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SCSL-04-16-A
(1303-1386)

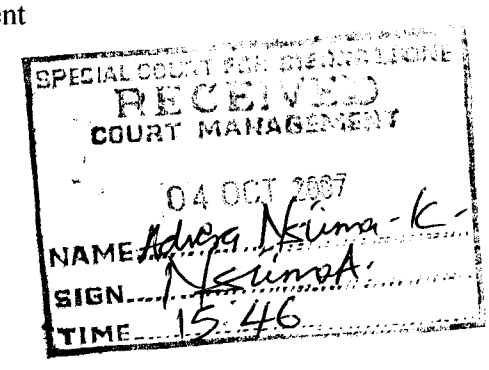
SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

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

Registrar: Herman von Hebel, Registrar

Date: 4th October 2007



The Prosecutor **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL -04-16-A

Public Document

RESPONDENT'S SUBMISSIONS - KANU DEFENCE

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INTRODUCTION

Further to the Appeal Brief of the Prosecution filed on the 13th September 2007,[1] pursuant to Rule 111 of the Rules of Procedure and Evidence of the Special Court ("the Rules of the Court"), against the Judgment of the Trial Chamber dated 20th June 2007,[2] as amended by the Corrigendum issues by the Trial Chamber on 19th July 2007,[3] the Kanu Defence hereby files its Respondent's Submissions pursuant to Rule 112 of the Rules of the Court.

Kindly take notice that in these, "Respondent's Submissions", **KANU** shall for easy reference, be referred to as **THE APPELLANT**, consistent with his Appeal Brief.

SUBMISSIONS

1. Prosecution's First Ground of Appeal: Failure of the Trial Chamber to find all three Accused criminally responsible under Article 6(1) and Article 6(3) for all crimes committed in Bombali District and Freetown and the Western Area

1.1 Under this ground, the Prosecution submits that the Trial Chamber erred in law and in fact:

(1) in not finding Brima, Kamara and Kanu each individually responsible, under Article 6(1) of the Statute, of planning, instigating, ordering, or otherwise aiding and abetting in the planning, preparation, or execution of ***all*** Bombali District Crimes and, Freetown and Western Area Crimes; and

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[1] SCSl-04-16-A, Registry pages 177-1087.

[2] SCSL-16-613, Registry pages 21465-22096.

[3] SCSL-16-628, Registry pages 23025-23678.

(2) in not finding Brima, Kamara and Kanu each individually responsible, under Article 6(3) of the Statute, for ***all*** Bombali District Crimes and, Freetown and Western Area Crimes.[4]

1.2 The Prosecution submits that all Bombali District Crimes and, Freetown and Western Area Crimes, were committed as part of a single, planned and systematic attack and campaign. Therefore, that the Trial Chamber erred in law and in fact in considering only the individual responsibility of each Accused for specific aspects of, or specific incidents occurring within the planned and systematic attack and campaign, and in failing to consider the individual responsibility of each Accused for planning, instigating, ordering, and otherwise aiding and abetting the campaign of crimes as a whole.[5]

Liability under Article 6(1) – Prosecution's case

1.3 The Prosecution's submission with respect to the liability of all 3 Accused under Article 6(1), is very basic. The Prosecution argues that once the Trial Chamber had found that all Bombali District Crimes and, Freetown and Western Area Crimes, were committed by the AFRC,[6] it should have proceeded to find all 3 Accused guilty of ***all*** Bombali District Crimes and, Freetown and Western Area Crimes, as they were all part of a single, planned and systematic attack and campaign in which all 3 Accused took part.[7] The Prosecution therefore, takes exception to the approach that was adopted by the Trial Chamber in assessing the individual responsibility of each Accused under Article 6(1), where it looked at each aspect of, or specific incident occurring within the alleged single systematic attack and campaign.[8]

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[4] Prosecution Appeal Brief, para. 15.

[5] Prosecution Appeal Brief, para. 16.

[6] Prosecution Appeal Brief, paras 8-10, in particular para. 10.

[7] Prosecution Appeal Brief, para. 16.

[8] *Ibid.*

1.4 This approach, the Prosecution submits, "involved a rather myopic examination of individual incidents and individual modes of liability under Article 6(1), in which the Trial Chamber only found an Accused individually responsible under Article 6(1) in cases where there was direct evidence relating specifically to a particular Article 6(1) mode of liability of a particular Accused in respect of a specific crime or incident."[9]

1.5 The Prosecution argues that the approach is erroneous both in law and in fact in four major respects. Firstly, in that, it implicitly assumes that liability under Article 6(1) will only exist where there is direct evidence that an Accused specifically planned, instigated, ordered, committed, or otherwise aided and abetted a specific crime or incident.[10] Much as one may well plan, instigate, order, or otherwise aid and abet a specific crime or incident within the context of a widespread attack, the Prosecution argues, one may also be liable for planning, instigating, ordering or otherwise aiding and abetting the entire attack.[11]

1.6 The other three errors identified by the Prosecution are essentially variants of the basic argument that the Trial Chamber erred in not entering intra-Article multiple convictions against the Accused, as all the Article 6(1) mode liabilities were part of the alleged single, planned and systematic attack and campaign. The first argument under this heading is that the Trial Chamber's approach fails to appreciate that a single act (or omission) of an Accused may constitute an Article 6(1) mode of liability in relation to more than one crime.[12] The second argument contends that the Trial Chamber failed to appreciate that the Accused's conduct while specifically proving criminal conduct in one respect might also prove

[9] Prosecution Appeal Brief, para. 34.

[10] Prosecution Appeal Brief, para. 35.

[11] Prosecution Appeal Brief, para. 36 *et seq.*

[12] Prosecution Appeal Brief, para. 42.

criminal conduct of another crime.[13] The third argument contends that the Trial Chamber erroneously held Article 6(1) mode liabilities to be mutually exclusive in respect of a given crime. That is, once the Court found the Accused individually responsible under Article 6(1), for say, "ordering" a crime, it declined to make any finding of whether the Accused also planned, instigated or aided and abetted that crime.[14]

1.7 The Prosecution therefore submits that all 3 Accused should have been found guilty under Article 6(1) of all Bombali District Crimes and, Freetown and Western Area Crimes. On the evidence on the record, or alternatively, on the evidence considered by the Trial Chamber, the Prosecution submits; the only conclusion that could be reached is that all these crimes were part of a single, planned and systematic attack and campaign.

1.8 In Section F of its Brief, the Prosecution therefore submits that the Appellant – Kanu should be found guilty of the following Article 6(1) crimes: planning, ordering, instigating and, aiding and abetting, all Bombali District Crimes and, Freetown and Western Area Crimes (including those that might be added on Appeal), in so far as they were part of the alleged single, planned and systematic attack and campaign.

1.9 The hallmark of the Prosecution's First Ground of Appeal is the hypothesis that all Bombali District Crimes and, Freetown and Western Area Crimes were part of a single overall plan ("***the single overall plan hypothesis***").[15] The plan, the Prosecution alleges, was formulated at a meeting in Koinadugu District (at

[13] Prosecution Appeal Brief, paras 43-44.

[14] Prosecution Appeal Brief, para. 45. Also see, paras, 46-49.

[15] Prosecution Appeal Brief, Section B, pp. 13-19.

Krubola) sometime in April/May 1998. The plan, it is further alleged, subsisted until the AFRC's withdrawal from Freetown.[16]

1.10 The Prosecution posits two arguments in support of the *single overall plan hypothesis*. Firstly, it submits that the systematic and widespread nature of the atrocities committed on the *Bombali-Freetown Campaign* shows that the attacks were part of an overall plan.[17] Secondly, that these attacks followed specific addresses, in particular the *Mansofinia Address*[18] and the *Orugu Address*,[19] both by Brima, where he either ordered or instigated the commission of atrocities against the civilian population, shows that the attacks were part of an overall plan. That widespread atrocities followed these addresses, the Prosecution argues, shows that the Bombali District Crimes and, Freetown and Western Area Crimes were not isolated incidents, but rather, were part of a single overall plan.[20] The only reasonable conclusion open to any reasonable trier of fact, the Prosecution submits, is that none of the crimes committed during the *Bombali-Freetown Campaign* were isolated incidents. Rather, that the "*crimes were an integral part of the plan for the Bombali-Freetown Campaign, and were committed in execution of the Bombali-Freetown Campaign*" (Own emphasis).[21]

Liability under Article 6(1) – The Appellant's response

[16] The Appellant contests the conclusion posited by the Prosecution that the AFRC's withdrawal from Freetown, and the attendant crimes committed, were part of the original Bombali-Freetown Campaign. The Appellant submits that the overall plan conceived at Krubola only envisaged a successful attack on Freetown. A disgraced retreat was never contemplated. The retreat from Freetown therefore, while incidental to the plan was not part of the overall plan.

[17] Prosecution Appeal Brief, paras 22-27.

[18] Prosecution Appeal Brief, para. 28.

[19] Prosecution Appeal Brief, para. 29.

[20] Prosecution Appeal Brief, para. 30.

[21] *Ibid.*

1.11 The Appellant contests the Prosecution's *single overall plan hypothesis* on a number of fronts. Firstly, as matter of law, the Appellant submits that the *single overall plan hypothesis*, as advanced by the Prosecution, is not legally tenable. The hypothesis impermissibly ties the individual responsibility of the Accused under Article 6(1), to the collective responsibility of the AFRC as a group, with respect to all the crimes committed in Bombali District and, Freetown and Western Area. The Prosecution's submissions, it might be recalled, urge the Court, in assessing the Accused's individual responsibility under Article 6(1), to look at the global picture against the background of the Trial Chamber's general finding that all Bombali District Crimes and, Freetown and Western Area Crimes, were committed by the AFRC.[22]

1.12 Most incredible however, is the Prosecution's condemnation of the approach that was taken by the Trial Chamber in establishing the individual responsibility of the Accused under Article 6(1), which analyzed each individual set of circumstances where atrocities were committed, rather than look at all the atrocities as a global whole.[23]

1.13 The Appellant recalls the legal submissions made under paragraphs 5.7 and 5.8 of his Appeal Brief,[24] and submits that the *single overall plan hypothesis* is impermissible in that it negates one of the cardinal principles of international criminal law, that culpability is personal and that objective and strict criminal liability is not permissible.[25]

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[22] Para. 1.3 hereof.

[23] Prosecution Appeal Brief, para. 16. Also see para. 31 *et seq.*

[24] *Prosecutor v Brima, Kamara, Kanu, SCSL-04-16-A*, "Kanu's Submissions to Grounds of Appeal", 13 September 2007.

[25] Cassese, *International Criminal Law*, 2003, at p. 209; Also see Daphna Shraga and Ralph Zacklin, *The International Criminal Liability for the Former Yugoslavia*, EJIL Vol. 5 1994, no. 3, at p. 370.

1.14 Secondly, the Appellant submits that, contrary to the assertion by the Prosecution, the approach that was taken by the Trial Chamber in establishing the Accused's Article 6(1) liability, which looked at each aspect of, or specific incident where atrocities were committed, with respect to each Accused, was the proper approach under the circumstances of the case.

1.15 The Appellant recalls the legal submissions in paragraph 5.23 of his Appeal Brief and submits that, given that the atrocities in question were committed by an irregular force in the context of guerilla warfare,[26] it was well-considered of the Court to proceed with extra caution in assessing the individual responsibility of the Accused. This follows from the established principle that where one exercises informal authority, the standard of proof is higher than that applicable to one holding an official position of command and serving within a formal and structured system of organization.[27] The Appellant observes that, while this principle would ordinarily apply where the Courts are dealing with the Accused's command responsibility, by parity of reasoning, it should equally apply in instances as the present one, where the Court seeks to establish the Accused's individual responsibility in respect of atrocities committed by an irregular force in an entire district, and in the context of a guerilla war.

1.16 Thirdly, the Appellant contests the factual basis upon with the *single overall plan hypothesis* is founded. More particularly, the Appellant contest the Prosecution's submission that the crimes committed were an integral part of the plan for the *Bombali-Freetown Campaign*, and were committed in execution of the *Bombali-Freetown Campaign.* This submission has no factual basis. The Appellant submits that the *single overall plan hypothesis*, on the facts of the case, or alternatively, on

[26] Both the military experts, Colonel Iron for the Prosecution and General Prins for the Defence agree that the AFRC was an irregular force that was waging guerilla warfare. This aspect of their evidence was accepted by the Trial Chamber. See for instance, Trial Chamber Judgment, para. 556.

[27] *Prosecutor v Galic*, ICTY Trial Chamber Judgment, 5 December 2003, IT-98-29, para. 174. See also *Prosecutor v Oric*, ICTY Judgment, 30 June 2007, IT-03-68-T, para. 320.

the facts that were considered by the Trial Chamber, is neither reasonable nor the only reasonable conclusion that is open to a reasonable trier of fact.

1.17 The Appellant acknowledges that a plan was conceived at Krubola. A meeting was held ***to discuss the future*** of the AFRC and ***to develop a new military strategy***. The military strategy involved the establishment of a new secure base in the north western part of Sierra Leone in preparation of a military offensive to repossess Freetown. An advance team was subsequently dispatched for that purpose.[28]

1.18 The overall plan was however not criminal in nature. Neither did it entail any criminal activities. The plan was strictly military in nature and sought to further a military end – the repossession of power in Freetown. There is no evidence or any finding that the plan, as conceived at Krubola, involved massive and widespread atrocities against the civilian population. The Prosecution does not make that suggestion in its Appeal Brief. Rather, it conveniently defers this assertion until a period subsequent to the meeting at Krubola – *the Mansofinia Address*.[29]

1.19 The Appellant therefore submits that the acts of violence against the civilian population that were committed on the *Bombali-Freetown Campaign*, in particular, the Bombali District Crimes and, Freetown Western Area Crimes, were not part of the overall plan conceived at Krubola. Neither were they part of any other overall plan, as there is no evidence nor finding of any other grand scheme. As the Prosecution explicitly concedes, there was only one overall plan, the one conceived at Krubola; the so-called, "*Bombali-Freetown Campaign*".[30] The incidents of crime in the Bombali District and in Freetown and the Western Area were therefore, in the context of the overall plan, ***independent*** acts of violence

[28] Prosecution Appeal Brief, paras 17-20.

[29] Prosecution Appeal Brief, Section B, p. 13, para. 20, in particular.

[30] Prosecution Appeal Brief, para. 22.

that were instigated particularly by Brima firstly, following the *Mansofinia Address*, and secondly, following the *Orugu Address*.

1.20 The point is reinforced by the fact that incidents of crime stopped once Musa took over command of the entire AFRC force at Colonel Eddie, only to resume after his death, when Brima was once again in control. Once Musa took over command at Colonel Eddie, throughout the entire march to Waterloo where he died, there is no evidence and no findings of any atrocities by the AFRC. The only evidence, which is consistent with the main objective of the overall plan conceived at Krubola, is of the AFRC's military engagements along the way. As the Trial Chamber found:[31]

> Upon arrival in 'Colonel Eddie Town' in November 1998, SAJ Musa assumed command. ..... SAJ Musa reorganized the troops and began the advance towards Freetown. The troops passed through the villages of Mange, Lunsar, Masiaka and Newton before arriving in Benguema in the Western Area in December 1998. Throughout the advance, the troops withstood frequent attacks by ECOMOG. ***Little evidence was adduced that the troops targeted civilians during this period, rather, they concentrated on purely military targets.***[32] (Emphasis added.)

1.21 The Appellant therefore submits that it is ill-conceived to try to paint the entire plan conceived at Krubola with criminality on the basis of some independent incidents of violence that occurred in the course of the execution of the plan at the behest of one particular leader – Brima. The Appellant submits that, while the orders by Brima to commit crimes might have tainted a part of the overall plan with criminality, in so far as they "remained effective and applicable to the incidents that occurred some time after their issuance",[33] they did not eclipse the

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[31] Trial Chamber Judgment, para. 198.

