Case No. SCSL-2004-16-A
THE PROSECUTOR OF
THE SPECIAL COURT
V.
ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

MONDAY, 12 NOVEMBER 2007
10.40 A.M.
APPEAL

APPEALS CHAMBER

Before Justices:	George Gelanga King, President Emmanuel Ayoola Renate Winter Raja Fernando Jon M. Kamanda
For Chambers:	Mr Alhaji Marong Mr Steven Kostas Ms Cecily Rose Ms Neelam Noorani
For the Registry:	Ms Advera Kamuzora
For the Prosecution:	Mr Christopher Staker Mr Karim Agha Mr Chile Eboe-Osuji Ms Anne Althaus Ms Tamara Cummings-John Ms Regine Gachaud Ms Bridget Osho Mr Robert Bliss
For the accused Alex Tamba	Mr Kojo Graham

Brima:	Mr Osman Keh Kamara Ms Roselyn Vusia
For the accused Brima Bazzy Kamara:	Mr Andrew William Kodwo Daniels Mr Cecil Osho-Williams Ms Oluwaseunl Soyoola
For the accused Santigie Borbor Kanu:	Mr Ajibola E Manly-Spain Mr Silas Cherkera

[AFRC12NOV07A - MD]

Monday, 12 November 2007

[Open session]

[The accused present]

[Upon commencing at 10.40 a.m.]

JUSTICE KING: Who appears?

MR STAKER: May it please the Chamber, my name is Christopher Staker. I appear for the Prosecution. With me Mr Karim Agha, Mr Chile Eboe-Osuji, Ms Anne Althaus. Our senior case file manager is Ms Tamara Cummings-John and we are assisted by Bridget Osho, national visiting lawyer and Mr Robert Bliss, intern. Thank you.

JUSTICE KING: Yes, Mr Graham.

MR GRAHAM: Good morning, your Honours. Kojo Graham for the first appellant, Brima. With me is Osman Keh Kamara and our

legal assistant Roselyn Vusia, spelt, V-U-S-I-A, Your Honours.

JUSTICE KING: Kojo Graham. With you?

MR GRAHAM: Is Osman Keh Kamara, O-S-M-A-N, Keh, K-E-H and Kamara

10:44:34 JUSTICE KING: And?

MR GRAHAM: And our legal assistant, Roselyn Vusia, spelt V-U-S-I-A, Your Honours.

JUSTICE KING: Thank you so much.

MR GRAHAM: I'm grateful.

10:44:45 JUSTICE KING: For the second appellant?

MR DANIELS: Good morning, My Lords. And, with the greatest respect, Andrew Daniels appearing for Bazzy Kamara. Together with me is Mr Osho-Williams.

JUSTICE KING: Mr who?

MR DANIELS: Mr Osho-Williams.

JUSTICE KING: Osho-Williams?

MR DANIELS: That's it, sir. Mr Cecil Osho-Williams.

JUSTICE KING: Yes.

10:45:16 MR DANIELS: And Madam Soyoola, S-O-Y-O-O-L-A.

JUSTICE KING: Thank you. Now, for the third appellant, Kanu?

MR MANLY-SPAIN: For the third appellant, My Lords, AE Manly-Spain.

10:45:38 JUSTICE KING: Can I know what the AE are from?

MR MANLY-SPAIN: Ajibola is for the -- - is the first name.

JUSTICE KING: Ajibola.

MR MANLY-SPAIN: Emmanuel is the second.

JUSTICE KING: Emmanuel?

10:45:49 MR MANLY-SPAIN: Yes.

JUSTICE KING: You are in good company. Yes. Manly-Spain.

MR MANLY-SPAIN: Yes. With me is Silas Chekera. C-H-E-K-E-R-A.

JUSTICE KING: Just a minute. Silas?

10:46:19 MR MANLY-SPAIN: Yes, Your Honour.

JUSTICE KING: Silas.

MR MANLY-SPAIN: Chekera, which is spelt C-H-E-K-E-R-A.

JUSTICE KING: Okay. Please acknowledge yourselves when you are mentioned, so we know who you are.

10:46:24 MR CHEKERA: Thank you.

JUSTICE KING: Thank you. Right. I think each of you would have received a copy of the scheduling order and, for 12 November, which is today, we will have the Prosecutor's submissions from 10.30 a.m. to 11.30 a.m., and, after that, from

11.30 a.m. to 12.30 p.m. we will have Brima's submissions. Mr Prosecutor, are you in a position to go on?

MR STAKER: Of course, Your Honour.

JUSTICE KING: Thank you.

10:47:02 MR STAKER: Your Honour, a minor housekeeping matter, perhaps. I notice that we haven't started exactly on 10.30. I presume the other parties would be amenable, if the Chamber is, that the sessions perhaps go the necessary length over to complete the schedule, rather than for speakers to have to carry

10:47:26 forward to the next session we are not scheduled.

JUSTICE KING: Yes. I can assure you we did come in at 10.30 but now it's 10.45. So, what will happen is that you will have your one hour -- is it one hour?

MR STAKER: Yes, Your Honour.

10:47:41 JUSTICE KING: Yes, your one hour, whatever it is, so you will go on until 11.45 anyway. All right?

MR STAKER: I am obliged, your Honour.

JUSTICE KING: Okay.

MR STAKER: May it please the Chamber, all of the

10:47:51 Prosecution's grounds of appeal have been fully briefed in the

Prosecution appeal brief and the Prosecution response brief which set out our arguments and authorities comprehensively. We rely fully on those written submissions and there is little in addition that we need to say in oral argument. Given the limited time available, I will merely highlight some of the more salient points.

Before I begin, I should point out that a folder of authorities was provided to the Chamber. These are authorities that I will be referring to in oral argument. Because of the

shortness of time, I don't propose to take Your Honours specifically to individual paragraphs. I will simply make the reference but the copies of the authorities are there.

The Prosecutions raised nine grounds of appeal against the final trial judgment. Our appeal brief sets out the remedies that we seek in relation to each of those grounds. In respect of all grounds, the Prosecution requests the Appeals Chamber to

revise the trial judgment to include findings of additional criminal responsibility on the part of the accused or to record additional convictions.

In relation to some grounds of appeal, one of the remedies of, one of the alternative remedies that we seek is for the Appeals Chamber to remit the case, if necessary, to the Trial Chamber for further findings of fact on specific matters.

Our submission is that that is not a remedy that would be impracticable. All of the relevant evidence is already before the Trial Chamber, and all of the parties have already presented their final trial submissions to the Trial Chamber.

We submit that, if necessary, the Trial Chamber could produce an additional supplementary judgment without the need for further hearings or proceedings. And, with that, I turn to the Prosecution's first ground of appeal.

This ground of appeal relates to the individual responsibility of the three accused for the crimes committed by AFRC forces during the Bombali/Freetown campaign. The main aspect of this ground of appeal challenges the findings of the Article 6.1 responsibility of the accused. The Trial Chamber found them each responsible under Article 6.3. That is, they had superior responsibility for all of the Bombali District Freetown

crimes but they were each found responsible under Article 6.1 for only a limited number of those crimes.

The Prosecution submission is that on the Trial Chamber's own findings, and the evidence that it had accepted, the only conclusion open to any reasonable trier of fact is that there was an orchestrated campaign of crimes committed against the civilian population throughout the Bombali/Freetown campaign, and that the three accused were responsible for planning, ordering, instigating or otherwise aiding and abetting all of the crimes committed in the course of that campaign. If that is so, the overall criminal responsibility of the accused is significantly greater than that found by the Trial Chamber.

First, where an accused is responsible under both Article 6.1 and Article 6.3, in respect of the same crimes, that is inherently graver than if the accused is responsible under Article 6.3 only. And, furthermore, where an accused is a prime mover of an entire campaign of crimes, that is inherently more serious than a case where an accused directly participated in

only some of the crimes.

The standards of review on appeal are dealt with in particular in paragraphs 1.5 to 1.9 of the Prosecution response brief. We say these principles are well-established. We acknowledge that these principles apply to the Prosecution as much as the Defence. This is not a trial de novo. It's not an opportunity for the parties merely to repeat before the Appeals Chamber the same arguments they made before the Trial Chamber.

The case law consistently affirms that it's the responsibility of the Trial Chamber, and not the Appeals Chamber, to assess the credibility and reliability of evidence to weigh

conflicting evidence and to make findings of fact. A finding of fact made by the Trial Chamber will only be reversed on appeal if it was so unreasonable that no reasonable trier of fact could have come to that conclusion on the evidence before it. And a finding will not be reversed merely because the Appeals Chamber,

or a different Trial Chamber, might equally reasonably have come to a different conclusion.

Now, I emphasise that in this first ground of appeal, and likewise in the third ground of appeal, the Prosecution does not, in fact, challenge many of the findings of the Trial Chamber. Rather, the Prosecution position is that it was the ultimate conclusion of the Trial Chamber reached from its own findings that were unreasonable. We say that based on the Trial Chamber's own findings of fact, and the evidence that it had accepted, the conclusion was one that was not reasonably open to the Trial Chamber.

Because of the standards of review, we say that the factual findings of the Trial Chamber, unless challenged on appeal, must be taken as a given in this case and, indeed, where they are challenged on appeal the standard of review is the reasonableness standard. And to give just a couple of examples.

In paragraphs 28 to 29 of the Prosecution appeal brief, we refer to the Trial Chamber's specific finding of fact that Brima gave the Mansofinia address and the Orugu address calling on AFRC troops to commit crimes against the civilian population generally. None of the parties have challenged this finding of fact on appeal and we say this fact must be taken as a given in

this case.

To take another example, the Trial Chamber found that Brima was the overall commander of AFRC forces during the Bombali/Freetown campaign except for one relatively short period from Colonel Eddie Town until just before the Freetown invasion.

Brima challenges that finding in his fourth and sixth grounds of appeal. We submit he cannot succeed in that ground of appeal unless he establishes that the Trial Chamber's finding was one which no reasonable Trial Chamber could have reached on the evidence before it. And unless he discharges that standard of review on appeal our submission is that it's a given for the purposes of this appeal that Brima was the overall commander of AFRC forces.

We note, furthermore, that the Trial Chamber made numerous findings that it accepted the credibility and reliability of witnesses. Again, assessing credibility and reliability is a

10:57:14 matter for the Trial Chamber. And we submit that unless it is shown by a party that a credibility and reliability finding was unreasonable, the credibility and reliability of the witnesses must be taken as a given in this case.

It is only when the Trial Chamber's own findings of fact,

10:57:50 and its own -- and the evidence that it expressly, or by necessary implication, relied on in reaching those findings is insufficient to establish the reasonableness of the conclusion, that it's necessary to look beyond that to further evidence in the case.

10:58:11 We submit that the reason why the Trial Chamber drew erroneous ultimate conclusions from its own findings of fact was that it adopted an erroneous approach to the evaluation of the evidence. This is dealt with in paragraphs 31 to 50 of the Prosecution appeal brief and I won't repeat everything that is

said there.

We describe the approach as rather myopic. Another

description would be compartmentalised or piecemeal. Basically, for each accused, the Trial Chamber looked at each individual crime base incident in isolation, and for each individual crime base incident it then looked at each mode of liability, individually. And then it asked itself: What specific evidence is there that proves beyond a reasonable doubt that this accused is responsible on this mode of liability for this particular crime?

And it can be seen, for instance, that the Trial Chamber found Brima responsible for ordering the terrorisation and killing of the civilian population in Karina because there was evidence of a specific order to that effect. But where there was no specific order that an accused had specifically ordered something, or specifically instigated something, the Trial Chamber found that this was not established.

We set out in our appeal brief, paragraphs 31 to 50, and our reply brief, paragraphs 2.4 to 2.8, the authorities we rely on to establish that this approach was incorrect.

I would refer to an additional authority not referred to in the Prosecution appeal brief, because it was subsequently decided, which is the Halilovic appeals judgment of the ICTY rendered on 16 October 2007.

I will refer just briefly --

JUSTICE KING: What was the date of it?

MR STAKER: It was 16 October 2007.

JUSTICE KING: That is very recent.

MR STAKER: Very recent, Your Honour. After the filings

were concluded. But the relevant paragraphs are, first, 6 to 13 set out the general standards of review that I've referred to. Paragraphs 119 and 125 affirm the general principle that the assessment of credibility is not to be undertaken by a piecemeal approach and that individual items have to be looked at in light of the entire body of evidence.

Paragraph 125 affirms the general principle that not every finding in a trial judgment needs to be proved beyond a reasonable doubt. What needs to be proved beyond a reasonable doubt is each element of the crime, each mode of liability, and each fact that is indispensable to a conviction.

And then in paragraphs 128 to 130, the point is made that the Trial Chamber must take a wholistic approach to the evidence; must base its judgment on the entire body of evidence in the case

without applying a standard of beyond reasonable doubt with a piecemeal approach. And that in reaching the ultimate conclusion the Trial Chamber does not confine itself merely to those facts which are essential to proving the elements of the crimes but must look at all the evidence on the record. We refer to other authorities for that --

JUSTICE KING: Now, before you go to the other authorities, I take it you have prepared copies of Halilovic for us here this morning?

MR STAKER: Yes. They are in the collection of authorities that were handed out.

JUSTICE KING: Could we please have them?

MR STAKER: I am sorry, Your Honour, I understood these had been distributed. If I ask for that to be done while I proceed. I do apologise.

JUSTICE KING: We want to follow your arguments, so it's

good to have them by us.

MR STAKER: Yes, Your Honour. As I indicated, if I were to take the Bench to each individual authority that I cite, I fear

11:03:18 that time would --

JUSTICE KING: No, no. I'm talking about this one that you did not cite, that came up this morning, Halilovic --

MR STAKER: Yes.

JUSTICE KING: -- which was delivered on the 16th of this

11:03:27 month [indiscernible]. We haven't got copies of that.

MR STAKER: Relevant extracts will be provided, Your Honour.

JUSTICE KING: Yes. So can we have them now?

MR STAKER: We refer in our appeal brief also to the Stakic

11:03:45 appeal judgment, paragraph 55, which provides another example.

JUSTICE KING: Just a minute, please. Right. Go on.

MR STAKER: Yes. In Stakic the accused was charged with a number of different acts of genocide and the Trial Chamber in that case looked at each individual act in isolation and said:

11:04:59 Was a genocidal intent proved in relation to that act? The Appeals Chamber agreed with the Prosecution, although not reversing the acquittal, that that was the incorrect approach and that the Trial Chamber should have looked at all of the evidence in the case as a whole with a view to establishing a genocidal

11:05:19 intent.

This piecemeal approach of the Trial Chamber is a matter

that will recur in a number of other of the Prosecution's grounds of appeal. We say that the Trial Chamber generally took the approach, this piecemeal approach of taking individual crimes in

isolation, individual modes of liability in isolation, and looking for evidence specific to that crime, specific to that mode of liability.

We say the correct approach is to look at all of the evidence in the case as a whole and say, on the basis of all of the evidence, have the elements of the crime been proved?

I emphasise again also the case law to the effect that it's not necessary to prove every fact beyond a reasonable doubt, only those facts which are indispensable to a conviction. Thus, for instance, in determining whether the accused were engaged in planning, it's not necessary to prove exactly where and when a plan was made, or exactly who were the participants in that plan.

A plan, an order, an active instigation, these are all things

that may be proved circumstantially, provided that the Trial Chamber is satisfied that on the basis of the entirety of the evidence in the case, as a whole, there can be no reasonable doubt that there was a plan and that the accused was one of the planners.

As I say, it is necessary to look at this in the light of all the evidence in the case as a whole. We have set out in our brief the different findings of the Trial Chamber that we rely on to show that this was the only reasonable conclusion. In the time available, I can't go through all of that in oral argument, but I would emphasise this: As I said, the Mansofinia address that Brima gave, before the Bombali/Freetown campaign began, contained an order calling on all, telling all AFRC troops that they were going back to Freetown, and calling upon them to kill, maim, and rape people on the way, and we submit that on the evidence there can be no -- no reasonable trier of fact could

possibly conclude that the plan, that a plan did not exist and

that the plan had not been formulated by the time that the Mansofinia address had been given.

We would also emphasise that Kamara and Kanu were senior officials in the AFRC at the relevant time. Kamara was Brima's deputy, his number two. Kanu was Chief of Staff in the Freetown period. They were also involved at headquarters, involved in planning and decision-making.

Now, we submit that on the evidence it cannot be open to any reasonable trier of fact to conclude that they were involved in planning operations but weren't involved in the planning of crimes, when the majority of operations at that time consisted of attacks against the civilian population in different locations.

