657) SCSL-04-16-A (1246–1302) 1246

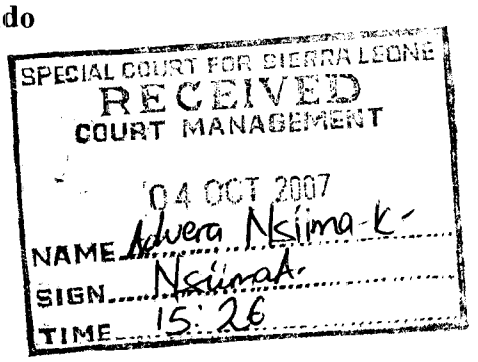
SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

BEFORE: Hon. Justice George Gelaga King, Presiding
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando

Registrar: Mr. Herman von Hebel

Date Filed: 4 October 2007



THE PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

Case No. SCSL–2004–16-A

KAMARA RESPONSE TO PROSECUTION APPEAL BRIEF

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A. INTRODUCTION

1. On 13 September 2007 the Prosecution filed its Appeal Brief[1] pursuant to Article 20 (Appellate Proceedings) of the Statute[2] and Rule 108 of the Rules of Procedure and Evidence[3] against the Judgment[4] and Sentence[5] of Trial Chamber II pronounced on 20 June 2007 and rendered on 19 July 2007 respectively in the case of the Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara (hereafter referred to as "the Appellant") and Santigie Borbor Kanu case no. SCSL 04-16-T.

2. The Prosecution Appeal Brief sets out nine grounds of appeal to which the Kamara Defence hereby responds pursuant to Rule 112 of the Special Court Rules of Procedure and Evidence.

3. The Respondent makes these submissions without prejudice to the legal submissions filed by the Respondent pursuant to the Notice of Appeal filed on 2 August 2007.

4. Throughout these submissions the Respondent is also referred to as Kamara, the Kamara Defence and the Appellant with all designations being interchangeable and referring to one and the same person.

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[1] *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-04-16-A Public Appeal Brief of the Prosecution, filed 13 September 2007

[2] Statute of the Special Court for Sierra Leone(hereafter referred to as 'the Statute'.)

[3] Rules of Procedure and Evidence

[4] Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Bobor Kanu Case No. SCSL-04-16-T, Judgment, 20 June 2007 ("Trial Chamber's Judgment").

[5] Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Bobor Kanu Case No. SCSL-04-16-T, Sentencing Judgment 19 July 2007.

B. KAMARA'S RESPONSE TO PROSECUTION'S FIRST GROUND OF APPEAL: INDIVIDUAL RESPONSIBILITY OF KAMARA FOR THE BOMBALI DISTRICT AND FREETOWN AND THE WESTERN AREA

4. The Trial Chamber found that at the meeting in Koinadugu District, various AFRC commanders met with SAJ Musa to discuss the future and develop a new military strategy. The commanders agreed that the troops who had arrived from Kono District should act as an advance troop which would establish a base in north western area Sierra Leone in preparation for an attack on Freetown. The purpose was to **"restore the Sierra Leone Army"**. [6] The Trial Chamber established that at the meeting in Koinadugu District it was decided that Brima would lead an advance **team north east to establish an AFRC base in Bombali District and that SAJ Musa and his troops would follow later**.[7]

5. The Respondent agues that the Prosecution failed to show that one of the aims of the meeting in Koinadugu was the planning of the crimes to be committed in Bombali and Freetown. From the Judgement and the evidence it is evident that the only plan formulated at the meeting in Koinadugu which was to **"restore the Sierra Leone Army."**

I. PLANNING

6. The Prosecution in paragraph 51 of its Brief adopted the definition of planning as stated by the Trial Chamber;

> "Planning" implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[8] Proof of the existence of a plan may be provided by circumstantial evidence.[9] Responsibility is incurred when the level of the accused's participation is substantial, even when the crime is actually committed by another person.[10]
> The *actus reus* requires that the accused, alone or together with others, designated the criminal conduct constituting the crimes charged. It is sufficient to demonstrate that the planning was a factor substantially contributing to such

[6] Trial Chamber's Judgement, para 190
[7] Trial Chamber's Judgement, para 379
[8] *Akayesu* Trial Judgement, para. 477; *Brđanin* Trial Judgement, para. 268; *Stakić* Trial Judgement, para. 443; Krstić Trial Judgement, para. 601.
[9] *Blaškić* Trial Judgement, para. 279.
[10] *Bagilishema* Trial Judgement, para. 30.

> criminal conduct.[11] The *mens rea* requires that the accused acted with direct intent in relation to his or her own planning or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan. Planning with such awareness has to be regarded as accepting that crime.[12]

7. The Trial Chamber found that at the meeting in Koinadugu District, various AFRC commanders met with SAJ Musa to discuss the future and develop a new military strategy. The commanders agreed that the troops who had arrived from Kono District should act as an advance troop which would establish a base in north western area Sierra Leone in preparation for an attack on Freetown. The purpose was to "restore the Sierra Leone Army."

8. In the Bombali District, the Trial Chamber found at Kamagbengbe there was a strategic discussion between the commanders which could constitute planning of the attack on Karina and the crimes committed therein. The Trial Chamber further noted that, given that witness TF1-334 did not name the commanders involved in this discussion it was not prepared to infer merely by virtue of the Accused Kamara's position as deputy commander that he was present during the discussions[13]. In Freetown and the Western Area, the Trial Chamber found no evidence that the Accused Kamara planned the commission of crimes in Freetown and the Western Area.[14]

9. The Prosecution has failed to prove beyond a reasonable doubt from the evidence adduced during the trial that Kamara in fact planned or took part in the planning of the crimes committed in Bombali and Freetown.

10. The Respondent agues that the fact that the Trial Chamber found that he was Brima's deputy commander at Mansofinia and throughout the journey to Colonel Eddie Town and during the Freetown invasion[15], does not imply that he was involved in the planning of the crimes in Bombali and Freetown.

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[11] *Kordić* Appeal Judgement, para. 26.
[12] *Kordić* Appeal Judgement, paras 29, 31 as cited by the Trial Chamber, paras 765-766
[13] Trial Chamber's Judgement, para 1917
[14] Trial Chamber's Judgement, para 1937
[15] Trial Chamber's Judgement, para 380,465, 472,474

II. ORDERING

11. The Respondent states that the Prosecution has generally failed to establish any instance where Kamara gave general order or where he reaffirmed the general order which he claims Brima gave. He states that the evidence presented by the Prosecution on that point did not reach the beyond reasonable doubt threshold necessary for a conviction.

12. The *actus reus* of 'ordering' requires that a person in a position of authority uses that authority to instruct another to commit an offence.[16] The *mens rea* for ordering requires that the accused acted with direct intent in relation to his own orders or with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.[17] The Respondent points out that Kamara could not be held liable for orders given by Brima. To be held liable for ordering it must be shown that the orders for the crime to be committed came directly from the person giving the order(s). One can only be held liable for ordering when it is evident that specific orders were give by the person who is said to be liable for ordering the crimes.

13. From the evidence and the Trial Judgement the only specific incident that was stated to show that Kamara order the committing of a crime was in the Bombali District where the Trial Chamber found that the Accused Kamara ordered the unlawful killing of five young girls in Karina.[18] In Freetown and the Western Area, the Trial Chamber found no evidence that the Accused Kamara ordered the commission of crimes in Freetown and the Western Area.[19] The Prosecution has not shown that there is substantial evidence to prove that Kamara in fact ordered the crimes committed in Freetown and the Western Area. Evidence of someone else ordering crimes to be committed **can not** be used to show that Kamara ordered the commission of crimes in Bombali District and in Freetown and the Western Area.

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[16] Trial Chamber's Judgement, para 772, referring to *Krstić* Trial Judgement, para. 601; *Brđanin* Trial Judgement, para. 270.
[17] Trial Chamber's Judgement, para 773, *Kordić* Appeal Judgement, paras 29, 30; *Blaškić* Appeal Judgement, para. 42.
[18] Trial Chamber's Judgement, para 1915
[19] Trial Chamber's Judgement, para 1937

14. The Respondent submits that the Prosecution's analysis that Kamara ordered the commission of specific crimes in Bombali District which were otherwise attributable to Brima,[20] is unfounded and cannot be taken by a reasonable trier of facts to imply that the Respondent ordered the commission of all crimes committed in Bombali District, Freetown and the Western Area.

III. INSTIGATING

15. The Respondent submits that the Prosecution failed to show that Kamara instigated the commission of crimes in Bombali and Freetown and the Western Areas.

16. In the meeting at Mansofinia with SAJ Musa, the restructuring of the troops was discussed and the purpose was to "restore the Sierra Leone Army" [21] The order to attack Karina was given at an address to the troops at Kamagbengbe. However, witness TF1-334 does not name the commanders involved in this discussion. The Trial Chamber stated it was not prepared to infer merely by virtue of the Accused Kamara's position as deputy comrnander that he was one of the commanders. [22]Witness TF1-033 did not state in his testimony that Kamara was present when Brima congratulated his subordinates on "a job well done" after they reported to him.[23]

17. Based on the above incidents referred to by the Prosecution, no evidence was adduced that Kamara prompted or influenced or gave practical assistance, encouragement or moral support to the perpetrators of the crimes committed in Bombali District. [24] No evidence was adduced by the Prosecution in support of its theory that Kamara is individually responsible for instigating all the crimes that were committed in Freetown.[25]

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[20] Prosecution's Appeal brief, para 116
[21] Trial Chamber's Judgement, para 190, 466.
[22] Trial Chamber's Judgement, para 1917
[23] TF1-033, Transcript 11 July 2005, p. 34.
[24] Trial Chamber's Judgement, para 1920
[25] Prosecution's Appeal brief, para 118-120

18. The Prosecution merely speculated on possible acts that could have led to the finding of Kamara responsible for instigating crimes committed in Bombali and Freetown, but failed to prove based on actual evidence which could have been acceptable by a reasonable trier of facts that Kamara instigated the crimes committed in Bombali and Freetown.[26]

IV. AIDING AND ABETTING

19. The Respondent submits that as established by the Trial Chamber, the Prosecution adduced no evidence to show that the Kamara prompted or influenced or gave practical assistance, encouragement or moral support to the perpetrators of the crimes committed in Bombali District.[27] The Prosecution centres it arguments on the fact that Kamara was a commander.[28]

20. The Respondent contends that although the Trial Chamber agreed with the Prosecution that a "persistent failure to prevent or punish crimes by subordinates over time may also constitute aiding or abetting,"[29] it further stated that it may be a basis for his liability for aiding and abetting, subject to the *mens rea* and *actus reus* requirements being fulfilled.[30]

21. The Prosecution failed to prove that Kamara fulfilled the necessary *mens rea* and *actus reus* requirements of aiding and abetting to be held liable by a reasonable trier of facts.

