



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

WEDNESDAY, 14 NOVEMBER 2007  
10.45 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

Ms Sophie Frediani  
Ms Rhoda Kargbo

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 Gachoud  
Ms Bridget Osho  
Mr Robert Bliss

For the accused Alex Tamba

Mr Kojo Graham

Brima:

Mr Osman Keh Kamara  
Ms Roselyn Vusia

Daniels

For the accused Brima Bazzy

Mr Andrew William Kodwo

Kamara:

Mr Cecil Osho-Williams  
Ms Oluwaseunl Soyoola

For the accused Santigie Borbor  
Kanu:

Mr Ajibola E Manly-Spain  
Mr Silas Cherkera

1 [AFRC14NOV07A - JS]

2 Wednesday, 14 November 2007

3 [The accused present]

4 [Open session]

10:45:40 5 [Upon commencing at 10.45 a.m.]

6 JUSTICE KING: Right. Good morning. We are this morning

7 going to call upon counsel for Kanu to present his submissions.

8 But let me say this just to give notice.

9 Yesterday we were being addressed on the various grounds  
10:47:33 10 and some of the grounds related to sentencing, and I think some

11 time it was said about, in the lower court, one or other or all

12 of the accused expressed some sort of contrition with regard to

13 the offence for which they had been found guilty.

14 It will be very helpful in our deliberations if at some  
10:47:56 15 stage you will refer to either the transcript or the record of

16 the Court so that we will know exactly what was said in the Trial

17 Chamber. We will find that very helpful in deliberating on the

18 submissions made. Now, having said that, I will call on

19 Mr Ajibola, I think it's Emmanuel, Emmanuel Manly-Spain, on

10:48:23 20 behalf of Kanu.

21 MR MANLY-SPAIN: Good morning, My Lords. My Lords, the  
22 third appellant has appealed against the judgment of Trial  
23 Chamber II delivered on 20 June 2007. In that judgment the  
Court  
24 found the accused, the appellant, guilty of crimes pursuant to  
10:49:04 25 Article 6.1 of the Statute of the Special Court of Sierra  
Leone,  
26 11 counts, and under Article 3 of various other counts.  
27 JUSTICE KING: Under Article 6, Sub-article 3?  
28 MR MANLY-SPAIN: 6.3.  
29 JUSTICE KING: Yes, that's right.

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19  
on  
made  
10:50:05

1 MR MANLY-SPAIN: My Lord, the grounds of appeal filed by  
2 the appellant is dated 2 August 2007, and it contains around  
3 grounds. The submissions to the grounds of appeal were filed  
4 13 September 2007, and we are relying on all the submissions  
5 therein, the cases referred to and the statutes also that are  
6 referred to therein.

finding  
responsibility.  
question  
10:50:39

7 My Lord, the first ground of appeal challenges the  
8 of Trial Chamber I on the matter of the greatest  
9 The Trial Chamber I decided, in its judgment, that the  
10 of those who bear the greatest responsibility was not a  
11 jurisdictional issue but, rather, it was a prosecutorial issue  
12 which was not for the determination of the Court.

13 JUSTICE FERNANDO: Was it Trial Chamber I or Trial  
14 Chamber II?

10:50:59  
June

15 MR MANLY-SPAIN: Trial Chamber II in its judgment of  
16 20 decided --

Instead  
admit

17 JUSTICE KING: Now, so you're correcting yourself?  
18 of Trial Chamber I, it should be Trial Chamber II. Always  
19 that you are correcting it because I have in my notes Trial

10:51:13 20 Chamber I.

21 MR MANLY-SPAIN: I'm sorry, My Lord.

22 JUSTICE KING: Always take the correction and amend it  
23 before you proceed.

24 MR MANLY-SPAIN: I did not realise it.

10:51:22 25 JUSTICE KING: That's why my brother told you. It's  
very

26 important --

27 MR MANLY-SPAIN: Yes, My Lord.

28 JUSTICE KING: -- when we go to deliberate on your  
29 submissions. So you meant to say Trial Chamber II?

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1 MR MANLY-SPAIN: Yes, My Lords.

2 JUSTICE KING: Thank you.

3 MR MANLY-SPAIN: I will henceforth be saying "the Trial  
4 Chamber."

10:51:33 5 JUSTICE KING: Very well. Okay. Very well. Repeat  
that  
6 submission again, please.

7 MR MANLY-SPAIN: That the Trial Chamber decided that the  
8 greatest responsibility --

9 JUSTICE KING: That it was not a jurisdictional issue.

10:51:46 10 MR MANLY-SPAIN: Yes, it was a matter for the Prosecutor  
to  
11 decide who were those who bear the greatest responsibility as  
12 stated in the Statute of the Court.

13 My Lords, I wish to direct you instantly to a decision  
by  
14 Trial Chamber I dated 3 March 2004 in the matter of the  
10:52:17 15 Prosecutor v Fofana.

16 JUSTICE KING: In the matter of?

17 MR MANLY-SPAIN: The Prosecutor v Fofana, case number  
18 SCSL-04-14-PT. In this matter the question came up whether  
the  
19 issue of the greatest responsibility was a personal issue for  
the  
10:52:49 20 Court, that is a jurisdictional issue, and the Court found  
that



adjudicate 21 it was a jurisdictional issue which the Court had to  
22 upon. It was not simply a procedural issue left with the  
23 Prosecutor to determine who bear the greatest responsibility.  
to 24 Without going into the correspondence that have been referred  
10:53:22 25 in our brief, preceding the passing of the Statute, I would  
wish  
26 to refer Your Lordships to the provisions of the Statute.  
provisions 27 JUSTICE KING: Before you go to pointing out the  
28 of the Statute, in Article 1 of the Statute, I would like to  
know  
29 exactly what was said in the authority you have just cited.

1 MR MANLY-SPAIN: At page 11 of our submissions, page 10,  
2 paragraph -- first of all page 10, paragraph 1 point --

3 JUSTICE KING: Page 10?

4 MR MANLY-SPAIN: Yes, of our submissions.

10:54:48 5 JUSTICE KING: Yes, paragraph?

6 MR MANLY-SPAIN: Paragraph 1.12.

7 JUSTICE KING: As you go along and recite them, read  
them,  
8 please.

9 MR MANLY-SPAIN: This submission finds support in the  
10 findings of the Trial Chamber I in the Fofana motion for lack  
of  
11 personal jurisdiction wherein the learned Chamber noted:

12 "Based on the trial priorities of the Statute of the  
13 Special Court for Sierra Leone it is clear that the  
draft  
14 has intended that the category of persons over whom the  
10:55:23 15 Special Court had personal jurisdiction was limited in  
16 expressing its preferences for persons who bear the  
17 greatest responsibility instead of persons most  
18 responsible, the Security Council directed that the fact  
19 that an individual under a leadership role should be the  
10:55:42 20 primary consideration. The severity of the crime or the  
21 massive scale of a particular crime should not be the  
22 primary consideration."

23 JUSTICE KING: Who was saying that?

24 MR MANLY-SPAIN: The Court, Trial Chamber I. Then at  
10:56:01 25 paragraph 1.13 we stated: "The greatest responsibility  
26 requirement as Trial Chamber I also found was meant to be a  
27 jurisdictional threshold. As the Chamber rightly observed,  
the  
28 issue of personal jurisdiction" --

29 JUSTICE KING: Is it in quotation marks? I want to know

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1 the exact words of the Trial Chamber.

2 MR MANLY-SPAIN: Well, the quotation is what I'm reading  
3 now.

4 JUSTICE KING: Well, When you get your quotations here  
at  
10:56:28 5 Court, I know it's the exact word.

6 MR MANLY-SPAIN: Yes, My Lord. I quote:  
7 "The issue of personal jurisdiction is a jurisdictional  
8 requirement, and while it does of course guide the  
9 prosecutorial strategy, it does not exclusively  
articulate  
10:56:47 10 prosecutorial discretion."

11 My Lord, what we are saying is that Trial Chamber I held  
12 that the question of who bears the greatest responsibility was  
a  
13 question to be determined as a matter of evidence at the  
trial,  
14 not a matter to be decided by the Prosecutor, thereby taking  
away  
10:57:20 15 the right of the Court to determine whether an accused was a  
16 person who bore the greatest responsibility. That is the  
point  
17 we are making.

18 JUSTICE KING: I see your point. My question to you  
then  
19 is: If Trial Chamber I says "A" and Trial Chamber II says  
"B,"

10:57:35 20 what is the position vis-a-vis the Appeals Chamber?

21 MR MANLY-SPAIN: It is for the Appeals Chamber to  
22 determine. Obviously one of them must be right and one wrong.  
23 That is why we have raised it. That is for the Appeal Chamber  
to  
24 decide and we are submitting that Trial Chamber I was right.

10:57:54 25 JUSTICE KING: So it is for the Appeals Chamber to  
decide,  
26 having regard to everything that was said, not just one  
27 particular portion of the decision, or did you mean the whole  
--

28 MR MANLY-SPAIN: Yes, My Lord.

29 JUSTICE KING: And why I ask that question: You agree  
also

1 that, in law, what is said by one Chamber or the other of  
either  
2 jurisdiction does not necessarily, in fact, does not bind one  
or  
3 other, the other Chamber; is that correct or not?

4 MR MANLY-SPAIN: Yes, My Lord.

10:58:29 5 JUSTICE KING: You agree?

6 MR MANLY-SPAIN: My Lord, at paragraph 1.

7 JUSTICE KING: No, wait. Don't hurry too much. Try and  
8 answer the questions as we go along. Do you agree with that  
9 proposition?

10:58:36 10 MR MANLY-SPAIN: Yes. I am directing you that even in  
our  
11 pleadings, in our submissions, we stated that in paragraph  
12 1.15 --

13 JUSTICE KING: Yes, well, tell us.

14 MR MANLY-SPAIN: "That while the appellant conceded that  
10:58:50 15 Trial Chamber II was not bound by the decision of Trial  
Chamber I  
16 in deciding on the greatest responsibility requirement, the  
17 appellant nonetheless submitted that its point of departure in  
18 paragraph 654 of the judgment is not legally tenable. In  
19 essence, the Trial Chamber's reasons that insofar as Article  
15

10:59:09 20 of the Statute conferred investigative and prosecutorial  
powers

21 on the Prosecutor over those who bear the greatest  
22 responsibility, while at the same time guaranteeing  
prosecutorial  
23 independence, that makes the Prosecutor's power in that regard  
24 non-reviewable for that that the Trial Chamber would not be in  
a  
10:59:30 25 position to reveal the Prosecutor's powers anyway."

26 And what we were saying is that if what Trial Chamber II  
27 decides, it means that the Court has no power to determine  
28 whether an accused person falls amongst the category of people  
29 who bear the greatest responsibility, and we are respectfully

1 submitting that that cannot be tenable because it is taking  
away 2 the power granted to the Court by the Statute.

3 If you, My Lord, look at the Statute, Article 1.1 of the  
4 Statute, reads as follows: "The Special Court, except as  
11:00:27 5 provided in subparagraph (2) have the power" -- "shall have  
the 6 power to prosecute persons who bear the greatest  
responsibility 7 for serious violations of International Humanitarian Law and  
8 Sierra Leonean law," etcetera, My Lords.

9 We are stressing here that the Court has power to  
prosecute 10 persons who bear the greatest responsibility. My Lord, under  
11:00:51 11 Article 15, the Prosecutor --

12 JUSTICE KING: Under article?

13 MR MANLY-SPAIN: 15.1, it says:

14 "The Prosecutor shall be responsible for the  
investigation 15 and prosecution of persons who bear the greatest  
16 responsibility for serious violations of International  
17 Humanitarian Law and crimes under Sierra Leonean law  
18 committed in the territory of Sierra Leone since 30  
19 November 1996."

11:01:25 20 The point here, My Lord, is that when Trial Chamber II



21 decided that it was the Prosecutor that has power to determine  
22 who the persons who bear the greatest responsibility are, it  
gave  
23 up the power given to them by the Statute to decide that  
matter  
24 by prosecuting and coming to a decision. That is the point I  
am  
11:01:58 25 making, My Lord.

26 JUSTICE KING: I'm trying to understand the point you're  
27 making, but in interpreting Article 1.1 of the Statute, every  
28 word in that Article should be considered. I mean, this Court  
29 adjudicates primarily, does it not?

1 MR MANLY-SPAIN: Yes, My Lord.

2 JUSTICE KING: So when the Statute itself in Article 1.1  
3 says "prosecute" --

4 MR MANLY-SPAIN: Yes, My Lord.

11:02:23 5 JUSTICE KING: -- what does that connote?

6 MR MANLY-SPAIN: To adjudicate.

7 JUSTICE KING: Adjudicate, prosecute.

8 MR MANLY-SPAIN: Adjudicate, My Lord, yes.

9 JUSTICE KING: All right. Very well.

11:02:28 10 MR MANLY-SPAIN: Yes, My Lord.

11 JUSTICE KING: I just wanted to know your own submission  
on 12 that.

13 MR MANLY-SPAIN: That is my submission, to adjudicate  
and 14 to adjudicate, My Lord, you --

11:02:36 15 JUSTICE KING: So it's a better word than to say  
16 "adjudicate."

17 MR MANLY-SPAIN: No. I'm not saying -- I don't think --

18 JUSTICE KING: You see, the purpose of that question  
really 19 is to show that, in fact, it is mainly to do with the  
Prosecution

11:02:50 20 with regard -- well, one interpretation, because we are still  
21 deliberating on this, the various interpretations can be  
shown.

22 I'm just saying that when you direct us to Article 1.1, then  
23 account should be taken of every word in that Article and then  
24 make your submissions with regard to the specific and the  
11:03:09 25 operative words used in that Article. That's just a guide to  
26 you.

27 MR MANLY-SPAIN: Yes, My Lord, I thank you. But that  
was  
28 why I read both Articles.

29 JUSTICE KING: Very well.

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1 MR MANLY-SPAIN: And I am stressing that both Articles  
give 2 the power to prosecute to both the Court and the Prosecutor.

3 JUSTICE KING: Just reiterate that; that both Articles  
give 4 the power to prosecute --

11:03:34 5 MR MANLY-SPAIN: To both the Court and the Prosecutor.

6 JUSTICE KING: -- and to prosecute. Just a second.  
Thank 7 you, Mr Spain.

8 MR MANLY-SPAIN: And we are respectfully submitting that  
9 the decision by the Trial Chamber in this case, to say they  
did

11:03:57 10 not have the right to decide, is fallacious, My Lord. My  
Lord,  
11 by way of example, if you look at the entire trial before the

12 Court, it proceeded on the belief by both parties that that  
was  
13 the point to be proved to the satisfaction -- the legal

14 requirements of proof beyond a reasonable doubt, et cetera,  
that

11:04:30 15 each accused was a person who bore the greatest -- who bear  
the  
16 greatest responsibility. This was the way the trial  
proceeded.

17 My Lord should not forget --

18 JUSTICE AYoola: No, why do you say that is the way the  
19 trial proceeded?

11:04:45 20 MR MANLY-SPAIN: My Lord because --

21 JUDGE AYoola: Is it greatest responsibility, is it an

22 element? Is it an element of --

23 MR MANLY-SPAIN: Well, Let me answer it this way, My  
Lord.

24 When the matter started Trial Chamber I was in charge of this

11:05:00 25 matter, and that decision was given by Trial Chamber I for  
final

26 decision as it was a jurisdictional matter, not a matter for  
the

27 Prosecutor to determine. That is why I said we proceeded on  
that

28 basis. It was a threshold issue; what were we defending. If  
you

29 look at all the other addresses, we addressed the Court on the

1 question of whether the accused fell into that category, that  
is  
2 why I submitted that that is the way the trial proceeded on  
the  
3 basis of --

4 JUSTICE KING: Now, you say it was a jurisdictional  
matter.

11:05:42 5 MR MANLY-SPAIN: Yes, My Lord.

6 JUSTICE KING: And you went before Trial Chamber I. It  
7 didn't fall under that category where those kind of matters  
would  
8 come up straight away to the Appeals Chamber to decide?

9 MR MANLY-SPAIN: No, My Lord.

11:05:56 10 JUSTICE KING: It didn't?

11 MR MANLY-SPAIN: No, My Lord.

12 JUSTICE KING: Under 72.

13 MR MANLY-SPAIN: My Lord, it was not appealed.

14 JUSTICE KING: That is what I'm saying. Did it not fall  
11:06:04 15 under those cases where, in fact, the matter could have come  
16 straight up to this Chamber, as in other jurisdictional  
matters  
17 which came before this Court, to decide?

18 MR MANLY-SPAIN: Yes, My Lord, it could have come, but  
the

19 decision --

11:06:17 20 JUSTICE KING: Well, why did it not?

one

21 MR MANLY-SPAIN: No, but the decision at that time was  
22 that was accepted by the Defence; that it was a jurisdictional  
23 matter.

your

11:06:29

24 JUSTICE KING: An application, as far as I understand  
25 submission, was made to Trial Chamber I with regard to this  
26 jurisdictional question.

27 MR MANLY-SPAIN: Yes, My Lord.

the

28 JUSTICE KING: My question to you is a simple one: All  
29 jurisdictional matters, as provided for in the Rules, came

Chamber  
the

1 straight up to the Appeals Chamber and not to the Trial  
2 to decide. Are you saying that this one does not come under  
3 category of those that can come straight up to the Appeals  
4 Chamber?

11:06:55 5 MR MANLY-SPAIN: [Microphone not activated].

6 JUSTICE KING: Sorry, I can't hear you.

7 MR MANLY-SPAIN: To be honest, I didn't look at it from  
8 that point of view.

9 JUSTICE KING: I'm don't -- I'm not saying you looked at  
11:07:05 10 it. I'm asking you a specific question and I'd be grateful if  
11 you would answer my question, one way or the other.

12 MR MANLY-SPAIN: It could have come, My Lord, but the  
13 Chamber --

14 JUSTICE KING: Tell me why it could have come; did it  
come  
11:07:38 15 under the category?

16 MR MANLY-SPAIN: Yes, My Lord, yes.

17 JUSTICE KING: Thank you. Just a minute. Thank you,  
18 Mr Manly-Spain.

19 MR MANLY-SPAIN: Yes, My Lord. My Lord, I should stress  
11:08:17 20 that the Court in that judgment determined that it would be a  
21 matter that would come before it to be determined on the  
22 evidence.



23 JUSTICE KING: You see, the real purpose, if I might be  
24 very frank with you, I am asking you, is to avoid situations  
like  
11:08:30 25 this one, that we have all those provisions in the Rules of  
26 Procedure and Evidence so that by the time it went to some  
other  
27 tribunal, for instance, this Court would have given the final  
28 pronouncement and there will be no confusion or no debate  
about  
29 it. That's why we have this fast-track process on an  
important

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1 question relating to jurisdiction because we realise that at  
the  
2 end of the day certain things might have happened which would  
not  
3 probably be rightly in the interests of justice.

4 MR MANLY-SPAIN: Much obliged.

11:09:14 5 JUSTICE AYoola: Well, Mr Spain --

6 MR MANLY-SPAIN: Yes, My Lord.

7 JUSTICE AYoola: -- refresh my memory, speaking for  
myself,  
8 you referred to the Fofana case. Were you involved in the  
Fofana  
9 case?

11:09:25 10 MR MANLY-SPAIN: No, My Lords.

11 JUSTICE AYoola: All right. So when did you raise the  
12 jurisdictional point before Trial Chamber II and how did you  
13 raise it?

14 MR MANLY-SPAIN: Well, anyway, it was never raised. We  
11:09:37 15 just went on trial, and at the end of the trial we addressed  
the  
16 Court on the question of jurisdiction.

17 JUSTICE AYoola: All right. It was not raised. You  
18 addressed the Court at the end of the case on the matter of  
19 jurisdiction, but you did say that it is a threshold issue.

11:09:53 20 MR MANLY-SPAIN: Yes, My Lord. That is what it decided,

21 the case decided.

22 JUSTICE AYoola: If it is a threshold issue, shouldn't  
you

23 have raised it at the threshold?

24 MR MANLY-SPAIN: Well, the decision of the Court was  
that

11:10:03 25 they were going to look at it at the end of the --

26 JUSTICE AYoola: Not in this case.

27 MR MANLY-SPAIN: Not in this case, My Lord.

28 JUSTICE AYoola: We are talking about this case.

29 MR MANLY-SPAIN: My understanding of what went on is  
that

but 1 it was not an issue whether it was a jurisdictional matter,  
2 it was a matter to be proved by evidence.

3 JUSTICE AYoola: Well, if -- I get confused by the  
4 submissions counsel is making. It is not -- it's a matter to  
be 5 proved as part of the merit of the case.  
11:10:41

6 MR MANLY-SPAIN: To be proved that the accused persons  
fall 7 into the category of those who bear the greatest  
responsibility.

8 JUSTICE AYoola: Is it an element of the case? Suppose  
the 9 accused person says he comes under category 1.2, one  
11:11:05 10 subsection -- 1, paragraph 2, which has nothing to do with the  
11 merits of the case, do you wait until the end of the case  
before 12 he raises that point? Suppose the accused person has come  
here 13 on peace-keeping operation, for instance, and is excluded by  
14 Article 1.2 --

11:11:28 15 MR MANLY-SPAIN: Yes.

16 JUSTICE AYoola: -- well, should he now say that the  
17 competence of the Court should be determined as part of the  
merit 18 of the case?

19 MR MANLY-SPAIN: My Lord, I don't think he would be  
charged

11:11:42 20 in the first place.

21 JUSTICE AYoola: Why would he not? Well, in that case,  
why  
22 do you think your client would be charged in the first place  
if,  
23 as you now contend, it is not within the jurisdiction of the  
24 Court? That leads to the presumption that there is  
jurisdiction

11:11:54 25 and who is to dislodge that presumption?

26 MR MANLY-SPAIN: I know the question of the jurisdiction  
we  
27 are submitting is for the Prosecutor to investigate; come to a  
28 conclusion that the person they intend to charge falls within  
the  
29 category and charge, then it is for the Court --

1 JUSTICE AYoola: That he has done.

2 MR MANLY-SPAIN: Yes, My Lord.

3 JUSTICE AYoola: And the Court will presume that he has  
4 done what is right, the presumption of regularity.

11:12:26 5 MR MANLY-SPAIN: Well, that is the real point we are  
6 making, that the Court was not right to do it that way. The  
7 Court had to decide whether the person fell within that  
category.

8 JUSTICE AYoola: If you are aborting that presumption,  
is  
9 it not your responsibility?

11:12:44 10 MR MANLY-SPAIN: Well, I do not think that it is a  
11 presumption, My Lord. It is a provision of the law; that it  
is  
12 for the Prosecutor to investigate and charge and prosecute.

13 JUSTICE AYoola: Suppose the Prosecutor has brought  
someone  
14 in the peace-keeping force, what happens?

11:13:02 15 MR MANLY-SPAIN: Then he would have raised it at the  
16 beginning, My Lord, the objection.

17 JUSTICE AYoola: Who would have?

18 MR MANLY-SPAIN: The persons who were charged.

19 JUSTICE AYoola: So why is this one different?

11:13:14 20 MR MANLY-SPAIN: Because, My Lord, these are people who  
21 could be charged. It is just a matter of who should determine

22 finally whether they fell within that category.

23 JUSTICE KING: But, Mr Manly-Spain --

24 MR MANLY-SPAIN: Yes, My Lord.

11:13:32 25 JUSTICE KING: -- let me ask you this question: Who has  
26 the responsibility of prosecuting persons who bear the  
greatest  
27 responsibility?

28 MR MANLY-SPAIN: According to the Act, My Lord, both the  
29 Court and the Prosecutor.

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1 JUSTICE KING: Now, the Statute, the provisions of the  
2 Statute must all be looked into. If you look at Article 1.1,  
it  
3 tells you, and I will quote the exact words there, Article 1.1  
4 says: "The Special Court shall, except as provided in  
11:14:06 5 subparagraph (2), have the power," and I emphasise the word  
6 "prosecute," "to prosecute" -- "to prosecute persons who bear  
the  
7 greatest responsibility for various violations of  
International  
8 Humanitarian Law." "Prosecute." Then go on to Article 15.  
It's  
9 a mandatory provision: "Shall." "The Prosecutor shall be  
11:14:34 10 responsible for the investigation and Prosecution."

11 In other words, if you interpret those two sections, who  
12 has the responsibility to prosecute those who bear the  
greatest  
13 responsibility for violations of international criminal  
14 humanitarian law?

11:14:58 15 MR MANLY-SPAIN: My position is slightly different from  
16 what your Lordship has said.

17 JUSTICE KING: I'm not expressing any position. I've  
just  
18 read -- don't read my mind. I have merely pointed out to you  
19 without coming to any conclusion the wordings in Article 1.1  
and  
11:15:13 20 in Article 15.1. I have not come to any conclusion. I didn't



21 say anything. I said who has -- I asked a question which you  
22 should try and answer, if you can.

23 MR MANLY-SPAIN: My Lord, to prosecute is not the same  
as  
24 to determine the guilt of the person that is prosecuted. It  
is  
11:15:33 25 for the Court to determine the guilt.

26 JUSTICE KING: I agree with you there.

27 MR MANLY-SPAIN: And --

28 JUSTICE KING: Stop there for a minute. So it is for  
the  
29 Court to determine the guilt. In other words, the Court is

1 adjudicating. I wish I could get your attention for a minute  
--

2 MR MANLY-SPAIN: Sorry, My Lord.

3 JUSTICE KING: -- so that you know exactly what I'm  
saying,

4 but I will wait until you've finish then. You see, what I'm  
11:15:52 5 trying to tell you, you are saying it is for the Court to  
6 determine the guilt. In other words, as I said earlier, to  
7 determine the guilt means to adjudicate. And if in Article

1.1

8 you have the word "prosecute" you must ask yourself why,  
instead

9 of "adjudicate" we have the word "prosecute" and then you also  
go

11:16:16 10 back now to Article 15 where it, in mandatory terms, it says,

11 "The Prosecutor shall be responsible," forgetting about the  
12 investigation, "shall be responsible for the Prosecution of  
13 persons who bear the greatest responsibility for violations of  
14 international --

11:16:39 15 MR MANLY-SPAIN: Yes, My Lord. My Lord, I think that  
the

16 provision under 1.1 is also mandatory.

17 JUSTICE KING: Yes.

18 MR MANLY-SPAIN: It is mandatory. It is not different  
19 from --

11:16:45 20 JUSTICE KING: Well, I didn't say it wasn't mandatory.

21 MR MANLY-SPAIN: But you --

22 JUSTICE KING: I'm emphasising the word "prosecute."

23 "Prosecute."

24 MR MANLY-SPAIN: -- [overlapping speakers] My Lord, the  
11:16:54 25 absence of the word "shall" in 1.1 does not make it a  
26 non-mandatory provision. That is what is the job of the  
Court.

27 JUSTICE KING: Let me explain myself again to you  
because

28 you don't see the point I'm making. You see, my emphasis in  
29 Article 1.1 is on the word "prosecute."

1 MR MANLY-SPAIN: Yes, My Lord.

2 JUSTICE KING: And there is no "adjudicate" there;  
3 establishing the guilt is not there. It's "prosecute."

4 MR MANLY-SPAIN: Yes, My Lord.

11:17:16 5 JUSTICE KING: And you yourself have said that you could  
6 have had "adjudicate" there, but we don't have it there. We  
have  
7 "prosecute." That is in Article 1.1; "shall." It's  
mandatory.

8 And the Special Court itself consists of the Chambers, the  
9 Prosecution, the Defence, and then in Article 15 it makes it  
11:17:41 10 quite clear about the role of the Prosecutor. The Prosecutor  
not  
11 shall be responsible for the investigation and prosecution of  
12 just persons -- what sort of persons? Persons who bear the  
13 greatest responsibility for serious violations of  
International  
14 Humanitarian Law and crimes under Sierra Leonean law. That's  
all  
11:18:02 15 I'm calling your attention to.

16 MR MANLY-SPAIN: I accept, My Lord. But what we are  
trying  
17 to say, My Lord, is that the interpretation given by this  
Court  
18 is that once the Prosecutor has determined that somebody falls  
19 among the category of those who bear the greatest  
responsibility,

11:18:21 20 the Court cannot deliberate on that. The Court cannot say,  
no,  
21 we do not think this person falls into that category.  
22 My Lord, if I can remember well, at the start of the  
23 Nuremberg cases, there was a provision that once the  
Prosecutor  
24 had decided that somebody should be charged, the Court cannot  
11:18:40 25 challenge that. Nobody can challenge that in Court. That  
26 provision has been removed -- has been unfair along ago. I do  
27 not think that this Court brings it back, My Lord, that once  
the  
28 Prosecutor says this person falls within that category, the  
Court  
29 cannot say "yes" or "no." That is the point we are making.