We refer also to the other findings of fact relating to their giving of orders for the commission of crimes; their participation, in particular, criminal incidents; the commission of crimes themselves; acts of commendation; congratulating troops on a job well done when crimes were committed and we say that when the evidence is looked at as a whole, no reasonable Trial Chamber could conclude that it had not been established that the elements of planning, ordering, instigating and aiding and abetting were satisfied in relation to all three accused in relation to all Bombali, Freetown crimes.

I would mention also in that respect the finding of the Trial Chamber that the accused created a climate of criminality.

The creation of such a climate, we submit, in which crimes are encouraged, at the very least, is instigation.

Unless I can be of further assistance on that I propose to turn to our second ground of appeal.

This ground of appeal relates to the --

JUSTICE KING: Just a moment.

MR STAKER: Thank you. The Prosecution's second ground of appeal relates to the Trial Chamber's decision not to make findings in respect of certain locations not specifically named in the indictment, notwithstanding that there was evidence of crimes committed in those locations.

Now, I emphasise that these crimes were pleaded in the indictment. The indictment typically charged the accused with crimes committed in a certain district, in a certain time period, and then gave a list of locations of those crimes that were specifically stated to be non-exhaustive. In other words, it was clear that it was alleged that crimes were also committed in

locations other than those specifically named.

11:11:36 Now, the first error of the Trial Chamber, in relation to this ground, is one that, in fact, recurs in relation to three other of the Prosecution's grounds of appeal. This consisted of the fact that the Trial Chamber made a finding in the final trial judgment that there were defects in the indictment without,

11:12:03 first, informing the parties that this was an issue in the case and giving the parties an opportunity to be heard on the matter.

In relation to our fourth ground of appeal, this argument is dealt with in paragraphs 356 to 371 of our appeal brief. In relation to ground 6, in paragraphs 536 to 546, and in relation

11:12:28 to ground 8, in paragraphs 654 to 658.

The basic authority on which we rely, in relation to this, are the Cyangugu appeal judgment of the ICTR which is quoted in paragraphs 366 and 541 of the Prosecution appeal brief, and the Jelesic appeal judgment of the ICTY which is referred to in

paragraphs 370, 545 and 657 of the Prosecution appeal brief. Cyangugu was a direct parallel to this case. There, the Appeals Chamber found that the Trial Chamber should not have found in the final trial judgment that there were defects in the indictment, contrary to what had earlier been decided in interlocutory decisions in the case, without first reopening the proceedings and allowing the Prosecution to argue the matter.

In the Jelesic case it was held that the Trial Chamber should not have propio motu dismissed a count at the Rule 98 stage without first hearing the Prosecution on the matter. In Jelesic, it was said at paragraph 27, that failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. In other words, fair trial rights also apply to the Prosecution which represents the public interest.

Now, in our submission, the relevant principles can be summarised as follows: First, allegations of defects in an indictment must be raised at the pre-trial stage. That is Rule 72. And the failure to do so, in principle, constitutes a waiver of the right to do so and the reason is obvious. It's in the interests of justice that a Prosecution not fail after a case has been tried because of a defect that was raised at a late stage, or that a trial is delayed so that action can be taken mid-course

to correct a defect.

Second proposition is that in exceptional cases, defects in an indictment might be raised at a later stage but it would be necessary to obtain the leave of the Trial Chamber to do so, upon a showing of good cause why the defect could not have been raised earlier.

If no good cause is shown, leave won't be granted and the waiver principle applies. And the fact that Brima's application to file a preliminary motion out of time was rejected by Trial Chamber II in this case is an application of that principle.

Thirdly, we submit, where the Trial Chamber gives an interlocutory decision on a matter, that settles the matter as far as the trial proceedings are concerned, subject to what I'm about to say.

The general principle is that parties cannot simply ignore an interlocutory decision. They can't simply reargue the same

point again and thereby unilaterally reopen the decision. They cannot thereby unilaterally require the other party to respond to the point on the merits and require the Trial Chamber to redecide it.

Where a party considers there is good cause to reconsider an earlier interlocutory decision it must apply to the Trial Chamber for leave and leave is not lightly granted. I provided an example from the Milosevic case. Unless reconsideration is granted, thereby putting the other party on notice that a matter's been considered, and that the party has to reargue it then, in this case, the Prosecution was entitled to ignore attempts by the Defence that earlier interlocutory decisions did not exist.

Fourthly, we acknowledged that the Trial Chamber can decide proprio motu to reconsider an earlier interlocutory decision in limited circumstance -- Cyangugu is the authority for that. But again, as I've said, Cyangugu is authority for the proposition that the Trial Chamber must first give the parties notice and give them an opportunity to be heard on the matter.

If a party simply seeks to pretend that an interlocutory decision didn't exist, and raise the same arguments in their final trial arguments then, if they haven't shown good cause, if they haven't been given leave by the Trial Chamber to reargue the point, if the Trial Chamber's given no indication to the parties that it's going to proprio motu reconsider, then the Prosecution was entitled to assume that this was not an issue in the case.

How was the Prosecution to know that this was now going to be reconsidered? And even if the Prosecution had known that the reality was it had no real opportunity to reargue the matter. The Defence raised these matters in their final trial briefs but by that time the Prosecution had already filed its own final trial brief. It couldn't respond to those arguments in writing; it could only deal with them in the oral argument.

Now, the oral arguments were very brief, and in those oral arguments the Prosecution had to cover the entirety of the Prosecution case and we submit it's just unreasonable to suggest that the Prosecution should have devoted any substantial amount of time to argue issues on defects in the indictment that had

already been decided by the Trial Chamber at the pre-trial stage and without any indication having been given that these were a live issue again.

We submit that because of this procedural error all of the decisions of the Trial Chamber finding defects in the indictment should simply be quashed. The decisions of the Trial Chamber, in the final trial judgment, finding defects in the indictment should be treated as if they had never been given.

And the question is: What is the result of that in this appeal? Now, first of all, we note that Kamara and Kanu filed

preliminary motions on defects in the form of the indictment. So we say, in respect of those defects, that they specifically raised in their pre-trial -- in preliminary motions -- they would have been entitled to appeal against Trial Chamber I's decision in this appeal.

Now, they haven't appealed for the obvious reason that the

Trial Chamber erroneously made a ruling in their favour, and we say the Trial Chamber's mistake should not prejudice them, so we concede that they can argue these points on appeal. But we say the position is as if the decision of the Trial Chamber had never been given. The position is as if the Defence is the appellant in relation to any allegations of defects in the indictment and the Prosecution was the respondent, and thus the Defence has the burden on appeal as an appellant.

11:20:16 We say the position is different in relation to any alleged defects in the indictment that were not raised by Kamara or Kanu in their preliminary motions, or in relation to any allegations of defects in the indictment made by Brima, because he never filed a preliminary motion within time.

11:20:37 Our submission is that by failing to raise those defects at the pre-trial stage, they've waived their right to do so. I refer again to our submissions in the reply brief on the waiver principle. Nevertheless, we do acknowledge that the case law recognises that the Defence is not entirely precluded from

11:20:59 raising alleged defects for the first time of appeal but in this situation the burden is on the Defence not only to establish the defect in the indictment but to establish that there was actual

prejudice to the Defence.

To put it very simply: If a defect was raised at the

pre-trial stage and ruled on, the Defence has the burden of proving that the Trial Chamber was wrong and of proving that the indictment is defective. If that happens, the burden shifts to the Prosecution to show no prejudice.

11:21:31 If the matter was never raised before the Trial Chamber specifically as an issue, then the Defence has the burden not only of showing defects in the indictment but has the burden of showing actual prejudice.

Now, in this case, neither Kanu, nor Brima, alleged that

11:21:59 the indictment -- alleged at the pre-trial stage -- that the indictment was defective for failing to plead locations with sufficient specificity.

The issue was raised by Kamara in a preliminary motion. But, in relation to this particular ground of appeal, we make a

11:22:19 further point. The case law indicates that even where an indictment is not defective, even when the indictment is not

defective, the accused are required to raise a specific objection whenever evidence is adduced at trial of which they claim they had insufficient notice causing prejudice to the Defence. And the fact that none of the Defence teams raised any such objections at trial means, in our submission, that they've also waived their right to raise this on appeal, unless they discharge the burden of establishing on appeal that the Defence was, in fact, materially prejudiced by the lack of notice.

11:22:45 11:23:08

In this respect, we rely on paragraph 199 of the Niutei Gacka appeal judgment and the authorities referred to in footnote 415 of the Prosecution appeal brief. Just to quote briefly from paragraph 199 of the Niutei Gacka judgment it is said:

"In the case of objections based on lack of notice the

Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely

motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation."

Now, in our submission, it's simply not possible for the Defence to sit back, make no objection to the leading of evidence relating to particular locations, and then at the very end of the trial to say: There is a defect in the indictment; we can't be convicted on that.

The case law says that even if the indictment is not defective, the accused have a responsibility to do that. We say a fortiori, if the indictment is defective, there is an even stronger obligation to object.

We say that in determining whether there has been particular prejudice to the Defence, it's necessary to look at not only whether they objected but whether they cross-examined Prosecution witnesses on a particular point; whether they led their own evidence on a particular point; at what particular time they first got notice; whether it was in a disclosed witness statement or the Prosecution pre-trial brief or -- and in light of all the surrounding circumstances was there prejudice. It may be there was prejudice into some locations but not others. Perhaps none.

We say the burden is on the Defence to show what prejudice

did they suffer, given that they never objected and the Defence, we say, has not discharged that burden. The Defence has maintained the position that the burden is on us and simply alleged generically there must have been prejudice. We say they have not discharged their standard on appeal.

Before moving on to the third ground of appeal, I would simply refer --

JUSTICE KING: You have 30 minutes more.

MR STAKER: Thank you, Your Honour. I refer to a few authorities dealing with the standard of review on appeal where a matter was or was not raised at the pre-trial stage. Niutei Gacka appeal judgment, paragraphs 195 to 200. Simic appeal judgment, paragraph 25; Kvocka appeal judgment, paragraphs 34 to 35; and Cyangugu appeal judgment, paragraphs 29 to 31. Copies have been provided by the Prosecution.

I emphasize again, any points I don't specifically touch on in oral argument we rely fully on our written brief.

The third ground of appeal relates to the Trial Chamber's finding of the responsibility of Kamara for the Port Loko District crimes. On the Trial Chamber's own findings, Kamara was the overall commander of a group of AFRC fighters who immediately after the Bombali/Freetown campaign moved to Port Loko District, became known as the West Side Boys, and we submit, on the Trial Chamber's own findings, the only conclusion open to any reasonable trier of fact is that West Side Boys conducted an orchestrated campaign of violence against the civilian population in Port Loko District and that Kamara was the chief orchestrator of that campaign of crimes.

We say the Trial Chamber's conclusion -- the Trial Chamber's finding that Kamara was not responsible under Article 6.1 for the killings in Manarma was based on the same myopic and

compartmentalised approach to evaluation of the evidence. What

the Trial Chamber did was look at the evidence that related very specifically to the attack in Manarma, and said: What specific evidence is there that this particular attack in Manarma was ordered by Kamara? In relation to the terror counts, it said: What specific evidence is there that it was committed for the purposes of spreading terror?

It didn't look at the evidence as a whole and, when one looks at the Trial Chamber's other findings in relation to Port Loko District, the findings indicate that West Side Boys moved from the Western Area to Port Loko District attacking the civilian population on the way; on Kamara's orders placed dead bodies of civilians on display to spread fear. Kamara sent troops into Gberibana, in order first to make it a civilian-free area.

The West Side Boys then set up a base in that town and on Kamara's orders conducted a number of attacks against civilians in surrounding areas.

Now, we say looking at the evidence as a whole, there can be no conclusion that any reasonable trier of fact could reach other than that the activities of the West Side Boys, in Port Loko District, were essentially a continuation of the campaign of crimes that was committed in Bombali, Freetown. Indeed, the Trial Chamber itself finds that this was part of the same widespread and systematic attack, that the Bombali/Freetown

campaign was part of as well.

We submit that on the Trial Chamber's findings it is evident that Kamara must be responsible, under both Article 6.1 and 6.3, for all crimes committed by the West Side Boys in Port

Loko District.

Now, the only crime considered by the Trial Chamber was, in fact, the attack on Manarma, because other crime bases it found either weren't pleaded in the indictment, so this relates back to our ground 2, or weren't attributable to the West Side Boys. But where it found that crimes were committed by the West Side Boys, if our second ground of appeal succeeds, we say that the killings, to and from Gberibana, including the attack at Mamamah, were clearly accepted by the Trial Chamber. And that if it's 11:30:32 possible for the -- well, if the second ground of appeal is upheld, convictions should be substituted for those attacks by the West Side Boys, Kamara should be found responsible for all of

those crimes under Article 6.1 and Article 6.3 in respect of the counts in which they are specifically charged, as well as counts 1 and 2 relating to terror and collective punishment.

I turn to our fourth ground of appeal which deals with joint criminal enterprise. Essentially, there are three separate issues here. The first, again, is the fact that the Trial Chamber decided that joint criminal enterprise had been defectively pleaded in the final trial judgment without first giving the parties notice and reopening the hearings.

This is an issue that was dealt with at the pre-trial stage. It was ruled on in the case of Kamara and Kanu by the Trial Chamber. Brima never filed a preliminary motion. No indication was ever given to the Prosecution that this was now being reopened. We submit the Trial Chamber's decision to find a defect should be quashed. The burden is on the Defence in this appeal to establish that there was a defect.

I refer briefly to our arguments in paragraphs 372 to 376

where the Trial Chamber found that it's not possible to plead disjunctively, both the basic and extended forms of joint criminal enterprise. They said you can't plead the basic form and the extended form, they are logically inconsistent. The indictment is defective in that respect. We say that is not true.

The case law establishes that there is no impediment to cumulative charging. An accused may be cumulatively charged with many crimes. The Trial Chamber, after hearing the evidence, can determine which ones are established. I refer to Celebici appeal judgment, paragraph 200. Of course, the question of whether accused can be cumulatively convicted of more than one crime is a separate issue on which there is other case law.

We note that the Trial Chamber found that there are four things that an indictment must plead in relation to joint criminal enterprise.

One is the period of time over which the joint criminal enterprise existed. I won't add to what is said in our appeal brief on that subject. We submit that it was quite clearly pleaded that the joint criminal enterprise commenced sometime between 25 May to 1 June 1997. We submit that is a rather specific time frame and we say that it's clearly alleged that the joint criminal enterprise existed at least until April 1999 which was the last time of material relevance to the indictment in this

11:33:30 case. Whether it continued after that was not material to this case.

As to the identity of those engaged in the joint criminal enterprise, again, I won't repeat what is in our brief. The Trial Chamber itself appeared to find nothing defective about

this in the indictment. I would, however, add a reference to Brdjanin appeal judgment of 3 April 2007 for a number of propositions.

It affirms that joint criminal enterprise responsibility

11:34:02 can apply in very large-scale cases. In very large-scale cases, the members of the joint criminal enterprise may be the upper echelons or the leadership of the military or political authorities in a country. And in that case it may not be the case that the individual foot soldier committing the crimes is a

11:34:22 member of the joint criminal enterprise. It's possible for a member of the joint criminal enterprise, a military commander, to use a soldier as a tool, as a tool, by giving them an order to do

something or by instigating them to do something, to commit a crime that is part of the joint criminal enterprise, and the soldier, in that situation, is not part of the joint criminal enterprise but the crime itself is part of the joint criminal enterprise because it is attributable to somebody who was a member of the joint criminal enterprise and it was committed as part of the joint criminal enterprise.

11:34:56 In other words, we are not saying that every AFRC combatant was necessarily a member of this joint criminal enterprise. Not even every combatant who may have committed crimes. We say the indictment pleads clearly who we allege the participants were.

A third matter is the nature of the accused's participation

11:35:18 in the joint criminal enterprise. We say the Trial Chamber identified no particular defect there.

The particular defect that the Trial Chamber identified was that, in the Trial Chamber's view, the indictment did not plead a purpose that was inherently criminal from the beginning. They

suggested that it's not clear why the AFRC invited the RUF to join to form the government. It may have been that they decided to join for non-criminal purposes and that the agreement to commit crimes emerged sometime later and so the indictment, by being framed in the way it was, in terms of a joiner of the AFRC and RUF did not plead a joint enterprise that was criminal from the beginning.

Now, we submit this is a misreading of the indictment and indeed a complete misunderstanding of international criminal law.

