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SCSL-04-16-A
(082-176)

C82

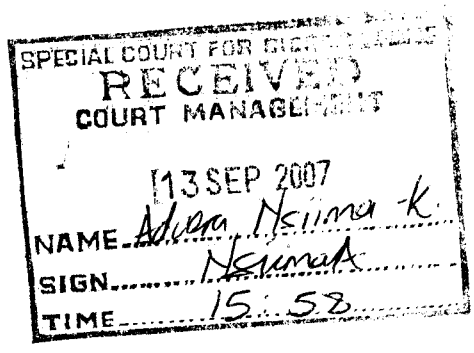
SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

Before: Hon. Justice George Gelaga King, President
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice Geoffrey Robertson. QC
Hon. Justice A. Raja N. Fernando

Registrar: Herman von Hebel, Registrar

Date: 13 September 2007



The Prosecutor **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL -04-16-A

Public Document

KANU'S SUBMISSIONS TO GROUNDS OF APPEAL

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A. INTRODUCTION

I. On the 20th June 2007, Trial Chamber II issued judgment in the case, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (the Judgment).[1] In the Judgment, the Trial Chamber found the Appellant – Santigie Borbor Kanu guilty of eleven out of fourteen counts of international crimes as follows:

II. The Trial Chamber unanimously found the Appellant guilty of the following crimes pursuant to Article 6(1) of the Statute of the Special Court ("the Statute"): Count 1: Acts of Terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(d) of the Statute; Count 2: Collective Punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(b) of the Statute; Count 3: Extermination, a Crime against Humanity, punishable under Article 2(b) of the Statute; Count 4: Murder, a Crime against Humanity, pursuant to Article 2(a) of the Statute; Count 5: Violence to life, health and physical or mental wellbeing of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(a) of the Statute; Count 9: Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(e) of the Statute; Count 10: Violence to life, health and physical or mental well-being of persons, as mutilation, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute; Count 12: Conscripting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities, and other serious violations of international humanitarian law, pursuant to Article 4(c) of the Statute; Count 13: Enslavement, a Crime against Humanity, pursuant to Article 2(c) of the Statute; Count 14: Pillage, a Violation of Article 3 common to the

[1] SCSL-2004-16-T, *The Prosecutor v Brima, Kamara, Kanu*, 20 June 2007.

Geneva Conventions and of Additional Protocol II, pursuant to Article 3(f) of the Statute.[2]

III. The Trial Chamber also unanimously found the Appellant guilty of the following crimes pursuant to Article 6(3) of the Statute. Count 1: Acts of Terrorism, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(d) of the Statute; Count 2: Collective Punishment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(b) of the Statute; Count 6: Rape, a Crime against Humanity, pursuant to Article 2(g) of the Statute;[3]

IV. After the Judgment, the Trial Chamber scheduled a Sentencing Hearing for the 16th July 2007. Pursuant to Rule 100(A) of the Rules of Procedure and Evidence of the Special Court ("the Rules"), the parties filed their Sentencing Briefs. A sentencing hearing was conducted in the 19th July 2007.

V. On the 19th of July 2007, the Trial Chamber sentenced all three Accused. The Trial Chamber sentenced the Appellant – Kanu, to a single term of imprisonment of **FIFTY YEARS** for all Counts on which he was found guilty, credit being given for any period which the Appellant was detained in custody pending this trial.[4]

VI. Following the Sentencing Judgment, pursuant Article 20 of the Statute and Rule 108A of the Rules of the Court, the Appellant – Kanu, on the 2nd August 2007, filed a Notice and Grounds of Appeal against both the Judgment and Sentence.[5]

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[2] *Ibid*, para. 2121, Corrigendum to Judgment para. 14
[3] *Ibid*, para. 2122 of the Judgment and Corrigendum to Judgment, para. 15
[4] Sentencing Judgment, Disposition.
[5] SCSL-04-16-A(034-041)

VII. Now, the Appellant hereby files Submissions on Grounds of Appeal against the Judgment and Sentence, pursuant Article 20 of the Statute of Special Court ("the Statute") and Rules 108(A) and 111 of the Rules of the Court.

A. INTRODUCTION

VIII. On the 20th June 2007, Trial Chamber II issued judgment in the case, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (the Judgment). In the Judgment, the Trial Chamber found the Appellant – Santigie Borbor Kanu guilty of 11 out of fourteen counts of international crimes as follows:

IX. The Trial Chamber unanimously found the Appellant guilty of the following crimes pursuant to Article 6(1) of the Statute: Count 1; Acts of Terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(d) of the Statute; Count 2: Collective Punishments, a violation of Article 3 common to the Geneva Conventions of Additional Protocol II, pursuant to Article 3(b) of the Statute; Count 3: Extermination, a Crime against Humanity, punishable under Article 2(b) of the Statute; Count 4: Murder, a Crime against Humanity, pursuant to Article 2(a) of the Statute; Count 5: Violence to life, health and physical or mental wellbeing of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(a) of the Statute; Count 9: Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(e) of the Statute; Count 10: Violence to life, health and physical or mental well-being of persons, as mutilation, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute; Count 12: Conscripting children under the age of 15 years into an armed groups and/or using them to participate actively in hostilities, an other serious violations of international humanitarian law, pursuant to Article 4(c) of the Statute; Count 13: Enslavement, a Crime against Humanity, pursuant to Article

2(c) of the Statute; Count 14: Pillage, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(f) of the Statute.[6]

X. The Trial Chamber also unanimously found the Appellant guilty of the following crimes pursuant to Article 6(3) of the Statute. Count 1: Acts of Terrorism, a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(d) of the Statute; Count 2: Collective Punishment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3(b) of the Statute; Count 6: Rape, a Crime against Humanity, pursuant to Article 2(g) of the Statute;[7]

XI. After the Judgment, the Trial Chamber scheduled a Sentencing Hearing for the 16th July 2007. Pursuant to Rule 100(A) of the Rules of Procedure and Evidence of the Special Court, all the parties filed their Sentencing Briefs. A sentencing hearing was conducted in the 16th July 2004.

XII. On the 19th of July 2007, the Trial Chamber sentenced all 3 Accused. The Trial Chamber sentenced the Appellant – Kanu to a single term of imprisonment of **FIFTY YEARS** for all Counts on which he was been found guilty, credit being given for any period which the Appellant was detained in custody pending this trial.[8]

XIII. Following the Sentencing Judgment, pursuant Article 20 of the Statute and Rule 101(A) of the Rules of the Court, the Appellant – Kanu, on the 2nd August 2007, filed a Notice and Grounds of Appeal against both the Judgment and Sentence.

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[6] *Ibid*, para. 2121, Corrigendum to Judgment para. 14
[7] *Ibid*, para. 2122 of the Judgment and Corrigendum to Judgment, para. 15
[8] Sentencing Judgment, Disposition.

XIV. Now, the Appellant hereby files Submissions on Grounds of Appeal against the Judgment and Sentence, pursuant Article 20 of the Statute of Special Court ("the Statute") and Rules 108(A) and 111 of the Rules of the Court.

B. GROUNDS OF APPEAL RELATING TO CONVICTION

GROUND ONE

1. The 'Greatest Responsibility Requirement'

1.1 The Appellant submits that in finding that the greatest responsibility requirement was not a jurisdictional issue, the Trial Chamber erred both in law and in fact. Consequently, the Chamber failed to establish whether the Appellant falls into the category of "those who bear the greatest responsibility" as stated in the Statute of the Court. This was a threshold issue the Chamber should have considered before assessing whether the Appellant was guilty of any crime.[9]

1.2 The Appellant contends that Article 1(1) of the Statute, which lays down the court's competence, was meant to establish a clear jurisdictional threshold. The meaning, object and purpose of this clause, as the Trial Chamber rightly observed, can be deciphered from its drafting history. Article I (1) of the Statute reads:

> There is hereby established a Special Court for Sierra Leone 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 30th November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

1.3 This articulation of the court's personal jurisdiction marked a significant departure from the more liberal wording of the Security Council's previous mandates to both the International Criminal Tribunal for the former Yugoslavia

[9] See paras 650-659 of the Trial Chamber's Judgment.

