SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando
Justice Jon M. Kamanda

Registrar: Herman von Hebel

Date: 22 February 2008

PROSECUTOR **Against** **ALEX TAMBA BRIMA**
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU
(Case No. SCSL-2004-16-A)

JUDGMENT

Office of the Prosecutor:
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Ms. Anne Althaus

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The **APPEALS CHAMBER** of the Special Court for Sierra Leone ("Appeals Chamber"), comprised of Hon. Justice George Gelaga King, Presiding, Hon. Justice Emmanuel Ayoola, Hon. Justice Renate Winter, Hon. Justice A. Raja N. Fernando, and Hon. Justice Jon Moadeh Kamanda,

SEISED of appeals from the Judgment rendered by Trial Chamber II ("Trial Chamber") on 20 June 2007, in the case of *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-04-16-T ("AFRC Trial Judgment" or "Trial Judgment");[1]

HAVING CONSIDERED the written and oral submissions of both Parties and the Record on Appeal;

HEREBY RENDERS its Judgment.

I. INTRODUCTION

A. The Special Court for Sierra Leone

1. In 2000, following a request from the Government of Sierra Leone, the United Nations Security Council authorised the United Nations Secretary-General to negotiate an agreement with the Government of Sierra Leone to establish a Special Court to prosecute persons responsible for the commission of crimes against humanity, war crimes, other serious violations of international humanitarian law, and violations of Sierra Leonean law during the armed conflict in Sierra Leone.[2]

2. As a result, the Special Court for Sierra Leone ("Special Court") was established in 2002 by an agreement between the United Nations and the Government of Sierra Leone ("Special Court Agreement").[3] The Special Court's mandate is to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[4]

[1] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-T, Special Court for Sierra Leone, Judgment, Trial Chamber II, 20 June 2007 [AFRC Trial Judgment].
[2] SC Res. 1315, UN SCOR, 4186th Mtg., UN Doc. S/RES/1315, 14 August 2000, paras 1-2.
[3] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone, 16 January 2002, 2178 U.N.T.S. 138 [Special Court Agreement]. The Agreement entered into force on 12 April 2002.
[4] *See* Special Court Agreement, Art. 1; Statute of the Special Court for Sierra Leone, annexed to the *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, United Nations and Sierra Leone, 16 January 2002, 2178 U.N.T.S. 138 [Statute or Special Court Statute], Art. 1.1.

3. In particular, the Statute of the Special Court ("Statute") empowers the Special Court to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, other serious violations of international humanitarian law and specified crimes under Sierra Leonean law.[5]

B. The Armed Conflict in Sierra Leone

4. The armed conflict in Sierra Leone started in March 1991 with an attack initiated in Kailahun District by an organised armed opposition group known as the Revolutionary United Front ("RUF")[6] under the leadership of Foday Sankoh, a former soldier of the Sierra Leone Army ("SLA"). The RUF's aim was to overthrow the Government of Sierra Leone.[7] By the end of 1991, the RUF held consolidated positions in a number of Districts within Sierra Leone and in the years that followed it took control of more Districts.[8] By early 1995, the RUF was in control of large parts of Sierra Leone and had established a stronghold in the north of the Country.[9] The RUF's success triggered the emergence of local pro-Government militias. These militias primarily consisted of traditional hunters and were known as the Civil Defence Forces ("CDF").[10] In the period following March 1995, the SLA was able to dislodge the RUF from most of its positions.[11]

5. In March 1996, elections were held in Sierra Leone and Ahmad Tejan Kabbah, the head of the Sierra Leone People's Party, was pronounced the winner.[12] About the same time, the Government's support of the CDF resulted in the development of tension between the SLA and the Government.[13] As a consequence, in September 1996, a retired SLA officer, Johnny Paul Koroma, attempted to seize power from the elected Government of President Ahmad Tejan Kabbah in a *coup d'état*.[14] This attempt failed and Johnny Paul Koroma was imprisoned.[15]

[5] Special Court Statute, Arts 2-5.
[6] AFRC Trial Judgment, paras 156-157.
[7] *Ibid* at para. 156.
[8] *Ibid* at paras 157, 159.
[9] *Ibid* at para. 160.
[10] *Ibid* at para. 159.
[11] *Ibid* at para. 160.
[12] *Ibid* at para. 161.
[13] *Ibid* at para. 161.
[14] *Ibid* at para. 161.
[15] *Ibid* at para. 161.

6. In the months that followed, negotiations between the Government and the RUF resulted in the Abidjan Peace Agreement, signed on 30 November 1996, which called for the cessation of hostilities on both sides.[16] In return for peace with the RUF, the Government agreed to grant amnesty to RUF members for crimes committed before the signing of the Peace Agreement.[17] The Parties further committed themselves to the disarmament, demobilisation and reintegration of RUF combatants.[18] In early 1997, the peace process broke down when hostilities erupted between the SLA/CDF and the RUF.[19]

7. On 25 May 1997, members of the SLA seized power from the elected Government of President Kabbah in a *coup d'état*, planned and executed by 17 junior rank soldiers. Johnny Paul Koroma was released from prison by the *coup* plotters and appointed Chairman of a new government, which was called the Armed Forces Revolutionary Council ("AFRC").[20] The AFRC suspended the 1991 Constitution of Sierra Leone, dissolved the elected Government and banned political parties.[21] Koroma then invited the RUF to join the AFRC in government.[22]

8. The AFRC was not immediately able to exercise control over the entire territory of Sierra Leone.[23] As a result, the armed forces of the AFRC, comprising both AFRC soldiers and RUF fighters undertook military operations to gain control over Bo and Kenema Districts which were controlled by the CDF.[24] This resulted in Bo Town being captured from the CDF in June 1997.[25] From that date, the AFRC controlled most parts of Freetown and other parts of the Western Area, as well as the Districts of Bo, Kenema, Kono, Bombali and Kailahun.[26] The AFRC however, remained under constant threat from the CDF and the forces of the Economic Community of West African States Monitoring Group ("ECOMOG") which were in control of the International Airport at Lungi in Port Loko District.[27]

9. On 23 October 1997, political, military and economic pressure on the AFRC forced it to accept the Six-Month Peace Plan known as the Conakry Accord brokered by the Economic

[16] *Ibid* at para. 162.
[17] *Ibid* at para. 162.
[18] *Ibid* at para. 162.
[19] *Ibid* at para. 163.
[20] *Ibid* at para. 164.
[21] *Ibid* at para. 165.
[22] *Ibid* at para. 164.
[23] *Ibid* at para. 166.
[24] *Ibid* at para. 166.
[25] *Ibid* at para. 166
[26] *Ibid* at para. 167.

Community of West African States ("ECOWAS").[28] The Conakry Accord called for the immediate cessation of hostilities throughout Sierra Leone and the restoration of constitutional government by 22 May 1998.[29] However, soon after the Accord was signed, hostilities resumed and AFRC forces were dislodged from their positions.[30]

10. The Government of ousted President Kabbah was reinstated in March 1998.[31]

11. After the fall of the AFRC, widespread atrocities continued to be committed throughout Sierra Leone.[32] In January 1999, President Kabbah was under pressure to enter into a peace agreement with the warring factions.[33]

12. On 7 July 1999, the Government of President Kabbah and the RUF signed a peace agreement known as the Lomé Accord, which resulted in a power sharing arrangement between them.[34] Hostilities ceased in January 2002.[35]

C. The Trial Proceedings

1. The Indictment

13. The original Indictments against Alex Tamba Brima ("Brima"), Brima Bazzy Kamara ("Kamara") and Santigie Borbor Kanu ("Kanu") were approved on 7 March 2003,[36] 28 May 2003,[37] and 16 September 2003,[38] respectively. These Indictments were later consolidated, amended and further amended.[39]

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[27] *Ibid* at paras 167-168.
[28] *Ibid* at para. 174.
[29] *Ibid* at para. 174.
[30] *Ibid* at para. 175.
[31] *Ibid* at para. 175.
[32] *Ibid* at paras 177-209.
[33] *Ibid* at para. 209.
[34] *Ibid* at para. 209.
[35] *Ibid* at para. 209.
[36] *Prosecutor v. Brima*, SCSL-2003-06-I, Indictment, 7 March 2003; *Prosecutor v. Brima*, SCSL-2003-06-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003.
[37] *Prosecutor v. Kamara*, SCSL-2003-10-I, Indictment, 26 May 2003; *Prosecutor v. Kamara*, SCSL-2003-10-I, Decision Approving the Indictment, the Warrant of Arrest, and Order for Non-Disclosure, 28 May 2003.
[38] *Prosecutor v. Kanu*, SCSL-2003-13-I, Indictment, 15 September 2003; *Prosecutor v. Kanu*, SCSL-2003-13-I, Decision Approving the Indictment, the Warrant of Arrest and Order for the Transfer and Detention and Order for Non-Public Disclosure, 16 September 2003.
[39] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Further Amended Consolidated Indictment, 18 February 2005 [Indictment].

14. The Further Amended Consolidated Indictment ("Indictment") comprised a total of 14 Counts. These Counts charged Brima, Kamara and Kanu (the "Accused") with:

(i) Seven Counts of crimes against humanity, namely: extermination, murder, rape, sexual slavery and any other form of sexual violence, "Other Inhumane Acts" and enslavement (Counts 3, 4, 6, 7, 8, 11, and 13, respectively);

(ii) Six Counts of violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, namely: acts of terrorism, collective punishments, violence to life, health and physical or mental well-being of persons (in particular murder and mutilation of civilians), outrages upon personal dignity and pillage (Counts 1, 2, 5, 9, 10 and 14, respectively); and

(iii) A single Count of "other serious violation of international humanitarian law" (Count 12) consisting of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities.

15. The Indictment stated that the Accused were individually criminally responsible, pursuant to Articles 6(1) and 6(3) of the Statute, for the crimes stated above and further alleged that the Accused participated in a joint criminal enterprise ("JCE") with the RUF, the objective of which was to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone and in particular the diamond mining areas.[40]

16. It is pertinent to note, as observed by the Trial Chamber, that at various stages of the proceedings the Accused raised objections to the Indictment on the ground of vagueness.[41] Brima submitted that the Indictment failed to plead with precision the crimes it was alleged he committed

[40] Indictment, para. 33.

[41] *See Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Defence Motion for Defects in the Form of the Indictment, 1 March 2005; *Prosecutor v. Kamara*, SCSL-2003-10-PT, Brief in Support of Preliminary Motion on Defect in the Form of the Indictment, 23 December 2003; *Prosecutor v. Kanu*, SCSL-2003-13-PT, Motion on Defects in Form of the Indictment and for Particularization of the Indictment, 16 October 2003; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Defence Pre-Trial Brief for Tamba Alex Brima, 17 February 2005, paras 22-30; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Kamara – Defence Pre-Trial Brief, 21 February 2005, paras 22-23; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Kanu – Defense Pre-Trial Brief and Notification of Defenses Pursuant to Rule 67(A)(ii)(a) and (b), 22 March 2004, paras 15-19; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-T, Public Version – Brima Defence Final Trial Brief, 11 December 2006, paras 126-156; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-T, Public Kamara Final Trial Brief, 11 December 2006, paras 89-103.

in person.[42] Kamara submitted that there was a lack of specificity in pleading individual criminal responsibility pursuant to Article 6(1) of the Statute.[43] Kamara further contended that the form of pleading joint criminal enterprise in the Indictment was defective in that the common purpose "to take any action to gain and exercise political control over the territory of Sierra Leone" did not amount to a crime within the Statute and was too broad. [44] Finally, Brima and Kamara contended that the charging of sexual slavery and other forms of sexual violence as prohibited under Article 2.g of the Statute, offended the rule against duplicity.[45]

2. The Accused

17. Consequent upon the May 1997 *coup d'état*, the Accused became members of the Supreme Council of the AFRC, the highest decision-making body of the military junta.[46] In that capacity they attended co-ordination meetings between leaders of the AFRC and the RUF.[47] In addition, Brima and Kamara were appointed as Public Liaison Officers ("PLO") 2 and 3, respectively.[48] Under the AFRC regime, PLOs had supervisory responsibility over designated government ministries.[49] The Decree establishing the office of PLO provided that they were responsible for "supervising, monitoring and coordinating the operations of any Department of State or such other business of Government, as may from time to time be assigned to [them]."[50] As PLO 2, Brima supervised the Ministry of Works and Labour, the Department of Customs and Excise, as well as two Government parastatals, Sierratel and SALPOST.[51] Similarly, as PLO 3, Kamara supervised the Ministries of Agriculture, Forestry, Fisheries, Energy and Power, the Income Tax Department, and Queen Elizabeth Quay.[52]

18. In March 1998, shortly after the AFRC junta was dislodged by ECOMOG forces, Johnny Paul Koroma separated from his soldiers on the pretext that he was travelling abroad to organise

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[42] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Defence Pre-Trial Brief for Tamba Alex Brima, 17 February 2005, para. 23.
[43] *Prosecutor v. Kamara*, SCSL-2003-10-PT, Brief in Support of Preliminary Motion on Defects in the Form of the Indictment, 23 December 2003, para. 8.
[44] *Ibid* at para. 9.
[45] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-T, Public Kamara Final Trial Brief, 11 December 2006, paras 94-96; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-T, Public Version – Brima Defence Final Trial Brief, 11 December 2006, para. 141.
[46] AFRC Trial Judgment, paras 285, 332, 434, 509.
[47] *Ibid* at paras 318, 437, 511.
[48] *Ibid* at paras 320, 438.
[49] *Ibid* at para. 321.
[50] *Ibid* at para. 321.
[51] *Ibid* at para. 321.
[52] *Ibid* at para. 436.

logistics for the troops.[53] The leadership of the AFRC then fell to a senior member of the SLA known as SAJ Musa. In December 1998 SAJ Musa was killed during an attack on an ECOMOG weapons depot in Benguema.[54] After SAJ Musa'a death, Brima took over as the overall commander of the AFRC force with Kamara as Deputy Commander and Kanu as Chief of Staff. From then on they remained the three most senior commanders of the AFRC until the cessation of hostilities in January 2002.[55]

3. Judgment

19. The trial of the Accused opened before Trial Chamber II on 7 March 2005, closing arguments were heard on 7 and 8 December 2006, and on 20 June 2007, the Trial Chamber rendered its Judgment.

20. The Trial Chamber found that there was an armed conflict in Sierra Leone between March 1991 and January 2002, and that the crimes charged related to the armed conflict.[56] It found that there was a systematic or widespread attack by the AFRC/RUF forces directed against the civilian population of Sierra Leone and that each incident described in the Indictment formed part of a widespread and systematic attack within the meaning of Article 2 of the Statute.[57] According to its Judgment, "operations" conducted by AFRC/RUF forces targeted civilians and the Accused knew that their conduct formed part of a widespread and systematic attack.[58]

21. The Trial Chamber evaluated the individual criminal responsibility of each of the Accused under Article 6(1) and 6(3) of the Statute. The Trial Chamber specifically held that "with respect to Joint Criminal Enterprise as a mode of criminal liability, the Indictment [had] been defectively pleaded" and that it would not consider JCE as a mode of criminal responsibility.[59]

4. Verdict

22. The Accused were found guilty and convicted of six Counts of violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, four Counts of crimes against humanity pursuant to Articles 2.a, 2.b, 2.c and 2.g of the

[53] *Ibid* at para. 184.
[54] *Ibid* at para. 201.
[55] *Ibid* at paras 420, 474, 531-532, 611.
[56] *Ibid* at paras 249, 254.
[57] *Ibid* at para. 224.
[58] *Ibid* at paras 238-239.

Statute, and one Count of other serious violations of international humanitarian law pursuant to Article 4.c of the Statute.[60]

23. With respect to the crime of rape as a crime against humanity, charged under Count 6 of the Indictment, Brima, Kamara, and Kanu were convicted on the basis of superior responsibility under Article 6(3) of the Statute.[61]

24. The Appellants Brima and Kamara were acquitted of the crime of "Other Inhumane Acts" as a crime against humanity, charged under Count 11 of the Indictment, and no conviction was entered against Kanu.[62]

25. The Trial Chamber did not enter convictions under Counts 7 and 8 of the Indictment.[63] Count 7 charged the offence of sexual slavery and any other form of sexual violence. A majority of the Trial Chamber held that the charge violated the rule against duplicity and dismissed it for that reason.[64] Count 8 was dismissed on the ground of redundancy based on the Trial Chamber's finding that the evidence led in support of that Count did not establish any offence distinct from sexual slavery.[65]

5. Sentence

26. For all the Counts of which they were found guilty, Alex Tamba Brima and Santigie Borbor Kanu were each sentenced to a single term of imprisonment of fifty (50) years, and Brima Bazzy Kamara to a single term of imprisonment of forty-five (45) years. The Trial Chamber ordered that each be given credit for any period during which they were detained in custody pending trial.[66]

[59] *Ibid* at para. 85.
[60] *Ibid* at paras 2113, 2114, 2117, 2118, 2121, 2122; Corrigendum to AFRC Trial Judgment.
[61] AFRC Trial Judgment, paras 2114, 2118, 2122; Corrigendum to AFRC Trial Judgment.
[62] AFRC Trial Judgment, paras 2113-2123.
[63] *Ibid* at paras 2116, 2120, 2123.
[64] *Ibid* at paras 93-95.
[65] *Ibid* at para. 714.
[66] AFRC Sentencing Judgment, p. 36.

II. THE APPEALS

A. The Prosecution's Grounds of Appeal

27. The Prosecution filed nine Grounds of Appeal.[67] Grounds One to Three raise the question of whether the Accused should have been found criminally responsible for additional crimes in Bombali District, Freetown and other parts of the Western Area, and Port Loko District and whether the Trial Chamber should have made factual findings on crimes in certain locations. In Ground Four the Prosecution complains that the Trial Chamber failed to consider JCE liability. The substance of Ground Five of the Prosecution's Appeal is that the Trial Chamber erred in not including evidence of the three enslavement crimes[68] as a basis of criminal responsibility for offences charged in Counts One and Two of the Indictment. Grounds Six, Seven and Eight raise questions of duplicity and redundancy. Finally, Ground Nine concerns the Trial Chamber's approach to cumulative convictions.

B. Brima's Grounds of Appeal

28. The Appellant Brima filed twelve Grounds of Appeal of which four were abandoned.[69] Ground One raises the issue of equality of arms, complaining that the Trial Chamber failed "to consider the fact that the inequality of arms between the Prosecution and Defence denied or substantially impaired the right of Brima to a fair trial resulting in a miscarriage of justice."[70]

29. Six of Brima's Grounds of Appeal state that the Trial Chamber erred in law and in fact in its evaluation of the evidence by finding that he was individually criminally responsible under Articles 6(1) and 6(3) of the Statute for the crimes stated in the Indictment.[71]

30. In his Twelfth Ground of Appeal he complains that the Trial Chamber erred in law and fact by failing to consider a number of mitigating factors, that the imposition of a global sentence of

[67] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Appeal Brief of the Prosecution, 13 September 2007 [Prosecution Appeal Brief].
[68] Recruitment of child soldiers, abductions and forced labour, and sexual slavery.
[69] The Appeals Chamber declines to consider Brima's Tenth and Eleventh Grounds as his Appeal Brief offers no supporting arguments and fails to identify any issue of appeal.
[70] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Brima Appeal Brief, 13 September 2007, para. 71 [Brima Appeal Brief].
[71] *Ibid* at paras 84, 120, 153, 168, 179.

fifty (50) years was excessive and disproportionate, and that the Trial Chamber impermissibly double-counted aggravating factors.[72]

C. Kamara's Grounds of Appeal

31. Kamara filed thirteen Grounds of Appeal of which five were against sentence. In Grounds One to Six he contends that the Trial Chamber erred in law and fact by misapplying the modes of liability for ordering, planning, and aiding and abetting.[73] In Ground Seven he complains that the Trial Chamber misapplied the standard for superior responsibility.[74] In Ground Eight he contends that the Trial Chamber erred in its evaluation of the credibility of witnesses.[75] In Grounds Nine to Thirteen, Kamara states that the Trial Chamber failed to consider mitigating circumstances,[76] misunderstood underlying sentencing principles[77] and consequently imposed an excessive sentence.[78]

D. Kanu's Grounds of Appeal

32. Kanu filed Nineteen Grounds of Appeal of which eight relate to sentencing. The issues raised by the Grounds of Appeal against conviction touch on:

(i) the greatest responsibility requirement;

(ii) the indictment, particularly in regard to pleading principles when the mode of committing is alleged and waiver of defect in indictments by reason of failure to object to evidence of material facts not pleaded;

(iii) evidential issues, particularly in regard to the evaluation of evidence of witnesses and treatment of accomplice evidence;

(iv) superior liability under Article 6(3) of the Statute, particularly if the evidence showed "shared concurrent responsibility with other superiors;"

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[72] *Ibid* at paras 180-196.
[73] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Kamara Appeal Brief, 13 September 2007, para. 77-190 [Kamara Appeal Brief].
[74] *Ibid* at para. 191.
[75] *Ibid* at para. 223.
[76] *Ibid* at para. 237.
[77] *Ibid* at paras 252, 257, 260.
[78] *Ibid* at para. 243.

(v) in regard to crimes of conscription of child soldiers, whether the absence of criminal knowledge on the part of an accused vitiated the requisite *mens rea*;

(vi) cumulative convictions, particularly, whether it is an error in law to convict an accused cumulatively under Article 3(b) or 3(d) as well as the underlying crimes charged in article 3(a) of the crimes of murder and mutilation and Article 3(e) of the crime of outrages upon personal dignity; and

(vii) the consequence of the finding by the Trial Chamber that JCE as a mode of criminal liability had been defectively pleaded on the validity of the entire indictment.

33. The Grounds of Appeal against sentence are rather wide-ranging, raising principles of sentencing, the effect of amnesty as a mitigating factor and whether it is not a mitigating factor that an accused is not a person who bears the greatest responsibility.

E. Common Defects in the Brima and Kamara Grounds of Appeal

34. It is expedient to note that many of the Grounds of Appeal raised by Brima and Kamara share a common deficiency. Although each of them alleges error in law or in fact, few of them give particulars of such error. This failure makes it imperative for the Appeals Chamber to repeat what should by now be regarded as commonplace: that in order for the Appeals Chamber to assess a party's arguments on appeal, the party must set out its Grounds of Appeal clearly, logically and exhaustively.

III. COMMON GROUNDS OF APPEAL RELATING TO THE INDICTMENT

A. Issues Arising from the Common Grounds of Appeal

35. Grounds Two, Four and Six of the Prosecution's Appeal, as well as Grounds Two and Ten of Kanu's Appeal all raise issues relevant to the proper pleading of the Indictment. Whilst the Grounds of Appeal filed by the two Parties advance different arguments, they raise similar issues with respect to the general pleading principles applicable to indictments at international criminal tribunals.

36. Furthermore, the Parties' submissions in support of these Grounds of Appeal state that the Trial Chamber committed a procedural error in reconsidering earlier pre-trial or interlocutory

decisions without giving notice to the Parties or without giving them an opportunity to be heard on the correctness of the previous decision(s).

1. Applicable Principles

(a) Specificity

37. In order to guarantee a fair trial the Prosecution is obliged to plead material facts with a sufficient degree of specificity.[79] The question whether material facts are pleaded with the required degree of specificity depends on the context of the particular case.[80]

38. In particular, the required degree of specificity varies according to the form of participation alleged against an accused.[81] Where direct participation is alleged in an indictment, we opine that the Prosecution's obligation to provide particulars in an indictment must be adhered to fully.[82]

39. Where superior responsibility is alleged, the liability of an accused depends on several material factors such as the relationship of the accused to his subordinates, his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates. Therefore, these are material facts that must be pleaded with a sufficient degree of specificity.[83]

40. In considering the extent to which there is compliance with the specificity requirement in an indictment, the term specificity should not be understood to have any special meaning. It is to be understood in its ordinary meaning as being specific in regard to an object or subject matter. An object or subject matter that is particularly named or defined cannot be said to lack specificity.

(b) Exception to Specificity

41. The pleading principles that apply to indictments at international criminal tribunals differ from those in domestic jurisdictions because of the nature and scale of the crimes when compared with those in domestic jurisdictions. For this reason, there is a narrow exception to the specificity requirement for indictments at international criminal tribunals. In some cases, the widespread nature

[79] *Kvoćka* Form of the Indictment Decision, para. 14.
[80] *Kupreškić* Appeal Judgment, para. 89.
[81] *Krnojelac* Form of the Indictment Decision, para. 18.
[82] *Brđanin* Form of the Indictment Decision, para. 22.
[83] *Krnojelac* Form of the Indictment Decision, para. 18; *Ntagerura* Trial Judgment, para. 35.

and sheer scale of the alleged crimes make it unnecessary and impracticable to require a high degree of specificity.[84]

2. Challenges to an Indictment on Appeal

42. Challenges to the form of an indictment should be made at a relatively early stage of proceedings and usually at the pre-trial stage pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence ("Rules") which provides that it should be made by a preliminary motion.[85] An accused, therefore, is in the ordinary course of events expected to challenge the form of an indictment prior to the rendering of judgment or at the very least, challenge the admissibility of evidence of material facts not pleaded in an indictment by interposing a specific objection at the time the evidence is introduced.[86]

43. Failure to challenge the form of an indictment at trial is not, however, an absolute bar to raising such a challenge on appeal.[87] An accused may well choose not to interpose an objection when certain evidence is admitted or object to the form of an indictment, not as a means of exploiting a technical flaw, but rather, because the accused is under the reasonable belief that such evidence is being introduced for purposes other than those that relate to the nature and cause of the charges against him.

44. Where an accused fails to make specific challenges to the form of an indictment during the course of the trial or challenge the admissibility of evidence of material facts not pleaded in the indictment, but instead raises it for the first time on appeal, it is for the Appeals Chamber to decide the appropriate response. Where the Appeals Chamber holds that an indictment is defective, the options open to it are to find that the accused waived his right to challenge the form of an indictment, to reverse the conviction, or to find that no miscarriage of justice had resulted notwithstanding the defect.[88] In this regard the Appeals Chamber may also find that any prejudice

[84] *Kvoćka* Form of the Indictment Decision, para. 17.
[85] Rule 72(B)(ii) expressly provides that preliminary motions by the accused include "[o]bjections based on defects in the form of the indictment."
[86] *Niyitegeka* Appeal Judgment, para. 199.
[87] *Semanza* Trial Judgment, para. 42.
[88] *Niyitegeka* Appeal Judgment, paras 195-200.

that may have been caused by a defective indictment was cured by timely, clear and consistent information provided to the accused by the Prosecution.[89]

45. The Appeals Chamber must ensure that a failure to pose a timely challenge to the form of the indictment did not render the trial unfair. The primary concern at the appeal stage therefore, when faced with a challenge to the form of an indictment, is whether the accused was materially prejudiced.[90]

B. Prosecution's Second Ground of Appeal: Locations Not Pleaded in the Indictment

1. Trial Chamber's Findings

46. The substance of the Prosecution's Second Ground of Appeal is that the Trial Chamber erred in law and in fact in failing to make findings on the responsibility of each Appellant in respect of crimes committed in several locations in Koindugu and Bombali Districts, Freetown and other parts of the Western Area and in Port Loko District including other locations enumerated in the Ground of Appeal, in respect of which evidence had been led.

