of time, from civilian life to an effective position of authority in a very brutal and bloody conflict, with no adequate training for the roles which they were to play. The Chamber finds that it is only reasonable to take account of the fact that inexperience in difficult situations, does increase the likelihood of making the wrong decisions. Whilst this in no way reduces the gravity of the crimes which were committed, the Chamber recognises it as a factor in mitigation of sentence.

3.3. Subsequent Conduct

67. The Chamber has examined the evidence filed by the Fofana Defence regarding Fofana's conduct subsequent to the time frame in which the crimes he committed occurred. In particular, the Chamber notes the submission of the Defence in relation to Fofana's commitment to and observance of the Lomé Peace agreement,[110] and the unchallenged evidence presented by the Defence in relation to his efforts subsequent to that agreement to work without any pay with the NGO community in ensuring that members of the CDF remained committed to the peace process within Sierra Leone.[111] The Chamber also notes the contents of the certificate of good conduct filed by the Officer in Charge of the SCSL Detention Facility, attesting to Fofana's exemplary behaviour whilst in custody during the course of trial.[112] The Chamber commends Fofana's subsequent conduct in fostering the peace process, and recognises it as a factor in mitigation of his sentence.

---

[110] Transcript of 19 of September 2007, pp. 57-58. See also *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (AC), Separate Opinion of Judge Robertson, 24 May 2005, para 52.

[111] Fofana Sentencing Brief, (in particular) Annexes A and B. See *Babic* Appeal Judgement, paras 56-59 and *Plavsic* Sentencing Judgement, paras 85-93, where the Chamber took into account subsequent conduct in promoting peace and reconciliation as a mitigating circumstance.

[112] Fofana Sentencing Brief, Annex F.

3.4. Lack of Prior Convictions

68. The Chamber notes that neither Fofana nor Kondewa has any previous convictions. For purposes of sentencing, a clean slate in terms of their criminal records, can be considered as a mitigating circumstance.[113]

3.5. Necessity as a Mitigating Factor

69. In the course of the Sentencing Hearing, Mr Powles, Learned Counsel for the Defence of Fofana, invited the Chamber to consider the Honourable Justice Thompson's findings on "Necessity" and to factor the same into the Sentencing Judgement as a mitigating circumstance. Mr Powles had this to say:

> [...] the findings and views of Your Brother Judge Bankole Thompson are at the very least a persuasive mitigating factor when considering sentence [...][114]

70. We observe, as Mr. Powles later admitted at this hearing, that the defence of Necessity was never raised by the Defence nor did its applicability to the circumstances of this case, feature for a determination at any stage before the delivery of the Judgement on the 2nd of August 2007.[115] In addition, it is our opinion, that the facts which we have accepted as proven and which form the basis of our findings of guilt against the two Accused in the Judgement, as well as the circumstances surrounding the commission of these offences, do not support nor do they give rise to a defence of Necessity.

3.5.1. Honourable Justice Thompson's Dissenting Opinion

71. In the process of our deliberations for the issuance of this Sentencing Judgment, our colleague and brother, the Honourable Justice Bankole Thompson, provided us with an advance copy of his dissent where he reiterates his stand and upholds the defence of Necessity and in which he had this to say:

> I most respectfully dissent from the said Judgment predicated upon my firm Judicial position taken in my Separate Concurring and Partially Dissenting Opinion (Annex C thereof) delivered on the 2nd day of

---

[113] See *Blaskic* Appeal Judgement, para 696, *Deronjic* Sentencing Judgement, para 152.
[114] Transcript of 19 September 2007, p. 54.
[115] *Ibid.*, pp. 54-55.

> August 2007, and based specifically on the analysis, considerations, and reasons advanced in Parts Eight and Nine of the said Opinion and consistent with the Dispositions made in Part Ten therein, acquitting the Accused on all Counts of the Indictment.[116]

72. The Chamber observes here that Parts Eight and Nine referred to by the Honourable Justice Thompson relate to the defence of 'Necessity' and that of "Salus Civis Suprema Lex Est' on which he based the acquittal of the Accused Persons; Moinina Fofana on Counts 2, 4, 5 and 7, and Allieu Kondewa on Counts 2, 4, 5, 7 and 8 of the Indictment. The Chamber could and would have addressed these defences and their applicability adequately and in greater detail, if as we have already indicated, these issues had been raised by the Parties in the course of the trial proceedings or at any stage before delivering our Judgement. This would have provided the Chamber the opportunity to address the defences so raised in the Dissenting Opinion in the said Judgement.