("the ICTY") and the International Criminal Tribunal for Rwanda ("the ICTR"),[10] the immediate predecessors to the Special Court. In both tribunals, Personal jurisdiction simply extended to, '*persons responsible*' for serious violations of international humanitarian law without *qualification* as to the nature of the *responsibility*.[11] This qualification, as the Trial Chamber I rightly found in the *Fofana Motion for Lack of Personal Jurisdiction*, was a deliberate choice.[12]

1.4 A survey of the *travaux preparatoires*, principally, the correspondence between the United Nations Security Council on behalf of the United Nations and the Government of Sierra Leone, the principal parties to the establishment of the Special Court, shows clearly that the parties were cognizant that the court would have limited time and resources and therefore deliberately circumscribed the Court's personal jurisdiction through the "greatest responsibility" requirement.[13]

1.5 It is significant that the Security Council rejected the 'most responsible' formulation of the equivalent provisions in the ICTY and ICTR statutes, which had been proposed by the UN Secretary General.[14] In the words of the Security Council President, the court would concentrate on the 'the *most senior* leaders suspected of being the *most responsible*' for the commission of international crimes falling within the subject matter jurisdiction of the court (Emphasis

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[10]Unlike the Special Court which was established by treaty, both tribunals, were established by the Security Council under Chapter VII of the United Nations Charter.

[11] See, SC/Res/ 808 (1993) and Art. 1, ICTYSt.; and SC/Res/955 (1994) and Art. 1 ICTRSt., respectively.

[12]*Prosecutor v Fofana*, Case No. SCSL-04-14-PT, Decision on the preliminary defence motion on the lack of personal jurisdiction filed on behalf of accused Fofana, Trial Chamber 1, 3 March 2004, para. 21.

[13] From the beginning, the Special Court, suffered serious financial concern, as it was going to be entirely dependent on voluntary contributions – See para. 68 - 72 of the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915 ("the Secretary General's Report"), on the question of funding. See also Art. 6 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court.

[14] See letter dated 22 December 2000 from the President of the Security Council to the Secretary General, S2000/1234, p.1.

added).[15] Culpability was to be linked to the seniority of an accused person's position relative to the commission of alleged atrocities. The "greatest responsibility" requirement the Security Council insisted, would limit the 'focus of the court to those who played a leadership role'.[16]

1.6 An observation of the UN Secretary General supports this view. He observed that: '[i]n its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", *which is understood as an indication of a limitation on the number of accused by reference to their command authority and the gravity and scale of the crime.*'[17] (Emphasis added).

1.7 In its findings, the Trial Chamber argues that the Security Council was subsequently swayed from this narrow view in favour of a wider interpretation. The court made reference to further correspondence between the UN Security Council and the UN Secretary General, in particular, a letter from the Security Council President to the Secretary General 'confirming' that:

> [t]he members of the Council share your analysis of the importance and role of the phrase 'persons who bear the greatest responsibility'. The members of Council, moreover, share your view that *the words beginning with* 'those leaders [...]' are intended as a guide to the Prosecutor in determining his or her prosecutorial strategy. (Emphasis added).

This "confirmation", related to an earlier "acknowledgment" by the Secretary General that while 'the determination of the meaning of the term "persons who bear the greatest responsibility" in any given case falls initially to the prosecutor,' it is ultimately a matter for the Special Court itself.[18]

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[15] *Ibid.*

[16] *Ibid.*

[17] The Secretary General's Report). para. 29.

[18] Para. 652 of the Judgment. Also see para. 657.

1.8 Two issues arise from the Trial Chamber's analysis of this correspondence between the Security Council President and the UN Secretary General. Firstly, it is respectfully contested that the letter by the Security Council President referred above, "confirmed" an interpretation that imported a wider meaning to the greatest responsibility requirement. The excerpt referred to above, it is submitted, *only* related to what later became the latter part of Article 1(1) of the Statute, which reads – 'including *those leaders* who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone' – which was evidently meant to guide the Prosecutor in his choice of *leaders* who bear the greatest responsibility as possible suspects; which was consistent with stated preference of the Security Council.

1.9 Secondly, the Appellant contests the interpretation that the Secretary General's 'confirmation' translated the greatest responsibility requirement into a guideline in the exercise of prosecutorial discretion.

1.10 On the contrary, the Secretary General underscored the primacy of the Special Court in the determination of the greatest responsibility requirement. The court was going to be the ultimate arbiter on the issue. This purpose, it is submitted, would be defeated if the requirement were a mere guideline to prosecutorial discretion. Under those circumstances, the court would be relegated to the marginal role of judicial review, which in the case of prosecutorial discretion is exceptional. Clearly that was not what the Security Council intended.

1.11 The Appellant therefore submits that the Trial Chamber read incorrectly the correspondence referred to in paragraph 562 of its judgment. A proper reading of that correspondence would have shown that the Security Council did not in any way depart from its previous position that the greatest responsibility requirement was to be a jurisdictional requirement to be primarily determined by reference to one's leadership role.

1.12 This submission finds support in the findings of the Trial Chamber 1 in the *Fofana Motion for Lack of Personal Jurisdiction*, where the learned chamber noted that:

> based on the *travaux preparatoires*, of the Statute of the Special Court for Sierra Leone, it is clear that the drafters intended that the category of persons over whom the Special Court had personal jurisdiction was limited. In expressing its preference for "persons who bear the greatest responsibility" instead of "persons most responsible", the Security Council directed that the fact that an individual held a leadership role should be the primary consideration; the severity of a crime or the massive scale of a particular crime should not be the primary consideration.[19]

1.13 The greatest responsibility requirement, as Trial Chamber 1 also found, was meant to be a jurisdictional threshold. As the Chamber rightly observed, '[t]he *issue of personal jurisdiction is a jurisdictional requirement*, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion…'.[20] (Emphasis added.)

1.14 The contrary, would make a legal nonsense as prosecutorial discretion cannot, by definition, be a legislated issue. If it were intended that prosecutorial discretion should be so prescribed, the issue would not have been dealt with in Article 1, which deals with the court's competence. Instead, the issue would have been addressed in Article 15 which deals with the powers of the prosecutor.

1.15 While the Appellant concedes that Trial Chamber II was not bound by the decision of Trial Chamber I in deciding on the greatest responsibility requirement, the Appellant nonetheless submits that its point of departure in paragraph 654 of

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[19] *Fofana Motion Decision*, para. 40.

[20] *Ibid*, para. 27.

the judgment is not legally tenable. In essence, the Trial Chamber reasons that in so far as Article 15 of the Statute conferred investigative and prosecutorial powers on the prosecutor over those who bear the greatest responsibility while at the same time guaranteeing prosecutorial independence; that makes the prosecutor's powers in that regard non-reviewable. Further, that the Trial Chamber would not be in a position to review the prosecutor's powers anyway.