47. The Trial Chamber in ruling on the submission of Brima complaining among other things, that the Indictment was impermissibly vague, because particulars of where the crimes occurred were not given, stated that:

> "the Prosecution has led a considerable amount of evidence with respect to killings, sexual violence, physical violence, enslavement and pillage which occurred in locations not charged in the indictment [and that] while such evidence may support proof of the existence of an armed conflict or a widespread or systematic attack on a civilian population, no finding of guilt for those crimes may be made in respect of such locations not mentioned in the indictment."[91]

48. It had been pleaded in several paragraphs of the Indictment that particular acts took place in several named locations in named Districts. It was made clear that the named locations were not exhaustive of the locations where the acts took place. An example is paragraph 45 of the Indictment where it was alleged that "members of AFRC/RUF unlawfully killed several hundred civilians in

[89] *Kupreškić* Appeal Judgment, para. 114 ("The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category."). *See also Ntakirutimana* Appeal Judgment, para. 27.
[90] *Kupreskic* Appeal Judgment, para. 115.
[91] AFRC Trial Judgment, para. 37.

various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Biaya." Commenting on this manner of pleading the Trial Chamber stated:

> "Moreover, the jurisprudence of international criminal tribunals makes it clear that an accused is entitled to know the case against him and is entitled to assume that any list of alleged acts contained in an indictment is exhaustive, regardless of the inclusion of words such as "including", which may imply that other unidentified crimes in other locations are being charged as well."[92]

49. The Trial Chamber found that with respect to crimes alleged in the Indictment, the Prosecution led evidence of offences which occurred in locations not specifically pleaded. As a consequence, it held that with the exception of Counts 9, 12 and 13 the crimes of recruitment of child soldiers, abductions and forced labour and sexual slavery (the three "enslavement crimes"), the Indictment was defective and that it would not make any findings on crimes perpetrated in locations not specifically pleaded. It is to be noted that the exception made by the Trial Chamber was because the Accused had "not specifically objected to lack of specificity with respect to locations [in] relation to enslavement, sexual slavery and child soldier recruitment in Counts 9,[93] 12 and 13," and that in the interest of justice they would treat pleading of those counts as permissible. The Trial Chamber held that evidence of crimes perpetrated in locations not specifically pleaded would only be considered "for proof of the chapeau requirements of Articles 2, 3 and 4 where appropriate, that is the widespread or systematic nature of the crimes and an armed conflict."[94]

2. Submissions of the Parties

(a) Prosecution's Submissions

50. The Prosecution submits that contrary to the Trial Chamber's findings, "locations" were properly pleaded in the Indictment and that in the alternative any defects in the Indictment were cured by providing timely, clear and consistent information to the Accused.[95]

51. It submits that the Indictment is not defective with respect to the pleading of locations and that whilst certain locations may not have been listed exhaustively, they were nonetheless correctly pleaded. The Indictment uses the terms "various" and "including" to demonstrate clearly that named locations within districts of Sierra Leone were not an exhaustive list of locations where

[92] *Ibid* at para. 37.
[93] *Ibid* at para. 41.
[94] *Ibid* at para. 38.
[95] Prosecution Appeal Brief, para. 197.

alleged crimes occurred. This it is argued is sufficient for an Indictment to be properly pleaded and satisfies the requirement that material facts must be pleaded with sufficient specificity in an indictment.

52. In support of its argument, the Prosecution submitted that Kamara had filed a preliminary motion at the pre-trial stage alleging just such a lack of specificity in the pleading of locations in the Indictment.[96] Kamara's argument, however, was expressly rejected by Trial Chamber I[97] which had at the time dealt with the preliminary motion. Consequently, the Prosecution contends that Trial Chamber II's finding in its Judgment that locations were not properly pleaded, amounted to a "[reversal of] previous interlocutory decisions in the case, or [a decision] *proprio motu* that the Indictment was defective."[98] It further argues that in so doing, Trial Chamber II committed an error of law or procedure in that it reversed a previous interlocutory decision "without first giving the parties the opportunity to argue the point."[99]

53. The Prosecution further asserts that apart from Kamara's preliminary motion, the Accused never raised an objection with respect to the pleading of locations in the Indictment. In particular, the Accused did not raise the issue in motions for acquittal pursuant to Rule 98 of the Rules, nor did the Trial Chamber in its Rule 98 Decision give notice to the Parties that it "had taken a decision not to consider evidence relating to locations not specifically pleaded . . . otherwise than for the purpose of establishing whether there was a widespread and systematic attack against the civilian population."[100]

54. The Prosecution submits, that as it was not aware that the Trial Chamber would not consider evidence relating to locations not specifically pleaded in the Indictment, and was never afforded an opportunity to make representations on the issue,[101] it was "entitled to proceed at trial on the basis that the Indictment was not defective in pleading the locations in the way that it did . . . ."[102]

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[96] *Ibid* at paras 201-203.
[97] *Kamara* Form of the Indictment Decision, paras 40-43.
[98] Prosecution Appeal Brief, para. 211 (At the time that the Kamara preliminary motion was filed, the case was before Trial Chamber I comprised of Judges Bankole Thompson, Pierre Boutet, and Benjamin Mutanga Itoe. Subsequently, with the creation of a second Trial Chamber for the Special Court, the case was transferred to Trial Chamber II (Judges Richard Lussick, Theresa Doherty and Julia Sebutinde). In effect, the Prosecution's submission is that Trial Chamber II reversed in the Trial Judgment, a pre-trial decision rendered by Trial Chamber I.).
[99] *Ibid* at para. 211.
[100] *Ibid* at para. 209.
[101] Transcript, AFRC Appeal Hearing, 12 November 2007, p. 16.
[102] Prosecution Appeal Brief, para. 206.

55. The Prosecution further submits that as a general principle of law, locations of crimes should be pleaded in an indictment but that the degree of specificity depends on the nature of the Prosecution's case. In circumstances where crimes are alleged on a large scale, details of precise locations of events need not be pleaded.[103] It further submits that the Trial Chamber recognised these principles and the large scale and prolonged nature of the conflict in Sierra Leone. Notwithstanding this recognition, it argues that the Trial Chamber failed to apply the law with respect to the pleading of locations.[104]

56. Finally, the Prosecution submits that the Appellant "made no motions during the trial . . . in respect of Prosecution evidence of crimes in locations not specifically pleaded . . . [and that therefore, the Appellant] waived their right to now claim [they were] prejudiced."[105] This failure to object, it argued, requires the Appellant to bear the burden of establishing that the pleading of locations in the Indictment was defective, and of establishing that their ability to prepare a defence was materially impaired by that defect.[106]

57. As a consequence of its submissions, the Prosecution requests the Appeals Chamber to revise the Trial Chamber's finding or remit matters back to the Trial Chamber for further "findings of fact on whether each of the Accused is individually responsible for these crimes."[107]

(b) Response of the Accused

58. In response, Brima and Kamara contend that Trial Chamber I's "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment" suggests that words as: "such as", "various locations", or "various areas . . . including" are contextual and that in context, that Decision supports the use of such terms only to demonstrate the widespread and systematic nature of an attack.[108] They argue that the Prosecution's contention that it was not put on notice of defects in the Indictment so far as the pleading of locations is concerned is without merit and that

[103] *Ibid* at para. 220.
[104] *Ibid* at para. 221.
[105] *Ibid* at para. 223.
[106] *Ibid* at para. 211.
[107] *Ibid* at para. 237.
[108] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Brima Response to Prosecution's Appeal Brief, 4 October 2007, para. 24 [Brima Response Brief]; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Kamara Response to Prosecution Appeal Brief, 4 October 2007, para. 32 [Kamara Response Brief].

the Trial Chamber's "Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98" was unambiguous in its meaning and effect.[109]

59. The Appellant Kanu submits that the Indictment failed to specify adequately locations in which certain crimes were committed and was therefore defective.[110] According to Kanu, where an Indictment is found to be defective, consideration must also be given to whether the Appellant was accorded a fair trial. In this instance, Kanu insists that he was entitled to assume that the list of alleged locations in the Indictment was exhaustive. He contends that "the word 'including' in the Indictment, in so far as it left the list of places open, did not make it clear that the crimes in question were also committed in locations . . . other than those expressly mentioned."[111] According to Kanu, this defect materially affected his ability to prepare his defence and is contrary to the general principle of law requiring that "the location of crimes alleged to have been committed be specified in the Indictment with as much clarity as possible so that the Accused is not materially prejudiced in the preparation of his defence."[112]

60. All the Appellants therefore submit that the Trial Chamber correctly arrived at its conclusion and in so doing protected the fair trial rights of the Appellant.

3. Discussion: Reversal of a Previous Interlocutory Decision

61. We find that Trial Chamber II reconsidered the decision reached by Trial Chamber I and came to a different conclusion with respect to the pleading of locations in the Indictment.

62. It seems to us that the following questions arise for determination:

(i) Whether Trial Chamber II properly reconsidered issues relating to the alleged defects in the Indictment;

(ii) If Trial Chamber II had such power, whether it ought not to have given the parties an opportunity to be heard on the matter.

[109] Brima Response Brief, para. 26; Kamara Response Brief, para. 34.
[110] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Respondent's Submissions-Kanu Defence, 4 October 2007, para. 2.9 [Kanu Response Brief].
[111] *Ibid* at para. 2.9.
[112] *Ibid* at para. 2.14.

63. In the *Ntagerura et al*. case, the ICTR Appeals Chamber held that it falls within the discretion of a Trial Chamber to reconsider a previous decision if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.[113] We endorse that opinion. Consequently, whether or not an issue relating to the form of an indictment should be reconsidered should be determined on a case-by-case basis having regard to the stage of proceedings, the issues raised by the earlier decision and the effect of reconsideration or reversal on the rights of the Parties.

64. With regard to question (ii) the Parties ought to have been given an opportunity to be heard on the matter as natural justice demands. However, even if they failed to accord the Parties that opportunity, this Chamber has the power to review the situation and come to its own conclusion in the interest of justice. In all the circumstances of the case, we opine that the Trial Chamber's error in not expressly giving notice to the Parties of its intention to reconsider the pre-trial decision, and its failure to re-open the hearings did not invalidate the decision. The Trial Chamber's limited treatment of the evidence of crimes committed in such locations was a proper exercise of its discretion in the interest of justice, taking into account that it is the Prosecution's obligation to plead clearly material facts it intends to prove, so as to afford the Appellants a fair trial.

65. The Prosecution's Second Ground of Appeal therefore fails.

C. Prosecution's Fourth Ground of Appeal and Kanu's Tenth Ground of Appeal: Joint Criminal Enterprise

1. Trial Chamber's Findings

66. Prior to the establishment of Trial Chamber II, Trial Chamber I, ruling on a preliminary motion brought by the Appellant, dealt with several pre-trial issues in this case, including the form of the Indictment and the pleading of joint criminal enterprise ("JCE") as a form of liability. In this regard the Trial Chamber held that:

> "the Indictment in its entirety, is predicated upon the notion of joint criminal enterprise . . [and that] the nature of the alleged joint criminal enterprise, the nature of the Accused's participation in it, the identity of those involved in the same, and the time frame of the alleged joint criminal enterprise are all pleaded with the degree of particularity as the factual parameters of the case admits."[114]

[113] *Ntagerura* Appeal Judgment, para. 55.
[114] *Kamara* Form of the Indictment Decision, para. 52.

67. On 17 January 2005, the case was transferred to Trial Chamber II. In the AFRC Trial Judgment, Trial Chamber II revisited the question whether joint criminal enterprise was properly pleaded, and departed from Trial Chamber I's pre-trial findings. Trial Chamber II concluded that JCE was not properly pleaded in the Indictment. According to Trial Chamber II, the common purpose of the joint criminal enterprise, *i.e.*, "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone," was not an inherently criminal conduct.[115] It also found, among other things, that whilst it generally concurred with Trial Chamber I's holding that paragraphs 33 and 34 of the Indictment must be read as a whole, "these two paragraphs do not clarify what criminal purpose the parties agreed upon at the inception of the agreement."[116] It also held that if a new common purpose had emerged which involved international crimes, such should have been pleaded because:

> "the Prosecution is required to know its case before the start of the trial and to know of the changing nature and purposes of the enterprise either between the AFRC and the RUF or within the AFRC. All those new and different purposes have to be pleaded in the indictment and the Prosecution cannot be permitted to mould the case against the accused as the trial progresses."[117]

2. Submission of the Parties

68. In its Fourth Ground of Appeal the Prosecution now challenges the Trial Chamber's finding that the joint criminal enterprise was defectively pleaded. The Prosecution submits that the Trial Chamber committed a procedural and legal error by reconsidering, at the final judgment stage, earlier interlocutory decisions concerning defects in the form of the Indictment without reopening the hearings.[118] It also submits that the Trial Chamber committed a procedural, legal and factual error in finding that joint criminal enterprise liability was defectively pleaded in the Indictment.[119] In the alternative, it submits that even if joint criminal enterprise liability was defectively pleaded, the defects were subsequently cured or were of such a nature that they did not prejudice the Defence so as to justify the Trial Chamber's failure to consider joint criminal enterprise liability.[120]

69. Kanu, in his Tenth Ground of Appeal, submits that once the Trial Chamber found that joint criminal enterprise had been defectively pleaded in the Indictment, it should have quashed the

[115] AFRC Trial Judgment, paras 66-70.
[116] *Ibid* at para. 71.
[117] *Ibid* at para. 80.
[118] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Public Prosecution's Notice of Appeal, 2 August 2007, para. 12(i) [Prosecution Notice of Appeal].
[119] *Ibid* at para. 12(ii)(a).

Indictment because the Indictment was predicated in its entirety on the notion of a joint criminal enterprise.[121] He also submits that the defective Indictment substantially prejudiced him in the preparation of his defence because at all material times he was unsure of the exact nature of the case against him.[122]

70. The Prosecution replies that the purpose of the joint criminal enterprise was inherently criminal and that joint criminal enterprise was therefore not defectively pleaded.[123] It argues that "even where the ultimate aim or objective of a common enterprise is not in itself inherently criminal, it is nonetheless a joint criminal enterprise if the participants have a common purpose of committing particular types of crimes in order to achieve that objective."[124] The Prosecution argues that the Trial Chamber erred in treating the "ultimate objective of the joint criminal enterprise as the alleged common criminal purpose itself, and in finding that the Indictment therefore did not plead a joint criminal enterprise that was inherently criminal."[125] In particular, it submits that the Indictment as a whole alleges a common plan to carry out a campaign of terrorising and collectively punishing the civilian population of Sierra Leone through the commission of crimes within the jurisdiction of the Special Court, in order to achieve the ultimate objective of gaining and exercising political power and control over the territory of Sierra Leone.[126]

71. Brima and Kamara in their response submit that by alleging in the Indictment that "the members of the JCE were willing to 'take any actions necessary,' " the Prosecution failed to indicate clearly "the criminal means involved in conducting the JCE . . . ."[127] Kanu submits that "gaining and exercising control over the population of Sierra Leone" is not a crime under international law and that with respect to JCE, an indictment must allege a common purpose which is a crime under international law.[128] Further, that the Prosecution should have pleaded unambiguously the joint criminal enterprise upon which it intended to hold him criminally responsible for the crimes alleged in paragraphs 34, 38, 39, 40, and 41 of the Indictment.[129]

[120] *Ibid* at para. 12(ii)(b).
[121] Kanu Appeal Brief, para. 10.2.
[122] *Ibid* at para. 10.3.
[123] Prosecution Appeal Brief, paras 393-394.
[124] *Ibid* at para. 386.
[125] *Ibid* at para. 388 (emphasis removed).
[126] *Ibid* at paras 389, 391.
[127] Brima Response Brief, para. 68; Kamara Response Brief, para. 115 (emphasis removed)
[128] Kanu Response Brief, para. 4.24.
[129] *Ibid* at para. 4.25.

3. Discussion

72. Article 6(1) of the Statute which is in the same terms as Article 7(1) of the ICTY Statute prescribes individual criminal responsibility for acts or transactions in which a person has been personally engaged or in some other way participated in one or more of the five ways stated in the Article.[130] As was said by the ICTY Appeals Chamber in *Tadić*:

> "[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."[131]

73. Article 6(1) does not expressly prescribe individual criminal responsibility through participation in the realisation of a common design or purpose. It was in these circumstances that the Appeals Chamber of ICTY in *Tadić* developed a doctrine of individual criminal responsibility for participation in a JCE.

74. The ICTY Appeals Chamber reasoned thus:

> "An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those 'responsible for serious violations of international humanitarian law' committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or *ordering* to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy*, *incitement*, *attempt* and *complicity*) . . .
>
> Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in

[130] Article 6(1) of the Statute provides that: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime."
[131] *Tadić* Appeal Judgment, para. 186.

> execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below . . .
>
> Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility . . .
>
> This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. It may also be noted that - as will be mentioned below - international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems." [132]

75. The *actus reus* for all forms of joint criminal enterprise liability consists of the following three elements:

(i) a plurality of persons;

(ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;

(iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.[133]

76. The question for determination in this appeal pertains to the requisite nature of the common plan, design or purpose. It can be seen from a review of the jurisprudence of the international criminal tribunals that the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective. The objective and the means to achieve the objective constitute the common design or plan.

77. In *Kvočka et al*. the ICTY Appeals Chamber was of the opinion that "the common design that united the accused was the creation of a Serbian state within the former Yugoslavia, and that they worked to achieve this goal by participating in the persecution of Muslims and Croats."[134] Whereas creation of a Serbian State within the former Yugoslavia is not a crime within the Statute

[132] *Ibid* at paras 189-193 (emphasis original).
[133] *Ibid* at para. 227.
[134] *Kvočka* Appeal Judgment, para. 46.

of the ICTY, the means to achieve the goal, such as persecution, constitute crimes within that statute.

78. Reference to the indictments in cases of *Martić* and *Haradinaj et al*., cited by the Prosecution, is similarly instructive. In *Haradinaj et al*. for example, it would appear that the Trial Chamber accepted[135] that the pleading of joint criminal enterprise was proper notwithstanding the Prosecution pleading a common purpose (namely "consolidate[ing] the total control of the Kosovo Liberation Army over the KLA operational zone of Dukagjin") which itself does not amount to any crime within the Statute of the ICTY.[136] However, the *Haradinaj* Indictment clearly alleges that the joint criminal enterprise involved the commission of crimes such as intimidation, abduction, imprisonment, beating, torture and murder of targeted civilians in violation of Articles 3 and 5 of the ICTY Statute.

79. Furthermore, the Appeals Chamber notes that the Rome Statute of the International Criminal Court ("Rome Statute" and "ICC," respectively) does not require that the joint criminal enterprise has a common purpose that *amounts to* a crime within the ICC's jurisdiction. Indeed, the Rome Statute departs altogether from the use of the phrase "amounts to" and instead requires that the "criminal activity or criminal purpose … involves the commission of a crime within the jurisdiction of the Court."[137] This formulation reflects the consensus reached by all of the States negotiating the Statute of the ICC at the Rome Conference, and therefore is a valuable indication of the views of States and the international community generally on the question of what constitutes a common purpose.

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[135] *Haradinaj* Form of the Indictment Decision, para. 25 (The Trial Chamber held that the relevant paragraphs plead the responsibility of the Accused pursuant to JCE in sufficient detail to inform them of the charges against them.).

[136] *Prosecutor v. Haradinaj*, IT-04-84, Second Amended Indictment, 26 April 2006, para. 26. The *Haradinaj* Indictment pleads that the common purpose:

> . . . which necessarily involved the commission of crimes against humanity and violations of the laws or customs of war, was the consolidation of total control of the Kosovo Liberation Army over the KLA operational zone of Dukagjin by attacking and persecuting certain sections of the civilian population there: namely the unlawful removal of Serb civilians from that area, and the forcible, violent suppression of any real or perceived form of collaboration with the Serbs by Albanian or Roma civilians there. The criminal purpose included the intimidation, abduction, imprisonment, beating, torture and murder of targeted civilians in violation of Articles 3 and 5 of the Tribunal's Statute.

[137] Art. 25(3) of the Rome Statute states: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime, within the jurisdiction of the Court if that person … in any other way contributes to the commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or ii. Be made in the knowledge of the intention of the group to commit the crime."

80. In view of the foregoing, the Appeals Chamber concludes that the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective.

81. Turning to the present Indictment, in order to determine whether the Prosecution properly pleaded a joint criminal enterprise, the Indictment should be read as a whole.[138] In particular, the most relevant paragraphs of the Indictment to the pleading of JCE are paragraphs 33-35, which state:

> "33. The AFRC, including **ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU**, and the RUF, including ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.
>
> 34. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.
>
> 35. **ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU**, by their acts or omissions, are individually criminally responsible pursuant to Article 6(1). of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Indictment, which crimes each of them planned, instigated, ordered, committed or in whose planning, preparation or execution each Accused otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which each Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated."[139]

82. The ultimate objective alleged in paragraph 33 of the Indictment, namely: to "take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas,"[140] may not of itself amount to a crime within the Statute of

[138] *Ntagerura* Trial Judgment, para. 30 ("In assessing an Indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment."); *see also Gacumbitsi* Trial Judgment, para. 176 (interpreting a general and introductory paragraph only to the extent of the greater detail provided in subsequent paragraphs).
[139] Indictment, paras 33-35 (emphasis original).
[140] *Ibid* at para. 33.

the Special Court, nonetheless, paragraph 33 of the Indictment read together with paragraphs 34 and 35 demonstrates the Prosecution's allegation that the parties to the common enterprise shared a common plan and design to achieve the objective by conduct constituting crimes within the Statute.

83. Paragraph 33 of the Indictment states that the plan was to "take any actions necessary" to gain territorial control and political power. Paragraph 34 of the Indictment states that the actions "included": controlling the population of Sierra Leone; using members of the population to support the JCE; and specifically enumerated crimes such as "unlawful killings, abductions, forced labour, physical and sexual violence." Paragraph 35 of the Indictment also indicates that crimes "referred to in Articles 2, 3, and 4 of the Statute . . . were within [the] joint criminal enterprise," or that those crimes were a reasonably foreseeable consequence of the JCE.[141]

84. The Appeals Chamber holds that the common purpose of the joint criminal enterprise was not defectively pleaded. Although the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute. The Trial Chamber took an erroneously narrow view by confining its consideration to paragraph 33 and reading that paragraph in isolation. Furthermore, the Trial Chamber erred in its consideration of "evidence" adduced at trial to determine whether the Indictment was properly pleaded.[142] The error arose because determination of whether the Prosecution properly pleaded a crime must be determined on the basis of whether the Prosecution pleaded all the material facts in the Indictment, not whether it had adduced evidence to support the allegations.[143]

85. Several other issues arose in the context of JCE for which the Appeals Chamber wishes to express itself. The Trial Chamber erred in concluding that the Prosecution could not plead the basic and extended forms of joint criminal enterprise liability in the alternative on the grounds that the two forms, as pleaded, logically exclude each other.[144] Pleading the basic and extended forms of JCE in the alternative is now a well-established practice in the international criminal tribunals.[145]

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[141] *Ibid* at para. 35.
[142] AFRC Trial Judgment, paras 74-76.
[143] *Brđanin* Decision on Motion to Dismiss Indictment, para. 15; *Krajisnik* Decision on Form of the Indictment, para. 8.
[144] AFRC Trial Judgment, para. 71 (finding that "[i]f the charged crimes are allegedly within the common purpose, they can logically no longer be a reasonably foreseeable consequence of the same purpose and vice versa.").
[145] *See Prosecutor v. Karemera*, ICTR-97-24, International Criminal Tribunal for Rwanda, Amended Indictment, 23 February 2005, para. 7; *Prosecutor v. Mpambara*, ICTR-01-65, International Criminal Tribunal for Rwanda, Amended Indictment, 7 March 2005, para. 6; *Prosecutor v. Brdanin*, IT-99-36, International Criminal Tribunal for the former Yugoslavia, Sixth Amended Indictment, 9 December 2003, para. 27; *Prosecutor v. Milošević*, IT-02-54, International

The Trial Chamber erred in finding that the Indictment failed to specify the period covered by the JCE.[146] That period is that covered by all of the alleged crimes, which in this case is between 25 May 1997 and January 2000.[147]

86. The Appeals Chamber having concluded that joint criminal enterprise was not defectively pleaded in the Indictment, need not address the Trial Chamber's finding that the Prosecution failed to cure the defective pleading of JCE.[148] Similarly, Kanu's Tenth Ground of Appeal, that the Trial Chamber erred in law by failing to quash the entire Indictment after finding that joint criminal enterprise was defectively pleaded, must fail.

4. Disposition

87. The Appeals Chamber has found that the Trial Chamber erred in law when it concluded that JCE was not properly pleaded in the Indictment. Consequently, the Prosecution's Fourth Ground of Appeal succeeds, however we see no need to make further factual findings or to remit the case to the Trial Chamber for that purpose, having regard to the interest of justice.

D. Prosecution's Sixth Ground of Appeal: The Duplicity of Count 7

88. In its Sixth Ground of Appeal, the Prosecution challenges the Trial Chamber's finding that Count 7 of the Indictment violated the "rule against duplicity" and prejudiced the rights of the Appellant. Count 7 of the Indictment alleged that the Accused bore individual criminal responsibility for "sexual slavery and any other form of sexual violence, a crime against humanity punishable under Article 2.g of the Statute."[149]

Criminal Tribunal for the former Yugoslavia, Amended Indictment (Bosnia), para. 6, 8; *Prosecutor v. Krajisnik and Plavšić*, IT-00-39 & 40, Amended Consolidated Indictment, 7 March 2002, para. 5.

[146] AFRC Trial Judgment at para. 77. The Appeals Chamber finds that an Indictment alleging a joint criminal enterprise must indicate the time period over which the enterprise existed. Established case law on the pleading of joint criminal enterprise requires that an indictment must allege the nature of the enterprise, the time period, the persons involved, and the nature of the accused's participation in the joint criminal enterprise. *See Krnojelac* Decision on Form of Second Amended Indictment, para. 16.