V. THE ERRORS IN THE TRIAL CHAMBER'S EVALUATION OF ARTICLE 6(3) LIABILITY FOR THE BOMBALI DISTRICT CRIMES AND FREETOWN AND THE WESTERN AREA CRIMES.

22. The Respondent agrees with the Prosecution that the Trial Chamber made no findings as to Kamara's responsibility under Article 6(3) for the enslavement crimes in Bombali and Freetown and the Western Areas.[31]

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[26] Trial Chamber's Judgement, para 1920, 1937
[27] Trial Chamber's Judgement, para 1920
[28] Prosecution Final Brief, para. 123, 125
[29] Prosecution Final Brief, para. 431.
[30] Trial Chamber's Judgement, para 777
[31] Prosecution Final Brief, para. 173

23. The Respondent submits relying on the arguments as set out in paragraph 144-155 of the Kamara Appeals brief that it is evident that a reasonable trier of fact would not find Kamara liable for three enslavement crimes.

24. The Respondent therefore concludes that there is no merit in the Prosecution's First Ground of Appeal and same should be dismissed.

C. KAMARA'S RESPONSE TO PROSECUTION'S SECOND GROUND OF APPEAL: THE TRIAL CHAMBER'S OMISSION TO MAKE FINDINGS ON CRIMES IN CERTAIN LOCATIONS

25. The Trial Chamber stated in its Judgment that it would "not make any findings on crimes perpetrated in locations not specifically pleaded in the Indictment."[32]

26. The Prosecution submits that the Trial Chamber erred thereby in that each of the crimes referred to in exhibit B of the Prosecution Appeal Brief was properly pleaded alternatively to the extent that any of those crimes was not adequately pleaded in the indictment the defect in the Indictment was subsequently cured by timely clear and consistent information by the Prosecution.[33]

27. The Prosecution submits that on the basis that the Trial Chamber accepted the evidence in paragraphs 1615 to 1627 of the Trial Judgment relating to the attacks to and from Gberi Bana in Port Loko District by AFRC troops under the command of Kamara, including the attack on Mamamah, the Prosecution inter alia "requests the Appeals Chamber to revise the Trial Chamber's Judgment by adding a finding that Kamara's convictions on Count 4

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[32] Trial Chamber's Judgment, para 38.
[33] Public Appeal Brief of the Prosecution, para 197.

and 5 under Article 6(3) for unlawful killings in Port Loko District also include his individual responsibility for these unlawful killings in Port Loko District".[34]

28. The Prosecution seeks the above remedy inter alia upon the assumption that the Prosecutions third ground of appeal will be upheld[35] by the Appeals Chamber who would in turn enter a conviction against Kamara under Article 6(1) rather than under Article 6(3) in respect of convictions against Kamara under Counts 4 and 5 for crimes committed in the Port Lokko District.

29. In support of the Prosecution argument that crimes were not specifically pleaded in the indictment the Prosecution makes a distinction between particular locations and locations arguing that a reference to crimes being committed in "various" locations within a particular District was specific and enough for consideration by the Trial Chamber.

30. The Prosecution's case is that it "was entitled to proceed at trial on the basis that the indictment was not defective in pleading the locations of crimes in the way that it did, and that any Defence issue in this respect had been settled by pre-trial decisions of the Trial Chamber".[36]

31. The Prosecution it is submitted came to this conclusion after considering the decisions in the *Sesay* Preliminary Motion Decision, the *Kamara* Preliminary Motion Decision, the *Kanu* Preliminary Motion and the *Brima* Preliminary Motion Decision.[37]

32. It is the submission of the Kamara Defence that the Prosecution failed to appreciate the true and proper meaning of Trial Chamber I's holding in the Sesay Preliminary Motion Decision which sought to state that the use of general formulations like "such as" or "various locations", or "various areas ...including" in the Indictment is allowable within context. Indeed Trial Chamber I held that the use of the said formulations "**is clearly**

[34] Public Appeal Brief of the Prosecution, para 235.
[35] Public Appeal Brief of the Prosecution, para 236.
[36] Public Appeal Brief of the Prosecution, para 206.
[37] Public Appeal Brief of the Prosecution, paras 202 to 205.

permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions"[38] i.e. it is submitted, to demonstrate the "widespread or systematic" nature of the attack.

33. Paragraph 19 of the Rule 98 Decision referred to in paragraph 37 of the Trial Judgment stated as follows:

> "We note that when citing locations where the various criminal acts are alleged to have taken place the language used in the particulars of the Indictments is not exhaustive and often uses the preposition "including" when referring to those locations. Given the "widespread" nature of the alleged crimes, it would in our view, be impracticable for the Indictment to name exhaustively every single location throughout the territory of Sierra Leone where these criminal acts allegedly too place. We do not understand the Indictment to be limited to only those villages or locations named in the particulars. **Clearly the Prosecution may (as indeed it has done in some instance) adduce evidence of alleged crimes in other villages not specified in the Indictment, in order to demonstrate the "widespread or systematic" nature of the attack on the civilian population (emphasis added)**

34. It is the submission of the Kamara Defence that the language used therein is clear and unambiguous and should not be interpreted otherwise as the Prosecution seeks to do by referring to the last sentence of the next paragraph of the Rule 98 Decision i.e. paragraph 20.

35. The Kamara Defence submits that the Trial Chamber took all evidence into account in determining whether or not the Prosecution evidence in relation to each Count is capable of supporting a conviction against the accused on that count and decided rightly (it is submitted) that it would not make any findings on crimes perpetrated in locations not specifically pleaded in the Indictment.

36. The Prosecution refers to various authorities cited by the Trial Chamber in support of its decision not to make any findings in respect of crimes perpetrated in locations not

[38] Public Appeal Brief of the Prosecution, paras 202 (emphasis added)

specifically pleaded in the Indictment. On such authority was paragraph 397 of the Brdanin Trial Judgment where the ICTY said that:

> *... the Trial Chamber finds that evidence was adduced with respect to a number of killings which were not charged in the Indictment. While such evidence may support the proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for the crimes of wilful murder or extermination may be made in respect of such uncharged incidents.*

37. It is the Kamara Defence position that in this regard the Prosecution is clutching at straws in order to distinguish this Judgment. The language used therein is clear and unambiguous and should not be subjected to any differing interpretation other than the clear meaning.

38. The second error relied on by the Prosecution in support of this particular ground of appeal is the failure of the Trial Chamber to find that any defect has been cured upon the grounds that a defect in an indictment can be deemed cured if the Prosecution provides the accused with timely clear and consistent information detailing the factual basis underpinning the charges.

39. The fact that Kamara was not found criminally culpable for the offence of "committing" any of the crimes referred to in the Counts in the Indictment notwithstanding the Kamara Defence submits that the accused were not put on sufficient notice as to cure the defects in the Indictment where particular locations had not been pleaded.

40. The Kamara Defence agrees with the finding of the Trial Chamber as set out in paragraph 53 of the Trial Judgment that the pleading relied on by the Prosecution as it relates to the personal perpetration of crimes cannot suffice to put an accused on notice and for this reason same is defective.

41. The Respondent therefore concludes that there is no merit in the Prosecution's Second Ground of Appeal and same should be dismissed.

D. KAMARA'S RESPONSE TO THE PROSECUTION'S THIRD GROUND OF APPEAL: FAILURE OF THE TRIAL CHAMBER TO FIND KAMARA INDIVIDUALLY RESPONSIBLE UNDER ARTICLE 6(1) AND ARTICLE 6 (3) FOR ALL CRIMES COMMITTED IN PORT LOKKO DISTRICT.

42. Paragraph 1955a of the Trial Judgment found that "The Prosecution has not adduced any evidence that the Accused Kamara committed, ordered, planned, instigated or otherwise aided and abetted any of the crimes committed in the Port Lokko District. The Trial Chamber finds that the Prosecution has not proved any of these modes of individual criminal responsibility against the accused Kamara for the crimes committed in Port Lokko District".

43. The Prosecution argue that the only conclusion open to any reasonable trier of fact is that Kamara is individually responsible, under Article 6(1) of the Statute, for committing and /or ordering, planning, instigating and/ or otherwise aiding and abetting all of the crimes committed by the AFRC troops under his command, known as "West Side Boys", in Port Lokko District between February and April 1999.[39]

44. The Prosecution argues that in respect of a killing incident in Manaarma (Port Lokko) Kamara should have been found individually responsible for those killings under Article 6 (1) of the Statute as well as under Article 6 (3) and appeal as such.[40]

45. The Prosecution appeals against the finding that the Prosecution did not establish beyond a reasonable doubt that the perpetrators of the crimes of sexual slavery in Port Lokko District were under the command of Kamara and maintain that Kamara should have been found individually criminally responsible under Article 6(1) and Article 6(3) of the Statute.[41]

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[39] Public Appeal Brief of the Prosecution, para 246
[40] Public Appeal Brief of the Prosecution, para 249.
[41] Public Appeal Brief of the Prosecution, para 251.

