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SCSL-04-16-A
(1733-1771)

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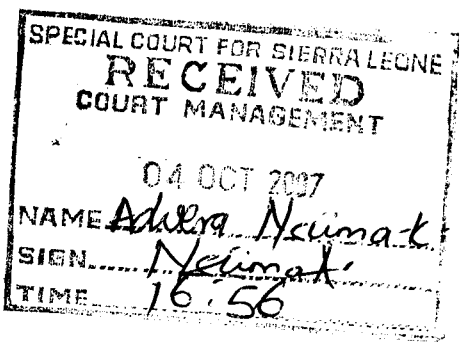
SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Mr. Herman von Hebel

Date Filed: 4 October 2007



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

Case No. SCSL–2004–16-A

PUBLIC
BRIMA RESPONSE TO PROSECUTION'S APPEAL BRIEF

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TABLE OF CONTENTS

INTRODUCTION

1. On 13 September 2007 the Prosecution pursuant to Rule 111 of the Rules of Procedure and Evidence filed its Appeal Brief containing the submissions of the Prosecution against the June 20, 2007 judgement (the "Judgement") of the Trial Chamber in the case of the Prosecutor against Alex Tamba Brima (the "Repondent") , Brima Bazzy BRIMA, and Santigie Borbor Kanu.

2. The Prosecution's grounds of appeal were set out in its Notice of Appeal filed on August 2, 2007.

3. Pursuant to Rule 112 of the Rules of Procedure and Evidence the Respondent hereby files its Response to the Prosecution's Appeal Brief filed on September 13, 2007.

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

4. The Trial Chamber determined in its Judgement that at a meeting held in the Koinadugu District, a number of AFRC commanders conferred witht with SAJ Musa to discuss the future of the AFRC fighting forces and the need for the development of a new military strategy. The commanders reached a consensus that the troops who had arrived from Kono District should act as an advance fighting force to locate and establish a base in the north western area of Sierra Leone in preparation for an attack on Freetown. The stated purpose was to **"restore the Sierra Leone Army"**. The Trial Chamber established that at the meeting in Koinadugu District it was decided that Brima would lead an advance **team north east to establish an AFRC base in Bombali District and that SAJ Musa and his troops would follow later.**

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

Planning

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

> "Planning" implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[1] Proof of the existence of a plan may be provided by circumstantial evidence.[2] Responsibility is incurred when the level of the accused's participation is substantial, even when the crime is actually committed by another person.[3]
> The *actus reus* requires that the accused, alone or together with others, designated the criminal conduct constituting the crimes charged. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[4] The *mens rea* requires that the accused acted with direct intent in relation to his or her own planning or with the awareness of the substantial likelihood that a crime would be committed a in the execution of that plan. Planning with such awareness has to be regarded as accepting that crime.[5] (765-766)

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

8. In the Bombali District, the Trial Chamber determined that at Kamagbengbe there was a strategic discussion between the commanders which could qualify as planning of the

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[1] *Akayesu* Trial Judgement, para. 477; *Brđanin* Trial Judgement, para. 268; *Stakić* Trial Judgement, para. 443; Krstić Trial Judgement, para. 601.
[2] *Blaškić* Trial Judgement, para. 279.
[3] *Bagilishema* Trial Judgement, para. 30.
[4] *Kordić* Appeal Judgement, para. 26.
[5] *Kordić* Appeal Judgement, paras 29, 31.

attack on Karina and the crimes committed therein. The Trial Chamber further noted that, given that witness TF1-334 did not name the commanders involved in this discussion it was not prepared to infer merely by virtue of the Accused BRIMA'S position as deputy commander that he was present during the discussions[6]. In Freetown and the Western Area, the Trial Chamber found no evidence that the Accused BRIMA planned the commission of crimes in Freetown and the Western Area.[7]

9. The Prosecution failed to proffer any direct or circumstantial substantial evidence when it presented its case nor in the Judgement to establish the fact that the first respondent Alex Tamba Brima in fact or in law planned or took part in the planning of the crimes committed in Bombali District and Freetown and the Western area..

10. The Respondent contends that the fact that the Trial Chamber found that Brima was the overall commander at Mansofinia prior to Saj Musa's arrival and throughout the journey to Colonel Eddie Town and during the Freetown invasion[8], does not imply or establish as as a proven fact that he was involved in the planning of the crimes in Bombali and Freetown.