[32] Also see the Trial Chamber Judgment, para. 1143, where the Court accepted the evidence of Defence Witness DAB-095 that at a Muster parade held at Colonel Eddie, SAJ Musa gave an order that the SLAs should not attack civilians.

[33] Trial Chamber Judgment, para. 1725.

entire plan. There are no findings, nor is it reasonable on the findings on record, to suggest that the orders lasted the entire *Bombali-Freetown Campaign*. In fact, that Brima almost always had to reissue orders to target civilians ahead of each attack goes to prove that criminality was never an integral part of the overall plan.[34]

1.22 On the basis of the foregoing argument, the Appellant submits that it would also be ill-conceived to suggest that, while the original overall plan at Krubola might not have harboured any criminal intentions, it evolved into one that involved the commission of atrocities. As submitted above, the fact that the commission of atrocities only coincided with the overall leadership of Brima shows that the commission of atrocities was not part of the overall plan that was conceived at Krubola. Further, while criminality might have tainted particular stages of the overall plan, it did not overshadow the entire plan as to make it entirely criminal. A significant part of the campaign, especially under Musa, as the Trial Chamber found, was crime free.

1.23 On the basis of the foregoing, the Appellant therefore contests the assertion by the Prosecution that the only reasonable conclusion open to any reasonable trier of fact is that the crimes that were committed in the Bombali District and, Freetown and the Western Area, were an integral part of the plan for the *Bombali-Freetown Campaign*, and were committed in execution of the *Bombali-Freetown Campaign*. [35] Rather, the commission of crime was an historical accident that resulted from the leadership of one particular individual. Therefore, that it would

[34] With respect to almost every major attack on civilians, the Trial Chamber found that Brima would always address the troops ordering or inciting them to commit atrocities. The addresses by Brima for instance include, "the Mansofinia Address" – Trial Chamber Judgment, paras 238, 1550, 1552, 1691-1695, 1725, 1830; "the Kamagbengbe Address" before the Karina attack – Trial Chamber Judgment, para, 1710; "the Rosos Address" – Trial Chamber Judgment, paras 1712; 1717-1719, 1714-176; "the Orugu Address" – Trial Chamber Judgment, paras 398-399, 402, 473, 532, 614-615, 902, 1580, 1773, 1790, 1945, 2068.

[35] For the applicable standard when adverse inference can be drawn, see: *The Prosecutor v. Delalic et al*, IT-96-21-A, Judgment (AC), 20 February 2001, para. 458.

defeat the course of justice in determining the Appellant's responsibility under Article 6(1) of the Statute, to look "*at all of the evidence in the case as a whole, and all of the conduct of the Accused as a whole*".[36]

1.24 On the basis of the foregoing argument, the Appellant submits that this Ground of Appeal should not succeed.

Article 6(3) Liability

1.25 With respect to the Appellant's liability under Article 6(3) of the Statute, the Prosecutions raises two main submissions, which are dealt with separately below:

Freetown and Western Area Crimes

1.26 The first submission, which is carefully couched as a ground of appeal on a point of law, essentially seeks a clarification of the Trial Chamber's finding in paragraph 2080 of the Judgment. The Prosecution questions why the Trial Chamber found Kanu guilty under Article 6(3), for crimes that were committed in the "Western Area" only, when in all its deliberations it had referred to "Freetown and the Western Area". This omission of "Freetown", the Prosecution argues, excludes Kanu from liability under Article 6(3), for the crimes committed in Freetown.[37] This 'omission' the Prosecution opines, could be a typographical error.[38] If however the 'omission' were deliberate, the Prosecution requests the Appeals Chamber to make an express finding that Kanu was also responsible under Article 6(3), for the crimes committed in Freetown.[39]

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[36] Prosecution Appeal Brief, para. 50.

[37] Prosecution Appeal Brief, para. 178.

[38] Prosecution Appeal Brief, para. 179.

[39] Prosecution Appeal Brief, para. 181 read with para. 180.

1.27 The Appellant submits the issue that this submission raises is not one for appeal. Consequently, the Prosecution is in the wrong forum. The Prosecution's submission, in so far as it, in the first instance, raises the possibility of a *typographical error* resulting in an *ambiguity*,[40] calls for a clarification by the Trial Chamber itself.

1.28 The Prosecution attempts to make the issue an appealable one by asking the Appeal's Chamber to revise the Trial Chamber's finding, if it establishes that the Trial Chamber deliberately excluded "Freetown" from the areas that Kanu is liable for under Article 6(3).[41] The Appellant however submits that, that aspect is only secondary to a preliminary finding by the Appeals Chamber that the omission was not a typographical error. The Appeals Chamber first has to make a determination that the omission of "Freetown" was a not typographical error before determining whether the omission was deliberate. The Appellant submits that the Appeals Chamber, short of conjure, would not be in a position to make that determination. The Prosecution is therefore tempting the Appeals Chamber into the realm of conjecture, which Court is neither legally nor factually disposed to venture into.

1.29 The Appellant observes that while the Rules of the Court appear to be silent on the issue of the correction of a Judgment, it is established in the practice of international criminal tribunals, including the Special Court, that a party to any proceedings can request a tribunal that would have made a particular decision or Judgment, to clarify any part of that decision or Judgment that is ambiguous or unclear to that party.[42] The Appellant observes further that, there appears to be no prescription rules attaching to this procedure. Therefore, there was nothing to stop

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[40] Prosecution Appeal Judgment, para. 179.

[41] Prosecution Appeal Brief, paras 181-182, read with para. 180.

[42] See for instance, *Prosecutor v Norman, Fofana, Kondewa, SCSL-04-1-T*, "Decision on Joint Motion of the First and Second Accused to clarify the Decision on Motion for Judgment of Acquittal Pursuant to Rule 98", 3rd February 2005.

the Prosecution from adopting this procedure in seeking to clarify the perceived ambiguity in paragraph 2080 of the Trial Chamber's Judgment. The Appellant submits that the Prosecution's submissions in this respect are a belated attempt to achieve what it failed to do at the appropriate time before the appropriate forum – the Trial Chamber.

1.30 The Appeals Chamber must therefore dismiss the Prosecution's submissions under this heading on the basis that it not possible, both legally and factually, for it to intervene in the manner requested by the Prosecution.

1.31 Alternatively, should this part of the Prosecution's Ground of Appeal succeed, the Appellant submits that the revision of the Trial Chamber's findings and the entry by the Appeals Chamber of an express finding that Kanu was also responsible under Article 6(3), for the crimes committed in Freetown, would only be necessary to describe the Appellant's full culpability or to capture the totality of his criminal conduct. It should however not affect the sentence.

1.32 The Appellant submits that the global sentence of fifty years imprisonment that was passed against him already took into account his responsibility under Article 6(3) for the crimes committed in Freetown. In its deliberations on sentencing, the Trial Chamber specifically acknowledged that, "Kanu was further [to his responsibility under Article 6(1)] found liable under Article 6(3) for crimes committed by his subordinates throughout Bombali District and ***Freetown and the Western Area***."[43] (Emphasis added.) Therefore while the Appellant's responsibility under Article 6(3) for Freetown might have been omitted in paragraph 2080 of the Judgment, it was nevertheless taken into account for sentencing purposes and reflects in the sentence against the Appellant.

Enslavement crimes

[43] Sentencing Judgment, para. 95.

1.33 The Prosecution's second submission with respect to the Appellant's liability under Article 6(3) predominantly relates to the issue of inter-Article cumulative convictions. The Prosecution argues that the Trial Chamber erred in only considering the Appellant's responsibility for the three enslavement crimes under Article 6(1) and not giving consideration at all to his responsibility under Article 6(3).[44]

1.34 The Prosecution submits that it is permissible to enter inter-Article cumulative convictions both under Article 6(1) and Article 6(3).[45] Further, the Prosecution accepts the Trial Chamber's opinion that, where the legal requirements pertaining to both Article 6(1) and Article 6(3) of the Statute are met in relation to a particular crime, the Trial Chamber would enter a conviction on the basis of Article 6(1) only, and would consider the Accused's superior position as an aggravating factor in sentencing.[46]

1.35 The Prosecution however places the caveat that, where this approach is adopted, the Trial Chamber should make an express finding in its reasoning in the body of the Judgment, as to the Article 6(3) responsibility of the Accused for every crime. This is because the Accused's Article 6(3) conviction would be relevant for sentencing (as an aggravating factor) with respect to his Article 6(1) conviction for the same crime.[47]

1.36 The Prosecution thus, in paragraphs 186 and 187, makes out a case against the Appellant – Kanu, for command responsibility for the three enslavement crimes in Bombali District and, Freetown and Western Area. Accordingly, it requests the Appeals Chamber to revise the Trial Chamber's Judgment by adding a finding

[44] Prosecution Appeal Brief, para. 183.

[45] Prosecution Appeal Brief, para. 161 as incorporated in para. 184.

[46] Prosecution Appeal Brief, para. 162 as incorporated in para. 184.

[47] Prosecution Appeal Brief, para. 163 as incorporated in para. 184.

that Kanu is individual responsible under Article 6(3) of the Statute, for the three enslavement crimes in Bombali District and, Freetown and Western Area.[48]

1.37 In response to the Prosecution's submissions under this heading, the Appellant recalls the submissions under Ground Six of his Appeal Brief and specifically incorporates the same herein, subject to the necessary changes.

1.38 The Appellant submits that the Prosecution's case in this instance should stand or fall on the Appeals Chamber's determination of the Sixth Ground of Appeal in his Appeal Brief.

1.39 Alternatively, should this part of the Prosecution's Ground of Appeal succeed, the Appellant submits that the entry by the Appeals Chamber of a finding that Kanu was also responsible under Article 6(3), for the three enslavement crimes committed in Bombali District and, Freetown and Western Area, save that the Appellant's superior responsibility for the three enslavement crimes might be aggravating with respect to his Article 6(1) conviction for the enslavement crimes, should only be necessary to describe the Appellant's full culpability or to capture the totality of his criminal conduct. It should otherwise not affect the sentence.

2. Prosecution's second Ground of Appeal: The Trial Chamber's omission to make findings on crimes in certain locations.

Prosecution's case

2.1 Under this Ground of Appeal, the Prosecution challenges the Trial Chamber's failure to make findings on whether certain crimes [set out in Appendix B to the Prosecution's Appeal Brief] had been committed in certain locations on the basis that the locations had not been *specifically* pleaded in the Indictment in the

[48] Prosecution Appeal Brief, para. 188.

paragraphs relating to the relevant Counts.[49] The Prosecution argues that each of the crimes referred to in Appendix B was properly pleaded in the Indictment.[50] Alternatively, that any defects in the Indictment were subsequently cured by the provision of timely, clear and consistent information by the Prosecution.[51]

First Error of the Trial Chamber: The Finding that these crimes were not pleaded in the Indictment

Prosecution's case

2.2 Under this heading the Prosecution argues that even where a particular location was not specifically listed in relation to a particular Count in the Indictment, the location was nonetheless pleaded, by virtue of the formulation of the Indictment, which related a particular crime to, "*various*" locations within a mentioned District, "*including*" certain specified locations. The word "including", the Prosecution argues, made it clear that the Indictment alleged that the relevant crimes were also committed in locations in the relevant District other than those expressly mentioned.[52]

2.3 The Prosecution argues that this interpretation is consistent with the ruling of Trial Chamber 1, in the *Sesay* Preliminary Motion, the *Kamara* Preliminary Motion and the *Kanu* Preliminary Motion.[53] Further, that the interpretation is also consistent with the Trial Chamber's own ruling in the Rule 98 decision.[54]

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[49] Prosecution Appeal Brief, paras 194-196.

[50] Prosecution Appeal Brief, Section B pp 73-82.

[51] Prosecution Appeal Brief, Section C, pp 82-85.

[52] Prosecution Appeal Brief, para. 200.

[53] Prosecution Appeal Brief, paras 202-204.

[54] Prosecution Appeal Brief, paras 207-210.

2.4 Therefore, in now deciding that the Indictment lacked specificity with respect to some of the locations, the Prosecution submits, the Trial Chamber was reversing the previous interlocutory decisions. Alternatively, that the Chamber decided *priori motu* that the Indictment was defective, without first giving sufficient notice to the parties, thus denying them an opportunity to be heard on the issue. ***Therefore unless the Accused establish, not only that the Indictment is defective, but also that the defect materially impaired the preparation of their defence, the Trial Chamber's decision in paragraph 39 of its Judgment should be reversed.***[55] In paragraph 223, the Prosecution however argues waiver, which would effectively forestall the foregoing submission. The Prosecution argues that, as the Defence failed to raise the issue of the defects in the Indictment at the trial stage, it can no longer do so on Appeal.

2.5 In paragraphs 212 to 225 of its Appeal Brief, the Prosecution makes further argument why the Trial Chamber's decision in this matter is erroneous in law. The Prosecution basically argues that the Trial Chamber's decision on the issue in question is not supported by any case authority, even the ones that the Court purported to rely on.

Appellant's response

2.6 Three principal issues arise from the Prosecution's submissions, *viz*: (1) whether the Indictment in *casu* was defective and, if so, whether that materially impaired the Defence in the preparation of their defence; (2) whether the Defence is estopped from raising defects in the Indictment on Appeal, on the basis of waiver; (3) whether the Trial Chamber can reverse previous interlocutory decisions, or alternatively, *priori motu* decide that an Indictment is defective.

2.7 It would appear from the Prosecution's submissions, and the Appellant agrees, that the matter could be disposed of by a determination of only the first issues.

[55] Prosecution Appeal Brief, para. 211.

However as highlighted above, that also appears to be contingent on a determination of the second issue of estopple. Paragraph 2.4 hereto refers. The Appellant will therefore only address those two issues.

Defects in the Indictment and prejudice to Defence

2.8 The Appellant submits that in *casu*, the Indictment was defective in that it failed to specify locations in which certain crimes were committed. Therefore, that the Trial Chamber was right in not make any findings on those locations, except to prove the *chapeau* requirements of Articles 2, 3 and 4 where appropriate, that is the widespread or systematic nature of the crimes and an armed conflict.[56]

2.9 The Appellant recalls the legal arguments on the specificity required of an Indictment, in Ground 2 of his Appeal Brief, and subject to the necessary changes incorporates the same herein. The Appellant submits that in the present case the Indictment was defective in that it, in many instances, left him in the dark as to exact location that his culpability related to. The Appellant submits that the use of the word *"including"* in the Indictment, in so far as it left the list of places open, did not make it clear that the crimes in question were also committed in locations *in the relevant District* other than those expressly mentioned.[57] The Appellant was left to guess as to the potential use of evidence on locations not pleaded in the Indictment. The Appellant refers to Appendix B to the Prosecution's Appeal Brief, which shows the extent of the defects with respect to crimes and the locations, and submits that the sheer magnitude of the defects in the Indictment resulted in a lack of specificity that materially affected his ability to prepare his defence. Therefore, that the Indictment was defective to that extent.

[56] Trial Chamber Judgment, para. 38.

