

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

TUESDAY, 13 NOVEMBER 2007
10.40 A.M.
APPEAL

APPEALS CHAMBER

President

Before the Judges:

George Gelanga King,

Emmanuel Ayoola
Renate Winter
Raja Fernando
Jon M. Kamanda

For Chambers:

Mr Alhaji Marong
Mr Steven Kostas
Mr Kamran Choudhry
Ms Jennifer Beoku-Betts

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
Brima:

Mr Kojo Graham
Mr Osman Keh Kamara

Ms Roselyn Vusia

Daniels

For the accused Brima Bazy Mr Andrew William Kodwo

Kamara: Mr Cecil Osho-Williams
Ms Oluwaseunl Soyoola

For the accused Santigie Borbor Mr Ajibola E Manly-Spain
Kanu: Mr Silas Cherkera

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13 NOVEMBER 2007

OPEN SESSION

1 [AFRC13NOV07A - MD]

2 Tuesday, 13 November 2007

3 [Open session]

4 [The accused present]

5 [Upon commencing at 10.40 a.m.]

6 JUSTICE KING: Dr Staker, yesterday, you were replying
to

7 the submissions made by Defence counsel, in response to your
8 submissions. I suppose you wish to continue this morning?

9 MR STAKER: Indeed, Your Honour.

10:43:42 10 JUSTICE KING: I think you have just about an hour?

11 MR STAKER: That's my understanding, Your Honour.

12 JUSTICE KING: Yes, that's right. So we will listen to
13 Dr Staker now and then I will go on from there.

14 MR STAKER: Thank you, Your Honour. As a preliminary
10:43:56 15 matter for the record I should also announce the presence in

16 Court today of Miss Regine Gachaud, who is a legal adviser for

the 17 the Prosecution. She was here yesterday afternoon but not in

18 morning when I announced the appearances.

19 JUSTICE KING: What is the name again?

10:44:08 20 MR STAKER: Gachaud, G-A-C-H-A-U-D. Regine.

21 JUSTICE KING: Which is the surname?

22 MR STAKER: The first, Gachaud. G-A-C-H-A-U-D.

23 JUSTICE KING: All right. Thank you. Is that a French
24 name?

10:44:26 25 MR STAKER: French/Swiss, Your Honour. Where the name
26 comes from originally I would have to take instructions on
that.

27 JUSTICE KING: I see.

28 MR STAKER: Possibly undertake research.

29 JUSTICE KING: Probably from Australia, originally.

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1 MR STAKER: For all I know, Your Honour.

2 JUSTICE KING: Right. You were quite impressive
yesterday,
3 so I hope you continue in the same vein.

4 MR STAKER: Impressive in brevity, I understand.

10:44:51 5 JUSTICE KING: In every sense of the word.

present
of
appeal.

6 MR STAKER: You are very kind, Your Honour. I will
7 my submissions in reply in order of the Prosecution's grounds
8 appeal and go straight to the Prosecution first ground of

10:45:06
and

9 It was submitted on behalf of Brima that there was no
10 evidence that Brima planned or instigated any of the crimes
11 that there was only evidence that he ordered certain specific
12 crimes.

advocates

10:45:22
wrong

13 Our view is that in making that submission, Brima
14 taking exactly the same compartmentalised approach to the
15 evidence which the Trial Chamber took, and which we say is
16 in law.

or

must

10:45:41
elements

17 We take no issue with the proposition that there are
18 elements that must be proved to establish planning or ordering
19 instigating, or aiding and abetting, and that these elements
20 be proved beyond a reasonable doubt. We deal with these
21 in our appeal brief. They were dealt with in the trial
22 and we indicated that we took no issue with the Trial
23 articulation of those elements.

judgment

Chamber's

10:45:58
Trial

24 But we say when determining whether those elements are
25 satisfied beyond a reasonable doubt, it's necessary for the
26 Chamber to look at all of the evidence in the case as a whole,
27 and not to take a piecemeal approach.

28 Similarly, we say, that the Trial Chamber, having made
29 copious findings of fact on the evidence, in reaching its

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as 1 ultimate conclusion, must look at all of its findings of fact
 2 a whole and not take a compartmentalised view and look at some
 3 findings in relation to some elements and other findings in
findings 4 relation to other elements. It must look at all of its
 5 in relation to each of the ultimate issues that it's called
10:46:36 6 to decide.
upon

 7 We say, further, that elements of crimes may be proved
 8 circumstantially. We concede they must be proved
circumstantial 9 circumstantially beyond a reasonable doubt. For a
 10 case it would be necessary for the Trial Chamber to conclude
10:46:57 11 that, on the basis of its findings, there could be no other
 12 conclusion, from the circumstances, but that the element are
 13 satisfied but our submission is that this is the case here.
On 14 the findings of the Trial Chamber no other conclusion is
 15 reasonably open.
10:47:15

16 JUSTICE KING: Are you saying -- let me ask you this

evidence 17 question: Are you saying that there was circumstantial
18 that the Trial Chamber ignored?
19 MR STAKER: What we are saying, no, we put it in a
slightly 20 different way. We say that the Trial Chamber made many many
10:47:28 21 different findings of fact.
22 From those facts it had to draw a conclusion in relation
to 23 each of the material elements for each of the crimes. So, for
24 instance, in looking at the question: Did Brima order all of
the 25 crimes committed during the Bombali/Freetown campaign? And
10:47:49 26 what it did was it took each incident, each crime that occurred in
the 27 Bombali/Freetown campaign, it took each one in isolation and
28 looking at it in isolation it said: What evidence is there
29 specifically that Brima ordered that crime? And in some cases

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it 1 there was no direct evidence that Brima ordered that crime, so
ordered 2 made a finding that it was not established that Brima had
3 that crime.

in 4 What we say is that when you look at all of the evidence
10:48:28 5 the case as a whole, when you look at all of the findings of
the 6 Trial Chamber as a whole, there can be no doubt, there is no
7 other inference reasonably possible but that Brima was the
8 driving force behind the campaign of crimes in the
9 Bombali/Freetown campaign. He was the prime mover. He was
the 10:48:47 10 person who made the campaign of crimes happen.

11 Now, our submission is that because we have to look at
12 of the findings as a whole, there are too many of them for me
to 13 detail them here in oral argument. We set them out our in our
14 brief. But we say that looking at those findings as a whole
it 15 is clear.

16 JUSTICE KING: Could you give me one example of any
17 circumstantial evidence that the Trial Chamber ought to have
18 taken into consideration in evaluating the whole of the
evidence?

19 MR STAKER: In evaluating the evidence. As I say, it's
not 20 the evidence that it failed to take into account, it's own
21 findings that it failed to take into account when reaching the
22 ultimate conclusion.

23 And to give, perhaps, the most obvious example, it's
24 alleged that we have no direct evidence that there was an
overall 10:49:40 25 plan for a campaign of crimes to be committed in the
26 Bombali/Freetown campaign. That is what the Trial Chamber
found.

27 This is the view that is being taken by the Defence.

in
28 One of the main findings that we refer to several times
29 our submissions is that of the Mansofinia address. The Trial

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judgment
the
1 Chamber expressly found, at paragraph 1695 of the trial
2 that Brima, while at Mansofinia, this was immediately before
3 Bombali/Freetown campaign started, about three days before the
4 troops set off in campaign, Brima addressed the AFRC troops in
10:50:24 5 Mansofinia and he ordered his forces to commit acts of terror
6 against the civilian population. That was the Trial Chamber's
7 finding.

of
of
10:50:43
Trial
on
8 In the immediately preceding paragraph, paragraph 1694
9 the trial judgment, the Trial Chamber refers to the evidence
10 witness TF1-033. We say it's clear from context that the
11 Chamber accepted this evidence particularly because it relied
12 the evidence of TF1-033 in numerous places throughout the
13 judgment. It made express findings of credibility and

14 reliability. And this witness had a clear recollection that,
in
10:51:06 15 giving the Mansofinia address, these were Brima's words. He
said
16 to the troops:
17 "You all know what befell on us when the ECOMOG forces
18 removed us from power in Freetown. Our colleagues,
19 soldiers, sympathisers, relatives were killed by
civilians
10:51:29 20 as well as the ECOMOG forces."
21 Killed by civilians as well as the ECOMOG forces.
22 "So for that reason we are going back to Freetown. We
are
23 going back to Freetown and we should return all that
fell
24 on us. So we are not going to spare any civilian, only
10:51:52 25 those we desire to be with us. Young girls and women
are
26 free to satisfy your sexual desire. This is Operation
27 Spare No Soul."
28 Now, can it be said there was no order to commit crimes?
29 Can it be said there was no instigation, and specifically can
it

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1 be said that there was no plan?

2 JUSTICE KING: How did the Trial Chamber look at that
piece
3 of evidence? In the first place that is direct evidence. It
is
4 not circumstantial, is it?

10:52:30 5 MR STAKER: Well, indeed. In fact, that is very direct
6 evidence and we find it perhaps, on my submission,
inexplicable.

7 JUSTICE KING: How did they look at it?

8 MR STAKER: I would say they indeed overlooked it,
because
9 they certainly accepted that evidence and, in our brief, we
refer
10:52:47 10 to another finding of the Trial Chamber that a considerable

11 period later, in Bombali District, there was an incident where
12 some of the AFRC soldiers killed some civilians who were
trying
13 to escape and the finding was that they killed those civilians
14 because they understood that that was what had been directly

10:53:05 15 ordered by Brima in giving the Mansofinia address. In other
16 words, it was understood by the troops that what was said at
the

17 Mansofinia address was a general order as to how they were to
18 conduct themselves throughout the entire campaign. And we
refer
19 to another --

10:53:25 20 JUSTICE AYoola: Sorry, my comment at this stage --
where
21 you said the entire campaign, do you mean the entire campaign
all
22 over the country because, if you look at 1695, paragraph 1695
of
23 the judgment, the Trial Chamber seemed to proceed on the basis
24 that the Mansofinia address was directed at a particular

10:53:53 25 district, and not to the entire campaign all over the country.
26 If you look at the third sentence, however, can you look at it
27 again?

28 MR STAKER: Your Honour, without wishing to interrupt, I
29 think I can concede exactly what you are saying, so perhaps
there

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1 is no need to go to it.

2 JUDGE AYoola: All right. So what do you say about
that?

3 MR STAKER: We say the Mansofinia address was directed
4 specifically to the Bombali/Freetown campaign. We are not
10:54:27 5 alleging that it related to the entire campaign throughout the
6 whole country.

7 The Prosecution case relating to the entirety of the
8 campaign throughout the whole country was our joint criminal
9 enterprise theory, and that is our fourth ground of appeal.
We

10:54:42 10 say there was a joint criminal enterprise and other
participants

11 in the joint criminal enterprise were committing crimes in
other

12 parts of the country and that because it was all part of one

13 joint criminal enterprise the accused in this case are
14 responsible for those other crimes as well.

10:54:58 15 This ground of appeal relates solely to the
16 Bombali/Freetown campaign. The Mansofinia address was given
in
17 Mansofinia, in Koinadugu District, and at the time there was a
18 specific plan that AFRC forces would go to Bombali, they would
19 set up an advance base there, other troops would join them and
10:55:20 20 they would then attack Freetown.

21 As I said, in the Mansofinia address, Brima said: We
are
22 going back to Freetown. So the campaign through Bombali was
part
23 of the same campaign as the attack on Freetown, and the
24 Bombali/Freetown was a single campaign, and this is not a
joint
10:55:39 25 criminal enterprise theory, specifically. This is crimes
26 committed by a particular group of AFRC forces who were under
the
27 direct command of Brima. Kamara was the deputy at all
material
28 times. Kanu was a senior commander within that force and this
29 group of AFRC forces went from Mansofinia, through Bombali

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1 District and attacked Freetown. And all along the way they
2 committed widespread crimes in a massive and systematic
manner.

3 And what we say is the Mansofinia address is obviously direct
4 evidence that, from the time before the campaign even began,
10:56:28 5 there was a plan for a campaign of crimes to be conducted
6 throughout that entire campaign. And the Mansofinia address
is
7 certainly evidence of the existence of a plan; it is
certainly,

8 we would say not even evidence -- I mean, if the Trial Chamber
9 found the address was given then the order was given: You
will
10:56:50 10 commit crimes throughout this campaign and it was clearly an
act
11 of instigation.

12 Now, we say that was only the beginning. It was only
the
13 beginning. Brima gave numerous other orders for the
commission
14 of crimes throughout the Bombali/Freetown campaign. We had a
10:57:20 15 declaration of an Operation Fearful; we had a declaration of
an
16 Operation Clear the Area. Clear the area meant clear the area
of
17 all civilians within a 15-mile radius. Go out and kill all
18 civilians within 15 miles from here.

19 We have examples of Brima ordering other crimes
10:57:36 20 specifically. We have evidence that in addition to giving
these
21 orders he had a famous, not evidence, we had a finding of the
22 Trial Chamber, one of its findings, that Brima's known
23 catch-phrase was Minus You Plus You. With you, without you.

It

the
10:58:02
that
Everything

24 meant you either obey orders or you will be killed. That was
25 Trial Chamber's finding as to what that meant.
26 We refer in our brief to the findings, or the evidence
27 no one would do anything without a word from Brima.
28 was reported back to him. The AFRC forces had a functioning
29 chain of command. Brima was the overall commander. He was in

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the
decided

1 charge of planning operations. Other troops reported back to
2 him. We have an example, we refer to it in paragraph 68 of
3 Prosecution appeal brief, the Kamagbengbeh meeting where the
4 attack on Karina was planned. Brima decided, planned and
10:58:46 5 this attack would happen and he said he wanted this attack to
6 shock the whole country and the international community.
7 Now, the Defence's theory, as I understand it, is that,
8 well, okay, there was evidence that he planned or ordered this
9 one attack on Karina but where is the direct evidence that he
10:59:04 10 attacked, or ordered, or planned any of the other attacks?

Chamber

11 Well, we say it's just not reasonable for any Trial

12 to conclude that while he may have directly planned or ordered
13 this attack on Karina, there is no evidence that he planned or
14 ordered any of the other crimes committed in the campaign. We
10:59:22 15 submit no reasonable Trial Chamber could conclude that.
Looking

16 at the findings as a whole, Brima was the driving force behind
17 this campaign of crimes.

18 The Defence try to make something of the fact that it's
not
19 clear where this plan was formulated. They argue that maybe
it

10:59:43 20 was formulated at Kurubonla, when SAJ Musa was in charge of
the
21 AFRC forces, or in Mansofinia, when Brima was in charge.

22 Our position is that it doesn't matter. As I submitted
23 yesterday, it's only necessary to prove, beyond a reasonable
24 doubt, those facts that are indispensable to a conviction.

11:00:06 25 What is indispensable to a conviction is that there was
a
26 plan and that Brima was one of the planners. I will come to
the
27 other two accused in a minute. What matters is that the
crimes
28 were instigated, and that Brima was one of the instigators and
so
29 forth. There are different possibilities.

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1 We submitted that the only reasonable conclusion was
that
2 the plan was formulated at the Kurubonla meeting but, contrary
to
3 what the Defence suggest, we do not pin our entire case on
that.

4 We say that even if the plan was formulated at Mansofinia it
11:00:46 5 makes no difference. SAJ Musa may have been part of the plan.
6 He may not have been. Something was made of the fact that for
a
7 period, relatively brief period, during the campaign, the
three
8 accused in this case were not commanders of the force from
9 Colonel Eddie Town until just before the Freetown invasion.

11:01:06 10 Initially, they were in detention for a period.
Obviously,
11 internal power struggles within the AFRC, and subsequently
were
12 rehabilitated, but SAJ Musa was in charge. SAJ Musa died then
13 shortly before the Freetown invasion and Brima became the
overall
14 commander again and the other two accused became senior
11:01:30 15 commanders.

16 Something is made of the fact that during the period
that
17 SAJ Musa was in charge, in the middle of that campaign, there
18 was, as the Trial Chamber found, little evidence of crimes
being
19 committed. And counsel for Kamara, I recall, said this puts a
11:01:47 20 big dent in the Prosecution case. Our position is: Where is
the

21 dent?
22 It may be that SAJ Musa was always part of this plan.
It
23 may be that the only reason there was no, only reason there
was a
24 little evidence of crimes being committed while he was in
charge
11:02:05 25 was either because the Prosecution didn't lead evidence of
that
26 particular period, or because at that time the AFRC was too
tied
27 up fighting ECOMOG; there were findings to that effect in the
28 trial judgment.
29 It's also possible SAJ Musa may have dropped out of the

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1 plan by that time. We say the inference is he was part of the
2 plan because after the forces left to embark on the
3 Bombali/Freetown campaign, he originally stayed behind in
4 Koinadugu District and the Trial Chamber found that there was
11:02:39 5 evidence that troops under his command continued to commit
crimes
6 there.

7 But we say regardless of that, even if he dropped out of
8 the plan while he was in charge, even if he was never part of
the

9 plan, the fact that the crimes revived immediately after Brima
11:02:58 10 became the overall commander again, and when the other two
11 accused became senior commanders again, in our view, merely
12 underscores the fact that the three accused in this case were
13 part of the plan, and were the movers behind making this
happen.

14 I have dealt with the accused Brima. If I address
briefly

11:03:24 15 Kamara. As I say, the detail is in our brief. We rely on our
16 brief. I merely highlight some of the main points.

17 We say it's irrelevant whether he was at the meeting
when
18 the original overall plan conceived. Because it's not our
case

19 that to be responsible for planning you must have been one of
the
11:03:49 20 original overall planners. He may have been. But, in the
case

21 of a large-scale campaign of crimes, it's possible that at
first
22 there is a large general plan that something is going to
happen,
23 and then, subsequently, further planning obviously has to
happen

24 to implement that. One thinks of the largest-scale atrocities
11:04:16 25 you can think of. Of course, all the fine detail aren't
planned
26 at the very beginning.

27 Now, we deal with the elements of planning, what is
different
28 necessary. Planners can be responsible for planning at
29 stages; the original conception or the planning of the

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Mansofinia

1 implementation. Brima, we say, as established by the
2 address, was part of it from the beginning.

only

3 We say on the findings of the Trial Chamber that the

other

4 conclusion open to any reasonable trier of fact is that the

11:04:50
at

5 accused became part of that plan, either immediately before or
6 the beginning of the campaign embarking.

headquarters,

7 As to Kamara, he was Brima's deputy in the periods when
8 Brima was the overall commander. He was based at

9 which was in charge of all planning operations. The Trial

11:05:17
crimes

10 Chamber found that he participated in decision-making. He was
11 part of a functioning chain of command and planning and orders
12 process. He was present when orders were given to commit

AFRC

13 and he was present when crimes were committed. And during
14 substantial periods of the campaign, the operations of the

11:05:47

15 consisted of attacks on civilians.

say

16 Now, if Brima was one of those in headquarters, at the
17 uppermost level of command, responsible for all planning, we

involved 18 could any Trial Chamber reasonably conclude that he was
19 in all the planning but somehow had nothing to do with the
11:06:10 20 planning when it came to the commission of crimes, which was a
21 very substantial part of what the AFRC operations were all
about?
when 22 He was a senior figure; the deputy, as I say. Present
to 23 crimes were committed, when orders were given. He contributed
24 the overall climate of criminality that prevailed amongst the
11:06:36 25 AFRC troops. And the fact that he knew that all of these
crimes
26 were being committed, that his presence without disapproval at
27 commission of crimes, his involvement -- sorry, my friend says
I
28 said Brima when I should have said Kamara; I am speaking about
29 Kamara.

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1 JUSTICE KING: That is correct.