Ordering

11. The *actus reus* of 'ordering' requires that a person in a position of authority uses that authority to instruct another to commit an offence. The *mens rea* for ordering requires that the accused acted with direct intent in relation to his own ordering or with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.[9] To be held liable for ordering it must be shown that the orders to commit a crime came directly from the person giving the order(s). One can only be held liable for ordering when it is evident that specific orders were give by the person who is held to be liable for ordering the crimes.

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[6] Trial Chamber's Judgement, para 1917
[7] Trial Chamber's Judgement, para 1937
[8] Trial Chamber's Judgement, para 380,465, 472,474
[9] Trial Chamber's Judgement, para 773, *Kordić* Appeal Judgement, paras 29, 30; *Blaškić* Appeal Judgement, para. 42.

12. The Respondent submits that the Prosecution's analysis that Brima ordered the commission of specific crimes in Bombali District cannot be taken by any reasonable trier of facts to imply that the Respondent ordered the commission of all crimes committed in Bombali District, Freetown and the Western Area.

Instigating

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

Aiding and abetting

14. The Respondent contends that although the Trial Chamber agreed with the Prosecution that a "persistent failure to prevent or punish crimes by subordinates over time may also constitute aiding or abetting,"[10] it further stated that it may be a basis for his liability for aiding and abetting, subject to the *mens rea* and *actus reus* requirements being fulfilled.[11]

15. The Prosecution failed to prove that Brima satisfied the necessary *mens rea* and *actus reus* requirements of aiding and abetting to be held liable by a reasonable trier of facts for aiding and abetting all the crimes committed in the Bombali District and the Freetown and Western areas.

The Errors in the Trial Chamber's evaluation of Article 6(3) liability for the Bombali District Crimes and Freetown and the Western Area Crimes.

16. The Respondent agrees with the Prosecution that the Trial Chamber made no findings as to Brima's responsibility under Aricle 6(3) for the enslavement crimes in Bombali and Freetown and the Western Areas.[12]

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[10] Prosecution Final Brief, para. 431.
[11] Trial Chamber's Judgement, para 777
[12] Prosecution Final Brief, para. 12

17. The Respondent submits that on the strength of the preceding paragraph and the Respondent's appeal brief no reasonable trier of fact would not find Brima liable for the three enslavement crimes under Article 6(3).

18. The Respondent contends that there is no substance and merit in the Prosecution's First Ground of Appeal and that same should be dismissed.

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

19. The Trial Chamber stated in its Judgment that it would "not make any findings on crimes perpetrated in locations not specifically pleaded in the Indictment."[13]

20. The Prosecution submits that the Trial Chamber erred as a result because each of the crimes referred to in exhibit B of the Prosecution Appeal Brief was properly pleaded. In the alternative to the extent that any of those crimes was not adequately pleaded in the indictment any resulting defect in the Indictment was subsequently cured by timely, clear and consistent information by the Prosecution.[14]

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

22. The Prosecution's case is that it "was entitled to proceed at trial on the basis that the indictment was not defective in pleading the locations of crimes in the way that it did,

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

and that any Defence issue in this respect had been settled by pre-trial decisions of the Trial Chamber".[15]

23. The Prosecution it is submitted came to this conclusion after considering the decisions in the *Sesay* Preliminary Motion Decision, the *BRIMA* Preliminary Motion Decision, the *Kanu* Preliminary Motion and the *Brima* Preliminary Motion Decision.[16]

24. It is the submission of the Respondent that the Prosecution failed to appreciate the true and proper meaning of Trial Chamber I's holding in the Sesay Preliminary Motion Decision which sought to state that the use of general formulations like "such as" or "various locations", or "various areas ...including" in the Indictment is allowable within context. Indeed Trial Chamber I held that the use of the said formulations "**is clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions"**[17] i.e. it is submitted, to demonstrate the "widespread or systematic" nature of the attack.

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

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

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[15] Public Appeal Brief of the Prosecution, para 206.
[16] Public Appeal Brief of the Prosecution, paras 202 to 205.
[17] Public Appeal Brief of the Prosecution, paras 202 (emphasis added)

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

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

28. The Prosecution refers to various authorities cited by the Trial Chamber in support of its decision not to make any findings in respect of crimes perpetrated in locations not specifically pleaded in the Indictment. On such authority was paragraph 397 of the Brdanin Trial Judgment where the ICTY said that:

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

29. It is the Respondent's position that in this regard the Prosecution is clutching at straws in order to distinguish this Judgment. The language used therein is clear and unambiguous and should not be subjected to any differing interpretation than the clear and stated intended meaning.