[57] Prosecution's Appeal Brief, para. 200

2.10 The Appellant submits that it is well establish that an accused person has the right to be informed, in detail, of the charge against him or her, and that, as a corollary, the Prosecution is obliged "to state the material facts underpinning the charges in the Indictment, but not the evidence by which material facts are to be proven."[58] That, no conviction against the Accused can be entered on the basis of material facts omitted from the Indictment or pleaded with insufficient specificity.[59]

2.11 The Appellant submits that where the Indictment is found to be defective for failure to plead material locations, as in the present case, or does not plead them with sufficient specificity, the Trial Chamber must consider whether the Accused was nevertheless accorded a fair trial. In *casu*, the Trial Chamber considered that it would not be fair to the Appellant to make findings on locations that had not been pleaded in the Indictment and thus held that while such evidence could support proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for those crimes would be made in respect of the locations not mentioned in the Indictment.[60]

2.12 The Appellant submits that the *Norman* Appeal Decision[61] cited by the Prosecution reiterates the need for specificity in the Indictment. This rule, the Court held, envisages that after particulars of personal identification, there should be "a statement of each specific offence of which the named subject is charged." Each such statement is what is commonly known as a count of the indictment, which encapsulates the offence with which the subject is charged – *i.e.* the law which he is alleged to have broken. The count should then be followed by a "short description" of the particulars of the offence – the time, place, reference to co-offenders and so on.[62]

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[58] *Kupreskic* et al, Appeal Judgement, para. 88

[59] *Kupreskic et al*, Appeal Judgement, para. 114

[60] Trial Chamber Judgement, para. 37

[61] Prosecution Appeal Brief, para. 214

[62] CDF Indictment Appeal Decision, para.51

2.13 The above cited decision makes it imperative for the Prosecution to state the locations of crime in the indictment to enable the Accused to prepare his defence. The *ICTY* Appeals Chamber also emphasised that, if the Indictment is found to be defective at trial, then the Trial Chamber must consider whether the Accused was nevertheless accorded a fair trial. No conviction may be pronounced where the Accused's right to a fair trial was violated for failure to provide him with sufficient notice of the legal and factual grounds underpinning the charges against him.[63]

2.14 The Appellant therefore, with respect to the specificity required for locations of crime, contests the Prosecution's submission that the Rules of the *ICTR* and *ICTY* require a greater degree of specificity of locations than is required by the Rules of the Special Court.[64] The general principle is that the location of the crimes alleged to have been committed should be specified in the Indictment with as much clarity as possible so that the Accused is not materially prejudiced in the preparation of his defence. The Appellant submits that, in this instance, the Trial Chamber correctly took the necessary measures to protect the fair trial rights of the Accused under Article 17(4) of the Statute. The admission of large amounts of evidence outside specified locations generally rendered the trial unfair as it had the effect of replacing the original case in the Indictment with a completely different one.

2.15 The Prosecution led a considerable amount of evidence with respect to killings, sexual violence, physical violence, enslavement and pillage which occurred in locations not charged in the Indictment, which made it difficult for the Appellant to understand the exact case against him. Under those circumstances, the Appellant submits that he was entitled to assume that the list of alleged locations in the Indictment was exhaustive. Alternatively, it was reasonable for the Trial

[63] *Kvocka et al* Appeal Judgement, paras. 30 & 33

[64] Prosecution's Appeal Brief, para. 219

Chamber to limit the geographic ambit of the Indictment by only focussing on the areas specifically pleaded in the Indictment.[65]

Estopple on the basis of waiver

2.16 The Prosecution submits that the Defence did not move any motion during the trial seeking necessary relief in respect of the Prosecution's evidence of crimes in locations that were not specifically pleaded in the Indictment, in relation to a particular Count. Consequently, that the Defence waived its right to raise the issue subsequently.

2.17 The Appellant submits that this argument is factually and legally ill-founded. Firstly, it ignores the fact that the Defence had earlier at the Pre-trial stage, unsuccessfully raised the issue of specificity, alleging lack of precision in the form of the Indictment, including *inter alia*, failure to provide sufficient particulars, and alleging vagueness in the Indictment.[66] Secondly, even if the Defence failed to voice a contemporaneous objection; that does not waive the Accused's rights, but simply results in a shifting of the burden of proof.[67]

2.18 In *Niyitegeka*, the Appeals Chamber opined that, the importance of the Accused's right to be informed of the charges against him under Article 20(4)(a) of the [ICTR] Statute and the possibility of serious prejudice to the Accused if material facts crucial to the Prosecution were communicated for the first time at trial suggests that the waiver doctrine should not entirely foreclose an Accused from raising a defect in the Indictment for the first time on appeal.[68]

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[65] Trial Chamber Judgement, para 38

[66] *The Prosecutor v. Brima, Kamara, Kanu*, Defence Preliminary Motion on Defects in the Form of the Indictment, paras 3-11.

[67] *Bagosora*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, para 5.

[68] *Niyitegeka*, Judgment (AC), para. 200. p.65

2.19 In *Fofana et al*, Trial Chamber I, while confronted with evidence not charged in the Indictment, or which fell outside the time frame of the Indictment, held that:

> In the Chamber's opinion, having regard to all the evidence adduced, these criminal acts were either not charged in the indictment or fall outside the time frame of the indictment or there is no indication that the accused were involved in the commission of these crimes through any of the modes of liability alleged in the indictment. Therefore, the Chamber did not examine these criminal acts for the purposes of making legal findings on the responsibility of each Accused.[69]

2.20 In *Semanza,* some Witnesses led evidence on the Accused's criminal activities, which had not been included in the Indictment, in aggravation. The Defence made no objections to the evidence and even cross-examined on it. In its Closing Brief, the Prosecution requested the Chamber to consider the allegations in their evidence as aggravating factors.[70] The Trial Chamber however refused to consider the evidence in aggravation. The Trial Chamber was not satisfied that the Accused was put on notice that additional crimes within the jurisdiction of the Tribunal, but not charged in the Indictment, could be considered as aggravating factors in relation to his eventual sentence. The Trial Chamber found that no such indication had been made by the Prosecutor prior to her Closing Brief. The Chamber found that it was a matter of fundamental importance that the Defence ought to be able to focus its attention on the crimes contained in the Indictment. That ordinarily, crimes not charged in the Indictment are not relevant to the proceedings.[71]

2.21 The Appellant therefore submits that it is clear from the above cases that the Court will not lightly impute waiver. Further, that the mere fact that the Accused

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[69] *Fofana & Kondewa*, Trial Judgement, para. 919

[70] *Semanza*, Judgment and Sentence, 15 May 2003, para 568

[71] *Ibid*, para. 569

failed to challenge a piece of evidence not pleaded in the Indictment at the Trial will not automatically waive his right to challenge it on Appeal. The ultimate question is always whether the Accused will not be unduly prejudiced. The Appellant recalls the legal arguments in paragraphs 2.28 to 2.29 of his Appeal Brief, and incorporates the same herein, subject to the necessary changes.

2.22 On the basis of the foregoing, the Appellant submits that the Prosecution's argument for estopple on the basis of his alleged failure to challenge evidence that was not pleaded in the Indictment on crime bases should not succeed.

Second error of the Trial Chamber: The failure of the Trial Chamber to find that any defect had been cure.

2.23 The Prosecution submits that it is well established in international criminal tribunals that in some instances, a defect in the Indictment can be "cured" if the Prosecution provides the Accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. That, in *casu*, if at all there were any defects, they were cured by the Prosecution's Pre-trial brief, its opening statement, and disclosed evidence such as witness statements or potential exhibits – Appendix B to the Prosecution's Appeal Brief.

2.24 The Appellant agrees with the Prosecution's general proposition of law on the issue of the curing of a defective Indictment. The Appellant however submits that the curing a defective Indictment through subsequent disclosures is not absolute.

2.25 In *Bagosora,* the Appeals Chamber held that where the Indictment suffers from numerous defects, there may still be a risk of prejudice to the Accused even if the defects were found to be cured by post-indictment submissions. In particular, the accumulation of a large number of material facts not pled in the Indictment reduces the clarity and relevance of the Indictment, which may impact on the Accused's ability appreciate the case before him for purposes of preparing an

adequate defence.[72] The Appeals Chamber thus underlined that that the possibility of curing material facts from the Indictment is not unlimited.[73]

2.26 Further, as the ICTR Appeals Chamber also held, in view of the factual and legal complexities normally associated with crimes within the jurisdiction of international tribunals there can only be a limited number of cases that fall within that category [i.e. "cured Indictments"].[74]

2.27 The Appellant therefore submits that it is clear from the above cases that it is not absolute that timely, clear and consistent post-indictment disclosure will always cure a defective Indictment. That has to be weighed against the fair trial rights of the Accused, in particular, his material ability to prepare his defence. In *casu*, the Appellant submits that the defects in the Indictment generally, and more particularly, those relating to location, were too many and too ambiguous to be cured without compromising the fairness of the Trial, or prejudicing him. Appendix B to the Prosecution's Appeal Brief, illustrates the extensive magnitude of the defects. Further, as the Prosecution notes, its Supplemental Pre-Trial Brief also contained a 109-page Annexure of summaries of the evidence that each of the proposed Prosecution witnesses was expected to give.[75] The Appellant submits that even if individual defects in the Indictment could be "cured" by subsequent disclosures, a vast number of such instances in a single trial would render such a "cure" meaningless. The sheer volume of evidence outside the Indictment, which has the effect of replacing one Prosecution case with another completely different one, would make the trial process inherently unfair.

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[72] *Bagosora et al*, Appeal Decision on *Aloys Ntabakuze's* Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, para. 26

[73] Ibid, para. 30

[74] *Kupreskic et al*, Appeal Judgement, para. 114

[75] Prosecution Appeal Brief, para. 229

2.28 The Appellant submits that nature and magnitude of the defects in the Indictment were such that they could not be cured without prejudicing him. The Appellant submits that he, in deed, was prejudiced by the defects in so far as he, in most instances, had to guess the exact location in respect of which a particular crime related. Under those circumstances it was therefore well-advised of the Trial Chamber not to make any findings on locations that were not specifically pleaded in the Indictment, as to do would have occasioned an injustice to the Accused.

2.29 With respect to the Prosecution's argument suggesting waiver – paragraphs 231 to 232 of the Appeal Brief, the Appellant refers to the legal arguments in Ground 2, paragraphs 2.28 to 2.29 of his Appeal Brief, which he incorporates herein, subject to the necessary changes.

2.30 On the basis of the foregoing arguments, the Appellant submits that this Ground of Appeal should not succeed.

3. Prosecution's Third Ground of Appeal: Failure of the Trial Chamber to find Kamara individually responsible under Article 6(1) and 6(3) for all crimes committed in Port Loko District

The Appellant takes no issue with this Ground of Appeal to the extent that its does not relate to him.

4. Prosecution's fourth ground of Appeal: The Trial Chamber's Decision not to consider Joint Criminal Enterprise Liability

4.1 The Appellant submits that the Prosecution is supposed to plead the category of Joint Criminal Enterprise (JCE) charged and failure to plead constitutes a defect in the indictment. The Trial Chamber rightly established the *actus reus* of JCE liability in paragraph 63 of the Judgment.

4.2 The Appellant disagrees with the Prosecution that the issue of alleged defects in the way in which joint criminal enterprise had been pleaded had been settled by the Trial Chamber at the pre-trial stage.[76] In the pre-trial motion filed by the Appellant, he highlighted defects in the pleading of the JCE "in paras. 23-25 of the indictment, it is asserted that the AFRC, including the Accused, and RUF shared a common plan, a common purpose or design, which was to take any necessary actions to gain and exercise political power and control over the territory of Sierra Leone."[77] The Trial Chamber rejected the Appellant/Respondent's contention that JCE is not pleaded with sufficient particularity as to the role and position of the accused.[78] The Trial Chamber further rejected the preliminary motion filed by *Kamara* that JCE has been defectively pleaded.[79] The crucial issue is whether the agreement involved international crimes at the inception of the JCE.

4.3 The Prosecution agrees with the Appellant that JCE which is defectively pleaded runs through the indictment. The entire Indictment should have been quashed once joint criminal enterprise was discarded. The Trial Chamber held that Defence submissions in relation to JCE can be grouped in three categories: (1) Objections to the form of pleading in the indictment, especially regarding its different forms; (2) legal submissions; and (3) evidentiary submissions. The Trial Chamber held that it will only consider submissions falling into the first category.[80] Had the Trial Chamber considered the evidentiary submissions it could have concluded that the evidence led contradicts the JCE pleaded, that is the evidence does not support the JCE that the attacks attributed to the accused in

[76] Prosecution Appeal Brief, para. 360

[77] *The Prosecutor v. Santigie Borbor Kanu*, Motion on Defects in the Form of the Indictment and for Particularization of the Indictment.

[78] *The Prosecutor v. Kanu*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment., para. 12

[79] *Kamara* Preliminary Motion Decision, paras 51-53

[80] Trial Chamber Judgment, para. 56

furtherance of an intent to regain control of the political and economic power of Sierra Leone, particularly the diamond areas of Sierra Leone. It is alleged in the indictment that the natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance to carry out the Joint Criminal Enterprise in Sierra Leone.

4.4 The Trial Chamber is not precluded from reviewing a Decision where shortcomings in the form of the indictment have actually resulted in prejudice to the rights of the Accused, and that it can reconsider an interlocutory decision on alleged defects in the form of the indictment if either (1) a clear error of reasoning has been demonstrated, or (2) it is necessary to do so to prevent an injustice.

4.5 The fact that the Trial Chamber reconsidered in the Trial Judgment some of its findings it had made in certain pre-trial decisions on the form of the indictment does not in itself constitute an error, as its within the discretion of a Trial Chamber to reconsider a decision it has previously made.[81] As the Trial Chamber rightly held, it has considered with great care the consequences of its decision and has considered reopening the hearing to allow the prosecution to make fresh submissions or to argue that any defects had since been remedied. However, the Trial Chamber does not believe that a reopening of the case is necessary, as the Prosecution did make submissions in response on this objection in their Final Trial Brief and closing arguments.[82]

4.6 As the Appeals Chamber emphasized in *Ntagerura et al*, 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

[81] Gali, Case No. IT-98-29-AR73, Decision on Application by Prosecution for leave to Appeal, 14 Dec. 2001, para. 13

[82] Trial Chamber Judgement, para. 84.

original decision.[83] In the present case, the Trial Chamber considered with great care the consequences of its decision and considered reopening the case, but however, held that reopening the case is not necessary, as the Prosecution did make submissions in response on this objection in their Final Trial Brief and closing arguments. The evidence adduced by the Prosecution witnesses contradicts the pleading of JCE. In its Final Trial Brief, the Prosecution submitted that:

> The common aim of the three Accused, other AFRC members and RUF members was to use any means necessary to regain political power and control over the territory of Sierra Leone. Controlling the diamond wealth of the country as a source of revenue continued to be a primary focus.[84]

4.7 The Prosecution acknowledged that they were put on their guard by the Defence when they raised defects in the indictment in their final trial submissions,[85]there was no need for the Defence to formally apply for leave to reopen the earlier interlocutory decisions on defects in the form of the indictment. The Appellant is submitting that where the both parties had the opportunity to make both written and oral submissions in their Final Trial Briefs there was no need to interrupt the deliberation process and reopen the hearings.

4.8 The Prosecution submitted that the Trial Chamber acted contrary to the requirements set out by the ICTR Appeals Chamber in the *Cyangugu* case.[86]The Appellant is submitting that the Trial Chamber acted within the requirements of the law, as the Prosecution did make submissions in response on this objection in their Final Trial Brief and closing arguments. The statement by the Prosecution that the Trial Chamber had reaffirmed in the Rule 98 Decision that it was not

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[83] *Ntagerura et al*, Appeals Chamber Judgement, para. 55

[84] Prosecution Final Trial Brief, para. 727

[85] Prosecution Appeal Brief, para. 367

[86] Prosecution Appeal Brief, paras. 366, 367, 368

entertaining arguments as to defects in the form of the indictment[87] is not correct as the Trial Chamber held that:

> "whether the Indictment has been sufficiently pleaded or defective in form is not a matter which falls within the scope of Rule 98"[88]. As the Trial Chamber rightly held, "it has therefore not pronounced itself on these issues."[89]

4.9 The Prosecution's submission that the first time they became aware that the Trial Chamber was indeed reopening the earlier interlocutory decisions was when the Trial Chamber's Judgment was given[90] is misleading. The Rule 98 Decision clearly left issues of defect of the Indictment open thereby putting the Prosecution on its guard that these issues will be revisited in the course of the trial and the Judgment. The Prosecution submitted during the closing arguments that:

> "with issues concerning the law on joint criminal enterprise liability. Again, this is dealt with extensively in the Prosecution brief, particularly at paragraphs 460-497 which are our main submissions on joint criminal enterprise liability"[91].