2 MR STAKER: But our submission is that in playing this
3 role, his actions instigated others to participate in the
4 commission of crimes. At the very least, aided and abetted by

11:07:25 5 contributing to the climate of criminality, and by performing
his
6 functions of deputy commander, which was a substantial
7 contribution, he knew, he knew that by performing the
functions
8 of deputy commander he was contributing to the ability of the
9 force to carry out this campaign of crimes.

11:07:48 10 Similarly, in the case of Kanu, a senior commander,
Chief
11 of Staff in Freetown, responsible throughout the
Bombali/Freetown
12 campaign for enslaved civilians. On the eve of the Freetown
13 invasion, he reiterated the Orugu address, which was a general
14 order by Brima for crimes to be committed throughout the
Freetown
11:08:21 15 invasion.

16 He committed crimes himself. He was present when crimes
17 were committed. He personally performed several amputations
on
18 civilians, in front of the troops, to say: This is how you do
19 it. This is long sleeve; this is short sleeve.

11:08:51 20 Again, I refer to all of the details in our brief but
our
21 submission is that his conduct throughout the campaign as a
22 whole, in the position that he had, instigated the commission
of
23 the crimes as a whole, by others in the force, that he was
part
24 of the planning and that, at the very least, the function that
he
11:09:17 25 played aided and abetted in the commission of this campaign of
26 crimes as a whole.

27 I would emphasise again, as a matter of law, coming back

28 now to the elements of modes of liability. For ordering, it's
29 not necessary that an accused be the only one who gave the
order.

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officials 1 In a military organisation there may be a hierarchy of
an 2 and an order may be passed down the chain. The general gives
it 3 order to the colonel, who passes it onto the major, who passes
4 down to the lieutenant, passes it onto the sergeant. Each of
11:09:59 5 those may be responsible for ordering the same crime.

6 Similarly, for instigating, it's not necessary that the
7 accused be the sole instigator. Several people can jointly
8 instigate a crime, and it's not necessary to prove that the
9 accused's act of ordering or instigating was a pre-condition,

a 10 sine qua non of the commission of the crime. It's necessary
11 to show that their act contributed substantially to the
commission 12 of the crime, not necessarily that it was an essential
13 pre-condition.

14 And, in our submission, all of the elements of these

11:10:47 15 different modes of liability have been satisfied in relation
to
16 all three accused in relation to the crimes committed during
the
17 Bombali/Freetown campaign as a whole.
18 Counsel for Kamara and Kanu suggests that the
Prosecution
19 theory is one of collective responsibility. That we are
trying
11:11:07 20 to attribute responsibility to them for acts of others. We
deny
21 that's the case. We accept that responsibility under Article
6.1
22 is individual but we say their individual responsibility has
been
23 established.
24 Contrary to what I understand the Defence to have
suggested
11:11:24 25 we are not saying that you look at all of these crimes
globally
26 and say that looking at all these crimes globally we must find
you
27 the accused responsible for all these crimes. What we say is
the
28 look at the evidence globally. You look at the findings of
29 Trial Chamber globally.

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Chamber, 1 Looking at the evidence, the findings of the Trial
of 2 has it been established, beyond a reasonable doubt, that all
We 3 the elements of these modes of liability have been satisfied?
conclusion 4 say on the findings of the Trial Chamber it's the only
11:11:59 5 open. We don't say Kamara is liable just because he was the
because 6 deputy commander; we don't say that Kanu is liable just
7 he was there; we say the elements are satisfied.

8 To deal briefly with some other points. Kanu tries to
make 9 something of the fact that these were irregular forces. We
have 10 already dealt with that argument in our reply brief. What
11:12:21 11 Kanu refers to are certain authorities that indicate that it may be
12 harder to prove Article 6.3 responsibility where there is an
13 irregular force.

14 First of all, we are not talking about Article 6.3, we
are 15 talking about Article 6.1. For planning, for instigating, for
16 aiding and abetting there doesn't have to be any subordinate
17 superior relationship. You can instigate anyone. So this
18 argument has nothing to do with this ground of appeal and
19 secondly, and in any event, the Trial Chamber found that there
11:13:02 20 was a functioning chain of command and planning and orders
21 process amongst the AFRC forces.

22 The only other thing I would say on the first ground of
23 appeal relates to this issue about the Trial Chamber saying

and 24 Western Area for Kanu's responsibility, rather than Freetown
11:13:22 25 the Western Area. We say even if the Trial Chamber has the
power
this 26 to correct typographical errors, if the Trial Chamber said
27 intentionally, it goes to substance not to typography. We say
28 there is nothing inappropriate in asking the Appeals Chamber
to
29 find that on the findings of the Trial Chamber Kanu was

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judgment 1 responsible for the Freetown crimes and that the trial
2 should be corrected to reflect that.
3 I turn then to the Prosecution's second ground of
appeal.
4 Counsel for Kamara made the submission that giving a
11:13:58 5 non-exhaustive list of locations in the indictment is
6 insufficient to put the Defence on notice of what they are
7 charged with.
8 We have already addressed this in our submissions. I
can
9 refer back to paragraph 220 of the Prosecution appeal brief.
We
11:14:16 10 cite case law from the ICTY and the ICTR to the effect that
where

precise 11 crimes on a very large scale are alleged, details of the
alleged 12 locations need not be pleaded if the sheer scale of the
the 13 crimes makes it impracticable to do so. There is case law of
decision 14 ICTY and ICTR to that effect. And when we look at the
11:14:42 15 of Trial Chamber I, on the preliminary motions in this case,
this 16 is the same approach they took.

quoted 17 They refer to a decision in the Sesay case, which is
the 18 in paragraph 202 of the Prosecution appeal brief, which takes
19 same approach. We submit that failure to plead all locations
11:15:01 20 does not ipso facto render an indictment defective. It does
not 21 ipso facto exclude consideration of any location not
specifically 22 mentioned in the indictment, and we submit that the Defence
has 23 not cited any authority for that proposition.

24 What the case law --
11:15:25 25 JUDGE FERNANDO: Now, how could the accused then defend
would 26 himself against those locations which you have not pleaded,
27 you expect the Defence to defend itself against?

28 MR STAKER: The case law, we submit, is quite clear on
29 this. If it is impracticable to plead all locations in the

1 indictment, then the indictment as such is not defective for
2 failing to plead them. The indictment is not defective. But
the
3 Defence is entitled, at any stage during the trial, when
evidence
4 is admitted of a location not specifically pleaded, to raise
an
11:16:07 5 objection.

6 JUDGE FERNANDO: It may have been relevant for the
purpose
7 of deciding the systematic and the widespread nature of the
8 offence, so there is no way that the accused could have
objected
9 to that evidence coming in because it is relevant for other
11:16:25 10 purposes.

11 MR STAKER: Yes. I'm not sure if I've quite understood
the
12 question. I think when evidence comes in of any crime in any
13 location not pleaded in the indictment, regardless of what
14 purpose it's being relied on for, whether it's being relied on
to
11:16:42 15 prove a chapeau element whether it's being relied on because
the
16 accused are going to be alleged to be responsible for those
17 crimes, in either case, the Defence is entitled to say:

Evidence

location 18 is now being adduced of crimes in this location. That
of 19 wasn't pleaded in the indictment. We have insufficient notice
11:17:02 20 that. And the Trial Chamber -- and this certainly happens. I
21 can refer to another case before a Trial Chamber here in the
22 Special Court where this practice occurs.

23 What will happen is that the Trial Chamber first will
24 determine whether or not the Defence has had insufficient
notice.

11:17:34 25 It will look at whether they were given notice of that
location
26 in the Prosecution pre-trial brief. They will look at whether
it
27 was mentioned in the opening statement. They will look at
28 whether witness statements that have been disclosed by the
29 Prosecution under Rule 66 or Rule 68 have referred to this

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given 1 location and the Trial Chamber will decide in all the
2 circumstances whether, in fact, sufficient notice has been
hasn't 3 to the Defence, and if it decides that sufficient notice
4 been given to the Defence, and that some prejudice has been

11:17:57 5 suffered by the Defence, it will order an appropriate remedy.
6 And there are different remedies that it can order. It needs
to
7 be realistic and pragmatic about this.

8 One possible remedy is to order an adjournment to enable
9 the Defence to further investigate that matter. One might be
to

11:18:20 10 say: That witness will only be called at the end of trial to
11 allow the Defence more time to deal with that allegation. In
a
12 very extreme case, but we submit this would be an extreme
case,
13 when no other solution is possible, the Trial Chamber could
even
14 order that evidence to be excluded. But we submit --

11:18:42 15 JUDGE FERNANDO: That evidence cannot be excluded
because
16 it is relevant for the purpose of, as I said before, deciding
the
17 systematic and the widespread nature of the crimes committed.

18 MR STAKER: Well, it, when you say, Your Honour, when
you
19 say it's relevant to proving the widespread and systematic
nature

11:19:02 20 of the crimes, it's also relevant to proving the individual
21 responsibility of the accused for the count with which they
are
22 charged. It's relevant for both purposes, and for both
purposes
23 the Defence would be entitled to say: We've had insufficient
24 notice and to raise an objection. And, in our submission,
this

11:19:22 25 is what the case law says.

26 I cited this case law yesterday, in my submissions, that

indictment

27 even where the Defence claim there is a defect in the
28 there is a duty for the Defence to raise specific objections
29 trial when the evidence is adduced. Even if the indictment is

at

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And

11:20:02
this

indictment

11:20:29
Defence,

burden

1 valid, even if it has no defect, if it doesn't plead all
2 locations specifically, the onus is on the Defence to raise
3 specific objections at trial when such evidence is adduced.
4 if the Defence does not object at trial, it effectively waives
5 its right to object, which means that if it wants to raise
6 as an issue on appeal, it must not only prove that the
7 was defective, it must prove, the burden is on the Defence to
8 show that it actually suffered prejudice as a result.
9 If the Defence objects at trial, and the Trial Chamber
10 agrees to admit it notwithstanding the objection of the
11 then the Defence can appeal against that ruling of the Trial
12 Chamber in a post-judgment appeal and, in such a case, the
13 may be on the Prosecution to establish that there was no
14 prejudice because the Defence didn't waive its right. It

11:20:48 15 objected at trial. On appeal the burden may be on the
16 Prosecution to prove that there was no prejudice.
17 But where the Defence does not object at trial, it
allows
18 this evidence to come in, raises no problem, it cross-examines
19 the witness on this crime scene location, it brings its own
11:21:09 20 evidence to rebut it, it deals with it in its Rule 98
21 submissions, it deals with it in its final trial arguments,
then
22 the failure to object is a waiver. It doesn't preclude a
remedy
23 on appeal necessarily, but, in view of the Defence's failure
to
24 object, the burden is on the Defence on appeal to show where
the
11:21:32 25 actual prejudice was.

26 And, in our submission, the Defence here has failed to
27 establish any prejudice. We have made this submission several
28 times and we say that the Defence still has shown no actual
29 prejudice. We made this submission in our appeal brief. No

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1 prejudice was referred to in the response brief. We made this
2 submission in oral argument yesterday and we still haven't
seen

the 3 any showing of actual prejudice. We say a mere assertion by
insufficient. 4 Defence that they must have suffered prejudice is

11:22:25 5 Counsel for Kanu argued that there has been no waiver in
trial 6 this case because Kanu challenged the indictment in a pre-
Kanu 7 motion. As I submitted yesterday, in the pre-trial motion,
insufficient 8 did not allege that locations had been pleaded with
9 specificity. And we say merely filing a preliminary motion on
11:22:50 10 one issue doesn't mean that the Defence is then entitled to
raise 11 any issue on defects and indictments before the Appeals
Chamber. 12

the 13 It's only where a Defence raises the very same issue that was
raise 14 substance of the preliminary motion that it's entitled to
show 15 that on the appeal and place a burden on the Prosecution to
16 that there was no prejudice, if there was a defect in the
indictment.

17 Where the Defence has not raised the argument before the
appeal, 18 Trial Chamber in the proper way, if it is to succeed on
19 the burden is on the Defence to show that there actually was
11:23:31 20 prejudice.

21 Kanu argued that we are trying to establish a lower
22 standard for pleading of specificity of indictments than at
the 23 ICTY. As I've said, we cite and we rely on specific case law
24 from Appeals Chambers of the ICTY and ICTR. We are not

11:23:52 25 advocating a lower standard. We submit that the Defence is
26 advocating for a higher standard.

and

27 The Kanu Defence also made the submission that defects
28 indictments can't always be cured. That timely, clear and
29 consistent notice from the Prosecution is not always enough.

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1 Again, we say failure to raise this at trial means that the
2 burden is on them in this appeal.

11:24:36
supplemental

3 We refer, again, to Appendix B to the Prosecution appeal
4 brief which sets out details of where notice was given to the
5 Defence in the Prosecution pre-trial brief, in its
6 pre-trial brief, and we give details of where the Defence
7 cross-examined Prosecution witnesses, where it led its own
8 evidence to rebut and, as I say, there was never any objection
9 throughout the trial by the Defence to the leading of this
10 evidence.

11:24:57

and

11 We say objections must be raised in a prompt and timely
12 way. It's not possible for the Defence to sit back, allow
13 evidence to be admitted, allow the trial to proceed, a long
14 expensive trial, as I say, and then at the very end to say:

11:25:15 15 Well, although we never objected, although we contentedly
convicted 16 proceeded through all of this, we now say we can't be
17 because we rely on a defect in the indictment.
18 We say that if the Defence is to discharge its burden of
19 showing prejudice it would be necessary for it to do so on a
11:25:35 20 case-by-case basis. It would have to take each location in
turn
21 and say: This was our prejudice for that location. We'd have
to
22 look at when notice was given, how notice was given, what the
23 notice was, whether they cross-examined, whether they called
of 24 their own witness. If there is prejudice in relation to some
11:25:53 25 those locations that doesn't mean there is prejudice in
relation
26 to all of those locations. The Defence would have to take it
27 location-by-location and show what the actual prejudice was
and
28 we submit the Defence hasn't done that.
29 I turn then to the Prosecution's third ground of appeal.

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1 JUSTICE KING: You have 15 minutes.

2 MR STAKER: Thank you, Your Honour. The Prosecution

3 recalls that counsel for Kamara noted the need to avoid
confusion
4 between the towns of Manarma and Mamamah. The Trial Chamber's
11:26:29 5 findings with respect to Manarma are dealt with in particular
in
6 paragraphs 955 to 963, 965, 1628 and 1629 of the trial
judgment.

7 JUSTICE KING: Let's hear it again.

8 MR STAKER: 955 to 963, 965, 1628, 1969.

9 JUSTICE KING: Thank you.

11:26:53 10 MR STAKER: This is Manarma. Kamara was held
responsible
11 for this incident under Article 6.3 and in this ground of
appeal
12 we say he should have also been found responsible under
Article
13 6.1.

14 Now, the Manarma incident was one of the attacks
committed
11:27:11 15 by the West Side Boys as they were moving to and from
Gberibana.
16 As I recalled yesterday, the Trial Chamber found that after
the
17 Bombali/Freetown campaign, the West Side boys moved from
Western
18 District to Port Loko District, attacked civilians on the way,
19 set up a base in Gberibana and from that base continued to
commit
11:27:38 20 attacks against civilians in the surrounding area.

21 The Trial Chamber's findings with respect to the other
22 attacks, to and from Gberibana, are dealt with in paragraphs
1615
23 to 1627 of the trial judgment.

24 We submit that it's clear from these paragraphs, even

11:28:01 25 looking at them alone, but certainly when read in the light of
26 the Trial Chamber's findings as a whole, we submit that it's
27 clear that the Trial Chamber found the facts referred to in
those
28 paragraphs, 1615, to 1627, that it found that they were
29 established. As I submitted yesterday, those facts can be
taken

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1 as a given.
2 The Trial Chamber's findings included that Kamara
ordered
3 the West Side boys to decorate Mamamah, decorating meaning to
4 execute any civilians and put their dead bodies on display in
11:28:40 5 order to make the area more fearful. Kamara, himself,
6 participated in the attack; was present when a group of
children
7 were trapped inside a burning house. When one of the children
8 tried to escape, Kamara forced him back inside the house at
9 gunpoint, and the children were burned to death in the house.

11:29:05 10 Kamara also ordered the West Side Boys to go into
Gberibana
11 and make it a civilian-free area, meaning that civilians in
the
12 village should be executed, and this also occurred. Other
places

13 were also attacked.

14 We say it follows from the Trial Chamber's reasoning in
the

11:29:27 15 judgment that Kamara was responsible under Article 6.3 for all
of

16 the crimes committed by the West Side Boys in Port Loko
District.

17 We say for similar reasons, as in our first ground of appeal,
18 looking at all of the findings of the Trial Chamber as a
whole,

19 the only reasonable conclusion is that Kamara was also
11:29:50 20 responsible under Article 6.1 for planning, ordering,
instigating

21 and/or aiding and abetting all of the Port Loko District
crimes.

22 Now, counsel for Kamara argues that Mamamah and
Gberibana

23 were not locations pleaded in the indictment, and we
acknowledge

24 completely that this is the case. This is why this ground of
11:30:15 25 appeal interrelates with the Prosecution's second ground of
26 appeal. Our second ground of appeal is that although this
27 location wasn't specified by name in the indictment it should
28 still have been considered.

29 If our second ground of appeal is upheld, we say based
on

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1 the Trial Chamber's findings, the Appeals Chamber can add
2 convictions for Kamara under Article 6.1 and 6.3 for the other
3 attacks to and from Gberibana including Mamamah.

11:30:52
matter

4 We say in relation to other locations not specifically
5 named in the indictment, the remedy would be to send the
6 back to the Trial Chamber for further findings of fact. But
7 these Port Loko crimes the Appeals Chamber itself could
8 substitute a conviction.

that

11:31:09
to

9 JUSTICE KING: Why do you think, or why do you submit
10 if we found as you are submitting we should send the case back
11 the Trial Chamber? Can't this Court deal with it itself?

11:31:28
we

12 MR STAKER: Certainly. In relation to these Port Loko
13 District crimes the Appeals Chamber can itself substitute
14 convictions. We say the Trial Chamber has already found that
15 these crimes have happened. Under our third ground of appeal,
16 say the only conclusion, reasonably open, is that Kamara was
17 responsible under Article 6.1 and 6.3 for all of the Port Loko
18 District crimes and the Appeals Chamber can itself revise the
19 trial judgment by adding a conviction.

11:31:47
about

20 When I say remit to the Trial Chamber, I am talking
21 other crimes that were not specified in the indictment. The
22 other ones referred to in our Appendix B.

23 We say that in some cases the Appeals Chamber could

in 24 substitute convictions, if the Trial Chamber has made findings
11:32:08 25 its judgment that the crime actually happened, and if the
Trial 26 Chamber has made findings of the responsibility of the
accused. 27 For instance, if we take a missing location or an unspecified
28 location in Bombali District; if the Trial Chamber made a
finding 29 that that crime happened, if we take that finding and put it

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1 together with their finding that all accused were responsible
2 under Article 6.3 for all of the Bombali/Freetown crimes, and
if 3 our first ground of appeal succeeds, so that all three accused
4 are responsible under Article 6.1 for all of the
Bombali/Freetown 5 crimes, then we say in the same way the Appeals Chamber could
11:32:48 6 itself revise the trial judgment and add a conviction.
7 The only time it would be necessary to remit a location
to 8 the Trial Chamber would be where the Trial Chamber made no
9 finding of fact that that crime occurred. In some cases, the
11:33:13 10 Prosecution led evidence of crimes in particular locations,
and

11 the Trial Chamber said: We are not going to consider that
12 evidence because the location wasn't pleaded in the
indictment.