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

38. The fact that the Respondent was not found criminally culpable for the offence of "committing" any of the crimes referred to in the Counts in the Indictment notwithstanding the Respondent submits that the he did not enjoy adequate and sufficient sufficient notice so as to cure the defects in the Indictment in instances where particular locations had not been pleaded.

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

40. The Respondent therefore concludes that there is not merit in the Prosecution's Second Ground of Appeal and same should be dismissed.

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

A. Definition and Summary

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

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

43. The *Tadic* case set out three forms of liability for JCE[2]:

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

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

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

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

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

The points of the Prosecution Appeal relating to JCE

1. First Error of the Trial Chamber: reconsidering earlier interlocutory hearings in the case, without first reopening the hearings

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

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[2] Ibid, para 196-204. See *BRIMA*, Trial Chamber Judgment, para 61.

47. The Prosecution allege that the decision of the pre-trial Trial Chamber, where a differently constituted Trial Chamber found that JCE had not been defectively pleaded, should stand.[3]

II. ANALYSIS

48. The Trial Chamber provides convincing reasons, why it has jurisdiction to decide the matter and to change the pre-trial decision.[4] The Trial Chamber stated that it can in certain circumstances "exceptionally reconsider a decision it, or another Judge or Trial Chamber acting in the same case, has previously made".[5]

ii) Failure of Defence to argue defective pleading at an earlier stage[6]

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

III. ANALYSIS

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

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[3] See Prosecution Appeal Document para 360, referring to *BRIMA* Preliminary Motion Decision, paras 4-9.
[4] See para 83 of the Trial Chamber Judgment.
[5] Trial Chamber Judgment, para 25, referring to Prosecutor v Aloys Simba, Case No. ICTR-2001-76-T, Judgment, 13December 2005.
[6] Prosecution Appeal Document, para 361

iii) Exceptional circumstances relied on by the Trial Chamber to reconsider a decision are not in play in this case[9]

51. In support of their arguments the Prosecution cite the ICTR case of *Cyangugu.*[10] In this case the ICTR Appeals Chamber found that the Trial Chamber had erred in deciding "to reconsider its pre-trial decisions relating to the specificity of the indictments at the stage of deliberations, it should have interrupted the deliberation process and reopened the hearings".

52. The Prosecution state that "the decision to reopen the earlier interlocutory decisions on defects in the form of the indictment was taken only after final trial arguments and the close of the case". They argue that "there is an obligation on the defence to raise that issue at the earliest opportunity, to allow the defect to be remedied as efficiently as possible if the defect is found to exist".[11]

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

IV. ANALYSIS

54. The Prosecution argue that the Defence should have applied to remedy any defects in an indictment at the "earliest opportunity".[12] However the vagueness (see above) of the indictment perhaps made it impossible for the Defence to have raised the issue any earlier.

55. Once the issue was raised, the Prosecution was given time to respond to the Defence's claim. At paragraph 84 of the Trial Judgment, the Trial Chamber state that reopening the

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[9] Prosecution Appeal Document para 366
[10] Cyangugu, Appeal Judgment, para 55.
[11] Prosecution Appeal Document, para 368.
[12] Prosecution Appeal Document, para 368.

hearing was decided against because the Prosecution had made submissions on the Defence's objection to the indictment in their Final Trial Brief and closing arguments.

iv) The Prosecution were not informed of the reopening of the interlocutory decisions until the written judgment emerged, and they should have been given clear notice[11]

V. ANALYSIS

56. There is no obligation under the Rules of Procedure to provide notice to the parties that an interlocutory decision has been reopened. The Prosecution did have a chance to respond to the Defence's arguments, during closing oral submissions and to say that the Defence document was too long to respond to properly, appears to be a very weak argument.

2. Second Error of the Trial Chamber: The finding that JCE was defectively pleaded

i) Disjunctive point

57. The Prosecution allege that it is permissible to plead both the basic and extended forms of JCE.[12] However the paragraph the Prosecution has cited from *Krnojelac* does not back up their submission. The relevant part of the paragraph reads:

> *"when the Prosecution charges the "commission " of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether r 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*

[11] Ibid, para 370.
[12] Ibid, para 373.