4.10 During the Closing Arguments, the Defence raised the issue of defect of pleading JCE and the category of the JCE relied upon by the Prosecution, the Trial Chamber posed a question relating to JCE liability to the Prosecution as to the categories of liability relied upon which the prosecution could not state because they were not sure since the indictment had been defectively pleaded. Below are excerpts of the Prosecutor's response during the closing arguments as to the mode of JCE:

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[87] *Ibid*, para. 368

[88] Rule 98 Decision, para. 323, Trial Chamber Judgement, para 83

[89] Trial Chamber Judgement, para. 83

[90] *Ibid*, para. 369

[91] Transcript, 7 December 2006, p. 70. paras. 18-22

Presiding Judge: The question is that you mention, Mr. Staker, when addressing about the second category of joint criminal enterprise that it cannot be discounted in this case, and I was wondering that evidence in this, if such evidence were to be believed, would support that category, the second category?

Mr Staker: Your Honour, it's not the Prosecution's case that we rely on that second category, and our case is not put this way. When our briefs are examined, it will be seen that we don't adopt this rigid categorisation of joint criminal enterprise liability into three separate categories.

My submission would be that the theoretical analysis that one sees in some of the case law draws this kind of distinction that is a bit artificial and suggests that there are actually three separate modes of liability which are three separate forms of liability. What we would say is the first and second category are essentially variants of each other. The first category is more where the agreement is expressed between the participants. The second is where the agreement may not be expressed but its clear there is this enterprise going on, there is this system that exists, and an accused can be liable if they are aware of the system and join in and contribute to it without showing that they necessarily have express agreement with all of the other participants.
So it doesn't go to whether we are relying on the first or second category. It goes, for instance, to this argument that there was no expressed agreement shown between the three accused or possible arguments that there no expressed agreement between the three accused and members of the RUF and so forth. We say looking at all of the evidence as a whole, is it clear that all of these crimes were committed as part of a single common plan, design, or purpose in which the three accused participated? That its not essential to find an expressed agreement between the three accused to establish that and that whether the joint criminal enterprise liability exists will be a matter to be determined on the evidence as a whole.[92]

[92] Transcript, 7 Dec. 2006, pp. 83-84

4.11 More recently, in the *Krnojelac* Appeal Judgement, where the Prosecution was specifically challenging the trial chamber's conclusion that the accused could not be held liable under the third form of joint criminal enterprise set out in the *Tadić* Appeal Judgement with respect to any of the crimes alleged unless an "extended" form of joint criminal enterprise was pleaded expressly in the indictment, the *ICTY* Appeals Chamber held that:

> [...] The Appeals Chamber reiterates that Article 18(4) of the Statute requires that the crime or crimes charged in the indictment and the alleged facts be set out concisely in the indictment. With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. Likewise, 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. However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment - for instance in a pre-trial brief - the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial. [93]

[93] *Ntakirutimana* Appeal Judgement, para. 475, citing Krnojelac Appeal Judgement.

4.12 The Appellant is submitting that the Trial Chamber is right to have concluded that; it has considered with great care the consequences of its decision and has considered reopening the hearing to allow the Prosecution to make fresh submissions or to argue that any defects had since remedied. However, the Trial Chamber does not believe that a reopening of the case is necessary, as the Prosecution did make submissions in response on this objection in their Final Trial Brief and Closing arguments.[94]

Second error of the Trial Chamber: The finding that joint criminal enterprise liability relied was defectively pleaded

4.13 If the Prosecution relies on a theory of joint criminal enterprise, the Prosecution must specifically plead this mode of responsibility in the indictment, failure to so will result in a defective indictment. The Prosecution must plead the purpose of the enterprise, the identity of the participants, the nature of the accused's participation in the enterprise and the period of the enterprise.[95] In order for an accused charged with joint criminal enterprise to fully understand which acts he is allegedly responsible for, the indictment should clearly indicate which form of joint criminal enterprise is being alleged.[96]

4.14 If the Prosecution relies on this specific mode of liability, it must plead the following material facts: the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused's participation in the enterprise[97]. In order for an accused charged with joint criminal enterprise to fully understand the

[94] Trial Chamber Judgement, para. 84

[95] *Ntagerura et al*, Appeal Judgement, para. 24

[96] *Ibid*, para. 24

[97] *Blagoje* Appeal Judgement, para. 22

acts he is allegedly responsible for, the indictment should also clearly indicate which form of joint criminal enterprise is being alleged.[98]

4.15 In accordance with Article 17(4)(a) of the Statute, the Accused has the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. The Appellant is submitting that as the Trial Chamber rightly stated, in order for the accused to know the case he has to meet, he must be informed by the indictment of:

(a) The nature or purpose of the joint criminal enterprise
(b) The time at which or the period over which the enterprise is said to have existed,
(c) The identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group, and
(d) The nature of the participation by the accused in that enterprise. Where any of these matters is to establish by inference, the prosecution must identity in the indictment the facts and circumstances from which the inference is sought to be drawn.[99]

4.16 The Indictment itself delineates distinct modes of commission and participation by the Accused, under Article 6(1): Committed (by participating in a joint criminal enterprise)., instigating., ordering., and aiding and abetting.[100] The Prosecution blurred the distinction of joint criminal enterprise and aiding and abetting. More seriously, it has failed to observe the important distinction between, on the one hand to prevent criminal conduct by the others., and on the other hand, participation in a joint criminal enterprise to commit crimes. There are important differences in the mental and objective elements for each mode of these forms of participation. As the Appeals Chamber has stated, "it would be

[98] *Ibid*, para. 22

[99] *Krnojelac*, Decision on the Form of the Second Amended Indictment, 11 May 2000, para. 16

[100] Indictment, para. 35

inaccurate to refer to aiding and abetting a joint criminal enterprise".[101] The fact that the same material facts may be proved both by aiding and abetting and participation in a joint criminal enterprise does not diminish the importance of the distinction between the two. There is a need for detail to be pleaded where the Prosecution case is based upon allegation that the accused is individually responsible for having aided and abetted the person who personally did those acts.[102] The Prosecution is conflating these two issues.

4.17 In *Vasiljevic*[103], the Appeals Chamber held that participation in a joint criminal enterprise is a form of commission under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime...and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint

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[101] *Kvocka et al.*, Judgement (AC), para. 91

[102] *Brdanin et al*,(TC) Decision on Form of Further Amended Indictment, dated 26 June 2001, para. 59, p.19

[103] Vasiljevic Appeal Judgement, para. 102

criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

4.18 The assertion by the Prosecution it had set forth the information to the extent that the information is known by the Defence does not satisfy that requirement. The Appellant is submitting that both the Prosecution and the Defence have spent enough time already during the pre-trial motions, Final Trial Briefs and closing arguments endeavouring to ensure that JCE is pleaded properly. In this light, the submission by the Prosecution that the first time that the Prosecution became aware that the Trial Chamber was indeed reopening the interlocutory decisions was when the Trial Chamber's Judgement was given[104] is not correct.

4.19 The principle of JCE doctrine is to hold an individual accountable for all his actions that fall within, or are a foreseeable consequence of entering into, a criminal agreement. As the Trial Chamber rightly stated, [T]he rationale behind this principle is that a person should not engage in activity that is criminal or foreseeably criminal.[105] The Prosecution of JCE in paragraph 34 of "gaining and exercising political control over the population of Sierra Leone in order to prevent or minimize resistance to their geographical control, and to use members of the population to provide support to members of the joint criminal enterprise"[106], is however not inherently a criminal activity or a crime in international law. As the Trial Chamber rightly said, [a] common purpose "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone" is not an international crime. This could have been abhorrent to some persons during the conflict, but abhorrence alone does not make that conduct a crime in international law.

4.20 The Prosecution's argument is that the Trial Chamber erred when it found this pleading defective on the ground that: [t]he Prosecution has alleged those two

[104] Prosecution's Appeal Brief, para. 369

[105] Trial Judgement, para.70

[106] Indictment, para. 34

forms disjunctively, thereby impeding the Defence ability to know the material facts of the JCE against them, as it appears that the two forms as pleaded logically exclude themselves. If the charged crimes are allegedly within the common purpose, they can logically no longer be reasonably foreseeable consequence of the same purpose and *vice versa.*[107] The Defence raised the defects in its pre-trial motions, closing briefs and oral arguments that the defects will impede its ability to know material facts underpinning the facts of JCE against them. The Appellant submits that the formulation of JCE in this case is incomprehensible. The Appellant is submitting that, the Trial Chamber was right for finding that JCE as a mode of criminal liability in the indictment, has been defectively pleaded. What is necessary is for the Appellant to be left in no doubt as to the substance of the allegations. This could be done as long as the indictment made clear, however, what the elements of joint criminal enterprise were that the Prosecution alleged.

4.20 The Prosecution is submitting that in determining whether the allegations of joint criminal enterprise liability have been adequately pleaded, it is necessary to consider the wording of the indictment as a whole, rather than to consider whether the allegations have been adequately pleaded in one or more specific paragraphs.[108] The Appellant submits that the Trial Chamber considered the wording of the Indictment as a whole when it found that, there are considerable difficulties with the Prosecution's pleading of the JCE in this case. While the Trial Chamber generally concurs with the learned colleagues of Trial Chamber I, when holding that paragraphs 33 and 34 have to be read as a whole, these two paragraphs do not clarify what criminal purpose the parties agreed upon at the

[107] Prosecution Appeal Brief, para. 375

[108] Prosecution Appeal Brief, para. 379

inception of the agreement.[109] In any event, such a reading bears similar difficulties. The Trial Chamber notes the position taken by the Prosecution that a JCE only needs to "involve" the commission of a crime. This position is indeed supported by jurisprudence. But the fundamental question that arises from this is whether the agreement involved international crimes at the inception of the JCE.[110]

4.21 The Trial Chamber rightly held that "Even though the contribution to a joint criminal enterprise need not be criminal in nature, the purpose has to be inherently criminal in nature and the perpetrators, including the accused, must have a common state of mind, namely the state of mind that the *statutory crime(s)* forming part of the objective should be carried out.[111] The Prosecution agrees with the Trial Chamber that the ultimate objective of the joint criminal enterprise was "to gain and exercise political power and control over the territory of Sierra Leone," that ultimate objective was not in itself inherently criminal under the Statute of the Special Court.[112]

4.22 However, the Prosecution submits that the Trial Chamber erred in treating this statement of the ultimate criminal enterprise as the alleged common criminal purpose itself, and in finding that Indictment therefore did not plead a joint criminal enterprise that was inherently criminal. The Appellant/Respondent submits that the indictment was suppose to allege a common purpose which is a crime under international law and then describes the crime committed in pursuing this common purpose. This the Prosecution failed to plead thereby rendering the Indictment defective and the submission by the Prosecution that this is clear from

[109] Trial Chamber Judgement, para. 71

[110] *Ibid*, para. 74

[111] *Ibid*, para. 73

[112] Prosecution Appeal Brief, para. 388

the wording of the Indictment as a whole[113]is not true for the Prosecution failed to exercise due diligence.

4.23 An indictment may also be defective when the material facts are pleaded without sufficient specificity, for example, when the times mentioned refer to broad date ranges, the places are only vaguely indicated, and the victims are generally identified[114]. It is of course possible that material facts are not pleaded with the requisite degree of specificity in an indictment because the necessary information was not in the Prosecution's possession. In this respect, the Appeal Chamber emphasis that the Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould its case against the accused in the course of the trial depending on how the evidence unfolds.[115] Other defects in an indictment may arise at a later stage of the proceedings because the evidence turns out differently than expected. In such circumstances, the Trial Chamber must consider whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of the evidence outside the scope of the indictment.[116]

4.24 The Prosecution submits in paragraphs 38 of the Indictment that: "members of the AFRC and RUF acted in concert with the accused (in other words, the participants in joint criminal enterprise) conducted armed attacks throughout the territory of the Republic of Sierra Leone, and that the targets of the armed attacks included civilians. The Prosecution cites paragraph 39 of the indictment to demonstrate JCE and paragraph 40 and 41 which according to him referred expressly to the "campaign of terror and punishment" conducted by the AFRC/RUF. The Prosecution concludes by stating that paragraph 34 of the indictment alleged that the joint criminal enterprise included gaining and exercising control over the

[113] *Ibid*, para. 389

[114] *Kvocka et al*, Appeal Judgement, para. 31

[115] *Niyitegeka* Appeal Judgement, para. 194

[116] *Kupreskic et al.* Appeal Judgement, 92

population of Sierra Leone in order to prevent or minimize their resistance to their geographic control, and to use members of the population to provide support to the member of the joint criminal enterprise.[117] The Appellant submits that "gaining and exercising control over the population of Sierra Leone" is not a crime in international law.

4.25 If the Prosecution intends to rely on the theory of joint criminal enterprise to hold the Appellant criminally responsible as a principal perpetrator of the crimes alleged in paragraphs 34, 38, 39, 40, 41 of the indictment, the indictment should have pled this in unambiguous manner and specificity upon which form of joint criminal enterprise the Prosecutor will rely. In addition to alleging that the accused participated in a joint criminal enterprise, the Prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise[118].

4.26 The purpose of the joint criminal enterprise as pled by the Prosecutor is not inherently criminal. In this case the Trial Chamber found that the indictment is defective. If the indictment is found to be defective because of vagueness or ambiguity, as in the present case, then the Trial Chamber is right not to have found the Appellant guilty of JCE as charged in the indictment.

4.27 The Prosecution submits that the time period of the alleged joint criminal enterprise was thus the time period spanned by all the alleged crimes.[119] The Prosecution further submits that even if it was necessary for the indictment to plead the time period over which the joint criminal enterprise was said to exist, the indictment in this case did so with at least as much particularity as the indictments in the *Martic* and *Haradinaj* cases, the indictments in the other ICTY cases referred to in paragraph 68 of the Trial Chamber's judgement, and in other

[117] Prosecution Appeal Brief, para. 390

[118] *Ntagerura* Trial Judgement, par. 34

[119] Prosecution Appeal Brief. Para. 399

cases before international criminal tribunals. The Prosecution therefore submits that there is no defect in this respect in the way in which the time period of the joint criminal enterprise was pleaded.[120] The Appellant submits that it is certain the time period the Prosecution is referring to is so broad and imprecise, coupled with the failure to provide the Appellant/Respondent with clear and consistent information which might have compensated for the ambiguity in the indictment relating to joint criminal enterprise.