Criminal responsibility under international law attaches to individuals, not to organisations. The indictment can't be taken to suggest that the RUF, as an organisation, had a criminal intent and that the AFRC, as an organisation, had a criminal intent and that the joint criminal enterprise was a joint enterprise of two organisations.

That cannot be the case under international criminal law and it wasn't the Prosecution's case. What the indictment clearly alleges, we submit, is that the three accused in this case began participating with others in a joint criminal enterprise including the three accused in the RUF case and other persons as well.

And as we indicate in our brief, it's quite clear from the indictment read as a whole what that criminal purpose was:

Namely, to carry out a campaign of terrorising and collectively punishing the civilian population of Sierra Leone through the commission of crimes within the jurisdiction of the Special Court in order to achieve the ultimate objective of gaining and exercising political power and control over the territory of Sierra Leone.

And, in our submission, this pleading is materially similar to certain indictments in other cases before the ICTY which we cite in our brief.

The Trial Chamber, in stating that gaining control over the territory of a country is not inherently criminal, confuses motive with intent. A joint criminal enterprise to commit a bank robbery may have the purpose of personally enriching the participants in the enterprise. There is nothing criminal about wanting to personally enrich yourself but, if the common purpose is to enrich yourself by criminal means, then that does become a

joint criminal enterprise and we say this enterprise, from its inception, had the criminal intent of conducting a campaign of terror and collective punishment in order to achieve the stated purpose.

11:38:26 I would refer in that respect also to the Martic trial judgment, paragraphs 442 to 445, which reaches a similar conclusion in relation to the indictment in the Martic case which is quoted in paragraph 382 of the Prosecution appeal brief. We submit that the indictment does plead with sufficient

11:38:52 particularity the nature or purpose of the joint criminal enterprise and, that being the case, I move on to the remedy that we seek in this respect.

Our submission is in several steps. We say first, if the Appeals Chamber were able to conclude, based on the Trial

11:39:16 Chamber's own findings of fact, that all of the elements of joint criminal enterprise had been established in this case, it would be open to the Appeals Chamber to substitute convictions for the acquittals entered by the Trial Chamber.

Secondly, if that's not possible, we would submit that it

may be possible for the Appeals Chamber to look at all of the evidence in the case, but, we submit that that is very difficult given the standards of review on appeal. The Appeals Chamber cannot make findings of fact at first instance. It could only reach a conclusion of fact if, looking at the evidence as a whole, there is only one conclusion that any reasonable trier of fact could reach.

We submit the more likely remedy is to send this case back to the Trial Chamber for further findings of fact on the joint criminal enterprise liability. As I say, we submit that is not an impracticable solution.

However, if the Appeals Chamber were to consider otherwise, there is another possibility which I would term the minimalist solution. This would be that the Appeals Chamber could find that joint criminal enterprise liability was not defectively pleaded. That the Trial Chamber was wrong in not considering it but to order no other remedy apart from making this declaration.

This kind of remedy was ordered for instance in the Jelesic appeal judgment, at paragraph 73 to 77 and the Aleksovski appeal judgment, paragraphs 153 to 154.

I turn then to the Prosecution's fifth ground of appeal. This relates to its finding that the three enslavement crimes of which the accused were convicted, sexual slavery, forced labour and recruitment and use of child soldiers, did not satisfy the elements of count 1, acts of terror and count 2, collective punishments. Again, we say this is an example of the compartmentalised, the piecemeal, the myopic approach to the evaluation of evidence. Rather than looking at all of the evidence in the case as a whole, and saying: On the basis of all

of this evidence, are the elements of terror and collective punishment satisfied in relation to the three enslavement crimes, rather, the Trial Chamber took each enslavement crime individually and said: What evidence is there specifically that this crime, sexual slavery, that this crime, child soldiers, was specifically committed to spread terror or to collectively punish?

We say looking at all of the evidence in the case as a

whole, there is only one conclusion open to any reasonable trier
of fact. We deal with this in our brief, but to highlight the
main points.

First, we submit that the three enslavement crimes did spread terror among the civilian population. It cannot reasonably be suggested that the civilian population was terrorised by the prospect of being killed, maimed or sexually assaulted by AFRC forces but, at the same time, they were quite at ease at the thought that they, or members of their family, might be enslaved by the AFRC.

Secondly, we submit that the victims of the enslavement crimes were targeted for the very same reason as the victims of all of the other crimes.

Indeed, they were members of the same communities as the victims of all of the other crimes and, in fact, they were themselves sometimes victims of the other crimes.

We submit that it cannot tenably be suggested that the victims of the enslavement crimes were not targeted for the same reason, namely, their perceived support for the Kabbah government or forces opposed to the AFRC or their perceived lack of support for the AFRC.

JUSTICE KING: Just to remind you, you have ten minutes more.

MR STAKER: Yes, Your Honour. I anticipate that, if necessary, I may be making an application for a slight extension possibly on the understanding the time would come off our submissions in reply.

JUSTICE KING: Very well.

MR STAKER: Perhaps we can cross that bridge when we come to it.

11:43:44 Thirdly, the Trial Chamber found, at paragraph 1459, that sexual slavery did not have the primary purpose to spread terror because its primary purpose was to take advantage of the spoils of war by treating women as property and using them to satisfy their sexual desires and to fulfil other conjugal needs.

11:44:11 This, in our submission, is a most manifest error. On this reasoning, mass rape would not be an act of terror because it's simply intended to provide a sexual outlet for the troops. Killing and maiming of civilians would not be an act of terror if its purpose was to provide an outlet for the sadistic urges of the troops.

We submit that it's obvious, when the evidence in the case is looked at as a whole, that the three enslavement crimes were part of the same widespread and systematic attack against the population in general. They were intended to cause terror. They were intended to collectively punish. The fact that the AFRC may have derived some material benefit by increasing their labour force, or increasing their military strength through forced labour and child soldiers, was a side effect of the campaign of terror rather than the purpose of the commission of those crimes.

If this widespread and systematic attack against the civilian population had not been conducted, the enslavement crimes would not have been committed. If the AFRC had seen no material benefit to be gained by enslaving these people the inference from the Trial Chamber's findings is that they would have been killed or mutilated or amputated, as part of the attack. The commission of the enslavement crimes was a way of inflicting terror and collectively punishing while at the same

time deriving some side benefit. But the fact that some side benefit was derived does not detract from the purpose of those crimes which is evident, when the evidence in the case as a whole, and the findings of the Trial Chamber, are considered.

I turn then to the Prosecution's sixth ground of appeal which relates to the Trial Chamber's finding that count 7 was defectively pleaded in that it was duplicitous because it pleaded sexual slavery and any other form of sexual violence in a single count. This led the Trial Chamber to dismiss the count.

Our submission is that this is a legal error and, as a result, in respect of acts of sexual slavery, the accused were convicted of a war crime only but were not convicted of a crime against humanity.

Again, we point out the Defence never raised this alleged defect at the pre-trial stage. They raised it for the first time in their final trial submissions.

The Trial Chamber never gave the Defence leave to raise defects in the indictment at this late stage. The Trial Chamber never gave notice to the Prosecution that earlier interlocutory decisions on defects in the indictment were now reopened. I've already dealt with this argument. We submit that it's obvious.

It cannot be possible for the Defence to refrain from making an objection as to defects in the indictment, allow a long and expensive trial to proceed to the very end and then, at the very last moment, say that they cannot be convicted because of some technical defect in the indictment that they point out for the first time, and certainly where they can't point to any prejudice that's been caused by the alleged defect.

Again, we say the decision of the Trial Chamber, that the indictment was defective in this respect, should be quashed. If the Defence want to pursue this point on appeal, for the reasons I've given, the burden is on them not only to show that the indictment was defective in being duplicitous but that the Defence actually suffered real prejudice that rendered the trial unfair.

The Prosecution says the pleading was not duplicitous. If the Defence address this in their response submissions, given that they bear the burden, we will respond to those submissions in our reply. I would merely say at this stage, the Defence has

established no prejudice. In their final trial submissions and their response briefs they never pointed to any prejudice whatsoever. And, as we say in our appeal brief, the suggested amendment to cure this defect would have been no more than the purest of legal formalities, and would have been of no practical consequence whatsoever.

As to the remedy, we say that on the Trial Chamber's findings it found that all of the elements of sexual slavery were established; there are express findings to that effect. We submit the Appeals Chamber, without referring the matter back to the Trial Chamber, can revise the trial judgment by substituting

convictions on count 7.

I move on then to the Prosecution's seventh ground of appeal which concerns the Trial Chamber's decision to dismiss count 8 for redundancy. Count 8 charged the accused with other inhumane acts, the crime against humanity of other inhumane acts

under Article 2.I of the Statute in respect of forced marriages.

Again, we rely on our written submissions but would emphasise the following points.

First, we emphasise that the crime of forced marriage as an other inhumane act respects fully the principles of nullum crimen sine legae and the principle of non-retroactivity. This is dealt with in our brief but the crime against humanity of other inhumane acts is a residual category of crimes that was recognised as long ago as the Charter of the Nuremberg Tribunal, it was Article 6(C) in the Charter of the Nuremberg Tribunal, and has been included in the statutes of international criminal tribunals since.

International law has recognised that it is impossible to establish an exhaustive list of inhumane acts that might be crimes against humanity. Provided the chapeau elements of crimes against humanity are established, provided that conduct rises to the level of gravity of other crimes specifically enumerated in Article 2 of the Statute, an accused can't submit, cannot argue that they never knew that it was unlawful to inflict such grave inhumanity on civilians in the course of a widespread and systematic attack against the civilian population. The law is sufficiently certain in stating: You shall not inflict inhumane

acts on the civilian population.

Secondly, we take issue with the Trial Chamber's finding at

paragraph 679 of the trial judgment that all crimes against humanity of a sexual nature are exhaustively defined in Article 2(G) of the Statute, so that the category of other inhumane acts under Article 2(I) only applies to acts of a non-sexual nature.

11:51:56 We say that can't be correct. If the category of other inhumane acts exists because it's impossible to define other inhumane acts exhaustively, what basis can there be for saying that inhumane acts of a sexual nature must now be taken to have people exhaustively defined? If a severely grave, inhumane act

11:52:20 of a sexual nature is committed that does not fall within the terms of Article 2(G) we ask what possible basis can there be for saying that it cannot be a crime against humanity of other inhumane acts?

Thirdly, and in any event, we emphasise our submission that forced marriage is not necessarily a crime of a sexual nature. The crimes of forced marriage and sexual slavery are aimed at the protection of different legal interests. As Judge Doherty stressed at various times in her partially dissenting opinion forced marriage does not necessarily involve elements of physical violence, such as abduction, enslavement or rape, although the presence of these elements may go to prove the lack of consent of the victim.

And I fourthly emphasise that we are not concerned here with the practice of arranged marriages as they traditionally exist in some cultures. This Court is not called upon to make any pronouncement about such practices because we -- this Court is concerned with the jurisdiction under International Humanitarian Law. To be a crime against humanity of forced marriage, the forced marriage must be one that takes place during

a widespread or systematic attack against the civilian

population.

JUSTICE KING: Dr Staker, your time is up. We will give you another ten minutes to go on.

11:53:53 MR STAKER: I am much obliged, Your Honour. As I say, the act of forced marriage, to be a crime against humanity, must take place as part of a widespread and systematic attack against a civilian population. What we are dealing with here is cases where members of a force committing that widespread or systematic

11:54:15 attack subject their victim population to forced marriages. In other words, members of the population under attack are plucked away by their attackers and forced to become the wife of one of those who attacked them and their families; forced to become the wife of an enemy.

11:54:38 Needless to say, this is totally different from traditional arranged marriages where parents or other relatives may arrange a marriage for their children in accordance with traditional customs. We note that in paragraph 55 of his final trial brief, Kanu argued that the phenomenon of bush wives was a replication

11:55:00 of customary marriage. We submit that that submission is an insult to the traditions of any country, certainly those of Sierra Leone.

Fifthly, as to the central question, whether the Prosecution has actually proven the pivotal element of forced

11:55:19 marriage, that is the forced conjugal association, we submit that the only conclusion open to any reasonable trier of fact is that it was. We refer to the findings of the trial judgment at paragraphs 233, 1080, 1157, 1129, 1138, 1153, 1154, 1156 and 1169.

Sixthly, contrary to what the Trial Chamber seems to imply in its judgment at paragraph 710, there is no burden on the Prosecution to show great suffering above and beyond the act of forced marriage itself. Any crime against humanity, that
11:56:02 satisfies the elements of an enumerated crime, is in and of itself of sufficient gravity to be a crime against humanity.

An obvious example is imprisonment. Imprisonment is a crime against humanity. It's no defence to say that the prisoner was kept in inhumane conditions and did not suffer; the mere fact
11:56:24 of imprisonment is suffering. We say the mere fact of being forced to remain in a conjugal association, with somebody who has

forcibly taken you from your community, who is somebody who was one of those attacking your community, and to be forced to remain with that person as a wife is inherently, of itself, a matter causing great suffering and no further evidence of suffering is required to make out the crime.

Having said that it's not necessary to establish further suffering, we submit that of course, in practice, in most circumstances, there will be further suffering and that is one of the reasons why international criminal law, we submit, makes forced marriage a crime under international law.

Our appeal brief refers to examples of the kinds of harm that can result from forced marriage. We emphasise that it was not just in this conflict in Sierra Leone where the phenomenon of forced marriages arises; that this problem has occurred in other places. There are problems, consequences typically associated with forced marriage. They include rejection from the victim's family and community once the forced marriage is over. In Sierra Leone we have, for instance, the evidence of the expert witness

Zainab Bangura, that was filed as Exhibit P32. It shows that former victims of forced marriages, after the conflict, were treated differently to victims of sexual slavery only. That the fact of the marriage led them to be perceived as wives of rebels.

11:58:23 Often they had children as a result of these forced marriages. The children were considered as being of rebel blood.

We submit that forced marriages do raise issues, do raise potential evils against which international law must protect that go beyond those protected simply by sexual slavery and that, as a

11:58:51 result, forced marriage, as an other inhumane act under international law does exist.

As to the Prosecution's eighth ground of appeal, I have very little to add to what is in our brief. I simply point out again that it was never ever even suggested by the Defence that

11:59:18 there was a problem in the way counts 10 and 11 were pleaded. This was something that emerged for the very first time in the Trial Chamber's judgment. It literally came from nowhere in the Trial Chamber's judgment.

What the Trial Chamber found was that it would be

11:59:36 duplicitous to treat mutilations and acts of violence other than mutilations in the same count. The reasoning for that I cannot

explain. I cannot say that we even perceive the logic in it but the result was that for all of the amputations and mutilations that were found by the Trial Chamber the accused were convicted of a war crime but not a crime against humanity.

Our submission is that the amputations that occurred in the conflict in Sierra Leone was a signal feature of the widespread and systematic attack against the civilian population, and that the full criminal culpability of the accused will only be

reflected by a conviction for a crime against humanity in respect of that conduct.

If the Defence wants to pursue this, again, I say the burden is on them on appeal to show not only the defect but actual prejudice, but I would merely note that the Kanu response brief concedes that the Prosecution is actually correct in law on this point.

Finally, I mention briefly the Prosecution's ninth ground of appeal. Again, I have nothing to add to our written submissions.

Our position is simply this: If an accused is convicted of two different crimes, based on different facts, the accused is convicted under Article 6.1 of a killing in Freetown, and under Article 6.3 of a killing in Port Loko District, at a completely different time, we submit that the disposition of the Trial Chamber's judgment must record a conviction for both crimes.

If the two crimes are charged in different counts it's simple: Count 1, killing in Freetown, convicted under Article 6.1. Count 2, killing in Port Loko District, convicted under Article 6.3.

We say, however, where both crimes are charged in a single count, then it's necessary for the conviction on that count to be recorded on both Article 6.1 and Article 6.3. Otherwise, the convictions for both crimes are not recorded in the disposition of the judgment.

The Trial Chamber took the view that where an accused is responsible under both Article 6.1 and Article 6.3 it could record the conviction under Article 6.1 only and take Article 6.3 responsibility into account in sentencing.

We have no problem with that in principle but we say that approach only applies where the convictions are on the same facts. If in respect of that one killing in Freetown there was a conviction under 6.1 and 6.3 you could convict under 6.1, take the 6.3 into account in sentencing. But where you have completely unrelated crimes based on different facts, we say the disposition of the Trial Chamber's judgment must reflect all of the crimes of which the accused were found responsible in the Trial Chamber's findings in the body of its judgment.

12:03:11 Your Honours, unless I can be of further assistance, those are my submissions.