13 In a case like that, as I say, the task of weighing the
14 evidence and making findings of fact is one for the Trial
11:33:32 15 Chamber. Normally, the Appeals Chamber would not make its own
16 findings of fact on the evidence at first instance and, in
17 relation to those locations, we would submit that the normal
18 solution would be to remit those particular locations to the
19 Trial Chamber for further findings of fact.

11:33:49 20 JUSTICE KING: Before you go on, there is one practical
21 aspect of it all that has been crossing my mind. Let us
suppose
22 for the purposes of argument, that this Chamber were to uphold
23 your grounds, let's look at the practical consequence of that
24 vis-a-vis the sentences that have been passed on the accused,
11:34:17 25 what have you to say about that?

26 MR STAKER: We have made submissions on that in our
briefs.
27 What we -- the Prosecution has not appealed as such against
the
28 sentencing judgment in this case; meaning that on the Trial
29 Chamber's findings as they stand we don't say that the
sentence

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1 was inappropriate.

2 But our submission is that if our grounds of appeal are
3 upheld, with the result that there are findings of additional
4 criminal responsibility of each of the accused, that the
accused
11:34:49 5 are in effect responsible for more crimes than they were found
to
6 be responsible for in the trial judgment, that this must lead
to
7 a revision of sentencing.

8 It's normal that if an accused on appeal is found to be
9 guilty of more crimes than what they were guilty of before,
that
11:35:06 10 consideration has to be given to increasing the sentence to
11 reflect that additional criminal responsibility.

12 JUSTICE KING: That is the whole point of my question.
13 Now, having regard to the sentences themselves that have
already
14 been passed, in what way do you think this Chamber, in all
11:35:25 15 justice, ought to review the sentences, upwards or downwards?

16 MR STAKER: Well, if findings are found of additional
17 criminal responsibility, it would follow as a matter of course
18 that sentences, if they were to be revised, should be revised
19 upwards. But, the reality of it is this: Where, on appeal,
an
11:35:51 20 accused is found to be responsible for even more crimes than
they
21 were responsible in the trial judgment, it's a matter of
22 sentencing discretion of the relevant Chamber what to do. And
23 that discretion may be exercised by the Appeals Chamber itself

to 24 directly, as we have said in our brief, or it may be remitted
11:36:10 25 the Trial Chamber for further sentencing. But regardless of
within 26 which Chamber exercises that discretion it's a discretion
27 the Chamber.

28 First of all, the Chamber might say: Yes, there is
29 additional criminal responsibility but, given the length of
the

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this 1 sentences that are already imposed, we do not believe that
2 additional finding of criminal responsibility warrants an
3 increase in sentence; that is a possibility.

11:36:44 4 Secondly, the Chamber might say, because of the scope of
required 5 the additional criminal responsibility some increase is
would 6 but, given the length of the sentences already imposed, it
7 only be a modest increase; a second possibility.

8 Third possibility might be that the Chamber says: We
don't 9 think an increase is warranted for the reasons I gave before
but,

11:37:03 10 if the Defence appeal were to succeed partially, so that there
is

11 a diminution of the criminal responsibility found by the Trial
12 Chamber, but that certain Prosecution grounds also succeeded
so
13 there is a simultaneous increase in criminal responsibility in
14 different respects, it would then fall to the Chamber to weigh
11:37:23 15 that. It might find that although the Defence was partially
16 successful, and the Prosecution partially successful, that
they
17 balance each other out and the sentence stays as it is. Or it
18 might find the balance tips one way or the other.

19 JUSTICE KING: What are your submissions on consecutive
and
11:37:42 20 concurrent sentences?

21 MR STAKER: Our submission on that, Your Honour, is that
22 the sentence ultimately imposed must reflect the overall
criminal
23 culpability of the accused. We say it's obvious that if an
24 accused is convicted of ten murders, the accused should
receive a
11:38:03 25 higher sentence than if the accused had only committed one
26 murder; we say that's obvious.

27 On the other hand, if the Trial Chamber were to take the
28 view, the Trial Chamber normally imposing sentence, were to
take
29 the view that a sentence of 20 years would be the appropriate

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1 sentence for one murder, we are not saying that the
appropriate
2 sentence for ten murders would necessarily be 200 years. We
are
3 not saying that all sentences must necessarily be consecutive.
4 Now, the practice of most international criminal --
well,
11:38:42 5 the ICTY and the ICTR, their practice today tends to be the
look
6 imposition of a single global sentence, that the Chamber can
7 at all of the different crimes, look at the role of the
accused,
8 the personal circumstances, the mitigating circumstances and
come
9 up with one single sentence that reflects the overall
culpability
11:39:06 10 of the accused.
11 If the Chamber imposes separate sentences in respect of
12 each crime, it's not our submission that the Chamber should
13 automatically order them to be served consecutively. In many
14 cases that would lead to sentences of several hundred years.
11:39:22 15 The way Chambers have approached that in practice, I
think
16 some cases at the ICTR at least, I think the ICTY as well, is
17 that where you have many different sentences they order some
to
18 be served concurrently with others, and some to be served
19 consecutively with others, and that when you work it all out
20 mathematically, you come to a sentence that, you know, is
11:39:42 longer

still

21 than the longest sentence imposed for any one crime but is
22 much less than the arithmetical sum of all of the sentences.

come

23 So whichever way the Chamber approaches it, it has to
24 to an overall result that is just and appropriate, in all of
11:40:04 25 circumstances.

the

you

26 JUSTICE KING: Yes. I take this opportunity of asking
27 just one more question on this point. I think, if I remember
28 rightly, one or other of the accused was sentenced to 50 years
29 imprisonment and the others 45 years. Now --

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to

1 MR STAKER: Yes. Your Honour, it was two were sentenced
2 50 years and one to 45.

Having

3 JUSTICE KING: Two, 50, one, 45 years. Thank you.

11:40:32
regard

4 regard to all of the submissions, mainly on the points of law
5 that you raised, how would you advise this Tribunal with
6 to the maximum sentence that has been passed and the lesser
7 sentence of 45 years?

that 8 MR STAKER: Well, our starting point, Your Honour, is
to 9 we have not appealed against sentence, so we are not seeking
11:40:56 10 suggest that the Trial Chamber should have approached
sentencing 11 in any other way than what it did.
12 It's the Defence have raised an appeal against sentence
and 13 we will be responding to that appeal.
14 JUSTICE KING: I know.
11:41:11 15 MR STAKER: And sentencing will be a very large part of
issue 16 that. For the purposes of the Prosecution appeal, the only
17 is what should happen in terms of sentence if the Prosecution
event 18 succeeds in one or more of its grounds of appeal. In that
it 19 our submission is that either the Appeals Chamber itself, if
11:41:28 20 does this, or the Trial Chamber if the Appeals Chamber remits
it 21 to a Trial Chamber, must exercise its sentencing discretion to
22 see what effect this has on sentence.
or 23 We submit that if the Prosecution is successful, in one
24 more of its grounds of appeal, this cannot possibly lead to a
11:41:48 25 reduction in sentence. If we proceed from the assumption the
of 26 Trial Chamber was correct, and now we have additional findings
between 27 criminal responsibility, the Chamber would have a choice
28 either leaving the sentence where it is notwithstanding the
29 additional criminal responsibility --

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1 JUSTICE KING: I think that that is the answer to the
2 question.

modest

3 MR STAKER: -- or increasing the sentence by a very
4 amount --

11:42:06 5 JUSTICE KING: I see.

6 MR STAKER: -- to a very large amount. That is a matter
7 within the discretion of the Chamber.

and

8 JUSTICE KING: That is the whole purpose of my question.
9 You mentioned, for instance, if somebody committed 100 deaths

11:42:19 10 for

10 that sort of thing, whether he should be punished, you know,
11 the 100 deaths. Now, in this Special Court, there is no death
12 sentence here but, of course, in those tribunals where you

have

13 death sentences passed, I don't know whether you can pass 100
14 death sentences and what would be the practical effect of

that.

11:42:40 15 get

15 MR STAKER: I understand in the United States you can
16 multiple life sentences. I again would have to ascertain
17 multiple death sentences are possible. In fact, I believe

whether

that

on 18 is possible because it means that if one conviction is quashed

19 appeal the other death sentences still remain.

11:42:58 20 JUSTICE KING: You have a point there.

is 21 MR STAKER: But my submission is simply that if a person

22 responsible for ten deaths, and if the sentence for one death

23 would be 20 years, it would be inappropriately low to impose a

24 sentence of 20 years for ten deaths because that is the same

11:43:17 25 sentence that would have been imposed for only one. On the
other

26 hand, it needn't be 200 years, which would be the sum total of

27 all of them.

28 JUSTICE KING: Yes.

29 MR STAKER: But the overall sentence must be just and

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1 appropriate in all of the circumstances.

about 2 JUSTICE KING: That has been very helpful. You have

3 five minutes more.

circumstances 4 MR STAKER: Your Honour, I think that in the

11:43:37 5 I probably don't need to address the other grounds of appeal.
I

6 think they have been adequately addressed in our briefs and
7 submissions yesterday. Other than Mr Eboe-Osuji has some
8 additional authorities on the duplicity point. Your Honour, I
9 understood, was inviting references to further authorities
11:43:54 10 yesterday but, if I could invite you to call on him for three
or
11 four minutes, simply to explain the additional material that
we
12 are submitting.

13 JUSTICE KING: Very well, Dr Staker. Just three
minutes.

14 JUDGE FERNANDO: Before you proceed to that, Dr Staker,
11:44:12 15 going back to that earlier question of locations not pleaded.
If
16 you wanted to lead evidence of crimes committed in locations
17 which were not pleaded could you have moved for amendment of
the
18 indictment to include those locations at that time?

19 MR STAKER: We submit there is a difference between
11:44:26 20 locations not pleaded in the indictment and locations pleaded
in
21 the indictment but not specifically identified. In this case,
22 the indictment said that there was a large-scale campaign of
23 crime. We take the Bombali crimes, for instance, a large-
scale
24 widespread attack against a civilian population in
11:44:45 25 Bombali District in which village after village after village
was
26 attacked by forces who were on the move.

27 In those circumstances, it's very difficult in an
28 indictment to identify every single location in which crimes
may
29 have been committed; every single location in which witnesses
may

1 testify to crimes having been committed.

2 We say in those circumstances an indictment is not
3 defective if it says, within this time frame, within this
4 district, there was a widespread attack against the civilian
5 population. Civilian population was attacked in numerous
6 locations including the following and give a non-exhaustive

11:45:23
list.

7 In that case, where evidence is brought of a location
8 specifically named, we submit it is a location that is pleaded
9 the indictment; it's just not specifically named. Now, if the

not
in

10 indictment said, the crimes were committed in location A and

11:45:46
B.

11 Full stop. Now, in that case, if the Prosecution wants to

prove

12 the crime committed in location C, yes, it has to seek an
13 amendment to the indictment because it's not pleaded in the
14 indictment. So, in this instance, we say an amendment to the

11:46:07

15 indictment was not necessary. The question is what notice has
16 the Defence been given of a particular location coming up in

the

17 trial?

18 Normally, it would be in witness statements disclosed to
19 the Prosecution. It would be in the pre-trial brief. The
11:46:21 20 Defence would otherwise have notice of it before the evidence
is
21 adduced. Now, it's always open to the Defence to say: We
only
22 heard about this four weeks ago when we got a Prosecution
witness
23 statement disclosed. We haven't had time to go out and do our
24 investigations in that place. We want some remedy. Give us
an
11:46:39 25 adjournment or, as I say, in an extreme case, you know, at
this
26 stage we can't possibly investigate that, exclude the
evidence.

27 But the Defence must object at the time and it must show
28 prejudice. It must give the Trial Chamber an opportunity to
29 correct the problem so that the trial can proceed. The
Defence

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1 can't just sit back, say nothing, and then at the end of the
2 trial say: Well, these locations weren't specifically in the
3 indictment, we can't be convicted of any of that.

4 JUDGE FERNANDO: Thank you.

11:47:08 5 MR STAKER: Thank you. So, Your Honour --

6 JUSTICE KING: Thank you again, Dr Staker, for again,
once

7 again putting your submissions so succinctly. You were saying
8 that -- sorry, thank you. I always forget that. I was just
9 thanking you for helping this Court and putting your
submissions

11:47:27 10 so succinctly. Now you want some further reply on the
question

11 of multiplicity?

12 MR STAKER: Duplicity.

13 JUSTICE KING: Completely different concepts.
Duplicity.

14 MR STAKER: Yes. If I might --

11:47:40 15 JUSTICE KING: You have three minutes, whoever is going
to

16 do it.

17 MR STAKER: Mr Eboe-Osuji. Thank you, Your Honour.

18 JUSTICE KING: Yes, Mr Eboe-Osuji.

19 MR EBOE-OSUJI: May it please the Court. If it's okay,
I

11:47:56 20 may speak from here. Thank you. Your Honours, yesterday,
when I

21 was making my submissions, I referred to a certain authority
from

22 the United States and in it was a reference to another
authority

23 that suggested a case that was decided on the -- a case on
whose

24 ratio decidendi was on duplicity. Here is that case. That is

11:48:21 25 the case of the US v Goodman, if the Court officer can please
26 assist me. There are three documents here. This is the case
and

27 here are two other ICTR rules and ICTY. I will explain them
in a

28 minute. This one is first.

There 29 I had handed up a pile of three separate documents.

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1 is the Goodman case and there is also the ICTR and ICTY Rules.

side 2 Your Honours, beginning with the Goodman case, I have

3 barred some of the important passages but just to get to the

the 4 point very quickly, I will take you to page 4. At page 4, on

11:50:16 5 left-hand side column, at paragraph 5, the passage directly
says:

two 6 "Count 6 is duplicitous, that is, it joins in the same count

7 distinct offences."

8 Now moving on to the right-hand side column, it's a

9 continuation of the discussion of the consequences of that

11:50:43 10 duplicity, and the Court says:

11 "First, count 6 charges one offence committed in

12 contemplation of bankruptcy as defined in paragraph

bankruptcy 13 (whatever) and another offence committed after

error 14 as defined in paragraph 1 of the same section. This

11:51:00 15 would, however, be harmless if the United States [that
is
16 the Prosecution] were required to elect upon which
charge
17 it would proceed. The entire count should not be
dismissed
18 when a less drastic ruling will suffice."
19 Your Honour, yesterday, in the course of submissions,
the
11:51:43 20 President also made reference to Article 14 of the Special
Court
21 Statute, Article 14.2 to be precise. Your Honours, if I may
read
22 Article 14 of the Special Court Statute beginning with Article
23 (1) -- sub (1), Article 14.1. It says:
24 "The Rules of Procedure and Evidence of International
11:52:11 25 Criminal Tribunal for Rwanda obtaining at the time of
26 establishment of the Special Court shall be applicable
27 mutatis mutandis to the conduct of the legal proceedings
28 before the Special Court."
29 Then in sub (2) it gives the Judges the permission to
amend

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1 the Rules of Procedure and Evidence or adopt additional rules
2 where the applicable rules do not or do not adequately provide

the 3 for a specific situation. In so doing, that is in amending
4 Rules, the Judges may be guided as appropriate by the Criminal
11:52:48 5 Procedure Act (1965) of Sierra Leone.

to 6 Your Honours, with respect, my reading of this suggests
7 me that it is saying that the Judges are free to be guided by
the 8 CPA of the Sierra Leone in amending the Rules. Of course,
when 9 that is done, everyone will be guided by such rules as
amended.

11:53:19 10 I submit, very humbly, that the Rules of the Special Court
have 11 not been so amended as to say that whenever there is a
12 duplicitous count, the count must be quashed automatically.

13 JUSTICE KING: No, no. The whole purpose of my
14 that Article in the Rules was in relation to the local case of
11:53:37 15 Rex v Lansana, why, in that case, they were also referring to
the 16 relevant provisions in the local Criminal Procedure Act with
17 regard to matters relating to duplicity, not with regard to
the 18 amendment of the Rules. You see, in given circumstances, this
19 Court will be guided by the Criminal Procedure Act but when

you 20 look at Lansana itself, the case of Lansana, the treason trial
11:54:08 21 in Sierra Leone, where the question of duplicity was very
22 exhaustively considered, in that decision, the Appeals Chamber
in 23 Sierra Leone referred to the Criminal Procedure Act probably
in 24 terms of the Indictment Act of 1915. So if you thought I was

11:54:27 25 talking about the amendment of the Rules that was not the
purpose
26 really.
27 MR EBOE-OSUJI: Very well, Your Honour.
28 JUSTICE KING: Now, to come back to your point here
about
29 this Goodman's case, I can see the point you are making. But
my

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1 observation is this: That again, since you are so particular
2 about the Rules, we go to the Rules and Statute and this Court
is
3 only guided by law, by decisions of the ICTR and the ICTY, and
4 with regard to interpreting matters relating to Sierra Leone
law
11:54:56 5 by the Supreme Court of Sierra Leone. There is nothing in our
6 Rules about guidance from decisions of the United States of
7 America, and, in any event, I say this because I am not quite
8 sure, in fact, whether those decisions will even be persuasive
in
9 the circumstances I have referred to.

11:55:16 10 MR EBOE-OSUJI: Very well, sir. I will take guidance
from
11 that direction. Now, lastly, and that ties in to what Your

12 Honour just said about which body of authority is more
persuasive
13 in this Court, I humbly harken back, once more, to the
provisions
14 of the ICTR Rules. I have handed out the relevant provisions
to
11:55:47 15 you. And that provision, Rule 72D -- the reason I discussed
it
16 yesterday, I do not need to repeat myself -- the reason I
brought
17 it this morning so that I can hand it up to you. I was
reading
18 from a computer yesterday, but today, I have made copies of
Rule
19 72 of the ICTR Rules, Rule 72, both B(i) and B(ii) as well as
11:56:18 20 Rule 72(D). Rule 72(B), sorry, Rule 72(A) sorry, Rule
72(A)(i)
21 and (ii) discuss challenges to jurisdiction and (A)(ii)
22 discusses, talks about challenges to alleged defect in the
23 indictment. And at (D), 72(D) there is definition of what is
24 meant by jurisdiction and it speaks in terms of exclusivity.
It
11:56:53 25 says: For purposes of paragraphs A(i) and (B) a motion
26 challenging jurisdiction refers exclusively to -- then it
lists
27 what it refers to. That would be person, subject matter, over
28 the person, subject matter over the territory, subject matter
29 over the period and subject matter in relation to violations,

1 motions attacking the indictment on those grounds.

2 They do not include, in fact, definition motions
attacking

3 the form of indictment. Thank you very much, Your Honour.

4 JUSTICE KING: Yes, just one minute. Yes, that is very
11:57:29 5 interesting. We will certainly look at all those rules you've
6 referred to. Again, going back to the Statute of the Special
7 Court, and the Rules, you are aware that at the inception of
this

8 Court it was provided that we can go by the ICTR Rules.

9 Now, we've had our own Rules, we've amended them several
11:57:55 10 times, and I am just wondering in those circumstances what is
the

11 effect of the ICTR Rules that you are citing? Are we more
12 concerned with the ICTR or with the Rules that we have in our
own

13 Rules of Procedure and Evidence? You see, it's not that we
have

14 a hierarchy of courts in the Special Court. I mean, this
Appeals

11:58:15 15 Chamber, the highest appellate body in the Court, is strictly
16 adhering to a Statute, the agreement, the Rules of Procedure
and

17 Evidence, taking into consideration every provision in those
18 Rules.

19 For instance, the way that evidence should be
considered;

11:58:34 20 the way as to the binding nature of precedent and so on. And
you

it
can
11:58:57
that
I
those

21 will understand that when you look at those Rules as a whole
22 is hardly bound by the decisions of outside tribunals. They
23 only guide us. That is a guide. You can reject them whenever
24 you think it's appropriate to reject them. So that it's not a
25 binding precedent, even with regard to the ICTR, that really
26 nearly came close to anything that we can you should look at
27 because of its persuasive nature. So this is the distinction
28 am making, that we have peculiar rules. We have developed
29 Rules, we have amended them and now they are the rules of the

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Honour,
material,
11:59:33
were

1 Special Court for Sierra Leone.
2 MR EBOE-OSUJI: I completely agree with you, Your
3 on that and it's only the citation of this extraneous
4 it's only for purposes of persuasion, in case you thought you
5 might find them useful in answering your question that you
6 faced with. That is all.
7 JUSTICE KING: Thank you. Thank you very much.