[147] Paragraphs 33 to 35 of the Indictment do not provide a time frame, but they should be read together with paragraph 32 of the Indictment which alleges that "[a]t all times relevant to this Indictment," the three accused persons, "through their association with the RUF, acted in concert with CHARLES GHANKAY TAYLOR" (emphasis original).

[148] AFRC Trial Judgment, para. 85.

[149] The Appeals Chamber also notes that sexual slavery was concurrently charged in the Indictment as a war crime under Count 9 which alleges the commission of: "Outrages upon personal dignity, a VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, punishable under Article 3.e of the Statute" (emphasis original).

89. The Trial Chamber found that Count 7 violated the rule against duplicity and dismissed the count in its entirety.[150] It noted that the argument that the Count was bad for duplicity, should have been raised by a Preliminary Motion under Rule 72(B)(ii). Nonetheless, the Trial Chamber considered that it was "not precluded from reviewing in the [Trial Judgment] whether shortcomings in the Form of the Indictment have actually resulted in prejudice to the rights of the Accused."[151] The Trial Chamber was satisfied that the Appellant did not delay raising the objection for tactical advantages, but had merely followed the "Separate and Concurring Opinion" of Justice Sebutinde to the Rule 98 Decision.[152] In Justice Sebutinde's Rule 98 Opinion, she held that Count 7 was duplicitous, duplex and defective and could "prejudice a fair trial of accused persons if uncorrected."[153] Justice Sebutinde was of the opinion that Count 7 was not incurably defective (at the Rule 98 stage), and suggested that it could be cured by an amendment dividing the offences into two separate counts.[154] However, the Trial Chamber indicated that it was not considering the question of duplicity and would instead confine itself to considering the *prima facie* state of the evidence to establish Count 7.[155]

90. In its Judgment, the Trial Chamber revisited Count 7 and endorsed Justice Sebutinde's Rule 98 Opinion that the Count offended the rule against duplicity.[156] It adopted her Rule 98 Opinion that Article 2.g of the Statute "encapsulates five distinct categories of sexual offences . . . each of which is comprised of separate and distinct elements."[157] It held that Count 7 of the Indictment charged the Appellant with two distinct crimes against humanity in one count, namely "sexual slavery" and "any other form of sexual violence."[158]

91. On appeal, the Prosecution first argues that the Trial Chamber committed procedural and legal error by reconsidering earlier interlocutory decisions concerning defects in the form of the Indictment at the final judgment stage without first reopening hearings on the issue.[159] Second, the Prosecution argues that the Trial Chamber committed legal, factual or procedural error in finding

[150] AFRC Trial Judgment, para. 95.
[151] *Ibid* at para. 93.
[152] *Ibid* at para. 93.
[153] Sebutinde Rule 98 Opinion, para. 8.
[154] *Ibid* at para. 9.
[155] Rule 98 Decision, para. 163.
[156] AFRC Trial Judgment, para. 94. *See* Sebutinde Rule 98 Opinion, para. 6.
[157] Sebutinde Rule 98 Opinion, para. 8.
[158] *Ibid* at para. 6.
[159] Prosecution Notice of Appeal, para. 18(i).

that Count 7 was defectively pleaded.[160] In the alternative, the Prosecution argues that even if Count 7 was defectively pleaded, any defects were subsequently cured or did not prejudice the Appellant.[161] The Prosecution requests the Appeals Chamber to reverse the Trial Chamber's decision and to revise the Trial Judgment to enter convictions against Brima, Kamara and Kanu under Count 7 for sexual slavery as well as under Count 9 for the war crime of "Outrages upon Personal Dignity."[162]

92. The issues that arise for determination in this Ground of Appeal are:

(i) whether the Trial Chamber erred in reconsidering the question of duplicity without reopening the issue to the Parties;

(ii) whether Count 7 violates the rule against duplicity;

(iii) if it does, whether the defect has been cured and whether the Trial Chamber erred in its choice of remedy.

93. In respect of the first issue, the Prosecution submits that it was entitled to proceed on the basis that the form of pleading of Count 7 was not an issue because the Trial Chamber had settled issues of defects in the form of the Indictment in earlier interlocutory decisions, none of which challenged the manner in which the Prosecution pleaded Count 7.[163] Furthermore, it submits that it is impermissible for an accused to raise a challenge to the form of the Indictment at the end of a trial.[164]

94. In response, Brima and Kamara submit that the Trial Chamber is empowered to reconsider its earlier decisions approving the Indictment without reopening hearings because the Prosecution had an opportunity in its closing arguments to address Count 7 but chose to do so only in a very cursory manner.[165] They further argue that the Prosecution failed to take advantage of an

[160] *Ibid* at para. 18(ii).
[161] *Ibid* at para. 18(ii).
[162] Prosecution Appeal Brief, para. 531. In its appeal brief the Prosecution notes that multiple convictions under Article 2.g and 3.e for the same conduct would be permissible because each statutory provision involves a materially distinct element not contained in the other. Article 2.g, as a crime against humanity, has *chapeau* elements which are distinct from those of Article 3.e, which constitutes a war crime.
[163] *Ibid* at para. 539.
[164] Prosecution Appeal Brief, para. 543.
[165] Brima Response Brief, para. 103; Kamara Response Brief, 149.

opportunity to amend the Indictment pursuant to Rule 50, as suggested by Justice Sebutinde's Rule 98 Opinion.[166]

95. In respect of the second issue, the Prosecution argues that:

(i) "[t]he rule against duplicity, as it exists in national legal systems, does not, and cannot, apply in the same way in proceedings before international criminal courts;"[167]

(ii) a single count may permissibly charge all violations of a single provision of the Statute;[168]

(iii) that even if sexual slavery and "any other form of sexual violence" constitute separate crimes, "[t]here was no ambiguity as to the legal characterisation of what the Accused were charged with, or the material facts underpinning those charges;"[169]

(iv) that while a formal amendment to the Indictment, as suggested in Justice Sebutinde's Rule 98 Opinion, would have cured Count 7 by recasting it in two separate counts, it "would have been of no practical or substantive consequence whatsoever" because the Defence was in no way prejudiced by the manner in which Count 7 was pleaded.[170]

96. In their respective response briefs, Brima and Kamara argue that Count 7 is entirely unclear as to what crimes were allegedly committed.[171] Kanu submits that he was "severely prejudiced in so far as he was not able to tell precisely which of the two crimes in the Count he should have defended himself against, and that materially affected the conduct of his defence."[172]

97. In respect of the third issue, the Prosecution submits that the Trial Chamber erred by failing to consider whether the defective pleading of Count 7 was subsequently cured by timely, clear, and consistent information.[173] In the alternative, it argues that even if the Appellant were not given

[166] Brima Response Brief, para. 100; Kamara Response Brief, para. 146.
[167] Prosecution Appeal Brief, para. 547.
[168] *Ibid* at para. 553.
[169] *Ibid* at para. 554.
[170] *Ibid* at para. 555.
[171] Brima Response Brief, para. 111; Kamara Response Brief, para. 157.
[172] Kanu Response Brief, para. 6.9.
[173] Prosecution Appeal Brief, para. 565.

timely, clear and consistent information, the appropriate remedy, as stated by Justice Doherty in her Partly Dissenting Opinion[174], would have been to sever the allegation of "any other form of sexual violence" from Count 7, leaving only the allegation of sexual slavery.[175]

98. In response, Brima and Kamara submit that the Trial Chamber's power to cure defects in the Indictment may be used only where the material facts supporting those charges have not been pleaded with sufficient precision.[176] They argue that this power simply allows the Prosecution "to introduce material facts at a later stage in order to give the indictment a sufficient factual basis, and has no relevance to a legal flaw in the wording of the charges."[177] Kanu submits that "the nature of the defect in this instance was such that, short of amending the Indictment, [it] could not be cured" and that the disclosures made by the Prosecution subsequent to the filing of the Indictment actually made his understanding of the charges even less clear.[178]

1. Discussion

99. The Appeals Chamber is of the opinion that the Prosecution's argument that the Trial Chamber reconsidered its prior decision is misconceived. Until its final judgment, the Trial Chamber did not rule on whether Count 7 was defective, even though Justice Sebutinde did point out that the Count was duplicitous in her Rule 98 Opinion.

100. Objections relating to defects in the form of the indictment should normally be raised at the pre-trial stage by way of a preliminary motion.[179] Where issues of defect in the form of an indictment are raised after the trial, it is incumbent on the party to show that its preparation of its case was materially impaired by the defect in the Indictment.

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[174] Doherty Partly Dissenting Opinion. Justice Doherty agreed with the majority's view that the Prosecution did not sufficiently specify the second limb of Count 7 ('any other form of sexual violence'), but she disagreed with the view that if Count 7 is duplicitous, the Trial Chamber must dismiss it in its entirety (para. 3). Justice Doherty opined that the majority's reasoning that Count 7 is "bad for duplicity" is "formalistic and disregard[s] the fundamental issue, which is whether the right of the Accused to be informed promptly and in detail about the nature and the cause of the charges against them has been violated" (para. 2). Justice Doherty did not consider the interests of justice would be served by allowing the accused to invoke their right to quash an indictment after the case has closed without a showing of material prejudice. Furthermore, she noted that the Accused were not only silent on the issue of duplicity throughout the trial, but proceeded to adduce evidence and defend themselves against Count 7 (para. 15). Consequently, Justice Doherty did not consider there to have been a miscarriage of justice in this case and instead of dismissing the count, she would have considered evidence only relating to sexual slavery, not "other forms of sexual violence" (*Ibid*).
[175] Prosecution Appeal Brief, para. 568.
[176] Brima Response Brief, para. 115; Kamara Response Brief, para. 161.
[177] Brima Response Brief, para. 116; Kamara Response Brief, para. 162.
[178] Kanu Response Brief, para. 6.15.
[179] *Kupreškić* Appeal Judgment, para. 79.

101. The rule against duplicity is not about vagueness but about a failure to plead with specificity the offences charged in the Count.

102. The Appeals Chamber agrees with the Trial Chamber that Article 2.g of the Statute provides for five distinct crimes against humanity, each of which is of a sexual nature, among which are "sexual slavery" and "any other form of sexual violence." "Sexual slavery" requires the exercise of rights of ownership over the victim, which is not the case for "other forms of sexual violence." Consequently, Count 7 of the Indictment, which charges the commission of "sexual slavery and any other form of sexual violence," offends the rule against duplicity by charging two offences in the same count. The dispositive question, therefore, is not whether the rule was violated, but what are the consequences. In *Bizimungu*, the ICTR Appeals Chamber stated that "[t]he rule against duplicity generally forbids the charging of two separate offences in a single count, although a single count may charge different means of committing the same offence."[180] In *Naletilić & Martinović* the ICTY Trial Chamber noted that common law jurisdictions developed the rule against duplicity in order to ensure precision and certainty in charging.[181]

103. The Appeals Chamber holds that the rule against duplicity applies to international criminal tribunals such that the charging of two separate offences in a single count renders the count defective, although a single count may charge different means of committing the same offence. Accordingly, Count 7 of the Indictment, which charges the commission of "sexual slavery and any other form of sexual violence," violates the rule against duplicity.

104. The Prosecution urges that upon finding defect in the form of the Indictment, the Appeals Chamber should examine whether the Appellants were materially impaired in the preparation of their defence.

105. Upon its finding that Count 7 violated the rule against duplicity, the Trial Chamber dismissed the count in its entirety. The Trial Chamber's choice of remedy was premised on its finding that any proceedings on the basis of a duplicitous count would render the trial unfair to the Appellants.

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[180] *Bizimungu* Decision on Leave to File Amended Indictment, para. 31 (holding that it would be improper to charge genocide and complicity in genocide in the same count.). *See also Naletilić* Decision on Motion to Amend Indictment (drawing a distinction between a count alleging one offence which involves multiple acts, and a count in which the Prosecutor seeks to include two separate types of offences.).
[181] *Naletilić* Decision on Motion to Amend Indictment, FN 2.

106. The duplicitous pleading of Count 7 placed the Appellants in the position of having to defend two crimes in the same count. The residual nature of the crime of "any other form of sexual violence" requires clarification of the conduct the Prosecution would rely upon to prove the offence.

107. A review of case law on this issue reveals that Courts typically quashed convictions entered on duplicitous counts.[182] According to other case law, a duplicitous count does not necessarily require the conviction to be quashed.[183] Courts have used other remedies which vary, depending on the particular harm to be avoided and the stage at which the threatened harm arises. Some Courts have held that an accused person who has been indicted on the basis of a duplicitous count may nonetheless be properly prosecuted and convicted if either the Prosecutor elects which of the charges in the offending Count he will proceed with, or the Court instructs the jury to agree as to which of the distinct offences the defendant actually committed.[184]

108. In light of the foregoing, the Appeals Chamber considers that the remedies available to the Trial Chamber included:

(i) quashing the count;

(ii) ordering that the Indictment be amended;

(iii) directing the Prosecution to elect to proceed on the basis of one of the two offences in the duplicitous count;

(iv) upon a review of the entire case, determining which of the two offences charged in the count the Appellant had defended fully, having regard to the manner in which the defence case had been conducted;[185] and

(v) refusing to consider evidence of one of the two charges so as to eliminate the duplicity of Count 7.[186]

[182] *See Cotterill v. Lempriere* [1890] L.R. 24 Q.B.D. 634; *R. v. Surrey JJ.* ex p. Witherick [1932] 1 K.B. 450; *R. v. Disney* [1933] 2 K.B. 138. *But see Lansana and Eleven Others v. R.* [1971] 186 ALR S.L.
[183] *R. v. Thompson* [1914] 2 K.B. 99; *R. v. Johnson* [1945] K.B. 419; *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985); *United States v. Sturdivant*, 244 F.3d 71, 79 (2d Cir. 2001).
[184] *United States v. Robinson*, 651 F.2d 1188, 1195 (6th Cir. 1981); *United States v. Ramirez-Martinez*, 273 F.3d 903, 915 (9th Cir. 2001); *United States v. Aguilar*, 756 F.2d 1418, 1422-1423; 1A Charles Wright and Arthur Miller, Federal Practice and Procedure, § 145 (3d ed.).
[185] *R. v. Jones* (1974), 59 Cr. App. R. 120, 126.

Each case is to be considered on its own merits.

109. In the instant case, from the evidence accepted by the Trial Chamber and the findings it had made, it should have chosen the option to proceed on the basis that the offence of sexual slavery had been properly charged in Count 7, return appropriate verdict on that Count in respect of the crime of sexual slavery and struck out the charge of "any other form of sexual violence."

110. Although the Trial Chamber had not chosen that option, no miscarriage of justice has resulted therefrom. It is not necessary for the Appeals Chamber to substitute a conviction for sexual slavery as the Trial Chamber relied upon the evidence of sexual slavery to enter convictions for Count 9 which charged the offence of "outrages upon personal dignity."

E. Kanu's Second Ground of Appeal: Waiver of Indictment Defects

111. In his Second Ground of Appeal, Kanu alleges that the Trial Chamber erred in law in finding him guilty, under Article 6(1) of the Statute of committing three crimes in Freetown and other parts of the Western Area.[187] Due to the Prosecution's failure to plead material facts with the required degree of specificity, the Trial Chamber found the Indictment defective as regards the crimes relating to an amputation carried out near Kissy Old Road and another carried out at Upgun.[188] It nonetheless concluded that Kanu's ability to prepare his defence was not materially impaired, having regard to Kanu's failure to object in a timely manner to evidence being led in respect of these crimes and his cross-examination of witnesses in respect of the same.[189] With respect to the remaining crime of looting vehicles at State House in Freetown, although the Trial Chamber did not expressly find the Indictment defective, it appears that it adopted a similar approach.[190]

112. Kanu submits that the Trial Chamber ought to have dismissed all charges that alleged his personal commission after it established that those counts of the Indictment were defective.[191] In support of this submission he argues that in his Pre-Defence Motion he raised several challenges to the validity of the Indictment including lack of specificity regarding different forms of individual

[186] Doherty Partly Dissenting Opinion, para. 15 (suggesting the consideration of evidence relating only to sexual slavery instead of dismissing the entire count).
[187] Kanu Appeal Brief, para. 2.1.
[188] AFRC Trial Judgment, paras 2053, 2050.
[189] *Ibid* at paras 2051, 2055.
[190] *Ibid* at para. 2057.
[191] Kanu Appeal Brief, para. 2.1.

criminal responsibility and lack of specificity regarding various Counts.[192] He further argues that the Trial Chamber erred in law, in finding that his failure to object to evidence led by the Prosecution, during the course of the trial automatically amounted to a waiver.[193] Such evidence, Kanu argues, could have been relevant for purposes other than establishing individual liability.[194] Thus, according to Kanu, the Trial Chamber ought not to have concluded that his failure to object amounted to waiver "without firstly satisfying itself that the failure by the Defence to challenge the extraneous evidence was a deliberate defence tactic, in which case the Defence would have been held to have taken a gamble to its detriment."[195]

113. In response, the Prosecution submitted that contrary to Kanu's claims, Kanu had not previously challenged the manner in which the Indictment pleaded crimes that alleged his personal commission.[196] Further, in instances where evidence was adduced that tended to show that Kanu personally committed specific crimes, the Prosecution contends that it was clear to Kanu that such evidence would be relied upon to establish his individual responsibility for "committing" crimes.[197] The Prosecution finally submits that in any event, it is Kanu who bears the burden of showing that he was prejudiced by the Trial Chamber's approach and that he has failed to discharge this burden.[198]

Discussion

114. Whether or not the Appellant raised a timely objection at trial will affect the question on appeal whether he was in fact prejudiced by the defective Indictment. Perusing the Record on Appeal and Kanu's "Preliminary Motion On Defects In The Indictment," it is clear that Kanu did not previously complain that the Indictment was defective in respect of his personal commission of the criminal acts alleged. This, therefore being the first time Kanu has raised this complaint, he must show that he was prejudiced.

115. The Appeals Chamber finds no merit in Kanu's Second Ground of Appeal and finds that he has manifestly failed in discharging this burden. Neither in his Appeal Brief nor during oral argument did he say that he had no notice of the crimes he was alleged to have personally

[192] *Ibid* at para. 2.17.
[193] *Ibid* at para. 2.19.
[194] *Ibid* at para. 2.20.
[195] *Ibid* at para. 2.27.
[196] Prosecution Response Brief, para. 2.82.
[197] *Ibid* at para. 2.84.

committed. Further, he neither demonstrated that he was prejudiced, nor that the preparation of his defence was materially impaired by the defect in the Indictment. On the contrary, counsel for Kanu cross-examined witnesses as to specific incidents, and when asked during the appeal hearing why no objection was raised when evidence was being led in respect of the aforementioned crimes, he replied that it was "a question of strategy" at trial.[199]

116. The Appeals Chamber accordingly rejects Kanu's Second Ground.

IV. COMMON ISSUES OF FACT: EVALUATION OF EVIDENCE AND WITNESS CREDIBILITY

A. Brima's Ninth, Tenth and Eleventh Grounds of Appeal: Evaluation of Evidence

1. Brima's Ninth Ground of Appeal

(a) Submissions of the Parties

117. Under the Ninth Ground of Appeal, Brima submits that the Trial Chamber committed an error of fact or law by resolving doubts in the evidence in favour of the Prosecution.[200] In support of this Ground, Brima raises two main arguments. First, that the Trial Chamber failed to address discrepancies between the evidence of witness TF1-184 and pre-trial statements he gave to the Prosecution.[201] Second, that other Prosecution witnesses including TF1-334, TF1-167, TF1-184, had incentives to lie and gave conflicting, contradictory or otherwise inconsistent evidence about certain events.[202]

118. In response, the Prosecution submits that Brima's arguments are vague and imprecise.[203] In particular, it argues that Brima failed to state with precision the reasonable doubt that was resolved in favour of the Prosecution, and how such a doubt was resolved in favour of the Prosecution.[204]

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[198] *Ibid* at para. 2.86.
[199] Transcript, AFRC Appeal Hearing, 14 November 2007, p. 22.
[200] Brima Appeal Brief, para. 168.
[201] *Ibid* at para. 169.
[202] *Ibid* at paras 176-177.
[203] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Response Brief of the Prosecution, 4 October 2007, para. 4.4.
[204] *Ibid* at para. 4.4.

(b) Discussion

119. The thrust of this Ground of Appeal is that it challenges the Trial Chamber's evaluation of the evidence and its findings of fact. Brima has not advanced any arguments in support of his contention that the Trial Chamber erred in law and fact by resolving any reasonable doubt in favour of the Prosecution. His general allegation that witnesses had a motive to lie and that their evidence was inconsistent or contradictory, does not refer to any particular instance of error in the Trial Chamber's analysis of the evidence. On the contrary, the judgment shows that the Trial Chamber carefully considered all the evidence before it, assessed the credibility of the prosecution witnesses including the fact that their evidence was not discredited during cross-examination, and concluded that the witnesses were credible and their evidence reliable.[205] Brima has not demonstrated any error in the Trial Chamber's assessment of the evidence of these witnesses.

120. With respect to the alleged inconsistency between the prior statement and trial testimony of witness TF1-184, the Appeals Chamber reiterates that this is clearly a matter for the Trial Chamber's evaluation. The mere existence of inconsistencies in the testimony of a witness does not undermine the witness's credibility. The Trial Chamber has broad discretion to determine the weight to be given to discrepancies between a witness's testimony and his prior statements. The Appeals Chamber will normally uphold a Trial Chamber's findings on issues of credibility, including its resolution of inconsistent evidence and will only find that an error of fact occurred when it determines that no reasonable tribunal could have made the impugned finding.

121. The same reasoning applies to Brima's submission that there were discrepancies between the testimonies of witnesses TF1-334 and TF1-167 relating to events in Karina.[206] The Appeals Chamber reiterates that it is for the Trial Chamber to determine whether discrepancies discredit a witness's testimony. When faced with competing versions of events, it is the prerogative of the Trial Chamber to determine which one is more credible.[207] In its consideration of witness TF1-184's evidence the Trial Chamber stated that:

> "although the evidence of the witness was unclear at times, in its cross-examination of the witness the Defence raised no *significant* inconsistencies between his evidence in chief and his prior statement to the Prosecution. In addition, the Trial Chamber finds that the

[205] AFRC Trial Judgment, paras 356-371.
[206] Brima Appeal Brief, para. 177.
[207] *Rutaganda* Appeal Judgment, para. 29.

> witness was not shaken on cross-examination and was generally corroborated by other witnesses."[208]

Brima has not demonstrated that the Trial Chamber either committed an error or acted unreasonably in making the above finding.

122. For the foregoing reasons, the Appeals Chamber dismisses Brima's Ninth Ground of Appeal.

2. Brima's Tenth and Eleventh Grounds of Appeal: Failure to Consider the Rivalry Between Brima and Witness TF1-334

123. Under his tenth and eleventh Grounds of Appeal, Brima alleges that the Trial Chamber failed to consider his testimony of the rivalry that existed between himself and Prosecution witness TF1-334 and that this occasioned a miscarriage of justice. Similarly, he submits that out of a total of 146 prosecution and defence witnesses called to testify at the trial, the Trial Chamber disproportionately relied on the evidence of two witnesses namely TF1-334 and TF1-167, and that this occasioned a further miscarriage of justice.

124. In his Appeal Brief filed on 13 September 2007, Brima did not proffer any arguments in support of the above Grounds of Appeal, but opted to associate himself with Kamara's submissions in support of Ground Eight of the latter's Appeal. The Appeals Chamber will therefore consider Grounds Ten and Eleven of Brima's Appeal when it deals with Ground Eight of Kamara's Appeal.

B. Kamara's Eighth Ground of Appeal: Credibility of Prosecution Witnesses

1. Submissions of the Parties

125. Kamara challenges the credibility of Prosecution witnesses TF1-334, TF1-167, TF1-184 and TF1-153 and submits that these witnesses were co-perpetrators of the crimes for which the Appellants were convicted, and therefore the Trial Chamber ought to have approached their evidence with particular caution. In addition, he submits that in return for their testimony before the Trial Chamber, witnesses TF1-334, TF1-167 and TF1-184 received preferential treatment while in detention at Pademba Road prison. Furthermore, according to Kamara, there were unresolved discrepancies in the evidence of the Prosecution witnesses and the Trial Chamber failed to provide a

[208] AFRC Trial Judgment, para. 362.

reasonable explanation why it chose to rely on the evidence of one witness and not the other. He adds that the Trial Chamber should have evaluated the credibility of the Prosecution witnesses in light of the evidence as a whole, and requests the Appeals Chamber to "review the evidence given by witnesses TF1-153, TF1-334, TF1-184 and TF1-167 especially with regard to issues on which the Trial Chamber relied in order to enter a guilty verdict."[209]

126. The Prosecution responds that the Trial Chamber correctly instructed itself on the appropriate legal standards applicable to accomplice evidence.[210] In response to the submission that the Trial Chamber had relied exclusively on certain witnesses, the Prosecution submits that the Trial Chamber had not violated the principle enunciated by the ICTY Appeals Chamber in *Kupreškić et al*. that it must convict in light of the whole trial record.[211] It submits further that the Trial Chamber did address the alleged discrepancies in the testimonies of TF1-334 and TF1-167, and found some to be significant and others not to be so. In its view, Kamara had not established any error in the Trial Chamber's assessment of the credibility of the witnesses in question.[212]

2. Discussion

(a) The Trial Chamber's Approach to Accomplice Evidence

127. The Trial Chamber in paragraph 125 of its Judgment states that "none of these Prosecution witnesses has been charged with any crimes and their evidence cannot, therefore, be described as 'accomplice evidence'."[213] The jurisprudence of the international criminal tribunals demonstrates that a witness facing criminal charges based on the same allegations as the accused may be considered an accomplice under the law. However, there is no requirement that in order to qualify as an accomplice, a witness must have been charged with a specific offence. The Trial Chamber, therefore, erred in finding that the witnesses of the Prosecution were not accomplices simply because they were not charged with any criminal offence.

128. The next issue for the Appeals Chamber's determination is whether the Trial Chamber's error invalidated its decision. If after evaluation of evidence of an accomplice the Trial Chamber comes to the conclusion that the witness is nonetheless credible and his evidence reliable, the Trial Chamber can rely on it to enter a conviction. The Appeals Chamber is of the opinion that in

[209] Kamara Appeal Brief, para. 238.
[210] Prosecution Response Brief, para. 4.41.
[211] *Ibid* at para. 4.57.
[212] Prosecution Response Brief, para. 4.65.

assessing the reliability of accomplice evidence, the main consideration for the Trial Chamber should be whether or not the accomplice has an ulterior motive to testify as he did.