73. In this regard, and without going into a detailed analysis at this sentencing stage on the defence of Necessity and its applicability, the Chamber, in arriving at this conclusion, has based its Decision on the fact that the constitutive elements of the defence of Necessity have not been established to sustain it as a defence, as we have found, particularly in this case.[117] The Chamber in this regard and again in arriving at this conclusion, further relies on the law on this subject as applied to the facts and principles established in the celebrated English case of *R. v. Dudley and Stephens*.[118] In that case, which has served as a foundation for the defence of Necessity in the common law, the Learned Justices decided that the defence of Necessity was unfounded, and sentenced both Accused Persons to death.

---

[116] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Dissenting Opinion of Hon. Justice Bankole Thompson from Sentencing Judgement filed Pursuant to Article 18 of the Statute, Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, Annex A, 9 October 2007, para 7.

[117] *R. v. Perka*, [1984] 2 S.C.R. 232. See also *U.S. v. Seward*, 687 F.2d 1270, 1275 (10th Cir. 1982), *State v. Marley*, 54 Haw. 450, 509 P.2d 1095 (1973), *State v. Drummy*, 18 Conn. App 303 (1989). The main constitutive elements of the defence of Necessity include a reasonable belief that there is an imminent or ongoing harm which cannot be avoided with any legal alternative; the harm sought to be avoided is greater than or as great as the law which must be broken; and a connection between the actor's conduct and the prevention of the harm. A failure to establish these elements results in the rejection of the defence of Necessity.

[118] (1884) 14 QBD 273 [*Dudley and Stephens*], which holds that "a man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life".

74. Applying the precedent of *Dudley and Stephens*, and the law on this defence, the Chamber, considering the facts and circumstances of this case, concludes that Necessity cannot be sustained as a defence in this case and that by a parity of reasoning, cannot be considered either for purposes of mitigating the sentences because the Chamber opines that it either stands as a defence, or fails on all other grounds or circumstances.

75. The Chamber notes and observes here that *Dudley and Stephens* was footnoted by the Honourable Justice Thompson in his Dissenting Opinion.[119] In addition and in the same Dissenting Opinion, the Chamber further notes that the Honourable Dissenting Judge himself, quoting from his own book, concedes that "the defence of Necessity bristles with conceptual and doctrinal difficulties" and that "these controversies are still unsettled".[120] According to Stephen, the Honourable Justice Thompson continues, the defence of Necessity is "a subject on which the law of England is so vague" and is "essentially a matter of judicial expediency".[121]

76. The above comments confirm the fragility of this defence in municipal or national systems where it may be applicable. The Chamber considers that it is reinforced and supported in its decision to rule against the propriety and applicability of Necessity as a defence to criminal liability in this case for the reasons that we advanced earlier in this regard and for the considerations that follow with respect to its pertinence and applicability in the domain of International Humanitarian Law.

3.5.2. Necessity as a Defence in International Humanitarian Law

77. Further to our finding that Necessity is not and cannot be a sustainable defence nor is it a mitigating factor in this case, it is equally the Chamber's view, suffice to say for our purposes here, that it cannot be accepted either, as a defence in cases where Accused Persons are indicted for serious violations of International Humanitarian Law as is the case with the two Accused Persons who we have convicted.

---

[119] Dissenting Opinion, p. C-28, n. 57.

[120] See Dissenting Opinion, para 71., where the Honourable Justice Thompson quotes from his own book (Bankole Thompson, *The Criminal Law of Sierra Leone* (Maryland: University Press of America Inc., 1999), pp. 267-268 [*The Criminal Law of Sierrra Leone*].

[121] Dissenting Opinion, para 71, citing *The Criminal Law of Sierra Leone*, pp. 267-268.

78. In this regard, it is the Chamber's considered opinion that accepting the applicability of the defence of Necessity in prosecutions involving either war crimes or crimes against humanity, would negate the norms and fundamental principles protecting persons not taking part in hostilities and the victims of armed conflicts and consequently, compromise the objectives which International Humanitarian Law seeks to achieve through International instruments and in particular, the Geneva Conventions and Additional Protocols I and II.[122]

79. The Chamber further opines that validating the defence of Necessity in International Criminal Law would create a justification for what offenders may term and plead as a 'just cause' or a 'just war' even though serious violations of International Humanitarian Law would have been committed. This, we observe, would negate the resolve and determination of the International Community to combat these crimes which have the common characteristics of being heinous, gruesome or degrading of innocent victims or of the civilian population that it intends to protect.