1.16 It is respectfully submitted that the Trial Chamber's reasoning is flawed in both instances. Firstly, it is submitted that judicial review would not be a derogation of the prosecutor's independence guaranteed in Article 15(1) of the statute. Judicial review is a traditionally accepted safeguard against abuse of authority, even prosecutorial discretion. Secondly, while it is conceded that the Trial Chamber bereft of the information in the possession of the prosecutor at the pre-trial stage, would not be in a position to determine whether any person indicted bears the greatest responsibility; that however does not change the nature of the requirement. As Trial Chamber 1 held, the question of who bears the greatest responsibility would be determined as a matter of evidence at the trial stage.[21]

1.17 That inquiry could be done after the close of the prosecution's case at the 'Motion for Judgment of Acquittal stage'.[22] At that stage, on the evidence adduced by the prosecutor, its credibility aside, the court would be in a position to determine whether, *prima facie*, the accused person before it falls within the greatest responsibility threshold. In this regard, it is important to note that the Appellant did raise the issue in his Motion for Judgment of Acquittal.[23]

1.18 It is also submitted that contrary to the Trial Chamber's finding, it is within the realm of possibility that the greatest responsibility requirement could be

[21] *Fofana Motion Decision* .para. 44.

[22] See Rule 98 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("the Rules of the Court")

[23] Kanu Motion of Acquittal

determined as early as at the pre-trial stage. In this regard, the practice in the ICTR and the ICTR, especially the latter, is instructive. Both tribunals, in line with their respective completion strategies, have streamlined their respective personal jurisdictions and now concentrate only on 'the most senior leaders suspected of being the most responsible' for the commission crimes within the respective statutes of the courts[24]; the same formulation insisted upon by the Security Council President in the drafting of the statute of the Special Court.

1.19 More interestingly, the ICTY went on to amend its Rules of Procedure and Evidence to include in the indictment review process; a preliminary determination of whether an indictee before the tribunal, *prima facie*, constitutes one or more of the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the tribunal.[25] This arrangement, presided over by a bureau comprising the President, the Vice President and the Presiding Judges of the Trial Chambers, effectively introduces a 'new jurisdictional threshold',[26] to be determined at the pre-trial stage.

1.20 In paragraph 653 of the judgment, the Trial Chamber, agreed with the prosecution's submission that it would be inconceivable that a long and expensive trial should proceed only to conclude at the end of the trial that the accused persons fall outside the court's jurisdictional threshold.[27] The foregoing submissions show that this reasoning is fallacious.

1.21 The greatest responsibility requirement is a jurisdictional requirement to be determined primarily on the basis of one's leadership position. This was also emphasized in the latter part of Article 1(1) of the Statute which specifically

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[24] See, S/Res/1503(2003) and S/Res/1534(2004), respectively.

[25] Rule 28 ICTYSt.

[26] See Côté, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, 3 *J. Int'l Crim. Just.* 162, at 185-6.

[27] See Prosecution Closing Argument, Transcript 7 December 2006, p. 63-66.

extended the court's personal jurisdiction over, 'those leaders who in committing such crimes [have] threatened the establishment of and implementation of the peace process in Sierra Leone'.

1.22 The Trial Chamber reasons in paragraph 568 that, the fact that the court's personal jurisdiction extended to alleged perpetrators between 16 - 18 years of age, should import a wider interpretation of Article 1(1) to include other categories of persons other than those in a leadership position. Thus the Chamber reasoned that a purposive interpretation to the statute would hold that persons between 16 and 18 years of age could not possibly have been in any leadership position to bear the greatest responsibility.

1.23 While this reasoning would generally hold true under normal circumstances, the Sierra Leonean civil war was exceptional. Young children not only bore the brunt of the war: by force or otherwise, they were also active participants. Some were even given "bush ranks" – that is, unofficial promotions in their respective fighting forces.[28] Thus much as some of these children could have been 'most responsible' for the crimes within the statute of the court, they could also 'bear the greatest responsibility' if they were in positions of leadership. The question would only be where to draw the line.

1.24 In any event, while the issue was canvassed in the Statute, it was not seriously contemplated that juvenile offenders would be arraigned before the court. As the Security Council President noted, it was the view of the members of the Council that the Truth and Reconciliation Commission would have a major role to play in the case of juvenile offenders. The Council therefore encouraged the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end.[29]

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[28] See para. 31 of the Secretary General's Report

[29] See Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary General, S2000/1234, p. 1 para. 3.

1.25 The Trial Chamber therefore erred in finding that the greatest responsibility requirement was not a jurisdictional requirement. Consequently, the Trial Chamber erred in convicting the Appellant without firstly establishing whether it had jurisdiction over him by virtue of Article 1(1). Had it not erred in the manner it did, the Trial Chamber, on the evidence on the record, would have – either at the close of the prosecution's case or at the close of the trial – found that the Appellant did not fall into the category of those persons who bear the greatest responsibility for the crimes within the statute of the court, committed in the territory of Sierra Leone since 30th November 1996. It would have therefore acquitted the Appellant for want of personal jurisdiction.

1.26 There is some evidence that the Appellant was one of the leaders in the AFRC; his designation after Mansofinia was that of Chief of Staff. Apart from this designation, the Appellant's exact position of authority in the AFRC throughout the period set out in the Indictment was never established. The Appellant's position in the AFRC government, unlike his co-accused in the court *aquo*, was never fully established. The Trial Chamber was unable to determine whether the Appellant played any influential role in the running or policy-making of the AFRC government.[30]

1.27 Similarly, the Trial Chamber was unable to establish the Appellant's position in the Koinadugu and Bombali districts further than a general finding that he was a senior commander in charge of the abducted civilians, including women and children.[31] Most importantly, the court rejected the suggestion by the prosecutor that the Appellant was the third in command in the Koinadugu and Bombali districts.[32] The Trial Chamber also failed to establish the Appellant's position in Freetown and the Western area beyond that his designation was Chief of Staff and

[30] Para. 511 of the Judgment. For a full discussion, see Part VII – Role of the Accused, p. 108 *et seq.*

[31] Para. 527 of the Judgment.

[32] Para. 522 of the Judgment.

that he was also in charge of the abducted civilians.[33] As the Trial Chamber found, no evidence turned on the Appellant's *de jure* position as Chief of Staff.

1.28 It is therefore submitted that on the evidence, the Appellant would not qualify as one of those who bears the greatest responsibility within the jurisdictional requirements of Article 1(1) of the statute of the court. According, the guilty verdict entered against him should be set aside as he does not meet the jurisdictional threshold of the court.

1.29 Alternatively, it is submitted that even if it were established that the Appellant meets the jurisdictional threshold of the court; his culpability should only be considered in the context of his leadership role. Put differently, his culpability under Article 6(1) of the statute of the court, to the extent that he committed the crimes *in person*, should only be considered as aggravating with respect to sentencing. This follows from the formulation of Article 1(1) which directed the court to look at the overall culpability of those who bear the greatest responsibility within the context of the entire civil war starting the 30th November 1996.

1.30 Thus the focus was on those who presided over the commission of atrocities, as opposed to the actual perpetrators of the incidents of the crimes punishable under the statute. Within that context, all the crimes that the Appellant committed *in person* should only be considered as aggravating and no further. Respectfully, the Appeals Chamber should therefore reverse any conviction entered against the Appellant under Article 6(1) to the extent that he committed the crimes in person.

GROUND TWO

2. **Pleading Principles When Mode of 'Committing' is alleged**

[33] Para. 535 of the Judgment.

2.1 The Appellant submits that the Trial Chamber erred in law in convicting him under Article 6(1) of the Statute on the basis that he 'committed' crimes *in person* under Article 6(1), after it had found in paragraph 53 of the judgment that the Indictment was defective in that it did not sufficiently disclose the particulars of his involvement *in person*. The Trial Chamber erred in finding that such defect had been cured by prosecution evidence of material facts not pleaded in the Indictment to which the Defence had not objected. The Appellant contends that the Trial Chamber ought to have dismissed the charge once it had established that the Indictment was defective.