8 JUDGE FERNANDO: Well, now that you are addressing
9 generally on duplicity, can you be of some assistance to me
11:59:53 10 personally? Is there any provision of our Rules that prohibit
11 expressly duplicity?

12 MR EBOE-OSUJI: Thank you very much, Your Honours, I am
not
13 aware of any such provision of the Rules. I have looked and I
14 have found none that has expressly forbidden duplicity. I can
12:00:16 15 say that, again once more for purposes of guidance, this
matter
16 has arisen in the different other tribunals in different ways.
17 As I indicated to you yesterday that Celebici does say should
--
18 one count should contain one offence. It's a matter of what
is
19 permissive. It's a statement of [indiscernible] what should
12:00:48 20 happen. It does not tell us what must happen if that rule is
21 violated. It does not say that where an indictment or a count
22 should contain only one offence contains two, that the whole,
the
23 entirety of the count must be quashed. It is there that your
24 discretion comes in.

12:01:12 25 JUDGE AYoola: Jurisprudence has shown that the way to
26 proceed is either to amend -- in this case the Prosecution did
27 not amend? Did the Prosecution amend? Another option is for
the
28 Prosecution to elect. Did the Prosecution elect? And if the
29 Prosecution neither amended nor elected, what is the
consequence?

friend

1 MR STAKER: Sorry, if I could interrupt my learned
2 just on that specific point. In the Prosecution final trial
3 arguments, we did not rely on any acts under that count other
4 than sexual slavery.

12:01:54
what

5 JUDGE AYoola: So we are to infer an election, is that
6 you are saying? We infer that you elected?

the

7 MR STAKER: We would submit that it was always clear to
8 Defence that sexual slavery was charged and if there was any
9 doubt as to whatever else may have been charged it was

certainly

12:02:12
on

10 either put to rest by the fact that no other acts were relied
11 other than sexual slavery in the final trial submissions.

else

12 Certainly there can have been no prejudice because nothing
13 was alleged. Yes, I mean, the count was about sexual slavery
14 ultimately.

12:02:29

15 JUDGE AYoola: Thank you.

in

16 JUSTICE KAMANDA: This is for Dr Staker. I just want to
17 get clarification on certain principles of law which you have
18 propounded or enumerated. You seem to give the point that the
19 burden of proof does shift from the Prosecution to the Defence

12:03:10 20 certain cases. Where there is no waiver is an example you
cite.

21 I want you to clarify that for me.

22 MR STAKER: Yes. The simple rule is that if the Defence
23 brings a preliminary motion alleging defects in the form of
the
24 indictment, and the Trial Chamber finds that there is no
defect

12:03:35 25 in the indictment, the Defence has the possibility, after
trial

26 judgment of appealing that finding before the Appeals Chamber.

27 Where that happens, the Defence has the burden, as the
28 appellant, to show that there was, in fact, a defect in the
29 indictment. Now, it's not a burden of proof as such because

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1 whether there is a defect is really a question of law, looking
at
2 the language of the indictment, rather than a question of fact
or
3 evidence, so it's really a burden of persuasion.

4 Once the Defence establishes that there is a defect in
the

12:04:16 5 indictment, in that situation, the burden shifts to the
6 Prosecution to show that notwithstanding the defect, no
prejudice

7 was caused to the Defence.

8 In cases where the Defence has not objected to defects
in

9 the indictment at the pre-trial stage, but then seeks to
appeal

12:04:41 10 alleging such defects in the post-judgment appeal, the general

11 rule is that the Defence, by not objecting at the pre-trial

12 stage, has waived its right to object on appeal. But the case

13 law recognises that notwithstanding that waiver it may be

14 possible to bring that issue on appeal, but, in such a case,
the

12:05:06 15 burden is on the Defence, given that it never raised this

16 pre-trial, the burden is on the Defence not only to establish
a

17 defect in the indictment, but the Defence also has the burden
of

18 showing that they suffered material prejudice.

19 Now, the situation is a little more complicated in this

12:05:26 20 case. This is a case where the Defence, for instance, did not

21 object pre-trial but objected in the final trial arguments.
We

22 say the same principle applies. The obligation is to object

23 pre-trial. You can't simply raise something in final trial

24 arguments as to defects in the indictment. And we say that
the

12:05:47 25 decision of the Trial Chamber to find a defect was wrong.
That

26 should be quashed. And we should be in the same position as
if

27 the last word on the subject were the decisions of Trial
Chamber

28 I. We say where the Defence objected, on a particular basis,
on

have

29 a very specific point, they can bring this on appeal. They

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if

12:06:23

1 to show a defect in the indictment. Then the burden is on the
2 Prosecution to show no prejudice. Where the Defence didn't
3 object at trial, they've waived their right. They can only
4 succeed on appeal if they show a defect in the indictment and
5 they bear the burden of showing actual prejudice.

pleaded

6 Now, the one other complication is in relation to the
7 missing locations count, the locations not specifically
8 in the indictment. We say that even if there was no defect in
9 the indictment, as we say it's not necessary for an indictment

to

12:06:46
there

10 plead every single location and we say in this circumstance
11 was no defect in the indictment in not naming every single
12 location.

the

12:07:04

13 Even if the indictment is not defective the Defence has
14 burden of objecting at trial whenever evidence is led on a
15 location of which they say they have had insufficient notice.
16 They have to raise it at trial so that the Trial Chamber has

the

17 opportunity to grant them some relief to enable the trial to
18 proceed and, if they don't object at trial, again, they have
19 waived their right to bring this on appeal, meaning they can
only
12:07:24 20 succeed on appeal if they not only show the defect in the
the
21 indictment, but if they show actual prejudice. And we say if
if
22 indictment was defective, their burden can't be any less than
whenever
23 the indictment was valid. They have the duty to object
notice.
24 evidence is led of which they say they had insufficient

12:07:51 25 In this case, the Trial Chamber found the indictment was
26 not defective. The logical consequence is the Defence knew it
27 had the obligation to object whenever it had a problem and it
28 didn't. So I hope that answers your question.

29 JUSTICE KAMANDA: Thank you.

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1 JUSTICE KING: Well, it only remains for me again, Dr
2 Staker, to once again express my satisfaction at your lucidity
3 and the way you've assisted this Court, sometimes in very
4 difficult circumstances.

12:08:21 5 I think now is the appropriate time to go for lunch and,
on

6 our return, the Defence will start their appeal. It's now
12.00.

7 According to our schedule from the pre-hearing Judge, we are
8 supposed to go out at -- today is the 13th -- at 12.00, so
it's

9 just about 12, and we will come back at 2.00. At 2.00. And
then

12:08:54 10 we will have Brima's appeal submission; submissions. I take
it

11 you have more than one submission?

12 MR GRAHAM: Yes.

13 JUSTICE KING: Thank you.

14 [Luncheon recess taken at 12,08 p.m.]

14:01:56 15 [AFRC13NOV07B - MD]

16 [Upon resuming at 2.02 p.m.]

17 JUSTICE KING: I believe the Prosecution has finished,
18 ended its submissions, I take it?

19 MR STAKER: Yes, Your Honour. I understand our time was
up

14:06:12 20 in any event. I'm not making an application for any
extension.

21 I know there were some grounds we didn't reply to but we think
22 that's adequately covered by our written pleadings and our
oral
23 submissions yesterday.

24 JUSTICE KING: Right. Thank you, Dr Staker. Now, the
14:06:28 25 appellant Brima, I think, according to the time schedule, you
26 have an hour to present your submissions.

27 MR GRAHAM: That is so, Your Honours.

28 JUSTICE KING: Right. Thank you.

29 MR GRAHAM: Good afternoon, My Lords.

1 JUSTICE KING: And this time it's Kojo?

2 MR GRAHAM: Graham.

3 JUSTICE KING: Graham. Yes.

14:06:53
submissions

4 MR GRAHAM: Good afternoon, My Lords. My Lord, before I
5 proceed, I state that we rely on our written appeal
6 filed on September 13, 2007. And further, for purposes of our
7 oral submissions this afternoon, we will focus on the fourth,
8 fifth and twelfth grounds of our appeal.

ground

14:07:19

9 Your Honours, I will proceed by addressing the first
10 of our appeal. The fourth ground of our appeal states as
11 follows:

for

12 "That the Trial Chamber erred in fact and/or in law by
13 finding the accused Brima responsible under Article 6.3
14 the crimes committed by his subordinates in
15 Bombali District between May 1st, 1998, and November
16 1998."

14:07:35
30th,

appellant

17 Your Honours, the appellant submits -- the first

the 18 submits that the Trial Chamber erred in fact by finding that
AFRC 19 first appellant was a superior, who had authority over the
14:07:57 20 forces, and that he was in the position to order them to
commit 21 crimes in the Bombali District, within the period under
responsibility, 22 reference, thereby incurring individual criminal
In 23 pursuant to Article 6.3 of the Statute of the Special Court.
24 arriving at the above finding, the Trial Chamber, we submit,
14:08:24 25 erroneously relied on Prosecution witnesses TF1-334, TF1-167
and 26 TF1-033.

27 It is our submission that in the light of the
28 inconsistencies and contradictions in the accounts of the
29 witnesses that we just referred to, as to the killings in the

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well 1 Karina, Mateboi, Pendembu and Rosos, in the Bombali District,
2 Your Honours, we refer to trial judgment pages 167 to 194 as
3 as paragraphs 1700 to 1744.

4 JUSTICE KING: What paragraphs are those?

14:09:09 5 MR GRAHAM: Your Honours, paragraphs 1700 to 1744.

6 JUSTICE KING: Thank you.

7 MR GRAHAM: And these paragraphs contain the findings of
8 the Trial Chamber in respect of the evidence given by TF1-334,
9 TF1-167 and 033. Your Honours, it is our humble submission
that

14:09:32 10 the Prosecution witnesses appeared to have given contradictory
11 accounts as regards the events which took place in the
12 Bombali District.

13 The identification of the appellant, insofar as the
14 testimony of these witnesses are concerned, is open to
question,

14:09:47 15 My Lords.

16 My Lords, witness TF1-157, for example, referred to a
17 person called Gullit, the name the Prosecution says the
appellant
18 was known by. However, according to his own testimony, this
is

19 the case because he heard others mention the name Gullit. He
14:10:07 20 provides no positive identification of this person, whether he
21 set his eyes, himself set his eyes on the first appellant.

22 Moreover, his evidence is punctuated by references to
23 atrocities committed by persons whom he refers to as "they,"
24 without mentioning any specific names in this regard. The
name

14:10:26 25 Gullit, according to the witness, was what he heard others say
26 and assumed it was one of the bosses because of the way they
27 spoke and in his own words I quote, "Because of the way they
28 spoke to people that is how I know they were bosses" and in
this
29 regard he was speaking in the plural.

evidence

Chamber

in

14:11:02
with

1 Your Honours, it is my humble submission that this
2 was insufficient, it was insufficient basis for the Trial
3 to ground its finding that the appellant, the first appellant
4 this matter, ordered his subordinates to perpetrate crimes
5 against the civilian population in Karina and his environs
6 the specific intent of instilling terror in the civilian
7 population in the Bombali District.

8 JUSTICE KING: Let me understand you properly: Are you
9 saying that the first appellant did not know Gullit?

14:11:23 10
was

11 MR GRAHAM: No, Your Honour. The submission, the first
12 appellant, the Prosecution's case is that the first appellant
13 also known as Gullit.

14 JUSTICE KING: Yes.

14:11:35 15
had

16 MR GRAHAM: And it's my humble submission that the
17 witnesses that testified on behalf of the Prosecution, none of
18 them were able to give evidence as to the fact whether they
 direct -- they knew him directly or personally and all the
 evidence that they gave was to the effect that they heard the

on 19 name Gullit. They never saw him. They never set their eyes

14:11:53 20 him. They said that they heard.

21 JUSTICE KING: Can you refer to the evidence so we can
22 follow you? The precise --

the 23 MR GRAHAM: Your Honours, I refer to page 90 to 92 of
24 transcript of 22 July 2005 in that regard.

14:12:04 25 JUSTICE KING: Page 90?

the 26 MR GRAHAM: To 92 of the transcript of 22 July 2005 of
27 Trial Chamber proceedings.

28 JUSTICE KING: Yes, what does it say? Go on.

29 MR GRAHAM: Thank you, Your Honours. Your Honours, for

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14:12:39 1 example, Defence witness DBK-086 gave evidence that throughout
Trial 2 the events in this area of Bombali District he never heard the
3 name of the appellant. Further, under cross-examination, he
4 stated that he did not hear the name Gullit as well. DBK-090,
5 also a resident of Bombali, also gave evidence before the

to 6 Chamber about the Bombali attack. And he also gave evidence

7 the effect that he never heard the name of the appellant.

8 Your Honour, Defence witness also DAB-100 who also

9 testified before the Trial Chamber, he gave evidence to the

14:13:01 10 effect that there was a group led by one person called Adama
Cut

11 Hand and, according to the testimony of DAB-100, it was a
group

12 led by Adama Cut Hand that perpetrated most of the atrocities
13 that took place.

14 JUSTICE KING: Before you go to Adama Cut Hand, did the
14:13:24 15 Prosecution call any witness who positively said that they
knew

16 the first appellant, otherwise known as Gullit?

17 MR GRAHAM: Yes, Your Honour. TF1-334.

18 JUSTICE KING: Yes.

19 MR GRAHAM: Who was the key Prosecution witness.

14:13:39 20 JUSTICE KING: Yes.

21 MR GRAHAM: Indeed, it was his testimony that the Trial
22 Chamber relied on. Your Honours, I will be addressing that.

23 JUSTICE KING: I know. But, I mean, if we have evidence
at
24 least from one person how can you make such a general
submission?

14:13:53 25 MR GRAHAM: Your Honour, say that again?

26 JUSTICE KING: I say that again. Now, you are saying
that
27 some of these protected witnesses that were called --

28 MR GRAHAM: Yes.

29 JUSTICE KING: -- did not, in fact, know who Gullit was,

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1 that it was the first appellant. But you have just mentioned
2 that you had at least one witness who was quite positive and
3 stated quite clearly that Gullit was, in fact, the first
4 appellant and they gave evidence about the acts of the first
14:14:19 5 appellant.

6 MR GRAHAM: That is how --

7 JUSTICE KING: Now, how do you tie that up with your
8 submission with regard to the others? Do you have to have six
9 before you can --

14:14:26 10 MR GRAHAM: Your Honours, we are saying that evidence is
11 inconsistent, in that TF1-334 was the key Prosecution witness
who
12 testified that the first appellant was present in Bombali. On
13 the other hand, you have Defence witnesses who were also
present
14 in Bombali at the time the incident took place, who never
heard
14:14:46 15 the name of the first appellant, as to whether he was present
in
16 Bombali, or whether he was responsible for the atrocities that
17 took place.

18 Your Honours, the evidence I was giving was to the
effect

19 that when the troops invaded Bombali, the evidence of 334 was
14:15:05 20 that the first appellant was the one who was in charge of the

21 forces. Indeed, the Trial Chamber found him criminally
22 responsible for the acts of his subordinates who committed
most
23 of the atrocities in Bombali, but our position is that the
24 evidence was inconsistent. Your Honour, we will go on.

14:15:25 25 JUSTICE KING: In what regard was the evidence
26 inconsistent?

27 MR GRAHAM: Well, the evidence of the Defence witnesses
28 were clearly inconsistent.

29 JUSTICE KING: In what regard?

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the
1 MR GRAHAM: Well, Your Honours, my submission is that
2 Defence witnesses who were also present in Bombali, as at the
3 time the incident took place, indeed some of them were even
4 adopted and went along with the fighting forces, it's our
14:15:47 5 submission that if, indeed, the first appellant was the
commander
6 of the fighting forces it should have been possible within the
7 context of the evidence that was given for them either to have
8 heard his name or to at least have been able to identify his
9 presence in Bombali.

14:16:03 10 JUSTICE KING: But you have referred to one witness, in
11 fact, who had heard his name who knew him and who gave
evidence.
12 In what way is there any inconsistency, to say that they
didn't
13 call his name or they didn't identify him; is that an
14 inconsistency?

14:16:20 15 MR GRAHAM: Well, Your Honours, the submission I'm
trying
16 to make is that the Trial Chamber unduly relied on the
evidence
17 of the Prosecution witnesses as against that of the Defence
18 witnesses.

19 JUSTICE KING: No, the point is this: The whole thing
goes
14:16:34 20 to credibility because the Trial Chamber had to decide, did
they
21 not, as to what -- which witnesses to believe. You don't have
to
22 have ten witnesses saying the same thing before the Trial
Chamber
23 can say "Oh, I believe them." You can have one witness, whose
24 evidence is so credible, that the Trial Chamber forms its
opinion
14:16:55 25 on that one witness's evidence and if you say the evidence of
the
26 Prosecution witnesses was inconsistent, then you have to
identify
27 the inconsistency so that we can follow your submission. But
you
28 so far have not, in fact, pinpointed your submissions that the
29 evidence given by those protected persons was inconsistent.

1 MR GRAHAM: Very well, Your Honours. I think the more
2 appropriate way should be the credibility of the witnesses in
3 this regard because, Your Honours, it is our submission that -

-

the

14:17:30 5
6
7
8 inconsistent,

abandon

14:17:48 10

4 JUSTICE KING: So do I take it that you are abandoning
5 ground of inconsistency because I'd like my notes to be quite
6 clear what you are saying. If you say the evidence of the
7 witnesses was inconsistent, then I am afraid you'll have to
8 identify the portions of the evidence that you find
9 so I can look at my notes and go on. But if you want to
10 it and go to credibility that's a different course.

11 MR GRAHAM: Very well, Your Honours. I think that the
12 preferred course would be to base the grounds of my argument -

-

13 JUDGE KING: On credibility.

14 MR GRAHAM: -- on credibility.

14:17:58 15

15 JUSTICE KING: Thank you very much. Right. Yes.

16 MR GRAHAM: Yes, Your Honours. And so it's our humble
17 submission that the credibility of TF1-334, who was a key
18 Prosecution witness, insofar as the events in Bombali was
19 concerned, was not credible.

14:18:14 20
Chamber

Your Honours, the appellant submits that the Trial

21 erroneously assessed the Prosecution evidence relating to the
22 killings in the mosque at Karina. For example, Your Honours,
the
23 evidence of Prosecution witness TF1-334 was that the first
24 appellant killed the Imam and several other persons in the
14:18:34 25 mosque.

26 Your Honours, the Defence called the Imam who appeared
27 before the Trial Chamber as a witness. He testified that at
the
28 time of the attack in Bombali he was not in Freetown and that
--
29 he was not in Bombali but then was in Freetown.

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1 The Trial Chamber's finding to that effect was that even
2 though -- Your Honours before I go on, I will mention that
3 another Prosecution witness, TF1-033, also testified before
this
4 Court that about 300 --

14:19:28 5 JUSTICE KING: TF what?

6 MR GRAHAM: TF1-033.

7 JUSTICE KING: Thank you. 033.

8 MR GRAHAM: Yes.

9 JUSTICE KING: TF1-033.

14:19:41 10
witness,

JUSTICE FERNANDO: Before you proceed to the next
11 wasn't there a clarification as to who they meant by Imam?