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".[13]

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

VI. ANALYSIS

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

ii) The Pleading of Supporting Facts[14]

60. The argument of the Prosecution is that whilst there is case law supporting the Trial Chamber's view of the four categories of supporting facts that must be present in order to prove JCE, there is also case law going the other way. The Prosecution argue that so long as the accused has been "meaningfully informed of the nature of the charges so as to be able to plead an effective defence", then the indictment is sufficient.[15]

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[13] *Krnojelac*, Appeals Judgment, para 138.
[14] Prosecution Appeal Document, para 377.
[15] *Gacumbisti* Appeal Judgment para. 165

VII. ANALYSIS

60.. At paragraph 77 of the Trial Chamber Judgment, the Trial Chamber asserts that the Prosecution failed to plead a time period, when the JCE was operative. The pleading of the time period is the second category of the supporting facts, required to make out a JCE.[16] The Trial Chamber addresses the Prosecution submission that the time period should be "all times relevant to the indictment". The Trial Chamber states that if this is the case, the Prosecution must prove that the "common purpose was inherently criminal from its inception".[17] The Prosecution have clearly not done this.

iii) The nature or purpose of the JCE

61. The indictment stated the purpose of the JCE as being:

> *"to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas."*[18]

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

62. The Prosecution Appeal is based on two ICTY cases, (*Haradinaj* and *Martic*) where in both cases the ultimate objective was not criminal.[19] The Prosecution argue that the principal factor to consider is the **means** by which the ultimate objective is to be obtained. In the two ICTY cases the means involved the "forcible removal" of perso.ns from areas involved in the Yugoslavia conflict.

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[16] See Trial Chamber Judgment, para 64.
[17] Ibid, para 77.
[18] Indictment, para 33.
[19] Prosecution Appeal Document, para 382.

63. The Prosecution submits that even where the motive is not unlawful, "the accused will be guilty of a crime if the act satisfied the actus reus of a crime, and the accused had an intent to perform those acts".[20] (Prosecution Appeal Document paragraph 387)

VIII. ANALYSIS

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

65. In the *Martic* indictment:

> "*the purpose of the JCE was the forcible removal of a majority of the Croat, Muslim and other non-Serb population*".[21]

66.. In the *Haradinaj* indictment:

> "*the common criminal purpose of the JCE was to consolidate the total control of the KLA over the Dukagjin operational zone by the unlawful removal and mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians*"[22]

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

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[20] Ibid, para 387.
[21] *Martic,* Second Amended Indictment, para 4 in para 382 of the Prosecution Appeal Document.
[22] *Haradinaj*, Second Amended Indictment, para 26 in para 382 of the Prosecution Appeal Document.

elucidated than the vague wording of the criminal purpose given in the indictment pleadings of the *BRIMA* case. (see above) In other words the criminal means of achieving the ultimate objective are spelt out in the *Martic* and *Haradinaj* indictments, whereas they are not in the *BRIMA* indictment.

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

69.. To extend serious criminal liability to those who are involved in non-criminal common enterprises would be an impermissible extension of international criminal law, and would amount to 'guilt by association'. This point of view is continuously echoed in the academic literature. For example Marco Sassoli states as a caveat to extended JCE that "there must be a criminal enterprise and the intention of the co-perpetrator to participate in and further such an enterprise".[23]

iv) Time at which or the period over which the enterprise is said to have existed

70. The Prosecution Appeal document alleges that the time period over which the JCE took place had "at least as much particularity as the indictments in the *Martic* and *Haradinaj* cases".[24] The Prosecution then states that there was "no defect...in the way in which the time period of the JCE was pleaded".

IX. ANALYSIS

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

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[23] Sassoli and Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case', [2000] Vol 839 *International Review of the Red Cross*, quoting Tadic Appeals Chamber, Judgment, para 220

[24] Prosecution Appeal Document, para 404.

indictment", it follows that the common purpose must be inherently criminal from the inception of this time period.[25] The Prosecution have produced no evidence in this regard.

72.. The Trial Chamber accepted that the common purpose of a JCE can change over time,[26] but found that the Prosecution had not pleaded these new and different purposes in the indictment and could not subsequently "mould the case against the accused as the trial progresses".[27]

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

3. Elements of JCE

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

75. **Actus reus**

a) A plurality of persons

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

c) Participation of the accused in the common design

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[25] Trial Chamber Judgment, para 77.
[26] Trial Chamber Judgment, para 79.
[27] Ibid.