46. The Prosecution appeals against the finding that Kamara was not found individually criminally responsible on Counts 1 and 2 in respect of the crimes committed in Port Lokko District under Article 6(1) and Article 6(3) of the Statute.[42]

47. The Prosecution therefore requests the "Trial Chamber" to reverse the Trial Chamber's findings in paragraph 1955a of the Trial Chamber's Judgment and to revise the Trial Chamber's Judgment by adding a finding that Kamara is individually responsible under both Article 6(1) and Article 6(3) of the Statute for all the crimes committed by AFRC troops under his command in Port Lokko District, namely:

(1) the attack on Manaarma, in respect of which Kamara was found individually responsible under Article 6(3) of the Statute only;
(2) sexual slavery in Port Lokko District;
(3) all of the crimes committed in Port Lokko District by AFRC troops under the command of Kamara that are encompassed within the Prosecution's other Grounds of Appeal, to the extent that the other grounds of Appeal are upheld; and
(4) based on (1) to (3) above, acts of terror (Count 1) and collective punishments(Count 2) in Port Lokko District.[43]

48. The other remedy sought by the Prosecution is for the Appeals Chamber to amend the Disposition of the Trial Chamber's Judgment and for an increment in the sentence imposed on Kamara.[44]

I. "ALLEGED" ERRORS IN THE APPROACH OF THE TRIAL CHAMBER TO THE EVALUATION OF THE ARTICLE 6(1) LIABILITY OF KAMARA

49. The Prosecution alleges that the Trial Chamber's approach to the assessment of the evidence in relation to the Port Lokko District crimes was "myopic"[45]in that the Trial

[42] Public Appeal Brief of the Prosecution, para 255
[43] Public Appeal Brief of the Prosecution, para 348
[44] Public Appeal Brief of the Prosecution, para 349

Chamber erred in failing to consider all of the evidence in this case as a whole, and the conduct of each of the accused as a whole, when determining the Article 6(1) liability of each of the Accused in respect of all of the Bombali District crimes and Freetown and Western Area crimes[46]

50. In this regard the Prosecution puts forward various arguments and submits by way of a summary "that it is always a question of fact to be determined on the basis of all the evidence in the case as a whole, and all of the conduct of the accused as a whole, as to precisely what crimes were committed pursuant to the orders of an accused, and what crimes were instigated, planned or aided and abetted by an accused."[47]

51. The Kamara Defence submits that apart from specific instances in the Kamara Appeal Brief argued to the contrary the Trial Chamber assessed the probative value and weight of the evidence in accordance with the Statute and Rules more particularly Rule 89(A) of the Rules.[48]

52. The Kamara Defence submits further that apart from specific instances in the Kamara Appeal Brief argued to the contrary the Trial Chamber assessed the evidence in a way as best favoured a fair determination of the case and which was consistent with the spirit of the Statute and the general principles of law and pursuant to Rule 89(B) of the Rules.[49]

53. The Kamara Defence therefore requests that the Appeals Chamber reject and or dismiss the Prosecutions arguments that the Trial Chamber's approach to the assessment of the evidence in relation to the Port Lokko District crimes was "myopic"[50]in that the Trial

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[45] Public Appeal Brief of the Prosecution, para 258.This paragraph goes on to refer to section C of the Prosecution's First Ground of Appeal
[46] Public Appeal Brief of the Prosecution, para 50. It is noted that in advancing this argument no reference is made therein to crimes committed in the Port Lokko District.
[47] Public Appeal Brief of the Prosecution, para 50
[48] Trial Chamber's Judgment, para 96.
[49] Trial Chamber's Judgment, para 96.
[50] Public Appeal Brief of the Prosecution, para 258.This paragraph goes on to refer to section C of the Prosecution's First Ground of Appeal

Chamber erred in failing to consider all of the evidence in this case as a whole, and the conduct of each of the accused as a whole, when determining the Article 6(1) liability of each of the Accused in respect of all of the Bombali District crimes and Freetown and Western Area crimes.[51]

54. The Kamara Defence says further that the Trial Chamber having handed down its Final Judgment cannot reverse its own finding in paragraph 1955a of the Trial Judgment as the Trial Chamber has now become *functus officio.*

II. "ALLEGED" ERRORS IN RESPECT OF THE INDIVIDUAL ARTICLE 6(1) RESPONSIBILITY OF KAMARA FOR THE PORT LOKKO

55. The Prosecution submits that in determining the Article 6(1) individual criminal responsibility of Kamara must be determined on the basis of the totality of the evidence as a whole and the only reasonable inference that could be drawn by any reasonable trier of fact is that Kamara planned, ordered, instigated or otherwise aided and abetted all of the crimes committed by the AFRC forces under his command in Port Lokko District between February 1999 and April 1999.[52]

III. PLANNING

56. The Trial Chamber defined Planning in relation to the law on individual criminal responsibility pursuant to Article 6(1) of the Statute as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[53]

57. The Trial Chamber stated that the actus reus required that the Accused , alone or together with others , designed the criminal conduct constituting the crimes charged. It is

[51] Public Appeal Brief of the Prosecution, para 50. It is noted that in advancing this argument no reference is made therein to crimes committed in the Port Lokko District.
[52] Public Appeal Brief of the Prosecution, para 260
[53] Trial Chamber's Judgment, para 765 referring to the Blaskic Trial Judgment, para 279.

sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[54]

58. The Respondent submits that despite the above qualifications and after rejecting the construction given by the Kamara Defence Team to the Brdanin Trial Judgment[55] which contends that responsibility for the planning of a crime only arises when an accused is "substantially involved at the preparatory stage of the crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance", the Trial Chamber after hearing all the evidence rightly found that the Respondent did not plan any of the attacks in the Port Lokko District.

59. The Respondent submits further that the despite the Trial Chamber's finding that the Respondent was the overall commander of the AFRC troops in the area known as the 'Westside Side' in Port Lokko District,[56] the evidence as narrated by Prosecution Witness Junior Johnson that it was he Junior Johnson as Operations Commander and his Operations Director who **planned** (emphasis added) the operations in the Port Lokko District[57] despite suggestions to the contrary as put forward by the Prosecution.

60. The Respondent therefore respectfully urges to Appeals Chamber to dismiss as without merit the arguments put forward by the Prosecution in this regard.

IV. ORDERED AND INSTIGATED

61. As regards these particular modes of perpetration or commission of crimes, that the Respondent 'ordered' and/or 'instigated' the commission of various crimes in the Port Lokko District so as to incur Article 6(1) liability the Prosecution relies on events that took place or allegedly took place in Mamamah and unnamed or unspecified locations in Gberi Bana within the Port Loko District.

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[54] Trial Chamber's Judgment, para 766 referring to the Kordic Appeal Judgment, paras 29, 31.
[55] Kamara Final brief, para 17 referring to Brdanin Trial Judgment para, 357.
[56] Trial Chamber's Judgment, para 1958.
[57] Trial Chamber's Judgment, para 628.

62. The Respondent submits that it refers to its arguments put forward in this Response in relation to the Prosecution Second Ground of Appeal and submits further that given that the crime locations relied upon by Prosecution to advance its arguments in this Ground of Appeal were not pleaded in the Indictment[58] the Trial Chamber was correct in refusing to attribute Article 6(1) individual criminal liability to the Respondent in respect of crimes committed in the Port Lokko District within the period relevant to the indictment.

63 The Respondent therefore respectfully urges to Appeals Chamber to dismiss as without merit he arguments put forward by the Prosecution in this regard.

V. OTHERWISE AIDED AND ABETTED

64. As regards this particular mode of perpetration or commission of crimes, that the Respondent 'otherwise aided and abetted' the commission of various crimes in the Port Lokko District so as to incur Article 6(1) liability under the Statute the Prosecution argues inter alia that as the Respondent was found to have incurred Article 6(3) individual criminal liability for the crimes committed in Manaarma the only conclusion open to any reasonable trier of facts is that the Respondent is **also** (emphasis added) individually criminally liable under Article 6(3) of the Statute for all other crimes committed by the AFRC forces under the command of the Respondent in Port Lokko District.[59]

65. Using the logic set out above the Prosecution urges the Appeals Chamber to of necessity find the Respondent culpable of Article 6(1) individual criminal under the Statute for having otherwise aided and abetted the commission of various crimes in the Port Lokko District.[60]

66. The Respondent respectfully submits that the Prosecution woefully failed during the Trial and consideration of the Prosecution and Defence evidence to convince the Trial

[58] Further Amended Consolidated Indictment para 50.
[59] Public Appeal Brief of the Prosecution, para 287
[60] Public Appeal Brief of the Prosecution, para 287

Chamber beyond a reasonable doubt about the Respondent's Article 6(1) criminal liability under the Statute for otherwise aiding and abetting the commission of various crimes in the Port Loko District during the period relevant to the Indictment.

VI. COMMITTED

67. The Prosecution seeks an Article 6(1) conviction under the Statute against the Respondent for committing the unlawful killing of children in Mamama.

68. The Respondent submits that as argued in its Second Ground of Appeal and also in paragraph 41 above the specific location of Mamama was not pleaded in the Indictment as part of the crimes committed in Port Lokko District and given especially that the mode of perpetration is that of 'committing' it would ultimately be unfair to at this appeal stage to convict the Respondent for the commission of any such crime as he was inter alia deprived of the opportunity to adequately prepare and defend himself.

VII. THE ALLEGED INDIVIDUAL ARTICLE 6(3) RESPONSIBILITY OF KAMARA FOR THE PORT LOKKO DISTRICT CRIMES

70. The Prosecution submits that on the basis of the findings contained in the Trial Chamber's Judgment the only conclusion open to any reasonable trier of fact is that the Respondent is individually responsible under Article 6(3) of the Statute for all the crimes committed by AFRC forces under his command in Port Lokko District.[61]

71. Relying on paragraphs 300 to 305 of the Public Appeal Brief of the Prosecution the Prosecution argument is that at the very least the Respondent must have had imputed knowledge of all the crimes committed by AFRC forces within Port Lokko District so as to confer on him Article 6(3) individual liability as a superior pursuant to the Statute if

[61] Public Appeal Brief of the Prosecution, para 305

only by virtue of the reputation of the AFRC forces as per the Bombali –Freetown Campaign.

72. The Respondent submits that the submissions relied by the Prosecution in paragraphs 300 to 305 of the Public Appeal Brief of the Prosecution are at best a passionate plea to the Appeal's Chamber for it to rely on circumstantial evidence to enter a conviction against the Respondent for Article 6(3) liability under the Statute as a superior.