12 MR GRAHAM: Well, when TF1-334 testified, he said that
13 Imam, the first appellant shot and killed the Imam at the
mosque.

14 We brought the Imam here to testify before this Trial Chamber
and

14:20:01 15 that established clearly that the Imam -- I mean, the de jure
16 Imam of the mosque at the time was in Freetown but the Trial
17 Chamber's finding in respect of that evidence was that it
18 established that whoever was leading the prayers in the church
at

19 that time was the one that the witness was referring to as the
14:20:17 20 Imam. It was on that basis that they found the first
appellant
21 guilty in that regard.

22 JUSTICE KING: What do you have to say to that?

23 MR GRAHAM: Your Honours--

24 JUSTICE KING: That, in fact, the Trial Chamber as far
as

14:20:30 25 they understood the evidence --

26 MR GRAHAM: Yes.

27 JUSTICE KING: -- the person that was called the Imam
might

28 not necessarily be the Imam that's recognised as Imam.

29 MR GRAHAM: Yes.

1 JUSTICE KING: But the person who was conducting the
2 prayers; were they wrong in coming to that conclusion?

3 MR GRAHAM: Yes, Your Honours, I believe so.

14:20:53
a

4 JUSTICE KING: Why do you believe so? If they killed
5 somebody who was conducting the prayers, if it's proven that's
6 fact, that they killed this person who was conducting prayers,
7 what difference does it make whether he is called Imam or he
8 called by some other name?

is

9 witnesses.

14:21:06
in

10 We, the Defence called in the witnesses also from Bombali, who
11 were also present at the time this event happened. We called
12 the assistant session speaker, who was present in Bombali.
13 were there.

They

14 JUSTICE KING: To say what?

14:21:20

15 MR GRAHAM: Sorry, in Karina, and he testified.

16 JUSTICE KING: To say what?

time.

17 MR GRAHAM: One or a number of people were killed but
18 definitely not the one who was leading the prayers at the
19 That was the evidence that was given before this Court.

14:21:34
was

20 JUSTICE KING: Was there any evidence that the one who
21 leading the prayers was killed?

22 MR GRAHAM: Well, the only evidence that was led to that
23 effect was the one given by TF1-334. Your Honours, that was
not
24 corroborated by any other witnesses.

14:21:49 25 JUSTICE KING: Does it have to be corroborated? It's
again
26 a question of who the Trial Chamber believed. After all, we
were
27 not there. They are the ones, the trial -- the Judges were
28 there, they observed the demeanour of the witnesses, how they
29 gave their evidence and so on. They were able to evaluate,
from

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1 all the circumstances before them, the credibility of that
2 particular witness. Is there anything wrong with that kind of
3 procedure?

4 MR GRAHAM: Well, generally no, Your Honours. Your
14:22:18 5 Honours, one of the submissions that -- one of the grounds on
6 which we've appealed was that the Trial Chamber unduly gave
7 preference to the evidence of the Prosecution witness as
opposed
8 to that of the Defence.

9 JUSTICE FERNANDO: What do you mean by "unduly"?

14:22:37 10 MR GRAHAM: Well, Your Honours, if you take the evidence
in

11 relation to the events that occurred at -- in relation to the
12 events that occurred --

13 JUSTICE KING: Sorry, go ahead.

14 MR GRAHAM: -- in relation to the events that occurred
at

14:22:52 15 Bombali, for example, we heard the Prosecution's evidence is
16 entirely set out by the evidence of TF1-334. It was also
17 supported in divers ways by the evidence of TF1-167.

18 Your Honours, we also, the Defence also called witnesses
19 who were also in Karina at the time, who were there as at the
14:23:18 20 time the attack took place. They ran out into the bush and
they

21 came back into Karina soon after the fighting forces left.

22 And as we are saying, in the course of the judgment, the
23 Trial Chamber made no comments whatsoever with regards to the
24 evidence that was adduced by the Defence in this regard, as to
14:23:35 25 whether the credibility of the Defence witnesses was in doubt
or

26 otherwise. No findings or comments whatsoever were made on
the

27 evidence that was adduced by the Defence in this regard, and
that

28 is one issue that I think -- that we think that we need to
draw

29 the Appeals Chamber's attention to.

1 And, Your Honours, following after that is also the
2 evidence that was given by Prosecution witness TF1-033. Your
3 Honours, TF1-033 testified that about 300 civilians were
killed
4 in Karina and about 200 were amputated.

14:24:17 5 JUSTICE FERNANDO: 300 were killed.

6 MR GRAHAM: 300 were killed and 200 amputated.

7 JUSTICE KING: [Microphone not activated]

8 MR GRAHAM: Your Honours, I can't hear you well.

9 JUSTICE KING: Sorry, did he say who did the
amputations?

14:24:39 10 MR GRAHAM: No, he didn't mention that but, according to
11 the evidence that was given, these atrocities were committed
by
12 the fighting forces who were under the command of the first
13 appellant.

14 JUSTICE KING: Very well.

14:24:49 15 MR GRAHAM: Yes. And, Your Honours, we are saying that
the
16 evidence of 033 is open to the question of credibility simply
17 because -- Your Honours, it raises serious issues of
credibility
18 because, Your Honours, the Defence also called in witnesses.

We
19 called in the, as I said, the session, the session speaker,
who

14:25:18 20 was in Karina as at the time the attack occurred. We also
called
21 in one of the local boys who testified, DBK-094, and the

22 assistant session speaker is DBK-089.

23 Your Honours, they were in Karina as at the time the
attack
24 occurred. They escaped and went into the bush. And indeed,
in
14:25:43 25 the case of DBK-094, he was able to see and observe the events
26 that were taking place in Karina from his hiding point. They
27 moved in further into the bush when they saw that the fighting
28 forces I think were moving around trying to locate some of the
29 residents of Karina. They were there and when the fighting

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1 forces left they soon after came back into the town of Karina.
2 Soon after the fighting forces had left. And they testified
as
3 to what they saw. The number of bodies that were killed, the
4 number of houses that were on fire and, Your Honours, the
14:26:15 5 evidence was clear, at least from the Defence perspective,
that
6 it was nowhere near 300 people being killed and 200 being
7 amputated. It was nowhere near.

8 Indeed, they did give evidence that there are two mass
9 graves in Karina and these mass graves, the seven people who
were

14:26:32 10 killed as a result of the attack, were buried in there.
Indeed,

11 this evidence was even corroborated by --

12 JUSTICE KING: Before you go to corroboration, you
13 submitted that the evidence of TF1-033 was not credible
because;
14 you didn't tell us because of what?

14:26:47 15 MR GRAHAM: Yes. Your Honours, his evidence was not
16 credible because Prosecution witnesses, witnesses, witness
that
17 was called by the Prosecution, his account of the events in
18 respect of a number of people who were killed greatly
contradicts
19 the evidence that was given by TF1-033 and I will refer to the
--

14:27:08 20 JUSTICE KING: Wait a minute, you are going too fast. I
21 [indiscernible] want to look at it as we go along. Suppose
one
22 witness goes to the witness box and swears that so many people
23 were killed without giving any number, and so many people were
24 amputated, and another one goes to the witness box and says
300

14:27:28 25 were killed, 200 were amputated, and another one goes to the
26 witness box and says 100 were killed, 50 were amputated. In
27 respect of the proof of offence of the crime, does the Trial
28 Chamber have to say: I agree with the number or what do they
29 have to find whether in fact a certain number of people were

1 killed and/or amputated?

2 MR GRAHAM: Well, Your Honours, I think that in the
3 circumstances the determination will have to be whether the
4 evidence that was given as to the number of people that were
14:28:03 5 killed is true or not. I think that should be the undertaking
of
6 the Court.

7 JUSTICE KING: What is the pith of the crime? The pith
of
8 the crime is unlawfully killing people and amputating. Is the
9 emphasis on the number of people killed, that there should be
14:28:19 10 uniformity in the evidence as regards the number? Did they go
one
11 out and say: Okay, now I'm going to count the bodies one-by-
12 and so on and so forth?

13 MR GRAHAM: That is so, Your Honour.

14 JUSTICE KING: The practical side of it, does it make
sense
14:28:29 15 to say that we, you know, after these troubles in the heat of
all
16 these happenings and so on, some witness would have gone there
to
17 count the body one-by-one and say: All these are dead and
these
18 are the ones who had their hands amputated, because that is
where
19 you are laying your emphasis.

14:28:43 20 MR GRAHAM: Your Honours, in the evidence that is
exactly

Honours,
led
dead.

21 what DBK-089, who was assistant session speaker -- Your
22 after the attack, those who were in hiding came in and they
23 evidence that they were responsible for the burying of the

24 JUSTICE KING: Yes.

14:28:58

25 MR GRAHAM: And I am saying that in their evidence the
26 numbers that were given is way, I mean, in terms of numbers,
27 is --

the
number

28 JUSTICE AYoola: Well, it's a question of understanding
29 significance of your submissions. Are you saying that the

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event

1 is a material factor, or are you saying that the event never
2 occurred? What exactly are you saying? Are you saying the
3 never took place or are you saying although it took place, the
4 number was exaggerated? Which one?

14:29:35
that

5 MR GRAHAM: That is our submission. Our submission is
6 the events took place but the numbers that were given were
7 grossly exaggerated and that goes to the credibility of --

8 JUSTICE AYoola: How is that material?

9 MR GRAHAM: Your Honour, My Lords, I believe that goes
to
14:29:47 10 the credibility of the witness because five witnesses --
11 JUSTICE KING: Excuse me, it will go to the credibility
if,
12 in fact, nobody was killed, nobody was amputated. You see,
the
13 numbers, as my brother has asked you, it's not the material
14 thing. The material thing is were people killed? Were people
14:30:07 15 amputated? Who caused the killing and the amputations? That
is
16 the crux of the matter.
17 MR GRAHAM: Very well, Your Honours.
18 Your Honours, before I go on, it is our humble
submission
19 that the evidence that was given by the Prosecution, in regard
of
14:30:28 20 the command responsibility for the first appellant in this
21 matter, was entirely based on the evidence of TF1-133. And
22 further on, Your Honours, it's also interesting to note that
the
23 account of Prosecution witness TF1-157 also differs from the
24 evidence of Prosecution witness TF1-133.
14:31:05 25 Prosecution witness TF1-157 testified that he saw the
26 rebels burn two houses and that he saw two people mutilated.
27 And, Your Honours, that is in the transcript of 22 July 2005
at
28 page 101, lines 8 to 17.
29 JUSTICE KING: 22 July of which year?

1 MR GRAHAM: I didn't hear, Your Honour.

2 JUSTICE KING: 22 July of which year?

3 MR GRAHAM: 22 July of 2005.

4 JUSTICE KING: Thank you.

14:31:35
Honour,

5 MR GRAHAM: At page 101, lines 8 to 17. And, Your

6 also, Prosecution witness TF1-055 was also called by the

at

7 Prosecution. He also testified that he saw two people killed

was

8 the mosque. His version differs from all the accounts that

9 given by the other Prosecution witnesses. That is also

14:32:04

10 significant because he was also a native of Karina.

11 What we have here is that we have completely different

12 versions of the events that transpired in Karina that day.

and,

13 Different versions given by different Prosecution witnesses

you

14 Your Honours, we believe that that goes to the credibility,

14:32:23
by

15 know, of the account of the events, insofar as they were given

16 the Prosecution witnesses.

17 Your Honours, the Defence produced three witnesses from

18 Karina, the Imam, who was DBK-095, who was supposedly killed

assistant

19 according to witness TF1-133, a local boy, DBK-094, and

14:32:46

20 session speaker DBK-089.

that
called
Chamber,
soon
14:33:08
Karina,
that

21 Your Honours, the crux of the Prosecution's case was
22 these killings took place in the mosque. When the Defence
23 in the Imam, and the Imam gave evidence before the Trial
24 in the course of the cross-examination, the Prosecution, as
25 as it was established that there was only one mosque in
26 the Prosecution introduces the possibility that atrocities did
27 not take place at the mosque but then it took place at a place
28 called Dawase.
29 Your Honours, Dawases are like small places of worship

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case.
at
14:33:39

1 I think you have in the rural and local community in Sierra
2 Leone. So it's very clear that, Your Honours, the Prosecution
3 itself, didn't feel very strongly about the strength of its
4 It was shifting grounds.
5 At one point in time they said the atrocities took place
6 the mosque in Karina. On one hand, they were also saying that
7 atrocities took place at a wasi, also in Karina. Your Honour,

of 8 the witness went on to describe what a wasi is, in the course
events 9 the cross-examination, and it became very clear that the
14:33:59 10 which were the subject matter of the killings took place only
at 11 the mosque. And, as I said earlier on, there are different
12 accounts. The Prosecution witnesses themselves have given
13 different accounts as to what happened at the mosque on that
day.

Trial 14 Your Honour, we submit that it was important that the
14:34:20 15 Chamber give some deference at least to the evidence that was
of 16 given by the Defence witnesses. I said that in the judgment
analysis 17 the Trial Chamber, no reference whatsoever was made, no
Defence 18 whatsoever was made of the evidence that was given by the
19 witnesses as to whether the Trial Chamber found that they were
14:34:39 20 not credible, or for whatever reason. I mean, no reasons were
21 given whatsoever.

at 22 And, Your Honours, we say this because we believe that
23 least some consideration should have been given by the Trial
24 Chamber to the evidence that was given by the session speaker,
14:35:10 25 for example, who was in Karina as at the time the events took
26 place, who went into hiding and came back soon into the Karina
27 Town after the fighting forces left.

also 28 Secondly, Your Honours, it is also very important to
29 realise that evidence was led before this Court that, as at
the

1 time that the fighting forces were in Karina, the ECOMOG Alpha
2 Jets were also flying over. Evidence was led in this Court
that
3 ordinances and bombs were dropped on Karina as at the time the
4 fighting forces were present in Karina at the time.

14:35:51 5 The evidence that was led before this Court was to the
6 effect that the invasion of Karina was very swift. The
troops,
7 they didn't spend that much time in Karina because of the fact
8 that there were also Alpha Jets also flying over and I think
also
9 attacking them whilst they were in Karina. Evidence was led
to
14:36:13 10 that effect by the Defence witnesses.

11 Your Honours, the effect, the sum of our arguments, of
our
12 submissions in respect of this fourth ground of appeal, which
13 relates to the command responsibility of the first appellant,
is
14 that the Prosecution's evidence, in our humble opinion --

14:36:39 15 JUSTICE KING: In your humble submissions.

16 MR GRAHAM: Sorry, Your Honours, in our humble
submission,
17 did not establish all the elements of command responsibility
so

18 as to ground a finding by the Trial Chamber that the first
19 appellant could be held responsible for the actions of his
14:37:04 20 subordinates.
21 Your Honours, I will move on to the fifth ground of
appeal
22 which also relates to the individual responsibility of the
first
23 appellant in respect of the crimes of murder and extermination
of
24 civilians in the Bombali District.
14:37:24 25 Your Honours, it is our submission that the appellant,
in
26 his case, said that he was never in the Bombali District and
that
27 he did not commit the offences of murder and extermination
within
28 the period under reference.
29 The appellant submitted that between the period 1 May
1998,

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Bockarie.

1 and July 1998, he was under arrest at Kailahun by Sam
2 This fact is corroborated by Defence witnesses DAB-059 and
3 DAB-142. Your Honour, Prosecution witness TF1-055, who was in
4 Karina at the time of the attack, and this is a Prosecution

14:38:09 5 witness, does not mention anything about the first appellant.
He

6 did not give any evidence to the effect that he either saw or
7 witnessed the first accused committing any crimes.

8 In this regard, the Trial Chamber also relied
exclusively

9 on the evidence of TF1-133. It is also significant, Your

14:38:43 10 Honours, that TF1-055, who was a Prosecution witness,
testified

11 that he and other villagers buried five people including those
12 killed at the mosque in the same place, in the mass grave.

13 Your Honour, this is significant because Defence
witness,

14 the Defence witnesses that we mentioned earlier on, DBK-094
and

14:39:08 15 DBK-089, who were all residents of Karina, also similarly
16 testified that after the fighting forces left, and they came
back

17 to Karina, they also assisted in the burying of their dead and
by

18 their account seven people were buried that morning. They
were

19 there in the morning. They never mentioned anything about 200
14:39:31 20 people being killed.

21 Your Honours, witness TF1-033, and before I go there I
22 refer to the evidence of Defence witness, I think DBK-001, who
23 was also a resident in Gbonia, at the time. He was amputated
by

24 the fighting forces.

14:39:54 25 Your Honour, he was in this Court, he testified before
this

26 Court, he mentioned the names of those who attacked his house
and

27 once again he mentioned the name Adama Cut Hand. He mentioned

name 28 Olangba and a host of other names. Never did he mention the
29 of the first appellant. He was questioned as to his position,

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appellant 1 his vision, his ability to observe and see those who attacked,
2 and he was very clear on that. Nowhere was the first
the 3 mentioned. His presence in Karina was principally based on
4 evidence of TF1-334 and TF1-167.

14:40:36 5 Your Honour, it is our humble submission that the
and 6 Prosecution's exclusive or almost, I mean reliance on TF1-133
Your 7 TF1-167 raises very serious issues for the Defence because,
evidence, 8 Honours, if we evaluate TF1-334, in the course of the
this 9 the Defence called a number of witnesses, Your Honours, and

14:41:08 10 [indiscernible] us to the credibility of TF1-334.

this 11 JUSTICE KING: But before you go to the credibility,
the 12 morning we heard the Prosecution side submitting to us that

attack

13 Trial Chamber found that the first appellant ordered the

14 on Karina. What do you have to say with regard to that?

14:41:28 15

MR GRAHAM: Your Honour, it is our submission that the
16 finding is against the weight of the evidence that was adduced
17 before the Trial Chamber. That is our submission. We were
18 saying that principally because we are saying that the

evidence

19 of the Prosecution relied entirely on the evidence of TF1-133,

as

14:41:51 20

is the case with all the other counts in the indictment.

21 JUSTICE KING: But are you saying that there was no
22 evidence that your client, the first appellant, ordered the
23 attack on Karina?

given

24 MR GRAHAM: Well, Your Honours, the evidence that was

14:42:10 25
on

was given by TF1-133 and that was the evidence that was relied
26 by the Trial Chamber.

27 JUSTICE KING: So there is evidence?

28 MR GRAHAM: Yes, insofar as the evidence of TF1-133 --

29 JUSTICE KING: Thank you.

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said 1 MR GRAHAM: -- is concerned. But our submission as I

2 earlier --

3 JUSTICE KING: I got your submission.

4 MR GRAHAM: Okay, thank you. And it is also our
submission

14:42:30 5 that the appellant was not even in Karina, according to his,
he

6 was not even in Karina as at the time of the attack, and that
he

7 was in Kailahun during the attack on Karina.

8 Your Honour, I was coming back to the point of the
issues

9 that we have with the Prosecution's reliance, if I may use the

14:42:57 10 word, absolute reliance on the evidence of TF1-333 on which
basis

11 the Trial Chamber made their findings.

12 Your Honours, we led evidence before this Court
regarding

13 TF1-333, extensive evidence regarding TF1-333 when he was in

14 Pademba -- sorry, TF1-334, I'm sorry, Your Honours, TF1-334 --
we

14:43:21 15 led extensive evidence before this Court. We indeed, in the

16 course of our evidence, we described them as the witnesses of

17 fortune. Your Honours, simply as witnesses of fortune because

18 extensive evidence was led by Defence witnesses, who were with

19 them in Pademba Prison, to establish the fact that whilst they

14:43:41 20 were there people from the Special Court came in there and
even

21 these were witnesses who were testifying. They were lured.