129. Whilst it is safe for a Trial Chamber to look for corroboration in such circumstances, it may convict on the basis of the evidence of a single witness, even an accomplice, provided such evidence is viewed with caution. In considering the credibility of certain Prosecution witnesses, the Trial Chamber noted that:

> "The Defence calls into issue the credibility of certain Prosecution witnesses because these individuals have allegedly been implicated in crimes under the jurisdiction of the court, or in domestic crimes, or that they were informants to the police, or admitted taking drugs. The Brima Defence specifically alleges that Witness George Johnson killed Brima's brother and that this was reason enough for the witness to "attempt to fabricate" evidence against the accused. A witness with a self-interest to serve may seek to inculpate others and exculpate himself, but it does not follow that such a witness is incapable of telling the truth. Hence, the mere suggestion that a witness might be implicated in the commission of crimes is insufficient for the Trial Chamber to discard that witness's testimony." [214]

130. With respect to the specific allegation that certain witnesses might have been induced to testify against the Appellant, the Trial Chamber held that:

> "The Trial Chamber is satisfied that these payments have been made in a transparent way and in accordance with the applicable Practice Direction. Allegations to the contrary are therefore without merit… Accordingly, the Trial Chamber has not given undue weight to these alleged 'incentives' when assessing the credibility of the witnesses in question."[215]

131. The Appeals Chamber is of the opinion that even though the Trial Chamber did not say that prosecution witnesses TF1-334, TF1-184 and TF1-167 (George Johnson) were accomplices, the Trial Chamber was mindful of Kamara's allegations that these witnesses may have been involved in criminal conduct or otherwise have reason to give false testimony.

132. For example, in addressing the issue of the credibility of witness TF1-334, the Trial Chamber noted that "[t]he witness revealed that he had sought and received an assurance from the Office of the Prosecutor that he would not be prosecuted for any crimes he had committed."[216] The Trial Chamber concluded, however, that he was a credible and reliable witness, that his evidence

[213] AFRC Trial Judgment, para. 125.
[214] *Ibid* at paras 124-125.
[215] *Ibid* at paras 128-130.
[216] *Ibid* at para. 358.

was consistent, that it was corroborated by the evidence of other witnesses, and that any discrepancies were minor.[217]

133. Similarly, the Trial Chamber noted that witness TF1-184 "was one of SAJ Musa's closest associates and that he believed that the Accused Brima deliberately killed SAJ Musa at Benguema because he wanted to regain command over AFRC troops."[218] The Trial Chamber concluded that there were no significant inconsistencies in witness TF1-184's evidence, that he was not shaken during cross-examination and that his evidence was corroborated by the evidence of other witnesses.[219] In considering the evidence of witness TF1-167, the Trial Chamber stated that it had "considered the objections raised by the Defence to the credibility and reliability of George Johnson,"[220] and concluded that his evidence was generally credible, and that he presented a truthful demeanour.[221]

134. In effect, the Trial Chamber carried out a detailed and careful analysis of the evidence of all the aforementioned witnesses[222] and looked for corroboration.[223] The Appeals Chamber concludes that even though the Trial Chamber erred in not characterising the evidence of witnesses TF1-334, TF1-184 and TF1-167 as accomplice evidence, basing its decision on the fact that they had not been indicted for their alleged role in the crimes charged against the Appellant,[224] it did, in fact, carefully consider the evidence of each witness and assessed their credibility in light of the totality of the evidence before it.

135. For these reasons, the Appeals Chamber has come to the conclusion that neither Kamara nor Brima has shown that this error invalidates the judgment so as to warrant its intervention.

136. Therefore Ground Ten of Brima's Appeal and Ground Eight of Kamara's Appeal are untenable.

[217] *Ibid* at para. 359.
[218] *Ibid* at para. 362.
[219] *Ibid* at para. 363.
[220] *Ibid* at para. 370.
[221] *Ibid* at para. 370.
[222] *Ibid* at paras 356-371.
[223] *Ibid* at paras 359, 362.
[224] *Ibid* at para. 125.

(b) Evaluation of the Evidence of Prosecution Witnesses

137. Kamara submits that there were discrepancies in the evidence of several prosecution witnesses with respect to events for which the Trial Chamber found him guilty and submits that the Trial Chamber failed to resolve these inconsistencies or to give a reasoned decision why it preferred one account over the other.

138. Kamara states without giving particulars, that there were significant inconsistencies in the testimony of Prosecution witness TF1-153. The Appeals Chamber reiterates that an appellant must make his submissions clearly and logically, and must support allegations of error with precise references to the trial judgment or other material that support his appeal. The Appeals Chamber will not consider submissions which are obscure, contradictory, vague or suffer from formal or other deficiencies.[225]

139. As Kamara has not referred to any particular instance of error in the Trial Chamber's evaluation of the witness' evidence or referred to any error in the Trial Chamber's evaluation of evidence, this argument fails.

140. With respect to the Trial Chamber's finding that Kamara bears individual criminal responsibility under Article 6(3) for the actions of AFRC troops in Kono District, he argues that there were contradictions in the evidence of Prosecution witnesses TF1-334 and TF1-167, in that whilst witness TF1-334 gave evidence that Kamara was the one who promoted Savage, the evidence of witness TF1-167 (George Johnson) was to the effect that Savage was appointed to the position of Lieutenant by Denis Mingo (*a.k.a*. Superman), a senior RUF Commander.

141. The Trial Chamber's conclusion that Kamara exercised effective control over Savage was based on its consideration of all the evidence before it, including evidence that Savage was subordinate to Kamara and reported to him, that Kamara supervised the activities of Savage, and that Kamara was present in Tombodu at the time when that town was under Savage's control.[226] As such, the Trial Chamber's finding that Kamara bears individual criminal responsibility under Article 6(3) for the crimes committed by Savage was not based solely on evidence of who appointed or promoted Savage. Kamara has not demonstrated that the alleged discrepancy in the evidence of Prosecution witnesses TF1-334 and TF1-167 about who appointed or promoted Savage

[225] *Vasiljević* Appeal Judgment, para. 12; *Kunarac*. Appeal Judgment, para. 47; *Kajelijeli* Appeal Judgment, para. 7.
[226] AFRC Trial Judgment, para. 1884.

affected the Trial Chamber's finding that Kamara bears individual criminal responsibility under Article 6(3) for the crimes committed in Kono District.

142. Kamara also submits that the Trial Chamber's finding that he was liable under Article 6(1) for ordering and under Article 6(3) as a superior for the killing of five young girls in Karina, was based on inconsistent testimony of witnesses TF1-334 and TF1-167.[227] Witness TF1-334 testified that he, Bazzy (*i.e.* Kamara), and Bazzy's Chief Security Officer ("CSO") locked five young girls inside a house in Karina and burnt them alive.[228] Witness TF1-167 testified that while in Karina with Kamara and Eddie Williams (*a.k.a.* "MAF"), Eddie Williams went into the house, wrapped people in carpets of the house, drew fuel from a Mercedes Benz and set the house on fire.[229]

143. With respect to the issue of the alleged discrepancy in the evidence of witnesses TF1-334 and TF1-167, the Trial Chamber found in its Judgment:

(i) at paragraph 887, "[i]n the presence of Witness TF1-334, the Appellant Kamara and two other "juntas" locked five young girls into a house and subsequently set it ablaze. The five girls were burnt alive."[230]

(ii) at paragraph 890, "[a] certain Eddie Williams, *a.k.a.* 'Maf,' wrapped an unknown number of people in a carpet inside a house and thereafter set the house on fire. The people were burnt alive. The Appellant Kamara was watching from outside the house, together with witness George Johnson and several personal security guards of the Appellant Kamara."[231]

It may reasonably be inferred from these findings that the Trial Chamber considered these witnesses to have been testifying about two different incidents. Kamara has not shown that the Trial Chamber erred in the above findings.

144. With respect to the killings at Fourah Bay for which Kamara was found liable for aiding and abetting under Article 6(1), he submits that Prosecution witnesses TF1-334 and TF1-184 gave conflicting evidence about whether it was Brima or Kamara who ordered the attack, the person who commanded the troops during the attack, and those who participated in the attack. The Trial

[227] Kamara Appeal Brief, para. 232.
[228] Transcript, TF1-334, 23 May 2005, pp. 65-67.
[229] Transcript, TF1-167, 15 September 2005, pp. 54-56.
[230] AFRC Trial Judgment, para. 887.
[231] *Ibid* at para. 890.

Chamber considered the evidence of witnesses TF1-334, TF1-184 and TF1-167 relating to the attack on Fourah Bay and concluded that:

> "there are discrepancies between the three accounts. Nonetheless, this does not mandate the dismissal of the entire testimony of each witness in relation to the attack on Fourah Bay. The Trial Chamber is of the view that the variations in the three accounts are explicable due to the passage of years since the events in question and the chaotic and stressful atmosphere existing at the relevant time, rather than bias on the part of witnesses George Johnson and TF1-334, as suggested by the Kamara Defence."[232]

The Appeals Chamber agrees with this conclusion.

145. Kamara also argues that the Trial Chamber erred in relying "exclusively" on Prosecution witnesses TF1-334, TF1-184 and TF1-167[233] and submits that the Trial Chamber should have assessed the credibility of these witnesses in light of the entire record of the case and considered whether there was another reasonable explanation of the evidence other than a finding of guilt against him.[234] In Ground Eleven of his Appeal, Brima adopts this aspect of Kamara's submissions and further submits that the Trial Chamber erred in relying disproportionately on two Prosecution witnesses i.e. TF1-334 and TF1-167.

146. A Trial Chamber must look at the totality of the evidence on record in evaluating the credibility of a witness. A party who alleges on appeal that a Trial Chamber has made a finding as to the credibility of a witness without considering the totality of the evidence on record must show clearly that such error occurred.

147. The Appeals Chamber opines there is no bar to the Trial Chamber relying on a limited number of witnesses or even a single witness, provided it took into consideration all the evidence on the record. Kamara and Brima have not demonstrated such error on behalf of the Trial Chamber.

148. Based on all the reasons given above, the Appeals Chamber has come to the conclusion that Ground Eight of Kamara's Appeal as well as Grounds Ten and Eleven of Brima's Grounds of Appeal must fail.

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[232] *Ibid* at para. 924.
[233] Kamara Appeal Brief, para. 230.
[234] *Ibid* at para. 237.

C. Kanu's Third Ground of Appeal: Evaluation of Defence Evidence

1. Submissions of the Parties

149. In Ground Three of his Appeal, Kanu alleges that the Trial Chamber erred in law and fact in its evaluation of the evidence before it. He submits that the Trial Chamber failed to assess objectively the evidence of Defence witnesses as against that of the Prosecution witnesses[235] and generally preferred and gave credit to Defence evidence only "where it coincided with that of the Prosecution or supported an adverse finding to the Defence."[236] He further submits that the Trial Chamber failed to explain adequately discrepancies and internal contradictions in the evidence of Prosecution witnesses especially TF1-334, Gibril Massaquoi and George Johnson, as well as discrepancies between their different accounts.[237]

150. The Prosecution responds that contrary to Kanu's submissions, the Trial Chamber properly evaluated the evidence of both Prosecution and Defence witnesses and "that it did not slavishly accept all the evidence" of the Prosecution witnesses. The Prosecution further submits that the Trial Chamber did explain its evaluation of the evidence and provided reasons for accepting or rejecting the evidence of witnesses.[238]

2. Discussion

151. Kanu's Third Ground of Appeal, as in Grounds Ten and Eleven of Brima's Appeal, and Ground Eight of Kamara's Appeal, challenges the Trial Chamber's evaluation of the evidence and its findings of fact. Kanu cites several instances in the Trial Judgment in support of his submission that the Trial Chamber failed to assess objectively the evidence of Defence witnesses as against that of Prosecution witnesses.[239] However, a review of the Judgment indicates that in arriving at its factual findings and contrary to Kanu's submissions, the Trial Chamber properly evaluated the evidence of both Prosecution and Defence witnesses taking the entire trial record into account.[240] Furthermore, the Trial Chamber gave the reasons why it preferred or rejected certain evidence.[241]

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[235] Kanu Appeal Brief, para. 3.1.
[236] *Ibid* at para. 3.2.
[237] *Ibid* at paras 3.3-3.9.
[238] Prosecution Response Brief, paras 4.31-4.32.
[239] Kanu Appeal Brief, paras 3.2, 3.11-3.13.
[240] *AFRC* Trial Judgment, paras 809, 828, 843, 859, 867, 882, 901, 954, 1200, 1221, 1288, 1336, 1353, 1391, 1405, 1412, 1420.
[241] *Ibid* at paras 356-377.

152. Kanu has not established that the Trial Chamber erred in its evaluation of the evidence of the witnesses or that its evaluation was unreasonable. His submission that the Trial Chamber tended to prefer the evidence of Prosecution witnesses, therefore, lacks merit.

153. With respect to Kanu's submission that the Trial Chamber attached less weight to the evidence of Defence witnesses because that evidence had not been put to the Prosecution witnesses in cross-examination, the Appeals Chamber notes that the Trial Chamber did take into consideration the fact that the Rules of the Special Court do not oblige a party to put its case to a witness.[242] The Trial Chamber considered that it would not be in the interests of justice to set aside the relevant Defence testimony, but rather proceeded to take this factor into account in assessing the weight to be attached to such evidence. The Appeals Chamber opines that the Trial Chamber's approach was in conformity with the Rules, which give it a discretion to apply the rules of evidence which best favour a fair determination of the matter before it.[243]

154. Kanu submits that the Trial Chamber failed to examine thoroughly the evidence of Prosecution witnesses TF1-033, TF1-334 and George Johnson, and to give sufficient reasons why it proceeded to accept their evidence in spite of material omissions and inconsistencies in their separate accounts. The Appeals Chamber reiterates that the Trial Chamber has a discretion to determine the weight to be given to discrepancies between a witness' testimony and his prior statements. It is for the Trial Chamber to determine whether discrepancies discredit a witness' testimony and, when faced with competing versions of events, to determine which one is more credible.

155. With respect to Kanu's submissions regarding Prosecution witness George Johnson, the mere fact that the Trial Chamber found his evidence relating to certain events to be unreliable does not warrant dismissal of his entire testimony. The same reasoning applies to the Appellant's

[242] *Ibid* at paras 132-133. The Trial Chamber found that "[i]n contrast to its ICTY and ICTY counterparts, the Rules of the Special Court do not oblige a Party to put its case to a witness. As claimed by the Prosecution, the Defence did lead evidence in the Defence case which was not put to Prosecution witnesses in cross-examination.… In the circumstances the Trial Chamber considers that it would not be in the interests of justice to set aside the testimony of the relevant Defence witnesses. However, in assessing the weight to be given to such evidence, the Trial Chamber will take into account that the evidence was not put to the Prosecution witnesses, with the result that the Trial Chamber did not have the benefit of observing their reactions." ICTY Rule 90(H)(ii) and ICTR Rule 90(G)(ii) provide that "[i]n the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction to the evidence given by the witness."
[243] Rule 89(B).

submission regarding Prosecution witness TF1-033. The Trial Chamber after evaluating that witness' evidence had concluded that:

> "While the witness appears on occasion to have exaggerated figures and was unclear on dates, he did not fabricate events. The Trial Chamber further found the witness truthful at trial, and is unwilling to conclude that his evidence overall is not credible or reliable."[244]

156. Kanu also submits that Prosecution witness TF1-033 did not mention the stay of the AFRC troops in Mansofinia, and that this was a significant omission on the part of the witness given that Mansofinia was the location where the AFRC troops restructured and reorganised for the advance to Freetown. The Trial Chamber noted that witness TF1-033 testified that AFRC troops were restructured at Yaya instead of at Mansofinia, and that the first stop of the troops after Yaya was Yiffin.[245] The Trial Chamber also observed that witness TF1-334 testified that the first stop of the troops after Mansofinia was at a village called "Yayah" and that witness George Johnson testified that "Yarya" was one of the villages the troops passed through on their way to Mansofinia.[246]

157. The Trial Chamber concluded that the reason for this inconsistency was that witness TF1-033's recollection of the location was mistaken, but that nonetheless his evidence generally corroborated that of witnesses TF1-334 and George Johnson. Furthermore, the Trial Chamber reasoned that its conclusion was supported by the fact that witness TF1-033 had also been confused in relation to the hometown of the Appellant Brima. The Appeals Chamber considers that it was reasonable for the Trial Chamber to arrive at this conclusion. The evidence of the three Prosecution witnesses in question i.e. TF1-033, TF1-334 and George Johnson on the troop restructure generally corroborated each other, and all of them mentioned a village called "Yarya" as the place at which the AFRC stopped either on the journey to Mansofinia, or during the advance to Freetown.[247] The alleged inconsistencies in the witnesses' accounts were therefore not so significant as to warrant a different factual finding by the Trial Chamber.

158. With respect to the evidence of Prosecution witness Gibril Massaquoi, the Trial Chamber observed that there were internal discrepancies in his evidence, as well as discrepancies between his

[244] AFRC Trial Judgment, para. 366.
[245] *Ibid* at para. 584.
[246] *Ibid* at para. 584.
[247] Transcript, TF1-033, 11 July 2005, pp. 13-15; Transcript, TF1-334, 23 May 2005, p. 39; Transcript, George Johnson, 15 September 2005, p. 44.

evidence and that of TF1-184 regarding events at State House.[248] The Trial Chamber nonetheless concluded that it was

> "satisfied that witnesses Gibril Massaquoi and TF1-184 describe the same incident, as their accounts are substantially similar and over six years passed between the events in question and their testimony. It is plausible that the discrepancies between the witnesses' accounts are explicable on the basis that the witnesses arrived at State House at a different point in time and described the incident from their various perspectives."[249]

159. The Appeals Chamber is of the opinion that the Trial Chamber gave a reasonable explanation for the discrepancies in the witness's evidence. Kanu has not demonstrated any reason why the Appeals Chamber should interfere with the Trial Chamber's finding.

160. For the foregoing reasons, Kanu's Third Ground of Appeal fails.

D. Kanu's Fourth Ground of Appeal: Evidence of Accomplice Witnesses

1. Submissions of the Parties

161. Under his Fourth Ground of Appeal, Kanu challenges the Trial Chamber's evaluation of the credibility of Prosecution witnesses TF1-334, TF1-167 (George Johnson), TF1-184, TF1-153 and Gibril Massaquoi. He makes submissions similar to those made by Kamara in Ground Eight of his Appeal and submits that because these witnesses were co-perpetrators of the crimes for which the Appellants were convicted, the Trial Chamber ought to have viewed their evidence with particular caution as has been the practice in the international tribunals, especially where such evidence was uncorroborated. In particular, he submits that the Trial Chamber erred in law by failing to classify these witnesses as accomplices based on the fact that they had not been charged with any crimes.[250]

162. In response, the Prosecution adopts the submissions it made in response to Brima's Tenth and Kamara's Eighth Grounds of Appeal, insofar as they relate to the evidence of accomplice witnesses.[251] The Prosecution maintains that the Trial Chamber had correctly instructed itself on the appropriate legal standards applicable to accomplice evidence.[252]

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[248] AFRC Trial Judgment, paras 907-909.
[249] *Ibid* at para. 910.
[250] Kanu Appeal Brief, para. 4.3.
[251] Prosecution Response Brief, para. 4.37.
[252] *Ibid* at para. 4.41.

2. Discussion

163. In view of the conclusion the Appeals Chamber came to on similar submissions made in respect of Ground Eight of Kamara's Appeal as well as Grounds Ten and Eleven of Brima's Appeal, it is not necessary to discuss these submissions afresh.

164. It is sufficient to state that for the reasons already given in that conclusion, this Ground must also fail.

V. THE PROSECUTION'S APPEAL

A. Prosecution's First and Third Grounds of Appeal: The "Bombali-Freetown Campaign" and Kamara's Alleged Responsibility under Article 6(1) for Crimes Committed in Port Loko District

165. In its First Ground of Appeal, the Prosecution alleges the Trial Chamber made numerous legal and factual errors in failing to find the Appellants individually responsible, pursuant to Article 6(1) of the Statute for planning, instigating, ordering, or otherwise aiding and abetting, and pursuant to Article 6(3), for all crimes committed in Bombali District, Freetown and other parts of the Western Area during the so-called "Bombali-Freetown Campaign."[253] It submits that the "Bombali-Freetown Campaign" constituted a "single planned and systematic campaign" that originated at a planning meeting in Koinadugu District in April or May 1998 and continued in Freetown and the subsequent retreat and regrouping of the AFRC combatants in the Western Area.[254]

166. The Prosecution alleges the Trial Chamber erred in law in that:

(i) The Trial Chamber adopted a compartmentalized or "myopic" approach to the evidence;

(ii) It relied upon direct evidence and discounted circumstantial evidence;

(iii) It failed to consider that a single act could cause multiple crimes;

(iv) It failed to appreciate the legal significance of conduct of the Appellants;

[253] Prosecution Appeal Brief, para. 15.
[254] *Ibid* at paras 16, 19, 22.

(v) It erroneously withheld findings on multiple modes of responsibility under Article 6(1) for each crime; and

(vi) It failed to consider whether the three Appellants bear Article 6(3) responsibility for the crimes for which they were convicted under Article 6(1).

(vii) The Appeals Chamber will consider each of these arguments in turn.

167. The Third Ground of the Prosecution's Appeal alleges both a legal and a factual error on the part of the Trial Chamber in finding that the Prosecution did not adduce any evidence and consequently did not prove that Kamara was individually responsible under Article 6(1) of the Statute for any of the crimes committed in Port Loko District. Most of the arguments presented by the Prosecution concern the Trial Chamber's factual findings in respect of the following crimes that were committed in Port Loko District (hereinafter the "Port Loko District crimes"):

(i) Unlawful killings in Manaarma for which Kamara was found individually responsible under Article 6(3) of the Statute;

(ii) Sexual slavery; and

(iii) Acts of terror and collective punishment in respect of (i) and (ii) above.

168. Grounds One and Three of the Prosecution's Grounds of Appeal address certain legal and factual issues, namely:

(i) that the Trial Chamber erred in law and in fact in not finding the Appellant individually responsible under both Articles 6(1) and 6(3) of the Statute for ***all*** crimes that the Trial Chamber found to have been committed in Bombali District, Freetown and other parts of the Western Area; and

(ii) that it erred in law and in fact in finding that the Prosecution did not adduce any evidence that Kamara committed, ordered, planned, instigated or otherwise aided and abetted any other crimes committed in the Port Loko District and that the Prosecution did not prove any of the modes of individual responsibility against Kamara for the crimes committed in Port Loko District.

169. However, as the Appellants have been convicted and sentenced to terms of imprisonment of fifty (50) years and forty-five (45) years for crimes committed under Article 6(1) or Article 6(3) of

the Statute in Bombali District and in the Western Area, the Appeals Chamber is of the opinion, taking all the circumstances into consideration, particularly having regard to the length of the sentences imposed, that it becomes an academic exercise and also pointless to adjudicate further on minute details raised in Grounds One and Three of the Prosecution's Appeal.

B. Prosecution's Fifth Ground of Appeal: The "Enslavement Crimes" as Acts of Terror and Collective Punishment

1. Trial Chamber Findings

170. The Trial Chamber found all three Appellants guilty of the crime "acts of terrorism" (Count 1 of the Indictment)[255] and guilty of the crime 'collective punishment' (Count 2 of the Indictment).[256] The evidence relied upon by the Trial Chamber in convicting the Appellants excluded evidence relating to the crimes of recruitment of child soldiers; abductions and forced labour and sexual slavery (the three "enslavement crimes"). According to the Trial Chamber, evidence of the three enslavement crimes did not in the particular factual context of the conflict in Sierra Leone satisfy the elements of the crimes of 'acts of terrorism' or 'collective punishments.'[257]

2. Submissions of the Parties

171. In its Fifth Ground of Appeal the Prosecution complains in substance that in the particular factual context of the case the Trial Chamber erred in law in holding that the three enslavement crimes were not acts of terrorism and also were not collective punishments.

3. Discussion

172. The Appeals Chamber is of the opinion that the Prosecution's attempt to search for further acts of terrorism by adding the three enslavement crimes to this list is an unnecessary exercise since the Appellants have already been convicted of acts of terrorism and an adequate sentence has been imposed.

173. The Appeals Chamber further finds the Prosecution's submissions regarding the crime of collective punishments to be imprecise and without merit. The Prosecution failed to demonstrate

[255] AFRC Trial Judgment, paras 1633, 2113, 2117, 2121.
[256] *Ibid* at paras 1634, 2113, 2117, 2121.
[257] *Ibid* at paras 1450 (relating to recruitment of child soldiers); 1454 (relating to abductions and forced labour); 1459 (relating to sexual slavery).

adequately how the Trial Chamber either erred in law, invalidating a decision or erred in fact, occasioning a miscarriage of justice.

174. The Appeals Chamber exercises its discretion not to entertain the Prosecution's Fifth Ground of Appeal and therefore it is dismissed in its entirety.

C. Prosecution's Seventh Ground of Appeal: Forced Marriage

1. The Trial Chamber's Findings and Submissions of the Parties

175. Under its Seventh Ground of Appeal, the Prosecution challenges the Trial Chamber's dismissal of Count 8 of the Indictment, which charged Brima, Kamara and Kanu with the crime of "Other Inhumane Acts" (forced marriage), punishable under Article 2.i of the Statute.

176. In dismissing Count 8 for redundancy, the Trial Chamber found that Article 2.i of the Statute ("Other Inhumane Acts") must be restrictively interpreted to exclude crimes of a sexual nature, because Article 2.g of the Statute, which encompasses "[r]ape, sexual slavery, enforced prostitution, forced pregnancy and *any other form of sexual violence*," exhaustively enumerates sexual crimes.[258] The Trial Chamber found that the Prosecution did not adduce any evidence that forced marriage was a non-sexual crime; that the Prosecution evidence with respect to forced marriages was completely subsumed in the crime of sexual slavery; and that there is no lacuna in the law which would necessitate a separate crime of forced marriage as an "Other Inhumane Act."[259] The Trial Chamber also found that use of the term "wife" by the perpetrator signified an intention to exercise ownership over the victim rather than to assume a marital or quasi-marital status with the victim.[260]

177. The Prosecution argues that a majority of the Trial Chamber (Justice Doherty dissenting) made three distinct errors of law and fact by finding that:

(i) the residual category of crimes against humanity "Other Inhumane Acts" under Article 2.i of the Statute should be confined to acts of a non-sexual nature;[261]

[258] *Ibid* at para. 697 (emphasis added).
[259] *Ibid* at para. 713.
[260] *Ibid* at para. 711.
[261] Prosecution Appeal Brief, para. 590.