4.28 In *Krnojelac,* the Appeals Chamber reiterates that Article 18(4) of the Statute requires that the crime or crimes charged in the indictment and the alleged facts be set out concisely in the indictment. With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial.[121]

4.29 The Appeals Chamber further held in *Krnolejac* that; 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. However, this does not, in principle, prevent the Prosecution

[120] *Ibid*, para. 404

[121] *Krnojelac* Appeal Judgement, para. 138

from pleading elsewhere than in the indictment - for instance in a pre-trial brief - the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial.[122]

Curing of Defects

4.30 The Prosecution submits that a defect in an indictment can be deemed "cured" if the Prosecution provides the accused with timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her.[123]

4.31 Whether the Prosecution has cured a defect in an indictment and whether the defect has caused any prejudice to the accused are questions aimed at assessing whether the trial was rendered unfair.[124] There was no notice from the Prosecution to have cured the defect in the way joint criminal enterprise was pleaded. In *Blagoje*, the Appeals Chamber reiterated that a vague indictment not cured by timely, clear and consistent notice causes prejudice to the accused. The defect may only be deemed harmless through demonstrating that accused's ability to prepare his defence was not materially impaired.[125]

4.32 The Prosecution is submitting that even if it were established that joint criminal enterprise liability was defectively pleaded in the indictment (and for the reasons given in paragraphs 416-423 above, it was not), the information given in the Prosecution pre-trial filings and Rule 98 response, as well as the pre-trial decisions of the Trial Chamber, was such that the Defence suffered no prejudice

[122] *Ibid*, para. 138

[123] Prosecution Appeal Brief, para. 413

[124] *Ntagerura et al*, Appeal Judgement, para. 30

[125] *Kordic and Cerkez* Appeal Judgement para. 169

as a result. Accordingly, any defects in the indictment were subsequently cured.[126] The Appellant submits that there was no timely information provided by the Prosecution to have cured the defect.

4.33 In *Kordic and Cerkez*, the Appeals Chamber considered whether notice was sufficiently communicated to the Defence through the information provided in the Prosecution's pre-trial brief or its opening statement.[127] In *Ntakiritimana,* the Appeals Chamber, held that in considering such notice, the timing of the communications, the importance of the information to the ability of the accused to prepare his defence and the impact of the newly-disclosed material facts on the Prosecution's case are relevant.[128] In *Naletilic and Martinovic*, the Appeals Chamber held that mere service of witness statements, or of potential exhibits by the Prosecution pursuant to the disclosure requirements of the Rules does not, however, suffice to inform the Defence of material facts the Prosecution intends to prove at trial.[129] The Appellant/Respondent is submitting that from his submissions during trial, the motion for judgement of acquittal, the final trial brief and closing arguments, demonstrate that he was not put on notice to the Prosecution's theory of joint criminal enterprise. He was left to speculate as to the nature of the joint criminal enterprise the Prosecution is relying upon and this severely impaired his ability to prepare his defence.

4.34 The Appellant submits that in considering whether the defect in an indictment has been cured by subsequent disclosures; the question arises as to which party has the burden of proof on the matter.[130] Clearly the burden of proof rest with the Prosecution. The question also arises whether an accused has been meaningfully

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[126] Prosecution Appeal Brief, para. 425

[127] *Kordic and Cerkez* Appeal Judgement, para. 169

[128] *Ntakiritimana* Appeal Judgement, paras. 27-28

[129] *Naletic and Martinovic*, para 27

[130] *Niyitegeka* Appeal Judgement, para. 198

informed of the nature of joint criminal enterprise so as to be able to prepare an effective defence.

4.35 The Prosecution is requesting the Appeals Chamber to make any resulting amendments to the Disposition of the Trial Chamber's Judgment, and to increase the sentences imposed on the Accused to reflect the additional criminal liability[131] or remit the proceedings to the Trial Chamber for further findings of fact on joint criminal enterprise liability.[132] The Appellant/Respondent is submitting that the Prosecution cannot be requesting to have a second bite of the cherry. The Prosecution is expected to know its case before proceeding to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegation in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[133]If a pleading merely assumes the existence of the pre-requisite, this fundamental principle has not been met.[134] The Appellant is submitting that this ground of appeal should be dismissed.

5. 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

The Prosecution's case

5.1 The Prosecution takes issue with the Trial Chamber's failure to find all 3 Accused guilty under Counts I (acts of terrorism) and Count 2 (collective punishment), with respect to the three enslavement crimes (sexual slavery, forced labour and

[131] Prosecution Appeal Brief, para. 422

[132] *Ibid*, para. 423

[133] *Kupreskic*, Appeals Chamber Judgement, para. 92

[134] Trial Chamber Judgement, para.65

child soldiers).[135] The Prosecution therefore requests the Appeals Chamber to substitute the Trial Chamber's finding with one that includes the individual responsibility of the Accused for acts of terrorism and collective punishment based on their responsibility for the three enslavement crimes.[136] The Prosecution contends that, based on the findings of the Trial Chamber, or alternatively, the evidence accepted by the Trial Chamber in making those findings, the instances of the commission of the three enslavement crimes satisfied the elements of terrorism and collective punishment.[137] Alternatively, that any reasonable trier of fact would come to the foregoing conclusion.

Acts of terrorism

5.2 With respect to crime of terrorism, the Prosecution takes issue with the Trial Chamber's interpretation/application of the third element of that crime, which the Chamber found, had not been satisfied.[138] The third element of the crime of terrorism requires that the acts or threats of violence constituting the crime must have been committed with the primary intention of spreading terror among the affected civilian population.[139] At the heart of the matter is the phrase, "***with the primary purpose of spreading terror***" – interpreted by the ICTR Appeal Chamber to mean, "*principal among the aims*".[140]

5.3 In the present case, the Trial Chamber undertook an elaborate analysis of the instances where the three enslavement crimes were committed and came to the conclusion that, while the underlying acts *might* have caused terror to the

[135] Prosecution Appeal Brief, paras 445-446.

[136] Prosecution Appeal Brief, para. 447.

[137] Prosecution Appeal Brief, para. 456.

[138]

[139] For the elements of the crime of terrorism, see Trial Chamber's Judgment, para. 667.

[140] *Galić*, Appeal Judgment, para. 104.

victims,[141] the primary purpose was not to spread terror, but rather, to serve certain military, utilitarian and sexual purposes.[142] Therefore, that the spreading of terror was not the primary purpose behind the acts of enslavement.

5.4 The Prosecution argues that once the intent to terrorise the civilian population were established, it was not necessary to investigate whether that was the primary purpose behind the acts of enslavement. The Trial Chamber should simply have found the Accused guilty of the underlying enslavement crimes as well as the crime of terrorism. The phrase, "*principal* among the aims", the Prosecution argues, must simply mean "*one* of the principal purposes".[143] Therefore, that the Trial Chamber should simply have found that one of the principle purposes behind the acts of enslavement was to terrorise the civilian population, rather than seek to establish whether it was the one principal purpose.

5.5 The Prosecution argues that the approach that was taken by the Trial Chamber is flawed in that it unduly emphasized one single purpose as the primary purpose.[144] The effect of this approach, the Prosecution argues, is that it would not be a violation of Article 3(d) of the Statute to commit acts that are ***specifically*** intended to terrorise the civilian population, provided that the spreading of terror was not the only purpose of the conduct in question and that another purpose was the more important purpose.[145]

5.6 Where there is an ***express*** *purpose* to spreads terror among the civilian population, the Prosecution argues, International Humanitarian Law is violated

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[141] Trial Chamber Judgment, para. 1453, where the Chamber also noted that the spreading of terror was a "side-effect" of the underlying crimes of slavery.

[142] Trial Chamber Judgment, paras 1450, 1454 and 1459.

[143] Prosecution Appeal Brief, para. 463. Also see para. 486, where the Prosecution argues that the meaning of the word "principal" does not necessarily mean "first" or "dominant"; it also means "cardinal", "essential", "fundamental", "main", "major", "paramount", "prominent", "salient".

[144] Prosecution Appeal Brief, para. 465.

[145] Prosecution Appeal Brief, para. 469.

whether or not the purpose of spreading terror was the only purpose, or whether or not another purpose was more important to those committing the conduct in question.[146] Further, that; where conduct is committed for the purpose of spreading terror among the civilian population, and simultaneously another purpose, it is artificial and unworkable to seek to identify one of those purposes as being the single "principal" purpose.[147]

5.7 The Prosecution also argues that the approach by the Trial Chamber is wrong in that it unduly emphasized the overall motive behind the Accused's criminal conduct. The Prosecution argues that by emphasizing the overall motive, persons otherwise guilt of terrorism would be exonerated where their acts are criminal but the overall motive is not. This approach, the Prosecution argues, would legitimize, as a means of warfare conduct ***specifically*** intended to spread terror among the civilian population, merely because some more important military purpose, in the circumstances of the present case, is served by doing so.[148] This, the Prosecution argues, amounts to a breach of the "most fundamental principles and purposes of international humanitarian law".[149]

The Appellant's response

5.8 The Appellant submits that there is nothing wrong, either in law or in fact, in the manner in which the Trial Chamber conducted itself on the matter in issue. Rather, it is the reasoning underlying the Prosecution's submissions that is fundamentally flawed. The Prosecution overlooks that terrorism is, effectively, a 'secondary' offence, founded on underlying acts normally constituting other distinct crimes ("the underlying crimes", in this instance, the three enslavement crimes). Therefore, as the requisite *mens rea* for terrorism is different from that of

[146] Prosecution Appeal Brief, para. 480.

[147] Prosecution Appeal Brief, para. 481.

[148] Prosecution Appeal Brief, paras 477-478.

[149] Prosecution Appeal Brief, para. 474. Also see para. 489.

the underlying crimes, it is erroneous to suggest that the two sets of crimes could be bundled together for purposes of entering a conviction.

5.9 In order to appreciate the correctness of the Trial Chamber's decision, it is necessary to understand the requisite *mens rea* for the crime of terrorism. *Mens rea* simply refers to the intent (*dolus*) on the part of the perpetrator of a crime to bring about a certain result from his criminal conduct. For example, where one wants to kill someone and shoots them, the intention of shooting them being to kill them. This intent is also referred to as the *general intent*.

5.10 There are however certain international law crimes, which in addition to the general intent, require what is called, "special intent" (*dolus specialis, dol aggravé). Dolus specialis*, in addition to the intent to bring about a certain result by undertaking certain criminal conduct, also requires that the perpetrator pursues a *specific goal* that goes beyond the result of his conduct, with the consequence that the attainment of such a goal is not necessary for the crime to be consummated.[150]

5.11 Terrorism is one of the crimes that require both the *general intent* and the *specific intent*. The *general intent* entails the intent on the perpetrator's part to bring about unlawful acts or threats of violence. The *special intent* entails the intent on the perpetrator's part to spread terror among the victims of the crime.[151] The *special intent* is what would distinguish terrorism from the underlying crimes, in the circumstances of the present case, the three enslavement crimes. This distinction is emphasized by the requirement that the intent to bring about terror must be the *primary purpose* behind the perpetrators conduct. Without the *special intent* element, terrorism would otherwise rank *pari passu* with the underlying crimes. The crime of terrorism would be perfected once *general intent* is established. That, the Appellant submits, is essence of the Prosecution's case.

[150] Cassese, p. 167.

[151] Cassese, p. 168.

5.12 The Appellant submits that the effect of the Prosecution's submissions is to render *special intent* irrelevant to the crime of terrorism. This is underscored by the Prosecution's argument that, once the Trial Chamber had found that the three enslavement crimes might have caused terror in the victims, it should also have found the Accused guilty of terrorism.[152] The point is further emphasized by the Prosecution's argument that the Trial Chamber should not have looked at the crime of terrorism separately from the underlying crimes, but rather, should have looked at all the crimes globally, as part of a single campaign of terror.[153] In other words, that the Trial Chamber should not have belaboured to draw the distinction between the underlying crimes for which only *general intent* suffices and terrorism which requires *special intent*. The Prosecution's submissions thus effectively relegate terrorism from being a *special intent* crime to the level of a *general intent* crime.

5.13 The Appellant submits that, in *casu*, while the Trial Chamber found that there was the necessary *intent* to commit the underlying crimes of slavery, and while the victims of the enslavement crimes might have been terrorized by the Accused's criminal acts; it was unable to establish *special intent* necessary to distinguish terrorism from the underlying enslavement crimes. Rather, the evidence indicated that the three enslavement crimes were committed with the primary aim of serving other military, utilitarian and sexual objectives, and that the spreading of terror was only incidental.[154]

5.14 The Appellant submits that, contrary to the Prosecution's submission, the reference by the Trial Chamber to the military, utilitarian and sexual objectives underlying the Accused's conduct in this case was not meant to define the

[152] Prosecution Appeal Brief, para. 502.

[153] Prosecution Appeal Brief, paras 495-500.

[154] Trial Chamber Judgment, para. 453.

crime.[155] The Court only used these objectives as *indicia* of whether or not the spreading of terror was the primary objective underlying the Accused's conduct. The objectives were not themselves constitutive of the *special intent* as the Prosecution would have it. Rather, they were *indicia* of the requisite *special intent*.

5.15 The Appellant therefore submits that the Trial Chamber's reasoning is legally sound and well-considered. The Court's reasoning is simply that, while terrorism might co-exist with the other underlying crimes, say abductions, or sexual slavery, the establishment of these underlying crimes would not necessarily give rise to terrorism. The special intent to terrorise the civilian population must be established, and must dominate the other criminal intents. Anything less would bring terrorism down to the level of the underlying general intent crimes.

5.16 On the basis of the foregoing argument, the Appellant therefore contests the Prosecution's argument that the Trial Chamber should not have looked at each crime individually, but rather, should have looked at all the crimes as a single campaign of terror.[156] As argued above, that would amount to relegating terrorism to the same level as the underlying crimes by obliterating the *special intent* element.

5.17 The Appellant also contests the assertion by the Prosecution that even if each of the three enslavement crimes were considered in isolation, the only reasonable conclusion open to a reasonable trier of fact, on the findings of the Trial Chamber, or alternatively, on the evidence accepted by the Trial Chamber in making those findings, is that the primary purpose of the enslavement crimes was also to spread terror among the civilian population. The Appellant submits that the reasons advanced by the Prosecution, which are dealt with separately below, do not sustain that conclusion.

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[155] See Prosecution Appeal Brief, para. 451.

[156] Prosecution Appeal Brief, paras 491-500; Also see, para. 511 and para. 513.

5.18 The first argument that the Prosecution advances in support of the above proposition is that, the fact that victims of the enslavement crimes were routinely mistreated indicates that the primary purpose of subjecting them to slavery was to spread terror. If terror was not the primary object, the Prosecution argues, cruelty towards the victims would not have been necessary.[157]

5.19 The Appellant submits that the reasoning behind this argument is legally flawed. The argument suggests that the mere fact that other crimes involving widespread violence to life, health and physical or mental well being of the victims are committed simultaneously, with enslavement crimes (or any other crime for that matter), *ipso facto* translates the enslavement crimes into terrorism. The Appellant submits that enslavement crimes (or any other crime) can separately co-exist with any other crime(s) involving widespread violence to life, health and physical or mental well being of the victims, without giving birth to a new crime of terrorism. The basic logic of the Prosecution's argument is otherwise that, any crime involving widespread or systematic violence plus another, equals terrorism?

5.20 The Prosecution also argues that the orders that were given by Brima before the attack on Karina, to *inter alia*, capture strong men in order "to shock the whole country", and to begin abducting civilians in order to attract the international community, on the Freetown withdrawal, show that the primary objective behind the abductions was to spread terror.[158]

5.21 The Appellant contests this submission for a number of reasons. Firstly, it is rather convenient to suggest that ***only*** the acts of abduction that followed the two separate orders by Brima, which were part of wider attacks involving other atrocities, were the only acts that were designed to shock the whole country, or to

[157] Prosecution Appeal Brief, paras 504-505.

[158] Prosecution Appeal Brief, para. 506.

attract international attention.[159] Secondly, the argument suggests that only the commission of terrorism would have shaken the whole country, or attracted international attention. The argument suggests that large scale abductions of women and children on its own would not have been enough to attract international attention. Thirdly, as argued in paragraph 5.21, the orders by Brima on the Karina attack and on the Freetown withdrawal, only related to those specific attacks. The orders did not cover the entire campaign as to constitute *special intent* or indicia of *special intent* for the three enslavement crimes which lasted the entire Indictment period.