22 Offers were made to them by people from the Special Court to
come

23 and testify against the appellants. I mean, extensive
evidence

24 was given. Evidence was given, Your Honour, this evidence was
14:43:58 25 not challenged in its entirety by the Prosecution and it
wasn't
26 only one witness. It was, I think we called almost about two
or
27 three witnesses in that regard, and extensive evidence was
given.
28 There was also another Prosecution witness, I think TF1-
184
29 who also happened to be in the same room with one of the
Defence

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before 1 witnesses, and there was abundant evidence that was laid
was 2 the Trial Chamber that these witnesses, particularly TF1-334
They 3 offered money. Evidence was given as to their lifestyle.
going 4 were being taken out to meet their girlfriends. They were
14:44:43 5 and coming out with chicken, fried rice, and all the things
that
became 6 people who were in prison were being deprived of, and it
7 very clear that there was an attempt to try to influence the
8 evidence that was to be given before this Court against the
first

9 appellant.

14:44:58 10 And, Your Honour, we felt that it was important that at
11 that.
12 least the Trial Chamber should have made some findings on

13 In the course of the judgment not a word was made or mentioned
14 about the -- with regard to the evidence that was given in
15 relation to TF1-334.

14:45:17 15 Your Honour, our concern is that if the bulk, the
16 fulcrum
17 of the Prosecution's case is based on TF1-334 and evidence,
18 abundant evidence has been led to the effect that he had other
19 motives, apart from coming to this Court to come and speak
20 sincerely and honestly before this Court, and we believe that
21 is

14:45:36 22 a matter that ought to be brought to the attention of this
23 Honourable Appeals Chamber at this point in time.

24 JUSTICE KING: What were the other motives that he had?

25 MR GRAHAM: Well, Your Honours, we believe that in the
26 light of the evidence that was given, and the offers that were
14:45:52 27 given to the Defence witnesses who testified, it became clear
28 that they were being engaged to come and testify before the
29 Special Court to come and say something else otherwise than
30 the
31 truth, and that was the evidence that was led before the
32 Tribunal.

1 JUSTICE KING: Did they refer to it or follow it? And
read 2 it [indiscernible].

3 MR GRAHAM: Just a second, my co-counsel would get some
4 support in that regard.

14:46:44 5 Your Honours, we will get you those references sooner or
6 later. There is definitely more than the one witness who
7 testified before this Court in that regard; very very
extensive 8 evidence.

9 JUSTICE KING: Very well.

14:47:07 10 MR GRAHAM: Your Honours, I believe it should be
possible 11 to let you have those references even after I complete my
12 submissions.

13 JUSTICE KING: Well, I want to follow your submissions
so 14 that we will make up our minds as we go along. When you say
14:47:21 15 abundant evidence --

16 MR GRAHAM: Yes.

17 JUSTICE KING: -- that that witness TF1-334 had other
18 motives and all that sort of thing, you know, you should give
the 19 examples.

14:47:34 20 MR GRAHAM: Yes.

21 JUSTICE KING: What are these motives and so on. Where
is 22 it in the record that it was shown that witness had other

23 motives, either under cross-examination or, even if it's
24 cross-examination of any other witness and so on, but you have
14:47:49 25 not identified, you have not supported your submission from
saying 26 anything on the record, or the judgment. That is why I'm
You 27 that as we go along, first, we should be able to follow you.
28 must, that was done this morning by Dr Staker. I mean, he was
evidence 29 referring to the relevant portions of the record of the

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1 and so on, so we were able to see what he was --
2 JUDGE AYoola: Mr Graham, maybe it will save a lot of
time 3 if you refer to paragraphs 126 and 127 of the judgment because
4 you gave the impression that the Trial Chamber did not
consider 5 all these facts. Look at paragraphs 126 and 127.
14:48:27 6 MR GRAHAM: Yes, Your Honours. I have the 126 and 127.
My 7 Lords, 126 deals with incentives for --
8 JUSTICE AYoola: You said this witness is what, being
taken 9 out, given chicken and so on.

14:49:03 10 MR GRAHAM: Yes, Your Honour. This was a period prior
to
11 their coming on board as witnesses for the Special Court.
This
12 was the period prior to their coming on as witnesses for the
13 Special Court. The evidence was that whilst they were in
there
14 at Pademba Road prison.

14:49:19 15 JUSTICE AYoola: Let's -- don't let's beat around the
bush.

16 Read 127. What does it say?

17 MR GRAHAM: "With regard to alleged financial incentives
18 the cost of allowances necessarily and reasonably incurred by
19 witnesses as a result of testifying before a Chamber, are met
by

14:49:33 20 the Special Court in accordance with the practice direction
and
21 allowances for witnesses and" --

22 JUSTICE AYoola: No, 126.

23 MR GRAHAM: Sorry, My Lord.

24 "The Defence alleges that the evidence of some of the
14:49:45 25 Prosecution witnesses is suspect because they allegedly
received

26 incentives to testify against the accused such as financial
27 incentives or the promise of relocation to another country."

28 JUSTICE AYoola: Then jump to 130.

29 MR GRAHAM: "Accordingly, the Trial Chamber has not
given

1 any undue weight to these alleged incentives when assessing
the 2 credibility of the witnesses in question."

3 JUSTICE AYoola: So the Trial Chamber did not ignore
your 4 submissions on those points?

14:50:23 5 MR GRAHAM: Well, Your Honours, my submission in this
Trial 6 regard is that the paragraph 130 reads: "Accordingly, the
7 Chamber has not given undue weight to these alleged incentives
8 when assessing the credibility of the witnesses in question."

9 Your Honours, that is the finding of the Trial Chamber,
but

14:50:48 10 it is our humble submission that the extensive nature of the
Defence 11 evidence that was given before this Trial Chamber, by the
12 witnesses, the extensive nature of the evidence that was given

13 the Defence witnesses before this Trial Chamber, Your Honours,
it

14 is our humble submission that the findings that the Trial
Chamber

14:51:15 15 made in that regard was completely against the weight of the
16 evidence. It falls entirely within the authority of the Trial
17 Chamber to make that determination. That is exactly why we
are 18 on appeal.

19 JUSTICE AYoola: What standard of review are you asking
us

14:51:32 20 to adopt?

in
21 MR GRAHAM: Well, Your Honours, our submission is that
22 the -- just a second, Your Honours. Your Honours, it is our
23 submission that no weight at all was given by the Trial
Chamber
24 in respect of the evidence that was given by the Defence
14:52:29 25 witnesses in regard of this very particular matter.

26 JUSTICE KING: What is this very particular matter?

27 MR GRAHAM: The issue of the evidence given by the
Defence
28 witnesses as to the TF1-334. Evidence was given to the effect
29 that, Your Honours, they even contacted some of these
witnesses

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1 directly and tried to lure them.
2 JUSTICE KING: Well, that is what my brother has
referred
3 you to, the relevant portion of the judgment, where the Court
4 considered your submissions about incentives, and the Court is
14:53:06 5 pointing out that if, in fact, by that you are saying that
these
6 people were paid a certain sum of money to come, that is
provided
7 for in the practice directions and so on.

at 8 MR GRAHAM: Your Honours, my -- our submission was that
They 9 this point in time, these persons had not become witnesses.
14:53:24 10 were in the process of being recruited. The practice
direction 11 applies to witnesses who have been taken on by the WVS as
12 official witnesses, either for the Prosecution or the Defence,
13 but this was a period prior to their recruitment as witnesses.
there 14 JUSTICE KING: Well, the Trial Chamber was saying if
14:53:42 15 was anything at all that they were paid, they were paid quite
16 properly under the provision in this practice direction. You
17 see, even if you led evidence with regard to these so-called
18 incentives, given chicken and all that sort of thing, the fact
19 that the Trial Chamber came to that conclusion shows that they
14:54:02 20 did not believe that submission that, in fact, these witnesses
21 were bribed, as it were, to come and give evidence.
22 I mean it is within --
23 MR GRAHAM: Very well.
to 24 JUSTICE KING: -- the jurisdiction of the Trial Chamber
14:54:15 25 evaluate the totality of the evidence and to come to a
reasonable 26 conclusion. Unless you can -- I will wait for you to be
27 finished. Unless you can show that the Trial Chamber came to
an 28 unreasonable conclusion, which no reasonable tribunal can come
29 to, how do you expect us to reverse them?

submitting 1 MR GRAHAM: Well, Your Honours, all that we are

weight 2 before the Honourable Appeals Chamber is that very little

3 was given by the Trial Chamber in respect -- regarding the
4 evidence that was given. I mean, that is our submission.

14:55:00 5 We do recognise that findings were made by the Trial
6 Chamber in that regard after --

7 JUSTICE KING: Well, excuse me. This -- is it wrong to
8 give very little weight to evidence that in the opinion of the
9 Trial Chamber is not credible? That is the whole point. I
mean,

14:55:16 10 credible evidence you will give weight. Evidence that is not
11 credible is almost useless and you give very little weight to
12 that type of evidence; isn't that the legal position?

I 13 MR GRAHAM: That is so, My Lord. That is so. My Lords,
14 will move on.

14:55:38 15 Your Honours, I will conclude my submissions in regard
of 16 this fifth ground of appeal relating to the individual
criminal 17 responsibility of Brima, the first appellant in this matter,
in 18 respect of the atrocities committed in Bombali. We rely on
our 19 written submissions made in this regard, which was filed on

14:56:12 20 September 7th, 2007.

21 Your Honours, I am looking at the time. I think that I
22 advise myself by moving on to the twelfth ground of appeal
which
23 relates to sentencing.

24 Your Honours, in respect of this ground of appeal, our
14:56:42 25 submission, our ground of appeal is that the Trial Chamber
erred
26 in law and in fact by imposing a global sentence of 50 years
on
27 the accused, which is excessively harsh and disproportionate
and
28 not in accordance with the sentencing practice and guidelines
of
29 the ICTY and the ICTR.

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1 Your Honours, it is our submission that a sentence of 45
2 years is excessively harsh and --

3 JUSTICE KING: How many years did your client get?

4 MR GRAHAM: 50 years, sorry, Your Honours.

14:57:19 5 JUSTICE KING: You said 45.

6 MR GRAHAM: 50 years.

7 JUSTICE KING: Well, you said 45 years [indiscernible].

8 MR GRAHAM: 50 years.

9 JUSTICE KING: [Indiscernible].

14:57:31 10 MR GRAHAM: It's 50 years, Your Honour. 50 years. Your
11 Honours, we submit that a sentence of 50 years is excessively
12 harsh, if considered within the context of the totality of the
13 factual and legal findings in comprising to other cases of
even
14 more serious nature that attracted lesser sentences in the
ICTR
14:57:53 15 and the ICTY.

16 Your Honour, in the case of the -- the Trial Chamber in
the
17 sentencing judgment, the Trial Chamber stated as follows, and
18 this is in page 13, paragraph 33 of the sentencing judgment.
19 And, Your Honours, with your kind permission I read, and it
14:58:14 20 states as follows:

21 "The Trial Chamber will also consider the sentencing
22 practice of the ICTY as its statutory provisions are
23 analogous to those of the Special Court and the ICTR.
The

24 Trial Chamber is therefore guided by the sentencing
14:58:29 25 practices at both the ICTR and the ICTY. The sentence
of

26 50 years as imposed on the accused by the Trial Chamber
27 compared to the ICTY and ICTR sentencing practice is
unduly
28 harsh."

29 Your Honours, it is our submission that if we refer to -
-

1 just a second, Your Honours. It is our humble submission that
2 the mitigating circumstances adduced by the appellant should
have
3 been given more weight in order to mitigate or reduce the high
4 sentence given --

14:59:06 5 JUSTICE KING: Let me ask that question again.

6 MR GRAHAM: Thank you, Your Honours.

7 JUSTICE KING: Could you please list to us all the
8 mitigating circumstances because that is very relevant.

9 MR GRAHAM: Thank you, Your Honour. Just one second.

14:59:24 10 Well, Your Honour, we -- the issue is his personal and
11 family circumstances and their lack of prior conviction and
the
12 fact that the accused was also -- has a medical poor health,
he
13 has a medical problem as well. And these are the three key
14 mitigating circumstances.

14:59:44 15 JUSTICE KING: And you think those are mitigating
16 circumstances in law? If, in fact, for the purposes of
argument
17 we say that, and I stress for the purposes of argument only, I
am
18 not saying that that is so, I'm saying for the purposes of
19 argument, that the Prosecution prove their case and the Trial

15:00:06 20 Chamber were right in finding the accused guilty, on the
counts
21 of the indictment for which they were found guilty, you are

no 22 saying that the fact that they are family men, that they had
23 previous convictions are mitigating circumstances when some of
24 the offences alleged, that they cold bloodedly killed people,
15:00:27 25 cold bloodedly amputated them; this morning, the Prosecution
was
showing 26 even giving a case of one of the accused persons who was
talk 27 those gathered around how to carry on an amputation and you
28 about those things as mitigating circumstances?
29 MR GRAHAM: Very well, My Lords. Our submission is that
in

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given 1 the light of the circumstances, that the charges in the counts
2 that the first appellant faced, the convictions that were
3 by the Trial Chamber, in respect of the indictment, it is
4 important that submissions are made by way of -- it's a plea
for 5 leniency or for any form of consideration at all.
15:01:24 6 JUSTICE KING: You see, Mr Kojo Graham, we are the
7 appellate chamber, the highest appellate tribunal in this
place 8 and, therefore, I would like you to quote legal authorities

9 wherein those circumstances, the set of conditions you
mentioned,
15:01:45 10 can be deemed to be mitigating circumstances. I do not want
to
11 use that -- the word "irrelevant," the examples you have given
12 us. When you consider the horrendousness, if they are
believed
13 that they did those things, you talk about mitigating
14 circumstances? Cold bloodedly sending a child at gunpoint to
go
15:02:07 15 into a burning house, so that that child will be killed and
you
16 talk about mitigating circumstances of having a family? If
that
17 evidence is believed and that child was killed, what do you
say
18 about that?

19 JUSTICE AYoola: Before you react to that, let me -- my
15:02:27 20 understanding is that the appellate tribunal will not
substitute
21 its discretion for that of the Trial Chamber, interference
with
22 sentence or sentencing will be from established principles.
You
23 have not referred to those established principles. You have
been
24 addressing this Chamber as if we are sentencing afresh. You
are
15:02:57 25 asking us to review the sentences passed by the Trial Chamber
and
26 we must be guided by principles.

27 MR GRAHAM: That is so, Your Honours. Your Honours, I
28 think that in our written submissions we've indeed given some
29 authority and references relating to our grounds of appeal, in

1 relation to the sentencing, in our written submissions.

which

2 JUSTICE AYoola: So, in summary, what is the basis on

have

3 you are inviting us to interfere? My impression is that you

Trial

4 been asking us to substitute our discretion for that of the

15:03:41

5 Chamber.

6 MR GRAHAM: No, Your Honours, that is not entirely the

in

7 case. Your Honours, the idea was to refer to comparative

8 sentences that have been given by both the ICTR and the ICTY

9 respect of similar convictions and the idea is to draw the

15:03:57

10 Honourable Appeals Chamber to the practice at the ICTR and the

years

11 ICTY, just to highlight the point that the sentence of 50

12 that was imposed by the Trial Chamber was a bit too harsh

13 comparatively. That is just the essence of our arguments, My

14 Lords.

As

15:04:18

15 JUSTICE AYoola: Who is to be the judge of harshness?

at

16 the President has been pointing out to you, each case, still

particular

17 the end of the day, each case has to be decided on its

18 gravity.

19 MR GRAHAM: I do agree with that, Your Honours, but Your
15:04:36 20 Honours, I believe that also as lawyers we also, in the light
of
21 the circumstances, we are simply drawing the attention of the
22 Court, you know, if nothing at all for persuasive effect, to
23 existing practice in the ICTR and the ICTY jurisdiction, just
for
24 the consideration of the Appeals Chamber.

15:05:04 25 We are in no way asking the Appeals Chamber to
substitute
26 or to substitute the discretion of the Trial Chamber with that
of
27 the Appeals Chamber. That is not our submission this
afternoon.
28 We are simply trying to draw your attention to the fact that
the
29 first appellant was given 50 years as a global sentence and
that

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1 in other jurisdictions at the ICTR and the ICTY that similar
2 convictions along those lines, accused persons received lesser
3 sentences. Those are the submissions that we are making
before
4 this Court.

15:05:38 5 JUSTICE KING: You see, the way I see it, Mr Graham, you
6 talk about mitigating circumstances. The Trial Chamber Judges
7 evaluated the evidence, came to certain conclusion. They, in
8 fact, pinpoint certain pieces of the evidence, like the
9 Mansofinia address, the declaration, fearful, clear the area,
15:06:01 10 minus you, plus you. You talk about mitigating circumstances.
11 Are not those examples aggravating circumstances, justifying
the
12 kind of sentences that were passed? I would like to hear your
13 view on this.
14 MR GRAHAM: Your Honours, I think you are entirely
right,
15:06:18 15 and I think that the Trial Chamber in also passing the
sentence I
16 think did undertake similar considerations. Your Honour, as I
17 said, we are simply referring to, if you take for example the
18 case of Akayesu --
19 JUSTICE KING: Forget about the case of Akayesu because
in
15:06:39 20 any case, at most, they are not binding on us. That, at most,
it
21 is merely persuasive. But let's take the evidence that
happened
22 in this place. Let's take the evidence itself. People were
cold
23 bloodedly amputated. Cold bloodedly murdered. They were put
in
24 houses. The houses were lit. They were trying to come out.
15:07:00 25 They went in there and you talk about mitigating circumstances
in
26 those regards, in that type of case?
27 MR GRAHAM: My Lord, I believe I have moved on from --

am

28 JUSTICE KING: I don't care whether you've moved on. I

29 asking you a question in this regard because we are here on

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1 appeal.

2 MR GRAHAM: Yes, My Lord.

3 JUSTICE KING: And, therefore, we have to look at the

4 grounds of appeal that you have brought here, and you have

15:07:20
about

5 advised yourself to appeal against sentence. And you talk

6 mitigating circumstances and the mitigating circumstances that

7 they had no previous conviction. So, if I didn't have any

8 previous conviction, I can take the most horrendous, brutal

9 crimes, that one -- that imaginable and then you come to this

15:07:38
fact,

10 Tribunal to say it's a mitigating circumstance because, in

11 they had never been convicted before. Well, I never.

12 MR GRAHAM: Your Honours, I agree with you. And, Your

said,

13 Honours, if I may even cite in support of what you've just

14 in the case of Bralo, the ICTY, Bralo spelt B-R-A-L-O and the

15:08:03
It

15 citation is the Bralo sentencing judgment of 7 December 2005.

16 said:

17 "In Bralo the ICTY Trial Chamber held that the
acceptance
18 of certain circumstances as mitigatory in nature does
not
19 detract from the gravity of the crime committed nor
15:08:20 20 diminish the responsibility of the convicted person or
21 lessen the degree of condemnations of his actions.
Indeed,
22 such circumstances may be unconnected with the
commission
23 of the crime itself and can arise many months or years
24 after the event. While aggravating circumstances must
be
15:08:40 25 proved beyond a reasonable doubt mitigating
circumstances
26 need only be proved on the balance of probabilities."
27 JUSTICE WINTER: Would you agree, or what is your
opinion
28 about established grounds for mitigating circumstances? As
far
29 as I can see, there were two grounds that have been overall

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1 accepted, two grounds for mitigating circumstances. One was
2 restoration and the other one confession. Has some of it,
3 confession or restoration occurred during the trial for your

4 client?