(ii) that the evidence adduced by the Prosecution was not capable of establishing the elements of a non-sexual crime of forced marriage independent of the crime of sexual slavery under Article 2.g of the Statute; and

(iii) in dismissing Count 8 (forced marriage as "Other Inhumane Acts") for redundancy on the ground that the evidence adduced by the Prosecution is completely subsumed in the crime of sexual slavery and that there is no lacuna in the law which would necessitate a separate crime of forced marriage as an "Other Inhumane Act."[262]

178. The Prosecution also asserts that forced marriage is distinct from the crime against humanity of sexual slavery as forced marriage "consists of words or other conduct intended to confer a status of marriage by force or threat of force . . . with the intention of conferring the status of marriage."[263] Further, the Prosecution contends that forced marriage essentially involves a "forced conjugal association by the perpetrator over the victim" and is not predominantly sexual as victims of forced marriage need not necessarily be subject to non-consensual sex.[264] It further argues that the imposition of a forced conjugal association is as grave as the other crimes against humanity such as imprisonment, causing great suffering to its victims.[265] Therefore, the Prosecution contends that forced marriage amounts to an "Other Inhumane Act" under Article 2.i of the Statute and requests that the Appeals Chamber enter convictions for all three Appellants under Count 8 for "Other Inhumane Acts."

179. Brima and Kamara argue that the Trial Chamber was correct in dismissing Count 8 for redundancy as the "alleged crimes of forced marriage" are subsumed in the crime of sexual slavery.[266] Furthermore, they assert that even if the Trial Chamber's finding in this regard is incorrect, any alleged crime of forced marriage should have been charged under Article 2.g of the Statute as "any other form of sexual violence," rather than as "Other Inhumane Acts" under Article 2.i of the Statute.[267] In support of this argument, Brima and Kanu submit that the category of "Other Inhumane Acts" under Article 2.i of the Statute only applies to acts of a non-sexual nature.[268] In addition to the specific crimes of a sexual nature listed in Article 2.g, that provision has an in-built

[262] *Ibid* at para. 587.
[263] *Ibid* at para. 612.
[264] *Ibid* at paras 612, 613, 614, 615.
[265] *Ibid* at paras 614, 617, 621.
[266] Brima Response Brief, para. 118; Kamara Response Brief, para. 164. The Appeals Chamber notes that Brima and Kamara have submitted identical responses to this Ground of Appeal.
[267] Brima Response Brief, para. 118; Kamara Response Brief, para. 164.
[268] Brima Response Brief, para. 119; Kamara Response Brief, para. 165.

residual category, "any other form of sexual violence" which includes crimes such as forced marriage.[269] Thus, Article 2.g of the Statute is broad and intended to cover not only crimes which are sexual in a physical sense (such as rape), but also gender-based crimes such as forced marriage. Accordingly, Brima and Kamara urge the Appeals Chamber to dismiss this Ground of the Prosecution's Appeal.

180. Kanu agrees with the Prosecution's submission that the Trial Chamber erred in finding that the offence of "Other Inhumane Acts" must be restrictively interpreted and limited to non-sexual crimes.[270] However, Kanu adds that this legal error does not invalidate the Trial Chamber's dismissal of Count 8 because the evidence led by the Prosecution to prove forced marriage failed to establish any conduct going beyond the elements of sexual slavery.[271]

2. Discussion

181. A preliminary point worthy of note is that the Prosecution may have misled the Trial Chamber by the manner in which forced marriage appeared to have been classified in the Indictment. The Indictment classifies Count 8 "Other Inhumane Acts" along with Counts 6, 7 and 9 under the heading "Sexual Violence." Under this heading in paragraphs 52 to 57, the Indictment alleges acts of forced marriages. This categorisation of forced marriages explain, but does not justify, the classification by the Trial Chamber of forced marriage as "sexual violence." Notwithstanding the manner in which the Prosecution had classified "Forced Marriage" in the Indictment and the submissions made by the Prosecution on this appeal which is inconsistent with such classification, the Appeals Chamber will consider the submissions made as an issue of general importance that may enrich the jurisprudence of international criminal law.

182. The first issue for the Appeals Chamber's determination relates to the scope of "Other Inhumane Acts" under Article 2.i of the Statute. The Trial Chamber concluded that in light of the exhaustive categorisation of sexual crimes under Article 2.g, the offence of "Other Inhumane Acts" must be restrictively interpreted so as to exclude offences of a sexual nature.[272] The Appeals Chamber considers that it is implicit in the Trial Chamber's finding that it considered forced marriage as a sexual crime.

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[269] Brima Response Brief, paras 120, 124-125; Kamara Response Brief, paras 166, 170-171.
[270] Kanu Response Brief, para. 7.11.
[271] *Ibid* at para. 7.18.
[272] AFRC Trial Judgment, para. 697.

183. In order to assess the correctness of the Trial Chamber's finding, regard must be given to the objective of the prohibition of "Other Inhumane Acts" in international criminal law. First introduced under Article 6.c of the Nuremberg Charter, the crime of "Other Inhumane Acts" is intended to be a residual provision so as to punish criminal acts not specifically recognised as crimes against humanity, but which, in context, are of comparable gravity to the listed crimes against humanity.[273] It is therefore inclusive in nature, intended to avoid unduly restricting the Statute's application to crimes against humanity.[274] The prohibition against "Other Inhumane Acts" is now included in a large number of international legal instruments and forms part of customary international law.[275]

184. The jurisprudence of the international tribunals shows that a wide range of criminal acts, including sexual crimes, have been recognised as "Other Inhumane Acts." These include forcible transfer,[276] sexual and physical violence perpetrated upon dead human bodies,[277] other serious physical and mental injury,[278] forced undressing of women and marching them in public,[279] forcing women to perform exercises naked,[280] and forced disappearance, beatings, torture, sexual violence,

[273] *Kupreškić* Trial Judgment, para. 563. The category of "Other Inhumane Act" was included in Article 6.c of the Nuremburg Charter to provide for any loophole left open by other offences not specifically mentioned. It was deliberately designed as a residual category as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive list would merely create opportunities for evasion of the letter of the prohibition. *See also Stakić* Appeal Judgment, para. 315; *Blagojević* Trial Judgment, para. 625; *Rutaganda* Trial Judgment, para. 77; *Kayishema* Trial Judgment, para. 149.

[274] *Blagojević* Trial Judgment, para. 625; *Akayesu* Trial Judgment, para. 585 ("The categories of crimes against humanity are set out in Article 3, this category is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met.").

[275] The crime of "Other Inhumane Acts" has been included in the following international legal instruments: Charter of the International Military Tribunal, Article 6.c; Charter of the International Military Tribunal for the Far East, Article 5.c; Control Council Law No. 10, Article II.c; Statute of the International Criminal Tribunal for the former Yugoslavia, Article 5.i; Statute of the International Criminal Tribunal for Rwanda, Article 3.i; Rome Statute of the International Criminal Court, Article 7.k. The crime of "Other Inhumane Acts" is also referred to in the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind, Article 18.k. *See also Stakić* Appeal Judgment, para. 315; *Blagojević* Trial Judgment; *Galić* Trial Judgment; *Čelebići* Trial Judgment; *Akayesu* Trial Judgment; *Tadić* Trial Judgment.

[275] *See* AFRC Trial Judgment, para. 698 (defining "Other Inhumane Acts" as "1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; 2. The act was of a gravity similar to the acts referred to Articles 2.a to 2.h of the Statute; and 3. The perpetrator was aware of the factual circumstances that established the character of the gravity of the act."). The Trial Chamber's definition mirrors the definition of "Other Inhumane Acts" in the Rome Statute, Elements of Crimes, Article 7.1.k. The *mens rea* for "Other Inhumane Acts" and the *chapeau* elements are not at issue in this Appeal.

[276] *Stakić* Appeal Judgment, para. 317; *Blagojević* Trial Judgment, para. 629; *Krstić* Trial Judgment, para. 523.

[277] *Kajelijeli* Trial Judgment, para. 936; *Niyitegeka* Trial Judgment, para. 465.

[278] *Naletilić* Trial Judgment, para. 271; *Vasiljević* Trial Judgment, para. 239; *Blaškić* Trial Judgment, para. 239; *Tadić* Trial Judgment, paras 730, 737, 744.

[279] *Akayesu* Trial Judgment, para. 697.

[280] *Ibid* at para. 697.

humiliation, harassment, psychological abuse, and confinement in inhumane conditions.[281] Case law at these tribunals further demonstrates that this category has been used to punish a series of violent acts that may vary depending upon the context.[282] In effect, the determination of whether an alleged act qualifies as an "Other Inhumane Act" must be made on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, the personal circumstances of the victims including age, sex, health, and the physical, mental and moral effects of the perpetrator's conduct upon the victims.[283]

185. The Trial Chamber therefore erred in law by finding that "Other Inhumane Acts" under Article 2.i must be restrictively interpreted. A tribunal must take care not to adopt too restrictive an interpretation of the prohibition against "Other Inhumane Acts" which, as stated above, was intended to be a residual provision. At the same time, care must be taken not to make it too embracing as to make a surplusage of what has been expressly provided for, or to render the crime nebulous and incapable of concrete ascertainment. An over-broad interpretation will certainly infringe the rule requiring specificity of criminal prohibitions.

186. Furthermore, the Appeals Chamber sees no reason why the so-called "exhaustive" listing of sexual crimes under Article 2.g of the Statute should foreclose the possibility of charging as "Other Inhumane Acts" crimes which may among others have a sexual or gender component.[284] As an ICTY Trial Chamber has recognised, "[h]owever much care [was] taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wish to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes."[285] The Trial Chamber therefore erred in finding that Article 2.i of the Statute excludes sexual crimes.

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[281] *Kvočka* Trial Judgment, paras 206-209.
[282] *See Kordić* Trial Judgment, para. 800 (finding that conditions varied from camp to camp but detained Muslims were used as human shields and were forced to dig trenches); *Galić* Trial Judgment, para. 599 (finding that there was a coordinated and protracted campaign of sniping, artillery, and mortar attacks upon civilians); *Tadić* Trial Judgment, paras 730, 737, 744 (finding that there were several incidents of assaults upon and beating of prisoners at a camp) and *Niyitegeka* Trial Judgment, paras 462, 465 (finding that the accused was rejoicing when a victim was killed, decapitated, castrated and his skull was pierced with a spike).
[283] *Galić* Trial Judgment para. 153; *Vasiljević* Trial Judgment, para. 235; *Krnojelac* Trial Judgment, para. 131; *Čelebići* Trial Judgment, para. 536; *Kayishema* Trial Judgment, paras 150, 151.
[284] Statute, Article 2.g. *See also* Article 7.g of the ICC Statute which lists "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." In contrast, Articles 3.g and 5.g of the ICTR and ICTY Statutes respectively only provide for 'rape' as a crime against humanity of a sexual nature.
[285] *Blaškić* Trial Judgment, para. 237, *citing with approval* J. Pictet, *Commentary on the 1st Geneva Convention of 12 August 1949*, Geneva, 1952, p. 54. *See also Kayishema* Trial Judgment, para. 149.

(a) The Nature of "Forced Marriage" in the Sierra Leone Conflict and its Distinction from Sexual Slavery

187. The Appeals Chamber recalls the Trial Chamber's findings that the evidence adduced by the Prosecution did not establish the elements of a non-sexual offence of forced marriage independent of the crime of sexual slavery under Article 2.g of the Statute;[286] and that the evidence is completely of the crime of sexual slavery, leaving no lacuna in the law that would necessitate a separate crime of forced marriage as an "Other Inhumane Act."[287]

188. The Trial Chamber defined sexual slavery as the perpetrator's exercising any or all of the powers attaching to the right of ownership over one or more persons by imposing on them a deprivation of liberty, and causing them to engage in one or more acts of a sexual nature.[288] In finding that the evidence of forced marriage was completely of the crime of sexual slavery, the Trial Chamber found that the relationship of the perpetrators to their "wives" was one of ownership, and that the use of the term "wife" was indicative of the perpetrator's intent to exercise ownership rights over the victim.[289] Implicitly, the Trial Chamber found that evidence of forced marriage was predominantly sexual in nature.

189. According to the Prosecution, the element that distinguishes forced marriage from other forms of sexual crimes is a "forced conjugal association by the perpetrator over the victim. It represents forcing a person into the appearance, the veneer of a conduct (*i.e.* marriage), by threat, physical assault or other coercion."[290] The Prosecution adds that while acts of forced marriage may in certain circumstances amount to sexual slavery, in practice they do not always involve the victim

[286] AFRC Trial Judgment, para. 704.
[287] *Ibid* at para. 713. The Trial Chamber held that sexual slavery had the following elements: (i) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, . . . or by imposing on them a similar deprivation of liberty; (ii) the perpetrator caused such person or persons to engage in one or more acts of a sexual nature; (iii) the perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur. AFRC Trial Judgment, para. 708. *See also* Rome Statute, Elements of Crimes, Article 7(1)(k).
[288] AFRC Trial Judgment, para. 708.
[289] *Ibid* at para. 711. In paragraph 697 of the AFRC Trial Judgment, the Trial Chamber found that "[i]n light of the exhaustive category of sexual crimes particularised in Article 2.g of the Statute, the offence of "Other Inhumane Acts," even though residual, must logically be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity."
[290] Prosecution Appeal Brief, para. 614.

being subjected to non-consensual sex or even forced domestic labour.[291] Therefore, the Prosecution contends that forced marriage is not a sexual crime.

190. The trial record contains ample evidence that the perpetrators of forced marriages intended to impose a forced conjugal association upon the victims rather than exercise an ownership interest and that forced marriage is not predominantly a sexual crime. There is substantial evidence in the Trial Judgment to establish that throughout the conflict in Sierra Leone, women and girls were systematically abducted from their homes and communities by troops belonging to the AFRC and compelled to serve as conjugal partners to AFRC soldiers.[292] They were often abducted in circumstances of extreme violence,[293] compelled to move along with the fighting forces from place to place,[294] and coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labour such as cleaning and cooking for the "husband," endure forced pregnancy, and to care for and bring up children of the "marriage."[295] In return, the rebel "husband" was expected to provide food, clothing and protection to his "wife," including protection from rape by other men, acts he did not perform when he used a female for sexual purposes only.[296] As the Trial Chamber found, the relative benefits that victims of forced marriage received from the perpetrators neither signifies consent to the forced conjugal association, nor does it vitiate the criminal nature of the perpetrator's conduct given the environment of violence and coercion in which these events took place.[297]

191. The Trial Chamber findings also demonstrate that these forced conjugal associations were often organised and supervised by members of the AFRC or civilians assigned by them to such tasks.[298] A "wife" was exclusive to a rebel "husband," and any transgression of this exclusivity such as unfaithfulness, was severely punished.[299] A "wife" who did not perform the conjugal duties demanded of her was deemed disloyal and could face serious punishment under the AFRC disciplinary system, including beating and possibly death.[300]

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[291] *Ibid* at para. 613.
[292] AFRC Trial Judgment, paras 711, 1079, 1084, 1088, 1103, 1108, 1121, 1130, 1165.
[293] For example one witness was abducted as a 'wife' moments after her parents were killed in front of her. *See* AFRC Trial Judgment, paras 1078, 1088.
[294] AFRC Trial Judgment, paras 1082, 1083, 1085, 1091, 1096, 1154, 1164, 1165.
[295] *Ibid* at paras 1080, 1081, 1130, 1165.
[296] *Ibid* at paras 1157, 1161. *See also* Doherty Partly Dissenting Opinion, paras 48, 49.
[297] *See* AFRC Trial Judgment, paras 1081, 1092.
[298] *Ibid* at para. 1115.
[299] *Ibid* at paras 1122, 1139, 1161.
[300] *Ibid* at paras 1138, 1141.

192. In addition to the Trial Chamber's findings, other evidence in the trial record shows that the perpetrators intended to impose a forced conjugal association rather than exercise mere ownership over civilian women and girls. In particular, the Appeals Chamber notes the evidence and report of the Prosecution expert Mrs. Zainab Bangura which demonstrates the physical and psychological suffering to which victims of forced marriage were subjected during the civil war in Sierra Leone. According to the Prosecution expert:

> "the most devastating effect on women of the war was the phenomenon called 'bush wife', rebel wife or jungle wife. This was a phenomenon adopted by rebels whereby young girls or women were captured or abducted and forcibly taken as wives . . . The use of the term 'wife' by the perpetrator was deliberate and strategic. The word 'wife' demonstrated a rebel's control over a woman. His psychological manipulations of her feelings rendered her unable to deny him his wishes… By calling a woman 'wife', the man or 'husband' openly staked his claim and she was not allowed to have sex with any other person. If she did, she would be deemed unfaithful and the penalty was severe beating or death.
>
> 'Bush wives' were expected to carry out all the functions of a wife and more . . . [S]he was expected to show undying loyalty to her husband for his protection and reward him with 'love and affection . . . 'Bush wives' were constantly sexually abused, physically battered during and after pregnancies, and psychologically terrorised by their husbands, who thereby demonstrated their control over their wives. Physically, most of these girls experienced miscarriages, and received no medical attention at the time . . . Some now experience diverse medical problems such as severe stomach pains . . . some have had their uterus removed; menstrual cycles are irregular; some were infected with sexually transmitted diseases and others tested HIV positive."[301]

193. In light of all the evidence at trial, Judge Doherty, in her Partly Dissenting Opinion, expressed the view that forced marriage involves "the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim."[302] She further considered that this crime satisfied the elements of "Other Inhumane Acts" because victims were subjected to mental trauma by being labelled as rebel "wives"; further, they were stigmatised and found it difficult to reintegrate into their communities. According to Judge Doherty, forced marriage qualifies as an "Other Inhumane Acts" causing mental and moral suffering, which in the context of the Sierra Leone conflict, is of comparable seriousness to the other crimes against humanity listed in the Statute.[303]

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[301] Sebutinde Separate Concurring Opinion, paras 13, 15, *quoting* Prosecution Expert Report on Forced Marriage.
[302] Doherty Partly Dissenting Opinion, para. 53.
[303] *Ibid* at paras 48, 51 (stating that "[s]erious psychological and moral injury follows forced marriage. Women and girls are forced to associate with and in some cases live together with men whom they may fear or despise. Further, the label 'wife' may stigmatise the victims and lead to their rejection by their families and community, negatively impacting their ability to reintegrate into society and thereby prolonging their mental trauma.").

194. Furthermore, the Appeals Chamber also notes that in their respective Concurring and Partly Dissenting Opinions, both Justice Sebutinde and Justice Doherty make a clear and convincing distinction between forced marriages in a war context and the peacetime practice of "arranged marriages" among certain traditional communities, noting that arranged marriages are not to be equated to or confused with forced marriage during armed conflict.[304] Justice Sebutinde goes further to add, correctly in our view, that while traditionally arranged marriages involving minors violate certain international human rights norms such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), forced marriages which involve the abduction and detention of women and girls and their use for sexual and other purposes is clearly criminal in nature.[305]

195. Based on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with a another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the "husband" and "wife," which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery.

196. In light of the distinctions between forced marriage and sexual slavery, the Appeals Chamber finds that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.

[304] Sebutinde Separate Concurring Opinion, paras 10, 12; Doherty Partly Dissenting Opinion, para. 36.
[305] Sebutinde Separate Concurring Opinion, para. 12.

(b) Does Forced Marriage Satisfy the Elements of "Other Inhumane Acts"?

197. The Prosecution submits that the crime charged under Count 8 is "Other Inhumane Acts," which forms part of customary international law, and therefore, does not violate the principle of *nullum crimen sine lege*.[306] Therefore, the Prosecution submits that the only question on appeal is whether forced marriage satisfies the elements of "Other Inhumane Acts." The Prosecution argues that forced marriage amounts to an "Other Inhumane Act" and that the imposition of a forced conjugal association is as grave as the other crimes against humanity such as imprisonment, causing great suffering to its victims.[307] In particular, the Prosecution argues that the mere fact of forcibly requiring a member of the civilian population to remain in a conjugal association with one of the participants of a widespread or systematic attack directed against the civilian population is at least, of sufficient gravity to make this conduct an "Other Inhumane Act."[308]

198. The Appeals Chamber agrees with the Prosecution that the notion of "Other Inhumane Acts" contained in Article 2.i of the Statute forms part of customary international law.[309] As noted above, it serves as a residual category designed to punish acts or omissions not specifically listed as crimes against humanity provided these acts or omissions meet the following requirements:

(i) inflict great suffering, or serious injury to body or to mental or physical health;

(ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the Statute; and

(iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act. [310]

The acts must also satisfy the general *chapeau* requirements of crimes against humanity.

199. The Appeals Chamber finds that the evidence before the Trial Chamber established that victims of forced marriage endured physical injury by being subjected to repeated acts of rape and sexual violence, forced labour, corporal punishment, and deprivation of liberty. Many were psychologically traumatised by being forced to watch the killing or mutilation of close family

[306] Prosecution Appeal Brief, paras 602-604.
[307] *Ibid* at paras 614, 617, 621.
[308] *Ibid* at para. 624.
[309] *Stakić* Appeal Judgment, para. 315; *Blagojević* Trial Judgment, para. 624.
[310] AFRC Trial Judgment, para. 698.

members, before becoming "wives" to those who committed these atrocities and from being labelled rebel "wives" which resulted in them being ostracised from their communities. In cases where they became pregnant from the forced marriage, both they and their children suffered long-term social stigmatisation.

200. In assessing the gravity of forced marriage in the Sierra Leone conflict, the Appeals Chamber has taken into account the nature of the perpetrators' conduct especially the atmosphere of violence in which victims were abducted and the vulnerability of the women and girls especially those of a very young age. Many of the victims of forced marriage were children themselves. Similarly, the Appeals Chamber has considered the effects of the perpetrators' conduct on the physical, moral, and psychological health of the victims. The Appeals Chamber is firmly of the view that acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence.

201. The Appeals Chamber is also satisfied that in each case, the perpetrators intended to force a conjugal partnership upon the victims, and were aware that their conduct would cause serious suffering or physical, mental or psychological injury to the victims. Considering the systematic and forcible abduction of the victims of forced marriage, and the prevailing environment of coercion and intimidation, the Appeals Chamber finds that the perpetrators of these acts could not have been under any illusion that their conduct was not criminal. This conclusion is fortified by the fact that the acts described as forced marriage may have involved the commission of one or more international crimes such as enslavement, imprisonment, rape, sexual slavery, abduction among others.

202. The Appeals Chamber has carefully given consideration to whether or not it would enter fresh convictions for "Other Inhumane Acts" (forced marriage). The Appeals Chamber is fully aware of the Prosecution's submission that entering such convictions would reflect the full culpability of the Appellant. The Appeals Chamber is also aware that the Trial Chamber relied upon the evidence led in support of sexual slavery and forced marriage to enter convictions against the Appellants for "Outrages upon Personal Dignity" under Count 9 of the Indictment. Since "Outrages upon Personal Dignity" and "Other Inhumane Acts" have materially distinct elements (in the least, the former is a war crime, and the latter a crime against humanity) there is no bar to entering cumulative convictions for both offences on the basis of the same facts. However, in this case the Appeals Chamber is inclined against entering such cumulative convictions. The Appeals Chamber is convinced that society's disapproval of the forceful abduction and use of women and girls as

forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an "Other Inhumane Act" capable of incurring individual criminal responsibility in international law.

203. The Appeals Chamber therefore grants Ground Seven of the Prosecution's Appeal.

D. Prosecution's Eighth Ground of Appeal: Cumulative Convictions under Counts Ten and Eleven

204. The Prosecution argues that the Trial Chamber erred in deciding not to consider mutilations under Count 11 as well as under Count 10 because considering mutilations and beatings and ill-treatment under the same Count would have resulted in a duplicitous charge.[311] The Prosecution submits that the convictions of the accused for mutilations as a war crime fail to recognise that acts of mutilation were also crimes against humanity, as they occurred as part of a widespread or systematic attack against the civilian population.[312] The Prosecution further submits that mutilations, and acts of physical violence other than mutilations, are not separate crimes, but are different ways of committing the war crime of violence to life, health and physical or mental well-being of persons, as well as the crime against humanity of "Other Inhumane Acts." Therefore, the Prosecution argues that Counts 10 and 11 were not defectively pleaded because both forms of physical violence may properly be alleged in both counts without resulting in a duplicitous charge.[313]

205. As discussed above, the rule against duplicity prohibits the charging of two separate offences in the same count.[314] However, the Appeals Chamber notes that Count 11 charged only the offence of "Other Inhumane Acts" as a crime against humanity, which was supported by material

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[311] *Ibid* at para. 726; Prosecution Appeal Brief, para. 653. With respect to physical violence, the Indictment alleges that:

> Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation, **a VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a of the Statute;
>
> In addition, or in the alternative:
>
> Count 11: Other inhumane acts, **a CRIME AGAINST HUMANITY**, punishable under Article 2.i. of the Statute.

In the Judgment the Trial Chamber notes that the paragraphs preceding Counts 10 and 11 allege that the acts of physical violence included mutilations (paras 59, 61-64) and beatings and ill-treatment (para. 60).

[312] Prosecution Appeal Brief, para. 652.

[313] *Ibid* at paras 660, 663.

facts alleging mutilations as well as beatings and ill-treatment. Thus, Count 11 on its face is not duplicitous. The Appeals Chamber also notes the distinction between charging conduct and charging offences. Article 2.i is a residual category which encompasses various forms of conduct. However, it is a single offence. Therefore, the Appeals Chamber finds that alleging multiple forms of conduct in the same count was not duplicitous because Count 11 only charged one offence, namely "Other Inhumane Acts."[315] It follows that Count 11 would not have been duplicitous had the Trial Chamber considered evidence of both mutilations and beatings and ill-treatment.

206. However, the Appeals Chamber finds that the Trial Chamber did not err in considering mutilations only under Count 10. The Appeals Chamber notes that Count 10, which alleges "violence to life, health and physical or mental well-being of persons, in particular mutilations," is clearly supported by the paragraphs alleging mutilations. The allegations of beatings and ill-treatment could not have been used to support Count 10. The Indictment would therefore have been much clearer had the Prosecution limited the factual allegations in support of Count 10 to mutilations. Furthermore, the Prosecution's intention to rely on acts of mutilation in support of Count 11 would have been much clearer had it separated the facts supporting this Count from those supporting Count 10. Consequently, the Prosecution's combination of the material facts that support Counts 10 and 11 created a degree of ambiguity in the Indictment. In light of this ambiguity, it was within the discretion of the Trial Chamber to consider evidence of mutilations solely under Count 10. Thus, the Appeals Chamber rejects the Prosecution's submission that the Trial Chamber erred in failing to consider evidence of mutilations under Count 11 as well as under Count 10. Ground Eight of the Prosecution's Appeal is therefore dismissed.