2.2 It is trite that under international criminal law, the Indictment is the primary accusatory instrument. As such, it must plead the Prosecution's case in sufficient detail so that the accused person is properly put to his defence.[34] Particulars of a charge must be pleaded in clear and concise terms.[35] Article 17(4(a) of the statute reiterates this duty. It requires that the Accused be informed 'promptly and in detail in a language which he or she understands of the *nature* and *cause* of the charge against him or her'. This duty, it has been noted, enjoins the Prosecution to particularize the material facts of the alleged criminal conduct of the Accused that, in its view, go to his/her involvement in the alleged crime. Failure to do so, it has been held, results in the Indictment being dismissed for vagueness as it would negatively impact on the Accused person's ability to prepare his/her defence.[36]

2.3 The obligation on the Prosecution in pleading the Accused's culpability in the Indictment, it must be underlined, is two fold. As the Appeals Chamber observed in the *Ntagerura* case, the obligation entails the duty to inform the Accused of the *nature and cause* of the charges against him/her as well as a concise *description*

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[34] *Kvocka Appeals Judgment*, para. 33. Also see *Prosecutor v. Ntageurura, Bagambiki, Imanishimwe*, Case No. ICTR-99-46-*A*, para. 126, p. 40, where the Appeal Chamber reiterated that no new charges may be introduced outside Indictment, which is the only accusatory instrument of the Tribunal.

[35] *Brdjanin Decision*, 26 June 2001, para. 61

[36] *Kupreskic et al*, (AC), Judgment, para. 98.

of the facts underpinning the charges.[37] The former duty, it is submitted, requires a clear and concise articulation of the specific charge that the Accused is facing; as only in respect of a charge that has specifically been preferred against the Accused in the Indictment can a conviction be entered.[38] The latter requires specific factual details relating to the charge.

2.4 The level of specificity required to describe the Accused's mode of criminal culpability in the Indictment was explained in *Kvocka* case. In that case, it was held that it was not enough for the Indictment to merely quote the provisions of Article [6(1)] without specifying mode or modes of responsibility being pleaded. The charge would otherwise be ambiguous. Where the Prosecution intends to rely on all modes of responsibility in Article [6(1)], the material facts relevant to each of those modes must be pleaded in the Indictment. The Indictment would otherwise be defective either because it pleads modes of responsibility which do not form part of the Prosecution's case, or because the Prosecution would have failed to plead material facts for the modes of responsibility it is alleging.[39]

2.5 In *Kordic et al*, the Appeals Chamber held that the alleged mode of criminal liability of the Accused in a crime pursuant to Article [6(1)] of the Statute should be clearly laid out in the Indictment. Further, that the nature of the alleged responsibility of the Accused should be unambiguous in the Indictment.[40]

2.6 Where the mode of committing within the meaning of Article 6(1) is being pleaded, the courts have held that detailed particulars such as the identity of the victim, the time and place of the events and the means by which the acts were committed must be set forth in the Indictment.[41] In cases where a high degree of

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[37] *Ntagerura (AC)*, para. 121, page 39

[38] *Naletilic, Judgment* (AC), para. 26.

[39] *Kvocka et al., Judgment* (AC), para. 29

[40] *Kordic and Cerkez, Judgment* (AC), para. 129

[41] *Ibid*, para. 89

specificity is impracticable, as the identity of the victims is information that is valuable to the preparation of the defence case, if the prosecution is in a position to name the victims, it should endeavor to do so.[42] Where that is not possible, general information that is sufficient to warn the accused of the allegations against him/her would be acceptable.

2.7 While, generally, defects in the Indictment which render it vague, would result in that part of the Indictment being quashed, defects in an Indictment may, in certain *exceptional* cases be 'remedied'.[43] It has been held that information furnished to the Defence by the Prosecution such as the Prosecution's Pre-trial Brief; the Prosecution's opening statement; and the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the Indictment to which each witness will testify, including specific references to counts and relevant paragraphs in the Indictment, may cure a defect in the Indictment as it may, in some cases, serve to put the Accused on notice.[44] The underlying factor in determining whether a defective indictment has been cured is *whether the Accused was in a reasonable position to understand the charge against him or her*.[45] (Emphasis added)

2.8 It has been held, however, that the mere service of witness statements or of potential exhibits by the Prosecution pursuant to disclosure requirements, does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial.[46] In the *Kupreskic* case, the Appeals Chamber held that notice by service of witness statements under Rule 66 (A) that the Prosecution would plead evidence of facts not pleaded in the indictment was no longer sufficient.[47]

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[42] *Ibid*, para. 90

[43] Case No. ICTR-99-46-A *The Prosecutor* v. *Ntagerura, Bagambiki, Imanishimwe*, para.114

[44] See *Naletilic, Appeal Judgment*, para. 27.

[45] *Kordic Appeal Judgment*, para. 142.

[46] *Mpambara* Trial Judgment, para.30, pp.11-12, relying on, inter-alia, *Naletilic* Judgment (AC), para. 27

[47] *Kupreskic et al* (AC), para. 323

2.9 In the *Brdanin* case, the Trial Chamber held that, where the Prosecution seeks to lead evidence of an incident which supports the general offence charged, but the particular incident has not been pleaded in the Indictment in relation to that offence, the admissibility of the evidence depends upon the sufficiency of the notice which the accused has been given that such evidence is to be led in relation to that offence. Until such notice is given, an accused is entitled to proceed upon the basis that the details pleaded are the only case which he has to meet in relation to the offence or offences charged. Notice that such evidence will be led in relation to a particular offence charged is *not* sufficiently given by the mere service of witness statements by the prosecution pursuant to the disclosure requirements imposed by Rule 66(A). This necessarily follows from the obligation now imposed upon the Prosecution to identify in its Pre-Trial Brief, in relation to *each count*, a summary of the evidence which it intends to elicit regarding the commission of the alleged crime and *the form of the responsibility* incurred by the accused. If the prosecution intends to elicit evidence in relation to a particular count additional to that summarised in its Pre-Trial Brief, specific notice must be given to the accused of that particular intention.[48]

2.10 In *casu*, the Trial Chamber noted that the Indictment alleged all modes of liability contained in Article 6(1) of the Statute without giving particulars regarding time, location and identity of the victims in relation to the crimes personally 'committed' by the Appellant.[49] This, the Trial Chamber noted, rendered the Indictment defective as it did not sufficiently put the Accused on notice that he would answer to the charge of personal perpetration of crimes.[50]

2.11 The Trial Chamber however went on to determine whether the defect could have been cured by the Prosecution's disclosed material to the Defence which

[48] *Brdanin* (TC), Decision on the Form of Further Amended Indictment, 26th June 200, para. 62

[49] Para. 52 of the Judgment.

[50] Para. 53 of the Judgment.

contained an initial witness list and a summary of facts and counts to which each witness would testify. This material, considered in conjunction with Witness statements disclosed pursuant to Rules 66 and 68, the Trial Chamber found, *might* have put the Defence on notice that evidence personally implicating the accused would unfold at trial. [51]

2.12 In determining this issue, the Trial Chamber also had to consider whether the Appellant had been given sufficient notice of the charge of personal perpetration of the alleged crimes. In this regard, the Chamber was to be guided by what it considered, the Defence's attitude regarding the defect, that is, whether the Defence had objected to the evidence or not. The Trial Chamber observed in this regard that, in case of lack of notice, the Defence must raise a specific objection at the time the evidence is introduced.[52] Failure to do so would be deemed a waiver. The Chamber thus went on to apply this test to the specific instances where it was alleged that the Appellant committed crimes in person.

2.13 In paragraph 2050 of the Judgment where the Trial Chamber established that the Appellant had committed an act of violence – amputations at Kissy Old Road; while conceding that the Indictment did not provide any particulars of the incident and was therefore defective in that regard. Further, that the defect had not been cured, as both the Supplementary Pre-Trial Brief and the Prosecution's Opening Statement, did not refer to the incident, the Trial Chamber nonetheless went on to find that this did not materially impair the Appellant's ability to prepare his case as he did not object to the evidence, and in fact, had put question on it in cross examined.