5.22 The Prosecution also argues that the fact that enslavement crimes continued after they ceased to serve any military or utilitarian purpose shows that they were committed with the primary aim of spreading terror. In this regard the Prosecution refers to the evidence of the Defence Military Expert's report which was accepted by the Trial Chamber, which states that:

> There can be little military justification for what happened during the retreat from Freetown [...] The abductions seem particularly self-defeating: at a time when there was benefit in reducing the size of the force to make it faster moving during the escape, the abductees swelled the size of the column, slowed it down, and made it a bigger target. One reason given for the abductions was to make the fighting strength seem larger than it was; *but I suspect that the truth was more simply that abductions were now common practice for the AFRC.*[160]

5.23 The Prosecution makes further reference to the Trial Chamber's finding that, the purpose of abducting civilians was to give the impression to the local population that the troops enjoyed greater support than they actually did. [161]

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[159] See Trial Chamber Judgment, paras 1553, 1710, 2038 on the attack on Karina; and paras 614, 1059, 1272, 1380, 1449, 1452, 1607, 1774, 1783, 1831 on the atrocities committed on the Freetown withdrawal.

[160] Prosecution Appeal Brief, para 507, quoting the Trial Chamber's Judgment, para. 1825.

[161] Prosecution Appeal Brief, para. 508.

5.24 In response to the foregoing arguments, the Appellant submits that rather than support the Prosecution's case, the excerpts referred to above, actually support the view that the AFRC continued with the abductions for military or political purposes. Firstly, as the Iron report observed, ***one reason given for the abductions was to make the fighting strength seem larger than it was***. In other words, the abductions were being used as a military gimmick. The fact that the Military Expert makes his own conclusion in this instance is a different matter. Secondly, even the Trial Chamber concedes that the purpose of abducting civilians served a political purpose. It found that the AFRC was abducting civilians to give a false impression of its popularity. The Appellant submits that that amounts to a political gimmick that was calculated to achieve a particular result; to give the impression among the population that it [the AFRC] enjoyed greater support than it actually did. The argument that the abductions outlived their usefulness is therefore ill-conceived.

5.25 Finally on this point, the Prosecution argues that, that the intention to terrorism the civilian population was the primary objective behind the three enslavement crimes can be inferred from the circumstances of the acts or threats, that is, from their nature, manner, timing and duration.[162] The Prosecution argues that, the fact that the enslavement crimes lasted the entire Indictment period; that they occurred simultaneously, with other acts of violence; and that they were committed on a large scale,[163] shows that terror was the primary intention.

5.26 Essentially, the Prosecution's argument is that the fact that the enslavement crimes were widespread or systematic, and that they occurred simultaneously, with other acts of violence, *ipso facto*, translates them into the crime of terrorism. The Appellant submits that this argument further illustrates the point made in paragraphs 5.11 *et seq* that the Prosecution is blaring the distinction between the *general intent* and the *special intent* requirements for the crime of terrorism. The

[162] Prosecution Appeal Brief, para. 509.

[163] Prosecution Appeal Brief, paras 510-516.

argument also illustrates the equation highlighted in paragraph 5.19 above that, in the Prosecution's view, any crime involving massive violence plus another, should amount to terrorism. This reasoning for reasons given above is not tenable.

5.27 On the basis of the foregoing arguments the Appellant therefore submits that it is not true that, even if each of the three enslavement crimes were to be considered in isolation, the only reasonable conclusion open to a reasonable trier of fact, on the findings of the Trial Chamber, or alternatively, on the evidence accepted by the Trial Chamber in making those findings, is that the primary purpose of the enslavement crimes was also to spread terror among the civilian population. The Appellant cautions that, "it is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence".[164]

Collective punishment

The Prosecution's case

5.28 The Prosecution questions why the Trial Chamber failed to consider the three enslavement crimes as also constituting the crime of collective punishment.[165]

5.29 The Prosecution argues that collective punishment should be given the widest meaning and should include enslavement.[166]

5.30 The Prosecution argues further that, since the enslavement of members of the civilian population by the AFRC was "indiscriminate" and "collective", in the same way as the unlawful killings, physical violence, sexual violence and burnings that were found by the Trial Chamber to satisfy the elements of

[164] *Tadić* Appeal Judgment, para. 64.

[165] Prosecution Appeal Brief, paras 517-518, read with para. 453.

[166] Prosecution Appeal Brief, paras 519-520.

collective punishment, the only reasonable inference that any reasonable trier of fact could reach based on the findings of the Trial Chamber, is that this civilian population was subjected to crimes of enslavement for the same purpose as they were subjected to the other crimes, that is, by way of collective punishment Accordingly, the Prosecution submits, the Trial Chamber erred in looking at each crime in isolation, when the only reasonable inference was that they were all part of a single campaign of collective punishment[167]("***the global liability approach"***).

5.31 Furthermore, that even if each of the enslavement crimes were considered in isolation, the only reasonable conclusion on the findings of the Trial Chamber, and the evidence accepted by the Trial Chamber in making those findings, is that enslavement crimes *did* serve as collective punishment. This, the Prosecution argues, is evident from: the order given by Brima to strip naked 35 abductees in Karina; the response of Brima to a request to release abducted priests and nuns that "they were all involved. They make us suffer"; the fact that a child soldier was continually flogged because he was a Mandingo and belonged to Tejan Kabbah people; and the fact that some enslaved civilians were amputated as "a message to President Kabbah".[168]

The Appellant's response

5.32 The Appellant submits that the essence of the Prosecution's submissions that the entire campaign by the AFRC was designed to collectively punish the civilian population is not legally sustainable. Collective punishment like terrorism is a *special intent* crime. In order to establish that the enslavement crimes also amounted to collective punishment, it was therefore necessary to establish the requisite special intent. On that basis, there was therefore nothing wrong in the Trial Chamber treating collective punishment separately from the underlying crimes, or those that were committed simultaneously, with the underlying crimes,

[167] Prosecution Appeal Brief, paras 521-524.

[168] Prosecution Appeal Brief, para. 525.

for which general intent would suffice. A failure by the Trial Chamber to make that distinction, as argued in context of terrorism would otherwise have relegated the collective punishment which requires *special intent* to a *general intent* crime.

5.33 With respect to the submission that, even if each of the enslavement crimes were considered in isolation, the only reasonable conclusion on the findings of the Trial Chamber, and the evidence accepted by the Trial Chamber in making those findings, is that enslavement crimes did serve as collective punishment, the Appellant submits that the Prosecution still advocates the global liability approach under a different guise. The Prosecution picks at isolated incidents that were committed within a particular context and attempts to use them to prove *special intent* for the entire campaign. The flogging of the Mende child soldier for instance only proves collective punishment with respect to that incident. It does not necessarily prove special intent to punish the other abductees who were taken hostage during the campaign. The same goes for the incident relating to the priests and nuns, and to the incident relating to the stripping naked of the 35 women at Karina.

5.34 Secondly, the approach is impermissible in that it seeks to impose collective responsibility. Isolated incidents are selected to establish special intent in relation to other separate and independent incidents, as well as to implicate other persons who were otherwise not involved in the selected incidents referred to. The Prosecution's submissions, for instance, do not prove that the Appellant – Kanu, in committing the enslavement crimes, intended, or shared the intention to collectively punish the civilians concerned. Most importantly that he had, or at least shared, the intention to terrorise the enslavement crime victims. The Prosecution only manages to show that Brima ordered the specified acts of collective punishment.

5.35 The Appellant therefore submits that this ground of appeal, or any part thereof, should not succeed on the basis of the submissions made above.

Legal effect if ground of Appeal is upheld

5.36 In the event that the Appeal's Chamber upholds, or partly upholds, this Ground of Appeal, the Appellant submits that his conviction under this ground would only be relevant to describe his full culpability or to capture the totality of his criminal conduct. The conviction being cumulative, should otherwise not affect the sentence that was given. The Appellant recalls the legal arguments made under Ground 8; paragraph 8.2, of his Appeal Brief and, subject to the necessary changes, incorporates the same here.

6. Prosecution's Sixth Ground of Appeal: The Trial Chamber's dismissal of Count 7 on grounds of Duplicity.

6.1 Under this Ground of Appeal, the Prosecution challenged the dismissal by the Trial Chamber of Count 7, for duplicity, in that it charged two crimes in a single Count, namely (1) sexual slavery, and (2) "any other form of sexual violence".

6.2 The Prosecution divides its submission into three headings. Under the first – Section B, the Prosecution argues that the Trial Chamber made a procedural error in, *priori motu* reconsidering interlocutory decisions on defects in the Indictment, without first affording the parties a right to be heard. The Prosecution therefore prays that the Trial Chamber's decision in dismissing Count 7 must be revised ***unless*** the Defence can show not only that Count 7 is impermissibly duplicitous, but also that it was materially impaired in the preparation of its defence.[169]

6.3 Under the Second heading – Section C of its Appeal Brief, the Prosecution argues that Count 7 is not badly pleaded, and is not defective for duplicity. The Prosecution submits that it is permissible, in a single Count, to charge all violations of a single provision of the Statute that are established by the pleaded

[169] Prosecution Appeal Brief, para. 546.

material facts in the Indictment.[170] The Prosecution submits further that no ambiguity arises from the way the Indictment is pleaded,[171] nor was the Defence prejudiced.[172]

6.4 Under the third heading – Section D, the Prosecution argues that, if at all, the Indictment were defective, the defective was cured by post-indictment disclosures throughout the Prosecution's case.

Appellant's response

6.5 The Appellant submits, and the Prosecution appears to agree (see paragraph 6.2 above), that a determination of the legal arguments under the second and third headings could dispose of the material issue under this Ground of Appeal without the need to address the first heading, which is procedural in nature.

Defect in the Indictment and prejudice to the Defence

6.6 The Appellant submits that it is a well-established principle that it is impermissible to charge an accused person in a general, vague and uncertain manner. Authorities on the issue make it clear that, where within the Count system of charging, allegations are framed in such a way as to create multiplicity, vagueness, and uncertainty, the particular Count or Counts are accordingly defective[173]. In *Karemera*, the Trial Chamber held that, allegations within an Indictment are defective in their form if they are not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent

[170] Prosecution Appeal Brief, para. 553.
[171] Prosecution Appeal Brief, para. 554
[172] Prosecution Appeal Brief, para. 559
[173] Professor Glanville Williams, The Court System and the Duplicity Rule", (1966) Crim. L.R., pp. 255-265, Cited by Judge Thompson in his Dissenting Opinion, CDF Trial Judgement, para. 13

elements, so as to enable the Accused to fully understand the nature and the cause of the charges brought against him.[174]

6.7 One of the principles relating to duplicity, multiplicity and uncertainty as defects in the form of the Indictment that has therefore developed, as Judge Thompson opined, is that:

> The general rule is that for each separate count there should be only one act set out which constitutes the offence. If two or three offences are set out in the same count, separated by the disjunctive 'or' and the conviction should be quashed.[175]

6.8 This position finds support in other sources. In *Delalic*, the Trial Chamber held that the Indictment should "articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner in order to inform the accused of the Charges against which he has to defend himself."[176] In *Bizimungu*, the Appeals Chamber, confirming the application domestic law principles on duplicity to international criminal tribunals, and contrary to the Prosecution's submission on the issue, held that, the rule against duplicity generally forbids the charging of two separate offences in a single count, although a single count may charge different means of committing the same offence.[177] According to Archibald, no more than one offence should be charged in a single count.[178] This rule against duplicity applies against conspiracy as much as to any other offence. ***Duplicity is a matter of form not evidence.***[179] Therefore, in order to ascertain

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[174] *Karemera*, Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, April 25, 2001, para. 16

[175] *Fofana et al*, Trial Judgement, Dissenting Opinion of Judge Thompson, para. 15.

[176] *Delalic*, Decision on Motion by the Accused based on Defects in the Form of the Indictment, Nov. 15, 1996, para. 14

[177] *Bizimungu* Interlocutory Appeal Decision Feb. 12 2004, para. 23

[178] *Richardson*, Archbold Criminal Pleading Evidence & Practice, 2005, para.34-47

[179] *Richardson*, Archbold Criminal Pleading Evidence & Practice, 2005, para.34-47

whether a Count is bad for duplicity, it is ordinarily unnecessary to look further than the Count itself.[180]

6.9 Appellant therefore submits that Count 7 was bad for duplicity in so far as it incorporated two separate crimes. Appellant submits further that he was severely prejudiced in so far he was not able to tell precisely which of the two crimes in the Count he should have defended himself against, and that materially affected conduct of his defence.

6.10 The Appellant submits that the Defence expressed its inability to respond fully and effectively to the Prosecution's case right at the pre-trial stage, and during the trial had to grapple to relate the testimony of the Prosecution's witnesses to the two of the possible crimes under Count 7. At all material times, it was difficult for the Appellant to understand how useful the witnesses' testimony could be with respect to Count 7.

6.11 Further, the Appellant submits that the impact of a duplicitous Count on the Accused, such as in the present case, if it is not dismissed, actually goes beyond simply affecting the preparation of his defence. They include "improper notice of the charges against him, prejudice in the shaping of evidentiary rulings, in sentencing, in limiting review on appeal, in exposure to double jeopardy, and of course the danger that a conviction will result from a less than unanimous verdict as to each separate offense"[181] In *casu*, the Prosecution for instance, prays for an increase in the sentence on the Appellant, if this Ground of Appeal succeeds.[182]

6.12 Alternatively, the Appellant submits that it is not necessary to show prejudice in the preparation of one's defence once it is shown that the Indictment was defectively pleaded. As highlighted in paragraph 6.8 above, duplicity is a matter of form not evidence. Therefore, in order to ascertain whether a Count is bad for

[180] *Ibid*, paras 34-37.
[181] *United States v Marshall*, 75 F3d 1097. 1111(7th Cir.1996)
[182] Prosecution Appeal Brief, para. 580(iv)

duplicity, it is ordinarily unnecessary to look further than the Count itself. The Appellant submits this is especially true of the defect in this case, which is not one of an omission in the Indictment, which could easily be supplemented by post-indictment disclosures, but is rather, inherent in the form, that is, the nature of pleading.

6.13 On the basis of the foregoing, the Appellant submits that Count 7 was bad for duplicity, and that materially affected his ability to prepare his defence.

Was the defect cured?

6.14 The Appellant submits that it is not absolute that the all defects are cured by post-indictment disclosures. The Applicant refers to the argument on duplicity under Ground 2 hereto, and incorporates the same herein, subject to the necessary changes.

6.15 Alternatively, the Appellant submits that the nature of the defect in this instance was such that, short of amending the Indictment, could not be cured. The Appellant submits that contrary to the Prosecution's assertion in paragraph 542 of its Appeal Brief, Judge Sebutinde's separate and concurring opinion on the Rule 98 Decision, which raised the present issue of duplicity, should have warned the Prosecution of the lack of specificity in the Indictment. The Appellant submits that specificity rule places a continuous burden on the Prosecution and once speficity of the Indictment comes into issue, *a fortiori*, arising from the opinion of a judge, it is incumbent upon the Prosecution to purge the perceived offence. The Appellant submits that in the context of the present case, furnishing the Appellant with post-indictment disclosures, where the he was already confused as to which of the two crimes under Count 7, he was facing, rather than make the picture clearer, actually made it worse.

6.16 Alternatively, that the defect could not be cured simply on the basis that duplicity is a matter of form not evidence. Therefore, in order to ascertain whether a Count is bad for duplicity, it is not necessary to look further than the Count itself. The Appellant submits this is especially true of the defect in this case, which is not one of an omission in the Indictment, which could easily be supplemented by post-indictment disclosures, but is rather, inherent in the form, that is, the nature of pleading.