JUSTICE KING: Thank you, Dr Staker, for presenting your submissions in such a lucid and succinct manner.

JUSTICE AYOOLA: Well, Dr Staker, assuming that you are

12:04:04 right in your submissions in respect of the conclusion arrived at by the Trial Chamber on joint criminal enterprise, what is the consequence of that in regard to the findings of guilt in respect of those counts? Collective, joint criminal enterprise is, if the accused persons have been found guilty as primary

12:04:43 participants, is it necessary to find them guilty again as secondary participants?

MR STAKER: If I understand, Your Honour, that question relates to this cumulative conviction between Article 6.1 and Article 6.3?

12:05:03 JUSTICE AYOOLA: No, 6.3 does not deal with that. 6.3 is superior responsibility but 6.1, you can have conviction under 6.1 by virtue of joint criminal enterprise. You don't have to go to 6.3 to convict a person for being a joint participant. Now, if you find, as the Trial Chamber has found here, that all these

accused persons have been primary participants, not secondary participants, not people participating, taking responsibility for the acts of others but as direct participants in terms of 6.1, either as aider and abetters, as people planning and ordering, do

12:06:03 you need to go to joint criminal enterprise again, and find a conviction, a separate conviction on those terms?

MR STAKER: Yes, Your Honour. In relation to the crimes of

which the accused have been convicted, and in relation to those crimes of which they may stand convicted following the determination of this appeal, it's true that we don't need to rely on joint criminal enterprise to sustain the conviction. But the joint criminal enterprise charges relate to other crimes; crimes committed in other districts. Crimes that may have been committed by forces of the RUF.

12:06:45 The Prosecution theory is that because there was a joint criminal enterprise between the three accused, and certain other people, including the three accused of the RUF, that all participants in the joint criminal enterprise are responsible for all crimes committed as part of that joint criminal enterprise.

12:07:05 That would have the result that the accused in this case would also stand convicted of crimes that may have been committed by forces of the RUF.

Now, the Trial Chamber in this case, because it found that joint criminal enterprise was defectively pleaded, gave no

12:07:23 consideration to it. So that where it found that crimes were committed by RUF forces it found that the accused were not responsible for those crimes because they were not committed by the AFRC.

So joint criminal enterprise is an important aspect of the

Prosecution's case and that there are many crimes on which the Trial Chamber did not enter convictions and which we have not appealed against in our other grounds of appeal but would lead to additional convictions if the joint criminal enterprise ground of appeal was upheld.

JUSTICE AYOOLA: Well, that leads me to the second question which I would want you to answer to clarify certain issues. Conviction, verdict is usually as to the counts not as to the particulars of the counts. Now, you've argued as if verdicts must be recorded in terms of particulars.

MR STAKER: No, that is not --

JUSTICE AYOOLA: Now, you have counts 3 to 5 consisting of various particulars but under the heading "unlawful killings." Now, verdict of guilty has been returned in terms of those counts. You seem to suggest that there must be verdict in regards to the particulars and not to the counts.

MR STAKER: That is not entirely correct, Your Honour. The conviction is as to counts. If there is a conviction on count 1,

that is a conviction on count 1. But, certainly in relation to sentencing, sentencing has to reflect the full gravity and magnitude of the conduct for which an accused is responsible. Therefore, although in the formal disposition it will only be a case of guilty or not guilty on a count, it's the body, the findings in the body of the Trial Chamber's judgment that will recount fully the Trial Chamber's findings of exactly what an accused was criminally responsible for or not, and on what basis.

Now, if one accused had been found criminally responsible for doing nothing more but aiding and abetting a killing of one victim, during the Bombali/Freetown campaign, that might have led

to a conviction under Article 6.1 for the count of murder, but, in sentencing, we take into account what was the gravity of this offence; aider and abetter only in respect of the killing of one victim.

12:10:06 If the findings in the body of the Trial Chamber's judgment are that the accused planned and ordered a massive large-scale campaign of crimes of course that's a completely different finding and will be reflected completely differently in sentencing. And if above and beyond that the finding is that the 12:10:26 accused were part of a joint criminal enterprise, and are responsible for crimes spanning into other districts in Sierra Leone, for crimes committed by the RUF, that takes it to another level again. So we submit that it's important in the interests of justice to ensure that correct findings are made on the full 12:10:47 criminal culpability of an accused.

JUSTICE AYOOLA: Are we to take it that you are making this point in relation to sentencing?

MR STAKER: The point of course has been made in relation to sentencing. The Prosecution has not, as such, appealed 12:11:01 against the sentence but we have made the submission that if our grounds of appeal are upheld, this necessarily would give rise to consideration of an increase in sentence to take account of the additional criminal responsibility that will have been found.

JUSTICE AYOOLA: Thank you.

12:11:24 JUSTICE KING: Yes, Dr Staker, I have a question for you. Is it correct to say that it is the law that matters relating to

jurisdiction could be raised at any time during a criminal trial?

MR STAKER: Yes, Your Honour. A defect in an indictment is not the same thing as a point of jurisdiction. If a --

JUSTICE KING: I didn't refer to defect in indictment. I just want to know the general principle of law. I am not referring to anything at this stage. I just want to know: Is it correct to say that, in law, questions going to jurisdiction of a criminal tribunal, could be raised at any stage of the trial?

MR STAKER: Yes, that would be correct, because for the reason that if the tribunal has no jurisdiction it has no jurisdiction. Jurisdiction is not a defect that can be remedied. It's not a defect that can be waived. If the tribunal has no jurisdiction, it has no jurisdiction, and no matter how far it's advanced in the trial, if it has no jurisdiction it has to stop. A defect in the indictment is something different. A defect in an indictment is something that can be cured. A defect can be

waived. A defect can be found to have caused no prejudice and therefore it didn't matter. That is something completely different to jurisdiction. You can't say: We have no jurisdiction but because it causes no prejudice to the Defence we will decide anyway.

JUSTICE KING: I see you are anticipating the point of my question. Let's come to the question of duplicity. Do you accept, or do you not, that the question of duplicity goes to jurisdiction?

MR STAKER: No, no, we submit it doesn't, for the reasons we have given. Duplicity, if an indictment is duplicitous, and we haven't admitted that, but if an indictment is duplicitous that is a defect which we submit can be waived. It's a defect that can be found to have caused no prejudice and therefore not warrant a remedy on appeal.

JUSTICE KING: Yes. But in a case decided in 1964, I think

it was Lord Parker, in Mallon v Mallon, who stated categorically that where a count is duplicitous it goes to jurisdiction, and that count must necessarily be quashed. You disagree with him, do you?

12:13:46 MR STAKER: Well, first of all, I would note that was 1964.

JUSTICE KING: That's correct.

MR STAKER: Secondly, I would note that that was, I presume, England and Wales and not an international criminal tribunal.

12:14:00 JUSTICE KING: Yes.

MR STAKER: It's firmly settled, we submit, in the practice of international criminal tribunals, that defects in indictments, as I say, they can be waived, they can be cured, they can be found on appeal to have caused no prejudice and not lead to a

12:14:16 remedy. I am not aware of any authority that says that a defect in the indictment is a matter going to jurisdiction.

As I say, the burden in this case, in our submission, is on the Defence. If the Defence want to argue along those lines, we will respond to those arguments in our reply submissions.

12:14:37 JUSTICE KING: Yes, but I think also there is a provision in the Statute of the Special Court that in cases like this, where probably you don't have explicit ruling, the Rules of Procedure and Evidence then should go to the Criminal Procedure Act of 1965 of Sierra Leone; is that correct?

12:14:55 MR STAKER: Well, the question is what the test is for going to that rule.

In our submission, that might be a convenient way of resolving a conundrum, when no other way out is seen. But we would emphasise the importance of the unity and the coherence of

international law.

It's fundamental that the law that this Special Court applies is international law. It applies not just in Sierra Leone. This isn't some law that was just created for Sierra

12:15:29 Leone. This is international law that applies equally and universally to every person in the world and every country in the world, and we submit that in the interests of the unity and coherence of that single body of law, it's primarily to the case law of other international criminal tribunals that resort should

12:15:50 be had for guidance and that, equally, those other tribunals should look for guidance to the case law of the Special Court.

JUSTICE KING: So the emphasis is on "guidance" then?

MR STAKER: Well, the emphasis is on guidance but guidance in the sense that the case law should develop coherently and consistently.

JUSTICE KING: Yes.

MR STAKER: Not guidance in the sense of "I've looked at a that and put it aside"?

JUSTICE KING: Naturally.

12:16:21 MR STAKER: It's guidance in the sense that we can see the themes and principles that are emerging and to progress the law in line with those themes and principles.

JUSTICE KING: Thank you. One last question briefly. How do you define "forced marriage"?

12:16:35 MR STAKER: Define "forced marriage"?

JUSTICE KING: That's right.

MR STAKER: It's in our brief. This is -- the defining element is the forced conjugal association. The difference between forced marriage and sexual slavery is simply that someone

held in sexual slavery, examples can be found in the case law of the ICTY of instances of sexual slavery where victims may be held in camps or compounds, basically imprisoned, and then people come and inflict these crimes upon them.

12:17:12 Forced marriage, as we say, needn't necessarily involve abuse; needn't necessarily involve anything sexual; needn't necessarily involve inhumane conditions they live in, although almost inevitably that will be part of it. The thing about a forced marriage is a person is forced to live with, on a conjugal

12:17:39 basis, with a person who forcibly took them from their own community, who is perceived by their community as the enemy.

JUSTICE KING: Thank you very much.

JUSTICE AYOOLA: Could I take it that you are defining forced marriage in terms of conflict or in terms of culture, or

12:17:57 sociology?

MR STAKER: I may have spoken a little too loosely. My submission was this: In order to be the crime against humanity of forced marriage it's obviously necessary that the chapeau elements of crimes against humanity are satisfied. So first,

12:18:11 there must be a widespread and systematic attack against the civilian population. Secondly, the act of forced marriage must be part of that widespread and systematic attack. A mere traditional arranged marriage, according to local custom, could never be a crime against humanity of forced marriage because it's

12:18:31 not part of a widespread and systematic attack against a civilian population.

JUSTICE KING: Thank you very much, Dr Staker, for your replies to the question asked. I think we are going to have a break soon, but we will ask the first appellant to start his

response.

MR GRAHAM: Thank you, Your Honours, I do not intend to be very long. Good morning, Your Honours. Indeed, I am honoured to appear this morning before the Appeals Chamber of the Special 12:19:20 Court for Sierra Leone, the highest deliberative body within the Special Court's legal hierarchy.

Your Honours, as appeal counsel for the first appellant, we have noted the appeal brief of the Prosecution; 910 pages in all filed on September 13th 2007. Similarly, we have noted the 12:19:39 responses of the appeals counsel for Kamara and Kanu, all filed on October 4, 2007; a total of 245 pages in all. In all, a

combined total of exactly 1155 pages of written submissions and supporting appendices have been filed by all the parties in respect of the Prosecution appeal brief, not to mention the volume of the record of appeal.

Your Honours, this morning, we've heard the eloquent submissions of my learned friends from the Prosecution in support of their written missions. On our part, as appeals counsel for Brima, it is not our desire or intention to bore Your Honours this morning by embarking on a journey of restating the written analysis and submissions before you, this bright Monday morning.

We humbly submit, Your Honours, that will be an exercise in futility, considering that one hour afforded us this morning by the scheduling order of November 7, 2007. To that end, I have a brief submission to make in response of the Prosecution's first ground of appeal.

Your Honours, the Prosecution's first ground of appeal is grounded on the fact that the Trial Chamber erred in law and fact by failing to find Brima criminally responsible under Article 6.1

and Article 6.3 for all crimes committed in the Bombali District, Freetown and the Western Area. Under this leg of appeal, the Prosecution argues that the Trial Chamber erred in law, and in fact, by not finding Brima individually responsible under Article 6.1 of the Statute for planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation and execution of all the crimes committed in the Bombali District as well as the Freetown and Western Areas.

Secondly, the Prosecution argues that the Trial Chamber erred in not finding Brima individually responsible under Article 6.3 of the Statute for all the crimes committed in the Bombali District, Freetown and the Western Areas.

Your Honours, the Trial Chamber in this judgment determined that a meeting was held in the Koinadugu District at which a number of AFRC commanders met with SAJ Musa to discuss a number of issues.

First, the discussion was focused on the future of the AFRC fighting forces and the need for the development of a new military strategy.

Secondly, also the commanders agreed that the troops that had arrived from the Kono District act as an advance team to

establish a base in north-western Sierra Leone in preparation for an attack on Freetown, the principal purpose of which was to restore the Sierra Leonean Army.

Your Honours, no evidence was led by the Prosecution to establish that the first appellant, Brima, at the time of the meeting, gave any orders or instructions in respect of the planning, ordering or instigating or otherwise aiding and abetting the commission of all the crimes that occurred in

Bombali, Freetown, and the Western Area.

It's not surprising, therefore, that the Trial Chamber found Brima responsible for the crimes committed in Bombali, specifically based on evidence that were given that Mr Brima gave specific orders, and the Prosecution led evidence to that effect.

It was on this ground that the Trial Chamber found Mr Brima responsible under Article 6.1 for the crimes that were committed in the Bombali District.

Your Honours, the Prosecution argues that Brima should have

12:23:39 been held responsible under Article 6.1 as well as Article 6.3 for all the crimes committed in the Bombali District, Freetown and the western Areas. Unfortunately, the Prosecution failed to adduce or provide any evidence to support the responsibility of Brima in that regard. No direct evidence was led to establish 12:24:05 that Mr Brima planned, ordered or instigated the commission of the alleged crimes in Bombali, Freetown and the Western Area.

Indeed, no circumstantial evidence was adduced as well by the Prosecution to establish the responsibility of Brima under Article 6.1 and 6.3 for all the crimes allegedly committed in 12:24:31 Bombali, Freetown and the Western Area.

Your Honours, abundant legal authority exists today as to the meaning of planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation or execution of the crimes alleged. In narrating submissions, we've referred to 12:24:52 abundant authority in that regard. Our submission is contained in our response to the Prosecution's appeal brief which ostensibly addresses the issues under the various headings.

The key issue in this regard, insofar as the responsibility of Brima, under Article 6.1 and 6.3, for the crimes committed in

Bombali, Freetown and the Western Area, is whether the Prosecution met the burden of establishing that Brima planned, instigated, ordered or otherwise aided and abetted in the planning and preparation or execution of the alleged crimes. Our humble submission is that the Prosecution failed to meet that burden.

We submit that the Trial Chamber rightly found Brima not individually responsible under Article 6.1 of the Statute and that it would be a giant leap of logic, legal logic, to hold Brima responsible under Article 6.1 and 6.3 for all the crimes committed by AFRC forces in the Bombali District, Freetown and the Western Areas.

Your Honours, these are my humble submissions in respect of the first ground of appeal by the Prosecution.

In respect of grounds 2, 4, 5, 6, 7, 8 and 9, Your Honours rely mutatis mutandis on our written submissions contained in our response to the Prosecution brief filed on October 4th, 2007.

Your Honours, I have no further submissions in this matter. Except to humbly observe that I have full faith and trust and confidence in the superior wisdom of the Appeals Chamber in that,

at the end of it all, Your Honours will separate the wheat from the chaff and arrive at a just and fair determination of the issues before you in this appeal.

Thank you very much. I am grateful for the time.

12:26:57 JUSTICE KING: Thank you very much, Mr Kojo Graham, for a very brief and succinct presentation. I have, myself, one question for you, and this relates to ground 6. I had asked Dr Staker whether it was not the law that matters which go to the jurisdiction of a criminal tribunal could be raised at any stage

of the trial and he gave his reply. I would like to hear your own views on that matter. That is the first question. And then, secondly, I would like to hear your views on whether or not objection on grounds of duplicity go to the jurisdiction of a

12:27:46 tribunal.

MR GRAHAM: Very well. I am grateful, Your Honours.

Your Honours, with regard to your first question regarding the matter of jurisdiction, it is my humble submission that

jurisdiction can be raised at any time in the course of a trial.

12:28:07 This is my humble submission that jurisdiction, in a way, is synonymous with the capacity of a court to hear the matter before that. In this regard, it is my submission that jurisdiction can be raised at any time in the course of a trial, as it goes to the very root of the [indiscernible] and authority of the tribunal,

12:28:26 it's competence, as a matter of fact. That is my response to that, Your Honours.

JUSTICE KING: Yes, thank you.

MR GRAHAM: Your Honours, I was a bit lost on your second question.