2.14 In paragraph 2052 where the Trial Chamber also found that the Appellant had committed another separate act of violence – amputations at Upgun; while also conceding that this incident had not been pleaded in the Indictment, and therefore,

[51] Para. 55 of the Judgment.

[52] Para. 49 of the Judgment.

to that extent, the Indictment was defective; the Trial Chamber also found that the Defence had not objected to the evidence, and therefore was not prejudiced.[53]

2.15 With respect to the charge of looting the Trial Chamber found in paragraph 2057 of the Judgment that the Appellant was guilty of looting a motor vehicle on the basis of the evidence of Prosecution Witness Gibril Massaquoi. This incident had also not been pleaded in the Indictment. Appellant submits that the Indictment was therefore defective in that respect; although the Trial Chamber did not deliberate on the issue.

2.16 The Trial Chamber went on to convict the Appellant under Article 6(1) for 'committing' acts of physical violence and for 'committing' an act of pillage *in person* principally on the basis of waiver.[54]

2.17 The Appellant submits that in the circumstances of the matter, the Trial Chamber erred in law in imputing a waiver, and thus a concession in his part. Firstly, as the Trial Chamber itself noted, the Appellant raised the issue of the defects in the Indictment right from the beginning. In his Pre-Defence Motion, the Appellant raised several challenges to the validity of the Indictment including, lack of specificity regarding different forms of individual criminal responsibility and lack of specificity regarding various counts.[55] While this should have warned the Prosecution to attend to the defects in the Indictment, the opportunity was not taken. In those circumstances, as the court observed in the *Krnojelac* case, it should not have been acceptable for the Prosecution to omit the material aspects

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[53] Para. 255 of the Judgment.

[54] Paras 2052 and 2056; and para 2057 of the Judgment, respectively.

[55] Case No. SCSL-03-13-PT, *The Prosecutor v Santigie Bobor Kanu*: Defence Motion For Defects in the Form of the Indictment, filed 17th October, 2003. Also see, *The Prosecutor v Brima, Kamara, Kanu*, SCSL-04-16-PT, Defence Preliminary Motion For the Form of the Indictment, filed 17 January 2004, where the Defence inter alia challenged the failure to particularize the mode of participation under Article 6(1) of the Statute.

of its main allegations in the Indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolded.[56]

2.18 Once the issue of defects in the Indictment had been raised at the Pre-trial Stage and the Prosecution had missed the opportunity to rectify the same, in the interest of fairness to the Accused, it should have been estopped from raising the issue subsequently. This follows from the reasoning in the *Kupreskic* case where the Appeal Chamber noted that where a Trial Chamber is faced with a situation in which "the evidence turns out differently than expected", it may not simply find that the error has been cured, but rather should take one or more of the steps envisioned by *Kupreskic,* including, excluding the evidence or ordering the Prosecution to move to amend the Indictment.[57]

2.19 Secondly, in the circumstances of the present matter, it would be erroneous to hold that a failure to object at the trial to 'extraneous' evidence not specifically pleaded in the Indictment automatically amounted to a waiver. That position assumes that the evidence was out-rightly irrelevant, which was not the case in this matter.

2.20 Given the inter-connection among the various charges that the Appellant was facing and consequently, the intertwining of the evidence, the Trial Chamber failed to appreciate that the 'extraneous' evidence relating to the charge of 'committing' in person, could have been relevant to the Prosecution's case in other respects and therefore to that extent relevant.

2.21 The Appellant, it can be noted, was facing fourteen counts of international crimes (war crimes, crimes against humanity and other serious violations of International Humanitarian Law), under two headings namely, individual criminal responsibility under Article 6(1) and command responsibility under Article 6(3)

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[56] *Krnojelac*: Decision on Form of Second Amended Indictment, 11 February, 2000, para. 23

[57] Para. 114.

of the Statute. The former involved a multiplicity of allegations that he planned; instigated; ordered; committed, or aided and abated the planning; preparation; or execution of the crimes in question. This heading also included the notion of joint criminal enterprise in all the three forms, namely the basic form, the extended form and the systemic form.

2.22 It can be observed that the presentation of the evidence on all these charges at the trial, did not systematically follow each respective charge, such that the Appellant was always aware of the aspect of the Indictment the evidence presented related. The evidence, tended to be a wholesale narration of the events within the personal knowledge of the witness. While, admittedly, it was up to the Appellant through his legal representative, to object on the basis of relevance, given the intricate nature of the charges and the intertwining of the evidence, the evidence presented was not always manifestly irrelevant as would have compelled the Defence to spring to their feet as soon as it was presented.

2.23 The evidence on the involvement of the Appellant in the commission the crimes *in person*, for instance, other than proving his culpability in that respect, would also have been relevant to prove the widespread and systematic nature of the attacks by the AFRC, which was relevant to establishing the *chapeau* requirement to the charge of crimes against humanity. The evidence would also have been relevant to prove a consistent pattern of conduct or where it fell outside the Indictment, a systematic pattern of conduct.[58] The same evidence would also have been relevant in respect of sentencing as aggravating circumstances. As the Statute of the Special Court does not provide for evidence to be lead in mitigation or aggravation at the sentencing stage, that evidence had to be led at the trial stage.

[58] *Kvocka et al.*, Judgment, November 2, 2001 at 652. Also see, May & Wierda, International Criminal Evidence, para. 4.31, p. 106.

2.24 Under those circumstances, the Appellant submits that the adverse inference that was drawn by the Trial Chamber that his failure to object to the evidence that implicated him for committing crimes *in person*, which had not been pleaded in the Indictment, amounted to a waiver was unreasonable. As argued above, it is not the only reasonable inference that could be drawn from the facts. The so called 'extraneous' evidence, as indicated above, was relevant in other respects.

2.25 Without specific pleadings in the Indictment of the particulars in respect to the mode of 'committing' *in person*, the Appellant was not sufficiently put on notice with respect to that allegation to have properly prepared his defence. Under those circumstances, as the Trial Chamber noted in the *Mpambara* case, even in the absence of any objection, no conviction can be entered against an accused if he or she was not in a reasonable position to understand the charges against him or her.[59]

2.26 The Appellant submits that under the circumstances of the case, the nature of the defect went to the heart of the Indictment such that it vitiated the basic safeguard that an Indictment must sufficiently warn the Accused of the case against him/her so that he can adequately prepare a defence.[60] The right of the Accused to adequately prepare his/her defence, it may be observed, is one of the cardinal pillars of the fair trial rights.[61] In *casu*, this right was violated to the extent that, until the evidence was tendered at trial, the Appellant did not have the particulars to the charge of "committing". That the Appellant challenged the evidence in cross examination, under the circumstances, is immaterial. As the Trial Chamber found in the *Ntagerura* case, it was normal under such a situation for the

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[59] Case No. ICTR-01-65-T *The Prosecutor v. Mpambara,* Trial Judgment, para.29 citing *Naletilic, Judgment (AC),* para. 27.

[60] Case No. IT-95-16, *The Prosecutor v. Kupresic*, Appeal Chamber Judgment, dated 23 October 2001, para. 122, p.13.

[61] Article 14(3)(b) of the ICCPR, Article 8(2)(c) of the American Convention, Article 6(3)(b) of the European Convention, paragraph 2(E)(1) of the African Commission Resolution, Article 21(4)(b) of the Yugoslavia Statute, Article 20(4)(b) of the Rwanda Statute, Article 67(1)(d) of the ICC Statute.

Appellant to defend against those facts at the trial.[62] The breach The Appellant therefore submits that this breach raised the presumption, 'that such a fundamental defect in the … Indictment did indeed cause injustice'.[63]

2.27 The Appellant submits further that, by drawing such an adverse inference that his failure to object amounted to a waiver, the Trial Chamber overlooked the duty incumbent on it to ensure that no injustice would be occasioned to the Appellant. The court should not have drawn such adverse inference 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.