The degree of participation required by the ICTY is a "substantial contribution to the enterprise's functioning".[28] This contribution is to have the aim of furthering the aim of the JCE.[30]

76. **Mens rea**

a) Basic form of JCE

The mens rea for the basic form of JCE is where all members of the JCE act according to a common design with a criminal intention to commit a crime, and such a crime is committed.[31]

b) Extended form of JCE

77. The mens rea for extended JCE is subjective recklessness. The accused will be liable if their act occurs outside the common purpose, but it is a "natural and foreseeable consequence of the execution of that enterprise" and the "accused was aware that such a crime was a possible consequence of the execution of that enterprise, and that with that awareness he participated in that enterprise".[32]

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

[28] *Kvocka et al.* Case No. IT-98-30/1-T, 2 November 2001, (Trial Chamber) para 309
[30] Ibid.
[31] *Tadic,* Appeals Judgment, para 196.
[32] Ibid. para 227

78. The Trial Chamber found that the instances in this case of the commission of the three enslavement crimes (sexual slavery, forced labour, and child soldiers) did not satisfy the elements of acts of terrorism or collective punishment.[18]

79. The Prosecution contends that the Trail Chamber erred in law and fact in making the above finding in respect of the three crimes of enslavement and requests the Appeals Chamber to reverse this finding and to revise the Trial Chamber's Judgment by substituting findings that the conviction of the three accused on Counts 1and 2 of the Indictment includes the individual responsibility of the accused for acts of terrorism and collective punishments based on their criminal responsibility for the three enslavement crimes.[19]

80. In respect of the Count 1 act of terrorism the Trial Chamber found that the element of mens rea was not established in this case for the three enslavement crimes "as it was not established that the enslavement crimes were committed with the primary purpose to terrorise the civilian population.[20]

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

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

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

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

84. The Prosecution concludes therefore that the only remaining issue is whether the third element i.e. whether the acts or threats of violence were committed with the primary purpose of spreading terror among [those] persons was satisfied in relation to the three enslavement crimes that were found to have been committed in this case.[21]

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

86. It is the submission of the Prosecution that no "explanation" was given by the Trial Chamber as to why the enslavement crimes did not satisfy the above mentioned elements.[22]

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

> "...a plain reading of Article 51(2) suggests that the purpose of the unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats that is from their nature, manner, timing and duration."[23]

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[21] Public Appeal Brief of the Prosecution, para 459.
[22] Public Appeal Brief of the Prosecution, para 455
[23] Galic Appeal Judgment, para 104.

88. The Trial Chamber relying on the above Appeals Chamber holding was correct it is submitted when it took the view that where the conduct may have had more than one purpose it is necessary to identify one single purpose as the primary purpose, and that the mens rea requirement of acts of terrorism will only be satisfied if terrorisation of the civilian population can be established to have been that single primary purpose.[24]

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

> "provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats that is from their nature, manner, timing and duration."[25] (Emphasis added).

90. The Respondent submits that it cannot be inferred from any circumstances that he had at anytime throughout the period of the Indictment and in respect of Count 7, 12 and 13 any intention to either spread terror or inflict collective punishment pursuant to Counts 1 and 2 of the indictment and therefore concludes that there is not merit in the Prosecution's Fifth Ground of Appeal and same should be dismissed.

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

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

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

92. The Prosecution contends that the errors of the Trial Chamber in respect of Ground 6 and 9 of the Prosecution Appeal are similar.[26]

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

I. TIMING OF THE DEFENCE OBJECTION

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

95. In respect of Ground 8 of the Prosecution Appeal, the Prosecution contend that "...at no stage before or during the trial in this case was it ever suggested by either the Defence or the Trial Chamber that Count 11 of the Indictment was defectively pleaded on grounds of duplicity in that it alleged both mutilations, and acts of physical violence and other mutilations, in a single Count."[27]

96. As noted in the Trial Judgement at Para 24, and discussed in Para 540 of the prosecution appeal, a trial chamber has an inherent discretion to reconsider decisions it has previously

[26] Public Appeal Brief of the Prosecution para 653
[27] Public Appeal Brief of the Prosecution para 656

made. This is confirmed in *Stanislaw Galić*[28], Case No. IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 13; *Kajelijeli* Appeal Judgement, para 203 [29]; *Cyangugu* Appeal Judgement Para 55[30].

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

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

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

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

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

a. to allow the prosecution to make their case as to why the indictment is not defective;

b. to allow the prosecution to argue that any defects had been remedied;

c. to allow the trial chamber to consider the effects of a change of decision on the parties; and

d. because the prosecution could not amend the indictment.