12:28:37 JUSTICE KING: My second question, I was particularly referring to the ground 6, and then I think the Trial Chamber came to count 7 in the indictment, and I think it was one of the Trial Chamber Judges, in fact, who raised this question about the duplicitous nature of count 7.

12:28:59 Of course, she was saying that you cannot charge more than one offence in a count and, if you did so, that would tantamount to its being duplicitous and at that stage I think she even invited the Prosecution to do something about it, whether they would amend or not, and that would tie up from the question

whether questions of jurisdiction can be raised at any time. Now, what is your view on the question of duplicity itself, in count 7?

MR GRAHAM: Very well, Your Honour. In my humble opinion I believe that the issue of duplicity very much goes down to the issue of the rights of the accused to have a fair trial. It is, of course, a matter of legal authority that accused must have full knowledge of the charges being brought against him to be able to defend that adequately and competently.

12:29:53 It is my submission that in the instance before us, as in the case of duplicity, the issue of the accused being able to provide, being able to have adequate information as to the exact nature of the charges against him is kind of absent in the instance of duplicity, where you have a duplicitous charge. 12:30:16 These are my humble views in respect of this matter.

JUSTICE KING: Thank you very much.

MR GRAHAM: And, in that respect, it goes to Article 17 of the special Statute which deals with the rights of the accused.

JUSTICE KING: Thank you very much, Mr Graham. You have 12:30:44 helped us out. In fact, we have made up for lost time.

MR GRAHAM: I am grateful, Your Honour.

JUSTICE KING: Because we were going to adjourn at 12.30 because, according to this schedule, we go for lunch now at 12.30 and we come back at 2.30, and then we will hear the appellant's Kamara, Kamara's response to the Prosecution's submission. So I think at this stage we will adjourn until 2.30, and we mean 2.30 prompt.

[Luncheon recess taken at 12.30 p.m.]

[AFRC12NOV07B - MD]

[Upon resuming at 2.35 p.m.]

JUSTICE KING: Good afternoon. This morning we left off where Brima's submissions in response were delivered. We are now going to Kamara's submissions in response.

MR DANIELS: Good afternoon, My Lords and Lady. My Lords, just as -- and Lady -- just as my --

JUSTICE KING: It's easier if you refer to all of us as Lords. It's easier for you.

MR DANIELS: Much obliged.

14:38:50 JUSTICE KING: Right.

MR DANIELS: By way of introduction, we will likewise not spend too much time on regurgitating what has already been put forward in our response. However, we will highlight on a few issues and in certain respects we shall adopt in entirety that 14:39:14 which we have filed by way of our response to the Prosecution appeal.

Your Honours, we will start with the first ground of -- My Lords, we will start with the first ground of appeal, and that is the failure of the Trial Chamber to find all three accused 14:39:30 criminally responsible under Article 6.1 and 3 for all crimes committed in the Bombali District, Freetown and the Western Area.

My Lords, you are aware by now that as regards the second accused, there were no findings of liability under 6.1 or 6.3 for any of the enslavement crimes. For the second accused Kamara, 14:40:03 apart from the three crimes of enslavement just mentioned, Kamara was found liable under 6.3 for all of the Bombali District crimes.

As regards his specific liability, 6.1 liability, Kamara was found liable for the killing of five girls in Karina, and

also for aiding and abetting certain specific incidents in Freetown. The reliefs sought by the Prosecution are to find Kamara liable for planning, instigating, ordering or otherwise aiding and abetting in the planning and preparation or execution

14:40:45 of all Bombali District crimes.

The relief also sought by the Prosecution is to find Kamara liable for all crimes under Section 6.3 of the Statute.

By way of background, the Prosecution's theory is based upon a meeting that allegedly took place in Kurubonla in the

14:41:13 Koinadugu District, in April and May 1998. The theory was that the commanders, led by the first accused, had a single overall plan: To attack Freetown. In this regard, they hold all the accused responsible for all crimes committed within the Bombali District.

14:41:43 The Trial Chamber found differently. In paragraph 1937 of the Trial Chamber judgment, the Trial Chamber specifically found there was no evidence that Kamara ordered, planned, instigated any of the modes of liability. The Prosecution refer to an incident, or a meeting, that allegedly took place in a town

14:42:24 called Kamagbengbeh where it's alleged that the planning of the

final attack, or the attack in the Bombali District, took place.

In this regard it is worthy to note that the Trial Chamber again,

in paragraph 1917, found that the fact of the second accused's

position, as a deputy commander, was not enough to suggest that

14:43:04 he was part of the planning of the attack on Bombali.

In fact, in paragraph 1918 of the Trial Chamber judgment,

the Trial Chamber said specifically, and I quote: "That no

evidence was adduced that the accused Kamara made a substantial

contribution to the planning of any crimes under counts 3 through

6, 10 through 11, in the Bombali District."

Now, in respect of the crimes that were committed within

the Bombali District, no doubt there were many, but then the

Bombali District encompasses quite a large span of area and,

14:43:53 apart from the specific incident where it's alleged that Kamara

was guilty of killing of five girls and, even then, the

Prosecution are aware that we have even challenged the findings

of the Trial Chamber in respect of whether or not Kamara was responsible for the killings of persons in the Bombali District.

14:44:20 Our position is that the evidence was not suggestive enough of his culpability. But we are saying that to infer, just by the fact that Kamara was a deputy commander, that he took part or had -- took part in the planning of the commission of the crimes within the Bombali District is farfetched and especially when you are dealing with crimes of 6.1 liability, the Trial Chamber rightly held that you must -- such liability attaches to the individual. So if you are going to find the second accused liable, then there must be at least some direct evidence to implicate the accused in having committed some of the crimes. To just find him culpable by virtue of his association with the first accused, we are saying, is not enough to establish liability.

14:45:11 The Prosecution also refer to certain instances where, during the campaign trail, from Bombali to Camp Rosos, and from camp Rosos to Colonel Eddie Town, the Prosecution have stated in this Court that the accused persons were under arrest, and they used the term "for an definite period." But then our submission is that it was long enough so as to put a dent in the whole theory of the Bombali campaign. In this respect, we say that the

Prosecution's theory of an overall plan to attack Freetown should fail.

This leads us on to the second ground of appeal, which is directed again at all the accused but, in this particular instance, the Prosecution are arguing that by virtue of adding the words "including" or -- "including" then, by implication, it necessarily follows that the pleadings are sufficient enough to include liability in that specific area where the second accused is found liable.

14:47:10 The Trial Chamber has stated, in paragraph 38 of its trial -- of the judgment -- that it would not make any findings of crimes in locations not specifically pleaded.

The Trial Chamber precedes this finding by stating, and we agree, that the jurisprudence of international criminal tribunals

14:47:33 makes it clear that an accused person is entitled to know the case against him, and is entitled to assume that any list of alleged acts is exhaustive regardless of the inclusion of the

words such as "including" which may imply otherwise.

JUSTICE KING: What are you saying?

14:48:03 MR GRAHAM: What we are saying is that this goes to section 17 issues of the Statute, the right to a fair trial, where you are going to charge somebody for a set of offences in a particular district, and you do not give him advance notice of the particular district within which he stands charged, or the

14:48:26 details of which he is to be found culpable, he's not in a position to prepare his Defence adequately and, as such, his Defence can be hampered. This is the point.

JUSTICE KING: So you are saying it's not enough merely to say "including." If there are any other sort of offences those

must be listed out; that's what you are saying?

MR DANIELS: That is what we are saying.

JUSTICE KING: Okay. All right. Very well.

MR DANIELS: We are saying "including" is too broad. We

14:48:55 are saying also that the list referred to in Appendix B, provided by the Prosecution, is a very tall and exhaustive list, and we

are saying that, for us, who went through the -- who were able to do the -- go on the ground to discuss with potential witnesses, it becomes a big difficulty, being able to prepare our Defence where we are not being given the crime bases in advance of the actual trial, or in advance of the person's testimony. That becomes a problem. It affects the rights of the defendant.

Indeed, we also rely on the decision of the Prosecutor in Norman, and this was in the Special Court over here, where the Trial Chamber, the Appeals Chamber said that the Prosecutor had a duty to select just so many charges that he can -- or that can readily be proved. And this need to be selective is a test, with the greatest respect, of the Prosecution's professionalism. The Trial Chamber must oversee the indictment in the interest of producing a trial that is manageable. This is also taken from the Trial Chamber's judgment and we fully endorse this view.

In respect of the Prosecution's third ground of appeal, that is to do exclusively with Kamara, where the Trial Chamber pleading, with the Appeals Chamber, to find Kamara again individually responsible for all the crimes committed within the Port Loko District.

It is the relief, or the relief sought by the Prosecution is that the Kamara be found culpable for the attack on Manarma, where indeed he was only found culpable under count 3 liability.

There is -- the problem with the crimes in Manarma, as has been pointed out by my friend from the Prosecution, was that at least for the town of Manarma, and for the town of Gberibana, these particular jurisdictions, or these particular crime bases were not pleaded and since they were not pleaded the Trial Chamber has found, and this applies in the case of this particular round of appeal, that these towns not having been pleaded then the Trial Chamber didn't mince its words by saying that it was not going to make any findings in respect of those towns not pleaded.

14:51:58 Fortunately, or unfortunately, many of these towns happened to be in the Port Loko area and perhaps that is why this is directed at the second accused.

The second accused has maintained, and says so in its response to the Prosecution appeal, that the person most culpable

14:52:17 for the offences committed in the Port Loko area goes by the name

of George Johnson, otherwise known as Junior Lion. Indeed, we refer to paragraph 1960 of the Trial Chamber judgment, where even the Trial Chamber acknowledges that George Johnson had stated before this Honourable Court that, indeed, he did have a position of command and exercised authority during the relevant period.

The position of the Kamara Defence is that George Johnson holds the greatest responsibility for the crimes committed within the Port Loko District and, indeed, not the second accused.

I have mentioned the town Manarma and I have mentioned the town Mamamah. Just to make a distinction, these are two different towns. In respect of the town of Manarma, where the Prosecution are asking for a 6.1 conviction against the second accused, our position is that in respect of the case of Manarma, it was the Junior Johnson who was most responsible for the

atrocities committed and not the second accused and, again, the accused cannot be held liable under 6.1 where he did not

personally partake in the atrocities committed.

In respect of the fourth ground of appeal, this is the Prosecution's fourth ground of appeal, that being the decision of the Trial Chamber not to consider joint criminal enterprise liability, our position has been that the pleadings were defective. They were not properly drafted in that it was not clear from the pleadings whether or not we were proceeding under basic liability or extended form of liability.

The Prosecution today have conceded that, by virtue of paragraph 33 of the indictment, paragraph 33 of the indictment, the allegation, or the allegation that is to carry out -- just a second, Your Honours. The allegation, as set out in paragraph 33, is that the accused persons and the RUF shared a common plan which was to take any actions necessary to gain and exercise political control and power over the territory of Sierra Leone, in particular, diamond mining areas.

The position of the Trial Chamber has been that that, in itself, is not criminal. And that not being criminal then it necessarily follows that once the underlying factor of the plan is not criminal, then the crime of joint criminal enterprise cannot stand. Indeed, the Prosecution rely on --

JUSTICE KING: What is not criminal, in itself?

MR DANIELS: That the -- to take any actions necessary to gain and exercise political power over the territory of Sierra Leone.

JUSTICE KING: It's not criminal?

MR DANIELS: This is -- that, on its own, is not a crime

within international law for which they can stand convicted.

JUSTICE KING: I see.

MR DANIELS: However, the issue here is that the Prosecution have stated that, in paragraph 32, that the time frame of the indictment is to do with all times relevant to this indictment. And the issue here is whether or not the intention becomes one of a fluid nature, whether -- it changes as we go along -- and the position of the Brima team, of the Kamara team, which is fully set out, is that this has not been properly pleaded and, as such, it must be rejected.

Indeed, the Prosecution have relied on the cases of Martic and Haradinaj, I think, which are set out in paragraphs 112 and 113 of the Prosecution's appeal brief. And we are saying that the circumstances in those cases are different and are not helpful to the Trial Chamber.

Other than that, Your Honours, we have fully set out our arguments in our appeal response, as filed, and we will be happy to answer any questions, Your Honour.

JUSTICE KING: Yes. I thank you for your assistance. Thank you very much indeed. No questions from us at this stage, Mr Graham. Thanks.

MR DANIELS: Mr Daniels, I beg your pardon.

JUSTICE KING: Mr Daniels, sorry. Your colleague is Mr Graham.

MR DANIELS: That is so.

JUSTICE KING: I think it's fair that you both seem to come from Ghana; that is what confuses me. We go now to, we are within time limits, so we go now to the third appellant.

MR MANLY-SPAIN: May it please you, My Lord.

My Lord, the Kanu response submissions are to be found at pages 1303 to 1386 of the Court records. Our submissions are in direct answer to the Prosecution's submission in its appeals

brief and grounds of appeal.

14:59:02 In our response submission, we have plead in certain paragraphs, such as paragraph 131, 536, 618 and 715, with regard to the legal effect if this Court were to find that the Prosecution grounds of appeal succeed, what the legal effect should be, and we are saying that throughout the Prosecution's 14:59:48 case they have been urging this Court to look at everything globally, and not individually, and we are respectfully submitting and praying that if the grounds of appeal succeed, the Prosecution grounds succeed, the grounds of appeal succeed, they can only affect the totality of the criminal conduct of the third 15:00:05 accused, not the sentence that has been given, in an upward manner, that is.

My Lord, the first ground of appeal of the Prosecution, we have replied to, in -- from page 1, page 2 of our response brief, and we have stated our reaction to this ground of appeal.

15:00:46 Basically, the Prosecution queried the failure of the Trial Chamber to find all three accused criminally responsible under Article 6.1 and Article 6.3 at the same time, for all crimes committed in Bombali District and Freetown and Western Area.

The allegation is that the Trial Chamber erred in law in 15:01:11 not finding the appellants individually guilty under Article 6.3 and also under Article -- under Article 6.1 and also under Article 6.3. That is, for acts done by themselves and acts done

by their subordinates and they are also querying that the Court,

with regard to the third accused, Kanu, did not incite a finding

in fact a finding of guilty for Freetown, just for the Western Area; that was put in the judgment.

We would wish to refer, Your Lordships, to paragraphs 15 and 16 of the Prosecution's brief and also to page 2 of our submissions, page 1305 of the records.

The Prosecution are asking this Court to insert a conviction also under Article 6.3, in respect of the third appellant, as they argue that all these crimes were part of a single, overall plan; that is, the global plan hypothesis. That queries that the Court treated the crimes individually and, therefore, the Court erred in law.

Our response is that it is the Prosecution who are wrong in law to want the Court to tie the individuals, the individual responsibility of the appellants under Article 6.1 to the collective responsibility of the AFRC as a group, or the RUF, with which they are alleged to have had a joint criminal

enterprise.

We would refer, Your Lordships, to our submission at paragraph 1, subparagraph (11) and paragraph 1, subparagraph (13) of our response submission. We are respectfully submitting that the basic principle to be applied here is that culpability is personal and that strict legal or criminal liability is not permitted. Criminal liability for the acts of others is not permitted. The culpability of the accused should be personal and for acts of others it should not be strict. They should go further to prove certain other things.

What we are saying, My Lords, is that the Prosecution is saying that: Just look at it as a whole. Whatever was done, whether the accused knew about it, or aided abetted et cetera,

just give one global conviction; that is, under both 6.1 and 6.3. Instead of that, what the Court has done is to find them guilty under 6.1, the third accused guilty under 6.1 and used 6.3 as an

aggravating factor in considering the punishment that was meted out to him and we are respectfully submitting that the Court did not err in taking that approach.

We are also, in support of this, we are also that the accused should not be taken to be criminally liable for the acts of others because you should look at the context of the fighting that took place. Now, the forces that were fighting were not regular forces. They were what the military experts that were called, both for the Prosecution and the Defence, referred to as irregular forces, who were fighting a guerrilla war, and that it is not always that the commander should take responsibility for what was done by subordinates, so that the point is that the liability of the commander is not strict in this case, in such an atmosphere.

We will also like you to -- refer you to page, paragraph 1, subparagraph 1.4 at page 8 of our submissions, and there reference has been made to the case of Galic and Oric, in support of this, our submission.

Much, My Lords, have been made about the overall plan that was agreed upon by the AFRC forces. The Prosecution has directed you to look at what was said at Mansofinia, but our respectful submission is that this plan was not conceived at Mansofinia but

at an earlier stage at, Kurubonla. It is this plan that we are respectfully referring, Your Lordships, to look at as the overall plan, and it is this plan that we are respectfully submitting that the Court found was not criminal in its inception; the

overall plan was at Kurubonla and it was not criminal in its inception. We would refer Your Lordships to pages 9 to 12 of our submission.