2.28 It is established law that inferences that go to the guilt of the accused person should not be made lightly. Municipal case law is instructive in this regard. In *Collins v. Morgan*,[64] the court held that in criminal law hearsay and *other inadmissible* evidence should be excluded by the court even though no objection had been made to such evidence. In the case of *R v. Gibson*,[65] the court excluded extraneous evidence even though it had not been objected to. That they are criminal cases, the court noted, is the best explanation of them.[66] And, as *Lord Coleridge CJ* cautioned, '[t]he true principle… is that it is the duty of the Judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows.[67]

2.29 In international law, the most common safeguard has been that an adverse inference can only be drawn where the facts of the matter admit that inference as

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[62] Case No. ICTR -99-46-A, *The Prosecutor v Ntagerura, Bagambiki, Imanishwe*, para. 160, p53.

[63] *Kupresic* Appeal Judgment, para.122.

[64] Byrne QC & Heydon, Cross on Evidence, 3rd Australian Edition, para. 1.131, p. 96.

[65] *Ibid*

[66] *Ibid*

[67] *Ibid*

the only reasonable one. Where facts admit of another interpretation that is consistent with the innocence of the accused, then such interpretation must be preferred.[68] The Appellant submits that in *casu*, given the circumstances of the matter, a reasonable trier of facts would therefore have given the Appellant the benefit of the doubt. The Trial Chamber ought to have reminded itself of the legal principle that any ambiguity must be resolved to the advantage and benefit of the Accused.

2.30 The issue of waiver aside, the Appellant submits that, given the multiplicity and the intertwining of the charges and the evidence against him, the defect in the Indictment in respect of the charge of 'committing' was such that, short of amending the Indictment; it could not be cured by pre-trial information furnished to the Defence by the Prosecution. The information, in view of the defective Indictment, still left the Appellant 'embarrassed'.

2.31 The Appellant therefore submits that any conviction entered against him under Article 6(1) on the basis that he 'committed' the crimes in question *in person* must therefore be quashed on the basis that the Indictment was defective such that he was not properly put to his defence with respect to that charge.

GROUND THREE

3. **Evaluation of Witnesses' Evidence**

3.1 The Appellant submits that the Trial Chamber generally erred in law and fact in its evaluation of the evidence before it. The Trial Chamber, with all due respect, failed to assess objectively the Defence witnesses' evidence against the Prosecution witnesses' evidence.

[68] *The Prosecutor v. Delalic et al*, IT-96-21-A, Judgment (AC), 20 February 2001, para. 458.

3.2 The Trial Chamber generally tended to prefer Prosecution's evidence and only credited the evidence adduced by the Defence where it coincided with that of the Prosecution or supported an adverse finding to the Defence. Thus the Trial Chamber proceeded as though their evidence was only good for purposes of the Prosecution's case. In paragraph 1106, for instance, the Trial Chamber credited the evidence of Defence Witnesses DAB-101 and DAB-125 to the extent that it corroborated the evidence of Prosecution Witness TF1-334 on the allegations of sexual slavery in Kono. Similarly, in paragraph 1131, the Trial Chamber only considered the evidence of Defence Witnesses DAB-156 and DAB-079, only to the extent that it corroborated Prosecution witnesses on the allegations of sexual slavery in Koinadugu. The same argument applies to the Trial Chamber's consideration of the evidence of DBK-126 in paragraph 1169; DAB-156 in paragraph 1186; DAB-098 in paragraph 1205; DSK-103 in paragraph 1209; DAB-081 and DBK-037 in paragraph 1269; DAB-089 in paragraph 1340; DAB-081 in paragraph 1341; DAB-085 in paragraph 1345; DAB-082 in paragraph 1346; DAB-090 in paragraph 1348; DAB-088 in paragraph 1349and DBK-101 and DBK-100 in paragraph 1356; of the Judgment.

3.3 Further, the Trial Chamber unreasonably ignored the discrepancies and contradictions in the evidence of the main Prosecution Witnesses especially TF1-334, Gibril Massaquoi and George Johnson, whose evidence was generally unreliable. In *Blagojevic*[69], the Trial Chamber ruled that in cases of repeated contradictions within a witness' testimony, the Trial Chamber must disregard the evidence unless it is sufficiently corroborated. In assessing the credibility of these witnesses, the Trial Chamber failed to bear in mind that 'the fact that a witness gives evidence honestly is not in itself sufficient to establish the reliability of that evidence'. The Chamber overlooked the fact that the issue was not merely whether the evidence of a witness is honest; but also whether the evidence is objectively reliable.[70]

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[69] Case No.IT-02-60-T *Blagojevic Trial Judgment*, para.23, p. 6.

[70] *Brdjanin* Trial Judgment, para. 25, relying on, inter alia, *Celibici* Appeal Judgment, para. 491, 506.

3.4 With respect to the evidence of George Johnson, whose evidence supports almost every conviction against the Appellant, the Trial Chamber, in many respects found his evidence suspect and yet proceeded to convict the Appellant largely based on the same witness' evidence. In paragraph 520 in its Judgment the Trial Chamber, for instance, observed that:

> Witness George Johnson testified that the Accused Kanu held the G-5 position, and that he was in charge of all abductees. While George Johnson corroborated TF1-334's evidence that at Mansofina the Accused Brima was the overall commander and the Accused Kamara his Deputy, his testimony suggests that FAT Sesay was third in command, and that a known AFRC commander was fourth in command. The Trial Chamber observes that in cross-examination it emerged that the witness had given conflicting information about the G-5 position in Mansofina. The Trial Chamber has found that the evidence of witness George Johnson in relation to the G4 and G5 positions in Kono District was unreliable... .

3.5 In paragraph 584 of the judgment, the Trial Chamber also observed that the Witness had deliberately embellished his evidence to down play his role in the attacks on the civilians on the way from Mansofinia to Rosos.

3.6 The Trial Chamber also observed material discrepancies in the evidence of witness TF1-033, yet it again proceeded to heavily rely on his evidence in convicting the Appellant. In its evaluation of the evidence of TF1-033,[71] the Trial Chamber observes that:

> [t]here were occasional significant discrepancies between the evidence witness TF1-033 gave at trial and his prior statements to the Prosecution...The Trial Chamber also notes that the Prosecution witness

[71] SCSL-04-16-J, Trial Judgment, 20 June 2007, p.123-124.

TF1-334 and George Johnson gave accounts of events at Tombodu, which differed substantially from the account provided by witness TF1-033.

3.7 In paragraph 336 of the Judgment, the Trial Chamber observed a further deficiency in the evidence of TF1-033 that:

> [T]he evidence of the witness regarding the troop restructure at Mansofinia suffered from the deficiencies typical in his testimony: it was overly general in comparison of other witnesses present at the same events.... .

Despite this observation, the Trial Chamber still went on to conclude that:

> The Trial Chamber is satisfied, however, 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.

3.8 In paragraphs 907 through 910, the Trial Chamber observed internal discrepancies in the evidence of Gibril Massaquoi, as well as discrepancies between his evidence and that of another Prosecution witness, TF-184; which the Chamber was however quick to excuse. The Trial Chamber considered the discrepancies inconsequential and readily accounted them to a loss of memory due to the passage of time.

3.9 Given the material omissions and inconsistencies, particularly in the evidence of Witnesses TF1-033, TF1-334 and George Johnson, the Trial Chamber should have thoroughly examined their separate account. Further, it should have given

sufficient reasons why it proceeded to accept their accounts all the same.[72] The Appellant submits that the Trial Chamber failed in its duty in that respect.