80. It is further our view, that the argument of fighting the enemy, the AFRC, as the two Accused Persons indisputably did, in order to restore the ousted democratically elected Government of President Kabbah which we hold is rather a mitigating circumstance, but on which the defence of Necessity has been found to be grounded by the Honourable Justice Thompson in his Dissenting Opinion, we conclude were carefully planned and premeditated killings of innocent and unarmed civilians for which we have found the two Accused Persons guilty. In these circumstances, the Chamber cannot but conclude that such an argument is meretricious and without any foundation.

81. Furthermore, the Chamber is of the opinion that the principle of 'Salus Civis Suprema Lex Est', is more an appropriate concept in legal philosophy on society and the law that neither

[122] See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 (entered into force 12 August 1949), Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea , 75 U.N.T.S. 85 (entered into force 12 August 1949), Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (entered into force 12 August 1949), Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (entered into force 12 August 1949), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 609 (entered into force 7 December 1978) [Additional Protocol I], Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 3 (entered into force 7 December 1978) [Additional Protocol II].

occupies a visibly recognisable place in criminal proceedings as a defence, nor does it feature as a legal defence that is established and properly recognised as such under the law.

3.6. Prevailing Circumstances

82. The Chamber has taken note of some significant and enlightening precedents on sentencing principles from sister International Criminal Tribunals of the ICTY and ICTR that have been cited by the Parties. However, even though the statutorily oriented sentencing principles in those cases remain relevant in guiding and assisting us to arrive at a decision in this case, it is pertinent to note that there is an important factual and contextual difference and distinction that the Chamber would like to draw between those cases as against this one which we consider relevant and pertinent in scaling the sentences that we are about to hand down on the Accused Persons in relation to the Counts for which we have found them guilty.

3.6.1. Historical Background/Prevailing Circumstances

83. The main distinguishing factor is that the acts of the Accused and those of the CDF/Kamajors for which they have respectively been found guilty, did not emanate from a resolve to destabilise the established Constitutional Order. Rather, and on the contrary, the CDF/Kamajors was a fighting force that was mobilised and was implicated in the conflict in Sierra Leone to support a legitimate cause which, as we have already seen, was to restore the democratically elected Government of President Kabbah which had been illegally ousted through a Coup d'Etat orchestrated and carried out on the 25th of May 1997, by a wing of the Sierra Leone Armed Forces that later constituted and baptised itself as the Armed Forces Revolutionary Council (AFRC).

3.6.2. Kamajors alongside the Sierra Leonean Armed Forces

84. The Chamber also finds it necessary to consider a further and additional element on the role of the Kamajors, from the outset of the war in Sierra Leone. In effect, these historically traditional hunters,[123] from the evidence adduced, were comrades in arms with the regular Sierra

[123] Judgement, para 60, Transcript of 3 January 2006, Sam Hinga Norman, p. 73, Transcript of 27 January 2006, Sam Hinga Norman, pp. 40-42.

Leone Armed Forces as early as from the outbreak of the rebel war.[124] They acted as guides to the regular Army and facilitated the war against the rebels.[125] Indeed, even the military regime of the NPRC that seized power in a military Coup in 1992,[126] used them to fight against the rebels and to protect the Constitutional Institutions of Sierra Leone. In this process, and in defence of their communities, the local Chiefs mobilised, enlisted and initiated their young and fit ones, into the Kamajor Society with the sole objective of combating the rebels and preventing the brutal killings of their kith and kin and other atrocities, in addition to protecting their lands and their properties.[127]

85. In executing this legitimate mission however, at a later stage that appears in the Indictment, and instead of limiting themselves and directing these attacks on legitimate military targets and objectives where collateral damage, if any ensued at all, could be perceived as justifiable, the Accused Persons and their Kamajors, as has been elucidated in the factual and legal findings of the Judgement, went beyond these acceptable military and legal limits and carried out killings and other atrocities against unarmed civilians who they characterised and designated as 'rebel collaborators'. We find that these atrocities were perpetrated, even though the evidence clearly established, and we so found, that the victims in fact, were disarrayed Sierra Leoneans including children fleeing for their lives and for safety from the bloody exchange of enemy fire, and further, that these civilian captives or fugitives, were unarmed and were not in the least, participating in hostilities. In fact, we note here that the crimes for which they have been found guilty were perpetrated by the Accused Persons and CDF/Kamajor fighters when combat activities and operations against the enemy AFRC forces were already over.