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

100. The Prosecution did have an opportunity in their closing arguments to address the issue and chose to do so in a very cursory manner; the Prosecution had an opportunity through the Rule 50[31] procedure to amend the indictment as suggested by Judge Sebutinde in her Rule 98 decision, so as to separate the charge of "other acts of sexual violence", and failed to do so[32];

101. The Cyangugu case concerned the trial chamber effectively overturning its own interlocutory decision on an issue that had been fully discussed and decided at the interlocutory stage. In this case, the question of whether count 7 was duplex was not

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

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

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

102. The Prosecution also rely on the Brdanin Trial Judgement to suggest that any fault in the indictment must be settled at the interlocutory stage. However even the most cursory reading of Para 52 of Brdanin demonstrates that the issue had once again been fully debated at the interlocutory stage, in contrast to this case where in the case of Count 7 the duplex nature of Count 7 had never been raised until the Rule 98 opinion[33].

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

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

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

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

II. WAS COUNT 7 DEFECTIVE FOR DUPLICITY?

106. Article 17(4) of the Statute gives a defendant the right "to be informed of the nature and cause of the charge against him." A count that its duplex or that charges the defendant with two or more separate offences[34]" is said to offend this right.

107. In her Rule 98 opinion Judge Sebutinde highlighted that Count 7 charged the defendant with two separate offences under Article 2g of the statute, the first being "sexual slavery" and the second being "and any other form of sexual violence"[35]. The count is therefore duplex.

108. The Trial Chamber noted that the particulars mentioned in paragraphs 58 through 64 mainly identify acts of mutilations which are covered by Count10, while paragraph 60 of the Indictment particularises beatings and ill treatment. The Trial Chamber considered these acts solely under Count 11 as considering mutilations and ill treatment under the same Count that would result in a duplicitous charge[36]

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

110.. In Brdanin the Court held that in cases where widespread violations of human rights have occurred, for example large-scale multiple murders, it is permissible to charge multiple offences of the same type within a single count[37]. However in both cases the counts

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

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

[36] Trial Chamber's Judgment para 726

[37] Brdanin Indictment Decision

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

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

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

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

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

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

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

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

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

III. SHOULD THE TRIAL CHAMBER HAVE CURED THE FLAWS?

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

115. The Respondent submits that the Prosecution entirely misunderstand the nature of this power, which may be used to cure charges where the "material facts supporting those charges" have not been pleaded with sufficient precision[38].

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

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

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

117. The issue under this ground is whether "forced marriage" can be charged as an "other inhumane act" under Article 2.i of the Statute. Part of the Prosecution's argument goes to whether forced marriage can be considered a crime against humanity at all.[39] This however, does not fully address the matter. It is submitted that even if forced marriage is found to be capable of being charged as a crime against humanity, the Prosecution still erred in charging it under Article 2 (i) and therefore the Trial Chamber were correct in law in dismissing Count 8 for redundancy.

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

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

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

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

(iii)The 'bush husband' abducted and forcibly kept his 'bush wife' in captivity and sexual servitude with the intention of holding her indefinitely in that state or in the reasonable knowledge that it was likely to occur.[40]

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

119. The Trial Chamber, following the Dissenting Opinion of Judge Sebutinde in the Rule 98 Decision,[41] took the view that, "The offence of 'other inhumane acts' pursuant to Article 2(i) of the Statute is a residual clause which covers a broad range of underlying acts not explicitly enumerated in Article 2(a) through (h) of the Statute. In light of the exhaustive category of sexual crimes particularised in Article 2(g) of the Statute, the offence of 'other inhumane acts', even though residual, must logically be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity."[42]

120.. The Prosecution argues that there is no logical basis for this sexual/non-sexual distinction,[43] but it is submitted that this does not fully take into account the internal structure Article 2 of the Statute. Article 2.g includes: "Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," (emphasis added) i.e. it itself contains a residual category, sufficient to encompass other crimes of a sexual nature. Therefore arguing (as the Prosecution do) that believing all sexual crimes to be encompassed within Article 2.g is akin to believing that all crimes of violence against the person are encompassed within Article 2. a-f is clearly a false analogy.