3.10 Appellant submits further that, while the Trial Chamber was quick to condemn the credibility of Defence Witnesses, it was slow to do the same to Prosecution Witnesses where it was warranted. Rather, the Trial Chamber appeared to explain away what were otherwise significant inconsistencies. One glaring defects in Witness TF1-033's evidence, for instance, was his failure to mention the AFRC's stay at Mansofinia. Mansofinia, it can be observed, marked the watershed in the AFRC movement. It was there that the organization restructured and re-organised before commencing the movement that was to eventually land them in Freetown. AUTHORITY The Trial Chamber was however quick to explain this glaring omission as a genuine loss of memory. It observed in paragraph 584 that:

> [g]iven that witness TF1-033 omits mention of Mansofinia, the Trial Chamber is of the view that witness TF1-033's recollection of the locations is mistaken. This conclusion is supported by the fact that the witness was also confused in relation to the home town of the Accused Brima, which he stated was the village 'Yaya', when in fact it is 'Yarya', one of a number of villages the troops passed through on their way to Mansofinia.

3.11 The Appellant also submits that based on what can only be considered spurious grounds; there were instances when the Trial Chamber preferred Prosecution Witnesses' evidence ahead of Defence Witnesses' evidence. For instance, in paragraph 561, the Trial Chamber dismissed the Defence Witnesses' evidence in favour of the Prosecution's simply on the basis that the Prosecution's evidence appeared more detailed. The Trial Chamber placed more weight on the evidence of Prosecution Witnesses' evidence regarding the AFRC command structure merely on the basis that Prosecution's witnesses were able to describe a hierarchy with identified positions to particular commanders, while Defence witnesses

[72] May & Wierda, International Criminal Evidence, para. 6.09, p.167.

tended to state one individual was overall commander, another as the deputy and other individuals collectively as 'commanders'. The Trial Chamber similarly placed more weight on the evidence of Prosecution Witnesses on the basis that they were able to give an overall view of the dynamics and functioning of the troop.

3.12 In paragraph 562 of the Judgment, the Trial Chamber attached more weight to Prosecution witnesses on the basis that even the lower ranked witnesses had access to the commanders. For instance, that Witnesses TF1-334 and TF1-184 were close assistants to senior AFRC commanders. This was in spite of the fact that some of the Defence witnesses whose evidence was rejected were themselves senior leaders in the AFRC. The Appellant submits that the mere fact that a lower ranked witness had access to the commanders or the fact that a witness gave a more detailed account are not sufficient criteria in assessing the credibility of a witness and the weight to be attached to his/her evidence.

3.13 In paragraph 377 of the Judgment, the Trial Chamber, in part, placed more weight on Prosecution evidence simply because it located the then accused persons at the places of crime. The Chamber concluded that:

> [T]he parties have submitted conflicting evidence on the command structure of the advanced team, an issue fundamental to both the Prosecution and Defence case. The Trial Chamber finds the evidence of the Prosecution witnesses who placed the Accused in Koinadugu and Bombali Districts during the relevant indictment period significantly more reliable, consistent and compelling, and thus more persuasive, than that of the Defence witnesses.

3.14 The *Bagelishema* case lays down the general factors to be considered in the assessment of credibility of a witness. These include: (1) credibility in terms of internal consistency and detail; (2) strength under cross-examination; (3)

consistency against prior statements of the witness; (4) credibility vis-à-vis other witness accounts or other evidence submitted in the case; (5) possible motive on behalf of the witness. Where the testimony of a witness shows weakness in any of these aspects, the Trial Chamber should look for corroboration. Where there is no corroboration, or where it consists of hearsay, the court must refuse to convict on that testimony.[73] Ultimately, the final assessment of the credibility of a witness must be considered in light of the entire trial record.[74]

3.15 In paragraph 133 of the Judgment, the Trial Chamber attached less weight to the Defence evidence on the basis that the evidence led had not been put to the Prosecution's witnesses in cross examination, which it observed, was a deliberate defence tactic. The court relied on the *ICTR* Appeals Chamber Judgment in *Kajelijeli* case.[75] The Appellant submits that the Trial Chamber erred in this respect in that it failed to appreciate that, in contrast to the *ICTY* and *ICTR*, the Rules of Special Court do not oblige a party to put its case to a witness.[76] The Trial Chamber should have been mindful that when applying the Rules and when making procedural decisions on matters about which the *Rules are silent* (as they often are) that this court is unique – as the UN Secretary General in his report put it, *sui generis*.[77] Therefore that, procedures and practices that have grown up in the *ICTR* and International Criminal Tribunal for the former Yugoslavia ("*ICTY*") should not be slavishly followed.[78] That, the question must always be whether a particular procedure is appropriate under the rules and practices of this Court[79]. Further, the Trial Chamber failed to appreciate that the Prosecution had the opportunity to test the veracity of the evidence by cross examination.

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[73] *Ibid*, para. 6.10, p.167.

[74] May & Wierda, International Criminal Evidence, para. 6.09, pp.166-167.

[75] Trial Chamber Judgment, para. 132.

[76] Rule 90 (H)(ii) of the ICTY Rules of Procedure and Evidence and Rule 90(G)(ii) of the ICTR Rules of Procedure and Evidence.

[77] *Ibid*, para. 46, p. 15.

[78] *Ibid*, para. 46, p. 16.

[79] *Ibid.*

3.16 The Appellant therefore submits that the Trial Chamber's assessment of the Defence evidence vis-à-vis that of the Prosecution was not objective and therefore, to that extent, affected the outcome of the case to his prejudice. Accordingly, that the Appeals Chamber reviews the evidence on all the convictions entered.

GROUND FOUR

4. **Evidence of Accomplice Witnesses**

4.1 The Appellant submits that the Trial Chamber generally erred in law and fact in overly relying on the inconsistent and in certain instances uncorroborated evidence of witnesses implicated in the commission of the crimes alleged in the Indictment, in particular George Johnson, TF1-334 and Gibril Massaquoi.

4.2 The Trial Chamber failed to properly evaluate the inconsistencies in the evidence of these witnesses given its prominence in the Prosecution's case vis-à-vis the fact that they were suspect witnesses. Where the evidence of either of these witnesses was uncorroborated, the Trial Chamber failed to caution itself appropriately as required by law.

4.3 More particularly, the Trial Chamber erred in law, in paragraph 125, in holding that the mere fact that 'none of these Prosecution witnesses ha[d] been charged with any crimes…' did not qualify their evidence as 'accomplice evidence'.

4.4 The Appellant submits that Witnesses TF1-184, TF1-334 and Gibril Massaquoi, to the extent that they took part in the crimes that were committed by the AFRC members, were accomplices to the crimes and therefore suspect witnesses. Their evidence should therefore have been treated as suspect. The Trial Chamber's assertion that the fact that these witnesses were not charged before the court

excluded them from being accomplice witnesses is, with all due respect, ill-conceived at law. The categorization of one as an accomplice witness is not dependent on their being arraigned before the same court that is considering their evidence. It solely depends on the fact that one is testifying to a crime that he/she was a party to. In those circumstances, the temptation to exculpate oneself or to inculpate others is so great, the court has to be on the guard.

4.5 An 'accomplice' has been variously been described but basically to the same effect. In *Akayesu*, the Trial Chamber held that an accomplice is, 'someone who associates himself in [a principal] offence committed by another'[80]. In *Niyitegeka*, the Appeals Chamber stated that the ordinary meaning of the term 'accomplice' is 'an association in guilt, a partner in crime'.[81]

4.6 Accomplice testimony is not *per se* unreliable; especially where it is thoroughly questioned through cross-examination. However, considering that accomplice witnesses may have a motive to lie or incentive to implicate the accused person before the Tribunal – as was the case with George Johnson's evidence on the restructuring at Mansofinia and the subsequent attacks on civilians *en route* to Rosos – the Trial Chamber when weighing the probative value of such evidence, was bound to carefully consider the totality of the circumstances in which it was tendered.[82]

4.7 While corroboration is not strictly required by law, where the Trial Chamber finds that internal inconsistencies and contradictions with other pieces of evidence demonstrates a poor, selective, or tainted recollection of events, such evidence must be corroborated.[83] In *Kordic*, the Appeals Chamber held that a Trial Chamber may convict an accused on the basis of the testimony of a single

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[80] *Akayesu*, para. 527-9, *Rutaganda*, para. 39, *Musema*, para. 121.