---

[124] Judgement, para 62, Transcript of 9 February 2006, Albert Joe Demby, pp. 103-107.
[125] Judgement, para 62, Transcript of 9 February 2006, Albert Joe Demby, pp. 101-102, 105-107, Transcript of 27 January 2006, Sam Hinga Norman, p. 37, Transcript of 15 February 2005, TF2-005, pp. 78-79.
[126] Transcript of 9 February 2006, Albert Joe Demby, pp. 101-104, Transcript of 2 June 2006, Mohamed Kaineh, pp. 10-12, Transcript of 24 May 2006, Lahai Koroma, pp. 36-40, Transcript of 25 May 2006, Mohamed Kineh Swaray, pp. 96-97, Transcript of 15 February 2005, TF2-005, pp. 78-79, Transcript of 15 March 2005, TF2-014, pp. 60-61, Transcript of 10 March 2005, Albert J Nallo, pp. 5-8, Transcript of 17 February 2005, TF2-222, pp. 10-18.
[127] Judgement, paras 62-69, Transcript of 15 February 2006, Albert Joe Demby, pp. 8, 10 &107, Transcript of 22 February 2006, Ishmael Koroma, pp. 14-15, Transcript of 1 June 2006, Joseph Ali-Kavura Kongomoh, II, pp. 44-46 & 48-49, Transcript of 27 January 2006, Sam Hinga Norman, pp. 40-42, Transcript of 24 January 2006, Sam Hinga Norman, pp. 56-57, Transcript of 17 February 2005, TF2-005, pp. 10-18.

86. However, although the commission of these crimes transcends acceptable limits, albeit in defending a cause that is palpably just and defendable, such as acting in defence of constitutionality by engaging in a struggle or a fight that was geared towards the restoration of the ousted democratically elected Government of President Kabbah, it certainly, in such circumstances, constitutes a mitigating circumstance in favour of the two Accused Persons.

87. It should be recognised however, that the crimes for which the Chamber has convicted them are grave and very serious, but what, in a sense, atones for this vice is the fact that the CDF/Kamajor fighting forces of the Accused Persons, backed and legitimised by the Internationally deployed force, the ECOMOG, defeated and prevailed over the rebellion of the AFRC that ousted the legitimate Government. This achievement, the Chamber notes, contributed immensely to re-establishing the rule of law in this Country where criminality, anarchy and lawlessness, which the United Nations sought to end and was determined to achieve in adopting Security Council Resolution 1315 (2000),[128] had become the order of the day.

88. We recall here in this regard, that the Learned Lead Counsel for the Defence Team of Allieu Kondewa, Mr Charles Margai, himself a well-informed citizen of this Country, in his submission at the Sentencing Hearing on the 19th of September 2007, re-echoed these sentiments of appreciation for the positive contribution of the Kamajors in ending the rebellion and for facilitating the restoration of democracy, peace and security in this Country.

89. Mr. Margai, in a plea for a lenient sentence for his client Kondewa, and also for Moinina Fofana, had this to say:

> We thank God, My Lords, that the war is over, but this war was described and has been described as the most brutal known to mankind. We should not lose sight of that. If it were not for the sacrifice of the CDF, God knows whether some of us, including my learned friend Kamara, would be here today. That, I submit, My Lord, is a factor to be considered, because, otherwise, if a sentence is severe and there occurs a rebel war, whether in Sierra Leone or elsewhere, government militias are going to ask themselves the question: Is it advisable for us to intervene. If we do, might we not be treated in the same manner as Allieu Kondewa and others?.[129]

90. He also stated:

---

[128] UN Sec Res. 1315(2000), 14 August 2000

[129] Transcript of 19 September 2007, pp. 83-84.

> I believe that what is contained in our brief is comprehensive enough, coupled with the authorities which have been cited, to assist Your Lordships in arriving at a fair, just sentencing that will address future occurrences of a similar nature in a positive light. [. . . .] Considering that he has spent over four years in detention, I believe that a sentence of three years will not be unreasonable. If he had not spent four years, I'm sure seven years would be appropriate. But having spent four years, I believe three years would be appropriate, at least for the Court not to be seen to act in vain.[130]

91. In this context, the contribution of the two Accused Persons to the establishment of the much desired and awaited peace in Sierra Leone and the difficult, risky, selfless and for a very sizeable number of their CDF/Kamajors, the supreme sacrifices that they made to achieve this through a bloody conflict, is in itself a factor that stands significantly in mitigation in their favour. In fact, the medal awarded to Moinina Fofana after the restoration by the reinstated President Kabbah, is a testimony of gratitude and appreciation of Sierra Leonean society, which the President incarnates.[131]

3.6.3. Motive of Civic Duty

92. In the course of the sentencing hearing, Fofana requested his Counsel to put across five points to the Chamber, which he feels are in his favour. The first of those points deal with what could be called a motive of civic duty. It was stated by Learned Counsel Powles, as follows:

> Firstly, the CDF was established with the sole aim of protecting the civilian population and restoring the democratically elected Government. These were, similarly, Moinina Fofana's sole reasons and motivating factors in joining the CDF movement.[132]

93. Kondewa, for his part, vowed never to give up any territory under his control to any military government, but only to the democratically elected Government of President Kabbah.[133] In his *allocutus* to the Judges during the sentencing hearing, Allieu Kondewa, addressing the Judges directly in his native Mende language after Learned Counsel Margai had addressed the Court on his behalf, had this to say:

---

[130] *Ibid.*, pp. 86-87.
[131] Fofana Sentencing Brief, Annex G. The medal was produced in Court by Mr. Powles during his sentencing submissions (Transcript of 19 September 2007, p. 64).
[132] Transcript of 19 September 2007, p. 64.
[133] Transcript of 10 November 2004, Father Garrick, p. 22.

> As we were fighting, we fought so that civilians would be secured and democracy would be restored and the staff be given back to President Tejan Kabbah. We all fought for that [...][134]

94. The Chamber is of the opinion that there is nothing in the evidence which demonstrates that either Fofana or Kondewa joined the conflict in Sierra Leone for selfish reasons. In fact, we have found that both Fofana and Kondewa were among those who stepped forward in the efforts to restore democracy to Sierra Leone, and, for the main part, they acted from a sense of civic duty rather than for personal aggrandisement or gain. This factor in addition to others that have been raised in this Judgement has, for each of them, significantly impacted to influence the reduction of the sentence to be imposed for each count.

VI. CONCLUSION

95. It is our view that a manifestly repressive sentence, rather than providing the deterrent objective which it is meant to achieve, will be counterproductive to the Sierra Leonean society in that it will neither be consonant with nor will it be in the overall interests and ultimate aims and objectives of justice, peace, and reconciliation that this Court is mandated by UN Security Council Resolution 1315,[135] to achieve. The motivation of the Accused in this case, where they fought to reinstate democracy, and the prevailing circumstances in which their crimes were committed, has therefore been taken into consideration by the Chamber in arriving at an appropriate sentence.

96. We again observe, however, that the crimes for which the Accused were tried and convicted remain very serious crimes, and both Fofana and Kondewa will bear the stigma of a conviction after we have pronounced their sentences. The Chamber hopes that this Judgement will send a message to future pro-democracy armed forces or militia groups that notwithstanding the justness or propriety of their cause, they must observe the laws of war in pursuing or defending legitimate causes, and that they must not recruit or use children as agents or instruments of war. It will, in addition, remind them of their obligation to protect civilians who are unarmed and not participating in hostilities, and whose aspiration is only to protection, regardless of their perceived affiliation.

---

[134] Transcript of 19 September 2007, p. 92.
[135] UN Sec Res. 1315(2000), 14 August 2000.

97. The Chamber notes that both the Prosecution and the Fofana Defence recommended that a global sentence be imposed, rather than a separate sentence for each crime.[136] It further notes that while the Kondewa Defence submitted that separate sentences should be imposed, it recommended a single sentence.[137] While the Chamber recognizes that it has the discretion to impose a global sentence,[138] it has chosen to impose separate sentences for each of the crimes for which Fofana and Kondewa have been convicted because it is our view that this better reflects the culpability of the Accused for each offence for which they were convicted, given that distinct crimes were committed by each Accused in discrete geographical areas.[139]

VII. DISPOSITION

FOR THE FOREGOING REASONS, THE CHAMBER:

SENTENCES Moinina Fofana to the following:

For 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, a **TERM OF IMPRISONMENT OF SIX YEARS;**

For 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, a **TERM OF IMPRISONMENT OF SIX YEARS;**

For Count 5 - Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF THREE YEARS;**

For Count 7 - Collective Punishments, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF FOUR YEARS;**

---

[136] Prosecution Sentencing Brief, paras 176-177, Fofana Sentencing Brief, para 48.
[137] Kondewa Sentencing Brief, paras 39-43,166.
[138] See AFRC Sentencing Judgement, para 12. See also *Prosecutor v. Kambanda*, ICTR-97-23-A, Judgement (AC), 19 October 2000, para 113.
[139] Unlike, for example, in several ICTY cases in which global sentences were held to be appropriate where the crimes occurred in one geographical location or where the crimes all formed part of one transaction (Krstic Trial Judgement, para 725. See also *Blaskic* Trial Judgement, para 807 and *Kunarac* Appeal Judgement, paras 342-344).

ORDERS that these sentences shall run and be served concurrently.