73. The Respondent submits that in accordance with the Appeals Chamber decision:

> "A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him...Such conclusion must be established beyond reasonable doubt. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonable from that evidence, and which is consistent with the innocence of the accused, he must be acquitted."[62]

74. The Respondent submits that a possible conclusion available to a reasonable trier of fact is that Prosecution Witness Junior Johnson is responsible for the crimes committed under Article 6(3) of the Statute as a superior by AFRC forces in Port Lokko District.[63]

75. The Respondent therefore respectfully urges to Appeals Chamber to dismiss as without merit he arguments put forward by the Prosecution in this regard.

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[62] Delalic et al., Appeals Chamber Judgment, Feb. 20, 2001 at para 458
[63] Public Appeal Brief of the Prosecution, para 628

VIII. ALLEGED ERRORS IN THE TRIAL CHAMBER'S EVALUATION OF THE INDIVIDUAL RESPONSIBILITY OF KAMARA FOR UNLAWFUL KILLINGS

76. The Prosecution submit that where the Respondent has been found individually responsible under Article 6(3) of the Statute he should like wise be found individually responsible under Article 6(1) of the Statute for the same reasons given in 257 to 296 of the Public Appeal Brief of the Prosecution.[64]

77. The Respondent submits that it has already responded to these submissions and therefore respectfully urges to Appeals Chamber to dismiss as without merit the arguments put forward by the Prosecution in this regard.

IX. THE ALLEGED ERRORS IN THE TRIAL CHAMBER'S EVALUATION OF THE INDIVIDUAL RESPONSIBILITY OF KAMARA FOR SEXUAL SLAVERY

78. The Prosecution argues that the Respondent should be found individually responsible under both Article 6(1) and Article 6(3) of the Statute for the acts of sexual slavery committed by the troops under his command in Port Lokko District for the reasons given in paragraphs 259 and 305 of the Public Appeal Brief of the Prosecution.[65]

79. The Respondent submits that evidence capable of supporting a conviction generally was generally not led in Port Lokko District to show that persons allegedly under his command, authority or direction, if any took part in the incidents alleged by the Prosecution under these Counts, nor was any evidence of probative value equally led to show or prove that the Respondent participated with any person or group of persons in the locations referred to in Port Lokko District.

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[64] Public Appeal Brief of the Prosecution, para 308
[65] Public Appeal Brief of the Prosecution, para 329

80. The Respondent submits that subject to the arguments set out above it has already responded to these submissions and therefore respectfully urges to Appeals Chamber to dismiss as without merit the arguments put forward by the Prosecution in this regard.[66]

X. THE ALLEGED ERRORS IN THE TRIAL CHAMBER'S EVALUATION OF THE INDIVIDUAL RESPONSIBILITY OF KAMARA FOR COUNTS 1 AND 2 IN RESPECT OF THE PORT LOKKO CRIMES

81. The Trial Chamber was not satisfied that the elements of Counts 1 and 2 were established in Port Lokko District as regard the Respondent[67] and the Prosecution therefore appeals against this finding and further maintains that the Respondent should have been found individually responsible on Counts 1 and 2 in respect of the crimes committed in Port Lokko District.[68]

82. The Prosecution argues that the conviction of the Respondent pursuant to Article 6(3) of the Statute as a superior for the crimes committed in Manaarma in Port Lokko District is suggestive enough of the Respondents culpability so as to incur Article 6(1) individual responsibility under the Statute.

83. The Prosecution submits contrary to the findings of the Trial Chamber[69] that the primary purpose of the attack on Manaarma under the direction of the Respondent was spreading terror among the civilian population.[70]

84. The Respondent submits that a proper consideration and evaluation of the evidence suggests that the real motive for the Manaarmah attack was of a military nature and was directed at ECOMOG forces.[71] Indeed the attack on the Lady whose stomach was

[66] Defence Motion for Judgment of Acquittal of the Second Accused Brima Bazzy Kamara para 30.18.
[67] Public Appeal Brief of the Prosecution, para 334.
[68] Public Appeal Brief of the Prosecution, para 335.
[69] Trial Chamber's Judgment, para 1631.
[70] Public Appeal Brief of the Prosecution, para 345 and 346
[71] Public Appeal Brief of the Prosecution, para 310.

allegedly split open was carried out against her as she was alleged to have been supporting forces hostile to the AFRC troops as was the testimony of DBK 012.

85. The Respondent therefore concludes that there is no merit in the Prosecution's Third Ground of Appeal and same should be dismissed.

E. KAMARA'S RESPONSE TO PROSECUTION'S FOURTH GROUND OF APPEAL: THE TRIAL CHAMBER'S DECISION NOT TO CONSIDER JOINT CRIMINAL ENTERPRISE LIABILITY

I. DEFINITION AND SUMMARY

86. 'Joint Criminal Enterprise' (JCE) can be defined as:
"a mode of liability to which individuals can be held responsible for crimes committed by others if it is proved that the people were acting together with a common purpose or plan which involved the commission of crimes".

87. The Special Court for Sierra Leone (SCSL) statute makes no mention of the crime of JCE, but Article 20(3) states that the SCSL will be "guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and Rwanda". In the *Tadic* case before the ICTY, JCE was recognized as forming part of customary international law.[72]

[72] *Prosecutor v Dusko Tadic,* Appeal Judgment, para 190

88. The *Tadic* case set out three forms of liability for JCE[73]:

1. The basic form
2. The systematic form
3. The extended form

89. The Prosecution argument is that Kamara was involved in a JCE with senior RUF commanders. The Prosecution allege that Kamara is guilty of both the basic and extended forms of JCE liability. However the Trial Chamber found that this mode of liability was not available to the Prosecution as it had been improperly pleaded.

90. The Trial Chamber found that the purpose of the JCE must be inherently criminal. At paragraph 33 the Prosecution's indictment stated that the purpose of the JCE was:

> *"to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas."*

91. The Trial Chamber deduced that this was not a criminal purpose, and therefore JCE was not justiciable under the SCSL's jurisdiction.

II. FIRST ERROR OF THE TRIAL CHAMBER: RECONSIDERING EARLIER INTERLOCUTORY HEARINGS IN THE CASE, WITHOUT FIRST REOPENING THE HEARINGS

a) Effect of pre-trial Trial Chamber decision on Preliminary Motions

92. The Prosecution allege that the decision of the pre-trial Trial Chamber, where a differently constituted Trial Chamber found that JCE had not been effectively pleaded, should stand.[74]

[73] Ibid, para 196-204. See *Kamara,* Trial Chamber Judgment, para 61.

93. The Trial Chamber provides convincing reasons, why it has jurisdiction to decide the matter and to change the pre-trial decision.[75] The Trial Chamber stated that it can in certain circumstances "exceptionally reconsider a decision it, or another Judge or Trial Chamber acting in the same case, has previously made".[76]

b. Failure of Defence to argue defective pleading at an earlier stage[77]

94. The Prosecution cite the Trial Chamber as saying that "Preliminary motions pursuant to Rule 72(B)(ii) are the primary instrument through which alleged defects in an indictment should be raised, and the Defence should be limited in raising such objections at a later stage for tactical advantage".[78]

95. The Prosecution Appeal document completely fails to place this statement in his proper context. The Trial Chamber did in fact decide that the motion pursuant to Rule 72 was not based exclusively on "tactical purpose", but was related to constant complaints concerning the "vagueness of the indictment".[79]

c. Exceptional circumstances relied on by the Trial Chamber to reconsider a decision are not in play in this case[80]

96. In support of their arguments the Prosecution cite the ICTR case of *Cyangugu.*[81] In this case the ICTR Appeals Chamber found that the Trial Chamber had erred in deciding "to reconsider its pre-trial decisions relating to the specificity of the indictments at the stage

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[74] See Prosecution Appeal Document para 360, referring to *Kamara* Preliminary Motion Decision, paras 4-9.
[75] See para 83 of the Trial Chamber Judgment.
[76] Trial Chamber Judgment, para 25, referring to Prosecutor v Aloys Simba, Case No. ICTR-2001-76-T, Judgment, 13 December 2005.
[77] Prosecution Appeal Document, para 361
[78] Prosecution Appeal Document, para 365 referring to Trial Chamber's Judgment para 24
[79] Ibid.
[80] Prosecution Appeal Document para 366
[81] Cyangugu, Appeal Judgment, para 55

of deliberations, it should have interrupted the deliberation process and reopened the hearings".

97. The Prosecution state that "the decision to reopen the earlier interlocutory decisions on defects in the form of the indictment was taken only after final trial arguments and the close of the case". They argue that "there is an obligation on the defence to raise that issue at the earliest opportunity, to allow the defect to be remedied as efficiently as possible if the defect is found to exist".[82]

98. The Prosecution submit that the defence ought to have applied for interlocutory hearings to be reopened.

99. The Prosecution argue that the Defence should have applied to remedy any defects in an indictment at the "earliest opportunity".[83] However the vagueness (see above) of the indictment perhaps made it impossible for the Defence to have raised the issue any earlier.

100. Once the issue was raised, the Prosecution was given time to respond to the Defence's claim. At paragraph 84 of the Trial Judgment, the Trial Chamber state that reopening the hearing was decided against because the Prosecution had made submissions on the Defence's objection to the indictment in their Final Trial Brief and closing arguments.

d. <u>The Prosecution were not informed of the reopening of the interlocutory decisions until the written judgment emerged, and they should have been given clear notice</u>[84]

101. There is no obligation under the Rules of Procedure to provide notice to the parties that an interlocutory decision has been reopened. The Prosecution did have a chance to respond to the Defence's arguments, during closing oral submissions and to say that the

[82] Prosecution Appeal Document, para 368
[83] Prosecution Appeal Document, para 368
[84] Ibid, para 370

Defence document was too long to respond to properly, appears to be a very weak argument.

III. SECOND ERROR OF THE TRIAL CHAMBER: THE FINDING THAT JCE WAS DEFECTIVELY PLEADED

a. Disjunctive point

102. The Prosecution allege that it is permissible to plead both the basic and extended forms of JCE.[85] However the paragraph the Prosecution has cited from *Krnojelac* does not back up their submission. The relevant part of the paragraph reads:

> *"when the Prosecution charges the "commission" of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both. The Appeals Chamber also considers that it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged".*[86]

103. The Prosecution would no doubt argue that the word "preferable", envisages that the basic and extended forms of JCE could be pleaded together.