1 JUSTICE AYoola: If I may be of assistance. You spent  
2 almost 30 minutes on this one point.

3 MR MANLY-SPAIN: I will move on, My Lord.

4 JUSTICE AYoola: Could I ask you a question before you  
move  
11:19:14 5 on?

6 MR MANLY-SPAIN: Yes, My Lord.

7 JUSTICE AYoola: How exactly do you determine the person  
8 who has greatest responsibility?

9 MR MANLY-SPAIN: According to what the Trial Chamber I  
11:19:22 10 said, My Lord, by proof; evidence in the Court, in the trial.

11 JUSTICE AYoola: Yes, but evidence must be led to prove  
12 certain factors. What are the factors that you have to  
establish  
13 to determine a matter as a justiciable issue, the category of  
14 persons who have greatest responsibility?

11:19:45 15 MR MANLY-SPAIN: In this case, My Lord.

16 JUSTICE AYoola: Not only in this case, generally.

17 MR MANLY-SPAIN: Well, let me limit it to this case, My  
18 Lord.

19 JUSTICE KING: Generally. Don't --

11:19:57 20 MR MANLY-SPAIN: Generally, to show that this person  
falls

21 within the category, you should look at his position in the

Lord, 22 movement; the role he played; the command he had. And, My  
23 we spent -- the Prosecution spent so much time in trying to  
prove 24 that this accused had such positions and the case, the  
decision 25 of the Court, you will see in so many cases, they went on to  
11:20:15 say:  
26 "Oh, the third accused was a senior commander. The third  
accused 27 had control of men under him." These are the people who bear  
the 28 greatest responsibility; it was an issue before the Court.  
29 JUSTICE AYoola: Was it a jurisdictional issue before  
the

1 Court? It wasn't a jurisdictional issue before the Court; it  
was 2 an issue of liability under common responsibility.

3 MR MANLY-SPAIN: Exactly. My Lords --

4 JUSTICE AYoola: That's different from saying that -- do  
11:20:53 5 you understand greatest responsibility to include criminal  
6 responsibility? Was it a category, a political category  
7 different from criminal responsibility?

8 MR MANLY-SPAIN: No, My Lord. I think greatest  
9 responsibility, the provision is for people who should be  
charged

11:21:12 10 because there were so many people concerned that there  
wouldn't 11 be enough time, money, et cetera, to prosecute all of them.  
So 12 they adopted that phrase, so that the people who were most  
13 responsible, let me put it that way, the higher-ranking  
people, 14 would be charged.

11:21:34 15 JUSTICE AYoola: Including leaders.

16 MR MANLY-SPAIN: Yes, My Lord. The leaders, to put it  
in 17 one word. Yes, My Lord. They were to be charged. Those who  
18 fall within the category, according to the investigation by  
the 19 Prosecutor.

11:21:59 20 JUSTICE AYoola: According to investigation by the



21 Prosecution.

22 MR MANLY-SPAIN: Yes, My Lord. Then, My Lord, it was a  
23 matter for the Prosecution to prosecute those people  
24 satisfactorily, according to the legal requirements.

11:22:14 25 JUSTICE AYoola: Yes. When you move to Prosecution  
26 satisfactorily, then you get to the range of criminal  
27 responsibility which is different from greatest responsibility  
28 determined not on the basis of criminality.

29 MR MANLY-SPAIN: Well, let me pose a question, My Lord.

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1 JUSTICE AYoola: Is it a crime to be a leader?

2 MR MANLY-SPAIN: No, My Lord. That is the point we were  
3 going to make, or we have made, I think. It's not because you  
4 were a leader, that is why you bear the greatest  
responsibility.

11:22:45 5 You could have been, but you were not -- you do not fall into  
6 that category. But the important point, My Lord, is that by  
the  
7 decision of the Trial Chamber, it takes away from itself its  
8 power to decide on this issue and we are submitting that that  
was  
9 wrong.

11:23:08 10 JUSTICE AYoola: Even if that was wrong, that does not  
11 necessarily mean that this Court should agree with your  
12 submissions. SO, you have to --

13 MR MANLY-SPAIN: Oh, no, My Lord.

14 JUSTICE AYoola: -- you have to submit the  
interpretation

11:23:21 15 of subparagraph (1) of Article 1 to this Court afresh,  
regardless  
16 of whether TCI or TCII have taken a position on the point.  
You  
17 are making a submission of -- on the interpretation of Article  
1,  
18 subparagraph (1).

19 JUSTICE KING: Yes. You see, that's why I referred you  
to

11:23:48 20 Article 1, subparagraph (1) and also Article 15. I mean,  
there  
21 are certain interpreting clauses in the Statute; you have to  
22 interpret it by coming to the right conclusion, having regard  
to  
23 the words actually used.

24 To my mind, prima facie, when you look at those two  
11:24:07 25 provisions and the actual wording of those provisions, it  
seems  
26 to me that it's saying: Those persons who in the opinion of  
the  
27 Prosecutor bear the greatest responsibility because in Article  
1  
28 it's mandatory, as you say. It says "Prosecutor." It says  
the  
29 Special Court "shall prosecute." The Special Court consists  
of

1 the various organs I have told you about, and then you come to  
2 15. It says the "Prosecutor shall be responsible to  
prosecute."

3 You have to take those into consideration in construing and  
4 interpreting the various provisions.

11:24:52 5 MR MANLY-SPAIN: Well, let me say this, My Lord: Our  
6 submission and interpretation of the two Articles is this:

That  
rights  
people  
responsibility  
7 the duty given to the Prosecution does not take away the  
8 of the Court, the power of the Court to determine that the  
9 charged are persons who fall within the greatest

11:25:18 10 category; that the Court should determine this by evidence  
11 adduced before it.

12 My Lord, I move on to ground 2. Our query, My Lord, is  
13 that the discretion of the Court was unreasonable when it  
decided

14 that the evidence, extraneous evidence that were led were  
cured

11:26:32 15 by -- the extraneous evidence led first time in the trial were  
16 waived -- that we waived our rights by not objecting at the  
time.

17 Here, we are submitting that the Court did not consider  
properly

18 the duty of the Prosecution to plead the indictment with

failure 19 specificity at the inception of the trial, and also the  
11:27:27 20 of the Prosecution to lead evidence on the matters that were  
21 pleaded.  
22 We will refer you to paragraph 226 of our submission.  
This 23 is particularly with regard to the charges under Article 6.1  
and 24 we have submitted as follows: That the Court, where the mode  
of 25 committing within Article 6.1 is being pleaded the Courts  
11:28:09 26 that detailed particulars such as the identity of the victim,  
avail 27 time and place of the events and the means by which the acts  
the 28 committed, must be set forth in the indictment.  
were 29 In cases where a high degree of specificity is

1 impracticable as the identity of victims information -- is  
2 information that the valuable -- that is valuable to the  
3 preparation of the Defence case if the Prosecution is in a  
4 position to name the victim should endeavour to do so. Where  
11:28:55 5 that is not possible, general information that is sufficient  
to  
6 warn the accused of the allegation against him or her would be  
7 acceptable.

8 My Lord, in this case I would wish to refer you to one  
9 particular piece of evidence that concerns the third  
appellant.

11:29:18 10 That is evidence that was given by Prosecution witness 334 on  
the  
11 alleged amputation by the third accused of a civilian, and  
also  
12 the looting of a motor car by the third accused, which was  
13 evidence given by the witness Gibril Massaquoi.

14 These are pieces of evidence that were not pleaded at  
all.

11:29:55 15 They only came to the notice of the Court at the hearing when  
the  
16 witness came out with this. Nothing of the sort were found in  
17 any witness statement served on the Defence or additional  
witness  
18 statements. Nothing was given to us. It merely came up for  
the  
19 first time during the trial.

11:30:35 20 JUSTICE AYoola: Your learned friend said you did not  
21 object.

22 MR MANLY-SPAIN: Yes, My Lord. My Lord, it is a  
question  
23 of strategy in trials. We knew that the evidence was coming  
from  
24 somebody who falls into the category of an accomplice. 334,  
for  
11:31:03 25 all intents and purposes of this matter, was an accomplice  
who,  
26 in examination-in-chief and cross-examination, or  
27 cross-examination, had admitted that he had come to give  
evidence  
28 before this Court, before the Court, because he had been  
29 guaranteed that he would not be prosecuted. He had been

1 guaranteed by the Office of the Prosecutor that he would not  
be  
2 prosecuted. This evidence came out. We believe that this  
3 evidence is tainted, and coming from an accomplice, it would  
need  
4 corroboration, at least, or warning, caution by the courts  
when  
11:31:55 5 deliberating on it. The evidence was not corroborated by  
anybody  
6 else, why I say that the third accused --

7 JUSTICE WINTER: May I ask a question as well?

8 MR MANLY-SPAIN: Yes, My Lord.

9 JUSTICE WINTER: In case somebody is an accomplice, and  
has  
11:32:17 10 the guarantee not to be prosecuted, does this imply  
automatically  
11 that this person is lying?

12 MR MANLY-SPAIN: No, My Lord, I'm not saying that. I'm  
13 merely saying that the evidence may require corroboration or  
at  
14 least the Court in dealing with this evidence should caution  
11:32:34 15 itself, that is, this is a person who had a purpose to serve.

16 JUSTICE KING: You have 15 more minutes. You see, we  
are  
17 taking notes of what you say, so I want to make my notes -- if  
I  
18 make a mistake, correct me, because my brother on my left, my



19 brother on my left --

11:32:51 20 MR MANLY-SPAIN: Yes, My Lord.

21 JUSTICE KING: -- has just asked you a question and your

22 submission, which I've got down, in respect of TF1-334, you  
said

23 this, and that's what prompted the question I'm sure.

24 TF1-334 was an accomplice and he said he had been

11:33:08 25 guaranteed that he would not be prosecuted. Therefore, you  
say,

26 his evidence is tainted and that's what spun that question.

27 That's what you said.

28 MR MANLY-SPAIN: Well, let me just rephrase it, please.

29 His evidence --

1 JUSTICE KING: Well, always take care what you are  
saying.

2 MR MANLY-SPAIN: -- evidence can be construed as  
tainted.

3 JUSTICE KING: So you want to amend that to say "can be  
4 construed."

11:33:30 5 MR MANLY-SPAIN: Yes.

6 JUSTICE KING: Well, you see, that's why she has that  
7 question -- my brother asked that question.

8 MR MANLY-SPAIN: I am grateful, My Lord.

9 JUSTICE KING: Thank you.

11:33:43 10 MR MANLY-SPAIN: Yes, My Lord. We would refer you to  
page

11 20 of our submissions on this matter, and paragraph 2050 of  
the  
12 judgment. Paragraph 2050.

13 JUSTICE KING: Paragraph?

14 MR MANLY-SPAIN: 2050 of the judgment.

11:34:19 15 JUSTICE KING: Of what?

16 MR MANLY-SPAIN: Of the judgment.

17 JUDGE KING: 2050?

18 MR MANLY-SPAIN: Yes, My Lord. On this evidence, My  
Lord,

19 it's one piece of evidence by an accomplice, the Court came to

11:34:32 20 the conclusion that the accused had actually amputated the  
hands

21 of a civilian. That, My Lord, we respectfully submit, was  
22 dangerous, My Lord, and due consideration was not given to the  
23 position of the accused and the address given by the accused,  
the  
24 way evidence of accomplice is to be treated, My Lord.

11:35:04 25 JUSTICE KING: Let me get you quite clear: I quite  
26 understand your submission with regard to the need for  
evidence  
27 of an accomplice to be corroborated; a warning from the Bench.

28 MR MANLY-SPAIN: Yes, My Lord.

29 JUSTICE KING: What is your submission because you are

1 saying that there's only one witness who said this or what?

2 MR MANLY-SPAIN: One witness who was an accomplice. One  
3 witness who himself in Court admitted that he also committed  
4 atrocities. He had a purpose to serve, My Lord.

11:37:39 5 JUSTICE KING: So you are saying -- sorry, go ahead,  
6 please.

7 JUSTICE WINTER: Sorry, I tried to understand because  
8 somebody has admitted that he committed atrocities himself, he  
9 understands that he would serve the Court better if he accuses  
11:37:39 10 wrongly somebody else; is this the submission?

11 MR MANLY-SPAIN: My Lord, it is clear that he would want  
to  
12 put a lot of weight or he would like to give evidence that  
would  
13 put the accused -- to show that the accused is guilty of the  
14 offences.

11:37:39 15 JUSTICE WINTER: Why should that serve himself?

16 MR MANLY-SPAIN: Then, there would be no point for him  
to  
17 be here, My Lord. If he were not going to benefit out of it,  
he  
18 would not have come, My Lord.

19 JUSTICE WINTER: Sorry, I don't get it. If somebody  
comes

11:37:39 20 to the Court under the guarantee that he will not be  
prosecuted,

am 21 for whatever he has done, he does not risk anything any more,  
22 I right?  
23 MR MANLY-SPAIN: Yes, in a way, My Lord.  
24 JUSTICE WINTER: Why should he then lie? To what  
purpose,  
11:37:39 25 if in any case he cannot be prosecuted?  
26 MR MANLY-SPAIN: My Lord, in the first place he would  
like  
27 his evidence to be of value to the Court, so he will lie.  
28 JUSTICE WINTER: Evidence is valuable to the Court if  
it's  
29 true, no?

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1 MR MANLY-SPAIN: Yes, My Lord.

2 JUSTICE WINTER: So, what would be the purpose of lying?  
3 Do I get it right that you mean that you suppose that lying to  
4 have an accused proven --

11:37:40 5 MR MANLY-SPAIN: Guilty.

6 JUSTICE WINTER: - guilty helps the Court?

7 MR MANLY-SPAIN: Yes, My Lord.

8 JUSTICE WINTER: Which means that you suppose that the  
9 Court is only valuable if you prove somebody guilty?

11:37:42 10 MR MANLY-SPAIN: No, no, no, My Lord. The purpose that  
the  
11 witness is here to serve is to give evidence that will cause  
the  
12 Court to come to a conclusion that the accused is guilty.  
That  
13 is the purpose he was here for. That is the purpose.

14 JUSTICE WINTER: Thank you.

11:38:00 15 JUSTICE KING: What does the oath say, when a witness  
gives  
16 evidence? What does it say, do you remember?

17 MR MANLY-SPAIN: My Lord, to speak --

18 JUSTICE KING: What does it say?

19 MR MANLY-SPAIN: To speak the truth.

11:38:12 20 JUSTICE KING: Who, I should speak the truth?

21 MR MANLY-SPAIN: No, no, no, the witness, My Lord.

22 JUSTICE KING: Well, exactly. To say the truth and what  
23 else?

24 MR MANLY-SPAIN: And assist the Court in coming to its  
11:38:20 25 decision.

26 JUSTICE KING: What is the wording of the oath?

27 MR MANLY-SPAIN: I can't recall it right now.

28 JUSTICE KING: Oh, right.

29 MR MANLY-SPAIN: The whole truth or nothing but the  
truth.

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1 JUSTICE KING: [Microphone not activated] you have known  
it  
2 for a long long time. When you say cannot recall you should  
be  
3 very frank with the Court.

4 MR MANLY-SPAIN: I am, My Lord.

11:38:42 5 JUSTICE KING: You are a senior barrister. I have known  
6 you in the local jurisdiction, and I know your capacity, so  
don't  
7 tell me you don't know -- you can't recall. You recall. So  
try  
8 and assist this Court.

9 MR MANLY-SPAIN: As My Lord pleases. My Lord, I am  
trying  
11:38:54 10 to do so, My Lord. I hope you don't take it any other way. I  
am  
11 trying to do so.

12 JUSTICE KING: Thank you for the assurance. I am told  
that  
13 you have ten minutes, but we asked you so many questions so  
you  
14 can have some more time.

11:39:20 15 MR MANLY-SPAIN: I am very grateful, My Lord.

16 JUSTICE AYoola: Now, you rightly made issue about that  
17 witness being an accomplice, but the evidence of an accomplice  
18 can still be admitted and relied upon. The only legal  
19 requirement is that there should be some degree of warning.

Now,



11:39:31 20 isn't there such warning in paragraphs 124 and paragraph 125?  
21 MR MANLY-SPAIN: Just a minute, My Lord.  
22 JUSTICE AYoola: In those paragraphs it would appear  
that  
23 the Trial Chamber did advert to the fact that some allegations  
24 were made as to the credibility of those witnesses on the  
basis  
11:39:59 25 that they, themselves, have been alleged to have committed  
some  
26 crimes, notwithstanding the Trial Chamber accepted their  
27 evidence.  
28 MR MANLY-SPAIN: Yes, My Lord. My Lord, I have noted  
the  
29 paragraphs you mentioned and paragraph 125 I wish to point out

1 that the Court says something.

2 JUSTICE KING: Well, read it.

3 MR MANLY-SPAIN: Yes, My Lord. In the middle it says  
4 "moreover" --

11:40:46 5 JUSTICE KING: Read the whole paragraph.

6 MR MANLY-SPAIN: Okay. Let me begin at 124:

7 "The Defence calls into issue the credibility of certain  
8 Prosecution witnesses because these individuals have  
9 allegedly been implicated in crimes under the  
jurisdiction

11:41:00 10 of the Court or in domestic crimes or that they were

11 informants to the police or admitted taking drugs. The

12 Brima Defence specifically alleges that the witness  
George

13 Johnson killed Brima's brother and that this was reason

14 enough for the witness to attempt to fabricate evidence

11:41:16 15 against the accused."

16 Paragraph 125:

17 "A witness with a self-interest to serve may seek to

18 inculpate others and exculpate himself but it does not

19 follow that such a witness is incapable of telling the

11:41:34 20 truth. And the mere suggestion that the witness might  
be

21 implicated in the commission of crimes is insufficient  
for

Moreover, 22 the Chamber to discard the witness's testimony.  
23 none of the Prosecution witnesses has been charged with  
any 24 crimes and the evidence cannot therefore be described as  
11:41:51 25 accomplice witnesses."  
26 This is fine, My Lord. The Trial Chamber misconstrued  
what 27 an accomplice is. They are saying that you have to be  
somebody 28 that is charged before you can be an accomplice and that is  
not 29 right.

1 JUSTICE AYoola: That is not your ground of appeal.

2 MR MANLY-SPAIN: My Lord, we --

3 JUSTICE AYoola: You did not allege misdirection in your  
4 ground of appeal.

11:42:38 5 MR MANLY-SPAIN: Our fourth ground of appeal, in our  
6 submissions filed, we raised this point, that is page 33, 4.3,  
we  
7 raise the point. More particularly, the Trial Chamber erred  
in  
8 law in paragraph 125 in holding that the mere fact that none  
of  
9 these Prosecution witnesses had been charged with any crimes,  
it  
11:43:21 10 did not qualify -- did not qualify their evidence as  
accomplice  
11 evidence.

12 JUSTICE KING: Well, that is quite a good point.

13 MR MANLY-SPAIN: That is completely wrong, My Lord.

14 JUSTICE KING: Just a minute. Yes. Well, that is why  
you  
11:43:32 15 should always go for the jugular vein. Go for the jugular  
vein.  
16 My brother on my right pointed out section 125 to you.

17 MR MANLY-SPAIN: Yes, My Lord.

18 JUSTICE KING: Now, having complained in that your brief  
19 that is what you should be highlighting to us, you know,  
because,

11:43:46 20 in fact, you are complaining and there seems to be, on the  
face  
21 of it, some justification in your complaint about that  
sentence.  
22 Moreover, none of these Prosecution witnesses has been charged  
23 with any crimes and their evidence therefore cannot be  
described  
24 as accomplice. You are complaining about that.

11:44:02 25 MR MANLY-SPAIN: Yes, My Lord.

26 JUSTICE KING: Yes. And we would be saying accomplices,  
27 does somebody who is an accomplice have to be charged; that is  
28 what I want you to emphasise to us.

29 MR MANLY-SPAIN: No, My Lord.

1 JUSTICE AYoola: Well, having --

2 MR MANLY-SPAIN: The charging --

3 JUSTICE AYoola: Just a minute. Maybe we shouldn't  
spend

4 too much time on this. Look at your paragraph 46.

11:44:24 5 MR MANLY-SPAIN: Yes, My Lord.

6 JUSTICE AYoola: And your page 34.

7 MR MANLY-SPAIN: Yes, My Lord.

8 JUSTICE AYoola: If you read your paragraph 4.6,  
together

9 with paragraph 124 and paragraph 125, do you have any ground  
of

11:44:37 10 complaint?

11 MR MANLY-SPAIN: Yes, My Lord.

12 JUSTICE AYoola: Would you like to read your paragraph  
4.6?

13 MR MANLY-SPAIN: Yes, My Lord.

14 "Accomplice testimony is not per se unreliable  
especially

11:44:51 15 where it is thoroughly questioned through

16 cross-examination. However, considering that accomplice

17 witnesses may have a motive to lie or incentive to

18 implicate the accused person before the tribunal, as was

19 the case with George Johnson's evidence on the

11:45:08 20 restructuring of Mansofinia and subsequent attacks on

when 21 civilians in [indiscernible] Rosos the Trial Chamber,  
22 weighing the probative value of such evidence, was bound  
to 23 carefully consider the totality of the circumstances in  
24 which it was tendered."

11:45:21 25 Yes, My Lord.

26 JUSTICE AYoola: And is there anything to show that that  
27 has not been done in this case?

28 MR MANLY-SPAIN: My Lord, the complaint, if we have to  
29 limit it, is on two fronts. The mere fact that the  
Prosecution

1 did not consider them to be -- him to be an accomplice is a  
2 breach of the law.

3 JUSTICE AYoola: Prosecution?

4 MR MANLY-SPAIN: Sorry, My Lord, I beg your pardon. If  
the

11:45:48 5 mere fact that the Court, My Lord, decided that they were not  
6 accomplices, it's wrong. So, at the end of the day, it is  
clear

7 they did not treat this piece of evidence as evidence of  
8 accomplices.

9 JUSTICE AYoola: If they have done, then they would have  
11:46:10 10 done what you suggested in 4.6. You set the pre-conditions,  
11 thorough cross-examination; didn't you thoroughly cross-  
examine

12 this witness?

13 MR MANLY-SPAIN: Not on that point, My Lord. As I said,  
it

14 was a matter of strategy --

11:46:26 15 JUSTICE AYoola: You don't isolate points on which you  
16 cross-examine. Didn't you thoroughly cross-examine that  
witness?

17 MR MANLY-SPAIN: Yes, My Lord. For example, we  
questioned

18 this witness with regard to the third appellant.

19 JUSTICE AYoola: Yes, you thoroughly cross-examined the  
11:46:41 20 witness, so the first condition set out in your 4.6 had been  
met.



21 Didn't the Trial Chamber advert to the fact that they might,  
22 these witnesses might have their own interest to serve? The  
23 Trial Chamber did, in 125 -- isn't it the law that it's not  
every  
24 misdirection that leads to miscarriage of justice? That has  
to  
11:47:15 25 be the law.

26 MR MANLY-SPAIN: Yes, My Lord, but substantial once,  
lead  
27 to miscarriage of justice, and we believe that this is a  
28 substantial error, My Lord.

29 My Lord, because of time, I will go forward. I will  
move

of 1 on. My Lord, I just want to say -- go briefly on the matter  
2 joint criminal enterprise, then I will go on to sentences and  
3 conclude.

4 JUSTICE KING: You are now moving on to joint criminal  
11:47:55 5 enterprise; that is what ground?

6 MR MANLY-SPAIN: Ground ten, My Lord.

7 JUSTICE KING: Ground?

8 MR MANLY-SPAIN: Ten.

9 JUSTICE KING: Thank you.

11:48:05 10 MR MANLY-SPAIN: It's really brief, what I wish to say,  
11 because we went over this quite a lot in my submissions in  
reply,  
12 in my submissions after the Prosecution had argued their  
grounds.

13 My Lord, we just want to point out that when you look at  
14 the pleading under paragraph 33 of the indictment, where JC  
was  
11:48:32 15 specifically pleaded, it reads, My Lord:

16 "The AFRC, including Alex Tamba Brima, Ibrahim Bazzy  
Kamara

17 and Santigie Borbor Kanu and the RUF, including Issa  
Hassan

18 Sesay, Morris Kallon and Augustine Gbao, shared a common  
19 plan, purpose or design (joint criminal enterprise)  
which

11:49:19 20 was to take any actions necessary to gain and exercise

21 political power and control over the territory of Sierra  
22 Leone, in particular, the diamond mining areas. The  
23 natural resources of Sierra Leone, in particular the  
24 diamonds, were to be provided to persons outside Sierra  
11:49:37 25 Leone in return for assistance in carrying out the joint  
26 criminal enterprise."

27 Our submission here, My Lord, is that it would appear  
from  
28 the wording that those who were on trial are not Alex Tamba  
29 Brima, Ibrahim Bazzy Kamara or Santigie Borbor Kanu, but the

1 trial -- the person or persons on trial is the AFRC, by the  
2 wording of this paragraph. The AFRC and the RUF, including  
3 such-and-such people -- yes, My Lord, are -- the principal  
4 parties to the JC are not Alex Tamba Brima and others but the  
11:50:33 5 AFRC.

6 JUSTICE AYOOLA: [Microphone not activated].

7 MR MANLY-SPAIN: Well, this is what is on the --

8 JUSTICE KING: How can you say that?

9 MR MANLY-SPAIN: Well, this is what is on the face of  
the  
11:50:39 10 indictment, My Lord.

11 JUSTICE KING: I want to follow your submissions fully  
12 well. How can you say it's the AFRC and not those persons  
you've

13 named? As I read it from my indictment, it says the AFRC, and  
14 the operative word there is "including"; what do you mean by  
11:51:01 15 "including"?

16 MR MANLY-SPAIN: Bad pleading, My Lord.

17 JUSTICE KING: It's for us to decide, not you.

18 MR MANLY-SPAIN: But I --

19 JUSTICE KING: Just a minute please. Just a minute.  
You  
11:51:10 20 can only make submission. So, get that in mind.

21 MR MANLY-SPAIN: That is what I am trying to --

the

22 JUSTICE KING: Just a minute, please. You see, it says

23 AFRC "including." You cannot ignore the word "including." It

24 says: "The Armed Forces Revolutionary Council, including Alex

11:51:21 25 Tamba Brima, Brima [sic] Bazzy Kamara and Santigie Borbor Kanu

26 and the RUF, including Issa Hassan Sesay" and so on "shared a

27 common crime." So how can you say just the AFRC when the word

28 "including" is used --

29 MR MANLY-SPAIN: My Lord, we are submitting -- the

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1 submission we are making for you to decide --

2 JUSTICE KING: Yes.

11:51:49  
trial.

3 MR MANLY-SPAIN: -- is that it was badly pleaded. That  
4 from an interpretation, or one of the interpretations you can  
5 give, it's the AFRC that is on trial. The RUF that is on

6 And it's a trial of organisations, not individuals.

7 JUSTICE KING: Was it established in the trial, at all,  
8 that these accused persons, these appellant or appellants, in  
9 fact, were members of the AFRC?

11:52:11

10 MR MANLY-SPAIN: Evidence was led to that effect.

on.

11 JUSTICE KING: Thank you. All right. Very well. Go

the

12 MR MANLY-SPAIN: Yes, My Lord. A point which we have  
13 raised, My Lord, is what should be the effect now, or since

badly

14 Court has decided that JC, joint criminal enterprise, was

11:52:36

15 pleaded, what should be the defect?

don't

16 JUSTICE KING: Now, will you point out please, if you

of

17 mind, this is very important, point out to the exact wording

18 the Trial Chamber's decision.

19 MR MANLY-SPAIN: Yes, My Lord.

11:52:47

20 JUSTICE KING: So we can follow exactly what you are

21 saying.

22 MR MANLY-SPAIN: Yes. Just a minute, My Lord.

23 In our submissions, at page 67, paragraph 10.1.

24 JUSTICE KING: The first paragraph, what -- page what?

11:53:36 25 MR MANLY-SPAIN: 10.1, page 67.

26 JUSTICE KING: Paragraph 10.1 of your own brief.

27 MR MANLY-SPAIN: Yes, My Lord.

28 JUSTICE KING: Yes, read.

29 MR MANLY-SPAIN: This time I will be going on while they

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1 are searching for the exact --

2 JUSTICE KING: No, wait, actually, I want to follow. We  
3 will wait for you. We have to be consistent to follow  
smoothly.