I mentioned before that the Prosecution were querying the
15:08:08 omission of Freetown in the finding against the third accused, the third appellant, instead of finding him guilty on Freetown, for Freetown and the Western Area, it was -- Freetown was omitted. We are respectfully submitting that this is not a matter for appeal. That the Prosecution, itself, at one stage
15:08:44 considered that it might have been a typographical error in the judgment. This, we are respectfully submitting, is something the Prosecution could have taken up with the Trial Chamber, not to

couch it as a ground of appeal on law.

Had the Prosecution done so, this would not have been a ground before Your Lordships today. We will refer you to page 14 of our submissions.

My Lords, we are also submitting that the failure to enter the words "Freetown," the word "Freetown" ought not to -- did not affect the final outcome of the proceedings before the lower court. That is, the Court did actually take into consideration the fact that the third accused, the third appellant, was liable for crimes in Bombali, Freetown, and the Western Area. So definitely, we are suggesting, we are submitting that it must have been an error, an omission, or typographical omission. We would refer Your Lordships to paragraph 1, sub -- paragraph 32 at page 14 of our brief. If I may read briefly, we have stated that:

"The appellant submits that the global sentence of 50 years imprisonment that was passed against him already took into

account areas raised 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 found liable under Article 6.3 for crimes committed by subordinates throughout Bombali and Freetown and the Western Area. Therefore, our submission is that while the reasonability under Article 3, 6.3 for Freetown might have been omitted, in paragraph 2080 of the judgment, it was nevertheless taken into account for sentencing purposes in the sentence against the third appellant."

So what we are trying to say, My Lords, is that this is an unnecessary matter before this Court.

I will now move on to ground 2. That is, the omission by the Trial Chamber to make findings on crimes in certain locations. I will refer Your Lordships to page 16 of our submissions, paragraphs 21 to page 18, paragraphs 25.

The claim by the Prosecution is that the Chamber, the Trial Chamber, was wrong to find that those locations that have not been specifically pleaded on the indictment, that those locations have been specifically pleaded in the indictment by the use of phrases and words such as "various locations in the Bombali District including" -- that is the query that it was

actually pleaded.

They also state that even if the pleading in the indictment was defective, the defects were cured by a timely, clear and consistent information given by the Prosecution to the Defence.

And they also plead that the Defence had waived its right to raise this point and are therefore estopped from doing so now.

We would wish to note, at this stage, that it is trite law that each count of the indictment should have two parts; a statement of the offence and also a statement or a short description of the particulars of the offence. That the statement of the offence states the law that has been broken and the particulars give the details, in short, of the time, the place, the co-accused, really what was done.

We are submitting, in paragraph 214, that the Prosecution are saying, wrongly, that in this Special Court the requirement for specificity is lesser, is of a lesser degree than in the other courts as the ICTR and ICTY. We are saying that this is

unfounded and untenable. We were submitting that the --

JUSTICE KING: What are you trying to say?

MR MANLY-SPAIN: I have -- first of all we refer to Article

15:15:26 17.4 of the Statute. And also --

JUSTICE KING: The -- my question is, you know, if you can

show us the authority for saying that you don't have to have that

type of specificity that you have in those two tribunals to have

that in the Special Court; what is your authority?

15:16:09 MR MANLY-SPAIN: No, I am saying you should have the same

specificity, not that you should have a lesser degree but it

should be the same. It is the same in all courts.

JUDGE WINTER: If I may interrupt shortly.

MR MANLY-SPAIN: Yes, My Lord.

15:16:34 JUDGE WINTER: If I remember correctly, the submission of

the Prosecution was not that this Court has a lesser degree of

specificity than any other international court but the submission

was, rather, that international courts have a lesser degree of

specificity than national courts, if I remember correctly.

MR MANLY-SPAIN: As My Lord pleases, but what I'm trying to put forward here, My Lord, is that the specificity that is required in this Special Court is the same as in the ICTR and ICTY. That is what I am canvassing.

15:17:22 JUSTICE KING: First, but if you want to change it you are allowed to change it, because the transcript is there.

MR MANLY-SPAIN: Yes, My Lord. The things that are required, My Lord, is, for example, the location of the crimes must be in the indictment with as much clarity as possible, so

15:17:54 that the accused is not materially prejudiced in the preparation of his Defence. And what we are saying here is that to use the phrase "including various locations" is not specific enough. And it prejudices the accused in the preparation of his defence; that the words are not specific enough, "including in various other

15:18:28 locations." These are the words used in the indictment that we are querying as not being specific enough.

With regard to the matter of the waiver of the right of the accused subject to the Prosecution failure to be specific, or that the accused are estopped from raising it on appeal, we would

15:19:02 refer Your Lordships to paragraph 217 and 219 of our brief.

We would contend, My Lords, that there has been no waiver

of these rights. There have been no waiver of these rights. As the Defence has addressed it in the pre-trial stage, and as there is authority in the Niutei Gacka appeal's decision, that an accused should not be estopped from raising a defect for the first time at the appeal stage, if material facts were disclosed by the Prosecution for the first time at the trial.

Now, we are saying that this is -- it all falls with our case, that material facts were disclosed for the first time to

the Defence during the trial of this matter; numerous instances of that taking place. We are therefore submitting, My Lord, that the Court, the Trial Chamber was right not to consider those pieces of evidence because it was a fundamental matter, an important matter, that the Defence ought to be able to focus its attention on crimes contained in the indictment. That is the case, Mr Lord, of Semanza, to support this, and we are referring you to paragraph 220 of our submission.

We also refer to 219 and 240 and 221. And we are

15:21:29 submitting that the real test in this instance is whether the accused will not, or will be unduly prejudiced by these pieces of evidence, if the court were to have based its findings on evidence not pleaded.

JUSTICE KING: Yes.

15:22:15 MR MANLY-SPAIN: Yes. We are referring to paragraph 220 and I mentioned the Semanza case. It was decided that, the Chamber found:

"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."

And we are respectfully submitting that these are the decision taken by the Trial Chamber.

15:22:50 The Prosecution has also queried, My Lords, the failure of the Chamber to find that any defects in the indictment had been cured by timely, clear and consistent information, given by the Prosecution to the Defence, through that -- the trial brief, witness statements, potential exhibits, et cetera.

In response, we are contending that although there is a general proposition of law, that an indictment may be so cured, that proposition is not so absolute, and irrespective of other matters, such as the risk of prejudice to the accused. While the defects are numerous, or when the defects so affect the clarity of the indictment, that they definitely affect the ability of the accused to appreciate the charges and prepare an adequate Defence. Here we refer to the case of Bagosora et al. We refer you to paragraphs 224, 225 and 226 of our submissions. Also paragraphs 227 and 228.

We are submitting that there were so many of these defects, and they were of such magnitude, in this our case, that the trial court was right to hold that the indictment was not cured, as that would have clearly prejudiced the appellant, the third appellant.

My Lord, with regard to ground 4, which is the JC, we have submissions covering paragraphs 4.3 to 4.10 of our submissions, written submissions. We submit, My Lords, that the JC that was pleaded is gaining and exercising control over the population of Sierra Leone. And the finding of the Court was that these JC, as

pled, is not a crime in international law.

The Prosecution have relied on the cases of Martic and Haradinaj, and we are respectfully submitting that these cases can be distinguished from our case. In those cases, the

15:26:15 distinction between those cases and ours is that in those cases

the court of trial found that the JC itself was criminal and a crime in international law. In our case, our Court found that the JC itself was not a crime in international law.

JUSTICE KING: What is this JC you talk about all the time?

You mean --

MR MANLY-SPAIN: The joint criminal enterprise.

JUSTICE KING: Well, why don't you say that?

MR MANLY-SPAIN: I am sorry, My Lord. The joint criminal

15:26:52 enterprise which I pointed out, in this our case, was merely gaining and exercising control over the population of Sierra Leone. And the Court found that that was not a crime in international law.

My Lord, that brings us back to the point I started with

15:27:13 is: Whether or where was the JC formulated in this matter? Was it at Kurubonla or Mansofinia? The Prosecution, I find, have made a point that it was at Mansofinia, and the JC conceived, or the idea came from the first appellant.

Our respective submission is that the evidence before the 15:28:04 Court was that the reorganising of the troops of the AFRC did not take place at Mansofinia but at Kurubonla, and that was under the leadership of SAJ Musa, not under the leadership of the first appellant. More, My Lord, will be said on JC when we come to do our address on our appeals, so I don't want to go on and on and 15:28:42 on, but we would wish to point out that the position taken by the Prosecution, that they were taken by surprise, at the end of the trial, by our submissions on JC, is not quite right. It's not quite right. Because their brief contains submissions on JC in the final trial brief and they did address the Court on it. So, 15:29:23 to say that they were taken by surprise is not quite right.

Now, I will go on, My Lord, to the fifth ground of appeal and we would refer you to page 44 of our brief. The fifth ground of appeal, My Lord, that the Trial Chamber failed to find all three accused individually responsible on counts 1 and 2 of the

indictment, in respect of the three enslavement crimes, that is, sexual slavery, forced labour and child soldiers.

The Prosecution wants this Court to decide that these three crimes, the accused ought to have been found guilty on these three crimes under terrorism.

Our first submission, My Lords, is that terrorism is a crime with a particular, a special intent which is different for the crimes of sexual slavery, forced labour and child soldiers. Terrorism is a specific intent crime, the mens rea of which is different from those of sexual slavery, forced labour or child soldiers.

We are submitting, My Lords, that the Trial Chamber rightly ruled that the primary purpose of the acts which are being queried, that is, the acts of sexual slavery, forced labour or child soldiers, they were not basically to spread terror but to serve certain military and sexual purposes. That is what the Court found.

But the Prosecution is saying that you should, the Court should have equated these three offences for which the law

15:32:24 requires different mens rea to terrorism. That is what the Prosecution is saying, that that's why the mens rea is different; they should cumulatively, globally amount to terrorism, and we are respectfully submitting that that is wrong, and that the Court came to the right decision.

15:33:09 With regard to ground 6, that is the ground of duplicity, we are respectfully submitting that the charge, the count, was bad in law because it had charged two offences in the same count, and so the Court held, that two crimes were charged in count 7 of the indictment. That is, sexual slavery, one, and two, any other

form of sexual violence.

Please be referred, My Lords, to paragraphs 6.1, 6,2, 6.3 and 6.4 of our response submission.

May it please you, My Lord, the second accused is

15:34:59 requesting permission to use the bathroom.

JUSTICE KING: Let him go escorted and since you are here,

we will continue.

MR MANLY-SPAIN: Yes, My Lord. The Prosecution, My Lord, is complaining that the Court made a procedural error when considering this -- its interlocutory decision on defects, particularly regarding to count, 7 that it ought to have been -- the Court ought to have invited discussion or arguments on it.

They are also saying that there is no ambiguity in the way the count was pleaded. Therefore, it was not badly pleaded and, thirdly, the Prosecution are submitting that any defects that may have been in the count were cured by post-indictment disclosures.

My Lord, we beg to differ in this regard, from their submission. We are of the opinion, My Lord, that the duplicity is something that is seen in the count on the indictment. It has nothing to do with the evidence at all, so it cannot be cured by timely disclosure of evidence. If the charge, if the count charges two offences, it is bad in law. You look at the face of the indictment; look at the count. Once that is there, it's bad in law. It is bad in law and it cannot stand.

JUSTICE KING: Why?

MR MANLY-SPAIN: Because it charges two offences. It goes against the established legal principles.

JUSTICE KING: But suppose the accused is not prejudiced?

MR MANLY-SPAIN: Well, I was coming to that, My Lord.

JUSTICE KING: Well, that is what I'm asking you now.

MR MANLY-SPAIN: Well, first of all, My Lord, it should not get that far. The prejudice should not come in. The charge is bad. It is a legal principle. It is bad. You don't go beyond that. That is our submission.

JUSTICE KING: Yes, but the question is, because they have contended in some of their briefs that if the accused is shown not to have been prejudiced then the count could stand. What is your own reply to that?

MR MANLY-SPAIN: Well, my reply briefly, My Lord, is that duplicity is a matter of form, not a matter of evidence. It's a matter of form. If the form is bad the count is bad. You don't cure the wrong or, for a lack of use of word, the wrongness in the charge by giving information about it. There are two charges. The law says you should not charge two. You should

charge one. You should not charge two --

JUSTICE KING: Which law is that?

MR MANLY-SPAIN: It was Delalic -- it was decided in Delalic. It was also held by Judge Thompson, in the Trial Chamber II case, the Hinga Norman case, and it is basically that the general rule is that each separate count should charge only one act.

JUSTICE KING: Only one act?

MR MANLY-SPAIN: Yes, sir.

15:38:56 JUSTICE KING: Or only one offence?

MR MANLY-SPAIN: I am taking them interchangeably, My Lord.

JUSTICE KING: You can't.

MR MANLY-SPAIN: I am sorry.

JUSTICE KING: You have to be precise in your submissions.

MR MANLY-SPAIN: Well, let me read it. The general rule is that "for each separate count there should be only one act set out which constitutes the offence."

JUSTICE KING: That's right.

15:39:19 MR MANLY-SPAIN: "If two or three offences are set out in the same count separated by the disjunctive or/and the conviction should be quashed."

JUSTICE KING: What is the basis for that?

MR MANLY-SPAIN: Several cases, My Lord. I have referred
15:39:35 to Judge Thompson's decision. I have referred you to Delacic, Bizimungu, et cetera.

JUSTICE KING: I am not asking about the cases; I said what is the basis for that proposition?

MR MANLY-SPAIN: That the accused would not know which of
15:39:52 the two offences he should defend.

JUSTICE KING: But can't he defend both?

MR MANLY-SPAIN: Not when they are in the same count, My Lord.

JUSTICE KING: You see, that's what I'm saying. You see,
15:40:04 the whole point really, isn't it a question of jurisdiction, that where one should have two offences in one count, that goes to the root of jurisdiction, the Court will not have jurisdiction in those cases. There are many dicta on the point and one of the famous ones is Lord Parker, Mallon V Mallon, and in all the other
15:40:29 cases they always refer to the fact that in so charging, two or more offences in one count, that will go to the question of jurisdiction. The Court has no jurisdiction in those cases. And

if you look from the Indictment Acts in Britain of 1915, that has been made specifically clear. Before that 1915 it was different but since then, when you have the Indictments Act, defining the jurisdiction of the Court in the indictment, it is quite clear that you cannot charge two or more offences in one count; isn't that the position?

15:41:09 MR MANLY-SPAIN: Yes, My Lord. Even Judge Richardson is not here now, this might be one of the reasons he is not here, because in the actual criminal pleadings he has stated this: That where a count is bad, a count is bad for duplicity, it is ordinarily unnecessary to look further than the count. This is

15:41:33 the position we are holding.

JUSTICE KING: You refer to Archibold, but it depends on what edition of Archbold. In fact, the old editions of Archbold, that wasn't quite clear. It was only after the 1915 Indictments Act that it was -- the third Act, it had to be revised.

15:41:51 MR MANLY-SPAIN: I am referring to Archibold Criminal Pleadings Evidence on Practice 2005. It's quite recent, My Lord.

JUSTICE KING: So you have raised it as a matter of jurisdiction?

MR MANLY-SPAIN: Well, now that you asked me, I agree, My
15:42:07 Lord.

JUSTICE KING: Well, that is what I was asking you all the time because, you see, I think that is the main basis, because I want to be certain of that and to see what your views are, the Defence, and if I am wrong to amend my views on the matter.

15:42:21 MR MANLY-SPAIN: Well, I will say, My Lord, that it is so because once the charge is bad the Court cannot give a decision on it. It's a matter of jurisdiction. That I think is a matter of jurisdiction.

JUSTICE AYOOLA: That is assuming it is not amended.

MR MANLY-SPAIN: Pardon, My Lord?

JUSTICE AYOOLA: That is assuming it is not amended.

MR MANLY-SPAIN: Yes, My Lord. In our case it wasn't amended so that is why I haven't said anything about that. That is how we went to judgment.

JUSTICE KING: Yes, but you have also had the submission made by the Prosecution that such objection should be made in limine, as it were. What is your reaction to that?

MR MANLY-SPAIN: My Lord, I would say that at the end of the day, the Court has to look at all that is before it and that the Court has a right to even deal with its previous decisions, if they were -- if those previous decisions are left as they were, they would be tantamount to prejudice against the accused. The Court can look at it and decide on it. And we were saying, My Lord, that this point was raised.