104. This paragraph does envisage the possibility of pleading both basic and extensive JCE, however the Appeals Chamber in this case has not given any detailed consideration to the disjunctive nature of pleading both the basic and extend forms of JCE liability. This is in marked contrast to the consideration given to the issue by the Trial Chamber in the *Kamara* case.

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[85] Ibid, para 373
[86] *Krnojelac,* Appeals Judgment, para 138

b. The Pleading of Supporting Facts[87]

105 The argument of the Prosecution is that whiles there is case law supporting the Trial Chamber's view of the four categories of supporting facts that must be present in order to prove JCE, there is also case law going the other way. The Prosecution argue that so long as the accused has been "meaningfully informed of the nature of the charges so as to be able to plead an effective defence", then the indictment is sufficient. [88]

107 At para 77 of the Trial Chamber Judgment, the Trial Chamber asserts that the Prosecution failed to plead a time period, when the JCE was operative. The pleading of the time period is the second category of the supporting facts, required to make out a JCE. [89] The Trial Chamber addresses the Prosecution submission that the time period should be "all times relevant to the indictment". The Trial Chamber states that if this is the case, the Prosecution must prove that the "common purpose was inherently criminal from its inception". [90] The Prosecution have clearly not done this.

c. The nature or purpose of the JCE

108 The indictment stated the purpose of the JCE as being:

> *"to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas".* [91]

The Trial Chamber found that this purpose was not criminal and that therefore there could be no JCE.

109 The Prosecution Appeal is based on two ICTY cases, (*Haradinaj* and *Martic*) where in both cases the ultimate objective was not criminal. [92] The Prosecution argue that the

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[87] Prosecution Appeal Document, para 377
[88] *Gacumbisi* Appeal Judgment para. 165
[89] See Trial Chamber Judgment, para. 64
[90] Ibid, para. 771
[91] Indictment, para 33.

principal factor to consider is the **means** by which the ultimate objective is to be obtained. In the two ICTY cases the means involved the "forcible removal" of persons from areas involved in the Yugoslavia conflict.

110 The Prosecution submits that even where the motive is not unlawful, "the accused will be guilty of a crime if the act satisfied the actus reus of a crime, and the accused and intent to perform those acts". [93]. (Prosecution Appeal Document para 387).

111 The Martic and Haradinaj indictments can be distinguished from the Kamara indictment. In both the Martic and Haradinaj indictments, the criminal **means** by which the ultimate objective was to be achieved were explicitly spelt out, whereas in the Kamara indictment they have not been.

112. In the Martic indictment:

> *"the purpose of the JCE was the forcible removal of a majority of the Croat, Muslim and other non-Serb population".* [94]

113. In the Haradinaj indictment:

> *"the common criminal purpose of the JCE was to consolidate the total control of the KLA over the Dukagjin operational zone by the unlawful removal and mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians"*[95]

114. The Martic and Haradinaj cases go into detail as to why the ultimate objective of the JCE involved criminal means. In both cases there is the common criminal purpose to forcibly remove civilians. Under Article 2(g) of the ICTY statute, "unlawful deportation or transfer ... of a civilian" constitutes a grave breach of the Geneva Conventions of 1949.

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[92] Prosecution Appeal Document, para 382
[93] Ibid, para 387
[94] Martic, second Amended Indictment, para 382 of the Prosecution Appeal Document.
[95] Haradinaj, Second Amended Indictment, para 26 in para 382 of the Prosecution Appeal Indictment.

The objectives in both the cases cited by the Prosecution are much more clearly elucidated than the vague wording of the criminal purpose given in the indictment pleadings of the Kamara case. (see above). In other words the criminal means of achieving the ultimate objective are spelt out in the Martic Haradinaj indictments, whereas they are not in Kamara indictment.

115 The Kamara indictment states that the members of the JCE were willing to "take any action necessary". This wording does not constitute a clear expression of the criminal **means** involved in concluding the JCE in the same way that the wording of the Martic and Haradinaj indictments does. (see above.

116. To extend serious criminal liability to those who are involved in non-criminal common enterprise would be an impermissible extension of international criminal law, and would amount to 'guilty by association'. This point of view is continuously echoed in the academic literature. For example Marco Sassoli states as a caveat to extend JCE that "there must be a criminal enterprise and the intention of the co-perpetrator to participate in and further such and enterprise. [96]

d. <u>Time at which or the period over which the enterprise is said to have existed</u>

117. The Prosecution Appeal Document alleges that the time period over which the JCE took place had "at least as much particularly as the indictments in the Martic and Haradinaj cases". [97] The Prosecution then states that there was "no defect ... in the way in which the time period of the JCE was pleaded".

118. The Prosecution have misunderstood the Trial Chamber's judgment. The Trial Chamber suggest that even if the relevant period is taken to be "all times relevant to the

[96] Sassoli and Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case', [2000] vol 839 Internal Review of eh Red Cross, quoting Tadic Appeals Chamber, Judgment, para 220
[97] Prosecution Appeal Document, para 404.

indictment," it follows that the common purpose must be inherently criminal from the inception of this time period. [98]The Prosecution have produced no evidence in this regard.

119. The Trial Chamber accepted that the common purpose of a JCE can change over time, [99] but found that the Prosecution had not pleaded these new and different purposes in the indictment and could not subsequently "mould the case against the accused as the trial progresses". [100]

120. The issue centres around the sufficiency of the Prosecution's pleadings as regards the criminal purpose of the JCE. The Prosecution gives little detail as to this criminal purpose or its changing nature.

IV. ELEMENTS OF JCE

121. If the Prosecution were able to prove that JCE should have been admitted at the pleading stage, there are a number of hurdles they would need to get over in order to prove Kamara's guilt.

122. **Actus reus**

(a) A plurality of persons

(b) The existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute (see above).

(c) Participation of the accused in the common design.

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[98] Trial Chamber Judgment, para 77.
[99] Trial Chamber Judgment, para 79.
[100] Ibid

The degree of participation required by the ICTY is a "substantial contribution to the enterprise's functioning". [101] This contribution is to have the aim of furthering the aim of the JCE. [102]

123. **Mens rea**

(a) Basic from JCE

The mens rea for the basic form of JCE is where all members of the JCE act according to a common design with a criminal intention to commit a crime, and such a crime is committed. [103]

(b) Extended form of JCE

The mens rea for extended JCE is subjective recklessness. The accused will be liable if their act occurs outside the common purpose, but it is a "nature and foreseeable consequences of the execution of that enterprise" and the "accused was aware that such a crime was a possible consequence of the execution of that enterprise, and that with the awareness he participated in that enterprise". [104]

[101] Kvocka et al, Case No. IT-98-30/1-T, 2 November 2001, (Trial Chamber) para 309
[102] Ibid.
[103] Tadic, Appeals Judgment, para. 196.
[104] Ibid. para 227

F. KAMARA'S RESPONSE TO PROSECUTION'S FIFTH GROUND OF APPEAL: THE TRIAL CHAMBER'S FAILURE TO FIND ALL THREE ACCUSED INDIVIDUALLY RESPONSIBLE ON COUNTS 1 AND 2 OF THE INDICTMENT IN RESPECT OF THE THREE ENSLAVEMENT CRIMES

124. The Trial Chamber found that the instances in this case of the commission of the three enslavement crimes (sexual slavery, forced labour, and child soldiers) did not satisfy the elements of acts of terrorism or collective punishment.[105]

125. The Prosecution contends that the Trial Chamber erred in law and fact in making the above finding in respect of the three crimes of enslavement and requests the Appeals Chamber to reverse this finding and to revise the Trial Chamber's Judgment by substituting findings that the conviction of the three accused on Counts 1and 2 of the Indictment includes the individual responsibility of the accused for acts of terrorism and collective punishments based on their criminal responsibility for the three enslavement crimes.[106]

126. In respect of the Count 1 act of terrorism the Trial Chamber found that the element of mens rea was not established in this case for the three enslavement crimes "as it was not established that the enslavement crimes were committed with the primary purpose to terrorise the civilian population.[107]

127. The Trial Chamber found that as regards Count 12 of the Indictment the purpose of the conscription and use of child soldiers was primarily military in nature.

128. The Trial Chamber found that as regards Count 13 of the Indictment the primary purpose of the commission of abductions and forced labour was primarily military in nature.

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[105] Public Appeal Brief of the Prosecution, para 446 referring to Trial Chamber's Judgment, paras 1447-**1459.**
[106] Public Appeal Brief of the Prosecution, para 447
[107] Public Appeal Brief of the Prosecution, para 451.

129. The Trial Chamber found that as regards Count 7 of the Incitement the primary purpose for the commission of the crimes of sexual slavery was the urge to take advantage of the spoils of war, by treating women as property and using them to satisfy sexual desires and to fulfil other conjugal needs.

130. The Prosecution concludes therefore that the only remaining issue is whether the third element i.e. whether the acts or threats of violence were committed with the primary purpose of spreading terror among [those] persons was satisfied in relation to the three enslavement crimes that were found to have been committed in this case.[108]

131. In respect of Count 2 collective punishment the Trial Chamber did not find the three enslavement crimes satisfied the elements for the crime this crime as set out below:
1. A punishment imposed indiscriminately and collectively upon persons for acts they have not committed; and
2. The intent on the part of the perpetrator to indiscriminately and collectively punish the persons for acts which form part of the subject matter of the punishment.