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

121. Judge Sebutinde refers to the residual category included within Article 2.g in her Separate Concurring Opinion in the Trial Judgement, going on to say that: "The clear legislative intent behind the statutory formula "*any other form of sexual violence*" in Article 2.g. is the creation of a category of offences of sexual violence of a character that do not amount to any of the earlier enumerated sexual crimes, and that to permit such other forms of sexual violence to be charged as "other inhumane acts" offends against the rule against multiplicity and uncertainty…."[44] (emphasis added).

122. The Prosecution also suggest that existing authorities suggest that the "other inhumane acts category does include crimes of a sexual nature.[45] However, the authorities cited are from the ICTR and ICTY,[46] whose statutes have a very different formulation of Article 3, their equivalent of Article 2. ICTR Statute Article 3.g, only refers to rape and has no residual category akin to that contained in Article 2.g of the Special Court Statute. Therefore it *is* consistent with the internal logic of Article 3 of the ICTR (and ICTY) Statute to charge other crimes of sexual violence under the general residual category of Article 3.i (equivalent to Special Court Statute Article 2.i). This is *not* the case with the Special Court Statute.

123. Indeed it is submitted that the purpose of the drafting of a more extensive sexual crimes paragraph in Article 2.g of the Special Court Statute is to include other sexual crimes in an area in which the definition is fast developing. It is worth noting that that in the Rome Statue of the International Criminal Court the definition has again been extended, including enforced sterilization before the internal residual category of "any other form of sexual violence of comparable gravity."[47]

124. Further it is submitted that the Article 2.g includes not only those acts which are purely physically sexual (such as rape) but also what have been termed "gender crimes." The

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[44] Trial Chamber Judgement, Judge Sebutinde Concurrence para 5, quoting *Prosecutor v. Sam Hinga Norman et. al*, Case No. SCSL-04-14-PT, Trial Chamber, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005 para 19 (iii).
[45] Prosecution Grounds of Appeal para. 595
[46] *Akayesu* Trial Judgement paras 688, 697; *Kuprekšić* Trial Judgement para. 566; *Kajeliji* Appeal Judgement paras 933-936 and para. 916.
[47] Rome Statue of the International Criminal Court Article 7.g

Trial Chamber uses this term at para. 707: "The jurisprudence of the ICTY and the ICTR is reflected in the Rome Statute of the International Criminal Court which, like the Statute of the Special Court, now separates gender crimes into an isolated paragraph and codifies sexual slavery as a crime against humanity.[48]" (emphasis added).[49]

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

126. The prosecution also argues that forced marriage need not necessarily include non-consensual sex.[50] However, they have advanced no evidence to show that this situation occurred in any of the crimes charged in this case. "On the underlying element of sexual abuse as an inherent component of forced 'marriage' Mrs. Bangura [the Prosecution expert] stated that all the victims or 'bush wives' interviewed, without exception, admitted to having been repeatedly raped or sexually abused or molested by their 'rebel husbands' while in captivity."[51] Any alleged crime of non-sexual forced marriage – or forced marriage without the element of non-consensual sex – simply does not arise in this case.

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

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

[50] Prosecution Grounds of Appeal para. 615

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

127. Indeed even the authorities upon which the Prosecution rely for acknowledgement that forced marriage may not always include non-consensual sex deal with forced marriage alongside systematic rape, sexual slavery and slavery-like practices.[52] Another states that "When "forced marriage" involves forced sex or the inability to control access or exercise sexual autonomy, which by definition, forced marriage almost always does, it constitutes sexual slavery,"[53] supporting the opinion of Judge Sebutinde submitted above.

128. Further it is submitted that Judge Sebutinde's view that forced marriages are "are clearly sexual in nature,"[54] is undoubtedly correct. If they are crimes they are clearly "gender crimes." Any other harm attached to this sexual nature and therefore, should it be found to be a crime against humanity, place it squarely within the scope of Article 2.g. Forced marriage is not alone in having other non-sexual harms which may attach to it, it is submitted that forced prostitution for example, also displays this characteristic.

129. To argue, as the Prosecution do, that forced marriage is not necessarily sexual is entirely inconsistent with its inclusion under the part of the indictment entitled "COUNTS 6-9: SEXUAL VIOLENCE". This was stated by Judge Sebutinde in her Opinion in the Rule 98 Decision.[55] The Prosecution were alerted to the redundancy of Count 8 at this stage and chose not to continue with charging forced marriage under this count.