JUSTICE KING: I am not saying it's not raised. You see, I am just going to what the Prosecution submitted and what you are responding. I understand it to be the Prosecution's position that in such cases an objection should be taken at the pre-trial stage, and if it's not taken it's deemed to have people waived. I'm asking you for your own response to that submission, having regard to the question of jurisdiction.

MR MANLY-SPAIN: Our response is that once it is accepted as a jurisdictional point, it's a matter of judicial -- it can be

15:44:13 raised at any stage before judgment. That is what we are submitting.

JUSTICE KING: Yes, go on. The question --

JUDGE AYOOLA: So --

JUSTICE KING: Sorry, go don.

JUDGE AYOOLA: Do I understand you are now saying that it's not a matter of form.

MR MANLY-SPAIN: No, it is basically a matter of form, My Lord. Because if you look at it, is it -- according to what it should be, is what it should be. If not, then it's bad in law but the question of whether it's a jurisdictional point is another matter. It's a matter of form going to jurisdiction.

My Lord, the first appellant would also like to use the restroom.

15:45:10 JUSTICE KING: If any other appellant would like to use the restroom let that appellant do so now. We will continue in their absence and they should be escorted.

MR MANLY-SPAIN: My Lord, the question also on this ground is whether the defect was cured. We will invite you to look no further than the count itself, as it appears on the face of the indictment. The only way it could have been cured, My Lord, was probably by amendment of the count, not by post-indictment disclosures. By amendment, and it was not amended.

JUSTICE AYOOLA: Was there any plea to that count?

MR MANLY-SPAIN: Yes, I think the accused pleaded not guilty to all the counts.

JUSTICE AYOOLA: Was there any defence to the count regardless of the alleged defect? Was evidence led by the Defence in regard to the facts constituting that count?

MR MANLY-SPAIN: Yes, My Lord. Yes, My Lord, evidence was led because the count on sexual slavery also went over to count 9 so evidence was led by the Defence in rebuttal.

My Lord, I think I have about ten minutes more.

JUSTICE KING: Yes.

MR MANLY-SPAIN: I would like to go to the forced marriage, on count 7. I will briefly -- pardon, Sir?

JUSTICE KING: What count is that?

MR MANLY-SPAIN: Ground, My Lord.

15:48:01 JUSTICE KING: Sorry?

MR MANLY-SPAIN: Ground. Seven, My Lord.

JUSTICE KING: I thought you said count 7, so ground 7?

MR MANLY-SPAIN: I am sorry, Your Honours.

JUSTICE KING: Yes.

15:48:44 MR MANLY-SPAIN: My Lord, due to the shortness of the time left, I would wish to refer the Court to our submissions in paragraphs 7.9 to 7.23, and the questions we are posing was whether in this trial forced marriage was proven by evidence as a distinct crime from sexual slavery. I think this is paramount to

15:49:19 this issue. And we are respectfully submitting that this was not done, was not proven separately or distinctly, and the Trial Chamber, in coming to a decision, had to avoid duplicating the counts in the indictment. It was the duty of the Trial Chamber to decide whether sexual slavery, or forced marriage, was proved

15:50:03 distinctly from sexual slavery, and the decision of the Court was that it was not, basically. The Court, in its wisdom, avoided duplicating the charges.

Much has been said about the interpretation of the Court under 2(i) and 2(g) of the Statute. At the end of the day, we

15:50:42 are submitting that no injustice was done to the Prosecution by the Court deciding that forced marriage has not yet crystallised into an international crime, or a crime against humanity. This is the piece of the decision by the Court.

JUSTICE AYOOLA: What was the offence charged?

MR MANLY-SPAIN: Forced marriage.

JUSTICE AYOOLA: Is it not other inhumane act?

MR MANLY-SPAIN: Yes, My Lord.

JUSTICE AYOOLA: That is the offence?

15:51:18 MR MANLY-SPAIN: Yes, under "other inhumane acts," forced marriage. What the Chamber decided is simply that, not yet a crime under this heading. That forced marriage is not a separate crime, a crime separate from sexual slavery. That is the point.

My Lord, I would then go on.

15:52:00 JUSTICE KING: You have got five minutes more.

MR MANLY-SPAIN: I am almost done, My Lord.

JUSTICE KING: Very good.

MR MANLY-SPAIN: My Lord, the defence of the third accused, as pleaded, for example, in paragraph 725, which I will read.

"In the event that the Appeals Chamber opposed this ground of appeal, that is these grounds of appeal, the conviction under count 8, that is 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."

And we are relying on our legal arguments under ground 8 of our grounds of appeal for this.

We are therefore to conclude, My Lord, we are therefore praying that this Court should not oppose any of the grounds of appeal filed by the Court's submissions. That is all.

JUSTICE KING: Thank you, very much, Mr Ajibola Manly-Spain.

MR MANLY-SPAIN: Yes, My Lord.

JUSTICE KING: For presenting your client's case.

MR MANLY-SPAIN: Thank you, My Lord.

JUSTICE KING: I just have one question for you. Where the Rules of Procedure and Evidence do not adequately provide for a specific situation, by what should this Court be guided? Is it by --

15:53:51

MR MANLY-SPAIN: Case law, maybe, My Lord.

JUSTICE KING: Maybe?

MR MANLY-SPAIN: Yes. My Lords, we also -- what I can give now, in all honesty, cannot be definitive.

15:54:04

JUSTICE KING: Why not?

MR MANLY-SPAIN: Because of the uncertainty of the question, My Lord.

JUSTICE KING: All right. Well, you will find that it's not an uncertainty. Look at Article 14 of the Statute of the Special Court and read it out.

15:54:15

MR MANLY-SPAIN: The use of --

JUSTICE KING: Read it out, Article 14.

MR MANLY-SPAIN: -- local law.

JUSTICE KING: And these are the points you should be bringing to this Court in helping us to adjudicate on the matter.

15:54:25

MR MANLY-SPAIN: The Rules of Procedure and Evidence of the international --

JUSTICE KING: I said Article 14 of the Statute of the Special Court. 14.2 of the Statute of the Special Court. Article 14.1.

15:54:44

MR MANLY-SPAIN: I have here probably what you are referring to. Yes, My Lord:

"The Judges of the Special Court as a rule may amend the Rules of Procedure and Evidence or adopt additional rules

where the applicable rules will not or do not adequately provide for a specific situation. In so doing they may be guided as appropriate by the Criminal Procedure Act (1965) of Sierra Leone."

15:55:30 JUSTICE KING: Yes, that's right. So what is the guide, there?

MR MANLY-SPAIN: Well, when you take into consideration the Criminal Procedure Act of Sierra Leone, that if a count is duplicitous, it should be quashed.

15:55:54 JUSTICE KING: Well, exactly. That is the whole point because, you see, that is why I referred to it. Because you take even the case of Lansana and others.

MR MANLY-SPAIN: Yes, My Lord.

JUSTICE KING: It's quite clear in that decision what the position is. You know, they referred to a lot of authorities, many authorities on the point. You know, even the later ones going from 1964 right up to the present time and they even referred also to the Criminal Procedure Act which, as stated, it says should be our guide as well --

MR MANLY-SPAIN: Yes.

JUSTICE KING: -- in this matter, and the conclusion that I think one can come to is, quite clearly, that where, in fact, it is shown that a count is duplicitous, then that deprives the tribunal of jurisdiction and, therefore, the count must be quashed. That is the way I understand it. And that is why I'm asking these questions, in case I am mistaken, I can be guided properly.

MR MANLY-SPAIN: Our position is that is the case, My Lord.

JUSTICE KING: Thank you. Well, thank you, once again, Mr

Ajibola --is it Emmanuel -- Ajibola Emmanuel Manly-Spain for the third appellant. We have some time now. I don't know, Dr Staker, instead of waiting for tomorrow morning, are you prepared to address us for 30 minutes and then finish with your appeal completely?

MR STAKER: I am not sure if we had finished quite with appeal.

JUSTICE KING: Or you want to deal with it tomorrow?

MR STAKER: No, Your Honour. Our understanding is we have an hour-and-a-half's time. We are perfectly content to follow straight on and do half an hour this afternoon which would leave another hour.

What I was going to raise by way of a housekeeping matter was that the original schedule was that the Prosecution would speak for an hour-and-a-half tomorrow morning.

JUSTICE KING: Yes.

MR STAKER: And that would be the only session, or the only speaker tomorrow morning.

JUSTICE KING: Yes.

MR STAKER: If we do half an hour this afternoon, that will leave an hour for the Prosecution tomorrow morning. Could I propose a similar schedule for tomorrow as today. That we sit from 10.30 to 12.30. The Prosecution could finish its hour and then the first of the appellants could present their arguments on

15:58:11 their appeal.

JUSTICE KING: Well, in any case, if you start now, it means that you will have another hour tomorrow. So when you finish we will decide what we are going to do.

MR STAKER: Yes. I am much obliged, My Lord.

JUSTICE KING: I think the Defence have heard you, so probably they themselves might get ready in case you finish, so we would not waste any time, they can go on from there. But at this point we have the schedule which we are well within the time
15:58:47 limits. It is good.

MR STAKER: Yes. Thank you, My Lord. It would perhaps seem more logical to take our grounds of appeal in order except that we have had three responses from three Defence teams which brings them out of order a little bit. Since there was a
15:59:03 considerable amount of discussion in this afternoon's session on this issue of duplicity we thought that while it was fresh in the

minds of everybody it might be more convenient to deal with that first.

JUSTICE KING: Thank you.

15:59:18 MR STAKER: In fact, it's my learned friend Mr Eboe-Osuji who will be dealing with that particular issue, so I'd invite you, Mr President, to call on Mr Eboe-Osuji.

JUSTICE KING: I invite you to --

MR EBOE-OSUJI: Sorry, Your Honour, thank you very much.

16:00:16 May it please, Your Honours, I will go straight to the heart of the matter which is the subject of duplicity and whether or not it is a question of jurisdiction. Your Honours, it is not.

JUSTICE KING: You mean you submit it is not; it is for us

16:00:35 to say it is not.

MR EBOE-OSUJI: Your Honour, I am submitting --

JUSTICE KING: Just a minute. All you can do is to submit that it is not.

MR EBOE-OSUJI: Very well.

JUSTICE KING: It's within our jurisdiction to say finally whether it is or it isn't, so you mean to submit it is not; is that correct?

MR EBOE-OSUJI: Very well, Your Honour, I do submit so.

16:00:47 JUSTICE KING: Very well.

MR EBOE-OSUJI: By the way, whatever I'm saying to you --

JUSTICE KING: No, never mind. Just go on with your submissions.

MR EBOE-OSUJI: -- are my submissions. Thank you, Sir.

16:00:57 JUSTICE KING: Good.

MR EBOE-OSUJI: Your Honours, I would first of all hand up to you copies of pages out of the Rules, Rule 72.

JUSTICE KING: The Rules of Procedure and Evidence?

MR EBOE-OSUJI: Your Honours, with respect, Rule 72 of the

16:02:11 Rules of the Special Court, 72(B) specifically, will give us an indication. Rule 72 says: "Preliminary motions by the accused are objections based on lack of jurisdiction," one, and secondly, "objections based on defects in the form of the indictment."

Clearly, Your Honours, attacks on the indictment on the

16:02:48 basis of duplicity are clearly objections on the form of the indictment. My learned friend actually does say that as well. I mean Mr Manly-Spain. The old rule expressio unius exclusio alterius fully apply. If the rules in Rule 72(B) would list a certain category of objections as relating to jurisdictions and

16:03:22 lists another category of objections as relating to form of the indictment, it means there is a reason why there was that division and we cannot mix them up. Objections on the form of the indictment or duplicity are what they are. They are not objections on grounds of jurisdiction.

Your Honours, also still on the Rules, it might be perhaps proper to say that Rule 72 has become a standard provision in the international tribunal. As you know, the Rules of this Court are founded on the ICTR Rules and that's exactly what the ICTR Rules
16:04:06 say. And, in turn, the ICTR Rules were founded on the ICTY Rules and exactly Rule 72 of the ICTY Rules say the same thing.

Now, there might be some debate on what is meant by "jurisdiction," in Rule 72(B)(i) -- I don't know if I need to discuss it -- but there is a definition of what is meant by
16:04:34 "jurisdictions" in the ICTR Rules. Within the time I have, I haven't been able to scour the Special Court Rules to find equivalent provision but, Your Honours, Rule 72(D) of the ICTR

Rules provides as follows:

"For purposes of paragraphs (A)(i), and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

(i) Any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute;

(ii) that the indictment does not relate to, two, the territories indicated in Articles 1, 7 and 8 of the Statute;

(iii) the period indicated in Articles 1, 7 and 8 of the Statute or;

(iv) any of the violations indicated in Articles, 2, 3, 4 and 6 of the Statute.

So, quite clearly, the meaning of "jurisdictions" or what "jurisdiction" means has been so clearly circumscribed. With respect, Your Honours, I submit it does not permit expansion of

that notion to encompass matters, or challenges relating to the form of the indictment.

Your Honour, a moment's indulgence, Sir. Your Honours, I also have, if I may trouble you one more time by handing up a pile of materials again, here are some excerpts or extracts from some of the materials that are in the large bundle of material we supplied to you as our authorities. This is a bundle of extracts relating to Prosecution appeal ground 5 and 6.

Your Honours, on the bottom right-hand corner of this pile of documents are hand paginations so that we can easily refer to what pages I will be discussing with you and I will right away, Your Honours, take you to page number 4.

Your Honours, this is a statement from your colleagues and the Supreme Court of Canada, in the case of R v The City of Sault Ste Marie, that was a case where the Supreme Court of Canada had to deal with a matter of the form of an indictment duplicity as well. What is interesting in this passage is the Court's discussion of the origin of the rule against duplicity, and I quote -- if you looked at line 5, from the top, line 5 from the top, the sentence that begins in the middle of that line goes:

"The Rule developed during a period of extreme formality and technicality in preferring of indictment and laying of

informations. It grew from the humane desire of Judges to alleviate the severity of the law in an age when many crimes were still classified as felonies for which the punishment was death by the gallows. The slightest defect made an indictment a nullity. That age has passed. Parliament has made it abundantly clear in those sections of the criminal code having to do with the form of the

indictment of informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities."

JUSTICE KING: Just pause there for a moment. That decision is the decision of the Supreme Court of Canada. This Court is not subject to the decisions of the Supreme Court of Canada, nor to the laws passed by the Parliament of Canada. Our Rules and our Statute make it quite clear. What we are guided by, and that is so that we don't waste time about this, we are guided by decisions of the ICTR, ICTY and also by the Criminal

Procedure Act (1965) of Sierra Leone. And when you are making these categorical submissions, you ought to call to mind the relevant provisions which, in fact, assist the Special Court for Sierra Leone. So I hope you will bear that in mind.

16:11:09 MR EBOE-OSUJI: Very well, Your Honours. Your Honour, may I -- I am not citing these authorities because they are binding on this Court; absolutely not. I only cite them for persuasive purposes, in order to bring to your attention, Your Honours, a way of looking at the possibility of resolving a conundrum that

16:11:37 faces you; a conundrum that have also faced other courts and how those other courts have dealt with them; it is not at all to cite you an authority which one considers as binding upon you. Absolutely not. This is an international court, Your Honours.

JUSTICE KING: Get on with your submissions, please. I

16:12:00 mean, there is no need for this preamble.

MR EBOE-OSUJI: Very well.

JUSTICE KING: I have made the point quite clear.

MR EBOE-OSUJI: Sure.

JUSTICE KING: If you find something that -- persuasive

within the context of our Statute and our Rules of Procedure and Evidence you are at liberty to do that. But to cite some authority from a foreign jurisdiction, and from a foreign parliament and pretend that it binds this Court, then you are wasting my time in particular. I have given you the boundaries which you should be able to take into consideration.

MR EBO-OSUJI: I am guided by your directions, Your Honour, but I have never cited it to bind you. I thought I would make that very clear.

Your Honours, the principles of law recognised by jurisdictions are also receivable by an international tribunal, an international court. Article 38 of the International Court of Justice Statute says that, and in the Rules of Procedure of this Court, I believe Rule 89, somewhere thereabouts, there ought to be a provision that says that rules of national jurisdictions are not binding on the Court but the Court may look at them for purposes of inspiration on how to resolve a matter.