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[314] *See supra*, section III.D concerning the Prosecution's Sixth Ground of Appeal regarding the Trial Chamber's finding of duplicity in Count 7.

[315] The Appeals Chamber notes that in alleging multiple forms of conduct in the same count, Count 11 of this Indictment is in keeping with the construction of counts in the Indictments before the ICTY. A review of indictments before the ICTY reveals that charging multiple forms of conduct in the same count which alleges the commission of the single offence of "Other Inhumane Acts" is an accepted practice. Count 2 of the Indictment in *Kvočka et al.*, which charged "Other Inhumane Acts," alleged murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement of persons. *Prosecutor v. Kvočka et al.*, IT-98-30/1, Amended Indictment, 26 October 2000. In addition, the factual allegations supporting Count 2 also supported Counts 1 and 3 which respectively charged persecutions and the war crime of outrages upon personal dignity. *Ibid*. The *Tadić* and *Kupreškić* Indictments similarly alleged multiple forms of conduct in the same Count which charged "Other Inhumane Acts." *Prosecutor v. Tadić*, IT-94-1, Second Amended Indictment, 14 December 1995; *Prosecutor v. Kupreškić* , IT-95-15, First Amended Indictment, 9 February 1998. Furthermore, the *Tadic* and *Kupreškić* Indictments also support multiple counts with the same set of factual allegations. *Ibid*. The accused persons in these cases did not raise objections to the manner in which the Prosecution had pleaded "Other Inhumane Acts" and the Trial and Appeals Chambers did not find that this manner of pleading was improper.

E. Prosecution's Ninth Ground of Appeal: Cumulative Convictions

207. In its Ninth Ground of Appeal, the Prosecution argues that the Trial Chamber incorrectly stated and applied the law when it held that:

> "Where both Article 6(1) and Article 6(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, it would constitute a legal error invalidating a judgement to enter a concurrent conviction under both provisions. Where a Trial Chamber enters a conviction on the basis of Article 6(1) only, an accused's superior position may be considered as an aggravating factor in sentencing."[316]

208. The Prosecution's argument on this Ground is twofold. First, the Prosecution argues that the Trial Chamber erred in law by precluding itself, within its discretion, from entering a conviction under *either* Article 6(1) *or* Article 6(3) and then taking the other form of culpability into account during sentencing. Second, it argues that the Trial Chamber erred in law by failing to recognize that the bar on concurrent convictions under Articles 6(1) and 6(3) only applies when the convictions are *based on the same facts*. The Prosecution submits that the Trial Chamber should have entered convictions under Articles 6(1) and 6(3) where they were based on different facts, even though they were pleaded in the same Count.[317]

209. If the Prosecution's second argument is accepted, the Prosecution proposes a lengthy set of additional convictions under Article 6(3) for criminal acts for which the Trial Judgment found the Appellants were responsible but did not enter convictions.[318] In summary, the Prosecution contends that, where multiple crimes are alleged within the same Count, the Trial Chamber should have examined each crime to determine whether the Appellants were guilty under Article 6(1), Article 6(3), or both. Only after doing so, could the Trial Chamber conclude whether to enter a conviction for specific crimes under Article 6(1) or Article 6(3), and whether to consider the alternative mode of responsibility during sentencing.

210. Brima and Kamara—in nearly identical briefs in the relevant part—respond that "even though the contemplated Article 6(3) convictions might not have been reflected in the Trial Chamber's Disposition, they were nonetheless, considered for sentencing purposes and reflect in the . . . global sentence imposed" as evidenced by the Trial Chamber's statement that the sentences

[316] AFRC Trial Judgment, para. 800.
[317] Prosecution Appeal Brief, paras 688-701.
[318] According to the Prosecution, the Trial Chamber should not have entered a conviction under Article 6(1) or under Article 6(3) for the conduct listed in Appendix E to the Prosecution Appeal Brief.

account "for the crimes for which [the accused are] responsible under Article 6(3)." Kanu similarly responds that the Sentencing Judgment adequately accounted for the Trial Chamber's finding of his Article 6(3) responsibility by considering it as an aggravating circumstance in the determination of his sentence.[319] Consequently, according to each Appellant, it is clear that the Trial Chamber considered their Article 6(3) criminal responsibility for sentencing purposes, even if, in the words of Brima and Kamara, "it was not reflected in the Trial Chamber's Disposition."[320] Kanu further argues that a conviction should be entered under Article 6(1) alone if either:

(i) Article 6(1) and 6(3) responsibility are proved for different acts alleged under a single Count; or

(ii) Article 6(1) and 6(3) responsibility are proved for the same acts alleged under different Counts.[321]

211. The question of law posed by the Prosecution in this Ground is whether the principle against cumulative convictions bars a Trial Chamber from entering a compound conviction under both Articles 6(1) and 6(3) for different criminal conduct charged under the same Count of the Indictment. All parties look to a survey of the relevant case law in *Prosecutor v. Orić* for guidance.[322] The Prosecution argues that the analysis in *Orić* only reaches to instances pertaining to alternative or cumulative modes of responsibility with regard to "the same principal crime on basically the same facts."[323] Kanu argues that the "consensus" opinion in the case law, including *Orić*, is that the Trial Chambers act within their discretion to determine whether to enter a conviction under Article 6(1) or 6(3) "as long as the ultimate penalty reflects the overall culpability of the Accused so that it is both just and appropriate."[324]

212. Brima and Kamara argue that the only difference between the present case and *Orić* is that in *Orić*, "the counts were different and the facts the same, but in the present case the counts are the same the facts are different."[325] Moreover, Kanu concedes that none of the case law to date "relat[es] to cumulative convictions on the same Count under Article 6(1) and Article 6(3) ***based on different facts***. All the cases on the point deal with the issue in the context of cumulative

[319] Brima Response Brief, para. 134; Kamara Response Brief, para. 180.
[320] Kanu Response Brief, para. 9.7.
[321] *Ibid* at para. 135-136; Kamara Response Brief, paras 181-182.
[322] *Orić* Trial Judgment, paras 342-343.
[323] Prosecution Appeal Brief, para. 701.
[324] Kanu Response Brief, para. 9.11.

convictions based on the same facts."[326] This is true, in fact, because the problem of cumulative or concurrent convictions only arises in instances of cumulative charging: a practice in international criminal tribunals whereby the Prosecution may allege multiple crimes for the same underlying conduct.[327] The problem of impermissibly cumulative or concurrent convictions does not arise when the alleged crimes are not based upon the same criminal conduct.[328]

213. In paragraph 800, the Trial Chamber attempted to address the problem of cumulative convictions to ensure that no factors were double-counted toward the sentence of the accused. The bar on double-counting requires that only those factors which have been proven beyond a reasonable doubt may be used to increase the sentence of an accused,[329] and that no factor taken into account as an aspect of the gravity of the crime may be additionally taken into account as a separate aggravating circumstance.[330] In summarizing the relevant rule against concurrent convictions under Articles 6(1) and 6(3), the Trial Chamber relied on paragraph 91 of the *Blaškić* Appeals Judgment, which states:

> "The Appeals Chamber considers that the provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing."

214. Read in isolation, this excerpt from the *Blaškić* Appeals Judgment would indicate that a compound conviction could not be entered for multiple charges in a single Count. But the following paragraph in *Blaškić* clarified that the holding there is limited to multiple convictions pertaining to

[325] Brima Response, para. 138; Kamara Response Brief, para. 184.
[326] Kanu Response Brief, para. 9.19.
[327] The Practice is allowed in light of the fact that, prior to the presentation of all the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven, if any. *See Galic* Appeal Judgment, para. 161; *Čelebići* Appeal Judgment, para. 400; *Kupreškić* Appeal Judgment, para. 385; *Kunarac* Appeal Judgment, para. 167; *Naletilić* Appeal Judgment, para. 103; *Kayishema* Trial Judgment, para. 627; *Akayesu* Trial Judgment, para. 468.
[328] *Galić* Appeal Judgment, para. 167. Unlike the present case, Galić was convicted of murder as a crime against humanity under two separate counts, one based on numerous incidents of sniping, another based on instances of shelling. Galić's arguments that these convictions were cumulative were dismissed on the grounds that they were based on separate facts. It is clear to the Appeals Chamber that the same conclusion would have been reached if the sniping and shelling had been charged in the same count.
[329] *Čelebići* Appeal Judgment, para. 763.
[330] *Deronjić* Sentencing Appeal Judgment, para. 106.

the same underlying facts: "concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts ***based on the same facts***, as reflected in the Disposition of the Trial Judgement, constitutes a legal error invalidating the Trial Judgment in this regard."[331] In light of the practice at international criminal courts of charging multiple instances of an offence within a single Count,[332] no identifiable legal principle should prevent compound convictions for multiple instances of the same offence charged in a single Count, when multiple convictions would be allowed if multiple instances of the same offence at issue were charged in separate Counts.

215. The Appeals Chamber finds that the Trial Chamber was satisfied that the legal requirements for conviction under Article 6(3) were met in several instances, but that the Trial Chamber did not enter convictions for those crimes. This constitutes an error of law. Trial Chambers do not have discretion to decline to enter convictions for crimes once they have been proven beyond reasonable doubt and they are not impermissibly cumulative. Instead, when the accused is charged for multiple instances of an offence under a single Count pursuant to both Articles 6(1) and 6(3), and one or more is proved beyond a reasonable doubt for each mode of responsibility, then a compound conviction should be entered against the accused,[333] and the Trial Chamber must take into account all of the convictions and the fact that both types of responsibility were proved in its consideration of sentence.[334] As the jurisprudence of the international criminal tribunals shows, "multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."[335]

216. Although the Trial Chamber erred in failing to enter convictions on the Appellants where it had found that the legal requirements for entering convictions under Article 6(3) have been met, in this case no useful purpose will be served by the Appeals Chamber now entering convictions on the

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[331] *Blaškić* Appeal Judgment, para. 92 (emphasis added). *See also Jokić* Sentencing Appeal Judgment, para. 24 (finding that the rule applies to concurrent convictions "in relation to the same counts based on the same facts.").
[332] *See Stanković* Form of the Indictment Decision ("Within the limits of the rules governing indictments, the Prosecution may choose between putting forth multiple detailed counts, or fewer counts combining specific allegations. This is evident from the Prosecution's practice at this Tribunal"); *Čelebići* Appeal Judgment, para. 400.
[333] This is the practice when, for example, an accused is convicted for personally committing some instances of a crime and aiding and abetting other instances of the same substantive crime charged within a single Count. *See Limaj* Trial Judgment, para. 741 (finding the Accused Haradin Bala guilty, *inter alia*, of "Count 6: Cruel treatment, a violation of the laws or customs of war, under Article 3 of the Statute, for having personally mistreated detainees L04, L10 and L12, and aided another episode of mistreatment of L04, and for his personal role in the maintenance and enforcement of inhumane conditions of detention in the Llapushnik/Lapusnik prison camp.").
[334] *See Naletilić* Trial Judgment, paras 627-628 (finding *Martinović* responsible under Article 7.1 for some instances of plunder, and responsible under Article 7.3 for separate instances of plunder, all charged under the same Count) *aff'd Naletilić* Appeal Judgment, paras 583-586.
[335] *Naletilić* Appeal Judgment, para. 585, *citing Kunarac* Appeal Judgment, para. 169.

basis of such findings, made by the Trial Chamber, having regard to the adequate global sentence imposed on each Appellant.

VI. BRIMA'S APPEAL

A. Brima's First Ground of Appeal: Equality of Arms

217. In his First Ground of Appeal, Brima alleges that the Trial Chamber erred in law and in fact in failing to ensure the equality of arms between the Prosecution and Defence, which "denied or substantially impaired [his] right . . . to a fair trial" and resulted in "a miscarriage of justice."[336]

1. Submissions of the Parties

218. Brima submits that the principle of equality of arms is a core element of the right to a fair trial;[337] that while equality of arms does not guarantee an equality of resources, there must at least be an approximate equality in terms of resources.[338] Brima complains that the Trial Chamber denied him "adequate time and resources" necessary to present his case.[339]

219. In response, the Prosecution contends that Brima's Ground of Appeal consists almost entirely of a discussion of general legal principles relating to the concept of equality of arms. Brima does not make any statement on the particular circumstances of his own case, except for general complaint contained in paragraph 81 of his Appeal Brief.[340] The Prosecution further states that during the trial, Brima never filed any written request seeking additional time or resources, and that he cannot now place on the Prosecution the burden of establishing that he did, in fact, have adequate time and resources.[341]

2. Discussion

220. The Statute and Rules provide for an accused's right to a fair trial.[342] In particular, Article 17(4) of the Statute requires that an accused has "adequate time and facilities for the preparation of

[336] Brima Appeal Brief, para. 71.
[337] *Ibid* at para. 72.
[338] *Ibid* at para. 73; Rule 45(B)(iii) of the Rules.
[339] Brima Appeal Brief, para. 81.
[340] Prosecution Response, para. 2.2.
[341] *Ibid* at para. 2.2.
[342] *See* Article 17 of the Statute; Rule 26*bis* of the Rules.

his or her defence and to communicate with counsel of his or her own choosing."[343] Equality of arms is a core element of the right to a fair trial.

221. Additional legal provisions relate to allocation of resources and facilities to the accused. Rule 45 directs the Registrar to establish, maintain and develop a Defence Office "for the purpose of ensuring the rights of suspects and accused [persons]." The Defence Office has the responsibility to, *inter alia*, provide "adequate facilities for counsel in the preparation of the defence."[344] The *Directive on the Assignment of Counsel* requires that reasonable facilities and equipment be provided to the Defence team.[345]

222. The Appeals Chamber notes the submission in paragraph 81 of Brima's Appeal Brief that Brima's fair trial right "was substantially and seriously compromised and impaired without the adequate time and resources needed . . . to conduct investigations that were vital to the presentation" of his case.[346] Brima, however, fails to substantiate his assertion with any specific claim as to how greater resources would have put him on more level footing, or what investigations were not undertaken due to the purported lack of time or resources. Nowhere in his Appeal Brief does he expressly identify the specific rights or entitlements that he required at the pre-trial or trial stage but which were unavailable to him with the effect that his right to a fair trial was violated.

223. The Appellant Brima is required to set out his Ground of Appeal and supporting arguments clearly and exhaustively. That has not been done in this case.

224. Brima's First Ground of Appeal is therefore dismissed.

[343] Article 17(4)(b) of the Statute.
[344] Rule 45(b)(iii) of the Rules.
[345] Directive on the Assignment of Counsel, 3 October 2003, Article 26.
[346] Brima Appeal Brief, para. 81.

B. Brima's Fourth and Sixth Grounds of Appeal: Superior Responsibility for Crimes Committed in Bombali, Freetown and Other Parts of the Western Area

225. Brima's Fourth and Sixth Grounds of Appeal, respectively, read as follows:

(i) "The Trial Chamber erred in fact and/or law by finding the Accused Brima was responsible under Article 6(3) for the crimes committed by his subordinates in Bombali District between 1 May 1998 and 30 November 1998 in which he did not directly participate resulting in a miscarriage of justice."[347]

(ii) There is an "error in law and/or fact due to the Trial Chamber's finding that the Accused Brima is liable as a superior under Article 6(3) for crimes committed in Freetown and other parts of the Western Area during the relevant indictment period thereby occasioning a miscarriage of justice. The Trial Chamber erroneously relied on the evidence of the prosecution witnesses TF1-334, TF1-167, TF1-184 and the prosecution Military expert witness at the expense of several Defence Alibi witnesses and the Defence military expert."[348]

226. Both Grounds complain that the Trial Chamber erred in law and/or fact in finding that the Appellant Brima is liable as a superior under Article 6(3) for crimes committed by his subordinates in Bombali District (Ground Four) and in Freetown and other parts of the Western Area (Ground Six) during the period covered in the Indictment. Both Grounds of Appeal are grossly defective because they do not give particulars of the errors alleged.

227. In failing to state particulars in his Grounds of Appeal, Brima's submissions are unacceptable, diffused and wide-ranging, complaining of the evaluation of evidence of witnesses by the Trial Chamber and what could be regarded as a profuse, but unnecessary, statement of general principles of law relating to superior responsibility, at the end of which the Appellant Brima did not pinpoint in respect of which finding and in which particular regard the Trial Chamber had erred in fact and or in law.

228. Most of the submissions in respect of Ground Six were mere assertions of fact which properly ought to have been made before the Trial Chamber.

[347] *Ibid* at para. 84.
[348] *Ibid* at para. 153.

229. The Appeals Chamber in perusing the Judgment of the Trial Chamber finds that the Trial Chamber had made appropriate legal and factual findings upon which it based its conclusion that Brima was responsible as a superior under Article 6(3). We are of the opinion that nothing useful has been urged in this Appeal to make us come to the conclusion that the Trial Chamber was in error.

230. For these reasons Grounds Four and Six of Brima's Grounds of Appeal must fail.

C. Brima's Fifth Ground of Appeal: Article 6(1) Responsibility for Murder and Extermination in Bombali District

231. In respect of Brima's Fifth Ground of Appeal, the Appeals Chamber repeats its opinion in regard to Grounds Four and Six, as Ground Five of Brima's Appeal has the same defects as those other two Grounds.

232. For the reasons stated in respect of those Grounds, Ground Five of Brima's Appeal must also fail.

VII. KAMARA'S APPEAL

A. Kamara's First Ground of Appeal: Ordering Murder of Five Civilians in Karina

233. In his First Ground of Appeal, Kamara submits that the "Trial Chamber erred in law and or fact in paragraphs 1915 and 2117 in finding Kamara responsible/guilty under Article 6(1) for *ordering* the unlawful killing of five civilians in Karina in the Bombali District pursuant to *Counts 3, 4 and 5* of the Indictment, thereby invalidating the Trial judgment and leading to a miscarriage of justice."[349]

1. Submissions of the Parties

234. Kamara submits that the evidence of Prosecution witnesses TF1-334 and Junior Johnson, upon which the Trial Chamber relied in finding him guilty of ordering murder, is both contradictory and unreliable. He argues that these witnesses gave contradictory evidence of his exact whereabouts at the time of the killings, the location of the killings, and the identity of the individual who ordered the killings. He further argues that in view of these contradictions, the Prosecution failed to prove

[349] Kamara Appeal Brief, para. 77.

liability beyond reasonable doubt and that the Trial Chamber's failure to exclude such evidence occasioned a miscarriage of justice.[350] He contends further that because of the status of witness TF1-334 as a co-perpetrator, the Trial Chamber erred in law in not cautioning itself as to how his testimony should be evaluated.

235. The Prosecution responds that the "Trial Chamber was duly mindful of the concerns of the Defence in this regard and had correctly instructed itself on the appropriate legal standards."[351]

2. Discussion

236. Kamara's First Ground raised two issues relating to:

(i) Contradiction in the evidence of Prosecution witnesses; and

(ii) Assessment of evidence of accomplice.

237. The Appeals Chamber has earlier in this Judgment pronounced on these two issues and there is no reason to repeat what it said already.[352]

238. The Appeals Chamber will not disturb the Trial Chamber's reliance on the testimony of witness TF1-334. Having heard the testimony of witness TF1-334, the Trial Chamber is in a far better position than the Appeals Chamber to decide whether his alleged participation in the commission of crimes affects his credibility and the reliability of his testimony. The Appeals Chamber finds that Kamara failed to demonstrate that a reasonable tribunal could not have relied on the evidence of the unlawful killings in Karina. This Ground of Appeal therefore fails.

B. Kamara's Second, Third and Fourth Grounds of Appeal: Planning Crimes in Bombali District and Other Parts of the Western Area

239. The Appeals Chamber has considered Kamara's Grounds Two, Three and Four where the substance of complaint is that the Trial Chamber erred in fact in finding that Kamara planned the crimes alleged in Counts 9, 12 and 13. Having scrutinised the Record on Appeal the Appeals Chamber concludes that the Grounds of Appeal were misconceived. The Trial Chamber in its findings had not found that Kamara planned the crimes set out in Counts 9, 12 and 13. However, the

[350] *Ibid* at paras 99, 101.
[351] Prosecution Response Brief, para. 4.41.
[352] *See supra* paras 127-128, 153.

Appeals Chamber has noted that the Trial Chamber in its Disposition had mistakenly stated that Kamara was guilty of the crimes in Counts 9, 12 and 13 pursuant to Article 6(1) of the Statute when it should have been Article 6(3).

240. Accordingly, the Appeals Chamber revises the Trial Chamber's Disposition by substituting Article 6(3) for Article 6(1) in respect of Counts 9, 12 and 13.

C. Kamara's Fifth and Sixth Grounds of Appeal: Aiding and Abetting Crimes in Freetown and the Western Area

241. Kamara contends that the Trial Chamber erred in law and in fact by finding him guilty under Article 6(1) for aiding and abetting the mutilation of civilians in Freetown and other parts of the Western Area as well as the killing of civilians at Fourah Bay.[353] In particular, he argues that the Trial Chamber erroneously "applied a wider standard of liability instead of the stricter standard to find the Appellant guilty as an aider and abettor based on its analysis of the *mens rea* of aiding and abetting."[354] He submits that the Trial Chamber was required to find that he was aware that his acts assisted the specific crime committed by the principal perpetrator and that he was aware of the essential elements of that crime.[355]

1. Errors of Law

242. In discussing the *mens rea* for aiding and abetting, the Trial Chamber stated:

> "The *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed."[356]

243. The Appeals Chamber finds that the Trial Chamber was correct in its analysis. The Appeals Chamber of the ICTY in both *Blaškić* and *Simić* found that it was not necessary to prove that the aider and abettor knew the precise crime that was intended or actually committed by the principal

[353] Kamara Appeal Brief, para. 156.
[354] *Ibid* at para. 165.
[355] *Ibid* at para. 166.
[356] AFRC Trial Judgment, para. 776.

perpetrator.[357] In both cases the ICTY Appeals Chamber held further that liability for aiding and abetting requires proof that the accused knew that one of a number of crimes would probably be committed, that one of those crimes was in fact committed, and that the accused was aware that his conduct assisted the commission of that crime.[358] The Appeals Chamber endorses this principle.

244. Kamara also alleges that the Trial Chamber erred in law in failing to require that "the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal."[359] The *Aleksovski*, *Krnojelac* and *Brđanin* Appeals Chambers held that the aider and abetter must be aware of the essential elements of the crime which was ultimately committed by the principal.[360]

245. In the present case, the Trial Judgment did not explicitly refer to the "essential elements" requirement, but instead limited its statement of the law to whether the accused knew or was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator.[361] The Trial Chamber found that Kamara was aware of the substantial likelihood that, as deputy commander of the AFRC troops, his presence would provide moral support and assist the commission of killings in the Fourah Bay area and killing and mutilations during "Operation Cut Hand" in Freetown.[362] Kamara was present during the attacks at Fourah Bay[363] and led a mission to loot machetes for "Operation Cut Hand" with full knowledge of the purpose for which the weapons were to be used.[364] The Trial Chamber was therefore correct to conclude that Kamara was aware of the intention of the perpetrators to mutilate people.[365]

246. In determining that Kamara was responsible for aiding and abetting the attacks at Fourah Bay, the Trial Chamber found that there was evidence that the Appellant Kamara participated in the attack on Fourah Bay in which civilians were killed and houses burnt.

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[357] *Simić* Appeal Judgment, para. 86; *Blaškić* Appeal Judgment, para. 50.
[358] *Ibid* at para. 50.
[359] Kamara Appeal Brief, para. 166.
[360] *Aleksosvski* Appeal Judgment, para. 162; *Krnojelac* Appeal Judgment, para. 51; *Brđanin* Appeal Judgment, para. 484.
[361] AFRC Trial Judgment, para. 776.
[362] *Ibid* at paras 1940-1941.
[363] *Ibid* at paras 1939-1940.
[364] *Ibid* at para. 1941.
[365] *But see Aleksovksi* Appeal Judgment, para. 164 (concluding that the appellant was aware of the relevant state of mind of the perpetrators because he had seen the injuries inflicted upon the victims.).

247. In addition, the Trial Chamber also held that Kamara being deputy commander of the troops, his presence at the scene gave moral support to the perpetrators and that the Trial Chamber is satisfied that the Appellant Kamara was aware of the substantial likelihood that his presence would assist the commission of the crime by the perpetrators.[366]

2. Errors in the Evaluation of Evidence

248. Kamara argues that his presence at Fourah Bay was not proven beyond a reasonable doubt because the Trial Chamber erred in its evaluation of the evidence.[367] Specifically, Kamara argues that inconsistencies between witness TF1-334 and witness TF1-184 should have been given more weight by the Trial Chamber.[368]

249. The Trial Chamber explicitly addressed the issue of discrepancies in witness testimony with regard to the killings at Fourah Bay as already noted, as follows:

> "The Kamara Defence submits that the testimonies of witnesses TF1-334, George Johnson and TF1-184 on the attack on Fourah Bay are inconsistent. The Trial Chamber accepts that there are discrepancies between the three accounts. Nonetheless, this does not mandate the dismissal of the entire testimony of each witness in relation to the attack on Fourah Bay. The Trial Chamber is of the view that the variations in the three accounts are explicable due to the passage of years since the events in question and the chaotic and stressful atmosphere existing in the relevant time, rather than bias on the part of witness George Johnson and TF1-334, as suggested by the Kamara Defence."[369]

250. On Appeal, Kamara failed to show that the Trial Chamber did not properly exercise its discretion in resolving the differences between the testimony of witness TF1-334, George Johnson and TF1-184.