4 You said the Trial Chamber held that the indictment was badly  
11:54:37 5 pleaded. I just want you to --

6 MR MANLY-SPAIN: No, joint criminal enterprise --

7 JUSTICE KING: The joint criminal -- that's correct.  
Joint  
8 criminal enterprise was badly pleaded so I just want to  
identify  
9 exactly where, so we follow you.

11:55:31 10 MR STAKER: Your Honour, perhaps I could assist my  
learned  
11 friend. I understand it's paragraph 778.

12 JUSTICE KING: You are very kind. Thank you very much  
for  
13 assisting the Court. 778.

14 MR MANLY-SPAIN: Thank you very much. Paragraph 778  
says:

11:56:20 15 "The Trial Chamber has already found that a pleading of common  
16 purpose in the indictment was defective and that joint  
criminal  
17 enterprise as a mode of liability cannot be relied upon by the  
18 Prosecution."

19 JUSTICE KING: That is the portion you are looking at,  
you



11:56:37 20 are searching for, is it? You accept that that was what you  
were

21 looking for?

22 MR MANLY-SPAIN: Yes, that is one of the place where the  
23 Court specifically said that joint criminal enterprise --

24 JUSTICE KING: That is why I am asking you because, you  
11:56:51 25 see, I am taking down your submission. Now, look at paragraph  
67

26 to 71 of the judgment.

27 MR MANLY-SPAIN: Yes, My Lord, this is it --

28 JUSTICE KING: Sorry?

29 MR MANLY-SPAIN: This is exactly it, My Lord. Thank  
you,

1 My Lord.

2 JUSTICE KING: Well, okay. Thank you. Yes, go on, make  
3 your submission now. So you are, in fact, referring to  
paragraph

4 67?

11:57:38 5 MR MANLY-SPAIN: Yes, My Lord, where the Trial Chamber  
6 found that a joint criminal enterprise --

7 JUSTICE KING: Please read it and then make your  
8 submission. Always read it so we can follow properly.  
Although

9 we have got time limits, but we want to really follow the  
case,

11:57:54 10 and we are not rushing you.

11 MR MANLY-SPAIN: "With the greatest respect, the Trial  
12 Chamber does not agree with the decision of" --

13 JUSTICE KING: I can't hear you.

14 MR MANLY-SPAIN: "With the greatest respect, the Trial  
11:58:03 15 Chamber does not agree with the decision of our learned  
16 colleagues and that the indictment" -- "that the indictment  
has

17 been properly pleaded with respect to the liability for JCE,  
18 since the common purpose alleged in paragraph 33, that is, to  
19 take any actions necessary to gain and exercise political  
power

11:58:20 20 and control over the territory of Sierra Leone, in particular  
the

21 diamond areas mining areas is not a criminal purpose  
recognised  
22 by the Statute. The common purpose pleaded in the indictment  
23 does not contain a crime under the Special Court's  
jurisdiction.  
24 A common purpose 'to take any actions necessary to gain and  
11:58:38 25 exercise political power and control over the territory of  
Sierra  
26 Leone' is not an international crime and, as the Appeals  
Chamber  
27 has noted whether to prosecute the perpetrators of rebellion  
for  
28 their act of rebellion and challenge to the constituted  
authority  
29 of the State as a matter of international law is for the State

1 authority to decide. There is no rule against rebellion  
2 international law."

3 Both the Prosecution and the Defence agree that joint  
4 criminal enterprise runs through the entire indictment.

11:59:21 5 fact

JUSTICE AYoola: Is that correct? Notwithstanding the

is

6 that the Trial Chamber held as you had read, my recollection

the

7 that they proceeded to consider the case not principally on

8 cases of joint criminal enterprise.

9 MR MANLY-SPAIN: Yes, My Lord.

11:59:41 10 Prosecution

JUSTICE AYoola: Now, how can you say both the

11 and the Defence agreed where the Court --

12 MR MANLY-SPAIN: In our submissions.

in

13 JUSTICE AYoola: That the case, the totality of the case

14 was based on joint criminal enterprise? How about committing,

11:59:56 15

person?

16 MR MANLY-SPAIN: Yes, My Lord.

person?

17 JUSTICE AYoola: How about aiding and abetting in

crime

18 MR MANLY-SPAIN: It is one of the ingredients of the

19 they are alleged to have committed.

12:00:06 20  
paragraph

think,

from

20 JUSTICE AYoola: You are trying to rely, in your  
21 10.1 on a statement made by the Trial Chamber I, I should  
22 in 2004. The passage you quoted in your 10.1 was a passage  
23 a decision of the first Trial Chamber, in 2004.

24 MR MANLY-SPAIN: Yes, My Lord.

12:00:33 25

25 JUSTICE AYoola: First, it would appear, doesn't it,  
26 wouldn't it, that that statement was plucked out; it wasn't  
27 really the basis of a decision, that decision, and it is clear  
28 that the Trial Chamber II did not agree with that statement.

29 MR MANLY-SPAIN: Yes, My Lord.

1 JUSTICE AYoola: And finally, really, if this Chamber  
2 agrees with the Prosecution, that JCE was properly pleaded,  
that  
3 is the end of your ground 10.

4 MR MANLY-SPAIN: I know, My Lord. I know, My Lord. I  
have  
12:01:13 5 argued extensively on that in my submissions. I know the  
6 paragraph that relates to the JC, My Lord, which I wanted to  
7 refer you to, is paragraph 85.

8 JUSTICE AYoola: Of?

9 MR MANLY-SPAIN: Of the judgment, My Lord. It reads:  
12:01:58 10 "For these reasons, the Trial Chamber finds with respect  
to  
11 joint criminal enterprise as a mode of criminal  
liability,  
12 the indictment has been defectively pleaded. Therefore,  
13 the Trial Chamber will not consider joint criminal  
14 enterprise as a mode of criminal liability."

12:02:15 15 My Lord --

16 JUSTICE KING: If I understand the Prosecution's case to  
17 this Court they are suggesting otherwise.

18 MR MANLY-SPAIN: Yes, My Lord.

19 JUSTICE KING: Now, let's look at the indictment itself,  
12:02:27 20 and that is paragraph 33 of the indictment. Could you assist  
21 this Court by telling us in what way the indictment is  
defective?

22 MR MANLY-SPAIN: According to the Court, My Lord.  
23 JUSTICE KING: No, according to the pleading in  
paragraph  
24 33.  
12:02:45 25 MR MANLY-SPAIN: Well, the -- because the joint criminal  
26 enterprise itself is not a crime under international law.  
27 JUSTICE KING: What?  
28 MR MANLY-SPAIN: Joint criminal enterprise.  
29 JUSTICE KING: Yes.

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1 MR MANLY-SPAIN: That is pleaded --

2 JUSTICE KING: Yes.

3 MR MANLY-SPAIN: In paragraph 33.

4 JUSTICE KING: Yes.

12:02:58 5 MR MANLY-SPAIN: That is, to take any action necessary  
to

6 gain and exercise political power over the -- and control over  
7 the territory of Sierra Leone is not --

8 JUSTICE KING: In particular, read the whole thing.

9 MR MANLY-SPAIN: In particular, the diamond mining  
areas.

12:03:16 10 JUSTICE KING: Yes, then go on. Read the whole of the  
11 indictment.

12 MR MANLY-SPAIN: "The natural resources of Sierra Leone,  
in

13 particular the diamonds, were to be provided to persons  
outside

14 Sierra Leone, in return for assistance in carrying out the  
joint

12:03:28 15 criminal enterprise. "

16 JUSTICE KING: What is joint criminal enterprise in the  
17 first place? What are the ingredients of the offence of joint  
18 criminal enterprise? What do you have to have?

19 MR MANLY-SPAIN: An agreement in the first place, that  
is

12:03:40 20 the direct -- one, the agreement by the persons who were



21 concerned to do certain criminal acts.

22 JUSTICE KING: Go on.

23 MR MANLY-SPAIN: Yes. There are three limbs to it, My

24 Lord.

12:03:53 25 JUSTICE KING: Yes, what are the limbs?

26 MR MANLY-SPAIN: The conceptual limb where -- the third

27 ground is where the person is responsible for acts done by

28 others.

29 JUSTICE KING: Yes.

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the 1 MR MANLY-SPAIN: Which he ought to have known would be  
2 consequence.

3 JUSTICE KING: Yes.

conceptual 4 MR MANLY-SPAIN: And also the second ground, the  
12:04:15 5 one where, for example, in a situation where you have  
something 6 like apartheid.

7 JUSTICE KING: Like what?

8 MR MANLY-SPAIN: Apartheid. There is not so much an  
9 agreement.

12:04:27 10 JUSTICE KING: Apartheid?

11 MR MANLY-SPAIN: Yes, My Lord.

12 JUSTICE KING: A separation of the races?

13 MR MANLY-SPAIN: Yes, My Lord. I am giving an instance.  
14 There is not so much an agreement but the perpetrators are  
aware 15 that this is what is to be done.  
12:04:39 16

17 JUSTICE KING: Yes, go on.

18 MR MANLY-SPAIN: That is the three limbs.

19 JUSTICE KING: So you are saying that, in fact, that you  
20 must have more than one person, naturally.

12:04:51 21 MR MANLY-SPAIN: Of course, My Lord, where there is an  
22 agreement.

22 JUSTICE KING: And then they must also have a common  
23 purpose.

24 MR MANLY-SPAIN: Yes, My Lord.

12:04:55 25 JUSTICE KING: And then, does it matter, in fact, if one  
or

26 other of them, so long as they have agreed on a common  
purpose,

27 if one or other of them did not physically commit the act

28 complained of by the Prosecution?

29 MR MANLY-SPAIN: No, My Lord.

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1 JUSTICE KING: Very well.

2 MR MANLY-SPAIN: It does not matter.

3 JUSTICE KING: And you still -- and yet you say it's  
4 defectively pleaded?

12:05:15  
word

5 MR MANLY-SPAIN: My Lord, the complaint is to -- the  
6 is the agreement. So --

is

7 JUSTICE KING: Is what is stated there, so you say that  
8 not a -- an unlawful agreement?

12:05:28  
over

9 MR MANLY-SPAIN: The agreement to take any actions  
10 necessary to gain and exercise political power and control  
11 the territory of Sierra Leone has been decided by the Court.

12 JUSTICE KING: By which Court?

13 MR MANLY-SPAIN: The Trial Chamber, the Trial Chamber.

14 JUSTICE KING: Which Trial Chamber; the lower court?

12:05:42

15 MR MANLY-SPAIN: Yes, My Lord. That was not --

16 JUSTICE KING: Yes. Decided to say what?

17 MR MANLY-SPAIN: That that was not a crime. The joint  
18 criminal enterprise that was pleaded.

12:05:52  
in

19 JUSTICE KING: You see, you have to take account of what  
20 [indiscernible] before us here. You know, you have said that,  
21 fact, that's not an offence, and so on, and so -- but the

22 Prosecution are contending otherwise. So, in addressing us to  
23 come at a resolution of the various different points you will  
24 have to convince us that, one, that your own stance is  
correct,  
12:06:09 25 the other side's stance is wrong. That is why I am taking the  
26 trouble to give you the opportunity while you are on your  
feet.

27 MR MANLY-SPAIN: Yes.

28 JUSTICE KING: To make the point to assist us; that is  
all.

29 MR MANLY-SPAIN: My Lord, remember I said that I had  
argued

1 this point when I was dealing with the Prosecution's -- my  
2 submissions against the Prosecution's grounds of appeal.

3 JUSTICE KING: Yes.

4 MR MANLY-SPAIN: That is why I did not want to go so  
much  
12:06:32 5 into it.

6 JUSTICE KING: Unless, you want to go, but we are asking  
7 you questions.

8 MR MANLY-SPAIN: Yes, My Lord.

9 JUSTICE KING: Because we want to come to a conclusion.

12:06:40 10 MR MANLY-SPAIN: Yes, My Lord.

11 JUSTICE KING: And we are asking you to assist us. That  
is  
12 why --

13 MR MANLY-SPAIN: Yes, My Lord.

14 JUSTICE KING: -- even though you have dealt with it --

12:06:44 15 MR MANLY-SPAIN: We are --

16 JUSTICE KING: -- just a minute -- in response to the  
17 Prosecution we are asking you to be able to guide us even at  
this

18 stage which is again part of your duties as Defence counsel.

19 MR MANLY-SPAIN: Yes, Your Honour. I will do my best.

12:06:58 20 JUSTICE KING: You are doing well; I can assure you  
about  
21 that.

22 MR MANLY-SPAIN: My Lord, I wanted -- why I went to this  
23 [indiscernible] I wanted to bring before the Court a question  
as  
24 to what should be the effect of the fact that the joint  
criminal  
12:07:15 25 enterprise had been badly pleaded.

26 JUSTICE AYoola: You've argued that very clearly in your  
27 paragraphs 10.1 to 10.3.

28 MR MANLY-SPAIN: Yes, My Lord. Well, let me now go on  
to  
29 sentencing, My Lord.

1 JUSTICE KING: Before you go on to sentencing.

2 MR MANLY-SPAIN: Pardon, My Lord?

3 JUSTICE KING: Before you go on to sentencing --

4 MR MANLY-SPAIN: Yes, My Lord.

12:07:36 5 JUSTICE KING: -- you see [microphone not activated] --

6 sorry, before you go on to sentencing, you wouldn't have this

7 opportunity to answer these questions later on, so I will give

8 you every opportunity. Now I am a bit -- I am turning over in  
my

9 mind what you were saying earlier on, about the greatest

12:08:01 10 responsibility, persons who bear the greatest responsibility,  
and

11 you are emphasising the fact that Article 1.1 refers to the

12 Special Court. Then I pointed out that word "prosecute" --

13 MR MANLY-SPAIN: Yes.

14 JUSTICE KING: What is the Special Court for Sierra  
Leone?

12:08:23 15 MR MANLY-SPAIN: It's a hybrid court, My Lord.

16 JUSTICE KING: No, no, no, no. What comprises the  
Special

17 Court for Sierra Leone?

18 MR MANLY-SPAIN: The Chambers and the Judges.

19 JUSTICE KING: Yes.

12:08:33 20 MR MANLY-SPAIN: The Prosecution.

21 JUSTICE KING: Yes.



22 MR MANLY-SPAIN: The Defence.

23 JUSTICE KING: No, not the Defence; not the Defence.

Look

24 at Article 11. Could you read Article 11 of the Statute.

12:08:45 25 MR MANLY-SPAIN: Yes, My Lord.

26 JUSTICE KING: Read Article 11.

27 MR MANLY-SPAIN: "The Special Court" -- Article 11:

28 "The Special Court shall consist of the following

organs:

29 The Chambers, comprising one or more Trial Chambers and an

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1 Appeals Chamber, the Prosecutor and the Registry."

2 JUSTICE KING: So, you see, there is no Defence there in  
3 the first place and then, secondly, in construing the section,  
4 the Articles, you refer not only to Article 1.1, and Article -

-  
12:09:33 5 you also have to refer to Article 15.

6 MR MANLY-SPAIN: I referred to it.

7 JUSTICE KING: Where -- yes, you did, where, in fact, in  
8 both cases you have the word "Prosecution and prosecute" and  
then  
9 when you look at the meaning of the Special Court, you begin  
to

12:09:49 10 see now how it should be interpreted; don't you agree?  
Frankly  
11 speaking.

12 MR MANLY-SPAIN: Well, yes, My Lord.

13 JUSTICE KING: Yes. All right. Go to your sentencing.

14 JUSTICE AYoola: Before you go to sentencing --

12:10:08 15 MR MANLY-SPAIN: Yes, My Lord.

16 JUSTICE AYoola: -- let me put a question which I also  
put  
17 to the Prosecution in terms -- in regard to greatest  
18 responsibility.

19 Suppose the matter has gone to trial, and a verdict has  
12:10:25 20 been rendered, as in this case, findings have been made;  
suppose

21 the accused person -- I am not relating this scenario to the  
22 present accused persons, it's rather hypothetical. Suppose  
the  
23 accused person had been found to have committed very numerous  
24 grave crimes, and that at the end of the day you say it's not  
a  
12:10:54 25 person with greatest responsibility, so the Court says, all  
those  
26 crimes are forgiven, go home?  
27 MR MANLY-SPAIN: No, My Lord, that is not what I am  
saying.  
28 JUSTICE AYoola: So what will the courts do?  
29 MR MANLY-SPAIN: But at that stage, My Lord --

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1 JUSTICE AYoola: If after going through the merits of  
the  
2 case, grievous offences are found to have been committed,  
maybe a  
3 whole -- a multitude of persons have been killed -- I'm not  
4 relating it to the facts of this case, I must emphasise that.

12:11:26 5 MR MANLY-SPAIN: Yes.

6 JUSTICE AYoola: I am not saying that your clients  
7 committed such crimes. Suppose hypothetically, the  
hypothetical  
8 accused had been found to have committed a series of murders,  
9 burnings, pillage, all sorts of things, grave offences, that  
10 those have been found as a fact, now you come at the end of  
12:11:44 the

11 day, you say come, this man does not bear greatest  
responsibility  
12 because he was not a leader, he was just a wild creature  
13 executing the joint common enterprise, so what does the Court  
do?  
14 The Court says go home? What happens?

12:12:10 15 MR MANLY-SPAIN: My Lord --

16 JUSTICE AYoola: Because the law, as having said in  
several  
17 instances, sometimes the law is not all logic, a little bit of  
18 common sense and responsibility to society comes in. So can  
you  
19 address the Court on that, so that we can understand the scope  
of

12:12:31 20 Article 1.1.  
21 MR MANLY-SPAIN: My Lord, we are not for one minute  
saying  
22 that those who bear the greatest responsibility should be  
limited  
23 to leaders only, in the first place. The investigation would  
24 show people who committed the crimes. For example, if I bring  
in  
12:12:54 25 our case, there is abundant evidence --  
26 JUSTICE AYoola: No, for the moment, forget your case;  
that  
27 is why I said it's purely hypothetical. I am not referring --  
28 the fact I have given doesn't relate to your clients.  
29 MR MANLY-SPAIN: As My Lord pleases. First of all, we  
are

1 not limiting those who bear greatest responsibility to  
leaders.

2 There can be other people who are perpetrators who commit such  
3 heinous crimes they will fall into that category, and that is  
why

4 we are saying it is for the Court, after evidence has been  
led,

12:13:32 5 to decide.

6 JUSTICE AYoola: So it's not a threshold issue.

7 MR MANLY-SPAIN: My Lord, on the one hand it is, when it  
8 comes to the decision to be made; the final decision.

9 JUSTICE AYoola: My understanding of threshold issue is  
an

12:13:53 10 issue that you have to deal with before you embark on any  
other  
11 thing.

12 MR MANLY-SPAIN: Yes, My Lord. It comes before you; you  
13 look at it. That is why at the early stage of the matter  
14 evidence has been presented to the Court to say that the

12:14:10 15 Prosecutor believes there is sufficient evidence upon which  
these

16 people could be tried. Then the Court says: Yes, they could  
be  
17 tried. But what we have been saying at the end, in our  
18 submission, is that at the end of the day, the Court should  
19 pronounce on this issue.

12:14:31 20 JUSTICE AYoola: If you are going to pronounce on that

21 issue as a jurisdictional issue that has to be specifically  
22 isolated in the course of the proceedings. Not as --

23 MR MANLY-SPAIN: [Indiscernible]

24 JUSTICE AYoola: Not mixed up as a matter of merit.

12:14:49 25 MR MANLY-SPAIN: As My Lord pleases.

26 JUSTICE KING: One more point. Now, taking into  
27 consideration Resolution 1315 of the Security Council of the  
28 United Nations, taking into consideration the agreement

between

29 the United Nations and the Government of Sierra Leone, taking

could  
the  
the  
limiting  
12:15:35 given,  
100  
phrase  
the  
12:15:56

1 into consideration also the Statute of the Special Court,  
2 it be said that, in fact, the mandate that has been given to  
3 Special Court is not to prosecute all those responsible for  
4 violations of International Humanitarian Law, they were  
5 it because, having regard to all those authorities I have  
6 unlike the other ad hoc tribunals, they did not want probably  
7 or 200 people being charged, and they limited to it in the  
8 of "bearing the greatest responsibility"; isn't that what  
9 interpreters from -- sometimes we call them mischief -- that  
10 Statute is directed to avoiding?

11 MR MANLY-SPAIN: My Lord, my query is not as to what you  
12 have said, My Lord.

13 JUSTICE KING: I didn't say it was your query. I am  
14 asking  
15 a general question. Why do you always try to read my mind?

12:16:03 15 MR MANLY-SPAIN: My Lord --

16 JUSTICE KING: I ask you an open question; that is all.  
17 Because I am giving you the opportunity to.

18 MR MANLY-SPAIN: My Lord, we agree that what you've said

--



19 JUSTICE KING: We, who?  
12:16:18 20 MR MANLY-SPAIN: Our team, My Lord.  
21 JUSTICE KING: Well, say that. Because where you say  
"we"  
22 it would seem as if I have agreed.  
23 MR MANLY-SPAIN: No, My Lord. I have agreed with you,  
24 because this limits the mandate --  
12:16:30 25 JUSTICE KING: Yes, you were right, in that you did say  
frankly  
26 that earlier on. I am just emphasising. You did admit  
that.  
27 that, in fact, it's to limit it. You did say so. I accept  
28 MR MANLY-SPAIN: Yes, My Lord.  
29 JUSTICE KING: But, you see, I am saying even regard to

1 interpreting those various provisions of the Statute, Article  
2 1.1, 15 and so on, all these are considerations that you have  
to  
3 take into consideration.

4 MR MANLY-SPAIN: And we have raised all of them in our  
12:16:55 5 submissions.

6 JUSTICE KING: I know. But, you see, I am emphasising  
7 certain aspects of it.

8 MR MANLY-SPAIN: I am much obliged, My Lord.

9 JUSTICE KING: You can move to sentence now. You have -

-  
12:17:20 10 MR MANLY-SPAIN: I did not hear you, My Lord.

11 JUSTICE KING: You can go on with your sentencing ground  
12 now.

13 MR MANLY-SPAIN: Yes, My Lord. Thank you, My Lord.

14 My Lord, we wish to refer to Article 6.4 of the Statute.

12:17:52 15 JUSTICE KING: Article what?

16 MR MANLY-SPAIN: Article 6.4 of the Statute of the  
Special

17 Court. It reads, My Lord: "The fact that an accused person  
18 acted pursuant to an order of a government or a superior shall  
19 not relieve him of a criminal responsibility but may be  
12:18:20 20 considered in mitigation of punishment if the Special Court  
21 determines that justice so requires."

Article 22 My Lord, yesterday, reference I believe was made to  
also 23 19.2 with regard to punishment, sentence. I believe this is  
24 relevant with regard to mitigating circumstances. We are  
12:18:46 25 submitting, really, that respectfully, My Lord, that even the  
26 Court's Statute recognise that there can be mitigating  
27 circumstance in -- when you decide on the appeal on sentence.  
We 28 would wish to refer also to Rule --  
29 JUSTICE KING: When you quote a provision, always  
explain

deals  
explain

12:19:42

1 it to us. You rightly have referred us to this one which  
2 with mitigation. But when you read it, and I want you to  
3 as you go along, it says that the fact that an accused person  
4 acted pursuant to the order of a government. Now, in this  
5 instance, did anyone act pursuant to an order of government?  
6 Just to clear my mind when I make up my mind.

7 MR MANLY-SPAIN: No, My Lord.

8 JUSTICE KING: Right. Now the next one, or superior.

9 MR MANLY-SPAIN: Yes.

12:19:57

10 JUSTICE KING: Or a superior.

11 MR MANLY-SPAIN: Yes.

what

12 JUSTICE KING: And you will interpret that vis-a-vis

submission

13 had preceded it; or a superior. Now, what is your own

14 with regard to the "or a superior"?

12:20:09

15 MR MANLY-SPAIN: Well, "or a superior" superior in arms.

16 JUSTICE KING: In what?

17 MR MANLY-SPAIN: Arms, My Lord.

18 JUSTICE KING: In arms?

19 MR MANLY-SPAIN: Yes, My Lord, someone who --

12:20:16

20 JUSTICE KING: No, I just asked. I want to clarify --

21 MR MANLY-SPAIN: A superior in arms.

22 JUSTICE KING: In arms.

23 MR MANLY-SPAIN: Yes, My Lord.

24 JUSTICE KING: So you have government, now, you are  
acting

12:20:21 25 pursuant to an order of a government or a superior in arms.

26 MR MANLY-SPAIN: Yes, superior, My Lord.

27 JUSTICE KING: Very well. I just wanted to clear the  
28 situation. Thank you.

29 MR MANLY-SPAIN: But the point for referring to this

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1 that --

2 JUSTICE KING: Sorry?

3 MR MANLY-SPAIN: I was wishing to point out that the  
Rules,

4 the Articles also recognise or provide that there can be  
12:20:38 5 mitigation, in certain circumstances.

6 JUSTICE KING: Yes.

7 MR MANLY-SPAIN: Rule 101(B) also, My Lord.

8 JUSTICE KING: Rule what?

9 MR MANLY-SPAIN: 101(B) of the Rules. 101(B).

12:20:57 10 JUSTICE KING: 101(B)?

11 MR MANLY-SPAIN: Yes, My Lord.

12 JUSTICE KING: Of which Rules?

13 MR MANLY-SPAIN: The Special Court Rules.

14 JUSTICE KING: Procedure and Evidence?

12:21:10 15 MR MANLY-SPAIN: Yes, My Lord, where it says that: "The  
16 Court shall take into account the factors mentioned in Article  
17 2 -- 19.2 as well as factors such as any aggravating  
18 circumstances, any mitigating circumstances including  
substantial

19 operation the Prosecution" et cetera.

12:21:33 20 The reason I have brought this out, My Lord, is for us  
21 to -- for me to be certain that mitigation can be afforded to  
the

22 accused in certain situations.

the 23 In addressing you on this point, My Lord, I would wish  
24 Court to look at the role of the third accused in the entire  
12:22:17 25 sphere of events, as found by the Trial Chamber, at paragraph  
26 1568 of the judgment.  
27 JUSTICE KING: Paragraph?  
28 MR MANLY-SPAIN: 1568 of the judgment. Basically, that  
the  
29 third accused was --

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it

1 JUSTICE KING: Read it out. Not basically. Always read  
2 properly so we follow exactly what was said.

3 JUSTICE KING: You say paragraph 1658 of the judgment?

moment,

4 MR MANLY-SPAIN: I'm just checking it out. Just a

12:25:14

5 My Lord.

the

6 JUSTICE KING: Now, you referred to paragraph 1658 of

7 judgment; do you wish to read that or not?

correct,

8 MR MANLY-SPAIN: I am just verifying whether it is

9 My Lord. Whether that is correct.

12:25:27

10 JUSTICE KING: I am sorry?

11 MR MANLY-SPAIN: I am just verifying whether that is --

did

12 JUSTICE KING: No, but I mean, do you accept that you

13 say paragraph 1658?

14 MR MANLY-SPAIN: 1568, I said.

12:25:34

15 JUSTICE KING: 1568? That's why I'm trying to get it.

move

16 MR MANLY-SPAIN: I can't find the page. Well, let me

17 on.

18 JUSTICE KING: No, you can't move on unless I know. You

19 read 1568 or you want to abandon it or what?

12:26:55

20 MR MANLY-SPAIN: That obviously is not the correct



21 paragraph.

22 JUSTICE KING: That is not obvious. I took a note down  
and

23 I asked you whether you are still referring to paragraph 1568?

24 MR MANLY-SPAIN: No, My Lord.

12:27:06 25 JUSTICE KING: No what?

26 MR MANLY-SPAIN: No, I am not still referring to it.

27 JUSTICE KING: You are abandoning paragraph 1568 and you  
28 said, just for my record, that is all. So I can read my  
notes.

29 MR MANLY-SPAIN: No, let me move on, My Lord.

1 JUSTICE KING: I want to know: Do you still refer to  
2 paragraph 1568?

3 MR MANLY-SPAIN: No, My Lord.

4 JUSTICE KING: Thank you very much. So I can take it  
out.

12:27:41 5 You are no longer referring to paragraph 1568. Thank you.  
You  
6 may proceed now.