15:09:24 5
trial,

6 at the conclusion of the trial, the first appellant addressed

the

7 Trial Chamber, and I think in that address he did express some

8 remorse, you know, for what had happened here in Sierra Leone.

9 That was at the conclusion of the trial.

15:09:50 10
--

11 he showed remorse for what has happened in Sierra Leone?

12 MR GRAHAM: Yes, what had happened in Sierra Leone.

13 JUSTICE WINTER: And did he show remorse for what he has

14 done himself?

15:10:04 15

MR GRAHAM: My Lord, I do not recall the exact --

16 JUSTICE WINTER: I do.

the

17 MR GRAHAM: -- wording of the statement that he made to

recall

18 Court at the conclusion of the trial, except to say that I

to

19 there was an apology to the people of Sierra Leone as well as

15:10:20 20

some of those who had suffered as a result of their actions.

21 JUSTICE WINTER: Thank you.

22 JUSTICE KING: You see, Mr Kojo Graham, sentencing is a

23 very important aspect of this appeal, and if you talk about

24 mitigation, not whether the accused had been convicted before,

15:10:40 25

whether he has a family, it is genuine remorse. And it's so

can

26 difficult in the peculiar circumstances of this case how one

27 show genuine remorse when, if the evidence is to be believed,

28 cold bloodedly, in a most brutal manner, you take your brother
29 citizen of this country, you put him down, you chop off his

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1 hands, you talk about long sleeve, you talk about short sleeve
2 and you have the temerity to come to this Court and talk about
3 mitigating circumstances when, at the end of the day, he
showed
4 really hardly any remorse, even in your submissions here.

15:11:23 5 I would have expected you to spend all your time, when
you
6 are talking about sentencing, to be begging for mercy. When
you
7 chop off somebody's hand or hands, or leg, or legs, that is
8 everlasting torture. Some of these people, in fact all of
them
9 who don't have hands, they cannot even do the basic
necessities

15:11:46 10 of life. They cannot even go to the toilet on their own and
you
11 talk about mitigating circumstances for these exceptionally
12 brutal offences, if, in fact those offences had been proved in
13 the lower court.

14 MR GRAHAM: Your Honour, My Lord, indeed, our plea for
15:12:03 15 leniency was going to be the last leg of the submissions that
we

16 were going to make under this ground of appeal.

17 JUSTICE AYoola: Really, I don't think this is the forum
to
18 be pleading for leniency. Your grounds are clear. You said
the
19 sentences were excessively harsh, and disproportionate and you
15:12:22 20 are limited to those grounds.

21 JUSTICE KING: I agree. You have two minutes more.

22 MR GRAHAM: Very well, My Lords.
23 My Lords, to sum up the submissions on the ground of
appeal

24 relating to sentencing, it is our humble submission that the
15:12:50 25 object of sentencing is definitely also to punish. It is our
26 submission, Your Honours, that rehabilitation and
reconciliation
27 is also one of the key objects of sentencing.

28 And, Your Honours, we sum up by saying that we believe
that
29 retribution and deterrence were the key motivating factors in
the

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and
1 sentence, and it is our humble submission that rehabilitation
by
2 reconciliation also ought to be given some due consideration

3 the Appeals Chamber.

4 These are our humble submissions in respect of the 12
15:14:21 5 grounds of appeal.

6 JUSTICE WINTER: Sorry, coming back once again to having
7 read your submissions concerning sentencing, I am asking: Do
you
8 think that reconciliation is possible without restoration and
9 confessions?

10 MR GRAHAM: Well, I think that restoration and
15:14:43 11 are, indeed, very important elements in the course of
confessions
12 establishing or ensuring full remorse by the appellant in this
13 matter.

14 Your Honours, we believe that remorse may well be showed
if

15 the sentencing involves an ambit that would also allow the
16 appellants to come back to their communities, to also be able
to
17 show real remorse by being able to associate and work with the
18 victims of their crimes. To be able to give back to their
19 community, in different ways, to make up for the atrocities
that

20 they were alleged to have committed, which this Trial Chamber
15:15:25 21 found them responsible, in the light of all the evidence that
was
22 presented before the Trial Chamber. It is indeed a very
23 difficult case. I do share the sentiments of the Honourable
24 President of the Appeals.

25 JUSTICE KING: Let me say this: It is not difficult at
15:15:44 26 all. The whole of the evidence must be looked at. These are

27 members of the Armed Forces Revolutionary Council. Hitherto,
28 they were members of the Defence force of this country. Their
29 duty was to protect this country from attack, not to turn with

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own
1 the weapons they were given to defend this country to their
2 brothers in this country and commit the most horrendous,
3 unbelievable cold blooded offences against their own brothers,
4 sisters, as if they were not human beings but animals, and
then
15:16:25 5 you talk about mitigating circumstances?

6 These were the people who were supposed to protect those
7 people that they, themselves, brutalised in this disgraceful
and
8 shameful manner. What mitigation is there? There is nothing
9 throughout this case, as I see the evidence, but aggravation.

15:16:45 10 They abused their position. They were merely cowards, if you
11 believe the evidence of the lower court because they know the
12 peaceful citizens of this country were not in the position to
13 stop themselves being amputated. To stop themselves being
raped.
14 To stop themselves being used as sexual slaves and they have
the

15:17:05 15 temerity to come here and talk about mitigation. But, have
you

16 finished your submissions.

17 MR GRAHAM: I am very grateful, Your Honours. I have no
18 further submissions in this regard.

19 JUSTICE KING: Thank you. I think it is most apt that
at

15:17:50 20 this stage we take a ten minutes break.

21 MR DANIELS: May it please Your Honour, My Lords, I've -
-

22 given that the Kamara Defence will be the next to address the

23 Trial Chamber, and given that the Trial Chamber has found it,
the

24 Appeals Chamber has found it fit to take a break at this

15:18:18 25 particular point, may we respectfully suggest that perhaps we

26 start our submissions first thing tomorrow morning?

27 JUSTICE KING: No, no, no. We are coming back after ten
28 minutes.

29 MR DANIELS: Very well.

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1 [Break taken at 3.15 p.m.]

2 [Upon resuming at 3.30 p.m.]

3 JUSTICE KING: I thank you for your assistance, Mr Kojo

4 Graham. We now go on to the Kamara's appeal submissions.

15:33:05 5 Counsel for Kamara.

6 MR DANIELS: Good afternoon, Your Honours, or good
7 afternoon, My Lords, I stand corrected.

8 My Lords, in respect of this appeal, the Kamara Defence
9 relies on its notice of appeal filed on 2 August 2005 and the
10 Kamara appeal brief submissions filed on 13 September 2007.

The

11 Kamara Defence also relies on all its oral submissions to the
12 Prosecution appeal made on 12 November 2007, insofar as they
13 are
14 in support of Kamara's appeal.

15 The grounds of our appeal are set out in paragraphs 6 to
16 18

15:33:54 15 of the Kamara notice of appeal, and the relief sought come
16 under

17 big E, under heading E. The grounds of appeal are all argued
18 in
19 paragraphs 77 to 270 of the Kamara appeal brief.

20 Before I go on, in this appeal, we'd wish to comment on
21 the

22 scope and, in this appeal, the Kamara Defence will limit its
23 arguments to matters that fall within the scope of its ground
24 of

25 appeal, namely, error of law, invalidating the judgment or an
26 error of fact involving a miscarriage of justice. The appeal
27 is
28 against both the conviction and the sentence.

29 The Kamara appeal sets out 13 grounds of appeal.

15:35:12 25 Ground 1 stands on its own and is to do with Kamara's

26 section 6.1 liability in the Bombali District. It is to do in
27 particular with the allegation that he ordered the killings of
28 five young girls.

to 29 Ground 2, 3 and 4 of the appeal stand together and are

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the 1 do with Kamara's 6.1 -- Article 6.1 liability in respect of
within 2 planning of what are now known as the enslavement crimes
3 the Bombali and Western Area.

4 Grounds 5 and 6 also stand together and are to do with
15:35:58 5 Kamara's Article 6.1 liability for allegedly aiding and
abetting
6 crimes of murder and mutilation committed in Freetown and in
the
7 Western Area.

8 Count 7 stands on its own and is to do with Kamara's
9 section 6.3 liability, that is, command responsibility.

15:36:21 10 Count 8 also stands on its own and is to do with the
11 Defence questioning the credibility of particular Prosecution
12 witnesses. Counts 9, 10, 11, 12, and 13 -- ground. I replace
13 the word "ground" for "count," I beg your pardon. Grounds 9,
10,
14 11, 12 and 13 all stand together and are to do with
sentencing.

15:37:05 15 Ground 1 of the Kamara appeal brief is set out in
paragraph

the 16 77 to 106. The relief sought is set out in paragraph 106 of
17 Kamara Defence brief.

fact, 18 Kamara appeals against the Trial Chamber's finding of
murder 19 in paragraphs 1915 and 2117, that Kamara is guilty of the

15:37:32 20 of five girls in Karina, which invalidates the judgment
leading 21 to a miscarriage of justice. In respect of this particular
crime 22

Chamber 23 alleged, or for which Kamara was found guilty, the Trial
Chamber 24 relied exclusively on the evidence of TF1-334. The Trial

25 also relied on the evidence of George Johnson, who is also
15:38:12 26 referred to as TF1-167.

by 27 The contention of the Defence is that the evidence led
and 28 TF1-334 is inconsistent with the evidence of Junior Johnson
is, therefore, unreliable.

29 The Kamara Defence have set out in detail, that is, we
have

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testimony 1 quoted from the transcript within our appeal brief the

2 of TF1-334 as regards the alleged murder of five girls in
3 Bombali District.

4 The Kamara Defence puts the evidence of Junior Johnson,
15:39:32 5 that is TF1-167, against the evidence of TF1-334. The
evidence

6 of Junior Johnson is set out in paragraph 90 of our appeal
brief.

7 What the Kamara Defence are saying is that the very
8 element, or a very important issue, as to the liability of
9 Kamara, is who gave the order to have the five girls murdered
in

15:40:13 10 Karina? On the evidence of TF1-334, the evidence was that it
was

11 Kamara in particular who gave the order for the young girls to
be
12 burnt in the house in Karina. The evidence of Junior Johnson
is

13 that it was the High Command who gave the order for the
burning

14 of the young girls.

15:40:47 15 There are also other inconsistencies. In respect of
where

16 the alleged incident took place, TF1-334 states categorically

17 that the evidence -- that the incident took place in Karina
Town.

18 The evidence of Junior Johnson was that the incident took
place

19 before entering or before Karina Town.

15:41:21 20 Our issue here is that, looking at the evidence put
against

21 each other, the evidence, paragraph 89, as set out in our
appeal

22 brief in paragraph 90, putting side-by-side, the evidence of
two

the
sit
15:41:52

23 Prosecution witnesses, we are saying that the reliability of
24 evidence of 334 is called into question because it does not
25 squarely with the evidence of Junior Johnson.

is,
of
evidence

26 We also rely on the evidence of Defence witnesses, that
27 DBK-094, who was an indigene of Karina and referred to by my
28 learned friend, Mr Graham, who made no mention of the burning
29 five young ladies in Karina Town. We also rely on the

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the
referred

1 of DBK-113 who, likewise, made no mention of the burning of
2 young girls in Karina Town, as set out in paragraph 100 of our
3 appeal brief. We rely on the Tadic authority, which is
4 to in paragraph 100 of our appeal brief, where we endorse the
15:43:12 5 last sentence of the holding that lack of reliability should
6 result in an exclusion of the evidence.

come

7 My Lords, the evidence will brought -- has been referred
8 to -- it will be considered, duly considered by the Appeals
9 Chamber and we have no doubt that the Appeals Chamber would

15:43:34 10 up with the best inference.

11 In this respect, My Lords, we move on to the second,
third
12 and fourth ground of appeal which, as I stated earlier on, had
to
13 do with the enslavement crimes.

14 The Defence Kamara, respectfully requesting for a
revision
15 of the, or a revision or reversal of the verdict in respect of
16 Kamara's 6.1, Article 6.1 liability in respect of counts 12, 9
17 and 13 of the indictment. The gravamen -- I beg your pardon -
-
18 the arguments in respect of grounds 2, 3 and 4 are set out at
19 paragraphs 107 to 155 of the Kamara appeal brief. The relief
15:44:08 20 sought is also more particularly set out at paragraph 155 of
the
21 appeal brief.

22 The evidence, or the conclusion arrived at by the Trial
23 Chamber was that by necessary inference they were able to
24 conclude that Kamara was part of the planning in respect of
the
15:44:45 20 sought is also more particularly set out at paragraph 155 of
the
21 appeal brief.

22 The evidence, or the conclusion arrived at by the Trial
23 Chamber was that by necessary inference they were able to
24 conclude that Kamara was part of the planning in respect of
the
15:45:17 25 crimes -- of the three enslavement crimes.

26 Indeed, we take the -- or we endorse the Akajesu holding
or
27 decision that which states that: "Planning implies that one
or
28 several persons contemplated the designing of the commission
of a
29 crime at both the preparatory and the execution phases."

1 We have referred to this full quotation at paragraph 113
of
2 our appeal brief. The position of the Kamara Defence is that
the
3 planning must be a factor substantially contributing to the
4 criminal conduct. We are saying that the evidence that was
led
15:46:29 5 before this Court did not demonstrate that Bazzy, Kamara, was
6 directly part of the planning of the -- for the crimes of
7 enslavement.

8 Indeed, we rely on the decision of Delalic et al, which
9 states that it is not sufficient that there's a reasonable
15:47:05 10 conclusion available from the evidence but, before we go
there,
11 we would draw the Court's attention to the Trial Chamber's
12 finding which is set out in paragraph 152 of our appeal brief.

13 In paragraph 152 of our appeal brief, the Trial Chamber
14 stated, categorically, and this is paragraph 1918 of the Trial
15:47:41 15 Chamber judgment, stated categorically that there is no --
that
16 no evidence was adduced that the accused Kamara made a
17 substantial contribution to the planning of any crimes under
18 count 3, through 6, 10 through 11 and 14 in Bombali District
but
19 was able, through reasonable inference, to deduce that as a
15:48:06 20 result of the systematic commission of the crimes committed on
a

21 large scale, the crimes were planned thereby -- we are saying
22 thereby erroneously assigning culpability to the second
accused.

23 We are saying that relying on the authority of Delalic
et
24 al there must be more than a reasonable conclusion, in order
to
15:48:32 25 arrive at the decision of the -- of Kamara's guilt in respect
of
26 the three enslavement crimes.

27 JUSTICE WINTER: If I may ask: What would you -- how
would
28 you define a more than reasonable conclusion?

29 MR DANIELS: A more reasonable conclusion. What we are

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1 saying is that planning -- this is a 6.1 offence and a 6.1
2 offence attaches personal liability, and we are saying that in
3 that instance there must be more than drawing reasonable
4 inferences. We are saying that there must be some evidence of
at

15:49:38 5 least some kind of direct participation or something more than
6 just speculation. This is our position. If I may carry on?

7 JUDGE FERNANDO: My understanding was both 6.1 and 6.3
8 attaches personal liability. One is direct liability, the
other

right, 9 is by way of -- it is again personal responsibility, all
15:50:04 10 but on the basis of command responsibility.
11 MR DANIELS: On the basis of command responsibility,
that 12 is for 6.3, but in respect of this particular appeal he has
been 13 found guilty by virtue of Article 6.1. That is why I'm making
14 that reference, very well.
15:50:28 15 With your permission, I will move on, My Lords, to
counts 16 5, grounds 5 and 6, which are set out in paragraph 156 to 191
of 17 our appeal, Kamara appeal brief. The relief sought is more
18 particularly set out in paragraph 191.
19 In this ground of appeal we are seeking a revision or a
15:51:09 20 reversal of the conviction of Kamara for the Article 6.1
the 21 liability for aiding and abetting the commission of crimes in
22 Freetown and Bombali area. I do apologise.
23 The contention of the Defence Kamara is that the
evidence, 24 as narrated by TF1-334, is inconsistent with the evidence as
15:52:05 25 narrated by Prosecution witness TF1-184. TF1-184 gave a
detailed 26 account of what happened at Fourah Bay Road on the 6th -- on
27 early January 1999. In his detailed account, he stated that
28 Kamara was not present at the time when the soldier was killed
at 29 Fourah Bay. TF1-334, in his evidence, on 14 June 2005, made

of 1 mention of Kamara being present at Fourah Bay, when the acts
2 mutilation and killing allegedly took place.

not 3 Here, again, we are saying that the Trial Chamber did
4 consider the issue of the inconsistencies between the evidence
of 5 334 and the evidence of 184.
15:53:22

6 JUSTICE AYoola: What is the basis of your making that
7 submission because, if you look at starting from paragraph
110,
Trial 8 of the judgment of the Trial Chamber, you will see that the
9 Chamber adverted to inconsistency. Must he take each one
10 individually and resolve them before he proceeds? From
15:53:58 paragraph
11 110 to 113.

12 MR DANIELS: We are saying that the -- inasmuch as the
13 Trial Chamber did mention that it was not overlooking some of
the 14 inconsistencies, that is the beef of our submission, that the
15 Trial Chamber was wrong and should have attached more
15:54:41 importance,
particular 16 you know, or gone into more detail in respect of this
17 charge because this again is to do with an Article 6.1 crime
18 which attaches personal liability and for which there must be

19 every certainty before you convict.

15:55:05 20 JUSTICE AYoola: How about paragraph 111?

21 MR DANIELS: Very well. I have seen paragraph 111 but
the
22 witnesses I just referred to, TF1-334 and TF1-184 I believe
were,
23 if I may call them insider witnesses, and these were of a
24 military background and, therefore, they were more --
paragraph

15:55:57 25 111 applies less to them than perhaps to the ordinary
civilians.

26 In support of our submissions, we are respectfully
relying
27 on the case of Mpambara, which is referred to in paragraph 169
of
28 our appeal brief. With your permission, I will just read the
29 paragraph which states that:

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1 "The mere presence of a person in authority at the scene
of
2 a crime constitutes aiding and abetting provided that it
is
3 shown that the inaction of the accused had an
encouraging
4 or approving effect on the perpetrators and the effect
was

15:57:02 5 substantial. And that the accused knew of this effect
and
6 the perpetrator's criminal intention without sharing,
7 without necessarily sharing the perpetrator's criminal
8 intent."

9 What we are saying is that the Trial Chamber failed to
make

15:57:19 10 any specific findings as to whether or not the presence of
11 Kamara, at the scene of the crime, had an encouraging,
approving
12 effect and that the effect was substantial. The other
witness,
13 who again, though a civilian, was moving with the advancing
14 forces, and that is witness TF1-153 whose evidence is full of
15 contradictions, and his evidence is discussed in -- from
15:58:07 16 paragraph 176 to 186 of our appeal brief submissions.

17 And, without wasting further time, we are saying that
the
18 evidence of that particular witness was so fraught with
19 inconsistencies as to make it unreliable.

15:58:59 20 Your Honours, My Lords, this takes us on to ground 7 of
the
21 of the Kamara appeal brief. The arguments for ground 7 are
22 contained in paragraph 191 to paragraph 221 of the Kamara
appeal
23 brief. The relief sought is more particularly set out in
24 paragraph 221.

15:59:46 25 This particular ground of appeal is to do with Article
6.3
26 liability attributed to the -- to Kamara, the second accused,
in
27 respect of all crimes committed by his subordinates, in
respect

Port

28 of the Kono District, the Bombali, the Western Area and the
29 Loko District. We have already made submissions yesterday in

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1 respect of the second accused's alleged culpability within the
2 Port Loko District, so, just by way of example, we will
3 concentrate on the allegations as they relate to a town called
4 Tomboodu, within the Kono District.