132. It is the submission of the Prosecution that no "explanation" was given by the Trial Chamber as to why the enslavement crimes did not satisfy the above mentioned elements.[109]

133. The Prosecution argument appears to centre on its interpretation the ICTY Appeals Chamber holding in the Galic case (referring to an identical provision, Article 13 of Additional Protocol II) where it was stated as follows;

> "...a plain reading of Article 51(2) suggests that the purpose of the unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that

[108] Public Appeal Brief of the Prosecution, para 459.
[109] Public Appeal Brief of the Prosecution, para 455

> the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats that is from their nature, manner, timing and duration."[110]

134. The Trial Chamber relying on the above Appeals Chamber holding was correct it is submitted when it took the view that where the conduct may have had more than one purpose it is necessary to identify one single purpose as the primary purpose, and that the mens rea requirement of acts of terrorism will only be satisfied if terrorisation of the civilian population can be established to have been that single primary purpose.[111]

135. The Respondent submits that the Prosecution in making reference to the particular holding in the Galic Appeal Judgment (para 104.) failed to appreciate the true import of the holding. The proviso is clear and unambiguous and reads thus;

> "provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats that is from their nature, manner, timing and duration."[112] (Emphasis added).

136. The Respondent submits that it cannot be inferred from any circumstances that he had at anytime throughout the period of the Indictment and in respect of Count 7, 12 and 13 any intention to either spread terror or inflict collective punishment pursuant to Counts 1 and 2 of the indictment and therefore concludes that there is no merit in the Prosecution's Fifth Ground of Appeal and same should be dismissed.

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[110] Galic Appeal Judgment, para 104.
[111] Public Appeal Brief of the Prosecution, para 464 referring to Trial Chamber's Judgment, para 1443.
[112] Galic Appeal Judgment, para 104.

G. KAMARA'S RESPONSE TO PROSECUTION'S SIXTH AND EIGHTH GROUND OF APPEAL: THE TRIAL CHAMBER'S FAILURE DISMISSAL OF COUNT 7 ON GROUNDS OF DUPLICITY

137. The Respondent will make submissions in respect of Ground 6 and 8 of the Prosecution's Appeal to the Trial Judgement. This relates to the dismissal of count 7 and 11 of the indictrnent against Kamara for duplicity.

138. The Prosecution contends that the errors of the Trial Chamber in respect of Ground 6 and 9 of the Prosecution Appeal are similar.[113]

139. In both cases the Prosecution Appeal has three strands, which will be dealt with in order below: the timing of the defence objection to the indictment, whether the indictment was defectively pleaded, and whether the trial chamber should have cured the fault.

I. TIMING OF THE DEFENCE OBJECTION

140. In respect of Ground 6 of the Prosecution Appeal, the Prosecution contend that the Trial Chamber had already decided on the validity of the indictment in the earlier interlocutory decisions of 1st April 2004. They suggest that by reconsidering its validity after the prosecution had closed its case the court erred in its procedure to the detriment of the Prosecution.

141. In respect of Ground 8 of the Prosecution Appeal, the Prosecution contend that "...at no stage before or during the trial in this case was it ever suggested by either the Defence or the Trial Chamber that Count 11 of the Indictment was defectively pleaded on grounds of duplicity in that it alleged both mutilations, and acts of physical violence and other mutilations, in a single Count."[114]

[113] Public Appeal Brief of the Prosecution para 653
[114] Public Appeal Brief of the Prosecution para 656

142. As noted in the Trial Judgement at Para 24, and discussed in Para 540 of the prosecution appeal, a trial chamber has an inherent discretion to reconsider decisions it has previously made. This is confirmed in *Stanislaw Galić*[115], Case No. IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 13; *Kajelijeli* Appeal Judgement, para 203 [116]; *Cyangugu* Appeal Judgement Para 55[117].

143. In this case, the trial judgement referred to the Cyangugu case and held that it had the power to reconsider its decision if a clear error of reasoning had been demonstrated or if it was necessary to do so to prevent an injustice. It appears that since the interlocutory decisions and the Trial Chamber did not address the duplex nature of count 7 and 11 respectively, it was the prevention of injustice that motivated the Trial Chamber to reconsider its decision.

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[115] A Trial Chamber may nevertheless always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realised that the previous decision was erroneous or that it has caused an injustice.[31] Where such a decision is changed, there will be a need in every case for the Trial Chamber to consider with great care and to deal with the consequences of the change upon the proceedings which have in the meantime been conducted in accordance with the original decision.

[116] There is an exception to this principle, however. In a Tribunal with only one tier of appellate review, it is important to allow a meaningful opportunity for the Appeals Chamber to correct any mistakes it has made.419 Thus, under the jurisprudence of this Tribunal, the Appeals Chamber may reconsider a previous interlocutory decision under its "inherent discretionary power" to do so "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice

[117] It is apparent from the foregoing that the Trial Chamber reconsidered in the Trial Judgement some of the findings it had made in certain pre-trial decisions on the form of the Indictments. This does not in itself constitute an error, as it is within the discretion of a Trial Chamber to reconsider a decision it has previously made146 if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.147 However, the Appeals Chamber emphasises that "where such a decision is changed, there will be a need in every case for the Trial Chamber to consider with great care and to deal with the consequences of the change upon the proceedings which have in the meantime been conducted in accordance with the original decision".148 In the present case, the Appeals Chamber considers that, once the Trial Chamber decided to reconsider its pre-trial decisions relating to the specificity of the Indictments at the stage of deliberations, it should have interrupted the deliberation process and reopened the hearings. At such an advanced stage of the proceedings, after all the evidence had been heard and the parties had made their final submissions, the Prosecution could not move to amend the Indictment. On the other hand, reopening the hearings would have allowed the Prosecution to try to convince the Trial Chamber of the correctness of its initial pre-trial decisions on the form of the Indictment, or to argue that any defects had since been remedied. The Appeals Chamber finds that the Trial Chamber erred in remaining silent on its decision to find the abovementioned parts of the Indictments defective until the rendering of the Trial Judgement.

144. In Para 55 of Cyangugu, the Appeals Chamber held that if the Trial Chamber intended to re-open its interlocutory decision, then it should have interrupted its deliberations and heard arguments from both the defence and prosecution. There appear to be 4 reasons for this:

a. to allow the prosecution to make their case as to why the indictment is not defective;
b. to allow the prosecution to argue that any defects had been remedied;
c. to allow the trial chamber to consider the effects of a change of decision on the parties; and
d. because the prosecution could not amend the indictment.

145. It could be argued that from the Trial Judgement and Prosecution Appeal the Trial Chamber did not give the Prosecution an opportunity to fully address the issue. However it may be possible to distinguish the present case from Cyangugu on several grounds.

146. The Prosecution did have an opportunity in their closing arguments to address the issue and chose to do so in a very cursory manner; the Prosecution had an opportunity through the Rule 50[118] procedure to amend the indictment as suggested by Judge Sebutinde in her Rule 98 decision, so as to separate the charge of "other acts of sexual violence", and failed to do so[119];

147. The Cyangugu case concerned the trial chamber effectively overturning its own interlocutory decision on an issue that had been fully discussed and decided at the

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[118] **Rule 50: Amendment of Indictment** (amended 14 March 2004)
(A) The Prosecutor may amend an indictment, without prior leave, at any time before its approval, but thereafter, until the initial appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it but, in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended indictment.

[119] "9. I do not think that Count 7 is incurably defective. In my opinion the defect could be cured by an amendment pursuant to Rule 50 of the Rules that splits the Offences into two separate counts. In my view, such a procedure would not unduly delay the trial, nor would it prejudice the accused persons since it would not necessitate the introduction of any new evidence of which they are not already aware and would in fact be in the interests of justice."

interlocutory stage. In this case, the question of whether count 7 was duplex was not raised, discussed or decided at any stage before the Rule 98 decision. This case is therefore materially different to the Cyangugu case and need not have necessitated the re-opening of the interlocutory appeal.

148. The Prosecution also rely on the Brdanin Trial Judgement to suggest that any fault in the indictment must be settled at the interlocutory stage. However even the most cursory reading of Para 52 of Brdanin demonstrates that the issue had once again been fully debated at the interlocutory stage, in contrast to this case where in the case of Count 7 the duplex nature of Count 7 had never been raised until the Rule 98 opinion[120].

149. Therefore in this case it may be argued that the Trial Chamber had the power to reconsider its earlier decision approving the Indictment or for that matter raise the issue of duplicity for the first time as it did in the case of Count 11.

150. Counts 7 and 11 were duplex, and hence could have prevented the Respondent from fully understanding the charges against him or defending himself against them, thus posing a serious risk of injustice.

151. The Prosecution had an opportunity to amend the indictment or address the issue in their closing arguments, and their failure to do so meant that the Trial Chamber was entitled to dismiss counts 7 and 11 as duplex.

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[120] Para 52. In the first place, the alleged defects of form that the Defence now seeks to raise resemble to a very large extent those that it raised earlier, in the only instance when it challenged the form of the Indictment. Then, as now, the Defence was challenging the specificity of pleading in the Indictment of the Accused's alleged responsibility pursuant to Article 7(1) and Article 7(3).88 As illustrated above, these challenges were addressed, fully litigated and finally decided upon by the Trial Chamber at the pre-trial stage of proceedings.

II. WAS COUNT 7 DEFECTIVE FOR DUPLICITY?

152. Article 17(4) of the Statute gives a defendant the right "to be informed of the nature and cause of the charge against him." A count that its duplex or that charges the defendant with two or more separate offences[121]" is said to offend this right.

153. In her Rule 98 opinion Judge Sebutinde highlighted that Count 7 charged the defendant with two separate offences under Article 2g of the statute, the first being "sexual slavery" and the second being "and any other form of sexual violence"[122]. The count is therefore duplex.

154. The Trial Chamber noted that the particulars mentioned in paragraphs 58 through 64 mainly identify acts of mutilations which are covered by Count10, while paragraph 60 of the Indictment particularises beatings and ill treatment. The Trial Chamber considered these acts solely under Count 11 as considering mutilations and ill treatment under the same Count that would result in a duplicitous charge[123]

155. The Prosecution contend that the rule against duplex charges is now redundant, particularly in international jurisprudence. As an example they cite Brdanin, however their use of this case is misconceived.