7 MR MANLY-SPAIN: My Lord, when it comes to sentencing  
and  
8 mitigation of sentence, pleas in mitigation, we are not for  
one  
9 moment submitting that we are pleading that you mitigate the  
12:28:16 10 crimes that have been committed.

11 The plea goes to the sentence that have been passed, My  
12 Lord. The Court has, on the evidence before it, found the  
13 accused guilty on the charges that I referred to at the  
14 beginning. My Lord, we cannot ask the Court, and it is not  
our  
12:28:55 15 duty to ask the Court, to reduce those crimes.

16 JUSTICE KING: To reduce?

17 MR MANLY-SPAIN: Those crimes. Those crimes have been  
18 found -- we have been found guilty on it, on those grounds.

19 JUSTICE KING: [Microphone not activated]

12:29:09 20 MR MANLY-SPAIN: Reduce the effect of those crimes on  
which

stage

21 they have been found guilty. What we are pleading at this  
22 is for you, the Court, My Lord, to mitigate the sentence.

23 JUSTICE KING: Yes, go on.

more

12:29:43  
tribunals

24 MR MANLY-SPAIN: Certain sentencing principles are now

25 or less trite in international tribunals. In certain

26 provision is made as to how the Court should go about passing

27 sentence, in cases where there are multiple convictions;

28 reference to the ICTR and ICTY.

29 There are also certain principles which the Court should

and  
1 take into consideration and these principles are retribution  
2 deterrence. But, at the same time, there is also a notion of  
3 rehabilitation, which the Courts consider, when they look at  
4 sentence in an appeal and/or even the trial court should look  
at.

12:31:09 5 In several cases, it has been ruled that when there are  
6 multiple convictions, the Court should give a sentence on each  
7 count on which the accused has been found guilty. In certain  
8 other cases it has been held that the Court can give one  
single  
9 sentence, like in our case, particularly where the multiple  
12:31:49 10 counts arise out of a single act or several acts that can be  
11 considered to be of the same transaction, like in our case.

12 My Lord, our query does not go to the Court's decision  
to  
13 give a single sentence because that was within their domain.

We  
14 are saying, My Lord, that had they gone by the other method,  
it  
15 would have been clearer why such a high sentence had been  
12:32:25 given,  
16 or whether it was necessary to give such a high sentence.

17 I know, for example, if they had gone by giving sentence  
by  
18 count-by-count, count-by-count, the normal thing was for the  
19 accused to serve it concurrently, the sentences concurrently.

12:33:04 20 Only the highest they should serve.

21 JUSTICE KING: That is if the Court orders that they be  
22 served concurrently. The Court is at liberty to either say  
they  
23 will be served consecutively or concurrently; isn't that  
right?

24 MR MANLY-SPAIN: Yes, My Lord.

12:33:15 25 JUSTICE KING: So there is no need to assume.

26 MR MANLY-SPAIN: No, My Lord, I am not assuming. I am  
27 saying that the normal practice nowadays is for the Court to  
28 order that it be served concurrently, that they serve the  
highest  
29 of these sentences. In our case, My Lord, I think the highest

1 sentence, had they been given count-by-count would not have  
been  
2 more than 25 years.

3 JUSTICE KING: How do you know? You see, when you  
submit  
4 like that, Mr Manly-Spain, let me tell you this: You see, you  
12:33:51 5 come to this Tribunal. We have to consider all of this. I  
mean,

6 I know that you are trying to do your best for your client,  
but  
7 you shouldn't be as categorical as you sometimes are or too  
8 speculative. You know, as was pointed out yesterday,  
questions

9 of remorse, questions of confessions and so on, that sort of  
12:34:11 10 thing could properly be considered mitigating factors when  
they

11 genuinely have said to the Court: We realise the gravity of  
the  
12 offences that you say we have committed, that you found us  
guilty  
13 of. We beg the Court. We are sorry.

14 MR MANLY-SPAIN: I am coming to that.

12:34:27 15 JUSTICE KING: I don't care whether you are coming to  
that.  
16 I am addressing you now.

17 MR MANLY-SPAIN: Yes.

18 JUSTICE KING: As to that point. Don't say you are  
coming

19 to that when I am asking you a question.

12:34:35 20 MR MANLY-SPAIN: I am sorry, My Lord.

21 JUSTICE KING: I don't like it, so please try and answer  
22 the question.

23 MR MANLY-SPAIN: I am so sorry, My Lord.

24 JUSTICE KING: Thank you. You see, these are the points  
12:34:42 25 that we want to hear; at least I want to hear you about.

Whether

26 remorse has been shown. The regrets expressed to the lower  
court

27 before coming here, and you try to convince us that they were

28 genuine and we will consider it, you know, because no man is

29 perfect. Perfect holiness belongeth only to the Lord.

1 MR MANLY-SPAIN: I am going to address you on that.

2 JUSTICE KING: All right. Well, please, I have been  
very  
3 accommodating. I have been told that you have exceeded your  
time  
4 by 45 minutes. See, we are bending over backwards.

12:35:10 5 MR MANLY-SPAIN: Yes, My Lord.

6 JUSTICE KING: So please come to the point.

7 MR MANLY-SPAIN: My Lord, what I was trying to establish  
is  
8 that there are certain principles --

9 JUSTICE KING: You've said that.

12:35:20 10 MR MANLY-SPAIN: -- or where you -- certain comparative  
11 cases, certain principles have been followed in sentencing. I  
12 was trying to convince you, My Lord, that had they gone  
13 one-by-one, count-by-count, none of the counts would have  
called  
14 for 50 years that the accused has been -- that has been  
imposed  
12:35:50 15 on the accused.

16 But what I am trying to say is not that you are bound by  
17 what I am saying or what has been decided in other courts,  
it's  
18 just that there is practice, and since international law is  
not  
19 so settled at the moment, various cases, in various cases  
certain



12:36:17 20 positions have been taken, or certain practices have been  
21 followed. Well, for example, the matter of the one global  
22 sentence in Kambanda, but in the other matters, they have gone  
23 for sentence count-by-count.

in 24 My Lord, we -- I am trying to say that if that had been

12:36:46 25 this, our case, none of the counts would have called for 50  
26 years.

27 JUSTICE AYoola: It so happens --

you 28 JUSTICE KING: That's why I stop you sometimes, because

29 tend to be --

1 MR MANLY-SPAIN: I want to say why, My Lord.

2 JUSTICE KING: -- excuse me, you can talk to me, wait  
until  
3 I finish asking my question. Then you can speak and don't go  
on  
4 when I am asking you a question. If you make such a  
submission,  
12:37:12 5 pinpoint the provision, the relevant provision; then we are  
able  
6 to follow you. You can't leave it in the air like that: Say  
7 none of the counts would have merited or warranted 50 years.  
Is  
8 there a limit? If so, bring it to our attention; then we will  
9 follow you properly.

12:37:32 10 MR MANLY-SPAIN: Yes, My Lord.

11 JUSTICE KING: Good.

12 MR MANLY-SPAIN: My Lord, the cases --

13 JUSTICE AYoola: Well, before you go to that, as I said  
14 yesterday, we are dealing here at this level of review with  
12:37:46 15 principles. Now, you have said that the Trial Chamber had,  
has a  
16 discretion to award global sentence and they have exercised  
their  
17 discretion. Why should we go to the speculative point as to  
what  
18 they would have done had they decided to pass sentence for  
each  
19 count? They have not done that. They have exercised their

12:38:09 20 discretion. I should have thought what you should show us now  
is

21 that that discretion has been wrongly exercised. Unless you  
22 go -- do that we cannot substitute our discretion for their  
23 discretion.

24 MR MANLY-SPAIN: My Lord, we are saying that it was --  
the

12:38:27 25 discretion was wrongly exercised because, in giving this  
26 judgment, the Trial Chamber did not take into consideration  
any

27 mitigating circumstances.

28 My Lord, in their judgment, the Trial Chamber said, I  
think

29 paragraph 25 of the sentencing judgment, that it had the

1 discretion to identify and weigh mitigating circumstances.

2 JUSTICE KING: Just a minute.

3 MR MANLY-SPAIN: Other than the accused's substantial  
4 cooperation with the Prosecutor. Such factors, they said,

would

12:39:22 5 [indiscernible] the concept of remorse.

6 JUSTICE KING: In paragraph what? 25?

7 MR MANLY-SPAIN: Yes, My Lord. 25 of the judgment,

under

8 mitigating circumstances.

9 JUSTICE KING: That paragraph refers to?

12:39:38 10 MR MANLY-SPAIN: Sentencing judgment.

11 JUSTICE KING: Sentencing judgment.

12 JUSTICE KING: Read it.

13 MR MANLY-SPAIN: It says:

14 "Under Rule 10(B) any substantial cooperation with the

12:39:49 15 Prosecutor by the convicted person, before or after

16 conviction, must be considered as a mitigating

17 circumstance. In addition, the Trial Chamber has a

factors

18 discretion to identify and weigh other mitigating

19 according to the circumstances of each case including

but

12:40:04 20 not limited to expression" --

21 JUSTICE KING: You said under Rule what?

22 MR MANLY-SPAIN: Under Rule 101(B).

23 JUSTICE KING: You said 10(B).

24 MR MANLY-SPAIN: Sorry, My Lord. 101(B).

12:40:16 25 JUSTICE KING: Every word you say is important.

26 MR MANLY-SPAIN: Yes, My Lord.

27 JUSTICE KING: And how it is transcribed and I don't  
want

28 my note to mislead me.

29 MR MANLY-SPAIN: It's 101(B), My Lord.

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1 JUSTICE KING: It is important that when you are quoting  
2 that you quote correctly. This is the third time. Under Rule  
3 101(B).

4 MR MANLY-SPAIN: 101(B).

12:40:40 5 "Including but not limited to expression of remorse or a  
6 degree of acceptance of guilt; voluntary surrender; good  
7 character with no prior criminal convictions; personal  
and  
8 family circumstances; the behaviour or conduct of the  
9 accused subsequent to the conflict; duress and indirect  
12:41:01 10 participation; diminished mental responsibility; the age  
of  
11 the accused; assistance to detainees or victims in  
12 exceptional circumstances; poor health."

13 My Lord, in the case of Kanu, the third appellant, he  
said,  
14 after judgment, he said, at page 74, paragraph 11.18 of the  
12:41:47 15 records --

16 JUSTICE KING: Of what?

17 MR MANLY-SPAIN: This is in our brief now. I am  
referring  
18 to our brief.

19 JUSTICE KING: Of your brief?

12:41:56 20 MR MANLY-SPAIN: Yes, My Lord.

21 JUSTICE KING: Yes. Please always give us that.

22 MR MANLY-SPAIN: Our brief, My Lord.

23 JUSTICE KING: Yes. Okay.

24 MR MANLY-SPAIN: Paragraph 11.18. Your Honours, this is  
12:42:07 25 what --

26 JUSTICE KING: Page 74, paragraph what?

27 MR MANLY-SPAIN: 11.18.

28 JUSTICE KING: 118.

29 MR MANLY-SPAIN: 11.18.

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citation.

1 JUSTICE KING: Okay. 11.18. That is a correct

2 Read it.

in

3 MR MANLY-SPAIN: "Your Honours, what we are saying now

have

4 Sierra Leone is that peace and reconciliation for all that

12:42:39

5 suffered in this war. Those that have died, we pray that God

[we]

6 send them to eternal life and those who have been victims,

forges

7 are asking for mercy. Yes, we've prayed that Sierra Leone

and

8 ahead. Some of us were and [had] a lower rank in this army

was:

9 we are under command and supervision. All we need to know

12:43:06

10 Yes sir, yes sir. We are coming back to ask the Sierra Leone

was

11 people to forgive us. We ask for mercy. We did not know. In

12 Sierra Leone everybody was angry. Civil society, everybody

you

13 angry. But now we pray that this peace that we have got be

14 sustained; that it becomes everlasting. That, Your Honours,

you

15 that are sitting there, judge us fairly. We are sorry, that

16 consider that we are just youth, so if you send us to life

17 imprisonment, Your Honours, we pray that [the] three [of you]

18 would not accept that and consider that we are youths. We are



19 going to pay the price for peace and we pray that the three of  
12:43:55 20 you, Justice Sebutinde, Justice Doherty and Justice Lussick,  
that  
21 you use your good offices as elders, mothers and fathers."  
22 My Lord, my submission here is that the accused did show  
23 remorse. They begged for mercy, as you have said, that he  
24 actually begged for mercy.  
12:44:15 25 JUSTICE KING: I said he begged for mercy?  
26 MR MANLY-SPAIN: No. I said as you said he should beg  
for  
27 mercy.  
28 JUSTICE KING: I see. I see what you mean.  
29 MR MANLY-SPAIN: He actually did so.

Chamber

1 JUSTICE KING: All right.

2 JUSTICE AYoola: Refresh my memory: Did the Trial

3 find that he did not show remorse?

4 MR MANLY-SPAIN: Yes, My Lord.

12:44:32 5 JUSTICE AYoola: I see.

6 MR MANLY-SPAIN: Yes, My Lord.

7 JUSTICE AYoola: Can you refer us to the passage?

8 MR MANLY-SPAIN: This is the sentencing judgment, My Lord.

9 At page 30. At page 30, My Lord, under number 4, "The

12:45:24 10 Prosecution submits that" -- sorry, My Lord. Yes, My Lord. It

11 is page 35. It's paragraph 139. "Remorse. The Trial Chamber

12 finds that the statement made by Kanu at the sentencing hearing

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

14 JUSTICE KING: [Microphone not activated].

12:46:23 15 MR MANLY-SPAIN: Yes, My Lord.

16 JUSTICE KING: [Microphone not activated].

17 MR MANLY-SPAIN: Pardon, My Lord?

18 JUSTICE KING: Mr Manly-Spain, we are bending over  
19 backwards, in the interest of justice, my attention has just  
been

12:46:34 20 drawn that we have over-accommodated you for an extra hour.

21 MR MANLY-SPAIN: I am finished, My Lord.

22 JUSTICE KING: Oh, you are not grateful for the fact  
that

23 we have accommodated you?

24 MR MANLY-SPAIN: I was going to say that, My Lord. I  
was

12:46:43 25 going to thank you all.

26 JUSTICE KING: That is what I expect.

27 MR MANLY-SPAIN: I know.

28 JUSTICE KING: All right. Very well. You've finished  
now?

29 MR MANLY-SPAIN: Yes, My Lord. I don't think there is  
much

I 1 more we can say but, My Lord, we wish to thank you very much.

2 know you have bent over backwards, to use your exact words.

3 JUSTICE KING: Not that it's merited to be used.

interests 4 MR MANLY-SPAIN: Well, I was going to say in the

12:47:07 5 of justice.

6 JUSTICE KING: All right. Very well.

our 7 MR MANLY-SPAIN: And we are praying, My Lord, that -- we  
8 are only praying that you consider what we have said in this

9 appeal, and come to a just decision.

12:47:19 10 JUSTICE KING: Thank you.

11 MR MANLY-SPAIN: I want to thank you all, My Lords.

12 JUSTICE KING: Well, Mr Manly-Spain, Mr Ajibola Emmanuel  
13 Manly-Spain, on behalf of the Bench let me thank you for your  
14 presentation of your appeal submissions. You have done your  
very

12:47:47 15 best in the interests of your client and we appreciate that.

16 MR MANLY-SPAIN: Thank you, My Lord.

in 17 JUSTICE KING: And it's very significant that, in fact,  
18 the determination to dispense even-handed justice we have  
given

19 you an extra hour.

12:48:01 20 MR MANLY-SPAIN: Much obliged.

we 21 JUSTICE KING: So at this stage now we will adjourn and  
22 will deduct our 15 minutes from the time we come back. We are  
23 still going to adhere to our schedule. Sorry, Dr Staker.

that 24 MR STAKER: Your Honour, I was just about to address  
12:48:18 25 very point. I am sure my learned friend Mr Manly-Spain was  
very  
26 grateful for that accommodation; we were hoping to have a  
little  
27 bit of accommodation ourselves. From the Prosecution side, we  
28 are very desirous of finishing the hearings today.

29 On the first day, we were, in fact, a little ahead of

1 schedule and although the Prosecution wasn't due to speak the  
2 following day we were quite prepared to begin immediately to  
keep 3 things moving.

4 We seem to be an hour behind schedule. It may be that  
not

12:48:49 5 all parties use all of the remaining time but, in case they  
do,  
6 my suggestion was going to be that we reconvene at 2 instead  
of  
7 at 2.30 and be prepared to sit until 5.30 if necessary,  
instead  
8 of 5, that would make up the hour. If less than the allotted  
9 time is used then we may still finish before 5.30.

12:49:10 10 JUSTICE KING: Well, I think that is a very reasonable  
11 suggestion.

12 MR MANLY-SPAIN: If I can be of assistance, Your Honour.  
13 We, on this side, would not be exercising our rights to reply,  
so  
14 the Prosecution can take as long as they want.

12:49:26 15 JUSTICE KING: Oh, well, that is very assuring, that is  
16 very good. Well, you have heard what --

17 MR STAKER: Sorry, could I just --

18 JUSTICE KING: Just a minute. Just one second before  
you  
19 say anything.

12:49:34 20 Mr Kojo Graham, I would like to hear from you what you  
are  
21 saying? Having regard to what just --  
22 MR GRAHAM: That appears to be the common consensus.  
23 JUSTICE KING: And Mr Daniels?  
24 MR DANIELS: That is so, My Lord.  
12:49:47 25 JUSTICE KING: So you will not be exercising your right  
to  
26 reply?  
27 MR STAKER: Your Honour --  
28 JUSTICE KING: Just one minute. So, in fact, you will  
have  
29 all the time in the afternoon. They are not going to reply.  
You

address

1 are going to, in fact, have the last word, so now you can  
2 us on that.

the

3 MR STAKER: Well, it's always a very fine thing to have  
4 last word even as respondent. If that is the case then there

may

12:50:15

5 be less necessity to begin at 2.30. We don't intend to exceed  
6 what was otherwise our allotted time in any event. Although,

out

7 of an abundance of caution, it might still be a possibility to  
8 start at 2. We might finish quite early in the day then, but

it

9 would allow time for all eventualities.

12:50:31

10 JUSTICE KING: Yes. But, you see --

11 MR STAKER: I am in the Chamber's hands; it's just a  
12 suggestion.

We

13 JUSTICE KING: No, I know. You are a much younger man.

14 have to have a break and relax to come and hear all these

12:50:43  
have

15 submissions, and to be quite alert when they are made. You

16 one hour right, is it? Or how many hours?

17 MR STAKER: We have two hours.

18 JUSTICE KING: Two hours.

19 MR STAKER: Yes.



12:50:53 20 JUSTICE KING: So if we get back at 2.30 by 4.30 we  
should  
21 be finished. But I think there is sense in what you said, so  
we  
22 will come back at 2.00. We will come back at 2.00.  
23 MR STAKER: I am obliged, Your Honour.  
24 JUSTICE KING: Is that all right by you? 2.00.  
12:51:08 25 MR STAKER: Yes, My Lord.  
26 JUSTICE KING: Thank you.  
27 [Luncheon recess taken at 12.55 p.m.]  
28 [AFRC14NOV07c - MD]  
29 [Upon resuming at 2.15 p.m.]

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1 JUSTICE KING: Well, before we adjourned, I did have my  
2 apprehensions about the time we should resume, and I think I  
have  
3 been justified. There are so many intervening factors came in  
4 and that is why we are here now. We were very busy during the  
14:23:23 5 hour. Some of us even hardly had time to have our lunch.  
But,  
6 in any case, we are here now. And I just repeat what the  
Defence  
7 said: That they were not -- they were going to forego  
replying  
8 to the response of the Prosecutor. So, Dr Staker, you have  
the  
9 floor for this afternoon.

14:23:39 10 MR STAKER: With your leave, Your Honour, Mr Agha will  
11 address the Chamber first on behalf of the Prosecution.

12 JUSTICE KING: Very good.

13 MR AGHA: Good afternoon, Your Honours, and also to my  
14 learned friends on the Defence Bench.

14:24:18 15 This afternoon I will briefly give the Prosecution  
response  
16 on sentencing regarding the accused, which is a very important  
17 part of their appeal.

18 The Prosecution starts by adopting the arguments in its  
19 response brief, dated 4 October 2007, in respect of sentencing  
in  
14:24:42 20 relation to all three of the accused.

21           As a starting point of the Prosecution submission the  
22 Prosecution emphasises the strict standard of review that is  
23 applicable before the Appeals Chamber will interfere with the  
24 sentence imposed by a Trial Chamber.

14:25:01 25           The Prosecution refers to paragraph 7.1 of its response  
26 brief and refers to well-settled jurisprudence in this regard  
by  
27 the Appeal Chamber at both the ICTY and the ICTR in such cases  
as  
28 Kayishema, Vasiljevic and Blaskic.

29           Firstly, that the degree of discretion conferred on a  
Trial

Trial

1 Chamber is very broad and it is result the Appeal Chamber will  
2 not interfere with the exercise of this discretion unless it  
3 finds that there has been a discernible error or that the  
4 Chamber has failed to follow the applicable law.

14:25:43

5 Secondly, that it is for the appellant to establish the  
6 existence of a discernible error in the exercise of the Trial  
7 Chamber's sentencing discretion.

within

8 Thirdly, that the weighing and assessing of the various  
9 aggravating and mitigating factors is a matter primarily

14:26:02

10 the discretion of the Trial Chamber.

overestimated,

11 Fourthly, that the appellant must show that the sentence  
12 imposed by the Trial Chamber was so unreasonable, or plainly  
13 unjust, in that it underestimated, or in this case

to

14 the gravity of the convicted person's conduct and that the  
15 Appeals Chamber is able to infer that the Trial Chamber failed  
16 to exercise its discretion properly.

14:26:26

17 Fifthly, that an appeal from sentence is of a corrective  
18 nature rather than a de novo sentencing hearing.

ICTY

19 This jurisprudence was recently reinforced by a recent

14:26:49

20 Appeals Chamber sentencing judgment in the case of Prosecutor

only  
down  
14:27:16  
will

21 Miroslav Bralo, which was handed down 2 April 2007, which is  
22 about six months ago, and endorsed in the Appeal Chamber's  
23 sentencing in the case of Dragan Zelenovic which was handed  
24 on 31 October 2007, which is less than two weeks ago.  
25 JUSTICE KING: What is the name of the case?  
26 MR AGHA: Dragan Zelenovic. D-R-A-G-A-N,  
27 Z-E-L-E-N-O-V-I-C.  
28 JUSTICE KING: Thank you.  
29 MR AGHA: And with the assistance of the Court clerk I

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1 hand up copies of both the extracts of those cases in the  
event  
2 that Your Honours would like to follow some parts which I  
refer  
3 to. There are also copies for Defence counsel.

4 JUSTICE KING: Very good. Thank you.

14:29:00 5 MR AGHA: Now, it will be the case of Bralo, which I  
will  
6 be from time to time referring to in this submission so it may  
be  
7 useful to keep it by your side. And the Appeals Chamber  
stated  
8 at paragraph 9 of its judgment in Bralo as follows:

9 "Trial Chambers are vested with a broad discretion in  
14:29:22 10 determining an appropriate sentence due to their  
obligation  
11 to individualise penalties to fit the circumstances of  
the  
12 accused and the gravity of the crime. As a general rule  
an  
13 Appeals Chamber would not revise a sentence unless the  
14 Trial Chamber has committed a discernible error in  
14:29:39 15 exercising its discretion or has failed to follow the  
how  
16 applicable law. It is for the appellant to demonstrate  
17 the Trial Chamber ventured outside its discretionary  
18 framework in imposing his sentence. To demonstrate the

exercising 19 Trial Chamber committed a discernible error in  
14:29:59 20 its discretion" --  
21 and this is what I would refer to as the test for  
22 discernible error which the appellant must demonstrate -- I  
will 23 continue:  
24 -- "the appellant has to demonstrate that the Trial  
Chamber 14:30:10 25 gave weight to extraneous or irrelevant considerations,  
26 failed to give weight or sufficient weight to relevant  
27 considerations, made a clear error on the facts on which  
it 28 exercised its discretion, or that the Trial Chamber's  
29 discretion was so unreasonable or plainly unjust that  
the

1 Appeals Chamber is able to infer that the Trial Chamber  
2 must have failed to exercise its discretion properly."  
3 Now, the Prosecution submits that that is a very high  
4 standard to be met on a factual basis on review, and the  
14:30:45 5 Prosecution further submits that based on the above test of  
6 discernible error, as just related, none of the appellants  
have  
7 established the existence of a discernible error in the  
exercise  
8 of the Trial Chamber's discretion in respect of any of their  
9 sentencing grounds on appeal as required by the settled  
14:31:07 10 jurisprudence or the international appellate tribunals.  
11 On the contrary, the appellants, for all three accused,  
12 repeat the assertions which they made in their sentencing  
briefs  
13 which were fully considered and weighed by the Trial Chamber  
in  
14 accordance with the applicable sentencing principles based on  
the  
14:31:28 15 particular facts of the case in respect of each accused in the  
16 Trial Chamber sentencing judgment dated 19 July 2007.  
17 In effect, each of the accused are asking for a de novo  
18 hearing which the Prosecution submits is not within the ambit  
of  
19 appellant review on sentencing.  
14:31:51 20 In short, all three accused are simply proclaiming, in



too  
to  
21 their appeal in respect of sentence, that the sentences are  
22 high and, therefore, need to be reduced but without pointing  
23 any discernible error committed by the Trial Chamber in the  
24 exercise of its discretion.

14:32:12 25 As such, the Prosecution submits that all the sentencing  
26 grounds of appeal raised by each of the accused in their  
entirety 27 respective appellant briefs should be dismissed in their  
28 as they fail to meet the appellant standard of review and  
29 sentences imposed by the Trial Chamber be upheld, even perhaps

1 increased modestly, as indicated by Dr Staker, in the event  
that  
2 the Prosecution should be successful on its other grounds of  
3 appeal.

4 The Prosecution, as with Kamara's oral submissions  
14:32:49 5 yesterday, submits that the Trial Chamber is obliged to take  
into  
6 account Article 19.2 of the Statute which states that: "In  
7 imposing sentences the Trial Chamber should take into account  
8 such factors as the gravity of the offence and the  
circumstances  
9 of the convicted person."

14:33:10 10 With regard to the gravity of the offence, the  
Prosecution  
11 submits that this is the key factor in determining sentence  
and,  
12 in this regard, refers to the ICTY appeals case of Celebici  
13 referred to at paragraph 40 of the Prosecution sentencing  
brief,  
14 dated 28 June 2007, which referred to the gravity of the  
offence  
14:33:36 15 as a most important consideration which may be regarded as a  
16 litmus test for the appropriate sentence or the primary  
17 consideration.

18 When all the accused claim that the sentences are too  
19 harsh, excessive or outrageous, it is important to consider

14:33:54 20 paragraphs 34 and 35 of the sentencing judgment dated 19 July  
21 2007, in order to stress the extreme gravity of the offences  
for  
22 which all the accused have been convicted, and, if it may  
assist  
23 the Bench, I can pass up a copy of that judgment.  
24 JUSTICE KING: Indeed.  
14:34:16 25 MR AGHA: So that you may follow one or two paragraphs  
26 which I may touch upon briefly.  
27 JUSTICE KING: That's right, yes. Thank you.  
28 MR AGHA: I refer Your Honours to paragraph 34 and 35  
which  
29 I think are worth reading at this point in time as a timely

in

1 reminder of such gravity and the findings of the Trial Chamber  
2 its sentencing judgment.