130. The Prosecution use the fact that "other inhumane acts" does not violate the principle of *nullem crimen sine lege* to argue that there is no difficulty in including forced marriage as a crime against humanity. This is not that case. That both the residual category of other inhumane acts and the residual category for sexual crimes within Article 2.g do not violate *nullem crimen sine lege* does not take away from the fact that a specific crime of forced marriage, which the Prosecution seeks to introduce, would indeed be novel and

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

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

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

[55] Ibid.

have to pass the test of similar gravity (and other element required for a crime against humanity).[56] This is not an easy test to pass and great care would be required to distinguish any crime of forced marriage to customary arranged marriage practices.

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

I. BRIMA'S RESPONSE TO PROSECUTION'S NINTH GROUND OF APPEAL : THE TRIAL CHAMBER'S APPROACH TO CUMULATIVE CONVICTIONS UNDER ARTICLER6(1) AND ARTICLE 6(3) OF THE STATUES.

132. The Trial Chamber in paragraph 800 stated that;

> Article 6(1) and 6(3) of the Statute denote different categories of individual criminal responsibility. Where both Article 6(1) and Article 6(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, it would constitute a legal error invalidating a judgement to enter a concurrent conviction under both provisions.[57] Where a Trial Chamber enters a conviction on the basis of Article 6(1) only, an accused's superior position may be considered as an aggravating factor in sentencing.[58]

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

> Where criminal responsibility for an offence is alleged under one count pursuant to both Article 7(1) and Article 7(3)[Special Court Statute Article 6(1) and Article 6(3)] , and where the Trial Chamber finds that both direct responsibility and

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

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

134. The Respondent submits that the Prosecution has failed to appreciate that when criminal responsibility are met under both Article 6(1) and Article 6(3) of the statute, the Trial Chamber will enters a conviction on the basis of Article 6(1) only and an accused's superior position ***would be*** considered as an aggravating factor in sentencing as was in the present case. Contrary to the Prosecution's argument in paragraph 704, the Trial Chamber in its Judgement convicted BRIMA under Article 6(1) on Counts 3 and 4 (unlawful Killing)[59] and in the Sentencing Judgement BRIMA was found criminally responsibility under Article 6(3) for unlawful killing in Kono which said factor was used as an aggravating circumstance in the determination of his sentence.[60]

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

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

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[59] Trial Chamber's Judgement. Para 2117
[60] Sentencing Judgement. Para 82

> In giving particular significance to the crime base to which the individual criminal responsibility is attached, and to the peculiar content of wrongfulness by which each of the two types of responsibilities in Articles 7(1) and 7(3) of the Statute are characterised, the Trial Chamber finds that active involvement by way of participating in the principal crime carries greater weight than failure by omission. Further, the Trial Chamber finds that participation in the crime means to have made a causal contribution to the impairment of the protected interest, whereas the failure as a superior need not necessarily contribute to the injury as such, but may merely involve the omission of his duty, as is particularly evident in the case of failure to punish.[61]

137. In the above case the Trial Chamber differentiated the substance and degree of wrongfulness of active participation and passive non-preventing or non-punishing crimes of subordinates. First, it held that if the accused's conduct fulfils the elements both of commission or of participation according to Article 7(1) of the Statute and of superior criminal responsibility according to Article 7(3) of the Statute with regard to the same principal crime on basically the same facts, regardless of whether indicted in the same or in different counts, the accused will be convicted only under the heading of Article 7(1) of the Statute in terms of the more comprehensive wrongdoing. And secondly, the final sentence should reflect the totality of the culpable conduct, the additional wrongfulness associated with an accused's failure in his duties as a superior in terms of Article 7(3) of the Statute must be taken into account as an aggravating factor in the sentencing.[62]

138. In the present case the Trial Chamber found that BRIMA'S conduct fulfilled the elements of commission or of participation according to Article 6(1) of the Statute and of superior criminal responsibility according to Article 6(3) of the Statute with regard to the same principal crime on basically the different facts. The only different with the *Oric* case and the present case is that in the *Oric* case the counts were different and the facts the same but in the present case the counts are the same and the facts are different.

140. The Trial Chamber in its application of the law to the facts at it had stated in its paragraph 800, and in accordance with the Trial Chambers view in Oric, convicted BRIMA for only

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[61] *Orić* Trial Judgement, paras 342.
[62] *Orić* Trial Judgement, paras 343.(emphasis added)

under the heading of Article 6(1) of the Statute in terms of the more comprehensive wrongdoing which greater weight than failure and used his failure in his duties as a superior in terms of Article 6(3) of the Statute as an aggravating factor in the sentencing.

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

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

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Respectfully Submitted,
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