251. Grounds Five and Six of Kamara's Appeal therefore fail.

D. Kamara's Seventh Ground of Appeal: Superior Responsibility

252. In Kamara's Seventh Ground of Appeal he submits that the "Trial Chamber erred in law and or fact in paragraphs 1884, 1893 (Kono), 1928 (Bombali), 1950 (Western Area), 1969 (Port Loko) and 2117 of the Judgment in finding Kamara criminally responsible/guilty under Article 6(3) for crimes committed by his subordinates at Tombodu, Kono District and throughout Bombali District

[366] Trial Judgment, para. 1940.
[367] Kamara Appeal Brief, paras 173, 175.
[368] *Ibid* at paras 173, 179.
[369] AFRC Trial Judgment, para. 924.

and the Western Area and Port Loko District pursuant to Counts 1, 2, 3, 4, 5, 6, 9, 10, 12, 13 and 14 of the Indictment thereby leading to a miscarriage of justice."[370]

1. Trial Chamber findings

253. The Trial Chamber found Kamara criminally responsible as a superior under Article 6(3) of the Statute for crimes committed by his subordinates in Kono District, Bombali District, Port Loko District and Freetown and other parts of the Western Area.[371] Regarding Kamara's superior responsibility in Kono District, the Trial Chamber found that after the departure of Johnny Paul Koroma from Kono District, Kamara became the highest ranking AFRC soldier in this location and that he exercised effective control over some mixed battalion of AFRC and RUF troops.[372] It also found that battalions consisting of both AFRC and RUF soldiers were under AFRC command in several locations in Kono District including Tombodu; that Savage committed crimes in Tombodu and that Kamara had effective control over Savage.[373]

254. Concerning Bombali District, the Trial Chamber found that there was a formal AFRC command structure in Bombali District and that Kamara in his capacity as Deputy Brigade Commander exercised effective control over AFRC troops in this location.[374] Additionally, it found on the basis of the evidence adduced that Kamara was the overall commander of AFRC troops in Port Loko District and that he had effective control.[375] In reaching this conclusion, the Trial Chamber relied on the evidence of Prosecution witnesses George Johnson and TF1-334 that Kamara gave orders which were carried out, that he appointed and promoted commanders, enforced discipline over AFRC troops, and was in a position of *de jure* authority over other high level commanders, including the Operations Commander, who reported to him.[376] Furthermore, the Trial Chamber found that it was satisfied beyond reasonable doubt that Kamara was the overall commander of the AFRC forces in Port Loko District and that he had substantial authority in that position.[377] The Trial Chamber also found that Kamara was the Deputy Commander of AFRC

[370] Kamara Appeal Brief, para. 191 (emphasis removed).
[371] AFRC Trial Judgment, paras 1893, 1928, 1950, 1969.
[372] *Ibid* at paras 1865-1866.
[373] *Ibid* at paras 1873, 1884-1885.
[374] *Ibid* at para. 1926.
[375] *Ibid* at paras 1958-1959.
[376] *Ibid* at para. 1959.
[377] *Ibid* at para. 500.

troops during the invasion of Freetown and that he had both *de jure* and *de facto* authority of command.[378]

2. Submissions of the Parties

255. Under his Seventh Ground of Appeal, Kamara submits:

(i) That he did not have effective control or the ability to control the actions of Savage and consequently could not be liable for crimes committed by Savage in Kono District;

(ii) That he did not have effective control over AFRC troops in Kono District;

(iii) That the Trial Chamber erred in its interpretation of witness TF1-334's evidence;[379]

(iv) That the Trial Chamber erred in fact in finding him criminally responsible as a superior for crimes committed in Bombali District on the basis of evidence demonstrating that he "ordered" crimes and "participated in decision making";[380]

(v) That the Trial Chamber erred in finding him responsible as a superior for crimes committed by AFRC troops in Freetown on the basis of evidence indicating that he was present at meetings and at headquarters at State House immediately following its capture on 6 January 1999.[381]

256. The Prosecution responds that Kamara failed to demonstrate that the Trial Chamber erred in finding him criminally responsible as a superior for crimes committed by AFRC troops in Kono District, Bombali District, Port Loko District and Freetown and other parts of the Western Area. It argues that Kamara's responsibility is not precluded by evidence that Savage had an uncontrollable character.[382] Further the Prosecution argues that Kamara cannot avoid responsibility by relying on evidence that other superiors concurrently exercised effective control over AFRC troops in Kono District.[383] The Prosecution further submits that the Trial Chamber's interpretation of witness TF1-334's testimony regarding muster parades in Kono District was correct and reasonable and argues

[378] *Ibid* at paras 1944-1948.
[379] Kamara Appeal Brief, para. 197.
[380] *Ibid* at para. 213.
[381] *Ibid* at paras 218-219.
[382] Prosecution Response Brief, paras 5.38-5.39.
[383] *Ibid* at paras 5.38-5.39.

that even if the evidence was in fact misinterpreted, Kamara has failed to demonstrate how this occasioned a miscarriage of justice in relation to his Article 6(3) responsibility.[384] The Prosecution maintains that there is no material inconsistency in the evidence of witnesses TF1-167 and TF1-334 concerning the burning of five young girls inside a house in Karina and the events in Freetown. In respect of the incident involving the death of five young girls in Karina, the Prosecution concedes that there are "variations in the details of how the crime was committed;" but notes that there is no dispute concerning what it calls the "essential features" of the evidence.[385]

3. Discussion

257. In addition to military commanders, superior responsibility under Article 6(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority.[386] A superior is one who possesses the power or authority to either prevent a subordinate's crimes or punish the subordinate after the crime has been committed.[387] The power or authority may arise from a *de jure* or a *de facto* command relationship.[388] Whether it is *de jure* or *de facto*, the superior-subordinate relationship must be one of effective control, however short or temporary in nature. Effective control refers to the material ability to prevent or punish criminal conduct.[389] The test of effective control is the same for both military and civilian superiors.[390]

258. Kamara submits that a finding of superior responsibility requires proof of both command and control which he claims are inseparable.[391] The Appeals Chamber rejects this assertion. The terms "command" and "control" are two related but distinct concepts. The term "command" refers to powers that attach to a military superior, while the term "control," which has a wider meaning encompasses both military and civilian superiors.[392]

[384] *Ibid* at paras 5.34-5.37.
[385] *Ibid* at paras 5.56-5.61.
[386] *Čelebići* Appeal Judgment, para. 195.
[387] *Aleksovski* Appeal Judgment, para. 76, *Bagilishema* Appeal Judgment, para. 50, *citing Čelebići* Appeal Judgment, para. 192.
[388] *Bagilishema* Appeal Judgment, para. 50.
[389] *Čelebići* Appeal Judgment, para. 256.
[390] *Bagilishema* Appeal Judgment, para. 50, *citing Aleksovski* Appeal Judgment, para. 76.
[391] Kamara's Appeal Brief, para. 194.
[392] *Čelebići* Appeal Judgment, para. 196.

(a) Kamara's Responsibility for Crimes Committed by Savage

259. Kamara contends that the Trial Chamber erred in finding him liable as a superior for crimes committed by Savage in Kono District. According to Kamara, he did not have the material ability to control the acts of Savage because Savage was unruly in character.[393] The Trial Chamber noted that there was evidence that Savage was very difficult to control and that he was unpredictable.[394] The Trial Chamber was satisfied that Savage's unpredictable character was not a bar to finding that Kamara had effective control over him.[395] The Appeals Chamber finds no reason to disturb the Trial Chamber's finding that Kamara is liable as a superior for crimes committed by Savage in Kono District.

(b) Kamara's Effective Control in Kono District and the Testimony of Witness TF1-334 on AFRC Muster Parades in Kono District

260. With respect to Kamara's responsibility for the crimes committed by AFRC troops in Kono, the Trial Chamber found that after the departure of Johnny Paul Koroma from Kono District, the AFRC was subordinate to the RUF and that Kamara became the highest ranking AFRC soldier in the District.[396] It also found that AFRC and RUF troops worked closely together in Kono District and that commanders from each faction supervised mixed battalions of AFRC and RUF troops.[397] It held that despite the AFRC's subordination to the RUF, including Kamara's subordination to the RUF's Denis Mingo, Kamara still had effective control over some mixed battalions of AFRC and RUF troops.[398]

261. In reaching this conclusion, the Trial Chamber relied on the evidence of witness TF1-334 who testified that Kamara, although subordinate to Denis Mingo, was the most senior commander of the AFRC in Kono District and that AFRC combatants "operated under their [*i.e.* Mingo's and Kamara's] command and were answerable to the AFRC commanders."[399] The Trial Chamber also noted the evidence of George Johnson that Denis Mingo appointed and promoted some members of the RUF and this was endorsed by Kamara,[400] and that Kamara exercised authority over promotions

[393] Kamara Appeal Brief, para. 208.
[394] AFRC Trial Judgment, paras 1881-1883.
[395] *Ibid* at para. 1886.
[396] *Ibid* at para. 1865.
[397] *Ibid* at para. 1865.
[398] *Ibid* at paras 1866, 1885.
[399] *Ibid* at para. 1867.
[400] *Ibid* at para. 452.

within the AFRC troops in Kono District.[401] According to witness TF1-334, although Kamara was subordinate to Denis Mingo and received orders from him, AFRC troops operated under Kamara's command and were answerable to him.[402] Witness TF1-334 corroborated George Johnson's testimony that Kamara made appointments, gave promotions and issued orders which were carried out by AFRC troops.[403]

262. Subordination of the AFRC to the RUF and substantial cooperation between the AFRC and RUF may have diminished the distinction between the two command structures. Nonetheless, the Appeals Chamber considers that concurrent command does not vitiate the individual responsibility of any of the commanders.[404] In its evaluation of concurrent command in Kono District, the Trial Chamber concluded that Denis Mingo's command in Kono District over joint units of the AFRC/RUF force did not preclude a finding of superior responsibility on the part of Kamara. The Trial Chamber noted Denis Mingo's position of authority over Kamara, but also noted that Kamara continued to issue orders to AFRC subordinates which were followed,[405] and remained the most senior AFRC commander in Kono until Brima's arrival in mid-May 1998.[406] The Appeals Chamber finds no error in the Trial Chamber's approach, and therefore affirms the Trial Chamber's finding that Kamara exercised effective control in Kono District.

263. Kamara argues that the Trial Chamber erred in its interpretation of witness TF1-334's evidence regarding muster parades in Kono.[407] He contends that witness TF1-334 only testified as to "how often a muster [parade] generally occurs in a military context" rather than to how often the AFRC held muster parades in Kono District as held by the Trial Chamber.[408] The relevant excerpts are the following:

> "Prosecution: You use the word muster, M-U-S-T-E-R; what do you mean by muster?
>
> Witness TF1-334: This is a military term that is to bring together the various forces and address them. That is what we call mustered.

[401] *Ibid* at para. 452.
[402] *Ibid* at para. 1867.
[403] *Ibid* at paras 1867-1868.
[404] *See Orić* Trial Judgment, para. 313 ("If a superior is proven to have possessed the effective control to prevent or punish relevant crimes, his or her own individual criminal responsibility is not excluded by the concurrent responsibility of other superiors"), *citing Blaškić* Trial Judgment, paras 296, 302, 303; *Krnojelac* Trial Judgment, para. 93; *Naletilić* Trial Judgment, para. 69; *Halilović* Trial Judgment, para. 62.
[405] AFRC Trial Judgment, para. 1870.
[406] *Ibid* at paras 451, 460-461.
[407] Kamara Appeal Brief, paras 197-198.
[408] *Ibid* at paras 197-198.

> Prosecution: How often does a muster *generally* occur in a military context?
>
> Witness TF1-334: Well, this was a weekly address. Every week the two groups were addressed.
>
> Prosecution: Now go on. You were talking about Morris Kallon saying something about the SLAs and that they should not muster?
>
> Witness TF1-334: And again he said the SLA should – had no right to call themselves SLA in Kono, and neither AFRC, because he only knew of one faction and that is the RUF faction. So this brought confusion between the RUF and the SLA."[409]

264. In paragraph 1869 of its Judgment, the Trial Chamber summarized the testimony, stating:

> "Witness TF1-334 also testified that the *AFRC troops held muster parades every week* in Kono, until they were prohibited from doing so by Morris Kallon (RUF) . . . The witness explained that 'mustering' is a military term that refers to the force being brought together and addressed publicly. This procedure is indicative of an organised force that is responsive to superior command."[410]

265. Having considered the relevant excepts, the Appeals Chamber holds that the Trial Chamber did not err in its interpretation of the evidence of witness TF1-334. The evidence remains that the AFRC held regular muster parades in Kono and that this fact demonstrates a degree of command and control from which effective control could reasonably be inferred.

(c) Kamara's Effective Control in Bombali District

266. Kamara contends that evidence demonstrating he "ordered" crimes and "participated in decision making" in Bombali District is insufficient to establish his criminal responsibility as a superior.[411] Kamara acknowledges that he had powers to issue orders but stated that he did not have powers to discipline AFRC troops.[412] The powers of a superior to issue orders and make binding decisions are indicative of his ability to exercise effective control.[413] Contrary to Kamara's contention, the Trial Chamber did not establish his effective control merely on the basis of evidence that he ordered crimes. Rather, it considered evidence that Kamara, *inter alia*, issued orders to troops in Karina which were obeyed, participated at a senior level in military operations in Bombali District and received reports from both the operations commander and the provost marshal.[414]

[409] Transcript, TF1-334, 19 May 2005, pp. 9-10 (emphasis added).
[410] AFRC Trial Judgment, para. 1869 (emphasis added).
[411] Kamara Appeal Brief, paras 213-217.
[412] *Ibid* at para. 216.
[413] *Halilović* Trial Judgment, para. 58.
[414] AFRC Trial Judgment, paras 1924-1925.

Accordingly, the Appeals Chamber endorses the Trial Chamber's approach in establishing Kamara's effective control in Bombali District.

(d) Conflicting Testimony of Witness TF1-334 and Witness TF1-167

267. Kamara submits that the Trial Chamber failed to reconcile the conflicting testimony of witness TF1-334 and witness TF1-167 concerning the burning of five young girls inside a house in Karina in Bombali District.[415] He argues that in failing to provide a reasoned opinion explaining its evaluation of the conflicting evidence, the Trial Chamber failed to establish that it was proved beyond reasonable doubt that he is liable as a superior under Article 6(3) of the Statute.[416] Kamara had advanced similar arguments in respect of the testimony of witnesses TF1-167 and TF1-334 concerning an order that prisoners released from Pademba Road Prison should move to State House and that AFRC troops should burn houses and parastatals in Freetown.[417]

268. While it is preferable for the Trial Chamber to state its reasons for accepting the evidence of one witness over that of another when they are contradictory, the Trial Chamber is not obliged to refer to every piece of evidence on the trial record.[418] Rather, it may only make findings of material facts that are essential to the determination of guilt in relation to a particular Count. The Appeals Chamber notes that the Trial Chamber has set out in its Judgment the standard of review for the evaluation of witness testimony.[419]

(e) Kamara's Responsibility as a Superior for Crimes in Freetown

269. The Appeals Chamber now turns to Kamara's final contention that the Trial Chamber erred in finding him responsible as a superior for crimes committed by AFRC troops in Freetown on the basis of evidence indicating that he was present at meetings and at headquarters at State House immediately following its capture on 6 January 1999.[420] Kamara asserts that such evidence does not form the basis upon which his liability as a superior could be assessed. The Appeals Chamber considers that Kamara misconstrues the Trial Chamber's findings. The Trial Chamber noted evidence that Kamara was present at meetings, but drew no inferences or conclusions from the

[415] Kamara Appeal Brief, paras 213-217.
[416] *Ibid* at para. 215.
[417] *Ibid* at paras 220-222.
[418] *Čelebići* Appeal Judgment, para. 498; *Kupreškić* Appeal Judgment, para. 39; *Kordić* Appeal Judgment, para. 382.
[419] AFRC Trial Judgment, para. 111.
[420] Kamara Appeal Brief, para. 219.

evidence as the Prosecution did not lead evidence about Kamara's contributions at those meetings.[421] The Appeals Chamber finds this conclusion to be reasonable.

270. Contrary to Kamara's assertion, his presence at State House did not form the sole basis for the Trial Chamber's finding of effective control. In addition to his presence, the Trial Chamber based its finding that he exercised effective control over AFRC forces on the fact that Kamara was often in the company of senior commanders; that he participated in decision making; that he did not distance himself from decisions that were made and that he gave orders that were obeyed.[422] Kamara has not demonstrated any error or unreasonableness in the Trial Chamber's findings.

271. For the above reasons, the Appeals Chamber holds that Ground Seven of Kamara's Appeal is untenable.

VIII. KANU'S APPEAL

A. Kanu's First Ground of Appeal: Those Bearing the Greatest Responsibility

1. Submissions of the Parties

272. Under his First Ground of Appeal, Kanu submits that the Trial Chamber erred in law and in fact by finding that the words "the Special Court … shall … have the power to prosecute persons who bear the greatest responsibility…" enshrined in Article 1(1) of the Statute is not a jurisdictional requirement.[423] Kanu submits that the Trial Chamber committed a further error in convicting him without first establishing whether it had jurisdiction over him.[424] According to Kanu, the drafters of the Statute were aware of the fact that the Special Court would have limited time and resources and therefore deliberately circumscribed the Court's personal jurisdiction through the "greatest responsibility requirement."[425] Kanu argues that the United Nations Security Council rejected the Secretary General's proposal for the "most responsible" standard in favour of the "greatest responsibility" standard in Article 1 of the Statute in order to limit the Court's competence to those who played a leadership role.[426] Kanu contends that the Court must be the ultimate arbiter on the issue and this purpose would be defeated if the requirement were interpreted as a mere guide to

[421] AFRC Trial Judgment, para. 1945.
[422] *Ibid* at paras 1945-1948.
[423] Kanu Appeal Brief, para. 1.1.; AFRC Trial Judgment, paras 640-659.
[424] Kanu Appeal Brief, para. 1.1.; AFRC Trial Judgment, paras 640-659.
[425] *Ibid* at para. 1.4.
[426] *Ibid* at para. 1.5.

prosecutorial strategy.[427] Kanu further relies on the findings of Trial Chamber I that the "greatest responsibility" standard was a jurisdictional requirement. [428]

273. Kanu submits that the determination of whether the accused is one of those who bear the "greatest responsibility" should be made either at the pre-trial stage or at the close of the Prosecution's case when considering the Motion for Acquittal.[429] He submits further that the Trial Chamber's assessment should be based on a consideration of the leadership position of the accused.[430] In conclusion, Kanu submits that he is not one of those who bear "the greatest responsibility" for the crimes committed, and because this jurisdictional requirement[431] was not met in his case, all convictions against him should be set aside.[432]

274. In response, the Prosecution submits that there was no error in the Trial Chamber's finding that the greatest responsibility standard is a guide to prosecutorial strategy rather than a jurisdictional requirement. It relies on the drafting history of the Statute to support this argument.[433] In particular, the Prosecution notes that the Security Council did not disagree with the Secretary-General's opinion that the phrase "persons who bear the greatest responsibility" must not be seen as a test criterion or a distinct jurisdictional threshold, but as a guide to the Prosecutor in adopting a prosecution strategy in individual cases.[434] The Prosecution contends that if the Appeals Chamber were to hold that the clause is a jurisdictional requirement, it would require a factual determination at the pre-trial stage that there is no person who has not been indicted who bears greater responsibility than the accused. According to the Prosecution, this would be an absurd interpretation because it is impossible to know the precise scope of criminal liability of an accused at the pre-trial stage.[435] Similarly, the Prosecution argues that it would be unworkable to suggest that this determination should be made by the Trial or Appeals Chamber at the end of the trial.[436] By way of analogy, the Prosecution submits that if "persons who bear the greatest responsibility" contained in Article 1 of the Special Court Statute was a jurisdictional requirement, then the term "persons responsible" contained in Article 1 of the ICTY and ICTR Statutes could also be viewed as

[427] *Ibid* at para. 1.10.
[428] *Prosecution v. Brima, Fofana and, Kondewa*, SCSL-03-11-PT, Trial Chamber I, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004.
[429] *Ibid* at para. 1.16.
[430] *Ibid* at para. 1.21.
[431] *Ibid* at para. 1.25.
[432] *Ibid* at para. 1.28.
[433] Prosecution Response Brief, para. 2.40.
[434] *Ibid* at para. 2.43.
[435] *Ibid* at para. 2.45.

jurisdictional requirements, leading to the "absurdity" that the Prosecutor would only be able to prosecute those who are actually guilty.[437]

275. The Prosecution further argues that prosecutorial discretion is not susceptible to judicial review,[438] except in circumstances where the Prosecutor acts in contravention of the rights of an accused and bases his decision to prosecute on impermissibly discriminatory motives.[439] The Prosecution argues that Kanu has failed to demonstrate that in indicting him, the Prosecutor has not exercised his discretion in good faith or that he did so unreasonably.[440] Moreover, the Prosecution submits that Kanu should have brought his challenge to the greatest responsibility standard at the pre-trial stage, and having failed to do so, he must be taken to have waived his right to do so at a later stage of the proceedings.[441]

276. In reply, Kanu submits that even if the Appeals Chamber were to hold that he has waived his right to raise this issue on appeal, it should, in the interest on justice or to avoid an injustice, consider the issue *proprio motu*.[442]

2. Discussion

277. The Appeals Chamber notes that Articles 1, 11 and 15 of the Statute read as follows:

> Article 1
> Competence of the Special Court
>
> 1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.
>
> 2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the

[436] *Ibid* at paras 2.46, 2.53.
[437] *Ibid* at para. 2.47.
[438] *Ibid* at para. 2.47.
[439] *Ibid* at paras 2.48-2.50.
[440] *Ibid* at para. 2.56.
[441] *Ibid* at para. 2.56.
[442] *Prosecution v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Submissions in Reply – Kanu Defence, 9 October 2007, para. 1.10.

peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

a. The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;
b. The Prosecutor; and
c. The Registry.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

278. In interpreting Article 1 of the Statute it should be noted that there are different organs of the Court each of which has its own function. Article 11 of the Statute states the Court comprises of the following organs:

(i) The Chambers, consisting of one or more Trial Chambers and one Appeals Chamber;

(ii) The Prosecutor; and

(iii) The Registry.

280. Each organ of the Court performs specific functions as set out in the Statute. The Chambers constitute the adjudicative organ of the Court. The Prosecutor by virtue of Article 15(1) of the Statue is the organ vested with the responsibility "for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. **The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source**" (emphasis applied).

281. It is evident that it is the Prosecutor who has the responsibility and competence to determine who are to be prosecuted as a result of investigation undertaken by him. It is the Chambers that have the competence to try such persons who the Prosecutor has consequently brought before it as persons who bear the greatest responsibility.

282. The Appeals Chamber agrees with the Prosecution that the "only workable interpretation of Article 1(1) is that it guides the Prosecutor in the exercise of his prosecutorial discretion. That discretion must be exercised by the Prosecution in good faith, based on sound professional judgment . . . that it would also be unreasonable and unworkable to suggest that the discretion is one that should be exercised by the Trial Chamber or the Appeals Chamber at the end of the trial."[443]

283. In the opinion of the Appeals Chamber it is inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused, the indictment ought to be struck out on

[443] Prosecution Response Brief, paras 2.52, 2.53.

the ground that it has not been proved that the accused was not one of those who bore the greatest responsibility.

284. Kanu's interpretation of Article 1 of the Statute is a desperate attempt to avoid responsibility for crimes for which he had been found guilty.

285. Kanu's First Ground of Appeal is therefore without merit

B. Kanu's Fifth and Sixth Grounds of Appeal: Effective Control for Superior Responsibility

1. Submissions of the Parties

286. The Fifth and Sixth Grounds of Kanu's Appeal both invoke errors relating to the Trial Chamber's findings that he bears superior responsibility under Article 6(3) of the Statute. Kanu advances identical legal arguments in support of these Grounds. Consequently, the Appeals Chamber will consider them together.

287. Kanu submits that the Trial Chamber adopted a flawed approach in assessing whether he had effective control over AFRC troops in Bombali District (Fifth Ground of Appeal) and Freetown and other parts of the Western Area (Sixth Ground of Appeal). Specifically, Kanu submits that the Trial Chamber adopted a "two-pronged" approach to determining effective control which sought first, to establish whether the AFRC leadership collectively had effective control and second, to establish whether Kanu individually had effective control over AFRC troops.[444] Kanu contends that the approach is "legally flawed" because it imputes criminal responsibility to him on the basis of collective responsibility rather than on the basis of individual criminal responsibility.[445]

288. In response, the Prosecution submits that Kanu had the material ability to prevent or punish the AFRC troops under his command and gave several examples in which Kanu exercised that authority. The Prosecution contends that Kanu's arguments are "without merit" and maintains that the Trial Chamber did not commit an error of fact or law that either resulted in a miscarriage of justice or invalidated the Trial Judgment.[446]

[444] Kanu Appeal Brief, paras 5.6-5.8, 6.2.
[445] *Ibid* at paras 5.7, 6.3.
[446] Prosecution Response Brief, para. 5.100.

2. Discussion

289. The Appeals Chamber recalls that the existence of a superior-subordinate relationship is paramount to the determination of superior responsibility. Critical to the finding of a superior-subordinate relationship is that the commander exercised "effective control" over his subordinates.[447] Effective control refers to the material ability of a superior, whether military or civilian, *de jure* or *de facto*, to prevent or punish his subordinates' crimes.[448] "Substantial influence" or "persuasive ability" which falls short of effective control is insufficient for a finding of superior responsibility.[449] A finding that a superior exercised effective control is a question of fact to be determined on a case-by-case basis.

290. The Appeals Chamber rejects Kanu's submission that the Trial Chamber adopted a two-pronged approach to determining effective control which sought first whether the AFRC leadership collectively had effective control to establish whether Kanu individually had effective control over AFRC troops. The Appeals Chamber considers that Kanu's assertion is premised on an incorrect interpretation of the Trial Chamber's findings. The Appeals Chamber is of the opinion that the Trial Chamber properly examined the AFRC structure in order to determine whether it created an enabling atmosphere for the exercise of effective control.

291. As to the issue of effective control in respect of superior responsibility the Appeals Chamber reiterates its conclusion it arrived at on the similar Ground of Appeal by the Appellant Kamara.

292. Kanu's Fifth and Sixth Grounds of Appeal therefore fail.

C. Kanu's Seventh Ground of Appeal: *Mens Rea* for Crimes Related to Child Soldiers

1. Introduction

293. In his Seventh Ground of Appeal, Kanu alleges that the Trial Chamber erred in law in dismissing his argument that "the absence of criminal knowledge on his part vitiated the requisite *mens rea* to the crimes relating to child soldiers."[450] He argues that the *mens rea* element required for the crime was in this instance negated by a mistake of law on his part. Due to various factors, detailed in his Appeal Brief, Kanu submits that "he believed that his conduct [of conscripting or

[447] *Čelebići* Appeal Judgment, para. 197.
[448] *Ibid* at para. 256; *Bagilishema* Appeal Judgment, para. 51, *citing Musema* Trial Judgment, para. 135.
[449] *Čelebići* Appeal Judgment, para. 266.

enlisting children under the age of 15 years] was legitimate."[451] He contends that at all material times, he lacked the requisite criminal intent required for the crime of "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities" punishable under Article 4.c of the Statute of the Special Court.

294. In the alternative, Kanu argues that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment.

295. The Prosecution observes that the Appeals Chamber has already ruled that conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities was a crime entailing individual criminal responsibility at the time of the acts alleged in the Indictment. The Appeals Chamber refers to its dictum that:

> "The rejection of the use of child soldiers by the international community was widespread by 1994 . . . Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above, the principle of legality and the principle of specificity are both upheld."[452]

296. Kanu's submission that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment is without merit. Furthermore it is frivolous and vexatious for Kanu to contend that the absence of criminal knowledge on his part vitiated the requisite *mens rea* in respect of the crimes relating to child soldiers.