SENTENCES Allieu Kondewa to the following:

For 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, a **TERM OF IMPRISONMENT OF EIGHT YEARS;**

For 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, a **TERM OF IMPRISONMENT OF EIGHT YEARS;**

For Count 5 - Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF FIVE YEARS;**

For Count 7 - Collective Punishments, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, a **TERM OF IMPRISONMENT OF SIX YEARS;**

For Count 8 - Enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities, an other serious violation of international humanitarian law, a **TERM OF IMPRISONMENT OF SEVEN YEARS;**

ORDERS that these sentences shall run and be served concurrently;

ORDERS that for both Fofana and Kondewa, the sentences shall run from the date each was taken into custody; and, in this regard,

ORDERS that Moinina Fofana shall serve a **TOTAL TERM OF IMPRISONMENT of SIX YEARS**, and that this takes effect from the 29th of May 2003, when he was arrested and taken into the custody of the Special Court; and further,

ORDERS that Allieu Kondewa (also known as Allieu Musa) shall serve a total **TOTAL TERM OF IMPRISONMENT of EIGHT YEARS** and and that this takes effect from the 29th of May, 2003, when he was arrested and taken into the custody of the Special Court.

Hon. Justice Bankole Thompson appends a Dissenting Opinion to this Judgement, in which he has indicated that he makes no pronouncement as to the sentence and reaffirms that the defence of Necessity is valid in the peculiar circumstances of this case. The said Opinion is attached to this Judgement as Annex A.

INSTRUCTS the Court Management Section to accept the filing of the present Judgement and to serve it after 5:00 p.m. today.

Done at Freetown, Sierra Leone, this 9th day of October 2007

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I

Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

ANNEX A: DISSENTING OPINION OF HON. JUSTICE BANKOLE THOMPSON FROM SENTENCING JUDGEMENT FILED PURSUANT TO ARTICLE 18 OF THE STATUTE

I. Introduction

1. On the 2nd day of August 2007, Trial Chamber I, comprising the Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Pierre Boutet delivered Judgement in the CDF Trial, unanimously, holding Accused Moinina Fofana not guilty on Counts 1, 3, 6 and 8 of the Indictment and accordingly acquitting him on each of the said Counts, and Accused Allieu Kondewa not guilty on Counts 1, 3 and 6 and accordingly acquitting him on each of the said Counts.

2. By the same Judgement dated the 2nd day of August 2007, the aforementioned Trial Chamber I, by a majority, Hon. Justice Bankole Thompson dissenting, held Accused Moinina Fofana guilty of the crimes charged in Counts 2, 4, 5 and 7 of the Indictment and accordingly convicted him on each of the said Counts, and also held Accused Allieu Kondewa guilty of the crimes charged in Counts 2, 4, 5, 7 and 8 of the Indictment, and accordingly convicted him on each of the said Counts.

3. On the same date, 2nd day of August 2007, the Hon. Justice Bankole Thompson filed, pursuant to Article 18 of the Statute of the Court, a Separate Concurring and Partially Dissenting Opinion on the Trial Chamber's Main Judgement, concurring in the findings of not guilty and the consequent acquittal of Accused Moinina Fofana on Counts 1, 3, 6 and 8 and Allieu Kondewa on Counts 1, 3 and 6. In the said Opinion, the Hon. Justice Bankole Thompson dissented from the findings of guilty and consequent conviction in respect of Accused Moinina Fofana on Counts 2, 4, 5 and 7 and Allieu Kondewa on Counts 2, 4, 5, 7 and 8, thereupon acquitting both Accused on all Counts of the Indictment.

4. On the 19th day of September 2007, a Sentencing Hearing was held by the Trial Chamber comprising the Hon. Justice Benjamin Mutanga Itoe and Hon. Justice Pierre Boutet, pursuant to Rule 16(A) of the Rules of Procedure and Evidence of the Court.

5. The Chamber now delivers a Sentencing Judgement against the Accused in respect of the Counts of the Indictment on which they have been convicted.

II. Dissent from Sentencing Judgement

6. I have had the benefit of reading and digesting the Sentencing Judgement in this case, for which opportunity I am immensely grateful to my learned and distinguished colleagues. I commend them for it.

7. I most respectfully dissent from the said Judgement predicated upon the firm judicial positions taken in my separate Concurring and Partially Dissenting Opinion (Annex C thereof) delivered on the 2nd day of August 2007, and based specifically on the analyses, considerations, and reasons advanced in Parts Eight and Nine of the said Opinion and consistent with the Disposition made in Part Ten therein, acquitting the Accused on all Counts of the Indictment.

III. Disposition

I, accordingly, make no pronouncement as to sentences.