156. In Brdanin the Court held that in cases where widespread violations of human rights have occurred, for example large-scale multiple murders, it is permissible to charge multiple offences of the same type within a single count[124]. However in both cases the counts

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[121] Archbold on Criminal Pleading, Evidence and Practice, 43rd Edition, Vol 1, Page 46, Para 1-57

[122] Article 2g- Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence

[123] Trial Chamber's Judgment para 726

[124] Brdanin Indictment Decision

61. The right of the prosecution to lead evidence in relation to facts not pleaded in the indictment is not as unlimited as its response to this complaint may suggest. Article 21.4(a) entitles the accused "to be informed promptly and in detail [...] of the nature and cause of the charge against him". For example, it would not be possible, simply because the accused was not alleged to be directly involved, to lead evidence of a completely new offence which has not been charged in the indictment without first amending the indictment to include the charge. Where, however, the

charges different offences, and therefore creates a greater level of legal uncertainty as to what defence should be offered. For example must the defence refute all of the elements of both offences as it were, or would it be sufficient to disprove just one essential element of one offence in order to defeat the charge? The further international precedents offered by the prosecution appeal, namely the Bizimungu Interlocutory Appeal Decision and the Naletilic and Martinovic Indictment Decision, again suggest that only multiple offences of the same type, and not different types of offences, can be charged within the same count.

157. In the case of Ground 6 of the Prosecution Appeal the count is in fact entirely unclear as to what crimes are alleged to have been committed.

158. For example, Para 554 of the Prosecution Appeal states that if "sexual slavery" and "any other form of sexual violence" are seen as two separate crimes, then the clear meaning of "any other form of sexual violence" in Count 7 is simply any form of sexual violence punishable under article 2g excluding rape and sexual slavery. This is an entirely illogical argument on two fronts:

1. the true interpretation of article 2g, as used by Judge Sebutinde, is that it encompasses 5 crimes- Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence, with "any other form of sexual violence" being intended as a 'catch-all' provision. Therefore any other form of sexual violence is a separate crime in itself, whereas the prosecution suggest that it actually refers to sexual violence and forced pregnancy- the other forms of sexual violence referred to in article 2g but not mentioned within the indictment. Furthermore, the Prosecution did not appear to lead

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offence charged, such as persecution and other crimes against humanity, almost always depends upon proof of a number of basic crimes (such as murder), the prosecution is not required to lay a separate charge in respect of each murder. The old pleading rule was that a count which contained more than one offence was bad for duplicity, because it did not permit an accused to plead guilty to one or more offences and not guilty to the other or other offences included within the one count. Such a rule is completely impracticable in this Tribunal, given the massive scale of the offences which it has to deal with. 184 But the rule against duplicity was nevertheless also one of elementary fairness, and the consideration of fairness involved was that the accused must know the nature of the case he has to meet.

evidence or charges specifically addressing enforced prostitution or forced pregnancy, and it is therefore ridiculous to suggest that they intended to charge them.

2. The wording of count 7, if "any other form of sexual violence" is taken to mean any other offence of the type listed in article 2g, would suggest that the count also includes a charge of rape. This means that the defendant would have been charged with the same offence in two different counts, which would offend the rule against multiplicity.

159. It is therefore suggested that if the Prosecution cannot logically interpret their own charges, the defence would be seriously impaired in attempting the refute them.

III. SHOULD THE TRIAL CHAMBER HAVE CURED THE FLAWS?

160. The Prosecution suggest in both Ground 6 and 8 of their Appeal that the Trial Chamber should have cured the flaws in the indictment and allowed it to stand. They note that this is established practice in international tribunals and were followed by the trial chamber elsewhere in the judgement.

161. The Respondent submits that the Prosecution entirely misunderstand the nature of this power, which may be used to cure charges where the "material facts supporting those charges" have not been pleaded with sufficient precision[125].

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[125] SYLVESTRE GACUMBITSI Appeal
49. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused. The Appeals Chamber has held that "criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible 'the identity of the victim, the time and place of the events and the means by which the acts were committed.'"117
An indictment lacking this precision may, however, be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.118 When an appellant raises a defect in the indictment for the first time on appeal, then he bears the burden of showing that his ability to prepare his defence was materially impaired.119 In cases where an accused has raised the issue of lack of notice before the Trial Chamber, in contrast, the burden rests on the Prosecution to demonstrate that the accused's ability to prepare a defence
was not materially impaired.120

162. In this case the defects in the charges are that they are duplex, and therefore conceptually uncertain and difficult to defend against. The use of the power to cure charges referred to by the Prosecution is simply to allow them to introduce material facts at a later stage in order to give the indictment a sufficient factual basis, and has no relevance to a legal flaw in the wording of the charges.

H. KAMARA'S RESPONSE TO PROSECUTION'S SEVENTH GROUND OF APPEAL: THE TRIAL CHAMBER'S DISMISSAL OF COUNT 8 FOR REDUNDANCY

163. The issue under this ground is whether "forced marriage" can be charged as an "other inhumane act" under Article 2.i of the Statute. Part of the Prosecution's argument goes to whether forced marriage can be considered a crime against humanity at all.[126] This however, does not fully address the matter. It is submitted that even if forced marriage is found to be capable of being charged as a crime against humanity, the Prosecution still erred in charging it under Article 2 (i) and therefore the Trial Chamber were correct in law in dismissing Count 8 for redundancy.

164. Judge Sebutinde concludes that the crimes alleged as forced marriage are subsumed in the crime of sexual slavery as:

(i) The 'bush husband' exercised any or all the powers attaching to the right of ownership over his 'bush wife' whereby not only was she was held under captivity and not at liberty to leave but, in addition, she was forced to render gender-specific forms of labour (conjugal duties) including cooking, cleaning, washing clothes and carrying loads for him, for no genuine reward.

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[126] Prosecution Grounds of Appeal Section D para. 602 et. seq.

(ii) Invariably, the 'bush husband' regularly subjected his 'bush wife' to sexual intercourse, often without her genuine consent and to the exclusion of all other persons;

(iii)The 'bush husband' abducted and forcibly kept his 'bush wife' in captivity and sexual servitude with the intention of holding her indefinitely in that state or in the reasonable knowledge that it was likely to occur.[127]

It is submitted that this is indeed that case, and that therefore the Trial Chamber was correct in dismissing Count 8 for redundancy. However, if this is not the case, it is submitted that any alleged crime of forced marriage should still have been charged under Article 2.g rather than Article 2.i for the reasons outlined below, and therefore the Trial Chamber was still correct in dismissing Count 8.

165. The Trial Chamber, following the Dissenting Opinion of Judge Sebutinde in the Rule 98 Decision,[128] took the view that, "The offence of 'other inhumane acts' pursuant to Article 2(i) of the Statute is a residual clause which covers a broad range of underlying acts not explicitly enumerated in Article 2(a) through (h) of the Statute. In light of the exhaustive category of sexual crimes particularised in Article 2(g) of the Statute, the offence of 'other inhumane acts', even though residual, must logically be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity."[129]

166. The Prosecution argues that there is no logical basis for this sexual/non-sexual distinction,[130] but it is submitted that this does not fully take into account the internal structure Article 2 of the Statute. Article 2.g includes: "Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," (emphasis added) i.e. it itself contains a residual category, sufficient to encompass other crimes of a sexual

[127] Trial Chamber Judgement, Judge Sebutinde Separate Concurring Opinion para. 16. See the elements of the crime of Sexual Slavery as stated by the Trial Chamber in the Applicable Law Chapter of the Judgement.
[128] Rule 98 Decision, Judge Sebutinde Concurrence paras 10-14
[129] Trial Chamber's Judgement, para. 697, referring to *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 19(iii).
[130] Prosecution Grounds of Appeal para. 591, referring to Prosecution Closing Trial Submission at Transcript 7 December 206 pp. 62-63

nature. Therefore arguing (as the Prosecution do) that believing all sexual crimes to be encompassed within Article 2.g is akin to believing that all crimes of violence against the person are encompassed within Article 2. a-f is clearly a false analogy.

167. Judge Sebutinde refers to the residual category included within Article 2.g in her Separate Concurring Opinion in the Trial Judgement, going on to say that: "The clear legislative intent behind the statutory formula "*any other form of sexual violence*" in Article 2.g. is the creation of a category of offences of sexual violence of a character that do not amount to any of the earlier enumerated sexual crimes, and that to permit such other forms of sexual violence to be charged as "other inhumane acts" offends against the rule against multiplicity and uncertainty…."[131] (emphasis added).

168. The Prosecution also suggest that existing authorities suggest that the "other inhumane acts category does include crimes of a sexual nature.[132] However, the authorities cited are from the ICTR and ICTY,[133] whose statutes have a very different formulation of Article 3, their equivalent of Article 2. ICTR Statute Article 3.g, only refers to rape and has no residual category akin to that contained in Article 2.g of the Special Court Statute. Therefore it *is* consistent with the internal logic of Article 3 of the ICTR (and ICTY) Statute to charge other crimes of sexual violence under the general residual category of Article 3.i (equivalent to Special Court Statute Article 2.i). This is *not* the case with the Special Court Statute.

169. Indeed it is submitted that the purpose of the drafting of a more extensive sexual crimes paragraph in Article 2.g of the Special Court Statute is to include other sexual crimes in an area in which the definition is fast developing. It is worth noting that that in the Rome Statue of the International Criminal Court the definition has again been extended,

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[131] Trial Chamber Judgement, Judge Sebutinde Concurrence para 5, quoting *Prosecutor v. Sam Hinga Norman et. al*, Case No. SCSL-04-14-PT, Trial Chamber, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005 para 19 (iii).
[132] Prosecution Grounds of Appeal para. 595
[133] *Akayesu* Trial Judgement paras 688, 697; *Kuprekšić* Trial Judgement para. 566; *Kajeliji* Appeal Judgement paras 933-936 and para. 916.

including enforced sterilization before the internal residual category of "any other form of sexual violence of comparable gravity."[134]

170. Further it is submitted that the Article 2.g includes not only those acts which are purely physically sexual (such as rape) but also what have been termed "gender crimes." The Trial Chamber uses this term at para. 707: "The jurisprudence of the ICTY and the ICTR is reflected in the Rome Statute of the International Criminal Court which, like the Statute of the Special Court, now separates gender crimes into an isolated paragraph and codifies sexual slavery as a crime against humanity.[135]" (emphasis added).[136]

171. It is submitted that "gender crime" includes crimes which cause other harms alongside sexual harms such as non-consensual intercourse. The Prosecution refers to "forced conjugal association" which they state includes being forced to perform domestic duties or being subject to mistreatment. In arguing that this is not subsumed within sexual slavery the prosecution submit that "forced marriage is not, *per se*, a sub-category of sexual slavery or of slavery in general, but a distinct offence, which may be described as 'slavery like.'" It is submitted that if this is the case then an offence which is very like sexual slavery is entirely that type of offence intended to be covered by the residual category of sexual/gender crimes in Article 2.g.