297. Kanu's Seventh Ground of Appeal therefore fails.

D. Kanu's Ninth Ground of Appeal: Findings of Responsibility Pursuant to Article 6(1) of the Statute

1. The Parties' Submissions and the Findings of the Trial Chamber

298. In his Ninth Ground of Appeal, Kanu submits that the Trial Chamber erred in convicting him under Article 6(1) for planning the commission of sexual slavery (Count 9), the conscription and use of children for military purposes (Count 12), and abductions and forced labour (Count 13).

[450] Kanu Appeal Brief, para. 7.1.
[451] *Ibid* at para. 7.8.
[452] Norman Child Recruitment Decision, paras 52-53.

The Trial Chamber held that Kanu "planned, organised and implemented the system to abduct and enslave civilians which was committed by AFRC troops in Bombali and Western Area." It further held that Kanu "had the direct intent to establish and implement the system of exploitation involving the three enslavement crimes, namely, sexual slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour."[453] The Trial Chamber was, therefore, satisfied beyond reasonable doubt that Kanu bore individual criminal responsibility under Article 6(1) for planning the commission of the above crimes in the Bombali District and the Western Area.[454]

299. Kanu argues that while the evidence shows that it fell upon him, as Chief of Staff, to manage the system of slavery within the AFRC faction, he could not be convicted on that basis for planning the crimes of sexual slavery, conscription and use of children for military purposes, and abductions and forced labour.[455] He further argues that at best, the evidence implicates him at the execution stage in the military training of children and the exploitation of women for sexual purposes.[456]

300. The Prosecution responds that Kanu's position of influence in the AFRC and his admission that he managed this system of slavery amply justify a reasonable inference that he was involved in planning the above crimes.[457]

2. Discussion

301. The Appeals Chamber concurs with the Trial Chamber's definition of planning under Article 6(1). The Trial Chamber stated that " 'planning' implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases."[458] Circumstantial evidence may provide proof of the existence of a plan, and an individual may incur responsibility for planning when his level of participation is substantial even though the crime may have actually been committed by another person.[459] According to the Trial Chamber, the *actus reus* for planning requires that "the accused, alone or together with others, designated [*sic*] the criminal

[453] AFRC Trial Judgment, para. 2095.
[454] *Ibid* at paras 2096-2098.
[455] Kanu Appeal Brief, para. 9.1-9.6.
[456] *Ibid* at para. 9.6.
[457] Response Brief of Prosecution, paras 6.61, 6.64, 6.66.
[458] AFRC Trial Judgment, para. 765.
[459] *Ibid* at para. 765.

conduct constituting the crimes charged."[460] While "there must be a sufficient link between the planning of a crime both at the preparatory and the execution phases," it is "sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct."[461] The Trial Chamber further stated that the *mens rea* "requires that the accused acted with direct intent in relation to his or her own planning or with the awareness of the substantial likelihood that a crime would be committed … in the execution of that plan."[462]

302. With regard to sexual slavery, the Trial Chamber found that:

> "In Bombali District the Accused Kanu designed and implemented a system to control abducted girls and women. All abducted women and girls were placed in the custody of the Accused. Any soldier who wanted an abducted girl or woman to be his "wife" had to 'sign for her'. The Accused informed his fighters that any problems with the women were to be immediately reported back to him, and that he would then monitor the situation. The Accused issued a disciplinary instruction ordering that any woman caught with another woman's husband should be beaten and locked in a box."[463]

On the basis of this evidence, the Trial Chamber was satisfied beyond reasonable doubt that Kanu was responsible for planning the commission of the crime of sexual slavery in the Bombali District and the Western Area. The Appeals Chamber agrees.

303. The Appeals Chamber now turns to the Trial Chamber's findings regarding the conscription and use of children for military purposes, as well as abductions and forced labour in the Bombali District and the Western Area. In the case of Bombali District, the Trial Chamber found that Kanu was in charge of forced military training of civilians at Camp Rosos and that children below the age of 15 years were among those forced to undergo training.[464] On the basis of this evidence, the Trial Chamber was satisfied beyond reasonable doubt that in the Bombali District Kanu was not only responsible for planning the conscription of children under the age of 15 into an armed group, but also for using such children to participate actively in hostilities, as well as for the crime of enslavement.

304. Regarding the Western Area, the Trial Chamber also found that Kanu "continued in his positions as Chief of Staff and commander in charge of civilians in Freetown and the Western Area" and that he had "approximately ten child combatants in his charge in Benguema following

[460] *Ibid* at para. 766.
[461] *Ibid* at para. 768; *Kordić* Appeal Judgment, para. 26.
[462] AFRC Trial Judgment, para. 766.
[463] *Ibid* at para. 2092.
[464] *Ibid* at para. 2093.

the retreat from Freetown."[465] On the basis of this evidence, the Trial Chamber found that Kanu was responsible for planning the conscription of children under the age of 15 into an armed group, or the use of such children to participate actively in hostilities, and enslavement in the Western Area.

305. Finally, the Appeals Chamber finds that the evidence led before the Trial Chamber warrants an examination of Kanu's responsibility for aiding and abetting the commission of sexual slavery and forced labour in Newton in the Western Area.[466] The Appeals Chamber notes that witness TF1-334, whom the Trial Chamber found to be credible and reliable, stated that Kanu was responsible for the women and girls in the camp at Newton. AFRC soldiers reported to Kanu if they had any problems with the women and girls.[467] The Trial Chamber found that while the women were helping with the cooking, "the 'girls' were sleeping with the 'commanders.' "[468] The Appeals Chamber is satisfied that in this position of responsibility regarding the women and girls at Newton, Kanu provided practical assistance to a system of sexual slavery and forced labour. The Appeals Chamber is further satisfied that Kanu was aware that his acts would assist in the implementation of this system of sexual slavery and forced labour. In light of the above evidence, the Appeals Chamber is satisfied that Kanu aided and abetted the commission of sexual slavery and forced labour in the Western Area. Thus, the Appeals Chamber finds that the Trial Chamber erred in failing to convict Kanu for aiding and abetting the commission of sexual slavery and forced labour in the Western Area.

306. The Appeals Chamber upholds the conviction of Kanu for planning the commission of sexual slavery in the Bombali District and upholds the conviction of Kanu for planning the commission of sexual slavery in the Western Area and further upholds the Trial Chamber's convictions for planning the conscription and use of children for military purposes as well as abductions and forced labour in the Bombali District and the Western Area. The Appeals Chamber furthermore finds that there is sufficient evidence that Kanu aided and abetted the commission of the said crimes. However, as he has already been convicted of planning those crimes the question of convicting him on the basis of aiding and abetting does not arise.

[465] *Ibid* at para. 2094.
[466] *Ibid* at paras 1165, 1389.
[467] Transcript, TF1-334, 15 June 2005, p. 15.
[468] AFRC Trial Judgment, para. 1164.

IX. GROUNDS OF APPEAL RELATING TO SENTENCE

A. Introduction

307. The Trial Chamber imposed a sentence of fifty (50) years imprisonment on Brima and Kanu respectively and forty-five (45) years imprisonment on Kamara.[469] The Trial Chamber found that there were a number of aggravating but no mitigating factors. The Appellants have appealed against the sentence, while the Prosecution has not done so except to request that if some of its Grounds succeed, the Appeals Chamber should consider revising the sentence to reflect any additional criminal liability. The Appellants' Grounds of Appeal are closely related, therefore, dealing with them separately would lead to unnecessary repetition. It is convenient to address the Appellants' submissions together except for those which raise a different issue in Kanu's Eighth Ground of Appeal.

B. Standard of Review on Appeals Relating to Sentence

308. Article 19 of the Statute limits the penalty that a Trial Chamber can impose upon a convicted person (other than a juvenile) to "imprisonment for a specified term of years." It further provides that the Trial Chamber shall, in determining the "terms of imprisonment," as appropriate, have recourse to the sentencing practices of the International Criminal Tribunal for Rwanda ("ICTR") and the national courts of Sierra Leone. The Statute requires the Trial Chamber to take into account such factors as the gravity of the offence and the individual circumstances of the convicted person in imposing sentences.[470]

309. The determination of an appropriate sentence being at the discretion of the Trial Chamber, the Appeals Chamber will only revise a sentence where the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. To show that the Trial Chamber committed a discernible error in exercising its discretion:

> "the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals

[469] AFRC Sentencing Judgment, Disposition.
[470] Article 19, Statute of the Special Court.

Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."[471]

C. Excessive Sentences: Ground Twelve of Brima's Appeal and Ground Ten of Kamara's Appeal

310. Brima alleges that the Trial Chamber erred by imposing a global sentence of fifty years, that it is "excessively harsh and disproportionate," and that it is inconsistent with the sentencing guidelines of the ICTY and the ICTR.[472] Kamara's Tenth Ground of Appeal argues that the Trial Chamber was required by Article 19(1) of the Statute to consider the sentencing practices in the ICTR and the national courts of Sierra Leone.[473] Kamara further argues that a sentence of 45 years is inconsistent with the penalties that have been imposed by the ICTR.[474]

311. Article 19(1) of the Statute provides that the "Trial Chamber, as appropriate, shall have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone." The phrase "where appropriate" shows that the Trial Chamber has a discretion in determining when to have recourse to sentencing practices in the two courts.

D. Mitigating Factors: Ground Nine of Kamara's Appeal and Grounds Eleven, Fifteen, Sixteen, Seventeen and Eighteen of Kanu's Appeal

312. The Appellants make two distinct submissions with regard to mitigating factors. First, that the Trial Chamber did not consider mitigating factors and second, that particular mitigating factors were not given adequate weight.[475]

313. Rule 101(B) of the Rules provides that the "Trial Chamber shall take into account the factors mentioned in Article 19(2) of the Statute, as well as such factors as: …any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person

[471] *Babić* Judgment on Sentencing Appeal, para. 44. *See also, Nikolić* Sentencing Appeal Judgment, para. 95. *Blagojević* Appeal Judgment para. 137; *Brđanin* Appeal Judgment, para. 500; *Bralo* Sentencing Appeal Judgment, para. 9; *Galić* Appeal Judgment, para. 394.
[472] Brima Appeals Brief, paras 180-181.
[473] Kamara Appeals Brief, para. 246.
[474] *Ibid* at para. 249.
[475] Brima Appeal Brief, paras 184,182; Kamara Appeal Brief, para. 237; Kanue Appeal Brief, paras 11.1, 11.9.

before or after conviction." Brima and Kanu argue that the Trial Chamber failed to consider mitigating factors.[476]

314. In the view of the Appeals Chamber an appellant challenging the weight given by a Trial Chamber to a particular mitigating circumstance has the duty of showing that the Trial Chamber abused its discretion.

315. The mere recital of mitigating factors, as the Appellants have done, without concrete arguments, does not suffice to discharge the burden of demonstrating that the Trial Chamber abused its discretion.[477]

E. Double-Counting, Gravity of the Offence and Aggravating Factors: Ground Twelve of Brima's Appeal

316. Brima submits that the Trial Chamber erred by considering the following factors in determining the gravity of the offence as well as aggravating factors:

> "The brutality and heinousness of the crimes such as the drugging of child soldiers, brutal gang rapes, lengthy periods of enslavement, the burning alive of civilians and amputations."

317. Although the issue of double-counting was only raised by Brima, it is in the interest of justice for the Appeals Chamber to consider the issue in relation to Kanu and Kamara as well. As the Trial Chamber notes in the Sentencing Judgment, "where a factor has already been taken into account in determining the gravity of the offence, it cannot be considered additionally as an aggravating factor . . . ."[478] This prohibition is well established in the case law of the international criminal tribunals.[479]

318. In *Nikolić*, the ICTY Appeals Chamber determined that the Trial Chamber had double-counted by repeating facts concerning the accused's general role in the offences.[480] However, the Appeals Chamber determined that there was no double-counting where the Trial Chamber

[476] Brima asserts that the Trial Chamber did not consider his lack of criminal convictions, good reputation in the Army and contribution to the peace process (Brima Appeal Brief, para. 184); Appellant Kanu asserts that the Trial Chamber did not take into consideration his relatively low position in the AFRC and that the length of time it took to conclude the proceedings caused him unbearable anxiety and mental anguish (Kanu Appeal Brief, para. 11.6, 11.9).
[477] *Simić* Appeal Judgment, para. 249; *Kvočka* Appeal Judgment, para. 675.
[478] Sentencing Judgment, para. 23.
[479] *Deronjić* Trial Judgment, para. 106-107; *Nikolić* Appeal Judgment, para. 61; *Stakić* Appeal Judgment, para. 411; *Krajisnik* Trial Judgment, para. 1140; *Bralo* Trial Judgment, para. 27.
[480] *Nikolić* Appeals Judgment, para. 61.

considered the impact of the crimes on the victim in one section and the vulnerability of the victims in the other section.[481]

319. The Appeals Chamber notes that there were instances of double-counting in the Sentencing Judgment.[482]

320. Although the Trial Chamber made an error by double-counting, the Appeals Chamber does not consider that this error had a significant impact upon the Appellants' sentences.

F. Kanu's Eighth Ground of Appeal: Cumulative Convictions and Sentence

1. Submissions of the Parties

321. In his Eighth Ground of Appeal, Kanu submits that the Trial Chamber erred in law in imposing a global sentence of fifty years. He argues that the term of imprisonment shows that the cumulative convictions entered against him were not discounted for sentencing purposes[483] and that the sentence imposed on him reflects the number of convictions rather than the underlying criminal conduct.[484] Kanu further submits that a more appropriate penalty that reflects his criminal conduct and not the number of convictions should replace the sentence imposed on him. In response, the Prosecution contends that the Trial Chamber was under no obligation to discount the cumulative convictions entered against Kanu for sentencing purposes.[485]

2. Discussion

322. The Trial Chamber stated that the Special Court Statute permits it to impose a single sentence. It added that in exercising its discretion whether to impose a single sentence, "[t]he governing criteria is that the final or aggregate sentence should reflect the totality of the culpable conduct, or generally, that it should reflect the gravity of the offences and the overall culpability of the offender, so that it is both just and appropriate."[486] The Trial Chamber then explained that "[i]n

[481] *Ibid* at para. 66.
[482] AFRC Sentencing Judgment, paras 44, 53, 57, 72, 75, 82, 85, 96, 107, 112.
[483] Kanu Appeal Brief, para. 8.1.
[484] *Ibid* at para. 8.3.
[485] Prosecution Response Brief, para. 3.56.
[486] AFRC Sentencing Judgment, para. 12.

the present case the Trial Chamber finds it is appropriate to impose a global sentence for the *multiple convictions* in respect of Brima, Kamara and Kanu."[487]

323. In the Sentencing Judgment, the Trial Chamber enumerated all criminal acts for which Kanu was found responsible under Article 6(1) of the Statute and also referred to the gravity of the criminal conduct of his subordinates throughout Bombali District, Freetown and other parts of the Western Area for which he was found liable under Article 6(3) of the Statute. The emphasis placed on Kanu's criminal acts demonstrates that the Trial Chamber ascertained the gravity of the offences in light of the individual criminal acts rather than in light of the multiple Counts for which Kanu was convicted. This approach ensured that the sentence encompasses Kanu's, overall, criminal conduct.

324. The Appeals Chamber finds that in imposing sentence, the Trial Chamber considered the overall criminal conduct of Kanu, rather than the number of convictions entered against him.

325. The Appeals Chamber thus finds no error in the Trial Chamber's approach that would warrant its interference with the sentence imposed. Ground Eight of Kanu's Appeal therefore fails.

G. Sentence: General Conclusion

326. Having considered all the Grounds of Appeal relating to the Sentencing Judgment of the Trial Chamber, the Appeals Chamber is satisfied that the Trial Chamber has overall properly exercised its discretion within the provisions of the Statute of the Court.

327. Article 19(2) of the Statute states as follows:

> "In imposing the sentences, the Trial Chamber should take into account such factors as the **gravity** of the offence and the individual circumstances of the convicted person" (emphasis added).

328. The Trial Chamber, in applying this provision to the case, had this to say:

> "Brima, Kamara and Kanu have been found responsible for some of the most heinous, brutal and atrocious crimes ever recorded in human history. Innocent civilians – babies, children, men and women of all ages – were murdered by being shot, hacked to death, burned alive, beaten to death. Women and young girls were gang raped to death. Some had their genitals mutilated by the insertion of foreign objects. Sons were forced to rape mothers, brothers were forced to rape sisters. Pregnant women were killed by having their stomachs slit open and the foetus removed merely to settle a bet amongst the troops as to

[487] *Ibid* at para. 12.

> the gender of the foetus. Men were disembowelled and their intestines stretched across a road to form a barrier. Human heads were placed on sticks on either side of the road to mark such barriers. Hacking off the limbs of innocent civilians was commonplace. The victims were babies, young children and men and women of all ages. Some had one arm amputated, others lost both arms. For those victims who survived an amputation, life was instantly and forever changed into one of dependence. Most were turned into beggars unable to earn any other living and even today cannot perform even the simplest of tasks without the help of others. Children were forcibly taken away from their families, often drugged and used as child soldiers who were trained to kill and commit other brutal crimes against the civilian population. Those child soldiers who survived the war were robbed of a childhood and most of them lost the chance of an education."[488]

The Appeals Chamber is, therefore, satisfied that having regard to that finding, the Trial Chamber was justified in imposing a prison sentence of fifty (50) years on the Appellant Alex Tamba Brima, forty-five (45) years on the Appellant Brima Bazzy Kamara, and fifty (50) years on Santigie Borbor Kanu.

329. The Appeals Chamber finds no cause to interfere with the exercise by the Trial Chamber of its discretion in sentencing the Appellants.

330. In the result the Appellants Appeal against sentence fails.

[488] *Ibid* at para. 34.

X. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence;

NOTING the written submissions of the Parties and their oral arguments presented at the hearings on 12, 13 and 14 November 2007;

SITTING in open session;

UNANIMOUSLY;

WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL;

HOLDS in regard to Grounds One and Three, that as the Appellants have been convicted and sentenced to terms of imprisonment of fifty (50) years and forty-five (45) years for crimes committed under Article 6(1) or Article 6(3) of the Statute, in Bombali District and in the Western Area, it becomes an academic exercise and also pointless to adjudicate further on Grounds One and Three of the Prosecution's Appeal;

ALLOWS the Fourth Ground of Appeal relating to joint criminal enterprise but sees no need to make further factual findings or to remit the case to the Trial Chamber for that purpose, having regard to the interest of justice;

ALLOWS Ground Seven relating to forced marriage but declines to enter a further conviction on Count 8 of the Indictment;

ALLOWS Ground Nine relating to cumulative convictions, but declines to enter such convictions for responsibility found under Articles 6(1) and 6(3) of the Statute, having regard to the global sentences imposed which are adequate;

DISMISSES Grounds Two, Five, Six and Eight;

WITH RESPECT TO BRIMA'S GROUNDS OF APPEAL;

NOTES that Grounds Two, Three, Seven and Eight have been abandoned;

DISMISSES the rest of his Grounds, namely Grounds One, Four, Five, Six, Nine, Ten, Eleven and Twelve and **AFFIRMS** the sentence of fifty (50) years imprisonment imposed by the Trial Chamber;

WITH RESPECT TO KAMARA'S GROUNDS OF APPEAL;

DISMISSES all of Kamara's Grounds of Appeal;

REVISES the Trial Chamber's Disposition in respect of Counts 9, 12 and 13 by substituting Article 6(3) for Article 6(1) of the Statute and **AFFIRMS** the sentence of forty-five (45) years imprisonment imposed by the Trial Chamber;

WITH RESPECT TO KANU'S GROUNDS OF APPEAL;

DISMISSES all of Kanu's Grounds of Appeal and **AFFIRMS** the sentence of fifty (50) years imprisonment imposed by the Trial Chamber;

ORDERS that this Judgment be enforced immediately pursuant to Rule 102 of the Rules of Procedure and Evidence.

Delivered on 22 February 2008 at Freetown, Sierra Leone.

Justice George Gelaga King, Presiding

Justice Emmanuel Ayoola

Justice Renate Winter

Justice Raja N. Fernando

Justice Jon M. Kamanda

[Seal of the Special Court for Sierra Leone]

XI. ANNEX A: PROCEDURAL HISTORY

1. The Further Amended Consolidated Indictment on 18 February 2005 (the "Indictment"), charged the three convicted persons with seven crimes against humanity, namely: extermination; murder; rape; sexual slavery and other forms of sexual violence; "Other Inhumane Acts"; and enslavement (Counts 3, 4, 6, 7, 8, 11, and 13, respectively). The Indictment further charged the three convicted persons with six violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, namely: acts of terrorism; collective punishments; violence to life, health and physical or mental well-being of persons, in particular murder and mutilation; outrages upon personal dignity; and pillage (Counts 1, 2, 5, 10, 9, and 14, respectively). In addition, the Indictment charged the three convicted persons with other serious violations of international humanitarian law, namely: conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (Count 12).

2. The Trial Chamber on 20 June 2007, convicted Brima, Kamara and Kanu of the following: acts of terrorism; collective punishments; extermination; murder; violence to life, health and physical or mental well-being of persons, in particular murder and mutilation; outrages upon personal dignity; conscripting children under the age of 15 years into armed groups and/or using them to participate actively in hostilities; enslavement; pillage; and rape (Counts 1, 2, 3, 4, 5, 10, 9, 12, 13, 14, and 6).[489] The Trial Chamber found Brima and Kamara not guilty of "Other Inhumane Acts," a crime against humanity, under Article 2(1) of the Statute (Count 11).[490] The Trial Chamber did not enter convictions under Count 7 for sexual slavery and any other form of sexual violence because Count 7 violated the rule against duplicity.[491] Finally, the Trial Chamber did not enter a conviction under Count 8 for "Other Inhumane Acts," a crime against humanity, under Article 2.i of the Statute, because there was no evidence of sexual violence as an inhumane act which was not subsumed under rape (Count 6) or outrages upon personal dignity, specifically sexual slavery (Count 9).[492]

3. On 19 July 2007, the Appellants were sentenced to terms of imprisonment for all the Counts of which they were found guilty. Alex Tamba Brima and Santigie Borbor Kanu were each

[489] *Ibid* at paras 2113, 2117, 2121.
[490] *Ibid* at paras 2115, 2119.
[491] *Ibid* at para. 95.
[492] *Ibid* at paras 2116, 2120, 2123.

sentenced to a single term of imprisonment of fifty (50) years, and Brima Bazzy Kamara to a single term of imprisonment of forty-five (45) years.

4. On 13 July 2007, the Defence filed a motion requesting an extension of time of four months to file notices of appeal pursuant to Rule 116 of the Rules.[493] In the motion it was argued that the delay in appointing counsel for the three Appellants constituted "good cause" for making the request. The Appeals Chamber denied the extension on 25 July 2007, holding that the defence counsel did not have *locus standi* to make the joint request.[494]

5. On 2 August 2007, Notices of Appeal were filed by the Prosecution and the Defence[495] along with a Joint Defence and Prosecution Motion for an Extension of Time for the Filing of Appeal Briefs.[496] The Appeals Chamber granted the Motion for Extension of Time and ordered both parties to file their Appeal Briefs no later than 13 September 2007.[497]

6. Also on 2 August 2007, the Prosecution filed a Motion for Voluntary Recusal or Disqualification of Hon. Justice Robertson, on the ground of actual or perceived bias.[498] After granting Hon. Justice Robertson time extensions to respond to the motion,[499] the Appeals Chamber rendered its decision on 3 October 2007, finding that the Motion for Recusal lapsed in view of the voluntary resignation of Hon. Justice Robertson on 14 September 2007.[500]

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[493] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Urgent Joint Defence Request for Extension of Time Limit Pursuant to Rule 116 for Filing of Notice of Appeal and Appeal Submissions, 13 July 2007.
[494] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Decision on Request for Extension of Time Pursuant to Rule 116 of the Rules of Procedure and Evidence, 25 July 2007.
[495] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Kamara Defence Notice of Appeal, 2 August 2007; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Public Brima Defence Notice of Appeal 2 August 2007; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Kanu's Notice and Grounds of Appeal, 2 August 2007; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Public Prosecution's Notice of Appeal, 2 August 2007.
[496] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Urgent Joint Defence and Prosecution Motion for an Extension of Time for the Filing of Appeal Briefs, 2 August 2007.
[497] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Decision on Urgent Joint Defence and Prosecution Motion for an Extension of Time for the filing of Appeals Briefs, 10 August 2007.
[498] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Prosecution Motion for Voluntary Recusal or Disqualification of Justice Robertson, 2 August 2007.
[499] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Public Order Extending Time for Filing a Response to 'Prosecution Motion for Voluntary Recusal or Disqualification of Justice Robertson,' 16 August 2007; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Public Order Extending Time for Filing a Response to 'Prosecution Motion for Voluntary Recusal or Disqualification of Justice Robertson,' 28 August 2007.
[500] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Public Decision on Prosecution Motion for Voluntary Recusal or Disqualification of Justice Robertson, 28 October 2007.

7. The Prosecution also filed a Motion on 2 August 2007, requesting an extension of the page limit for its consolidated Appeal Brief from 170 pages to 250 pages.[501] On 24 August 2007, the Pre-Hearing Judge Hon. Justice Winter, authorised the Prosecution to file an Appeal Brief of no more than 250 pages, and extensions of no more than 20 pages each for the Appeal Briefs of Brima, Kamara and Kanu.[502]

8. The Prosecution and the Appellants filed their respective appeal briefs on 13 September 2007. The response briefs of the Parties were filed on 4 October 2007,[503] and replies were submitted on 9 October 2007.[504]

9. Oral arguments of the Parties were heard by the Appeals Chamber on 12, 13 and 14 November 2007.

[501] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Urgent Prosecution Motion for an Extension of the Page Limit for its Appeal Brief, 2 August 2007.
[502] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Decision on Urgent Prosecution Motion for an Extension of the Page Limit for its Appeal Brief, 24 August 2007.
[503] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Kamara Response to the Prosecution Appeal Brief, 4 October 2007; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Respondent's Submissions – Kanu Defence, 4 October 2007; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A , Brima Response to Prosecution's Appeal Brief, 4 October 2007; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Response Brief of the Prosecution, 4 October 2007.
[504] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Submissions in Reply – Kanu Defence, 9 October 2007; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-A, Reply Brief of the Prosecution, 9 October 2007.

XII. ANNEX B: GLOSSARY

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