3 Paragraph 34:

14:35:34  
ever

4 "Brima, Kamara and Kanu have been found responsible for  
5 some of the most heinous, brutal and atrocious crimes  
6 recorded in human history. Innocent civilians, babies,  
7 children, men and women of all ages were murdered by  
8 shot, hacked to death, burned alive, beaten to death.

being

had

14:35:58  
were

9 Women and young girls were gang-raped to death. Some  
10 their genitals mutilated by the insertion of foreign  
11 objects. Sons were forced to rape mothers, brothers  
12 forced to rape sisters. Pregnant women were killed by  
13 having their stomach slit open and their foetus moved  
14 merely to settle a bet amongst the troops as to the

gender

14:36:17  
intestines

15 of the foetus. Men were disembowelled and their  
16 were stretched across the road to form a barrier. Human  
17 heads were placed on sticks on either side of the road  
18 mark such barriers. Hacking off the limbs of innocent  
19 civilians was common practice. The victims were babies,

to

14:36:34 20 young children and men and women of all ages. Some had  
one  
21 arm amputated, others lost both arms. For those victims  
22 who survived the amputation life was instantly and  
forever  
23 changed into one of dependance. Most were turned into  
24 beggars unable to earn any living and even today cannot  
14:36:55 25 perform the most simplest of tasks without the help of  
26 others. Children were forcibly taken away from their  
27 families, often drugged and used as child soldiers who  
were  
28 trained to kill or commit other brutal crimes against  
29 civilian population. Those children who survived the  
war

1           were robbed of a childhood and most of them lost a  
chance  
2           of an education."  
3           At paragraph 35, below, it continues: "The Trial  
Chamber  
4           cannot recall any other conflict in the history of warfare in  
14:37:30 5           which innocent civilians were treated to such savage and  
inhumane  
6           treatment."  
7           Brima's counsel himself, in oral submissions yesterday,  
8           agreed that a harsh sentence was necessary, although I stand  
to  
9           be corrected by the transcript. The Prosecution submits that  
the  
14:37:49 10          Trial Chamber, through assessing and evaluating the evidence  
and  
11          making such findings as in paragraphs 34 and 35 above, did not  
12          impose an excessively harsh sentence on any of the accused,  
13          bearing in mind the substantial aggravating factors which the  
14          Trial Chamber found present in respect of each accused; Brima,  
at  
14:38:11 15          paragraphs 53 to 57; Kamara, at paragraphs 82 to 88; and Kanu,  
at  
16          paragraphs 107 to 112, coupled with the Trial Chamber's  
finding  
17          that for each accused there was nothing in either their  
personal  
18          circumstances to justify mitigation and rejected all of the

always 19 mitigating factors which they raised. This gravity must  
14:38:48 20 be borne in mind when assessing the appropriate sentence.  
of 21 Now, dealing with the sentencing ground raised by each  
few 22 the accused, and jointly where possible, we will touch upon a  
23 specific areas.  
24 Brima indicated, with regard to the excessive nature of  
14:39:10 25 their sentences, at paragraph 181, that the sentence imposed  
on 26 him was excessively harsh and exceedingly disproportionate if  
and 27 considered within the context of the totality of its factual  
serious 28 legal findings in comparison to other cases of even more  
the 29 nature that attracted lesser sentences at both the ICTY and

1 ICTR.

2 The Prosecution submits that the Trial Chamber at  
paragraph

3 33 of its sentencing judgment was, indeed, guided by the  
4 sentencing practices of both the ICTY and ICTR. The  
Prosecution

14:39:47 5 submits that the Appeals Chamber is only guided and not bound  
by

6 such sentencing practices. Even the Prosecution submits that  
7 they are persuasive. They are sentencing practices and the  
8 submission is the practices they were looking at was how  
9 mitigation should be treated; how aggravating circumstances

14:40:09 10 should be treated and not at how long each sentence should be.  
11 They were looking at the guidelines of the sentencing  
practices.

12 It was not simply a comparison of sentences.

13 The Prosecution submits that according to the Appeals  
14 Chamber jurisdiction on sentences, sentences need to be  
14:40:26 15 individualised and based on the particular facts of each case:  
16 The gravity of the offence committed and the role and  
17 participation of the accused in such offences. Whilst taking  
18 into account the relevant sentencing factors, and that in this  
19 case the Trial Chamber imposed a sentence within its  
discretion,

14:40:45 20 which reflected the individual facts of each of the accused's



other

21 case. Thus, by not slavishly imposing sentences based on  
22 cases it's not an abuse of the Trial Chamber's exercise of its  
23 discretion.

14:41:01

this

the

have

24 The Prosecution submits that repeated references to  
25 sentences imposed in other cases, where lower sentences were  
26 imposed, by way of a comparison to the sentence imposed in  
27 case is of little if any assistance in determining the  
28 appropriate sentence in respect of the facts of this case and  
29 role of the accused. The Prosecution submits that all cases

1 their own individualised circumstances and that no one case is  
2 the same on its facts.

3 The Appeals Chamber, in the case of Kayishema at the  
ICTR,  
4 as referred to the Prosecution in its response brief dated 4  
14:42:12 5 October 2007, has held that there are no hierarchy of crimes  
6 under the Statute, and that is the ICTR Statute, all crimes  
7 specified therein are serious violations of International  
8 Humanitarian Law capable of attracting the same sentence.

9 Thus, just because a person has been convicted of  
genocide,  
10 it does not automatically follow that he should receive a  
14:42:12 10 higher  
11 sentence than someone who has only been convicted of a crime  
12 against humanity. The Prosecution submits that each case must  
be  
13 determined on its own individual merits and facts.

14 Just turning to a couple of cases to illustrate the  
point.

15 Brima refers to the ICTY case of Krajisnik, who received 27  
16 years. Krajisnik, however, did not personally commit any  
crimes  
17 and the crimes committed did not reach the level of brutality  
as  
18 in this case, such as amputation, the use of child soldiers.

19 The ICTY case of Martinovic, which is again referred to,  
14:42:46 20 revolved around a camp case and was totally different on its

was 21 facts. Kamara, likewise, refers to the case of Serushago who  
22 sentenced to 15 years, but Serushago pleaded guilty. He  
soldier. 23 cooperated with the Prosecution and he was not a trained

24 Reference is also made to the --

14:43:05 25 JUSTICE KING: Sorry, that is one instance where -- I  
26 always forget to switch this on. That is one instance where  
you 27 can refer to that as a mitigating circumstance, where there is  
28 cooperation, isn't it?

29 MR AGHA: If he has cooperated it would indeed be a

1 mitigating circumstance which would lead to potentially a  
lesser  
2 sentence on the discretion of the Trial Chamber but, in this  
3 case, there was no cooperation. There was no pleading of  
guilty.  
4 So just to refer to these cases in isolation, without looking  
14:43:37 5 into the particular facts and circumstances prevailing in each  
6 case, the Prosecution submits is of very little assistance to  
the  
7 appellants in trying to say that the Trial Chamber erred in  
8 exercising its discretion. Each case must be individualised.  
9 Likewise, reference is made to the ICTR case of -- and  
you  
14:44:02 10 will have to excuse my pronunciation -- Elizaphan  
Ntakirutimana,  
11 who was an old man of around 70 years of age, who suffered  
from  
12 serious health problems. Again, a different set of facts.  
13 Semanza, which was referred to yesterday, a sentence of 25  
years  
14 was mentioned; that was uplifted to 35 years on appeal. As  
the  
14:44:20 15 Trial Chamber found in its sentencing judgment, in addition to  
16 paragraphs 33 and 34, which we have just read and applied to  
all  
17 three accused, at paragraph 40 in respect of Brima, the Trial  
18 Chamber considered that the crimes for which Brima was  
convicted

19 were heinous, deliberate, brutal and targeted very large  
numbers  
14:44:43 20 of unarmed civilians and had a catastrophic and irreversible  
21 impact on the lives of the victims and their families. This  
is  
22 an individualised finding which the Trial Chamber took into  
23 account when exercising its discretion.  
24 Brima also claims that more weight should have been  
given  
14:45:03 25 to mitigating factors. Brima, at paragraph 183 of his  
appellate  
26 brief, asserts that the Trial Chamber erred in law by failing  
to  
27 give the mitigating factors more weight. Brima, however, does  
28 not explain why the Trial Chamber should have given his  
29 mitigating factors more weight. As Brima rightly points out,  
in

1 paragraph 187 of his brief, at paragraph 25 of the sentencing  
2 judgment, the Trial Chamber stated, amongst other things, that  
in  
3 addition the Trial Chamber has the discretion to identify and  
4 weigh other mitigating factors according to the circumstances  
of  
14:45:42 5 each case. This is also a position that Brima accepts in  
6 paragraph 191 of his brief.

7 It is well-established jurisprudence that it is for the  
8 Trial Chamber to assess what weight, if any, should be given  
to  
9 mitigating factors. The was endorsed by the Appeals Chamber -  
-  
14:46:00 10 again, I refer to the case of Bralo, which has been handed up,  
11 which, at paragraph 84, stated that: "The Appeals Chamber  
12 stresses that upon finding that mitigating factors have been  
13 established a decision as to the weight to be accorded to" --  
14 "thereto lies within the discretion of the Trial Chamber."

14:46:26 15 The Trial Chamber, at paragraphs 58 and 68 of its  
16 sentencing judgment, did consider Brima's mitigating factors  
and  
17 would have determined what, if any, weight to give to them  
based  
18 on its discretion and all the circumstances of the case. As  
19 such, Brima has not shown any discernible error in the  
exercise

14:46:49 20 of the Trial Chamber's discretion.

21 Furthermore, Brima showed no genuine remorse as alleged,

22 which was considered at paragraph 67 of the sentencing brief,

and

23 I think it will be instructive at this point, as Your Honours

had

24 indicated this morning, to pass up the extracts of what indeed

14:47:09 25 all three accused did say about remorse at their sentencing

26 hearing. So, if I may, with the assistance of the Court

clerk,

27 pass up the relevant transcripts.

28 Your Honours, all three transcripts are stapled together

in

29 the one document, but each with the name of which accused it

1 refers to.

2 Now, on the one in front of you, it should say the  
3 transcript 16 July 2007, and at page 51 this is exactly what  
4 Brima had to say regarding any remorse.

14:48:36 5 Accused Brima, this is at line 13:

6 "I stand for peace and reconciliation and I pray that  
the

7 Honourable Judges of this Chamber could use their wisdom  
to

8 bring peace and reconciliation to the people of Sierra  
9 Leone. And I show remorse to the victims of this  
situation

14:48:51 10 of this war that took place in Sierra Leone. I thank  
you

11 all."

12 The Prosecution submits that can hardly be considered as  
13 sincere and genuine remorse and has been decided, or in the

14 Dragan Nikolic case that, with regards to remorse, is a  
question

14:49:11 15 of that remorse being genuine and sincere and, again, the  
16 Prosecution would submit that it is within the discretion of  
the

17 Trial Chamber to evaluate whether or not the statement made by  
18 Mr Brima amounted to genuine remorse for mitigating purposes.

19 And the appellant has not shown that the Trial Chamber erred  
in

14:49:34 20 any way in not regarding it as genuine and sincere remorse.



just  
remorse.  
14:50:22  
of

21           And I can pass up this other case of Dragan Nikolic,  
22           for the reference on this point of sincere and genuine  
23           And this judgment and this paragraph would apply to all three  
24           accused because it applies remorse generally for all accused.  
25           And I refer to paragraph 239, wherein it stated: "The Defence  
26           submits remorse is a mitigating factor if the Trial Chamber is  
27           satisfied that the expressed remorse is sincere which is not  
28           doubted in the present case. According to Defence the element  
29           remorse is well-founded and genuine."

1           So it's for the Trial Chamber to, based on its own  
2           discretion, gauge the sincerity of that remorse and unless the  
3           appellant has shown that the Trial Chamber has erred in that  
4           discretion it is not a matter, the Prosecution submits, the  
14:51:12 5           Appeals Chamber should likely interfere with.

6           For the other mitigating factors which Brima relied on,  
7           such as no prior convictions, ill-health and family  
obligations,  
8           it is well-settled, in the jurisprudence, that such factors  
9           attract little, if any, weight when viewed against the gravity  
of

14:51:45 10          the offence. And the submission of the Prosecution is that  
the  
11          appellant has shown that the Trial Chamber made no error in  
12          exercising its discretion when it declined to give such  
factors  
13          either no or little weight when gauged against the gravity of  
the  
14          offence, the other aggravating factors which were present in  
this  
14:52:09 15          case against this accused.

16                    Moving to Kamara.

17            Again, Kamara claims that not enough weight was given to  
18            his mitigating factors. It is alleged that at paragraph 238  
of  
19            Kamara's sentencing brief that there was overwhelming evidence  
14:52:30 20            adduced by the Defence in respect of the mitigating

evidence, 21 circumstances. The Prosecution submit that hardly any  
Defence 22 as opposed to bald assertions were adduced by the Kamara  
in 23 in connection with any mitigating circumstances. For example,  
24 that Kamara assisted in the release of some British soldiers  
14:52:50 25 the west side.

26 None of these assertions, the Prosecution submits, would  
27 pass muster on the balance of probabilities test required for  
28 them to meet the standard of mitigating circumstances.

29 And, even then, in the Trial Chamber's exercise of its

In  
was  
RUF  
14:53:30  
Both  
found  
14:53:51  
the  
its  
14:54:09  
72  
and

1 discretion, it can choose to give them little if any weight.  
2 essence, Kamara complains like Brima that insufficient weight  
3 given to his mitigating circumstances. These mitigating  
4 circumstances, in essence, boil down to Kamara's role in the  
5 conflict prior to the coup and his post-war contribution.  
6 of these factors were considered by the Trial Chamber, at  
7 paragraphs 78 and 79 in its sentencing judgment, and were  
8 by the Trial Chamber not to justify any mitigation. Hence,  
9 Kamara's mitigating factors were considered but no weight was  
10 attributed to them. This does not demonstrate any discernible  
11 error in the Trial Chamber's exercise of its discretion in  
12 respect of sentencing. This is especially true in light of  
13 gravity of the offences for which Kamara was convicted, which  
14 were addressed by the Trial Chamber at paragraph 72 to 77 of  
15 sentencing judgment which, amongst other things, at paragraph  
16 were found to be heinous, deliberate, brutal and targeted with  
17 very large number of unarmed civilians and had a catastrophic  
18 irreversible impact on the lives of the victims and their  
19 families.

14:54:28 20  
committed

At paragraph 17, 73 I apologise, that the crimes

21  
22  
23  
at

by Kamara's subordinates were of the most serious gravity and  
Kamara's failure to prevent or punish the commission of these  
crimes must be considered correspondingly grave. Furthermore,

24  
14:54:48 25  
Kamara's

paragraphs 85 to 88, the Trial Chamber found significant  
aggravating factors present in Kamara's case, including

26  
a  
27  
of

violent and active participation in burning alive civilians in  
house, the vulnerability of his victims, the prolonged period

28  
29  
deterrence.

time over which the enslavement crimes were committed.

Moving to undue prominence to retribution and

1 Kamara, at paragraphs 252 to 256, stresses that too much  
2 importance was given to retribution and deterrence as a  
3 sentencing factor. The Trial Chamber, at paragraph 13 to 18  
of  
4 its sentencing judgment considered all sentencing objectives.  
14:55:27 5 The fact that the Trial Chamber chose to give more weight to  
6 retribution and deterrence, based on the particular  
circumstances  
7 of this case, as opposed to rehabilitation, does not  
demonstrate  
8 that there was a discernible error in the Trial Chamber's  
9 exercise of its discretion.

14:55:43 10 On the contrary, it shows that it considered all  
sentencing  
11 objectives and found that the most appropriate one, based on  
the  
12 particular circumstances of this case, were deterrence and  
13 retribution as opposed to rehabilitation. Had Kamara, or any  
of  
14 the other accused pleaded guilty, shown genuine remorse,  
14:56:02 15 cooperated with the Prosecution, apologised to their victims  
and  
16 admitted their own guilt, rehabilitation may have played a  
17 greater role as a sentencing objective. This, however, was  
not  
18 the case with regard to any of the accused.

19 And again, before you, there is Kamara's transcript of  
what

14:56:22 20 he said regarding his remorse. And, once again, without going  
21 through the entire transcript, the Prosecution would submit  
that  
22 would not amount to genuine remorse and it would be at the  
23 discretion of the Trial Chamber to decide whether or not that  
24 remorse was sincere.

14:56:43 25 In fact, at paragraph 256, Kamara concedes that the  
26 imposition of a punishment should be one which is deserved for  
27 the offence committed, having regard to the seriousness of the  
28 harm caused by the offender, his degree of culpability and any  
29 extenuating circumstances. Based on this proposition, it is

1 clear that the Trial Chamber did not err in imposing the high  
2 sentence on Kamara in the context of the gravity of the crimes  
3 which Kamara had found to have committed and the total lack of  
4 extenuating circumstances in Kamara's case.

14:57:20  
paragraph

5 Furthermore, contrary to Kamara's contention at

also

6 256, he was found to be a high-ranking commander and a senior  
7 official by the Trial Chamber, at paragraph 468. There was  
8 found to be a functioning chain of command within the AFRC, at  
9 paragraph 468 of the trial judgment, as opposed to Kamara's  
10 contentions.

14:57:41

also

11 Kamara goes further. He says that the Trial Chamber

enough

12 erred in the misinterpretation of Resolution 1315 and not

submits

13 prominence was given to reconciliation. The Prosecution

and

14 that the Trial Chamber did not misinterpret Resolution 1315

14:58:00

15 there is nothing to suggest that the Resolution was hinting at  
16 light sentences. On the contrary, wording such as "credible  
17 system of justice to end impunity" would indicate lengthy  
18 sentences to deter others from committing such crimes.

14:58:20

19 With regard to reconciliation, there is no evidence to

20 suggest a lower sentence would be more greatly contributing to



21 reconciliation as opposed to higher sentences. This is a bald  
22 assertion. Indeed, the Prosecution submits that when the  
23 sentences were handed down in the AFRC case there was no  
24 particular public outcry that the sentences were outrageously  
14:58:40 25 high or were counter-reconciliation. Even at paragraph 262  
26 Kamara concedes that there is no real hope of fostering  
27 reconciliation between Kamara and the victims of his crimes.

28 JUSTICE KING: At this stage, you just direct us to what  
29 Kamara actually said to show remorse in the Trial Chamber;  
that

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1 is very important.

And

2 MR AGHA: Yes, indeed. I will do that, Your Honour.

28

3 this is in part which I earlier -- and after Brima we have the  
4 next page, page 58 Kamara, and he starts at the bottom on line

14:59:18

5 and he reads:

you

6 "Your Honour, I thank you very much for the good work

Leonean.

7 have done. Your Honour, I am just a young Sierra

join

8 I joined this army to fight for my people. I did not

me

9 the army to fight against my people. My Lord, I am not

14:59:36

10 Charles Taylor or Johnny Paul Koroma or Foday Sankoh for

in

11 to bear greatest responsibility. I am just a sergeant

you

12 the army, My Lord, but I believe in the experience that

you

13 have, I rely on your experiences, My Lord. I know that

those

14 will be able to deliver justice, My Lord and I stand for

14:59:54

15 reconciliation, My Lord. And finally, My Lord, all

sorry

16 that suffered in this war, who lost their lives, I am

17 for them, My Lord. I thank you, very much."

18 He is not personally saying that he himself has genuine

19 remorse for his activities. In fact, he seems to be  
complaining

15:00:13 20 that it should be Johnny Paul or someone more senior than him  
who

21 should be in the dock.

22 Now, on reconciliation, in connection, in the recent  
ICTY

23 Appeals Chamber sentencing judgment in the case of Bralo,  
which

24 has already been referred to, this is instructive. In that  
case,

15:00:36 25 at paragraph 81, where the appellant claimed, in the light of  
the

26 international tribunal wider aim to secure justice, peace and  
27 reconciliation, within the region, the Trial Chamber abused  
its

28 discretion in adopting an overly restrictive view of the  
powers

29 and functions of the international tribunal, and by assessing  
the

1 value of mitigating factors too narrowly. That is, the  
promotion 2 of peace and reconciliation was not given enough weight.  
3 In response, the Appeals Chamber, at paragraph 82, found  
4 that the Trial Chamber was fully aware of this role and  
15:01:15 5 explicitly took it into account when considering the purposes  
of 6 punishment to be followed in its sentencing process, just as  
the 7 Trial Chamber has done in this case, at paragraphs 13 to 18 of  
8 its sentencing judgment, which dealt with sentencing  
objectives.  
9 In Bralo, the Appeals Chamber, at paragraph 82, stated further  
15:01:35 10 that:  
11 "In addressing the Appellant's submission that the Trial  
12 Chamber did not give sufficient weight to the sentencing  
13 factor," ie peace and reconciliation, "the Appeals  
Chamber 14 recalls that 'while national reconciliation and the  
15:01:49 15 restoration and the maintenance of peace are important  
16 goals of sentencing, they are not the only goals.' As  
the 17 Trial Chamber rightly stressed, the purposes of  
punishment 18 are clearly set out in the jurisprudence of the  
19 International Tribunal. In particular, the Appeals  
Chamber

15:02:07 20  
in

21 recalls the importance of the principle of retribution  
22 the International Tribunal's sentencing process. The  
23 Appeals Chamber concurs with the Trial Chamber that the  
24 principle of retribution imposed on a convicted person  
'amounts to an expression of condemnation by the

15:02:21 25

26 international community at the horrific nature of the  
27 crimes committed, and must therefore be proportionate to  
his specific conduct'."

28  
the

And there can be no doubt that the utmost severity of

29 crimes committed by all three accused, the Prosecution would

1 submit, ought to prevail over this sentencing goal of  
2 reconciliation.

3 Turning now briefly to Kanu.

4 Kanu asserts that by imposing a global sentence for a  
15:02:58 5 single term of imprisonment the Trial Chamber erred in law and  
6 had it not done so Kanu would have received a lesser sentence.

7 However, Kanu has pointed to no discernible error in the  
8 exercise of the Trial Chamber's discretion in this regard. On  
9 the contrary, at paragraph 12 of its sentencing judgment, the  
15:03:18 10 Trial Chamber has explained why it chose to impose a single  
11 global sentence, which was entirely within its discretion, and  
12 indeed, such commonly -- such global sentences are commonly  
13 imposed in the latest jurisprudence of many of the  
international

14 tribunals. For example, if we have a look at the ICTY,  
15:03:41 15 Krajisnik, Bralo, we have been looking at, Vukovar, Galic.

16 The Prosecution submits that there is absolutely no  
basis  
17 for the Defence proposition that a count-by-count sentence  
would  
18 have led to a lower sentence that was handed down. The  
Defence

19 has cited no authority or proposition for this principle. It  
was  
15:04:01 20 for the Trial Chamber to weigh the various sentencing factors  
and

chose

21 in exercising its direction choose whether or not to impose a  
22 global sentence and they gave a reasoned decision why they  
23 to impose a global sentence.

15:04:23  
factors

24 As for many other of Kanu's grounds of appeal, as are  
25 contained in 11.1, this covers nearly all the mitigating  
26 which he raised in his sentencing brief on 5 July 2007, and  
27 repeated in his oral arguments before the Trial Chamber on 16  
28 July 2007.

29 These grounds of mitigation were carefully considered in

1 detail by the Trial Chamber in its sentencing judgment, at  
2 paragraphs 113 to 139, and were rightly either rejected or  
given

3 no weight in mitigation by the Trial Chamber, especially when  
4 viewed against the gravity of the offences and Kanu's  
15:05:02 5 participation in the crimes, coupled with the numerous  
6 aggravating circumstances which the Trial Chamber found  
existed  
7 in Kanu's case, at paragraphs 107 to 112.

8 In particular, Kanu raised the issue of superior orders  
in  
9 his sentencing brief. This was considered by the Trial  
Chamber

15:05:21 10 in its sentencing judgment at paragraphs 121 and 122 and was  
11 rejected in mitigation. The Defence has shown no discernible  
12 error. The Prosecution submits that Kanu was not a foot  
soldier

13 who this, in the interests of justice provision, may apply to.  
14 He was a senior commander. He was an issuer of orders. He  
15:05:45 15 wasn't a man necessarily taking orders, a young private. This  
16 was considered by the Trial Chamber and in its discretion it  
was  
17 not given any weight.

18 The Prosecution submits that a review of paragraphs 113  
to  
19 119 of the sentencing judgment reveals that, in effect, Kanu  
is



15:06:11 20 asking for a de novo hearing of all the matters which Kanu  
raised  
21 at the sentencing stage, and which were considered and  
evaluated  
22 by the Trial Chamber. As such, since a de novo hearing has no  
23 place in appellate review, the Prosecution submits that all of  
24 Kanu's sentencing grounds of appeal must be dismissed in their  
15:06:23 25 entirety.

26 This is more so since many of his assertions are  
blatantly  
27 at odds with the trial record, such as his relatively low  
command  
28 position; that he was a protector of women. This was  
adjudicated  
29 upon and it was not given any weight.

foundation

1 Kanu allegedly showed genuine remorse is without  
2 based on the submissions at the sentencing hearing as found by  
3 the Trial Chamber. This morning, counsel for Kanu referred to  
4 part of what Kanu had to say when he had the opportunity to  
15:06:58 5 speak. And before Your Honours, I have placed the full text  
of 6 what Kanu actually had to say.

the

7 JUSTICE KING: And might I ask you to read the whole of  
8 text of what he had to say.

9 MR AGHA: Yes, I will do that.

15:07:09 10 JUSTICE KING: It is very relevant and very important.

and

11 MR AGHA: For your benefit, I have also put in blue the  
12 parts which were referred to by Mr Manly-Spain this morning  
13 now I will read the entirety of it. Accused Kanu -- this is  
14 line 3, page 88.

on

13:06:20 15 Your

16 "ACCUSED KANU: Sorry, Your Honours. Good afternoon,  
17 Honours, good afternoon the Prosecutors, good afternoon  
18 Defence.

the

First

18 "I want you to forgive me because I am a stammerer.  
19 of all, Your Honours, I pray that as you've come with

13:06:43 20  
when

justice in Sierra Leone, then what we are asking for,

21 we had been fighting this war it started in 1990, it was

22 March 3, 1991.

23 "Now three of us have been convicted and we are facing

24 sentence but, My Honours, you, that are sitting up  
there, I

13:07:03 25 know that both Justice Sebutinde, Justice Lussick and

26 Justice Doherty, that you yourselves have children like  
us.

27 We pray that Your Honour, that whatever the Prosecution  
has

28 said about us, that it's a case that everybody knows  
that

29 that was not how it operated.

1 "Your Honours, what we are saying now in Sierra Leone is  
2 that peace and reconciliation for all that had suffered  
in  
3 this war. Those that have died, we pray that God send  
them  
4 to eternal life and those who have been victims, who are  
13:07:47 5 asking for mercy, Your Honours, yes, we've prayed that  
6 Sierra Leone forges ahead. That this Special Court that  
7 has been brought that, Your Honours, this is a highly  
8 political court, My Honour, but, My Honours, I don't  
want  
9 you to --

13:08:09 10 "THE INTERPRETER: Your Honours, would the witness be  
11 allowed to be asked" --  
12 Then the Presiding Judge, and if we turn to the next  
page  
13 89, the Accused Kanu continues:

14 "Yes, My Honour. I told you that I was stammering. My  
13:08:32 15 Honour, I just wanted to buttress what I was saying,  
that  
16 we are soldiers and that we were sworn to protect our  
17 people and not to destroy our people.  
18 "Your Honours, when we joined the war we had been  
fighting  
19 against the RUF. Like Charles Taylor, we did not know  
him

13:08:46 20  
people

21  
them

22

23

24  
you,

13:09:05 25

26  
27  
happening

28  
give

29

before. Gadaffi, we did not know him before. The

who fuelled this war in this country, we did not know

before but today, see, justice has trapped us in this

country.

"Your Honour, we pray that you, the three of you, like

Justice Sebutinde, I am not asking you to operate on a

sentiment. You are an African from Uganda, and you came

from your own country and you knew what had been

there, and we pray that whatever sentence you want to

you, yourself, would know how to do it."

1 Interpreter, Presiding Judge, and then we continue at  
line  
2 21, where it says "Brima" but ought to read "Kanu":  
3 "As I said, Your Honours, I said like for you, Justice  
4 Sebutinde, you are an African woman from Uganda and  
where  
13:09:49 5 you came, you know where -- what had been happening  
there  
6 and you know that it was a mistake of law. Some of us  
were  
7 and have a low rank in this army and we are under  
command  
8 and supervision. All that we need to know was: Yes  
sir,  
9 yes sir. But for today, Your Honours, if you can see  
the  
13:10:08 10 Court said that those who bear the greatest  
11 responsibilities, and those who are the three people who  
12 belong to the other ranks, Bazzy Kamara, Brima.  
13 Now, Your Honour, yes, we are the ones that are going to  
14 pay the price for peace, but it should not be the three  
of  
13:10:27 15 us that we pay the price for peace in Sierra Leone.  
There  
16 are soldiers who had committed. All the ECOMOG, when  
they  
17 went and fought in Sierra Leone, and the wounded Sierra  
18 Leonean people, and we are coming to ask them, the  
Sierra

19 Leonean people, to forgive us.

13:10:45 20 "We ask for mercy. We did not know. See, in Sierra  
Leone

21 everybody was angry. Civil society, everybody was angry

in

22 Sierra Leone, but now we pray that this peace that we

have

23 got be sustained; that it becomes everlasting.