Done at Freetown this 9th day of October, 2007

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

ANNEX B: TABLE OF AUTHORITIES

1. Special Court for Sierra Leone Decisions and Judgements

Full Citation	Short Name (If Applicable)
Prosecutor v. Fofana and Kondewa	
Prosecutor v. Fofana and Kondewa, SCSL-04-14-T, Judgement, 2 August 2007.	Judgement
Prosecutor v. Fofana and Kondewa, SCSL-04-14-T, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson filed Pursuant to Article 18 of the Statute, Judgement (TC), Annex C, 2 August 2007.	Dissenting Opinion
Prosecutor v. Norman, Fofana and Kondewa	
Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-T, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (AC), Separate Opinion of Judge Robertson, 24 May 2005.	
Prosecutor v. Brima, Kamara and Kanu	
Prosecutor v. Brima, Kamara and Kanu, SCSL-04-16-T, Trial Judgement (TC), 19 July 2007.	AFRC Sentencing Judgement

2. International Criminal Tribunal for Rwanda Decisions and Judgements

Full Citation	Short Name (if Applicable)
Prosecutor v. Kambanda	
Prosecutor v. Kambanda, ICTR-97-23-A, Judgement (AC), 19 October 2000.	
Prosecutor v. Kambanda, ICTR-97-23-S, Judgement and Sentence (TC), 4 September 1998.	*Kambanda* Trial Judgement
Prosecutor v. Kamuhanda	
Prosecutor v. Kamuhanda, ICTR-99-54A-A, Judgement (AC), 19 September 2005.	

Prosecutor v. Muhimana	
Prosecutor v. Muhimana, ICTR-95-1B-T, Judgement and Sentence (TC), 28 April 2005.	
Prosecutor v. Ndindabahizi	
Prosecutor v. Ndindabahizi, ICTR-01-71-A, Judgement (AC), 16 January 2007.	
Prosecutor v. Niyitegeka	
Prosecutor v. Niyitegeka, ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003.	
Prosecutor v. Ntagerura, Bagambiki, and Iminishimwe	
Prosecutor v. Ntagerura, Bagambiki and Iminishimwe, ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004.	
Prosecutor v. Ntakirutimana and Ntakirutimana	
Prosecutor v. Ntakirutimana and Ntakirutimana, ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004.	
Prosecutor v. Semanza	
Prosecutor v. Semanza, ICTR-97-20-T, Judgement (TC), 15 May 2003.	

3. **International Criminal Tribunal for the Former Yugoslavia Decisions and Judgements**

Prosecutor v. Aleksovski	
Prosecutor v. Aleksovski, IT-95-14/1-A, Judgement (AC), 24 March 2000.	*Aleksovski* Appeal Judgement
Prosecutor v. Babic	
Prosecutor v. Babic, IT-03-72-A, Judgement on Sentencing Appeal (AC), 18 July 2005.	*Babic* Sentencing Appeal
Prosecutor v. Babic, IT-03-72-S, Sentencing Judgement (TC), 29 June 2004.	*Babic* Sentencing Judgement
Prosecutor v. Blagojevic	
Prosecutor v. Blagojevic, IT-02-60-T, Judgement (TC), 17 January 2005.	

Prosecutor v. Blaskic	
Prosecutor v. Blaskic, IT-95-14-A, Judgement (AC), 29 July 2004.	*Blaskic* Appeal Judgement
Prosecutor v. Blaskic, IT-95-14-T, Judgement (TC), 3 March 2000.	*Blaskic* Trial Judgement
Prosecutor v. Delalic, Mucic, Delic and Landzo	
Prosecutor v. Delalic, Mucic, Delic and Landzo, IT-96-21-A, Judgement (AC), 20 February 2001.	*Celibici* Appeal Judgement
Prosecutor v. Delalic, Mucic, Delic and Landzo, IT-96-21-T, Judgement (TC), 16 November 1998.	*Celibici* Trial Judgement
Prosecutor v. Deronjic	
Prosecutor v. Deronjic, IT-02-61-A, Judgement on Sentencing Appeal (AC), 20 July 2005.	*Deronjic* Sentencing Appeal
Prosecutor v. Deronjic, IT-02-61-S, Sentencing Judgement (TC), 30 March 2004.	*Deronjic* Sentencing Judgement
Prosecutor v. Erdemovic	
Prosecutor v. Erdemovic, IT-96-22-Tbis, Sentencing Judgement (TC), 5 March 1998.	
Prosecutor v. Furundzija	
Prosecutor v. Furundzija, IT-95-17/1-A, Judgement (AC), 21 July 2000.	*Furundzija* Appeal Judgement
Prosecutor v. Hadsahasanovic	
Prosecutor v. Hadsahasanovic, IT-01-47-T, Judgement (TC), 15 March 2006.	
Prosecutor v. Jokic	
Prosecutor v. Jokic, IT-01-42/1-A, Judgement on Sentencing Appeal (AC), 30 August 2005.	*Jokic* Sentencing Appeal
Prosecutor v. Kordic and Cerkez	
Prosecutor v. Kordic and Cerkez, IT-95-14/2-A, Judgement (AC), 17 December 2004.	