6.17 The Appellant therefore submits that the present Ground of Appeal should not succeed.

6.18 However, should this Ground of Appeal succeeds, as both Count 7 and Count 9, relate to the same crime – sexual slavery; the conviction under Count 7, as the Prosecution submits, would serve to describe the full culpability of the Accused or to capture the totality of his criminal conduct.[183] The Appellant submits that the conviction should otherwise not affect the sentence. The Appellant recalls the legal arguments made under Ground 8; paragraph 8.2, of his Appeal Brief and, subject to the necessary changes, incorporates the same in the present submission

7. Prosecution's Seventh Ground of Appeal: The Trial Chamber's Dismissal of Count 8 for Redundancy

The Prosecution's case

7.1 Under this ground, the Prosecution challenges the dismissal by the Trial Chamber, of Count 8, which charged the Accused with the offence of 'other inhumane acts' – forces marriage, a crime against humanity, punishable under Article 2(i) of the Statute, for redundancy.

[183] Prosecution Appeal Brief, para. 532.

7.2 More particularly, the Prosecution challenges the Trial Chamber's findings, by majority decision, Judge Doherty dissenting, that:

1. the crime against humanity of 'other inhumane acts' punishable under Article 2(i) of the Statute exists as a residual category, and must therefore involve conduct not otherwise subsumed by other crimes against humanity under Article 2 of the Statute.
2. the Trial Chamber was not satisfied that the evidence adduced by the Prosecution was capable of establishing the elements of a non-sexual crime of forced marriage independent of the crime of sexual slavery under Article 2(g) of the Statute.

7.3 The Prosecution argues that the Trial Chamber erred in law and in fact in making these findings. That, as a result of these errors, the Trial Chamber made a procedural error in dismissing Count 8 for redundancy.[184]

7.4 The Prosecution argues that, contrary to the Trial Chamber's finding, it is not correct that in order for a crime to be a crime against humanity of 'other inhumane acts', the crime must be of a non-sexual nature.[185]

7.5 The Prosecution argues that the issue that fell for determination before the Trial Chamber, which this appeal should now determine, is not whether forced marriage is a sexual crime or a non-sexual crime, but simply, whether forced marriage satisfies the elements of the crime against humanity of other inhumane acts.[186]

[184] Prosecution Appeal Brief, paras 584-587.

[185] Prosecution Appeal Brief, paras 594-5.

[186] Prosecution Appeal Brief, para. 596.

7.6 The Prosecution submits that forced marriage exists as a separate crime against humanity of 'other inhuman acts', punishable under Article 2(i) of the Statute.[187] Adopting the definition by Judge Doherty in her Partially Dissenting opinion, which mirrors its own definition,[188] the Prosecution argues that, "[t]he crucial element of 'forced marriage' is the imposition, by threat or physical force arising from the perpetrator's word or conduct, of forced conjugal association by the perpetrator over the victim."[189]

7.7 The distinguishing feature of forced marriage, the Prosecution argues, is the "forced *conjugal association* by the perpetrator over the victim". Forced conjugal association, represents forcing a person into the appearance, the veneer of a conduct (i.e) marriage, by threat, physical assault or other coercion.[190] "Thus, while acts of slavery, or forced labour or slavery, may usually be present in cases of forced marriage, this is not inevitably the case. Non-consensual sex, and forced labour, are not part of the definition of, and are not required in order to establish, that forced marriage has occurred. Rather, it is the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a *forced conjugal association* by the perpetrator over the victim that constitutes the definition of forced marriage."[191]

7.8 The Prosecution therefore, *inter alia*, requests the Appeals Chamber to reverse the Trial Chamber's decision to dismiss Count 8 for redundancy and to revise the Trial Chamber's judgment and convict each Accused under Article 6(1) and Article 6(3) of the Statute for the crime against humanity of other inhumane acts (forced marriage) and to enter convictions for each Accused on Count 8.[192]

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[187] Prosecution Appeal Brief, Part D, pp 204-216.

[188] Prosecution Final Trial Brief, paras 1009-1012.

[189] Prosecution Appeal Brief, para. 612, relying on Dissenting Opinion of Justice Doherty, para. 53.

[190] Prosecution Appeal Brief, para. 614.

[191] Prosecution Appeal Brief, para. 615. (Footnotes omitted).

[192] Prosecution Appeal Brief, para. 645.

The Appellant's response

7.9 The Appellant submits that the question that fell for determination before the Trial Chamber and in deed the real issue for determination under this Ground of Appeal is whether, on the facts of the case as they were considered by the Trial Chamber, the Court erred in striking out Count 8, which charged the Accused with "forced marriage" as a crime against humanity of 'other inhumane acts', punishable under Article 2(i) of the Statute, for redundancy. In other words, whether forced marriage on the facts as they were considered by the Trial Chamber, was distinct, or was proven to be distinct from sexual slavery such that it could stand on its own, as a residual offence under Article 2(i).

7.10 This approach, the Appellant submits, averts the dangers of getting mired in technical and abstract legal arguments that had no bearing on the outcome of the case. It is trite that it is not for the courts to indulge in academic exercises, but simply to apply the law in relation to real issues before it.

7.11 In this regard, the Appellant, while conceding that, conceptually, the Trial Chamber erred in law in holding that the crime against humanity of 'other inhuman acts' under Article 2(i) of the Statute could not involve acts of a sexual nature as these were exhaustively dealt with under Article 2(g), and was therefore limited to non-sexual crimes, the Appellant submits that that error did not materially affect the Court's ultimate findings in this case and would therefore not invalidate the decision.

7.12 The Appellant submits that, in dealing with the real issue before it, the Trial Chamber, neither erred in law nor fact, and was therefore correct in dismissing Count 8 for duplicity. The Chamber considered whether, on the evidence that had been presented by the Prosecution, it could allow "forced marriage" to stand as a residual offence of 'other inhumane acts' under Article 2(i), in view of the more

specific provisions, Article 2(a) to (h). In other words, whether there was any lacuna in Article 2 that forced marriage could plug.[193] This, of course, was against the background that, at a conceptual level, the Trial Chamber had earlier conceded that forced marriage could constitute a residual offence under Article 2(i). Trial Chamber I having granted leave to allow forced marriage to be added to the Indictment, Trial Chamber II had further allowed the charge to stand at the Rule 98 stage, *albeit*, under the erroneous opinion that it would only relate to non-sexual crimes.[194]

7.13 In the final Judgment however, after a careful analysis of the all evidence relevant to the issue, the Trial Chamber came a finding that the Prosecution had not established any ***non-sexual elements*** that could distinguish forced marriage from sexually slavery. The Trial Chamber found as follows:

> Having now examined the whole of the evidence in the case, the Trial Chamber by a majority, is not satisfied that the evidence adduced by the Prosecution is capable of establishing the elements of a non-sexual crime of "forced marriage" independent of the crime of sexual slavery under article 2(g) of the Statute. [195] (Footnote omitted).

7.14 The inquiry however did not end there. The Trial Chamber was also unable to find any ***sexual elements*** that could distinguish forced marriage from sexual slavery. The Chamber found that the Prosecution had not been able to show that "forced marriage" as a crime against humanity of 'other inhumane acts' was distinct from sexual slavery covered under the more specific Article 2(g). Rather, the Court found that forced marriage was entirely dependant on the same sexual

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[193] Trial Chamber Judgment, para. 703, where the Trial Chamber found that, "Forced marriage" as an 'other inhumane act', must therefore not involve conduct otherwise subsumed by other crimes enumerated under Article 2 of the Statute.

[194] Rule 98 Decision, para. 165.

[195] Trial Chamber Judgment para. 704.

acts as sexual slavery. [196] The Appellant submits that the juxtaposition of forced marriage and sexual slavery in this instance would not have been necessary if the object were only to establish whether forced marriage was a sexual or non-sexual crime. Therefore, that the juxtaposition was also meant to compare the sexual elements between forced marriage and sexual slavery.

7.15 The Trial Chamber's findings proceeded on the reasoning that Article 2(i) was a residual clause; a safety net, designed to capture any criminal conduct of similar gravity to that enumerated in Article 2(a) to (h), likely to escape the ambit of these more specific clauses.[197] Therefore, that Article 2(i) could not have been meant to duplicate the more specific offences in Article 2(a) to (h). More particularly, that forced marriage as a residual offence could not therefore be seen to be duplicating sexual slavery. The Appellant submits that there is no error in law or in logic in this reasoning.

7.16 The Trial Chamber was therefore correct in dismissing "forced marriage" for duplicity. On the evidence, the crime being sexual in nature, impermissibly duplicated the crime of sexual slavery. Within that limited context, the Appellant does not understand the Court's findings to mean that the Trial Chamber articulated a general proposition of law that the crime against humanity of 'other inhumane acts' was entirely exclusive to non-sexual offences. Rather, that the Trial Chamber simply found that on the evidence "forced marriage" as article/incident of the crime against humanity of 'other inhumane acts', could not constitute a separate *other inhumane acts crime* as it was not materially distinct from the established offence of sexual slavery.

7.17 The Prosecution implicitly concedes that forced marriage and sexual slavery largely depended on the same factual elements. The Prosecution's point of departure is however the notion of *forced conjugal association.* In the

[196] Trial Chamber Judgment, paras 708-713.

[197] Trial Chamber Judgment, footnote 1363 and accompanying text.

Prosecution's submission, the mere state of being, that is, being in a marriage situation by the imposition, by threat or physical force arising from the perpetrator's words or other conduct, is what distinguishes forced marriage from sexual slavery. In the Prosecution's own words,

> [w]hile acts of sexual slavery, or forced labour or slavery, may usually be present in cases of forced marriage, this is not inevitably the case. Non-consensual sex, and forced labour, are not part of the definition of, and are not required in order to establish, that forced marriage has occurred. Rather, it is the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a *forced conjugal association* by the perpetrator over the victim that constitutes the definition of a forced marriage.[198] (Footnote omitted.)

7.18 The Appellant submits that the distinction drawn by the Prosecution in this instance is rather abstract, if not artificial. The Trial Chamber was unable to establish any real distinction between forced marriage and sexual slavery, and none exists. If one pierces the veil of abstract legal definition (as the Trial Chamber did), one finds (as the Trial Chamber rightly did) that the constituent elements of forced marriage and sexual elements are essential the same.[199]

7.19 Under those circumstances, it would be ill-conceived, and in fact, would occasion an injustice to the Accused, to draw an artificial legal line. As Justice Hunt and Justice Bennouna highlighted in their dissenting opinion in *Ĉelebići* Appeals Judgment, *albeit* under slightly different circumstances; the fundamental function of the criminal law is to punish the Accused for his criminal conduct, and only for his criminal conduct. Taking into account abstract elements creates the danger that the Accused will also be convicted (and suffer prejudice) for crimes which have a distinct existence only as a purely legal and abstract matter.[200]

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[198] Prosecution Appeal Brief, para. 616.

[199] See for instance, Trial Chamber Judgment, paras 708-713.

[200] Separate and Dissenting Opinion of Judge Hunt and Judge Mohamed Bennouna, *Čelebići* Appeal Judgment, para. 27, discussing the issue of cumulative convictions.

7.20 Unjustified multiple convictions under those circumstances, as the learned judges also found, pose prejudice, or very real risk of prejudice to the Accused in a number of ways. Multiple convictions come with the social stigmatization inherent in being convicted of a crime. Also, the number of crimes for which a person is convicted may impact on his parole eligibility depending on the national laws of the country enforcing the sentence. Further, multiple convictions may also expose the convicted person to the risk of increased sentences and/or to the application of 'habitual offender' laws in the case of subsequent convictions in another jurisdiction.[201]

7.21 The Appellant therefore, on the basis of the foregoing arguments, submits that, while the Trial Chamber erred in its conceptual articulation of the category of 'other inhuman acts' as a crime against humanity, the error did not materially affect its finding that "forced marriage" could not stand as a separate crime against humanity of 'other inhumane acts', as it duplicated sexual slavery. The error therefore, would not invalidate the ultimate decision in *casu*. Neither, save for jurisprudential purposes, would it result in a miscarriage of justice. If at all, the error would only impact on a cumulative conviction (of forced marriage) for conduct already punished under sexual slavery.

7.22 Alternatively, the Appellant submits that "sexual slavery" has not yet crystallized into a crime against humanity of 'other inhumane acts' and on that basis, this ground of appeal should not succeed. The Appellant submits, and the Prosecution concedes,[202] that there is no consensus on whether the phenomenon of "forced marriage" constitutes a ***separate*** crime against humanity of 'other inhumane acts'. There has as yet been no serious suggestion in judicial or academic opinion that "forced marriage' could constitute a distinct crime against humanity of 'other inhumane acts'. Rather, the tendency has been to subsume forced marriage under

[201] Supra, para. 23.

[202] Prosecution Appeal Brief, para. 613.

existing categories of crimes against humanity like, sexual slavery,[203] as did the Trial Chamber; torture or rape;[204] or the general genre of slavery and slave-like offences.[205]

7.23 The Appellant submits that the issue in this instance is not whether the crime against humanity of 'other inhumane acts' was firmly established in customary international law at all material within the temporal jurisdiction of the Special Court.[206] That is not, and has never been, in dispute. Rather, the issue is whether it was firmly established in customary international law at all material times within the temporal jurisdiction of the Special Court, that "forced marriage" (***as an item of particulars***) constituted a separate crime against humanity of 'other inhumane acts'. The Appellant submits that forced marriage has not yet crystallized into a distinct crime against humanity of other inhumane acts. Judicial, legal and academic opinion is divergent on the issue. In dealing with this issue, the Appellant therefore humbly submits that the Appeals Chamber takes heed of the caution by Justice Thompson which, though it was made under different circumstances, is equally applicable in this instance, that:

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[203] *Kvočka* Trial Judgment, footnote 343; Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observer Notes, Article by Article* [The Hague: Kluwer, 1999], p. 142; United Nations Economic and Social Council, "Contemporary Forms of Slavery: Systemic Rape, Sexual Slavery and Slave-Like Practices during Armed Conflict" (Final Report submitted by Ms Gay J McDougal, Special Rapporteur) E/CN.4/Sub.2/1998/13 of 22 June 2000, para. 30; United Nations Economic and Social Council, "Contemporary Forms of Slavery: Systemic Rape, Sexual Slavery and Slave-Like Practices during Armed Conflict" (Update to Final Report submitted by Ms Gay J McDougal, Special Rapporteur) E/CN.4/Sub.2/2000/21 of 6 June 2000, para. 13

[204] Kalra, "Forced Marriage: Rwanda's Secret Revealed", U.C. Davis Journal of International Law and Policy, pp. 214-216.

[205] United Nations Economic and Social Council, "Contemporary Forms of Slavery: Systemic Rape, Sexual Slavery and Slave-Like Practices during Armed Conflict" (Final Report submitted by Ms Gay J McDougal, Special Rapporteur) E/CN.4/Sub.2/1998/13 of 22 June 2000, para. 8 and 30; Sierra Leone Truth and Reconciliation Commission, *Witness To Truth*, Final Report of the Sierra Leone Truth and Reconciliation Commission)(2004) Vol. 3B, para. 184.

[206] Prosecution Appeal Brief, para. 602.

> ... . To seek to apply whatever disparate, incoherent and inconclusive general principles that exist in the form of evolving jurisprudence without constructive adaptation is a logical mistake that may well make us, as judges, victims of the fallacy of slippery precedents.[207] (Footnote and emphasis omitted.)