24 "That Your Honours, you that are sitting there, judge us

13:11:04 25 fairly so that we are -- sorry, that you consider that

we

26 are just youth, so if you send us to life imprisonment,

27 Your Honour, we pray that you three would not accept

that

28 and consider that we are youths. Use your good offices

as

29 judges, national and international judges, that Your

1 Honours, whatever the Prosecution says, yes, they are  
2 building a case, they are working, and we would not say  
3 that, see, they have been -- everything had been  
explained  
4 to them and they came to prosecute us.

13:11:38 5 "And like TF1-334, Your Honour, if I should tell you  
that  
6 he is right now campaigning with other political  
parties,  
7 the real party, but they brought him to come and  
prosecute  
8 us and those are the people who came to prosecute us as  
9 commanders. My Honour, you see, let me don't continue  
so  
13:12:33 10 as not to waste time.

11 "People in the gallery, you also know are people they --  
12 whosoever has come to this Court to hear today, yes, we  
are  
13 three in the Sierra Leone Army. We joined the army to  
14 protect our people and not to destroy our people.

13:12:33 15 "Like, for me, I knew that I went to Liberia, I went to  
that  
16 ECOMOG, I fought. But today everybody say, they say  
17 it's three of us, Tamba Brima, Bazzy Kamara, Santigie  
18 Borbor Kanu. We are the ones that bear the greatest  
19 responsibility.



13:12:33 20 "We are going to pay the price for peace and we pray  
that  
21 three of you, Justice Sebutinde, Justice Doherty and  
22 Lussick, that you use your good offices as elders,  
mothers  
23 and fathers. Your Honours, I thank you and I thank the  
24 Court." I thank the Court."  
15:12:06 25 Now, the Prosecution would submit that read in its  
26 entirety, that statement does not amount to sincere and  
genuine  
27 remorse. Again, it is looking at the Court as being  
political.  
28 It is more a gripe that why am I here? I don't bear the  
greatest  
29 responsibility and he is not laying before the people, yes, I

1 have committed these crimes and I am truly sorry and I will do  
2 everything I can to atone for that, and the Trial Chamber did  
not  
3 err when it concluded that that was not genuine and sincere  
4 remorse.

15:12:42 5 JUSTICE KING: Would you say that that was a mitigating  
6 circumstance or was it an arrogant plea before the Judge, the  
7 Judges in the Trial Chamber?

8 MR AGHA: My submission, Your Honour, is that it was a  
very  
9 surprising plea. I think it was not a plea of personal  
remorse.

15:13:05 10 The Prosecution would submit it was a plea of why me? And  
even  
11 appealing to the sentiment of the Judges. It wasn't somebody,  
12 the Prosecution submits, who would put his hand on his heart  
and  
13 said: Yes, I have done what I have been convicted of and I  
truly  
14 and heart-feltly apologise to those victims and I will do  
15 everything I can to atone for my misdeeds.

16 JUSTICE KING: Thank you.

17 MR AGHA: Now, Your Honour, we obviously have to move  
18 rather rapidly because I am already biting into the time which  
I  
19 should have, so I am going to skip some matters very quickly,  
but

15:13:47 20 just turning very briefly to some of the other grounds raised  
by

21 Kanu.

22 One of the grounds he raised is that we should consider  
23 that there was a chaotic political situation prevailing and  
that

24 should have been a mitigating ground.

15:14:02 25 JUDGE FERNANDO: Before you move on to another issue, is  
26 there a principle that, or isn't there a principle that once a  
27 particular set of facts have been taken into consideration, in  
28 deciding the gravity of the offence, that the same facts  
should

29 not be taken in deciding the aggravating circumstances?

trial  
What  
they  
from  
15:14:42

1 MR AGHA: That is correct, Your Honour. And in the  
2 judgment it's made clear that they are not double-counting.  
3 they have regarded as aggravating, as going towards gravity,  
4 have not also regarded as aggravating, and that is apparent  
5 the trial judgment.

situation,  
Blaskic  
15:15:06

6 So coming back to the point of the chaotic war  
7 in Bralo, and I just refer to paragraph 13, it upheld the  
8 Appeals Chamber decision that, in fact, a chaotic situation in  
9 war was absolutely not a mitigating circumstances. This was  
10 again heard and considered and rejected by the Trial Chamber.

arguments

11 The other grounds which all three accused, in particular  
12 Kanu play, is all the great work they did after the conflict.  
13 This has been totally refuted by the Prosecutions and this is  
14 referred to in the oral transcript of the Prosecution's

15:15:28  
which  
essence,  
the  
Again,

15 on sentencing hearing, dated 16 July 2007, pages 36 to 39,  
16 refers to the truth and reconciliation report which, in  
17 makes clear that all three accused played a negative role in  
18 contribution towards peace as opposed to a positive role.

19 their role was to take revenge against the RUF who had  
betrayed  
15:15:54 20 them and formed the government, and their own personal attempt  
to  
21 gain power.

22 As for lack of military training Kanu was a trained  
23 professional soldier. This should be aggravating, not  
24 mitigating.

15:16:11 25 In conclusion, Your Honour, the Prosecution submits that  
26 all the sentences should remain the same or based, as I  
mentioned  
27 earlier, on whatever finding this Appeals Chamber may make in  
the  
28 Prosecution's appeal, be subject to a minor uplift because by  
no  
29 stretch of the imagination have any of the appellants met the

1 appellate review standard on appeal. And that is to show that  
2 the Trial Chamber made a discernible error.

3 Now, I would end my submission there on sentencing and  
4 would invite the Chamber for any questions, if they have any,  
15:16:59 5 before briefly moving on to some of the factual matters which  
6 were addressed yesterday.

7 JUSTICE KING: Yes.

8 MR MANLY-SPAIN: Sorry, My Lord, one of the accused  
wants  
9 to use the toilet.

15:17:26 10 JUSTICE KING: Let him be escorted.

11 MR MANLY-SPAIN: Thank you.

12 JUSTICE KING: Which of the accused?

13 MR MANLY-SPAIN: The second appellant, Kamara.

14 JUSTICE KING: Is that your client?

15:17:53 15 MR MANLY-SPAIN: No, My Lord.

16 JUSTICE KING: Your client is Kanu?

17 MR MANLY-SPAIN: Yes, My Lord.

18 JUSTICE KING: Who is for the second accused?

19 MR DANIELS: My Lord, I am.

15:18:07 20 JUSTICE KING: Very well.

21 MR DANIELS: Mr Daniels.

22 MR AGHA: Your Honours, if I may proceed on a separate  
23 point.

24 JUSTICE KING: Yes, go ahead.

15:18:22 25  
am

MR AGHA: I apologise for the time I am consuming -- I

26 very minded of that -- so I am trying to cut matters a little  
bit

27 brief and would then reiterate that any areas which I don't

28 particularly, or specifically cover, we do rely fully on our

29 response briefs.

SCSL - APPEALS CHAMBER

Kanu,

15:18:54  
October

review

15:19:16

15:19:35  
different

15:19:55

of

1           Now, yesterday, Your Honours, Brima, Kamara and today  
2 addressed the Appeals Chamber on a number of factual matters  
3 raised in each of their various grounds of appeal arising from  
4 the appellate briefs, all dated 13 September 2007. As I  
5 mentioned earlier, we refer to our response brief dated 4  
6 2007 fully in reply to those appeals briefs.

7           Before individually addressing a few of the factual  
8 matters, the submission of the Prosecution is that the Appeals  
9 Chamber must strictly adhere to the standards of appellate  
10 on factual matters as laid down by the jurisprudence of the  
11 international criminal tribunals. The appellant cannot simply  
12 appeal a factual finding of a Trial Chamber and expect the  
13 Appeals Chamber to substitute the Trial Chamber finding with a  
14 finding which the appellant would prefer.

15           One of the purposes of the Appeals Chamber on appellate  
16 review is not to hold a rehearing of the case and reach  
17 factual findings from that reached by the Trial Chamber. The  
18 Prosecution submits that based on the jurisprudence of the  
19 international tribunals, an extremely high standard has to be  
20 satisfied before the Appeals Chamber will interfere in the  
21 factual finding of a Trial Chamber. I refer to paragraph 1.7



Appeals 22 the Prosecution response brief, which quotes the Celebici  
23 Chamber, where it was stated as follows:  
24 "Pursuant to the jurisprudence of the Tribunal, the task  
of 25 hearing, assessing and weighing the evidence presented  
15:20:14 at 26 trial is left primarily to the Trial Chamber. Thus, the  
27 Appeals Chamber must give a margin of deference to a  
28 finding of fact reached by a Trial Chamber. Only where  
the 29 evidence relied on by the Trial Chamber could not have  
been

1           accepted by any reasonable tribunal of fact or where the  
2           evaluation of evidence is 'wholly erroneous' may the  
3           Appeals Chamber substitute its own finding for that of  
the  
4           Trial Chamber. It must be borne in mind that two  
judges,  
15:20:46 5           both acting reasonably, can come to different conclusion  
on  
6           the basis of the same evidence."  
7           The Prosecution submits that none of the appellants have  
8           satisfied this very high standard; namely, none of the  
appellants  
9           have demonstrated that any of the Trial Chamber's factual  
15:21:02 10          findings, which they assail in their grounds of appeal, could  
not  
11          have been reached by a reasonable tribunal of fact or that the  
12          Trial Chamber's evaluation of the evidence has been wholly  
13          erroneous.  
14          Turning to Brima.  
15:21:16 15          Brima, in his oral arguments in respect of ground 4  
seemed  
16          to suggest yesterday, firstly, that as a matter of fact the  
Trial  
17          Chamber erred in finding that Brima was present, a commander  
and  
18          ordered crimes committed in Karina and, secondly, that he was  
not  
19          responsible for the killings at the mosque in Karina.

15:21:38 20  
present,

21  
by  
22  
according

23  
crimes

15:21:55 25  
and

26  
was

Turning to the first argument that Brima was not  
was not a commander and did not order killings in Karina, the  
Prosecution submits that during the trial, and as alluded to  
Brima yesterday, he had relied on the defence alibi as  
to Brima he was detained in Kailahun at the time when the  
were committed in Karina. Brima's alibi was fully considered  
rejected by the Trial Chamber at paragraphs 344 to 377 of its  
trial judgment and it was held, at paragraph 378, that Brima  
overall commander of the advance team that travelled from  
Mansofinia in the Koinadugu to Camp Rosos in the Bombali

1 District.

2 The Prosecution submits that Brima has not appealed the  
3 rejection of his alibi for Karina, or Freetown, by the Trial  
4 Chamber and as such it must be taken as given that he was  
present

15:22:28 5 in Karina, as found by the Trial Chamber at the time when the  
6 crimes were committed.

7 Furthermore, and crucially, the Prosecution submits  
there  
8 can be no doubt as to Brima's identity and presence in Karina.  
9 He was identified by three Prosecution insider witnesses as  
being

15:22:46 10 in command at Karina. TF1-334 knew Brima from his army days  
and  
11 had been closely involved with the AFRC from the coup to  
12 post-intervention, in Kono, Bombali, Freetown and the West  
Side.

13 Secondly, TF1-167 knew Brima from his army days and had  
14 been closely involved with the AFRC from the coup to  
15:23:09 15 post-intervention to Kono, Bombali, Freetown and the West  
Side.

16 Thirdly, TF1-033 was an abductee who knew Brima from the  
17 coup and had accompanied the AFRC post-intervention to Kono,  
18 Bombali and Freetown. Furthermore, the fact that Brima led  
the  
19 attack on Karina was corroborated by the hearsay evidence of  
15:23:30 20 insider TF1-184.

witnesses 21 JUSTICE KING: Can we have the numbers of those  
22 again?  
23 MR AGHA: TF1-334, TF1-167, also known as George Johnson  
24 and Junior Lion, TF1-033 and hearsay corroboration of TF1-184.  
15:23:54 25 Unlike the crime-base witnesses, who had never seen Brima  
before  
26 he and his troops arrived in Karina, and who the appellant  
relies  
27 on to prove his absence from the crime scene at Karina as  
28 mentioned yesterday, all three of the Prosecution witnesses  
knew  
29 Brima and clearly identified him as a commander.

1           Thus, the Prosecution submits that on the basis of the  
2           above, a reasonable trier of a fact could have reached the  
same  
3           conclusion as the Trial Chamber did, namely, that Brima was  
4           present and was commander during the attack on Karina.

15:24:28 5           Secondly, Brima contends that no reasonable trier of  
fact  
6           could conclude that he was responsible for the killings of the  
7           civilians and the Imam at the mosque in Karina. At paragraph  
8           1703 of its trial judgment, the Trial Chamber relied in  
9           convicting Brima on the direct eyewitness evidence of  
Prosecution

15:24:46 10          insider witness TF1-334 who personally saw Brima shoot the  
Imam  
11          and eleven others.

12                   JUSTICE KING: What paragraph?

13                   MR AGHA: 1703 of the Trial Chamber's decision. The  
14          Defence brought as a witness the actual Imam of Karina mosque  
to

15:25:01 15          refute that the Imam was killed and in order to undermine the  
16          credibility of witness TF1-334 the Prosecution submits that in  
17          Islam any member of a prayer gathering can lead the prayers  
and,  
18          as such, may be an observer may be regarded as the Imam.

19                   The Trial Chamber, the Prosecution submits, correctly  
held

15:25:20 20 at paragraph 1705 of its judgment that: "The Chamber is of  
the  
21 view that the exact identity of the individual who led the  
22 prayers that day is not paramount but, rather, the fact that  
the  
23 leader of the prayers was indeed killed."  
24 This fact is not in dispute. In that regard the Trial  
15:25:39 25 Chamber finds evidence of eyewitness TF1-334, who was present  
at  
26 the mosque and actually saw the accused Brima shooting  
civilians,  
27 including the leader of the prayers at the mosque in Karina is  
28 credible and reliable. The fact that several civilians died  
as a  
29 result of the shooting is corroborated by TF1-167. In the  
Trial

1 Chamber's view the Prosecution evidence is not challenged by  
the  
2 evidence of Defence witness DBK-094 and DBK-089 who only  
3 testified about the absence of the Imam during the attack on  
the  
4 mosque. They do not dispute the fact that mass killings of  
15:26:15 5 civilians, including the person who led the prayers that day,  
6 took place at the mosque.

7 The Prosecution submits that no corroboration is  
required  
8 and that Trial Chamber, in paragraph 109 of its trial  
judgment,  
9 in discussing the evaluation of evidence, specifically stated  
15:26:31 10 that: "The Trial Chamber has examined the evidence of a  
single  
11 witness with particular care before attaching any weight to  
it."

12 Thus, the Prosecution submits that on the basis of the  
13 above findings, a reasonable trier of fact could have reached  
the  
14 same conclusion as the Trial Chamber did regarding Brima  
carrying  
15:26:49 15 out the killings at the mosque.

16 Touching briefly upon the credibility and reliability of  
17 Prosecution witnesses, this ties in with Brima's assertion  
that  
18 no reasonable trier of fact could have found Brima to be  
present,



the 19 the commander, during the attack on Karina and have committed

15:27:05 20 killings at the mosque. It's the assertion that the  
Prosecution

21 insiders, who were relied upon, lacked credibility and  
22 reliability and should not have been believed by the Trial  
23 Chamber.

24 The Prosecution submits that according to the settled  
15:27:17 25 jurisprudence of international tribunals, in assessing the  
26 credibility and reliability and weight to be attached to the  
27 evidence of a particular witness, the Appeals Chamber will not  
28 likely interfere with the findings of the Trial Chamber.

29 The Prosecution refers to paragraph 1.7 of its response

1 again, and on page 8 relies on numerous Appeal Chambers'  
2 decisions, including Kvocka, where the Appeals Chamber has  
3 stated: The reason that the Appeals Chamber will not likely  
4 disturb findings of fact by a Trial Chamber is well-known.

The

15:27:47  
person,

5 Trial Chamber has the advantage of observing witnesses in  
6 and so is better positioned than the Appeals Chamber to assess  
7 the reliability and credibility of the evidence. Accordingly,

it

witness

8 is primarily for the Trial Chamber to determine whether a  
9 is credible and decide which witness's testimony to prefer

15:28:04  
in

10 without necessarily articulating every step of the reasoning  
11 reaching a decision on these points.

stated

12 The Prosecution submits that when evaluating live  
13 witnesses' evidence the Trial Chamber, at paragraph 108,

15:28:21

14 that: When evaluating the credibility of witnesses, who gave  
15 evidence viva voce, the Trial Chamber has taken into account a  
16 variety of factors, including: The demeanour, conduct and  
17 character, where possible; their knowledge of the facts for

which

18 they testified; their proximity to the events described; the  
19 impartiality; the lapse of time between the events and the

15:28:42 20 testimony; their possible involvement in the events and the  
risk  
21 of self-incrimination and their relationship with the accused.  
22 On the credibility of Prosecution witness TF1-334, 167  
who  
23 Brima and Kamara and Kanu have challenged, the Trial Chamber  
made  
24 the following findings in its judgment. Regarding TF1-334, at  
15:29:07 25 paragraph 359, the Trial Chamber stated the following:  
26 "The Trial Chamber observes that witness 344 spent 16  
days  
27 on the stand, including five days of cross-examination  
in  
28 which his testimony in chief was not shaken. The  
witness  
29 provided a substantial amount of detail corroborated by

his  
1 other witnesses as well as plausible explanations for  
2 knowledge of such information. The Trial Chamber finds  
3 that his evidence throughout was consistent and any  
4 discrepancies minor. In addition, the witness presented  
a  
15:29:43 5 truthful demeanour. Thus, the Trial Chamber finds that  
he  
6 was a credible and reliable witness."  
7 With regard to TF1-167, George Johnson alias Junior  
Lion,  
8 at paragraph 370, the Trial Chamber has considered the  
objections  
9 raised by the Defence on the credibility and reliability of  
15:30:02 10 George Johnson. The Trial Chamber observes that the witness  
11 provided consistent and detailed evidence during his  
examination  
12 in chief and that he was not shaken on cross-examination. The  
13 Trial Chamber further found that his overall demeanour on the  
14 stand indicated candour. Thus it concludes that the witness  
was  
15:30:22 15 generally credible and reliable.  
16 The Prosecution submits that the Trial Chamber didn't  
err  
17 in relying on the evidence of either TF1-334 or 167 and giving  
18 their evidence greater weight than many of the Defence  
witnesses  
19 given on behalf of Brima.

15:30:36 20 In fact, at paragraph 372 to 376 of the trial judgment  
the  
21 Trial Chamber considered all the Defence witnesses who gave  
22 evidence that Brima was not in command in Bombali and came to  
the  
23 conclusion, at paragraph 337, that: The Trial Chamber finds  
the  
24 evidence of the Prosecution witnesses who placed the accused  
in  
15:30:55 25 Koinadugu and Bombali District during the relevant indictment  
26 period significantly more reliable, consistent, compelling and  
27 thus more persuasive than that of the Defence witnesses.  
28 The Trial Chamber properly evaluated the witnesses, gave  
29 itself the appropriate guidelines to follow, and the Defence  
have

1 not demonstrated that the Trial Chamber has erred in placing  
2 reliability or on credibility on those witnesses which  
primarily,  
3 according to the appellate jurisdiction, lies within the  
purview  
4 of the Trial Chamber who has the ability to watch, observe and  
15:31:34 5 demonstrate how these witnesses actually conduct themselves  
6 whilst giving evidence.

7 Briefly, turning to Kamara.  
8 Kamara asserted that no reasonable trier of fact could  
have  
9 found on the evidence that he gave the order for the five  
young  
15:31:50 10 girls to be burnt alive in a house in Karina. As was found by  
11 the Trial Chamber, at paragraphs 86 -- 887 of the trial  
judgment.

12 In essence, Kamara's appeal revolves around inconsistencies in  
13 the evidence of the two Prosecution insider witnesses. These  
are  
14 the two witnesses we have just discussed, TF1-334 and 167 who  
the  
15:32:11 15 Trial Chamber evaluated their credibility and found them to be  
16 reliable.

17 Kamara asserts that 334 gave evidence that Kamara gave  
the  
18 order for the girls to be burnt alive, whilst TF1-167 gave  
19 evidence that the High Command gave the order. The  
Prosecution

15:32:27 20 submits that the Trial Chamber found, at paragraph 468, that  
in 21 Kamara was Brima's deputy throughout the Bombali campaign so,  
conclude 22 effect, it was not unreasonable for the Trial Chamber to  
23 that Kamara was part of the High Command.  
24 Furthermore, the Prosecution considers the inconsistent  
15:32:47 25 evidence between where the instance occurred just before  
entering 26 Karina, or just after entering Karina, are again minor in  
nature.  
27 The most important finding by the Trial Chamber is not only  
that  
28 Kamara ordered the five girls to be burnt alive but that, at  
29 paragraph 890 of the trial judgment, the Trial Chamber found  
that

1 when the houses were set on fire and the people burnt alive  
the  
2 accused Kamara was watching from outside the house, together  
with  
3 George Johnson and other security guards of Kamara. As such,  
the  
4 event is not in dispute and nor is Kamara's presence.

15:33:28 5 Again, the Trial Chamber quite correctly in its trial  
6 judgment, at paragraph 110 to 113, set out its standard of  
7 evidence when looking at inconsistencies, and at paragraph  
110, I  
8 will briefly read this:

9 "It is the responsibility of the Trial Chamber to  
resolve  
15:33:49 10 any inconsistency that may arise within and/or amongst  
11 witnesses' testimonies. In doing so, the Trial Chamber  
has  
12 discretion to evaluate any inconsistencies, to consider  
13 whether the evidence taken as a whole is reliable and  
14 credible and to accept or reject the 'fundamental  
features'

15:34:08 15 of the evidence." In this context, the Trial Chamber  
16 endorses the statement of the ICTY Appeals Chamber in  
17 Kupreskic that 'the presence of inconsistencies in the  
18 evidence does not, per se, require a reasonable Trial  
19 Chamber to reject it as being unreliable'."

15:34:26 20 And finally, at paragraph 113:



minor 21 "Thus, in general, the Trial Chamber has not treated  
or 22 discrepancies between the evidence of various witnesses,  
23 between the evidence of a particular witness and a  
discrediting 24 statement previously made by the witness, as  
15:34:41 25 their evidence where the essence of the incident had  
26 nevertheless been recounted in acceptable detail."  
27 And the Prosecution would submit that the evidence  
Karina, 28 regarding the burning of the five girls in the house, in  
Trial 29 has been rendered and accepted in acceptable detail by the

1 Chamber.

2 Vis-a-vis the other factual grounds, which were raised  
by  
3 learned Defence counsel, the Prosecution would rely fully on  
its  
4 response brief, and I will now hand over to Dr Staker, unless  
the

15:35:23 5 Bench have any particular questions for myself.

6 JUSTICE KING: I have no questions but let me take this  
7 opportunity to thank you for being so systematic and clear in  
8 your submissions. Thank you.

9 Dr Staker.

15:35:45 10 MR STAKER: Before I begin, I just noted that Your  
Honour

11 Judge Fernando had a question earlier about double-counting in  
12 sentencing. It wasn't clear to me that Your Honour felt your  
13 question had been entirely answered. I just wanted to check  
14 whether we can be of any further assistance on that?

15:36:12 15 JUSTICE KING: Which Judge is that?

16 MR STAKER: Judge Fernando had a question about -- -

17 JUDGE FERNANDO: My question was: Isn't there a  
principle  
18 that where a particular set of fact has been taken into  
19 consideration in deciding the gravity of the offence that so  
the

15:36:20 20 same facts should not be taken into consideration in deciding

21       aggravating circumstances.

22               MR STAKER:  Yes, that's quite right, Your Honour.  That  
was

23       a point that we made clearly in our own sentencing  
submissions, I

24       am sure the Defence made it in their sentencing submissions  
and

15:36:36 25       it is reflected in the sentencing judgment.  Certain things,  
like

26       the particular brutal way in which a crime was committed, it

27       might be counted as going to gravity or it might be counted as

28       going to aggravating circumstances, but it can't be counted

29       twice, so we acknowledge that.

1           Your Honour, the Defence has raised, in their notices of  
2           appeal and appeal briefs raised various grounds of appeal that  
3           have not been addressed by them in oral argument. We  
understand  
4           they continue to rely fully on their appeal briefs in relation  
to  
15:37:12 5           those and of course we continue to rely fully on our written  
6           briefs in response.

7           In relation to the matters that were addressed by  
Defence  
8           counsel, in their oral submissions, again, of course, we  
continue  
9           to rely on our written briefs but I would make some additional  
15:37:32 10          points in this oral reply; oral response, I am sorry.

11          The first matter I wanted to address was the argument  
12          concerning those bearing the greatest responsibility. One  
matter  
13          that may be of some significance is that Mr Manly-Spain,  
counsel  
14          for the appellant Kanu, was originally allotted one hour for  
his  
15:37:59 15          appeal submissions and he spent half-an-hour of that arguing  
that  
16          Kanu was not one of those bearing the greatest responsibility.  
17          At the same time, in relation to his sentencing ground of  
appeal,  
18          he was arguing that Kanu had expressed remorse.

I 19 Mr Agha, of course, has dealt with the remorse issue but  
15:38:22 20 would merely note that of course while the Defence is free to  
to 21 argue any point which it considers assists it, it has a right  
22 raise any legal argument, there would appear to be some  
is 23 inconsistency between spending half-an-hour arguing that one  
24 not one of those bearing the greatest responsibility and the  
15:38:42 25 argument that one has genuine remorse. I leave that thought  
for 26 consideration.

27 Our submission is that it may be that the appellant Kanu  
28 has failed to appreciate fully the extent and gravity of what  
29 he's actually been convicted of by the Trial Chamber.

1                   On this issue of those bearing the greatest  
responsibility,

2                   our argument is dealt with in paragraphs 2.38 to 2.68 of our  
3                   reply brief. A few brief points:

4                   First of all what does it mean, those bearing the  
greatest

15:39:21 5                   responsibility? It would seem to be the logic of Kanu's  
argument

6                   that if the Special Court only indicts 13 people that it can't  
7                   indict the 14th most responsible until it's indicted the 13th  
8                   most responsible. That you have to decide everybody in  
9                   descending order of responsibility and you can't indict one

15:39:44 10                   person unless you have already indicted those higher up the  
list.

11                   That of course, in our submission, is an unrealistic  
12                   interpretation. First of all, how do you tell what the  
hierarchy

13                   of responsibility is? Even if we were fully apprised of all  
14                   facts and details it's a matter on which reasonable minds  
might

15:40:05 15                   differ and if reasonable minds might differ a discretion has  
to

16                   be exercised and as I think emerged from submissions this  
morning

17                   that must be a discretion that is exercised by the  
Prosecution.

18                   We submit that the reason why those words were inserted

ICTY 19 into Article 1 was to avoid the situation that arose at the  
15:40:28 20 and ICTR where numerous of those who were indicted were  
actually 21 rather low-level perpetrators and the provision give some  
attention 22 direction to the Prosecution that it should focus its  
23 on the upper echelon of perpetrators.  
24 We submit that the inclusion of this wording wasn't  
15:40:51 25 intended to include some fine jurisdictional test, that would  
26 enable cases to be knocked out over technical arguments, it  
was 27 intended to enhance the efficiency of the Court by directing  
the 28 focus of its investigations and Prosecutions.  
29 But, in any event, we submit that an argument that you  
have

1 to compare different people to decide who bears the greatest  
2 responsibility --

3 JUSTICE AYoola: Before you go on to that, why was it  
4 headed "Competence" if it's a prosecutorial discretion matter?

15:41:28 5 Why did it come under the provision dealing with competence of  
6 the Court?

7 MR STAKER: It's simply the way it was worded. I think  
in

8 the ICTY the Statute was -- the section of the ICTY says the  
ICTY  
9 has jurisdiction over serious violations of international

15:41:46 10 criminal law. Here, the wording, well, perhaps this comes  
more  
11 towards the end of my submissions. It is --

12 JUSTICE AYoola: All right. If it comes to the end of  
your  
13 submission.

14 MR STAKER: Well, it may be more helpful if I try and  
15:42:07 15 address it now, but I am just trying to think of what works

16 better, but if I put it this way: To the extent that it goes  
to  
17 competence it's included in an expression dealing with

18 but we would submit what it means is that the Special Court  
has

19 competence to deal with cases, where this discretion is  
exercised



15:42:25 20 by the Prosecution, that a person indicted is one of those  
21 bearing the greatest responsibility, if I can put it that way.  
22 There might conceivably be some argument that if the  
23 Prosecution indicted a person, that could not conceivably be  
one  
24 of those bearing the greatest responsibility, if it indicted a  
15:42:46 25 person and said: We are charging that person with pillage and  
26 the material facts alleged in the indictment were that the  
person  
27 stole a teapot during an attack on a village, now, you might  
say  
28 that goes to competence, that the Court would say: This is  
29 obviously not someone bearing the greatest responsibility.