Prosecutor v. Kunarac, Kovac and Vokovic	
Prosecutor v. Kunarac, Kovac and Vokovic, IT-96-23- & IT-96-23/1-A (AC), Judgement (AC), 12 June 2002.	*Kunarac* Appeal Judgement
Prosecutor v. Kunarac, Kovac and Vokovic, IT-96-23-T and IT-96-23/1-T, Judgement (TC), 22 February 2001.	
Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic	
Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic, IT-95-16-A, Judgement (AC), 23 October 2001.	*Kupreskic* Appeal Judgement
Prosecutor v. Kupreskic, Kupreskic, Kupreskic, Josipovic and Santic, IT-95-16-T, Judgement (TC), 14 January 2000.	*Kupreskic* Trial Judgement
Prosecutor v. Krstic	
Prosecutor v. Krstic, IT-98-33-T, Judgement and Sentence (TC), 2 August 2001.	*Krstic* Trial Judgement
Prosecutor v. Dragan Nikolic	
Prosecutor v. Dragan Nikolic, IT-94-2-S, Sentencing Judgement (TC), 18 December 2003.	
Prosecutor v. Momir Nikolic	
Prosecutor v. Momir Nikolic, IT-02-60/1-S, Sentencing Judgement (TC), 2 December 2003.	
Prosecutor v. Obrenovic	
Prosecutor v. Obrenovic, IT-02-60/2-S, Sentencing Judgement (TC), 10 December 2003.	*Obrenovic* Trial Judgement
Prosecutor v. Oric	
Prosecutor v. Oric, IT-03-68-T, Judgement (TC), 30 June 2006.	*Oric* Trial Judgement
Prosecutor v. Plavsic	
Prosecutor v. Plavsic, IT-00-39- & 40/1-S, Sentencing Judgement (TC), 27 February 2003.	*Plavsic* Sentencing Judgement
Prosecutor v. Stakic	
Prosecutor v. Stakic, IT-97-24-A, Judgement (AC), 22 March 2006.	*Stakic* Appeal Judgement

Prosecutor v. Tadic	
Prosecutor v. Tadic, IT-94-1-A, Judgement in Sentencing Appeals (AC), 26 January 2000.	*Tadic* Sentencing Appeal
Prosecutor v. Todorovic	
Prosecutor v. Todorovic, IT-95-9/1-S, Sentencing Judgement (TC), 31 July 2001.	
Prosecutor v. Vasiljevic	
Prosecutor v. Vasiljevic, IT-98-32-A, Judgement (AC), 25 February 2004.	*Vasiljevic* Appeal Judgement

4. Cases from Domestic Jurisdictions

Full Citation	Short Name (if Applicable)
R. v. Dudley and Stephens, (1884) 14 QBD 173	*Dudley and Stephens*
R. v. M. (C.A.), [1996] 1 S.C.R. 500	
R. v. Perka, [1984] 2 S.C.R. 232	
State v. Drummy, 18 Conn. App. 303, 557 A.2d 574 (1989)	
State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973)	
U.S. v. Seward, 687 F.2d 1270, 1275 (10th Cir. 1982)	

5. International Legal Documents

Full Citation	Short Name (If Applicable)
Treaties, Conventions and Protocols	
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 609 (entered into force 7 December 1978).	Additional Protocol I.
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 3 (entered into force 7 December 1978).	Additional Protocol II.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 (entered into force 12 August 1949).	

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea , 75 U.N.T.S. 85 (entered into force 12 August 1949).	
Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (entered into force 12 August 1949).	
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (entered into force 12 August 1949).	
UN Security Resolutions	
UN Sec Res. 1315(2000), 14 August 2000.	
Reports	
Child Soldiers (Geneva: ICRC, 2003), available at http://www.icrc.org/	

6. Secondary Sources

Full Citation	Short Name (If Applicable)
Books and Articles	
Bankole Thompson, *The Criminal Law of Sierra Leone* (Maryland: University Press of America Inc., 1999).	*The Criminal Law of Sierra Leone*