7.24 The Appellant humbly submits that the Appeals Chamber should guard against falling victim of 'the fallacy of slippery precedents'. On the basis of the foregoing arguments, the Appellant reiterates the submission in his Trial Brief that the Prosecution is seeking to introduce a new crime.[208] Therefore that this ground of appeal should not succeed on that basis.

Legal effect if Ground of Appeal is upheld

7.25 In the event that the Appeals Chamber upholds this Ground of Appeal, the conviction under Count 8, being cumulative, should only be necessary to describe the full culpability of the Accused or to capture the totality of his criminal conduct. The conviction should otherwise not affect the sentence. The Appellant recalls the legal arguments made under Ground 8; paragraph 8.2, of his Appeal Brief and, subject to the necessary changes, incorporates the same here.

8. Prosecution's Eighth Ground of Appeal: The Trial Chamber's treatment of Count 11

8.1 The Appellant acknowledges that inter-Article cumulative convictions in respect of the same criminal conduct are permissible at law. Therefore, only on that basis, the Appellant agrees that the Trial Chamber erred in the manner alleged in

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[207] *The Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-J, 2 August 2007, Separate and Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, para. 24.

[208] Kanu Final Trial Brief, para. 56.

paragraph 648 of the Prosecution's Appeal Brief. The Appellant concedes that it was permissible for the Court to enter cumulative convictions for mutilation both under Article 2(j) and Article 3(a) of the Statute.

8.2 The Appellant however disagrees with the Prosecution that the 'additional' conviction for mutilation under Count 11 should result in an upward revision of the respective sentences against all 3 Accused.[209] The Appellant submits that the conviction being cumulative should not affect the global sentences that were imposed, which, by the Prosecution's own admission, already took into account that amputations "were one of the most shocking and notorious features of the widespread and systematic attack against the civilian population during the conflict".[210] The Appellant submits that the additional conviction would only be relevant, as the Prosecution correctly observed, to describe the full culpability of the Accused or provide a complete picture of their criminal conduct – the *totality principle*.[211]

8.3 The Appellant reiterates the submissions made under ground 8, in particular, paragraph 8.2 of his Appeal Brief and specifically incorporates the same herein.

8.4 The Appellant submits further that, the suggestion by the Prosecution that the fact that the additional conviction for mutilation under Count 11 (as a crime against humanity) should somehow aggravate the culpability of the Accused (and following that logic, presumably attract an increased penalty) is not legally tenable.[212] That argument is based on the erroneous legal premise that crimes against humanity are more serious than war crimes. The Appellant submits that there is no hierarchical gradation of crimes under the Statute of the Special Court.

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[209] Prosecution Appeal Brief, para. 680.

[210] Prosecution Appeal Brief, para. 652, referring, *inter alia*, to the Trial Chamber's Sentencing Judgment, paras 34-35; 46.

[211] Prosecution Appeal Brief, para. 652.

[212] Prosecution Appeal Brief; 652 read with para. 680.

As the ICTR Appeals Chamber held in *Kayishema*,[213] which is equally true of the Statute of the Special Court,[214] 'all the crimes specified therein [the ICTR Statute] are "serious violations of international humanitarian law", capable of attracting the same sentence'.

8.5 The Appellant therefore submits that the additional conviction under Count 11, if allowed, should not affect the sentence.

9. Prosecution's Ninth Ground of Appeal: The Trial Chamber's approach to cumulative convictions under Article 6(1) and Article 6(3) of the Statute.

Prosecution's case

9.1 The ultimate issue this Ground of Appeal raises, is whether the Trial Chamber erred in law, in finding that it would constitute a legal error invalidating the Judgment to enter concurrent convictions under Article 6(1) and Article 6(3) in respect of a single Count in circumstances where an Accused was found to be individually responsible under Article 6(1) and Article 6(3) for different crimes based on separate facts encompassed within that Count.[215]

9.2 The Prosecution submits that Trial Chamber's decision not to enter concurrent convictions in such circumstances was an error of law, or at least, an error in the exercise of the Court's discretion. The Prosecution argues that the Trial Chamber's decision leads to unreasonable results in that the Disposition of its Judgment does not reflect the gravity of the criminal responsibility of the Accused.[216] Further, that the decision in some cases fails to reflect the criminal

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[213] *Prosecutor v Kayishema, Ruzindana*, ICTR-95-1-A, 1 June 2001, para. 367.

[214] Article 1(1) of the Statute.

[215] Prosecution Appeal Brief, para. 701.

[216] Prosecution Appeal Brief, para. 702.

responsibility of the Accused for crimes committed in an entire district.[217] Other than the totality principle, the Prosecution also agues that the decision creates a potential problem at the appeal stage, should the Accused successfully appeal any Article 6(1) conviction. In that event, the Prosecution argues, it would be left with no conviction on the entire Count, even if the Accused were guilty under Article 6(3).[218]

9.3 The Prosecution therefore argues that the Trial Chamber's Disposition should also have reflected the Accused's Article 6(3) convictions, where they were based on different facts. In Annexure E to its Appeal Brief, the Prosecution requests the Appeals Chamber to revise the Trial Chamber's Disposition to include the Article 6(3) crimes for which all 3 Accused, respectively, were found individually responsible.

9.4 In paragraph 707 of its Appeal Brief, the Prosecution requests the Appeals Chamber, depending on the success of its other Grounds of Appeal, to also enter cumulative convictions on the same Count under Article 6(1) and Article 6(3) where the Accused is found individually responsible under both Articles, but based on different facts.

9.5 Resulting from the amendments to the Disposition, as envisaged above, the Prosecution requests the Appeals Chamber to increase the penalty imposed on Brima, Kamara and Kanu to reflect the additional criminal liability.[219]

Appellant's response

9.6 Before delving into the substantive issues raised in this Ground of Appeal, the Appellant will hasten to address the issue of the Prosecution's prayer for an

[217] Prosecution Appeal Brief, para. 704.

[218] Prosecution Appeal Brief, para. 703.

[219] Prosecution Appeal Brief, para. 709.

upward revision of the sentence. The Appellant submits that, should this Ground of Appeal succeed, the cumulative convictions envisaged in Annexure E to the Prosecution's Appeal Brief, should not affect the sentence, as prayed. The Appellant submits that, even though the contemplated Article 6(3) convictions might not have been reflected in the Trial Chamber's Disposition; they were nonetheless, considered for sentencing purposes and reflect in the fifty-year global sentence that was imposed against him.

9.7 In *casu* the Trial Chamber underlined its imposition of a fifty-year global sentence against the Appellant with a general finding that the "final or aggregate sentence should reflect the totality of the culpable conduct, or generally, that it should reflect the gravity of the offences and the overall culpability of the offender, so that it is both just and appropriate".[220] In its deliberations on what would be a "just and appropriate" sentence in the circumstances of the case, the Court went on to consider the Appellant's liability under Article 6(3) even if it were not reflected in the Disposition. The Trial Chamber found as follows: "With regard to the crimes for which Kanu is responsible under Article 6(3), the Trial Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, detailed in the Trial Chamber's Factual Findings are of a particularly heinous nature. ... ." The Court then went on recite some of the incidents from its Factual Findings in the Judgment for which Kanu was liable under command authority.[221] Clearly, the Trial Chamber considered the Appellant's Article 6(3) criminal responsibility for sentencing purposes, even if it was not reflected in the Trial Chamber's Disposition.

9.8 The Prosecution's prayer for an upward revision of the penalty to reflect the Accused's additional criminal liability under those circumstances must therefore be taken to refer only to the additional cumulative convictions that might arise if

[220] Sentencing Judgment, para. 12.

[221] Sentencing Judgment, para. 96; also see para. 97.

the Prosecution's other Ground of Appeal succeed as prayed in paragraph 707 of its Appeal Brief.

9.9 The Appellant submits that the Prosecution's request for an increase in the sentence to reflect the Accused's "additional criminal liability" betrays an erroneous belief that the mere entry of additional cumulative convictions would necessarily result in an increase in the penalty imposed. Case law on the point however indicates that the issue is not so much a question of the number of convictions entered as it is about ensuring that the penalty imposed reflects the overall culpability of the offender so that it is just and appropriate.[222]

9.10 Further/alternatively the Appellant will now turn to the substantive issues raised under this ground. The Appellant notes from the onset that the question of which approach to take with respect to concurrent convictions under Article 6(1) and Article 6(3) in respect of a single Count, is not yet settled in law. As the ICTY Appeals Chamber noted, the law is still in development on this issue.[223] Therefore, it is important that the Appeals Chamber should guide against the so-called 'fallacy of slippery precedents'.

9.11 Despite the divergence of judicial opinion, there however appears to be a consensus that how the Courts determine the issue of cumulative convictions under Article 6(1) and Article 6(3) is entirely discretionary as long as the ultimate penalty reflects the overall culpability of the Accused so that it is both just and appropriate.[224] Three distinct approaches however appear to be evolving from the practices of international criminal tribunal.[225] The first involves imposing

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[222] *Čelebići* Appeal Judgment, para. 429-430.

[223] *Oric* Trial Chamber Judgment, para. 339; Also see a survey of the different cases and the different opinions on the issue – paras 240-243.

[224] *Supra*, para. 9.7.

[225] The three distinct categories are summarized in *Čelebići*, Appeals Judgment paras 743 *et seq*. For a comprehensive discussion on the different approaches by the Courts, also see, *Oric* Trial Judgment, paras 399-342.

punishment on the Accused for two separate offences encompassed in the one Count. The second involves entering a conviction under Article 6(3) with the Accused's direct participation as an aggravating factor. The third involves entering a conviction under Article 6(1) with the Accused's position of authority serving as an aggravating factor.

9.12 The Prosecution alleges that in *casu* the Trial Chamber took the second option. The Prosecution takes no issue with that choice.[226] It however takes issue with the Chamber's application of that option.[227] The Prosecution argues that the Trial Chamber's Disposition should have recorded the cumulative convictions under Article 6(1) and Article 6(3), respectively, where they were based on different facts, even though they were pleaded in one Count.[228] "Recording a conviction on a single Count under *both* Article 6(1) *and* Article 6(3) in such circumstances [the Prosecution argues] does not amount to a concurrent conviction under Article 6(1) and Article 6(3) for the same crime, but rather, reflects the fact that the Accused was individually responsible under different provisions of Article 6 for different crimes within the same Count."[229]

9.13 On a closer look the Appellant however submits that the Prosecution is effectively challenging the exercise of the Trial Chamber's discretion in selecting the second option of the three different approaches highlighted in paragraph 9.11 above. In effect, the Prosecution argues that the Trial Chamber should have taken the first option, and should have entered cumulative convictions on the same Count under Article 6(1) and Article 6(3) on the basis that the convictions are based on different facts. Thus while the Prosecution purports to question the ***application*** of the approach taken by the Trial Chamber, it is effectively, questioning the Court's discretion (i.e its choice of approach). The Prosecution actually makes this

[226] Prosecution Appeal Brief, para. 687.

[227] Prosecution Appeal Brief, para. 688.

[228] Prosecution Appeal Brief, paras 688-693;694-701.

[229] Prosecution Appeal Brief, para. 693.

concession in paragraph 702 of its Appeal Brief, where it argues that the Trial Chamber's failure to enter same Count cumulative convictions under Article 6(1) and 6(3) based on different facts, amounts to an error of law, "or at least, an error in the exercise of the Trial Chamber's discretion". (Footnote omitted).

9.14 On that basis, it is therefore imperative to establish whether the Prosecution has made out a sufficient case for a review of the Trial Chamber's discretionary powers. In this regard, the Appellant submits that the Prosecution fails to establish that the Trial Chamber, in choosing the second approach of the three options outlined in paragraph 9.11, made a discernable error necessitating judicial review by the Appeal Chamber.

9.15 Discernable errors that will cause the Appeals Chamber to overturn the exercise of discretion by a Trial Chamber are that the Trial Chamber: (1) misdirected itself as to the principle to be applied or the law relevant to the exercise of its discretion; (2) took into account irrelevant considerations; (3) failed to take into account relevant considerations; (4) gave insufficient weight to relevant considerations; (5) made an error as to the facts upon which it has exercised its discretion; or (6) reached a decision that no reasonable Trial Chamber could have reached.[230]

9.16 It is not clear which of these grounds the Prosecution alleges in the present case. While the first ground – that Trial Chamber misdirected itself as to the principle to be applied or the law relevant to the exercise of its discretion would appear more suited to the Prosecution's case, the Prosecution itself acknowledges that it takes no issue with the Trial Chamber's choice of the second approach of the

[230] *Prosecutor v Krajisnik*, No. IT-00-39AR73.1, "Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment", 25 April 2005, para. 7; *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, "Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table", 19 August 2005, para. 5; *Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR73.3, "Decision on Interlocutory Appeal Against Decision of 13 February 2004 Partially Granting Prosecutor's Motion for Leave to Amend the Indictment", 27 August 2004, para. 26.

three options in paragraph 9.11.[231] The Prosecution therefore does not take its case beyond the bald allegation that the Trial Chamber's choice of approach, at least, amounts to an error in the exercise of its discretion.

9.17 Even if it were argued that the decision by the Trial Chamber to apply the second approach in this case were an error of law, the Appellant submits that the Prosecution still fails show that that error would invalidate the decision. The Appellant submits that the failure by the Trial Chamber to enter same Count cumulative convictions under Article 6(1) and Article 6(3) would not invalidate the decision in this case. Firstly, the Prosecution's concern that the failure to enter cumulative convictions under the circumstances of this case, would impact on the totality principle is inconsequential. As argued in paragraphs 9.6 to 9.8 above, the Accused criminal responsibility, while it might not have reflected in the Disposition, was nevertheless taken into account for sentencing purposes. Secondly, the apprehension that a failure to enter same Count cumulative convictions under Article 6(1) and Article 6(3) could expose the Prosecution in the event of a successful Article 6(1) appeal by the Accused, is more apparent than real. As the Prosecution concedes, the Appeals Chamber could always revise the Trial Chamber's judgment by converting the conviction under Article 6(1) into a conviction under Article 6(3).[232]

9.18 The Appellant therefore submits that, simply on the basis that the Prosecution has failed to make out a sufficient case for a review of the Trial Chamber's exercise of its discretions, or alternatively, its interpretation and application of the law on the question of same Count cumulative convictions under Article 6(1) and Article 6(3), this Ground of Appeal should not succeed.

9.19 Alternatively, the Appellant submits that there is as yet no established position relating to cumulative convictions on the same Count under Article 6(1) and Article 6(3) ***based on different facts***. All the cases on the point deal with the issue

[231] *Supra*, para. 9.12.

[232] Prosecution Appeal Brief, para. 703.

in the context of cumulative convictions based on the same facts. Therefore that the entire premises of the Trial Chamber's findings on the issue, and consequently the Prosecution basis for appeal, is ill-conceived.

9.20 The Appellant submits that the three different approaches in *Čelebići*,[233] the second of which the Trial Chamber ostensibly adopted, relate to cumulative convictions on the same Count under Article 6(1) and Article 6(3), based on the same facts. The same approach is therefore not directly applicable (as applied by the Trial Chamber, and as argued by the Prosecution) to cumulative convictions on the same Count under Article 6(1) and Article 6(3), based on the different facts. The Trial Chamber's decision on the issue, and the Prosecution's challenge, are therefore misplaced. The Appellant submits that the Trial Chamber, and the Prosecution, fell 'victims of the fallacy of slippery precedents' by trying to fit the circumstances of the present case into the four corners of existing, but not entirely applicable, 'precedents'.

9.21 The Appellant therefore submits that the present Ground of Appeal should not succeed, simply on the basis that the Prosecution is challenging a wrong decision in the wrong manner.

Humbly submitted,

Ajibola M. Manly-Spain

[233] *Supra*, footnote

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