1 JUSTICE AYoola: Wouldn't that be subject matter  
2 competence?

3 MR STAKER: That would be subject matter competence,  
yes.

4 But the way that I'm putting it is that the determination of  
who

15:43:19 5 bears the greatest responsibility is not something capable of  
6 calculation with mathematical precision and the question is:  
How  
7 do you decide?

8 Now, we submit it would be an untenable interpretation  
to

9 interpret a provision that was intended to make this Special  
15:43:38 10 Court more efficient, to interpret it in a way that it had the  
11 effect that a large trial could continue to the very end and,  
at

12 the end, notwithstanding that the Trial Chamber finds it  
proved

13 beyond a reasonable doubt that grave crimes were committed by  
the  
14 accused to say: Yes, but we are not satisfied that there  
weren't

15 other people bearing even greater responsibility than this  
16 accused and that therefore the case has to be dismissed.

17 JUSTICE AYoola: I think at the end of it all, the  
question

18 which arises is: Who determines competence? Is it the

19 Prosecutor who determines competence of the Court or the Court  
15:44:18 20 itself?  
21 MR STAKER: Well, we would say primarily it's the  
Statute  
22 that determines competence, and we say that the Statute,  
23 correctly interpreted, clearly indicates that the question of  
who  
24 bears the greatest responsibility is not a matter that can be  
15:44:34 25 determined with mathematical precision.  
26 JUSTICE AYoola: The Statute determines the competence  
and  
27 in Article -- subparagraph (1) of Article 1, the Article also  
28 excluded peacekeepers.  
29 MR STAKER: Yes.

1 JUSTICE AYoola: Suppose you --

2 MR STAKER: Subject to a proviso, of course.

3 JUSTICE AYoola: Yes, subject to a proviso, but let's  
leave

4 the proviso aside for the time being. Suppose you, as

15:45:09 5 Prosecutor, decided to bring a peacekeeper before the Court,  
your

6 decision cannot be reviewed?

7 MR STAKER: No, that is not what we are suggesting.  
There

8 are -- to the extent that it's jurisdictional, there are

9 jurisdictional requirements that are capable of, to use the  
words

15:45:27 10 I adopted, "mathematical precision," the Special Court only  
has

11 jurisdiction over crimes committed within the territory of  
Sierra

12 Leone, so if an indictment alleged that a person committed a

13 crime in Paris, or, you know, it's obvious, it does not fall

14 within the jurisdiction.

15:45:47 15 On the question of who bears the greatest  
responsibility,

16 we say it cannot be the interpretation that at the end of a

17 lengthy trial a case is dismissed on that basis. So we say  
the

18 Statute cannot mean that. We say that to the extent that it

19 means anything, it confers a discretion on the Prosecution.  
And

15:46:10 20 if it goes to competence, as long as the Prosecution has  
21 exercised that discretion properly, that is to say there has  
been  
22 no abuse of discretion, it has been exercised in good faith,  
then  
23 the Special Court has competence.

24 In fact, we could read it, in effect, as saying: The  
15:46:27 25 Special Court has competence to try those who, in the  
26 Prosecutor's good faith, properly exercised discretion, are  
27 considered by the Prosecution to be those bearing the greatest  
28 responsibility.

29 Now, I can point to some of the problems that would  
arise

there  
law.

1 with any other interpretation. We say this interpretation,  
2 is nothing unusual about that; it's standard administrative  
3 Statutes confer discretions on executive authorities and they  
4 only exceed the jurisdiction of the power conferred on them if  
15:46:59 5 the power is conferred in an unreasonable way or taking into  
6 account irrelevant --

law

7 JUSTICE AYoola: But we do know that in administrative  
8 there is judicial review.

9 MR STAKER: There is judicial review.

15:47:13 10 JUSTICE AYoola: There is a review of such discretion --

11 MR STAKER: Yes.

12 JUSTICE AYoola: -- on the basis of whether it is within  
13 the power.

14 MR STAKER: Yes. And I haven't excluded the possibility  
15:47:20 15 that there may be that kind of judicial review. But it would  
be  
16 along the lines of judicial review. It would be where there  
has

17 been an abuse of discretion, a lack of good faith, use of the  
18 power for an improper purpose. An example --

19 JUSTICE AYoola: Or ultra vires.

15:47:34 20 MR STAKER: Well, if it's a discretion, it's a question  
of

put 21 whether the discretion has been properly exercised. Let me

22 it that way.

issue 23 I can actually cite an example of where this kind of

argued 24 came up; it was in the Celebici case. One of the accused

15:47:49 25 that he was too low level a perpetrator. He said that all of  
the

26 Serbs who had been indicted by the ICTY were much higher level

27 perpetrators. And he said the only reason that he had been

28 indicted was because he was Muslim and that the Prosecutor had

29 wanted to find some Muslim people to indict, to look a bit

1 balanced between the ethnic groups, and he was all they could  
2 find.

3 Now, the Appeals Chamber in the Celebici case rejected  
that  
4 argument, but did appear to accept that if there was an  
abusive  
15:48:25 5 prosecutorial discretion along the lines alleged this might be  
a  
6 matter in which the Appeals Chamber could grant a remedy. But  
we  
7 say that any other interpretation -- and of course to get that  
8 kind of remedy it would be necessary for an appellant, it  
would  
9 be necessary for the Defence to establish the abuse of  
15:48:40 10 discretion. It's not enough simply to say so. And the reason  
11 why any other interpretation doesn't work is this:

12 First of all, how is it possible to know that there is  
13 anybody more responsible than the accused presently indicted  
14 before the Special Court? The Special Court will make  
findings  
15:48:59 15 of the criminal responsibility of everybody indicted here.  
But  
16 how do we know about the criminal responsibility of anyone  
else?  
17 They haven't been indicted and tried. There is a presumption  
of  
18 innocence and, in fact, how do we even know at the time of an



before

19 indictment what the criminal responsibility of the accused  
20 the Special Court are? Again, there is a presumption of  
21 innocence. It can't be said that we only have jurisdiction to  
22 try the guilty because then you have to determine guilt before  
23 you can determine if you have jurisdiction to issue an  
24 indictment.

15:49:34  
can

25 What we say is that the decision as to who to prosecute  
26 only be based on the evidence in the possession of the Office  
27 the Prosecutor. The Office of the Prosecutor looks at all the  
28 evidence in its evidence collection that its gathered and it  
29 says: Based on the evidence we have, who in our good faith

of

1 professional discretion do we consider that evidence points to  
as  
2 those bearing the greatest responsibility?

3 JUSTICE AYoola: What does "greatest responsibility"  
mean?

4 MR STAKER: Greatest responsibility, we do deal with  
this

15:50:09 5 in our brief. There is something said about this in the  
report

6 of the Secretary-General, which was the report called for by  
the

7 Security Council that led to the negotiation of the Special  
Court

8 agreement. And it indicates that it can imply leadership,  
9 meaning the highest level leaders, but that it's not confined  
to

15:50:29 10 that and it can also relate to the gravity or severity of the  
11 crimes that were committed.

12 Ultimately, we say obviously it has to be a mixture of  
13 these two considerations. It cannot be rank alone because, as  
we

14 know, criminal responsibility is individual; a person is  
indicted

15:50:49 15 because of their individual criminal responsibility and not  
16 because of their rank.

17 It would be possible for one person in a hierarchy to be  
18 criminally responsible with subordinates below them also

19  
responsibility

criminally responsible, with their superiors, no

15:51:15 20

at all because they had no knowledge, couldn't have prevented,

21

couldn't have punished afterwards because they didn't know and

22

they weren't personally involved in any way.

23

suppose

So you can't just ask who was the most senior -- or

24

it

they had some responsibility, yes, they knew something about

15:51:22 25

uncovered

but never investigated and, if they had, it might have

26

this and there would have been punishment. It may be a lesser

27

it's

culpability notwithstanding that they are higher ranking, so

28

a weighing of different things.

29

Judge

Now, when an indictment is confirmed, the confirming

1 is not in a position to examine all of the evidence in the  
2 possession of the Office of the Prosecutor to decide if the  
3 person being indicted on all the evidence collected appears to  
be  
4 one of those bearing the greatest responsibility.

15:51:55 5 At the end of the trial it might also emerge that the  
6 criminal responsibility of the person indicted is not quite as  
7 great as what was originally envisaged because not all charges  
in  
8 the indictment might be proved. But if a person is indicted  
on  
9 the basis of certain charges and then ultimately the Trial

15:52:16 10 Chamber decides that only half of those charges have been  
proved  
11 does the Trial Chamber then say: Well, we can't convict on  
the  
12 half of the charges that were proved because we no longer  
13 consider this was one of the most responsible so we throw  
14 everything out.

15:52:31 15 Now, we submit that is unreasonable. We say that these  
16 words, they confer a discretion on the Prosecution and  
provided  
17 this discretion is exercised in good faith, which must be  
based  
18 not on hard objective facts because until we have a verdict in  
19 the case we have no hard objective facts, we only have the

15:52:52 20 professional opinion of prosecutors based on the evidence they  
evidence 21 have. And unless the Defence, we say, can provide some  
22 and some basis for suggesting that this discretion has not  
been 23 exercised properly, we submit that there is no possibility of  
any 24 remedy or review.

15:53:10 25 Because of that, perhaps I don't even need to go so far  
as 26 to concede that there is a possible remedy or review. I could  
27 perhaps take the high road and say that the prosecutorial  
that 28 discretion is unreviewable. I don't think we need to take  
29 high road and I indicated in the Celebici case --

1 JUSTICE AYoola: To take that high road, you will travel  
it 2 alone.

3 MR STAKER: Well, I always prefer to travel in good  
4 company, so, you know, I was quite quite prepared to make the  
15:53:44 5 concession and I travel the low road in good company, then,  
Your 6 Honour.

7 That's probably all I need to say on that ground of  
appeal.

8 We would say the -- I would merely add: The Defence has  
brought 9 nothing, by way of specific argument, or specific evidence, or  
15:54:07 10 specific anything to indicate that Kanu is not one of those  
11 bearing the greatest responsibility. It's merely an assertion  
12 and the assertion includes things like: He was only low  
ranking.

13 Well, the Trial Chamber found that he wasn't low ranking.  
This

14 is ignoring the findings of the Trial Chamber. The fact that  
he

15:54:29 15 looked after women and children. Well, the Trial Chamber  
found

16 he didn't. They found that he was in charge of a system of  
17 exploitation and cruelty of being in charge of enslaved  
18 civilians, women and children.

19 Submissions can't be based on mere assertion and they

15:54:47 20 certainly can't be based on mere assertions that contradict  
what  
21 the Trial Chamber actually found unless and until a ground of  
22 appeal is upheld in which case the success of the argument  
23 depends on the success of the ground of appeal. But we say  
the  
24 submission was just one at large, very general, undetailed,  
15:55:06 25 unsubstantiated. And unless I can be of further assistance on  
26 that?  
27 The next ground of appeal concerned, Kanu's ground 2,  
which  
28 concerned the pleading of crimes that were committed  
personally  
29 by Kanu. This is dealt with in paragraphs 2.69 to 2.91 of the

1 Prosecution response brief. Kanu argues that insufficient  
2 specifics were given in the indictment of crimes that he was  
3 alleged to have committed personally.

4 JUSTICE KING: Sorry, Dr Staker, I think we have given  
both  
15:56:01 5 sides some time. We will take a few minutes adjournment and  
come  
6 in again. We will adjourn for five minutes.

7 [Break taken at 3.55 p.m.]

8 [Upon resuming at 4.10 p.m.]

9 JUSTICE KING: Dr Staker, do you have any idea how long  
you  
16:12:50 10 are going to be? I was saying, do you have any idea how long  
you  
11 are going to be?

12 MR STAKER: I was hoping within another 10 or 15  
minutes.

13 JUSTICE KING: That is very good.

14 MR STAKER: But Mr Eboe-Osuji has another five minutes  
or  
16:13:03 15 so.

16 JUSTICE KING: I mean, when I say "you" I mean your  
team.

17 MR STAKER: The team. I would say about 20 minutes.

18 JUSTICE KING: About 20 minutes.

19 MR STAKER: Yes.



16:13:10 20  
public

JUSTICE KING: Because I've heard that tomorrow is a

any

21 holiday, I don't know whether that has been confirmed, but in

22 case we will try to finish today.

Honour.

23 MR STAKER: I will be as quick as I can then, Your

24 JUSTICE KING: Very well.

16:13:25 25  
therefore,

MR STAKER: On the issue of crimes pleaded in the

26 indictment that Kanu committed personally, he argues that

27 insufficient detail was given in the indictment and,

all

28 the indictment is defective. We say this is not the issue at

29 because the Trial Chamber itself found that the indictment was

1 defective in that respect. What the Trial Chamber said was  
that  
2 Kanu had waived his right to object to this because he had not  
3 raised the objection at trial.

4 Now, this comes back to the same submissions that the  
16:14:00 5 Prosecution made in its second ground of appeal relating to  
the  
6 pleading of locations. We've set out the case law. I dealt  
with  
7 that yesterday. Our response brief also sets out the relevant  
8 case law but, basically, a lack of notice in the indictment is  
9 something that is waivable. We have a Rule 72. Rule 72 says:

16:14:23 10 If the Defence have any problems with the indictment, they  
raise  
11 it at the pre-trial stage, so that it can be cured, it can be  
12 remedied and the trial can proceed in an orderly fashion.

13 If the accused doesn't raise it at the pre-trial stage,  
14 they have also then still the opportunity during the trial to  
16:14:49 15 raise specific objections. When evidence of something is  
adduced

16 the Defence can say: I'm sorry, we object. We were not given  
17 sufficient notice of that in the indictment. We haven't  
fairly  
18 had time to prepare. We are surprised. And the Trial Chamber  
19 can grant some remedy. It can grant an extension of time; it  
can

16:15:14 20 do various things. In an extreme case it might exclude the

21 evidence altogether.

22           What the Defence can't do, we submit, is to fail to  
raise  
23 any objection whatsoever, to cross-examine the evidence when  
it's  
24 brought by the Prosecution; to bring its own evidence to rebut  
16:15:33 25 the Prosecution evidence; and to hope to be acquitted on the  
Defence,  
26 merits but then, if the merits are decided against the  
27 the Defence then says, for the first time: Oh, yes, but there  
28 was a defect in the indictment; we can't be convicted. This  
is  
29 the waiver rule. Problems have to be raised at the time. You

1 can't save up problems as your second attack, in case you are  
2 unsuccessful on your first.

3           What would the risk have been to the Defence of raising  
4 this defect at the time of the trial? The risk of course  
would

16:16:08 5 have been that the Trial Chamber would have found a way to  
6 correct the defect or to grant some remedy that would remove  
any  
7 prejudice to the Defence, and the trial could have proceeded.

8 And it would seem to be, in my submission, that the Defence in  
9 this case deliberately didn't raise any objection for the very  
16:16:30 10 reason that the Defence wanted to save this up their sleeve,  
as

11 it were, in the event of a conviction, and to drop this at the  
12 end of trial, in final trial arguments or on appeal, as a  
reason  
13 for not being convicted.

14           I would refer the Chamber to paragraph 133 of the trial  
16:16:56 15 judgment. This related to a slightly different issue about  
the  
16 Defence not putting its case to Prosecution witnesses in  
17 cross-examination, and the Trial Chamber noted this was not an  
18 oversight by the Defence, but a deliberate strategy devised by  
19 Defence counsel, as explained in the Defence closing

arguments,  
16:17:19 20 and the Trial Chamber then proceeds to quote Mr Manly-Spain:

21 "Would it be in our interests to show our hands by  
22 cross-examining on a point which the Prosecution can come  
later  
23 to correct? It's only a matter of strategy."

24 And Mr Manly-Spain did say earlier today that the  
failure  
16:17:45 25 to object at trial was a question of strategy.

26 Now, we say it's open to the Defence to adopt whatever  
27 strategy the Defence wishes, but that the Defence must take  
the  
28 consequences of the strategy that it does adopt.

29 JUSTICE KING: Well, I have one question on this point:

1 You know, I would like to hear your views on the general  
2 principle that it is, generally speaking, for the Prosecution  
to  
3 prove its case beyond reasonable doubt. What, in your  
opinion,  
4 is the position where the Defence chooses not to say anything  
but  
16:18:26 5 to leave it to the Prosecution to prove its case beyond  
6 reasonable doubt? Is the Defence obliged to say: Look, well,  
we  
7 are going to show our hand. Suppose they decide not to show  
8 their hand as a matter of strategy; what is wrong with that?  
9 MR STAKER: No, the Defence isn't required to show its  
hand  
16:18:45 10 but if it remains silent it cannot then complain that  
something  
11 went wrong when it didn't raise objections. Our submission is  
12 that --  
13 JUSTICE KING: The question I'm raising really is this:  
Do  
14 you accept that it is within the powers of the Defence --  
16:19:00 15 MR STAKER: Yes.  
16 JUSTICE KING: -- or the competence of the Defence to  
just  
17 sit down and say nothing and say to themselves: Well, the  
onus  
18 is on the Prosecution to prove its case beyond reasonable  
doubt.

analogy: 19 MR STAKER: Yes. To give Your Honour the simple  
16:19:15 20 The Prosecution presents all of its evidence and the Defence  
our 21 says: We have a right to silence. It's not for us to prove  
are 22 innocence, the Prosecution has to prove we are guilty, so we  
23 not leading any evidence.  
24 JUSTICE KING: Yes.  
16:19:29 25 MR STAKER: The Trial Chamber has heard the Prosecution  
then 26 case, Trial Chamber, you decide. But if the Trial Chamber  
not 27 finds the accused guilty, the accused can't say: But that's  
28 fair, I never presented any evidence in my Defence.  
29 JUSTICE KING: That is the point.

1 MR STAKER: We say of course it's the Defence's right to  
2 remain silent but if it does it takes the consequence. It has  
3 the opportunity to say something if it wants. If it wants to  
say  
4 nothing it doesn't have to, but the Trial Chamber will then  
16:20:02 5 decide.

6 JUSTICE KING: The point I am making is this: You have  
7 said that the Defence can sit down and at the end of the day  
the  
8 Trial Chamber comes to a conclusion. Now, of course, at that  
9 stage the Trial Chamber will have to decide whether or not, in  
16:20:14 10 those circumstances of the Defence not doing anything active,  
11 whether the Prosecution has proved its case beyond reasonable  
12 doubt. If the Prosecution has, the Trial Chamber will  
13 undoubtedly convict, but there is nothing to stop the Defence  
to  
14 say: Look, I am not going to take anything -- I'm not going  
to  
16:20:30 15 show my hand. I'm not even going to call the accused person  
to  
16 give evidence.

17 MR STAKER: Exactly.

18 JUSTICE KING: I can either get up and say: I don't  
call  
19 witnesses, I close my case.

16:20:40 20 MR STAKER: Yes.



21 JUSTICE KING: Rely on the fact that they, in their  
22 opinion, think that the Prosecution has not proved its case  
and  
23 that the Trial Chamber will hold that they have not proved  
their  
24 case.

16:20:49 25 MR STAKER: Yes.

26 JUSTICE KING: The question is not whether they objected  
to  
27 anything that the Prosecution has done. The overall question  
is:  
28 Whether the Prosecution has proved its case beyond reasonable  
29 doubt.

I

1 MR STAKER: Yes. If I understand Your Honour correctly,  
2 agree 100 per cent. And if I could explain what I understand  
3 this to mean?

4 JUSTICE KING: Yes, very well. Okay.

Chamber

16:21:22 5 MR STAKER: To take the example I gave before: The  
6 Prosecution presents its evidence. The Defence says nothing.  
7 The accused is innocent unless the Trial Chamber finds guilt  
8 established beyond a reasonable doubt. But if the Trial  
9 finds guilt established beyond a reasonable doubt the Defence  
16:21:31 10 can't complain that they didn't bring any evidence to rebut  
the  
11 Prosecution evidence.

12 JUSTICE KING: Well, that is exactly the point.

your

13 JUSTICE AYoola: I happen to have, before you conclude  
14 submissions, maybe you would take my own observations into  
16:21:45 15 consideration. The position, as I understand it, is that the  
16 Defence have argued that you led evidence on matters not  
17 contained in the particulars of the indictment.

18 MR STAKER: This was the --

16:22:06 20

19 JUSTICE AYoola: And they argue further, that they are  
20 entitled to ignore those, that evidence, on non-pleaded  
21 particulars as not part of the case.

22                    Now, my understanding is that they took a risk. The  
risk  
23                    they took is the risk that probably you will, at one stage  
before  
24                    the conclusion of the case, apply to amend the indictment to  
16:22:33 25                    bring it in line with the evidence that you have led, but I  
don't  
26                    think the Prosecution did that in this case.  
27                    They took a risk. The evidence has been led in. So  
that  
28                    gives you an opportunity to amend your indictment to bring the  
29                    indictment in line with the evidence already led but the

1 Prosecution in this case did not do that.

2 MR STAKER: Well, I've made this --

3 JUSTICE AYoola: If the Prosecution, the prejudice that  
4 might be occasioned to the Defence is that if the Prosecution

had

16:23:10 5 amended then the Defence has certain rights consequent on the  
6 amendment. They have a right to -- maybe to have the case

to

7 reopened; maybe to ask that they be allowed to lead evidence

8 meet the new indictment but, in this case, nothing happened.

9 MR STAKER: Yes. I would say, first of all, if this

16:23:39 10 objection had been raised it would not have necessarily been

might

11 dealt with by amending the indictment. The Trial Chamber

12 have, for instance, given an order that the Prosecution was

particular

13 required to give full particulars to the Defence of a

14 matter that wasn't adequately pleaded.

16:23:56 15 indictment?

JUSTICE AYoola: Is it not particulars in the

but

16 MR STAKER: Normally, particulars are in the indictment

pleaded

17 as the case law says, anything that is not sufficiently

could

18 in the indictment may be cured by other ways. I am sure I

where

19 find precedents in fact, before the Special Court itself,

16:24:13 20 insufficient pleadings in the indictment were cured by the  
filing

21 of a bill of particulars or something else. It needn't

22 necessarily be by way of formal amendment to the indictment.

23 But I, given the limited time, I don't want to belabour

24 this point because we have made the submission many times and  
I

16:24:32 25 find myself making the same submission again that I have made

26 before. But, again, if I could just give the two examples,  
one

27 after the other, to illustrate my point.

28 One deals with proof beyond a reasonable doubt, one  
deals

29 with procedural error, which are two different things of  
course,

1 but we say the principle is the same.

2 Prosecution presents its case. Defence isn't required  
to  
3 say anything. It can be silent. The Chamber then decides.  
But

4 if the Chamber decides against the Defence, the Defence can't  
16:25:02 5 complain that they didn't present any evidence; it was their  
6 choice. We say --

7 JUSTICE KING: Well, that is my problem. That is the  
one  
8 that I want you to help me solve. I mean, if the Defence  
remains

9 quiet, even let us say for the purposes of argument they are  
16:25:17 10 aware that there is a defect in the indictment, and they  
decide

11 not to do anything about it, not to raise an objection. They  
say

12 to themselves: After all, it is for the Prosecution to prove  
13 their case, to see that the indictment is in order, and they  
want

14 to see what's going to happen at the end of the day, and they  
16:25:35 15 have done nothing, can you blame them for that -- then they  
say

16 they have waived their rights -- to my mind it never changes.  
17 The onus is on the Prosecution to prove their case and there  
is

18 nothing which obliges the Defendant to help the Prosecution  
prove

19 their case.

16:25:47 20 MR STAKER: No, but the Prosecution has proved its case.

21 The indictment alleges that the accused Kanu committed certain

22 crimes and the question is, at the end of the day: Has the

23 Prosecution proved beyond a reasonable doubt that Kanu  
committed

24 certain crimes? And the Trial --

16:26:04 25 JUSTICE AYoola: At this late hour, please refresh my

26 memory: What is the purpose of the indictment in a case?

27 MR STAKER: Yes. The indictment of course is to give  
the

28 Defence notice of the case against the accused to enable it to

29 prepare its defence.

1 JUSTICE AYoola: That's correct. So, if you say the  
2 Prosecution has proved its case is it any case other than the  
3 case presented in the indictment?

4 MR STAKER: Of course not, Your Honour, but our  
submission

16:26:30 5 is this was what was pled in the indictment. What the Trial  
6 Chamber found, that the accused Kanu had committed, was  
pleaded

7 in the indictment. What Kanu says is: Yes, but it didn't  
give  
8 enough particulars to give him notice. And we say the  
principle

9 is the same. If the Defence believes that it does not have  
16:26:50 10 sufficient particulars to enable it to defend the case, Rule  
72  
11 says it can bring a preliminary motion and get those  
particulars.

12 And if the Defence does not file a preliminary motion, if it  
does  
13 not object at trial, when the evidence is presented, if it  
does

14 not -- if it cross-examines the Prosecution witness on that  
16:27:09 15 evidence, if it brings its own evidence to rebut it and never  
16 makes a complaint, it cannot, afterwards, complain that there  
was  
17 a defect in the indictment. The right has been waived.

18 I do apologise, Your Honour. I just wanted to make the  
19 further point -- I've made the submission before but I make it



16:27:30 20 again. What the case law says is: If the accused did object  
at  
21 trial, and the Trial Chamber ruled against the Defence, of  
course  
22 it has a right to appeal and on appeal the Defence has to  
prove  
23 there was a defect in the -- or has to persuade the Appeals  
24 Chamber there was a defect in the indictment -- then the  
burden  
16:27:49 25 is on the Prosecution to show that there was no prejudice.  
26 If the Defence didn't raise the defect during the trial,  
if  
27 the Defence wants to successfully appeal, it must show first  
of  
28 all there was a defect in the indictment, and that the Defence  
29 did suffer actual prejudice and we submit that is what the  
case

1 law of the ICTY and ICTR says.

2 JUSTICE AYoola: I thought you submitted yesterday that  
3 insufficiency of particulars is not a defect. I thought that  
was  
4 your submission yesterday.

16:28:21 5 MR STAKER: In relation to locations. In relation to  
6 locations we -- I didn't say categorically that failure to  
7 specify locations is never a defect. If there was, for  
instance,  
8 a massacre somewhere, the Srebrenicza massacre in the former  
9 Yugoslavia, an accused was charged with that and said: You  
are

16:28:46 10 accused with committing this large-scale massacre on a farm  
11 somewhere. Now, the indictment may not be defective -- the  
12 indictment may be defective for failing to specify just  
exactly  
13 where that was. But in this case, as I explained, what the  
14 indictment alleged was that there was a widespread and  
systematic

16:29:11 15 attack against the civilian population. The AFRC forces were  
on  
16 the move. They were mobile, heading through an entire  
district  
17 attacking villages here and there on the way and it is simply  
not  
18 practicable to plead every single location that may come out  
in  
19 evidence of where atrocities are committed.

16:29:28 20 In those circumstances, we say it is not a defect in the  
21 indictment to allege the widespread and systematic campaign  
and  
22 to say that many villages were attacked, including the  
following,  
23 and then to give a non-exhaustive list, we say that isn't  
24 defective but still the Defence can complain about evidence of  
16:29:46 25 particular locations if they consider they have not had  
26 sufficient notice.

27 JUDGE FERNANDO: Now, if you had the particular  
locations  
28 before proceeding to trial, was it impracticable for the  
29 Prosecution to have pleaded those locations in the indictment?

1 MR STAKER: I am not sure I entirely understand the  
2 question, Your Honour.

16:30:13  
for

3 JUDGE FERNANDO: No. But you say that you had that  
4 evidence. If you had the evidence of those particular crimes,  
5 committed in those particular locations, was it impractical  
6 the Prosecution to have pleaded those locations specifically  
7 the indictment?

in

to

I

witnesses,

know

8 MR STAKER: Yes. Well, the reality, Your Honour, I have  
9 confess is, I wasn't here at the Special Court at the time --  
10 would have to take instructions from others on just precisely  
11 what the situation was. My understanding is you can have a  
12 situation where, first of all, some witnesses, victim  
13 or perhaps perpetrator witnesses, someone who was part of the  
14 AFRC forces as it travelled through the countryside may, for  
15 instance, in a statement, give evidence about an attack on a  
16 village, where the witness might not even know the name of the  
17 village because they were part of a force passing through the  
18 country, and if it's an area they don't know they might not  
19 which village it was.