172. The prosecution also argues that forced marriage need not necessarily include non-consensual sex.[137] However, they have advanced no evidence to show that this situation occurred in any of the crimes charged in this case. "On the underlying element of sexual abuse as an inherent component of forced 'marriage' Mrs. Bangura [the Prosecution expert] stated that all the victims or 'bush wives' interviewed, without exception, admitted to having been repeatedly raped or sexually abused or molested by their 'rebel

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[134] Rome Statue of the International Criminal Court Article 7.g

[135] Rome Statute, Article 7(1) (g)-2 (crime against humanity). The Rome Statute also recognises sexual slavery as a war crime in Article 8(2) (b) (xxii)-2 (other serious violation of the laws or customs of an international armed conflict) and Article 8(2) (e) (vi)-2 (serious violation of Common Article 3).

[136] For use of the term "gender crime" see also *Prosecutor v. Alex Tamba Brima, et al.*, Case No. SCSL-04-16-PT, Trial Chamber Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004, para.58. Also Trial Judgement, Judge Sebutinde Separate Concurring Opinion para. 4

[137] Prosecution Grounds of Appeal para. 615

husbands' while in captivity."[138] Any alleged crime of non-sexual forced marriage – or forced marriage without the element of non-consensual sex – simply does not arise in this case.

173. Indeed even the authorities upon which the Prosecution rely for acknowledgement that forced marriage may not always include non-consensual sex deal with forced marriage alongside systematic rape, sexual slavery and slavery-like practices.[139] Another states that "When "forced marriage" involves forced sex or the inability to control access or exercise sexual autonomy, which by definition, forced marriage almost always does, it constitutes sexual slavery,"[140] supporting the opinion of Judge Sebutinde submitted above.

174. Further it is submitted that Judge Sebutinde's view that forced marriages are "are clearly sexual in nature,"[141] is undoubtedly correct. If they are crimes they are clearly "gender crimes." Any other harm attached to this sexual nature and therefore, should it be found to be a crime against humanity, place it squarely within the scope of Article 2.g. Forced marriage is not alone in having other non-sexual harms which may attach to it, it is submitted that forced prostitution for example, also displays this characteristic.

175. To argue, as the Prosecution do, that forced marriage is not necessarily sexual is entirely inconsistent with its inclusion under the part of the indictment entitled "COUNTS 6-9: SEXUAL VIOLENCE". This was stated by Judge Sebutinde in her Opinion in the Rule 98 Decision.[142] The Prosecution were alerted to the redundancy of Count 8 at this stage and chose not to continue with charging forced marriage under this count.

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[138] Trial Judgement, Judge Sebutinde Separate Concurring Opinion para. 15

[139] Report of the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict E/CN.4/Sub.2/1998/13

[140] Sierra Leone Truth and Reconciliation Commission *Witness to Truth* vol 3B para 184

[141] *Prosecutor v. Brima et al*, SCSL-04-16-T, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde on the Trial Chamber's Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, para 14

[142] Ibid.

176. The Prosecution use the fact that "other inhumane acts" does not violate the principle of *nullem crimen sine lege* to argue that there is no difficulty in including forced marriage as a crime against humanity. This is not that case. That both the residual category of other inhumane acts and the residual category for sexual crimes within Article 2.g do not violate *nullem crimen sine lege* does not take away from the fact that a specific crime of forced marriage, which the Prosecution seeks to introduce, would indeed be novel and have to pass the test of similar gravity (and other element required for a crime against humanity).[143] This is not an easy test to pass and great care would be required to distinguish any crime of forced marriage to customary arranged marriage practices.

177. It is submitted that, in any case, the issue of whether forced marriage can ever be a crime against humanity is not a live issue in this case, as even if it is found to be so, as argued above, it should be charged under Article 2.g. Therefore in this case it was wrongly charged and the Trial Chamber was correct to dismiss Count 8 for Redundancy.

I. KAMARA'S RESPONSE TO PROSECUTION'S NINTH GROUND OF APPEAL: THE TRIAL CHAMBER'S APPROACH TO CUMULATIVE CONVICTIONS UNDER ARTICLER 6 (1) AND ARTICLE 6(3) OF THE STATUES.

178. The Trial Chamber in paragraph 800 stated that;

> Article 6(1) and 6(3) of the Statute denote different categories of individual criminal responsibility. Where both Article 6(1) and Article 6(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, it would constitute a legal error invalidating a judgement to enter a concurrent conviction under both provisions.[144] Where a Trial Chamber enters a conviction on the basis of Article 6(1) only, an accused's superior position may be considered as an aggravating factor in sentencing.[145]

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[143] See Prosecution Grounds of Appeal para. 592, also ICC Statue where Article 7.7 which refers to "any other form of sexual violence of comparable gravity."
[144] *Blaškić* Appeal Judgement, para. 91; *Kordić* Appeal Judgement, para. 34.
[145] *Blaškić* Appeal Judgement, para. 91; *Aleksovski* Appeal Judgement, para. 183; see also *Orić* Trial Judgement, paras 339-343.

179. The Respondent takes no issue with the Trial Chamber's approach in principle and in theory. As rightly stated by the Prosecution, this approach had been held in the ICTY Appeals Chamber that;

> Where criminal responsibility for an offence is alleged under one count pursuant to both Article 7(1) and Article 7(3)[Special Court Statute Article 6(1) and Article 6(3)] , and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).

180. The Respondent submits that the Prosecution has failed to appreciate the fact that when criminal responsibility are met under both Article 6(1) and Article 6(3) of the statute, the Trial Chamber will enter a conviction on the basis of Article 6(1) only and an accused's superior position ***would be*** considered as an aggravating factor in sentencing as was the present case. Contrary to the Prosecution's argument in paragraph 704, the Trial Chamber in its Judgement convicted Kamara under Article 6(1) on Counts 3 and 4 (unlawful Killing)[146] and in the Sentencing Judgement Kamara was found criminally responsibility under Article 6(3) for unlawful killing in Kono which said factor was used as an aggravating circumstance in the determination of his sentence.[147]

181. The issue to be considered is not the whether the geographical areas of the crimes are the same or different, but whether :- (1) both Article 6(1) and Article 6(3) responsibility are alleged under the same count, and the legal requirements pertaining to both of these heads of responsibility are met irrespective of whether they relate to the same facts or different facts; (2) both Article 6(1) and Article 6(3) responsibility are alleged under the different count, and where the legal requirements pertaining the different counts of these heads of responsibility are met in relation to the same facts.

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[146] Trial Chamber's Judgement. Para 2117
[147] Sentencing Judgement. Para 82

182. In the *Oric* case where the charges of Articles 7(1) and 7(3) of the Statute [same as Article 6(1) and 6(3) of the Special Court Statute] were set out in two different counts of the Indictment, namely Counts 3 and 5, the Trial Chamber in the ICTY held that;

> In giving particular significance to the crime base to which the individual criminal responsibility is attached, and to the peculiar content of wrongfulness by which each of the two types of responsibilities in Articles 7(1) and 7(3) of the Statute are characterised, the Trial Chamber finds that active involvement by way of participating in the principal crime carries greater weight than failure by omission. Further, the Trial Chamber finds that participation in the crime means to have made a causal contribution to the impairment of the protected interest, whereas the failure as a superior need not necessarily contribute to the injury as such, but may merely involve the omission of his duty, as is particularly evident in the case of failure to punish.[148]

183. In the above case the Trial Chamber differentiated the substance and degree of wrongfulness of active participation and passive non-preventing or non-punishing crimes of subordinates. First, it held that if the accused's conduct fulfils the elements both of commission or of participation according to Article 7(1) of the Statute and of superior criminal responsibility according to Article 7(3) of the Statute with regard to the same principal crime on basically the same facts, regardless of whether indicted in the same or in different counts, the accused will be convicted only under the heading of Article 7(1) of the Statute in terms of the more comprehensive wrongdoing. And secondly, the final sentence should reflect the totality of the culpable conduct, the additional wrongfulness associated with an accused's failure in his duties as a superior in terms of Article 7(3) of the Statute must be taken into account as an aggravating factor in the sentencing.[149]

184. In the present case the Trial Chamber found that Kamara's conduct fulfilled the elements of commission or of participation according to Article 6(1) of the Statute and of superior criminal responsibility according to Article 6(3) of the Statute with regard to the same principal crime on basically the different facts. The only difference with the *Oric* case

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[148] *Orić* Trial Judgement, paras 342.
[149] *Orić* Trial Judgement, paras 343.(emphasis added)

and the present case is that in the *Oric* case the counts were different and the facts the same but in the present case the counts are the same and the facts are different.

185. The Trial Chamber in its application of the law in paragraph 800 to the facts of the case and in accordance with the Trial Chambers view in Oric, convicted Kamara only under the heading of Article 6(1) of the Statute in terms of the more comprehensive wrongdoing which carried greater weight and failure in his duties as a superior in terms of Article 6(3) of the Statute as an aggravating factor in the sentencing.

186. However, if as suggested by the Prosecution that the a conviction should be entered under Articles 6(1) and 6(3) of the Statute separately in respect of the same count solely based on the different fact, then the use of Kamara's criminal responsibility under Article 6(3) as an aggravating factor in sentencing would be an error of law, leading to a miscarriage of justice.

187. The Respondent submits that, in its application of the cumulative conviction, the Trial Chamber has not erred in law and sees no reason why the Appeals Chambers should revise the Trial Chamber's Judgement based on Prosecution's Ninth Ground of Appeal. The Prosecution has failed to show that this alleged error of the Trial Chamber lead to a miscarriage of justice.

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04 October 2007

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Respectfully Submitted,
Andrew K. Daniels

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