16:00:52
paragraph

5 The starting point, Your Honours, or My Lords, is
6 1890 of the Trial Chamber's judgment. In paragraph 1890 of
7 Trial Chamber's judgment, the Trial Chamber held, and with
8 permission I will read: "That the Trial Chamber finds that it
9 has not been established beyond reasonable doubt that the
10 Kamara's authority extended to all battalions in Kono."

the

your

accused

it

the

16:01:33

11 The position of the Defence is that both the Prosecution
12 and Defence witnesses gave extensive evidence to support that
13 was the RUF, rather, who was in total command and control of
14 Kono District. In this regard, we refer to the evidence of
15 DBK-113, dated 13 October 2006. Indeed -- the reference, My

16:02:09

16 Lord?

17 JUSTICE KING: No, could you read paragraph 1890 of the
18 Trial Chamber's judgment, in your brief?

19 JUSTICE AYoola: You read from 1900

16:02:50 20 JUSTICE KING: You said 1890. When I consult my record,
I
21 don't see what you are reading there, so let's get the record
22 straight.

23 MR DANIELS: I am grateful for your assistance.

24 JUSTICE KING: You have your assistant by your side,
that's

16:03:06 25 why --

26 MR DANIELS: I will read 1900.

27 JUSTICE KING: Just a minute, just a second. You have
28 assistants by your sides and if you go wrong they should
correct
29 you. It's not for us to correct you when you quote wrongly

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1 because 1890 does not say what you say it says.

2 MR DANIELS: I stand corrected.

3 JUSTICE KING: Thank you.

4 MR DANIELS: If I may continue?

16:03:57 5 JUSTICE AYoola: Well, you said you read from 1900. How
6 does that help you because in any event the finding was in
your 7 favour.

8 MR DANIELS: I am saying that the Trial Chamber went on
to 9 find that the accused Kamara was guilty in respect of all
16:04:18 10 criminal offences committed within the Kono area, and we also
11 refer to the transcript of 19 May 2005, TF1-334, that is a
12 Prosecution witness, who stated that Savage was promoted from
13 corporal to lieutenant by the second accused, but this
evidence

14 is in direct contrast to the evidence of Junior Johnson who,
in 15 his testimony on 15 September 2005, stated that Savage was
16:05:07 16 appointed to lieutenant by Denis Mingo, who is Superman, and
is 17 part of the RUF.

18 We are saying that there is no explanation as to why the
19 Trial Chamber preferred the testimony of witness TF1-334 to
that 20 of 167 on this material fact. The issue of who appointed
16:05:42 21 Savage
is a material fact in establishing the liability of Kamara.

22 JUSTICE KING: They preferred his evidence to that of
which 23 witness?

24 MR DANIELS: They preferred his evidence to that of TF1-
167 25 who is also known as Junior Johnson.

26 Moving on, My Lords, I now deal with the eighth ground
of 27 appeal, which is set out in paragraphs 221 to 236 of the
Kamara

to 28 appeal brief. The relief sought is more particularly referred
29 in paragraph 236.

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1 Much of this particular ground has been covered by my
2 learned friend, Mr Graham, but what the Kamara Defence are
saying 3 is that in respect of witnesses TF1 -- before I go on, this
4 particular ground is to do with the credibility of Prosecution
16:07:24 5 witnesses, TF1-334, TF1-184 and TF1-167. We are reiterating
the 6 point made by counsel for Brima. The Kamara position is that
7 while TF1-334 and TF1-184 were incarcerated at the Pademba
Road 8 prison, their motive was to seek freedom in exchange for their
9 testimonies.

16:08:16 10 This is fully explained or set out in our appeal brief.
We 11 make mention of the evidence of DBK-012 and DBK-113 who are
12 Defence witnesses and who testified that TF1-334 received
13 preferential treatment while in the Pademba Road prison.

14 As stated earlier on, grounds 9 to 13 of the
Prosecution,

16:09:06 15 of the Kamara Defence, will be considered together, as they
are
16 all to do with sentencing. I hope that I will not incur the
17 wrath of the Bench while I proceed.
18 JUSTICE KING: Well, depends on what you mean by
19 mitigation, vis-a-vis aggravation. But you, under no
16:09:43 20 circumstance, should you incur the wrath. The Bench will look
at
21 the evidence in its totality, including all the counts of the
22 indictment that were proved, which is altered in the sentences
23 passed, and we would also look at the whole of the evidence to
24 see whether in the lower court and the Trial Chamber there
were
16:10:02 25 any mitigating circumstances.
26 The call was not so much as your right to plead on
behalf
27 of your client mitigating circumstances but, in fact, to
identify
28 mitigating circumstances in law. You see, it's all very well
to
29 say we are going on the grounds of mitigation and so on and so

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1 forth, not just for the sake of going on those grounds, but to
2 bring credible submissions related to the law by which you can

3 take into consideration any mitigating circumstance.

16:10:38 4 If there is no mitigating circumstance, there is no
squeeze 5 mitigating circumstance. As far as I see it, you cannot

when 6 water out of stone. That is the point I am making. Because
see 7 I look at all the evidence, what I have so far been able to

8 are aggravating circumstances. The inhumanity of it all. The
am 9 evidence is before me. That is what I'm saying. And what I

16:11:05 10 taking also the findings of the Trial Chamber in considering
your 11 grounds of appeal and so on. And I see unprecedented
inhumanity,

12 all aggravations, all aggravations.

13 At the end of the day I didn't see anyone saying: My
Lord, 14 we are deeply sorry. I wish I was not alive. I wish I was
dead.

16:11:27 15 Then I would begin to see where probably there is so much
remorse

16 that I must take that as a mitigating circumstance. But for
17 anybody to come and tell me that they have a family, that they
18 had not been convicted before, and those are mitigating
19 circumstances, in the highest chamber in this Special Court, I
16:11:41 20 make no more comments about that. So go on. It's not the
wrath,
21 it's just the law and the situation.

I 22 MR DANIELS: Very well, My Lord. I can assure you that
23 will make no comment on family circumstances.

24 JUSTICE KING: Right.

16:12:00 25 MR DANIELS: By virtue of Article 19.2 of the Statute of

mitigating
sentence.

26 the Special Court, the Court has an obligation to take
27 circumstances into consideration before delivering its
28 The Trial Chamber found that nothing, and I repeat nothing in
29 Kamara's personal circumstances, justifies any mitigation of

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mention

1 sentence.

2 In this particular appeal, the Kamara Defence made

3 of Kamara's activity with respect to enhancing peace and

4 reconciliation in Sierra Leone immediately after the war. We

16:13:03
of

5 make a particular reference to Kamara negotiating the release

and

6 up to 200 children from the West Side Boys to the Red Cross

7 to UNICEF in 1989. This is more particularly set out in

8 paragraph 241 of our appeal brief.

9 JUSTICE KING: What paragraph?

16:13:32
the

10 MR DANIELS: 241. In paragraph 242 of the appeal, of

sentencing

11 Kamara appeal brief, we refer to paragraph 91 of the

12 judgment where the Trial Chamber held that the -- that Kamara

13 failed to express any genuine remorse whatsoever for his
crimes.

14 My Lords, the Kamara did address the Court and did
16:14:21 15 apologise for his -- or did apologise for the hurt suffered by
16 those victims of the war. The full text of what he said is in
17 the transcript of 16 July 2007, at pages 58 and 59.

18 The second accused also was somewhat instrumental in
19 negotiating for the release of some of the British soldiers
that

16:15:29 20 were held hostage by the West Side Boys at some time in 1999.

21 As regards the length of sentence, the Kamara appeal,
22 Kamara is saying that 45 years is excessive and
disproportionate

23 in all the circumstances of the case. Sentencing a 40-year-
old

24 man to 45 years in prison, in a country where the life
expectancy

16:16:11 25 is 40 to 41 years, we daresay is the imposition of a life
26 sentence.

27 JUSTICE AYoola: When you submit that it is
28 disproportionate, with what are you comparing what, to get
your
29 proportionality?

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1 MR DANIELS: I am getting to that. I am about to refer
to

2 some cases, case law. With your permission, I will carry on.

3 Taking a cue from the Bench, we refer to the case, or,
in

4 fact, to three cases in paragraphs 250 to 251 of the Kamara
16:17:07 5 appeal brief.

6 In the case of the Prosecutor v Omar Serushago, the
7 defendant was convicted of three counts of crimes against
8 humanity and one count of genocide, which the Court
emphasised,

9 but it considered as the crime of all crimes. The defendant,
who
16:17:38 10 was a leader of the Interahamwe was sentenced to 15 years of
11 imprisonment.

12 In the Prosecutor v Semanza, the defendant was convicted
of
13 one count of complicity in genocide and four counts of crimes
14 against humanity. He was sentenced to 25 years imprisonment.

16:18:06 15 In the Prosecutor and Gerard Ntakirutimana, the
defendant
16 was convicted of one count of genocide and one count of crimes
17 against humanity and sentenced to 25 years imprisonment.

18 What we are saying is that -- we are saying in paragraph
19 248 of the Kamara appeal brief, I beg your pardon, 246 of the
16:18:55 20 Kamara appeal brief, paragraph 246 of the Kamara appeal
briefs,

21 refers to Article 19.1 of the Statute which mandates the Trial
22 Chamber to have recourse to practices regarding prison

sentences
23 in the International Criminal Court for Rwanda and the Courts
of

24 Sierra Leone.

16:19:31 25 JUSTICE WINTER: May I just interrupt for a moment: Is
it
26 your submission, if I understand correctly, that counting the
27 number of counts somebody is convicted of makes, gives the
28 possibility for setting the standards of proportionality?

29 MR DANIELS: Our position is that the case must be
viewed

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1 as a whole. It must be a reflection of the totality of the
2 culpability of the accused.

3 JUSTICE AYoola: Well, I think you have not yet answered
my
4 question. When you mention proportionality, what are you
16:20:22 5 comparing one with? What are you comparing one with the
other?

6 You referred to cases decided by ICTR; are you saying that
7 proportionality refers to proportionality as between here and
8 there?

9 MR DANIELS: I am saying that the guiding principles of
the
16:20:44 10 Trial Chamber in Sierra Leone are that they must look at the
11 sentencing practices in Rwanda, and we are saying that for
crimes
12 of a particular nature, the accused persons were sentenced to

13 proportionally less of a prison term.

14 JUSTICE AYoola: How about 19.2 in which one of the
factors

16:21:12 15 is gravity of the offence; that doesn't count for
16 proportionality?

17 JUSTICE KING: And the individual circumstances of the
18 accused person. I think you have been very frank with the
Court

19 by referring us to those Articles. And I think the overriding
16:21:27 20 Article is in fact 19.2. The gravity of the offence. That
was

21 what I was telling before the break, and the individual
22 circumstances of the accused person. The individual
23 circumstances of each of those accused persons, apart from
24 anything else, is that they were members of the Sierra Leone
16:21:44 25 military; isn't that correct?

26 MR DANIELS: That is correct.

27 JUSTICE KING: Right. Now, that function is to protect
the
28 State of Sierra Leone. You know the history of what happened.
29 In the evidence, as I have seen it, and it's indisputable,
that

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country 1 instead of being in the army and helping to protect this
the 2 of Sierra Leone they betrayed the trust imposed in them, from
group, 3 evidence led in this case, and joined forces with another
for 4 the RUF, and proceeded to commit those indescribable offences
16:22:23 5 which they have been convicted and, as you have rightly and
be 6 frankly pointed out, in considering the sentences, there can
Article 7 no doubt that the Trial Chamber took into consideration
8 19.2 of the Statute of the Special Court, the gravity of the
9 offences.

16:22:42 10 Could you have anything graver than the offences
committed
into 11 by these accused persons? And didn't the Trial Chamber take
State 12 consideration the fact that they were soldiers, paid by the
13 and the citizens of the State, to protect the State of Sierra
by 14 Leone? They committed, from the evidence, this shameful act
16:23:09 15 reneging on their obligation that they were under, as soldiers
in
took 16 this State, broke down the rule of law, from the evidence;
atrocious 17 it upon themselves to bully people, to commit the most
18 offences imaginable, and the Trial Chamber took all that into
that 19 consideration in imposing the sentence and gave the sentence
16:23:33 20 we know, 50 years and 45 years in those circumstances. I
would
21 like to hear your views on that.

respond,

tell,

16:24:05
were

at

at

22 MR DANIELS: My views, since I am being asked to
23 are that I would dare to go slightly out of the ambit and
24 or suggest, that the way forward in these matters is
25 reconciliation. There is no doubt that the crimes committed
26 heinous; we do not dispute that. The circumstances were
27 particular, but, we can look, perhaps, to some of our African
28 countries, and I say this with the greatest respect, we look
29 South Africa, we look at what is happening in Uganda, you look

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is

of

16:25:05
the

has

1 what happened in Mozambique and you see that the way forward
2 one of reconciliation. That is what is happening.
3 We take judicial notice of the fact that the Government
4 Sierra Leone has changed. That in a couple of days a new
5 President is going to be sworn in. That not -- no soon after
6 President was appointed one Omrie Golley, an RUF combatant,
7 been set free.

8 JUSTICE KING: Where is the evidence of that?

9 MR DANIELS: Well, that is why I dared to say, I am
16:25:33 10 shifting slightly.

11 JUSTICE KING: No, because -- I ask you that because he
is 12 not here. You say an RUF combatant; where is the evidence of
13 that?

14 MR DANIELS: That he was an RUF combatant?

16:25:45 15 JUSTICE KING: Yes.

16 MR DANIELS: Well, it's what I have learnt since I have
17 come to --

18 JUSTICE KING: You talk like -- you talk as a lawyer.

19 MR DANIELS: Very well.

16:25:53 20 JUSTICE AYoola: Well, what would be of assistance to
this 21 case is to discuss the principles of the matter. You are
asking 22 us to review the sentence and, as I mentioned earlier, we can
23 only do that on some established principles. All this about
24 reconciliation may be relevant if there is an established
16:26:19 25 principle that the Trial Chamber ought to have taken
26 reconciliation into consideration in sentencing.

27 Unless you can do that, you will be inviting us to
revise 28 the sentences on bases which we cannot apply here, unless you
29 have shown -- unless you can show that there is an error in

1 principle, or that the sentences are unreasonable, as you have
2 tried to do. What is the principle of the matter? Why do you
3 say that reconciliation should count?

4 MR DANIELS: Well, I am referring to the resolution of
the
16:27:04 5 United Nations, Resolution 1315 passed in the year 2000, which
6 gave birth to the establishment of the Special Court for
Sierra
7 Leone.

8 Indeed, in that Resolution, it is stated, and with your
9 permission I will read, that:

16:27:23 10 "In particular circumstances of Sierra Leone, a credible
serious 11 system of justice and accountability for the very
12 crimes committed there would end impunity and would
13 contribute to the process of national reconciliation and
to 14 the restoration and maintenance of peace."

16:27:43 15 What we are saying is that within this resolution is the
16 hope that not only must we stamp out impunity but we must also
17 look forward to the process of national reconciliation.

18 JUSTICE AYoola: Where do you locate that Resolution in
19 Article 19?

16:28:10 20 MR DANIELS: It is the mandate giving birth to the
Special 21 Court.

22 JUSTICE AYoola: No, no. This Court operates on the
basis

enacted, 23 of the Statute, so, after the Resolution, Article 19 was

24 so where do you --

16:28:24 25 MR DANIELS: I am looking at the spirit of the --

26 JUSTICE AYoola: No, you have to look at the spirit of
27 Article 19 and tell us what the spirit of Article 19 is, in
terms

28 of your submission. You have to take with Article 19.

29 MR DANIELS: Article 19, I will read it.

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1 JUSTICE KING: You have read it already.

2 MR DANIELS: I have read it already. Well, what I have
to

3 say is that -- I have nothing to say.

4 JUSTICE KING: Yes, exactly. See, that is the whole
point.

16:29:02 5 I understand your point. You have done very well so far. You
6 have almost an impossible situation. You have read Article
19.1

7 and 19.2. If you are going by the whole of it, Article 19,
read

8 19.3.

9 MR DANIELS: Very well.

16:29:15 10 JUSTICE KING: Read it and let's hear what it says. You

11 see, all those places that were burnt down, destruction of
12 property, now, they come here as indigene people, they are
being
13 defended by the State of Sierra Leone, the very people that
they
14 have been accused of hurting and so on. We can't even --

16:29:33 15 MR DANIELS: 19.3, it goes on to say that:
16 "In addition to imprisonment the Trial Chamber may order
acquired
17 the forfeiture of property proceeds and any assets
returned
18 unlawfully, or by the Criminal Court, and they are
Leone."
19 to their rightful owner or to the State of Sierra

16:29:51 20 JUSTICE KING: Yes. Did the Trial Chamber make any such
21 order?

22 MR DANIELS: I believe no such order was made.

23 JUSTICE KING: Well, exactly. So, in fact, they have
got
24 some mitigation there, on the Trial Chamber's own volition.

16:29:58 25 MR DANIELS: But having said --

26 JUSTICE KING: You see, Mr Daniels, I can understand
your
27 position, it's a very difficult one. But also at the same
time
28 justice is always to be dispensed in an even-handed manner. I
29 mean, the other day, I will take judicial notice of the fact
that

1 some organisation was saying that Government of Sierra Leone
2 should apologise for rape committed by so-called rebels. What
3 business has the Government of Sierra Leone to do with that?

Did

4 they rape these people?

16:30:34

Leone

committed

of

16:30:51

act

16:31:06
why

say,

submissions

16:31:31
done

5 You see, we don't have a sense of proportion and it was
6 broadcast all over the world that the Government of Sierra
7 should apologise for the atrocities of rape and so on,
8 by people. What had the Government of Sierra Leone to do with
9 it? When the very people who were to support the Government

10 Sierra Leone were themselves doing these things. And then you
11 turn around, at the end of the day, and say the Government of
12 Sierra Leone should apologise.

13 I mention it, even though it's your right and duty to
14 in the best interests of your client, to know that there are
15 certain areas beyond which one cannot reasonably go. That is
16 I mention it.

17 MR DANIELS: On that note, My Lords, we would wish to
18 once again, that we rely on all our written and oral
19 and that it has been a pleasure responding to the questions.

20 JUSTICE KING: Well, let me say this: That you have

21 very well, you and Mr Graham, in exceedingly impossible
22 circumstances, have done very well for your clients. But, as
you
23 rightly say, both you and the Prosecution have submitted
several
24 times, this Chamber will look at the totality of the evidence
in
16:31:50 25 adjudicating upon the appeals of the Prosecution and the
Defence
26 and more so when it comes to the question of sentencing.

27 So I thank you very much for your frankness and for your
28 effort, particularly in your bringing quite frankly the
29 provisions of Article 19.2 of the Statute of the Special
Court.

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1 Thank you.
2 MR DANIELS: I am most grateful.
3 JUSTICE KING: At this stage I think it's -- we are
going
4 to adjourn and I think it will be the turn of Mr Ajibola -- I
16:32:23 5 think you are called Emmanuel as well -- Manly-Spain, to
address
6 us tomorrow morning when we assemble. I don't know, he is
always
7 smiling when I mention the name Emmanuel. You feel that you
are

8 in good company, no doubt.

9 Tomorrow, according to the schedule, we should assemble

16:32:44 10 here at 10.30 and, Mr Spain, you will have from 10.30 until
11.30

11 to present your submissions, and then from 11.30 until 12.30
the

12 Prosecutor will respond. And I want to take the opportunity
of

13 thanking the Prosecution also for their assistance to the
Court.

14 Thank you.

16:33:07 15 [Whereupon the hearing adjourned at 4.30
p.m.,

16 to be reconvened on Wednesday, the 14th day
of

17 November 2007 at 10.30 a.m.]

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