16:31:20 20

It may also be the case that the Prosecution has not

21 finalised its witness list by that stage. It may not know  
22 exactly which witnesses are being called.

23 I can't go as far as to say that it would have been  
24 impossible to have included several additional names. But, I  
16:31:46 25 could go as far as saying it would be impracticable to have  
put  
26 in the indictment the name of every single location on which  
27 evidence was going to be given, and if the Chamber needs more  
28 precise information than that, I would have to take further  
29 instructions.

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1 JUSTICE KING: Right, Dr Staker. In any case, I  
understand  
2 your view on the matter and your position. You were not here  
at  
3 the inception. You did not, in fact, draft the indictment.  
But,  
4 that aside, for the time that you have been here, in this very  
16:32:14 5 trial, at some stage of the proceedings the Defence decided,  
as a  
6 matter of their own strategy and tactics, that they were going  
to  
7 stay put, as it were, on tactical grounds, and it happened,  
from  
8 what I have seen of the record, that at some stage one or  
other  
9 of the Judges did point out, or was of the opinion that there  
was  
16:32:37 10 a defect in the indictment.

11 Nothing happened and at the end of the day Defence  
counsel,  
12 in my own opinion, within their powers, raised the point that,  
in  
13 fact, even though it had been pointed out that there was an  
14 alleged defect in the indictment, nothing had been done about  
it.

15 And, therefore, the Court ought not to find their clients  
16:32:58 15 guilty  
16 on that particular count. Do you say that the Defence had  
waived

the 17 its right to mention or to submit -- make that submission at  
18 end of the day?

19 MR STAKER: Whenever a Defence makes a defect, makes a  
16:33:19 20 submission as to a defect, later than the pre-trial stage or  
21 later than the deadline for filing of preliminary motions, our  
22 submission is the Defence will always have to show good cause  
why 23 they didn't raise it earlier. Now, it may be that I haven't  
24 persuaded the Chamber and, if not, there may be little point  
16:33:39 25 belabouring the issue.

26 Our submission is simply this: That there is an  
obligation 27 on the parties to raise problems in a timely manner. It's  
true, 28 the Defence is innocent until proven guilty. The Defence  
doesn't 29 have to do anything to prove their innocence. They can remain

it  
the  
1 silent. But if there is a problem, either party has to raise  
2 in a timely manner so that it can be rectified and will not --  
3 you know, if left uncorrected -- be a basis for undermining  
4 entire trial once we get to the end of trial.

16:34:14 5 That is our basic submission: That if a party has a  
6 problem, you raise it, enable it to be dealt with, or you have  
7 to accept that the time has passed for that.

8 Now, we say there is a safety valve for that submission  
9 because, even if the Defence never raised the defect at trial,  
10 16:34:33 they can still exceptionally, notwithstanding the waiver rule,  
11 raise it on appeal if they can show actual prejudice occurred  
12 to the Defence. But we say if they didn't raise it at trial they  
13 cannot save it up, bring it out for the first time at final  
14 trial

14 then

16:35:00 15 allege that the burden is on the Prosecution to prove that  
16 they weren't prejudiced by this. We say the burden is on them and  
17 they haven't discharged that.

18 JUSTICE KING: Well, that is my difficulty. I mean, I  
19 agree with all that you have said but this one -- you say that

a



16:35:12 20 party, just sitting down doing nothing, at the end of the day  
21 they cannot say: Well, look, the indictment is defective in  
this  
22 regard and in this particular instance they could very well  
also  
23 say that this had been pointed out and nothing was done, and  
you  
24 say they've waived their right?

16:35:30 25 MR STAKER: Well, I would take issue with the suggestion  
26 that this was ever pointed out. The defect, the Defence,  
27 particularly on this point, never filed a motion challenging  
the  
28 defect.

29 JUSTICE KING: No, I am not saying they did. I am  
merely

one 1 saying that at some stage, I think it was under the 98 stage,  
2 of the Judges pointed out something about a defect.

3 MR STAKER: Judge Sebutinde --

4 JUSTICE KING: Yes.

16:35:52 5 MR STAKER: -- pointed out what she considered were two  
6 defects in the indictment.

7 JUSTICE KING: Yes.

and 8 MR STAKER: One was a duplicitous pleading in one count  
9 one was -- I apologise, Your Honour, it's late in the day --  
but

16:36:33 10 in any event this wasn't one of the defects that was  
suggested.

complaints 11 Our submission would be that if the Defence never  
12 about a defect in an indictment, if the Trial Chamber hasn't  
13 suggested there is a defect, this was one opinion of one Judge  
in 14 a partially dissenting opinion. It did not mean that the  
16:36:33 15 majority of the Trial Chamber agreed and --

16 JUSTICE KING: No, I am not saying they agreed. That,  
17 again, I have to take you up on that. I know that it, as you  
put 18 it, you might say it was a partially dissenting opinion.

19 Dissenting opinion or otherwise, the fact is that one Judge at  
16:36:45 20 least gave the Prosecutor notice that in her own opinion she

21 thought that the indictment was defective and still why she  
22 thought so.

23 MR STAKER: Yes.

24 JUSTICE KING: That gave an opportunity to the  
Prosecution,

16:37:01 25 if they so desired, to do something about it. If the  
Prosecution

26 did not do anything about it, are you going to say that the  
27 Defence have waived their rights? That is my point.

28 MR STAKER: No. They --

29 JUSTICE KING: Well, it's majority or minority to my  
mind

1 is completely and utterly irrelevant. Did the Prosecution  
have  
2 notice that one or other of the Judges was saying that there  
was  
3 a defect in the indictment? At the end of the day, the  
Defence,  
4 as any reasonable defence would, seized on that and  
capitalised  
16:37:35 5 on that. How can you say that they have waived their right?

6 MR STAKER: Again, Your Honour, if I have not persuaded  
7 Your Honour I won't do it by keep repeating the same thing.  
Our  
8 submission basically is that a defect in an indictment is  
9 something that can be waived. It's not something that is a  
16:37:54 10 categorical technical -- it is not like jurisdiction.

11 If someone was charged before this Court of committing a  
12 crime in Paris, this Court doesn't have jurisdiction. And  
even  
13 if at the final trial stage it was raised that this Court  
simply  
14 has no jurisdiction, that's it. But a defect in an  
indictment,

16:38:14 15 this is the giving of inadequate notice to the Defence, it's  
for  
16 the Defence to complain and say: We have been given  
inadequate  
17 notice. And if the Defence doesn't complain, the right is  
waived

cause 18 to raise it at a later stage unless the Defence shows good  
there 19 and actual prejudice for not having raised it earlier. And  
16:38:35 20 is that safety valve.  
still 21 If the Defence can show genuine prejudice, there may  
and 22 be a remedy, but the Defence can't save up a technical point  
perhaps 23 say: Defectively pleaded. We can't be convicted. And  
24 if I leave it at that.  
16:38:48 25 JUSTICE KING: No, just one more question before you  
leave 26 it -- that. Can you point to where anywhere in the Rules  
where 27 the Defence are obliged to show that they have suffered  
28 prejudice, in the Rules of the Special Court.  
29 MR STAKER: I don't know about the wording of the Rules.

1 Certainly in the case law that we have cited --

2 JUSTICE KING: No, no, I am saying about the Rules.

3 MR STAKER: No. The waiver rule, I believe, is something

4 that is acknowledged in the case law but not firmly provided for

5 in the Rules. We would say it follows as a matter of logic, why

6 would we have a Rule 72 giving a deadline for filing of

7 preliminary motions alleging defects in the form of the

8 indictment if they could be raised at any time? There would be

9 no purpose in Rule 72 if you could raise defects in the

10 indictment for the first time in final trial argument --

11 JUSTICE KING: No, I was talking about prejudice, not now

12 that -- we have passed that one now.

13 MR STAKER: No. Well --

14 JUSTICE KING: I am talking about where in the Rules do you

15 find it said that where they have not raised it then they must  
16 show that they have suffered prejudice before they can raise  
it?

17 Where in the Rules do you find it? If it's not there it's not  
18 there.

19 MR STAKER: Again, it's in the case law, rather than the  
16:39:53 20 text.

am 21 JUSTICE KING: No, I am not asking about the case law, I  
question. 22 asking about the Rules; is it in the Rules? That is my  
23 MR STAKER: We would say by implication.  
24 JUSTICE KING: Oh, by implication. Thank you very much.  
16:40:02 25 That is all right. By implication.  
26 MR STAKER: If I can explain the implication.  
27 JUSTICE KING: Very well.  
28 MR STAKER: If the Rules impose a time limit for doing  
same 29 something, that would be meaningless if a party could do the

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1 thing at any other time when it wanted. If a time limit is  
2 imposed, it follows that if you don't do it by that time limit  
3 you have waived your right to do it, certainly unless you can  
4 show good cause why you couldn't have done it within the time  
16:40:21 5 limit, and that you've suffered some prejudice and you  
couldn't  
6 have done it within the time limit, so you are entitled to a  
7 remedy. If you don't do it within the time limit it follows  
as a  
8 matter of structure and logic you have the burden of showing  
why  
9 you should be able to do it now.

16:40:34 10 JUSTICE KING: Very well.

11 MR STAKER: Your Honour, I am aware of the time. I am  
12 deeply aware of the time. I do have some other points that I  
do  
13 simply have to make.

14 One of them concerns the, I think, witness of fortune  
was  
16:40:48 15 an expression used by the Defence, the allegation that because  
they  
16 certain payments were made to witnesses this must mean that  
17 are lying. Now, I mean, we have dealt with this submission.  
It  
18 came out in argument with Defence counsel this morning, that  
the  
19 mere fact that somebody -- that payments or disbursements are



16:41:07 20 made to witnesses doesn't mean that they are necessarily --

21 JUSTICE KING: I don't think you need to deal with that  
22 point [microphone not activated].

23 MR STAKER: The point then made.

24 JUSTICE KING: Yes.

16:41:16 25 MR STAKER: What I merely wanted to point out, Your  
Honour,

26 is that under the Rules, there are two Rules I would refer to.

27 One is Rule 34, which, particularly Rule 34(A), Rule 34(A)

28 obviously deals with payments or services provided to  
witnesses

29 on behalf of VWS. The other is Rule 39, which deals with the

1 responsibility of the Prosecutor, during the investigations  
2 phase, and indicates that the Prosecution, the Office of the  
3 Prosecutor can also take necessary measures during the  
4 investigations phase. This is before a witness may be within  
the  
16:42:23 5 care of the victims and witnesses unit because they haven't  
6 formally been given the status of witness yet; it's still at  
the  
7 stage of investigation.

8 Now, Defence counsel spoke about evidence that were  
given  
9 by some Defence witnesses at the trial relating to special  
16:42:41 10 treatment that certain persons supposedly had while they were  
in  
11 Pademba Road prison. Our submission is that this was evidence  
12 that was before the Trial Chamber and was fully considered by  
the  
13 Trial Chamber and was taken into account.

14 JUSTICE KING: Just let me have the Rules again that you  
16:43:02 15 referred to.

16 MR STAKER: Rule 34.

17 JUSTICE KING: 34.

18 MR STAKER: Rule 34 and Rule 39.

19 JUSTICE KING: Of the Rules of Procedure?

16:43:17 20 MR STAKER: Of the Rules of Procedure and Evidence.

please.

21 JUSTICE KING: Could you read the relevant portion,

a

22 MR STAKER: Well, it says: "The Registrar shall set up

23 witnesses and victims section."

24 It sets out the functions which includes: Provided them

16:43:41 25  
and

with adequate protective measures and security arrangements

26 develop long and short-term plans for their protection and

counselling

27 support. Ensure that they receive relevant support

28 and other appropriate assistance including medical assistance,

29 physical and psychological rehabilitation, especially in cases

1 rape, sexual assault and crimes against children.

2 That indicates, of course, that disbursements will be  
made

3 for the benefit of witnesses by witnesses and victims section  
and

4 the Trial Chamber mentioned this practice direction.

16:44:15 5 We refer to Rule 39, which indicates that the  
Prosecution

6 has a similar function in the investigations phase. And, as I  
7 was saying, the role of witnesses and victims section only  
begins

8 once a victim has been formally given the status of a witness  
9 that earlier, when things are at the phase of investigations,  
WVS

16:44:47 10 won't be involved, and the responsibility will be discharged  
by  
11 the Prosecution.

12 It is perhaps a bureaucratic thing but responsibility  
13 shifts at a certain point. As I say, the evidence that was  
given

14 by these Defence witnesses of what may have been happened at  
16:45:07 15 Pademba Road gaol was before the Trial Chamber. It was  
16 considered by them; it was taken into account.

17 As to disbursements made by the witnesses and victims  
18 section, and the OTP, these were also disclosed to the Defence  
19 during the trial; both disbursements by victims and witnesses

16:45:30 20 section and by the Office of the Prosecution. Although it may  
be  
21 that the disbursements from OTP only commenced from the date  
of a  
22 witness formally being identified as such. But, in any event,  
23 the Defence had records of both and, in fact, we will see in  
the  
24 trial judgment, at footnote 194, there is a reference to  
Defence  
16:46:04 25 Exhibit D6.  
26 Defence Exhibit D6 was, in fact, a disbursement record  
27 provided by the Office of the Prosecutor and not by VWS. As I  
28 say, the disbursement records from both VWS and OTP, which  
29 overlap in time because disbursements by OTP can continue

1 throughout the proceedings. The Defence knew about them.  
They  
2 were able to bring all relevant evidence of this before the  
Trial  
3 Chamber. It was able to make whatever case it wanted in  
respect  
4 of these, and, whatever case it made, the Trial Chamber  
16:46:48 5 considered it and came to the conclusion it did.  
6 I would simply also add that by a letter of 13 July  
2007,  
7 which was while this case was still -- while the Trial Chamber  
8 was still seized of this case because it was before the  
9 sentencing judgment was given, the Prosecution made disclosure  
to  
16:47:12 10 the Defence. We understand our disclosure obligations  
continue  
11 even after the trial judgment throughout the appellate phase  
and  
12 disclosure -- searches and disclosures have continued.  
13 We made a further full disclosure of witness  
disbursements  
14 by the Office of the Prosecutor to the Defence, also in  
updated  
16:47:37 15 form, indicating later payments than the ones that had been  
made  
16 at the time of the original disclosure being made, and a copy  
of  
17 the covering letter for that disclosure was sent to the legal  
18 officer of Trial Chamber I.

19                   What the letter did point out was that the final trial  
16:47:58 20       brief of the Prosecution, at the trial, had indicated that the  
21       only payments made to witnesses were by witnesses and victims  
22       unit. Of course, as the Defence had always known,  
disbursements  
23       were also made by the Prosecution, but that information was  
sent  
24       to the Trial Chamber. That information was always known to  
the  
16:48:20 25       Defence throughout the trial.

26                   As I say, it was open to the Defence to make anything of  
27       that that the Defence wanted to, and anything the Defence did  
28       make of that was properly considered by the Trial Chamber in  
29       giving its decision, and we submit, in accordance with normal

1 standards, the burden is on the Defence on appeal.

2 Now, Your Honour, very conscious of the time, unless I  
can  
3 be of further assistance, could I ask you to call on Mr Obe-  
Osuji  
4 for a very brief submission on two other very small points.

16:48:58 5 JUSTICE KING: Very well. Thank you very much, Dr  
Staker.  
6 Mr Obe-Osuji.

7 MR EBOE-OSUJI: Thank you very much, Your Honours. I  
will  
8 begin with the most recent submissions of today, the one that  
I'm  
9 going to talk about. I begin with Kanu's submissions  
16:49:28 10 specifically on the matter of accomplice evidence.

11 Your Honour, in the course of his submissions, the  
matter  
12 arose as to the import of paragraph 125 of the judgment. If  
you  
13 recall, Your Honours, paragraph 125 -- in paragraph 125 the  
Trial  
14 Chamber said -- I will take it from the middle because that is

16:50:08 15 the contentious comment by the Trial Chamber. In the middle  
of  
16 the paragraph: "Moreover, none of these Prosecution witnesses  
17 have been charged with any crimes and their evidence cannot,  
18 therefore, be described as 'accomplice evidence'."

19 The question arose as to whether this was a misdirection



16:50:30 20 and what is the effect of it. I'm prepared to concede, for  
21 purposes of this appeal, that it is a misdirection. President  
22 King had asked whether someone needed to be charged first for  
23 them to be considered accomplice evidence. But, the question  
24 then becomes: What is the effect of it? We say that the  
effect

16:51:26 25 of it does not invalidate the decision in terms of applicable  
26 standards of appellate review, as a question of law.

27 Nor does it amount to a miscarriage of justice, and the  
28 reason I say that, Your Honours, is because a full  
appreciation  
29 of the entire paragraph reveals that this comment is, at most,

1 pure surplusage and not the crux of the Trial Chamber's  
reasoning 2 on that matter. The full paragraph says:  
3 "A witness with a self-interest to serve may seek to  
4 inculcate others and exculpate himself, but it does not  
16:52:01 5 follow that such a witness is incapable of telling the  
6 truth. Hence, the mere suggestion that a witness might  
be 7 implicated in the commission of crimes is insufficient  
for 8 the Trial Chamber to discard the witness's testimony."  
9 That, Your Honours, is the main point and that main  
point 10 is amply grounded in the authority.  
11 One of those authorities would be the case of The  
12 Prosecutor v Niyitegeka. Niyitegeka is spelt  
13 N-I-Y-I-T-E-G-E-K-A. If I may hand up to the Court and to my  
14 learned friends excerpts of paragraph 98 in this Appeals  
Chamber 15 judgment from the ICTR.  
16:52:58 16 Your Honours, paragraph 98, if I may read? If I may  
read 17 paragraph 98, paragraph 98 is directly on the point. It says:  
18 "The ordinary meaning of the term 'accomplice' is 'an  
19 associate in guilt, partner in crime'..." "Nothing in  
the 20 Statute or the Rules of the Tribunal prohibits a Trial

21 Chamber from relying upon testimony of those who were  
22 partners in crime of persons being tried before it. As  
23 stated above, a Chamber may admit any relevant evidence  
24 which it deems to have probative value."... "Accomplice  
16:54:32 25 testimony is not per se unreliable, especially where an  
26 accomplice may be thoroughly cross-examined."...  
"However,  
27 considering that accomplice witnesses may have motives  
or  
28 incentives to implicate the accused person before the  
29 Tribunal, a Chamber, when weighing the probative value  
of

1           such evidence, is bound to carefully consider the  
totality       2           of the circumstances in which it was tendered."... "In  
the           3           view of the Appeals Chamber, reliance upon evidence of  
4           accomplice witnesses per se does not constitute a legal  
16:55:03 5           error."  
6           Your Honours, the Appeals Chamber of the ICTR has put it  
in           7           a way we urge you to view as persuasive, and that is what the  
8           Trial Chamber has said in the opening part of paragraph 125  
9           saying: The mere fact that someone is an accomplice does not  
16:55:28 10          automatically disable that testimony from being considered by  
the           11          Trial Chamber. It is a totality of the whole evidence that  
12          Trial Chamber must look at.  
13           JUSTICE KING: Yes. The first sentence of paragraph 98,  
14          that gives me a little bit of concern because, here we are, we  
16:55:49 15          are talking about a legal term, and I would have expected some  
16          legal definition of "accomplice" but what they have given  
there         17          is an Oxford English Dictionary meaning of "accomplice." If  
look         18          at the footnote 133 there, it says it comes from the Oxford  
19          English Dictionary. I don't find that helpful, as far as I am  
16:56:10 20          concerned. I need a legal definition, not the meaning of the

21 English language in this kind of technical word "accomplice."  
22 MR EBOE-OSUJI: Very well, Your Honours. As I said,  
this  
23 is just referred to you for you to consider if you find it  
24 inspirational. Of course, Your Honours, you are very  
experienced  
16:56:28 25 lawyers in your own rights and you also know the meanings of  
26 these things but, as you know, a lot of legal terminology have  
27 their roots in the ordinary English language, or language of  
28 whatever legal system in which those terms are used, so it is  
not  
29 unusual to have definitions of -- taken from dictionaries to  
be

1 received within the body of law in any jurisdiction.

2 JUSTICE KING: You see, the point here is, as you have  
3 rightly conceded, there was a misdirection as far as the Trial  
4 Chamber is concerned about the definition of an accomplice.

16:57:09 5  
an

5 Now, what you have given me is not a legal definition of

6 believe,

6 accomplice, it's what is stated in the Second Edition, I

7 of the English Oxford Dictionary, in this appellate chamber.

8 What is your own legal definition of "accomplice"?

9  
16:57:34 10  
11  
12  
crime.

9 MR EBOE-OSUJI: Your Honour, the legal definition of  
10 "accomplice" as I understand it is, in ordinary language, a  
11 partner in a crime. Someone with whom -- an associate in a  
12 criminal enterprise who assisted somebody in committing a

13 like

13 JUSTICE KING: That is something like it. Something

14 a

14 it. Something like it. That is what I would have expected in

16:57:52 15  
16  
in

15 decision which you cite as a persuasive decision but to quote  
16 from the Oxford English Dictionary, I don't find that helpful

17 the particular and peculiar circumstances of this matter.

18  
19  
16:58:08 20  
own.

18 MR EBOE-OSUJI: We have thought that -- thank you very  
19 much, Sir. I thought that the words of your colleagues in the  
20 Appeals Chamber of the ICTR may be more persuasive than my

21 So that is why I cited that.

is 22 JUSTICE KING: No, no, no, no. I mean, definitely that  
23 why it has been pointed out even in our Statute, and in our  
24 Rules --

16:58:15 25 MR EBOE-OSUJI: Very well.

I 26 JUSTICE KING: -- that they are only a guide. Where we  
27 disagree we can say categorically, and in this one I don't --  
28 find it not particularly helpful, the definition, that they  
have 29 given in that paragraph of an accomplice, in the first  
sentence.

1 It says that the ordinary meaning of the term "accomplice" is  
an  
2 associate and guild partner in crime. You have done much  
better  
3 than that. And when I look at the footnote it says -- I was  
4 shocked to see that it says -- what is it -- Oxford English  
16:58:45 5 Dictionary Second Edition, and you want me to give my decision  
on  
6 that?

7 MR EBOE-OSUJI: Thank you, Sir. If I may --

8 JUSTICE AYoola: Need you belabour the point?

9 JUSTICE KING: Yes.

16:58:55 10 JUSTICE AYoola: Because you are citing -- you are not -  
-  
11 you are bringing the decision to our notice. Probably, they  
have  
12 adopted the ordinary meaning as defining the legal meaning as  
13 well.

14 MR EBOE-OSUJI: Thank you, Sir.

16:59:10 15 JUSTICE AYoola: But I agree with the President's point  
of  
16 view, but need we belabour the point.

17 MR EBOE-OSUJI: I will not. The point I need to make is  
18 whatever definition one gives to the term "accomplice," the  
pith  
19 and substance of the matter is: What do you do with such an



16:59:34 20 evidence? Do you just reject it because this person has been  
21 described as an accomplice, however you define that, and the -  
- I  
22 believe the reasoning of the Trial Chamber, done in the Court  
23 below you, was quite right, that the mere fact that someone is  
24 termed an accomplice does not automatically disable or render  
16:59:58 25 useless the evidence of such a witness. That is all I need to  
26 say to you on that point, Your Honour.  
27 And, on the other point upon which I wish to address  
you,  
28 was one made by my learned friend for Mr Kamara, when he spoke  
29 yesterday. He argued on the subject of command  
responsibility.

RUF  
overall  
in  
17:01:08

1 He tried to argue that, in Kono, there was evidence that the  
2 had overall command in that region, and because they had  
3 command in that area, that somehow would have negated the  
4 effective control of, or command, effective control of Kamara  
5 the region, for purposes of command responsibility. I believe  
6 that urge was made on you yesterday.

tribunals  
17:01:42  
command

7 Our response, to that, Your Honour, is that it is amply  
8 grounded in the jurisprudence of international criminal  
9 that the fact that you may have somebody else who may exercise  
10 control, or command over a particular subordinate, does not  
11 negate the liability of another commander, who also has  
12 over that subordinate.

17:02:06  
the  
we  
so  
committed a

13 So that's where we end up. And the Trial Chamber in the  
14 Court below, Your Honour, in the Chamber below, did recognise  
15 that jurisprudence in their reasoning. They cited cases like  
16 case of Aleksovski; they cited cases like Oric, Oric, O-R-I-C;  
17 may also add to that cases like Blaskic, Struger and so on and  
18 forth which make that point that you may have a number of  
19 superiors exercising authority over a subordinate who

17:02:41 20 crime and each of those, any or all of those superiors may be  
21 held to have criminal responsibility arising from the conduct  
of  
22 the subordinate. And that is a very old notion, Your Honour.  
23 That notion goes back to the Tokyo judgment, which we've cited  
in  
24 our response brief.

17:03:04 25 We have dealt with this area from paragraph 5.38 of our  
26 response brief and paragraphs following but, in the Tokyo  
27 judgment, Your Honours, if I may again once more trouble the  
28 Court officer with the authority of the Tokyo judgment.

29 This is a judgment of the International Military  
Tribunal

would

1 for The Far East, rendered in 1948. Your Honours, if you  
2 go to page 48,443, towards the end of that page you will see a  
3 discussion. This discussion was made in the context of  
4 responsibility for the abuse of prisoners of war. And in this  
5 passage, the tribunal says, and I quote:

17:04:44

Japan

6 "In general, the responsibility for prisoners held by  
7 may be stated to rest upon:  
8 "1. Members of the government.  
9 "2. Military or naval officers in command of formations  
10 having prisoners in their possession.  
11 "3. Officials in those departments which were concerned  
12 with the well-being of prisoners.  
13 "4. Officials, whether civilian, military or naval  
14 direct and immediate control of prisoners."

17:05:06

having

17:05:26  
held

15 Again, we have a list of different people who may be  
16 criminally responsible for the abuse of prisoners. The same  
17 notion is what is reflected in the litany of authorities, or  
18 the heavyweight of authorities upon which the Trial Chamber  
19 relied in saying the fact that the RUF may have overall

control

17:05:49

20 did not negate the possibility of, or the evidence in the case

21 which showed that Kamara did have control over the man called  
22 Savage, and was therefore liable for the crimes committed by  
23 Savage in the area.

24 Your Honours, that will be what I had happily meant to  
say

17:06:25 25 to you. I say "happily" because I didn't have to deal with  
the

26 subject of duplicity today. Unless, of course, Your Honours  
want

27 me to. I will leave it at that. Thank you.

28 JUSTICE KING: Well, I think that is an interesting note  
to

29 end your submissions on. Yes, Dr Staker.

1 MR STAKER: Well, Your Honour, I think we have even more  
2 cause for gratitude than Mr Manly-Spain this morning. We have  
3 certainly been given some latitude.

Fernando

17:06:44 5  
instructions.

4 I just wanted to clarify: There was a point Judge

to

6 If necessary, I just wanted to clarify if we could have leave

If

7 file something in writing subsequently to clarify that point.

8 we were going to, it would require, well, making appropriate  
9 inquiries of those who are here at the time.

17:07:24 10  
is

11 JUSTICE KING: No, I think you've ably assisted us. The  
12 consensus is that you all have assisted us very ably and there  
13 no need to file anything after today.

Staker,

very

17:07:46 15  
And I

13 I want to take this opportunity of thanking you, Dr

14 and your team, for your cooperation, your guidance and the

15 decent way in which you have conducted your appeals and, with  
16 regard to the Defence, as I have said earlier on, your task is  
17 not an easy one but you've acquitted yourselves very well.

18 want to take this opportunity on behalf of my colleagues to

19 commend you for your efforts in the circumstances in which you

17:08:04 20 find yourselves.

all 21 So, once again, let me thank you very very much indeed,

22 of you, for your great assistance you have given to us. The

matters 23 [indiscernible] all round has helped us even to look at

24 that we had not, in fact, looked at in detail before, and the

17:08:23 25 industry and research that each and every one of you has

engaged 26 in is a matter for admiration. So thank you all very much.

ask 27 At this stage, we are going to pack our books before I

28 the usher to adjourn the Court; and it will be adjourned sine

29 die.

p.m.

1 [Whereupon the hearing adjourned at 5.08

2 sine die]

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