Your Honour, now moving straight to how the tribunals have dealt with this issue, I will take you, Your Honours, to page 6, for instance. Page 6 is the case of Prosecutor v Ntakirutimana.

Page 6 of the bundle. At page 6 we have an excerpt of the Appeals Chamber decision of the ICTR that captures the original case on the form of the indictment before the international tribunals, which is the Kupreskic case. And I will read paragraph 27 of the Ntakirutimana appeals judgment:

> "If an indictment is insufficiently specific Kupreskic stated that such defect may, in certain circumstances, cause the Appeals Chamber to reverse a conviction. However, Kupreskic left open the possibility that a

> defective indictment could be cured if the Prosecution provides accused the timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. The question, whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or as the Kupreskic appeals judgment put it whether the trial was rendered unfair by the defect."

Whether the trial was rendered unfair by the defect. Your

Honour, the rest of it continues to discuss when that may be considered to be so.

Moving again, moving further to page 7 of the bundle, we have another judgment from the Appeals Chamber of the ICTR, in the Ntagerura case, that is the Prosecutor v Ntagerura:

16:15:49 "In reaching his judgment," say the Appeals Chamber, "the Trial Chamber can only convict the accused of crimes which are charged in the indictment. If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial or, in other words, whether the defect caused any prejudice to the Defence."

That is must, the Trial Chamber must consider further whether the accused person was accorded a fair trial or whether prejudice was caused. That's an obligatory statement of what the Trial Chamber must do when it finds that it having a defect.

So, Your Honours, it's a question now of substance and not one of form. It goes back to your questions to the Defence of Mr Kanu, as to what prejudice was caused to them. You asked that

question and that question was never answered or, to the extent that it was an answer, it was a deflection of it, to say once a form is wrong the indictment must be quashed. Your Honours --

JUSTICE KING: No, no, just a minute, I have to correct you there. Even when you quote this case of Ntagerura, it talks about vagueness and/or ambiguity. My specific question to both Dr Staker, and the Defence counsel, with regard to one specific concept, and that is duplicity, vagueness, or ambiguity does not necessarily connote duplicity. That is the whole point of this.

16:18:02 I am, we are talking about duplicity. Whatever they might say in this case, persuasive or otherwise, should be in terms of duplicity; I hope you get the point I am stressing. In other words, more specifically speaking, if two or more offences are charged in one count of an indictment, and that's proved to be

16:18:31 duplicitous, ought the Court not to quash the conviction?

Or must it go on and say: Was the defendant prejudiced or was it cured, because the defendant understood what he was saying? Could the defendant be taken to have understood a duplicitous count, or does it go to jurisdiction which, in fact,

16:18:53 deprives the Court to go on and makes it mandatory that a conviction must be quashed. That is the crux of the matter.

MR EBOE-OSUJI: Your Honours, when I started, I took your direction when I made a reference to the judgment from a certain national jurisdiction. Your Honour shot me down immediately. So
16:19:21 I am a little intimidated to want to venture into that territory again.

JUSTICE KING: You look everything but intimidated, as far as I am concerned. Everything but intimidated.

MR EBOE-OSUJI: Your Honour, may I proceed, Sir?

JUSTICE KING: In fact, you get braver and braver as you make your submissions, but do go on.

MR EBOE-OSUJI: Thank you, Sir. Your Honour, you know, all this takes us back to the source of this concept of duplicity;
16:19:44 where did it come from? It came from national jurisdictions, from the common law jurisdictions. The notion of duplicity did

not suddenly materialise onto the international plain of its own force.

Justice Sebutinde, who spoke about it, was coming from a national law background perspective. Her discussion on duplicity does not cite a single international authority that says: When you have a duplicitous indictment you have a problem with the indictment. She does not. Your Honours, we all understand that the origin, or the concept of duplicity, originated from the common law systems. The question then is: How do those systems treat the concept of duplicity in the modern age?

If I may address you on that. Your Honour, in a lot of the national jurisdictions, they no longer regard duplicity as something that fatally flaws an indictment.

16:21:01 JUSTICE AYOOLA: Well, those are the authorities you should show us.

JUSTICE KING: Exactly.

JUSTICE AYOOLA: You've limited yourself to Canada. Maybe you should go on to the United Kingdom, we start from there.

16:21:12 Then we can travel to Canada --

JUSTICE KING: And you can come to Sierra Leone as well, where this Court is, and we have some authorities on the matter as well, and we have the Criminal Procedure Act of 1965 as well.

JUSTICE AYOOLA: Well, don't think we have taken any

decision on this point.

MR EBOE-OSUJI: We, haven't thought so, Your Honour. I have not.

JUSTICE AYOOLA: Yes. We just want you, if there is no international criminal justice system jurisprudence on the point then of course it would be very useful if you can see whether national jurisdictions have developed the doctrine, in which direction. Whether it's an absolute defect that cannot be cured, or whether it is the consequence of whatever defect you may have in a duplicitous count, would be determined -- the consequence would be determined on the basis of miscarriage of justice or fair hearing. Those are the two issues.

One is the old thinking, that a duplicitous count, charge, is fatal. Then there is, as you are saying, the new thinking that probably it is not that fatal, if it does not lead to any miscarriage of justice.

MR EBOE-OSUJI: Thank you, sir. A moment's indulgence.

JUSTICE KING: If you are not ready we will come back

tomorrow. Get back to your missions.

16:23:10 MR EBOE-OSUJI: Your Honours, I also want to hand up to you another authority to show you how the matter is evolving in national jurisdictions, if it pleases Your Honours. This is a case from the United States, for instance -- can the Court officer please assist me, hand up this to the Judges and to my

16:23:28 learned friends on the opposite side.

Your Honours, while that document is being handed up, perhaps -- Your Honours, this is a case from the United States Court of Appeal for the Fifth Circuit, a case entitled Reno v the United States.

Going straight to the point, Your Honour, if you look at paragraph, at page 5 of this document, page 5. If you are at page 5, on the left-hand column, the third paragraph from the top that has 1 and 2 in front of it. This is a case again about

16:25:01 duplicity of indictment, and the Court goes: "If it be assumed arguendo that the indictment is duplicitous the District Court was correct in observing that 'duplicity' is not a fatal defect."

And that is representative of the state of procedure in that jurisdiction with respect, I submit. It ties in, Your Honours, with what I was referring to earlier in the case from the Supreme Court of Canada that said: Nowadays we look at substance and not form. It also ties in with respect to the judgments we have seen in both Ntakirutimana and in Ntagerura. You are required, with respect, Your Honours, to look at the substance and not the form.

JUSTICE KING: The very case you've just cited, the next paragraph -- the very case you've just cited, the next paragraph says: "In our opinion, however, the indictment is not duplicitous." What is the consequence of that? Whatever else it said mustn't it surely be obiter? They have categorically held in the case you tried to persuade us with that, in that particular case that was before that tribunal, the indictment was not duplicitous. The count itself was not duplicitous; isn't that correct?

MR EBOE-OSUJI: Your Honour, that is what it says.

JUSTICE KING: Well, I am saying, isn't that correct? Not what it says, but is that correct or not?

MR EBO-OSUJI: Your Honour, it is correct. It is correct.

JUSTICE KING: All right. Very well.

MR EBOE-OSUJI: It is correct.

JUSTICE KING: Very well.

MR EBOE-OSUJI: It is correct. What it is saying, with respect, Sir, is --

16:27:26 JUSTICE AYOOLA: We know what it is saying.

JUSTICE KING: Exactly.

JUSTICE AYOOLA: But the crux of your submissions is in the case cited in 1.2, isn't it? The crux of your submission is the case cited in support of the finding that duplicity is not a

16:27:45 fatal defect. If you read further, that paragraph, you will find the case cited in support of that proposition.

MR EBOE-OSUJI: Sorry, Your Honour? I --

JUSTICE AYOOLA: If you will read on page 5 the paragraph 1.2 you will find the case cited in that passage in support of

16:28:08 the proposition that duplicity is not a fatal defect.

MR EBOE-OSUJI: Yes, Your Honours.

JUSTICE AYOOLA: That should be the authority that you should be relying on, rather than the obiter, because it becomes an obiter, when you look at paragraph 3.

16:28:26 MR EBO-OSUJI: Very well, sir. We will pull up that other

authority. It's just in the course of research, they keep referring you to authorities. I was looking at another authority. It showed me this one I have given to you and it's also referring to another one. But I will look for the other one and send it up as well. But the point I make, Your Honours, is that the law is developing in many jurisdictions.

JUSTICE AYOOLA: No, I am sorry to be interrupting you, but you said this so many times. What will be of assistance to move the case forward is if you can just present the authorities.

You've presented one. You've presented one from the United States. You have given us another one from Canada. If that's all, then, I don't think the matter can be carried forward than you have carried it.

MR EBOE-OSUJI: Very well, Sir. To wrap up my submission on this point, I would humbly fall back on the suggestion that the origin of the rule against duplicity, it started out of the

humane desire of Judges to alleviate the strictures of the death penalty in a certain era when the death penalty was prevalent.

I think one can say it may yet still have some function in certain jurisdictions, where someone is charged with an offence, that may result in the death penalty. The Judges will still want to have the ability to say: No, we are not going to proceed on this trial; if we proceeded the person would be executed at the end of the day. In some jurisdictions, in fact, the law in that regard still applies but not in the international criminal justice system any more, of which this Court is a part.

The reason for being, the whole words on death of the notion of duplicity, does not exist in the international criminal justice system and we have made that submission quite clearly in our brief and there is no need to belabour that point.

Your Honours, still on the subject of the death penalty, if I may shift the discussion a bit, and my learned friend during his submission said that, in Delalic and Bizimungu, it is said that an account should -- one count should contain one offence. That is correct. That is what Delalic says and that is what Bizimungu says. They do say that a count should contain one crime. But they do not say where that rule is violated the result is necessarily a nullity of the whole count. There is a

difference between what should happen and what should happen to violation of that, we should [sic]. Your Honours, people should not commit war crimes. People should not commit crimes against humanity. People should not commit genocide but people do. People have done those. And the penalty for them has not been the death sentence, has not been to kill them. Just like you would kill a count that has violated that rule. So something that should happen, it happens nevertheless. The question is: What should be done about it and we submit that the result should not be a quashing of whole count, so that nothing at all indeed is left. The result should be what Justice Doherty submitted which is: Okay, I do not like this count because it is duplicitous but there is enough evidence, by the way, but the accused knew that they had been charged with two crimes in the same count that was quite crystal clear to them, but we do not want to convict them on both count, we are going to convict them only on one. That is what Justice Doherty ruled, and, in my view, in our respectful submission, that is a sensible

proposition on the matter.

16:33:12 JUSTICE KING: Thank you. The first thing I want to point out is that in the Special Court there is no death penalty so I don't know the point of that submission. But that apart, you started your submissions by referring to Rule 72 of the Rules of Procedure and Evidence. I wondered what was your purpose in 16:33:39 referring to that? It talks about preliminary motions by the accused, our objections based on lack of jurisdiction, objections based on defects in the form of the indictment. That is with regard to preliminary motions by the accused, stating what they are going to be, and what they ought to be. Now, what is the

purpose of that reference?

MR EBO-OSUJI: I am sorry, Your Honour. The reason I referred you to that authority is to point out that in that provision there is an indication of where -- of whether a defect 16:34:18 in the form of the indictment is a question of jurisdiction. The

provision makes a provision for objection on the form of the indictment. It's a separate matter from objection on the form of jurisdiction. So, therefore, the provision in itself clearly indicates that attacks on the form of the indictment are not subject, are not to be thought of or considered as attacks on the basis of jurisdiction. They do not go to jurisdiction.

JUSTICE KING: I think if you look at that thing properly and read the whole thing from 72, the whole of Rule 72, you will find that there is, as you would call it, some raison d'etre behind that. That deals with the circumstances in which the Trial Chamber will be obliged to remit certain preliminary motions to the Appeals Chamber. That is the whole purpose for the whole of Rule 72. If you look at Rule 72(D) and (E) it will tell you quite clearly that where objections are made in a preliminary motion, to jurisdiction and defects in the indictment, provided that certain requirements are fulfilled, then the Trial Chamber, instead of dealing with the matter, may send the matter or remit the matter to the higher tribunal, to the Appeals Chamber. That is the whole purpose of that. It is not that it is saying that you only have these two type of preliminary motions. What preliminary motions can go straight up; that's what it is telling you.

MR EBOE-OSUJI: Very well, Your Honours. Your Honour, my reading with respect of Rule 72 is it is a rule that delineates

what motions to bring before the tribunal and when to bring them.

Rule 72 begins with Rule 72(A): "Preliminary motions by either party shall be brought within 21 days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule

16:36:34 66(A)(i)" and proceeds to (B): "Preliminary motions by the accused are objections based on lack of jurisdiction, objections based on defects in the form of the indictment" and so on and so forth it goes, with some other provisions as well.

So this provision or Rule 72 is regulating what motions a

16:36:59 party may bring as a preliminary motion before the Court and, as I said earlier, in the ICTR equivalent of this, I believe Rule 72(D) does go further to clearly define what was meant by objection on the form of the indictment.

Your Honour, that Rule, Rule 72(D) of the ICTR Rules arose

16:37:25 from a certain confusion in the early days; it was an amendment

that came to the rules later on. In the early days there was a practice by counsel to formulate all kinds of different motions as questions of jurisdiction and then, ultimately, I believe it was around 2000, the judges got together and amended the rules to clearly define what was meant by "jurisdiction" in the context of Rule 72. So that gives us an idea of what is meant by "jurisdiction" and what is excluded from the notion of "jurisdiction."

16:37:49

So, again, I will wrap up my submissions on the duplicity by drawing to your attention one more little matter. My learned friend, Mr Manly-Spain, when he spoke, did refer to the case of Semanza. And in his brief he also does refer to the case of Semanza as a controlling authority.

16:38:07

Your Honours, I will urge, with respect, a lot of caution

in moving along those lines. The Semanza case that my learned friend is referring to is a Trial Chamber decision in Semanza.

Now, there is an Appeals Chamber judgment in Ntagerura. This is interesting, Your Honours. Ntagerura and Semanza were tried by the same Trial Chamber. I happen to know a bit about that because I was the Prosecution Counsel in Semanza at the ICTR and by the time the judgment came I had left the Office of the Prosecutor. Being the only counsel, I was not part of the appeal process, so nobody reminded them that there had been decisions on the form of the indictment, whereas the counsel in Ntagerura remained on the case and brought it up at the Appeals Chamber level to say: Your Honours, but there were decisions, pre-trial decisions, on the form of the indictment but the Trial Chamber at the stage of judgment reversed themselves without giving us an opportunity to litigate the matter if they were going to change that position and that was the reason why the Appeals Chamber in Ntagerura said "no." Yes, the Trial Chamber can do that. They have freedom. They have the discretion to reverse themselves or to reconsider their position, their decisions, but if they are going to do that they have to give all the parties an opportunity to relitigate the case. And we are saying that it is Ntagerura that controls the jurisprudence on that and not Semanza.

Your Honours, I will leave it at that on the matter of duplicity. I would have liked to say one or two words on

16:40:20 terrorism but I don't know that I have time to do that.

JUSTICE KING: I think we are going to adjourn now. Dr Staker, you being the leader, what is your next step with regard to your response?

MR STAKER: Well, our proposal would be that we resume

whenever the hearing is scheduled to resume tomorrow.

JUSTICE KING: 10.30.

MR STAKER: It was scheduled for 10.30. As I understand, we have about an hour left. The question is whether the session

16:40:56 ends at that point, or whether, well, put it this way: We are open to the possibility of matters simply continuing, if there is time left in the morning. We are in the hands of the Bench and of course my colleagues for the Defence will have a view on that.

JUSTICE KING: Yes. So you have just under an hour to

16:41:14 finish your reply.

MR STAKER: I am not sure that we will even take that long. My understanding, that is what remains of our allotted time.

JUSTICE KING: Yes.

MR STAKER: It remains to be seen if we use all of that.

16:41:26 JUSTICE KING: Well, good. Thank you very much. The Defence, you have heard the suggestions made by that side. We will see how things go tomorrow and take a decision from there.

But I think tomorrow morning, the Prosecution will finish submitting on their reply and then, after that, if there is time

16:41:48 within the schedule that we have prepared, we will see what happens. Okay.

I want to thank you all for your contributions this afternoon, and for the dignified way you made your submissions,

and we stand adjourned now until tomorrow morning at 10.30.

16:42:05 [Whereupon the hearing adjourned at 4.40 p.m.,

to be reconvened on Tuesday, the 13th day of November 2007 at 10.30 a.m.]