[81] *Niyitegeka* Appeal Judgment, para.98, p.32.

[82] *Ibid.*

[83] SCSL-04-14-J, *The Prosecutor v. Fofana & Kondewa*, Judgment of 2/08/07, para. 283, p. 89

witness, 'although such evidence must be assessed *with the appropriate caution*, and care must be taken to guard against the exercise of an underlying motive on the part of the witness'.[84] In *Naletilic,* the Trial Chamber highlighted that it had been very careful to scrutinize the evidence of a single witness with particular care before entering a conviction upon it.[85]

4.8 With respect to testimony of an alleged accomplice, the Trial Chamber in the *Niyitegeka* case, '...exercised caution in its deliberations on such evidence',[86] and went on to observe that the evidence of accomplice witnesses 'is subject to special caution'.[87] On appeal, the Appeals Chamber went on to caution that, considering that accomplice witnesses may have a motive or incentive to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such evidence, is bound to *carefully* consider the totality of the circumstances in which it was considered.[88]

4.9 Trial Chamber I, which had occasion to consider the evidence of similarly placed witnesses in the case of *Prosecutor v Fofana and Others* made a very illuminating observation. The court had this to say concerning accomplice witnesses:

> In this case, the Chamber has found that these witnesses who themselves operated either within the CDF inner circle, or at a fairly high level within the overall CDF structure. The Chamber recalls particularly the evidence of witnesses.... Many of these witnesses were directly involved as key participants in the events alleged in the indictment. With this category of witnesses, who could be considered as co-perpetrators or accomplices, a trier of

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[84] *Kordic and Cerkez* Trial Judgment, para. 274.

[85] *Naletilic*, Trial Chamber Judgment, para. 11.

[86] *Niyitegeka* Trial Judgment, para. 48.

[87] *Ibid.*, para. 73.

[88] *Niyitegeka* Appeal Judgment, para. 98; See also, *Kajelijeli* Appeal Judgment, para. 18, where the Appeals Chamber approved of the Trial Chamber's decision to treat the testimony of a witness who was allegedly biased against the accused with "caution".

fact has to exercise particular caution in examining every detail of the witnesses' testimony.[89]

4.10 In a Dissenting Opinion, Judge Thompson, while acknowledging that the testimony of a single witness does not require corroboration, cautioned against accomplice evidence that:

> We do not imply that a tribunal must now view the evidence of witnesses in the context of trials of such magnitude and complexity with caution, especially the testimonies of those characterized as "insider witnesses", (accomplices). In this regard, as already alluded to, the Chamber was supremely mindful of the need to treat the testimonies of such witnesses with utmost circumspection realizing that though they may have offered to testify out of a conviction of public-spiritedness yet they invariably are witnesses with self-serving interest or motivations[90].

4.11 In *casu*, the Trial Chamber erroneously did not consider the evidence of such Prosecution witnesses as George Johnson, TF1-153, TF1-184, Gibril Massaquoi and TF1-334 as accomplice evidence. As such, it failed to apply the necessary caution required when dealing with the evidence of such witnesses. That omission, Appellant submits, materially influenced the outcome of the case against his favour. Accordingly, the Appeals Chamber must review all the accomplice evidence on the record. Where there is any doubt as to the credibility of the evidence, or where the evidence is not corroborated, the Appeals Chamber must reverse any guilty verdicts entered on the basis of that evidence.

GROUND FIVE

5. Liability under Article 6(3) – Bombali District

[89] SCSL-04-14-J *The Prosecutor v. Fofana & Kondewa*, Judgment, 2nd August 2007, para. 278, p.87-88

[90] SCSL-04-14-J, *The Prosecutor v. Fofana & Kondewa*, Dissenting Opinion of Justice Bankole Thompson 2nd August 2007, para. 47.

5.1 The Appellant submits that the Trial Chamber erred both in law and fact in finding the Appellant guilty of the crimes of Rape, Acts of Terrorism and Collective Punishment, under Article 6(3) of the statute of the court. The Chamber erred in failing to establish the requisite 'effective control' element.

5.2 As has been held in previous judgments, superior responsibility under Article 6(3) of the Statute is founded on the notion of 'effective control' – translated as the material ability to prevent and punish the commission of offences.[91]

5.3 What constitutes 'material ability' differs depending on the position of authority of the accused person relative to the crimes in question. While *de jure* authority, for instance, raises the presumption of effective control,[92] substantial influence over the conduct of others falls short of effective control.[93] The decisive criterion in assessing one's position of superiority, as the Trial Chamber stated in the case of *Prosecutor v Bagalishema*, is his or her ability, as demonstrated by his duties and competence, to effectively control his or her subordinates.[94]

5.4 In military terms, 'material ability' has been translated to mean 'command authority' – the authority to command forces.[95] Effective control in those terms must entail the 'actual possession (...) of powers of control over the acts of

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[91] *Prosecutor v Delalic et al*, (*Celebici*) ICTY Appeals Chamber Judgment, February 20, 2001, IT-96-21, para. 370.

[92] *Celebici* Appeals Judgment para. 256.

[93] *Celebici* (supra) para. 266; *Ntagerura* Trial Judgment para. 628.

[94] *Prosecutor v Ignace Bagalashima*, ICTR Judgment, 7 June 2001, ITCR-95-1 A-T

[95] See, *Prosecutor v Halilovic*, ICTY Judgment, 16 November 2005, IT-01-48-T, where the Trial Chamber acquitted the accused on the basis that, though part of the leadership, had no command authority over the forces that carried out military operations. His role, the court found, only related to coordinating and monitoring functions.

others'.[96] It must entail, *de facto* control – the right of a superior to exert control over a subordinate.[97]

5.5 In *casu*, having failed to establish effective control on the basis of the Appellant's *de jure* position, *albeit*, differently described by the witnesses,[98] the Trial Chamber – rightly so, it is submitted – sought to establish his *de facto* position within the Bombali district in respect of the crimes committed in that district.[99] The Appellant having argued that he never had military command over the fighting forces, the Trial Chamber sought to establish 'command authority', by reference to his participation in military operations.

5.6 In seeking to establish effective control, the Trial Chamber adopted a two-pronged approach. The first prong sought to establish whether the AFRC leadership, collectively, had effective control over its subordinates. The second prong then sought to establish whether the Appellant, as one of the leaders individually, had effective control over the subordinates.[100] In that regard, the

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[96] *Prosecutor v Delalic et al.*, ICTY Appeals Chamber Judgment, February 20, 2001, IT-96-21, para. 370.

[97] See I. Bantekas, *The Contemporary Law of Superior Responsibility*, AJIL Vol. 93: 373, 1999 at 577. At this juncture, the honourable Appeals Chamber is referred to the criteria devised by the Trial Chamber of establishing effective control. Para. 788 of the judgment refers. Respectfully, it is submitted that the test, far from establishing command authority, simply confirms a leadership position. It falls short of establishing 'command authority' and would fall on the basis of the *Holilovic* case.

[98] Although the Trial Chamber found in the Judgment that the Appellant's position had been established as that of Chief of Staff, the witnesses differed on his exact designation. The evidence oscillated between the position of G5 and Chief of Staff. The only consensus was that he was in charge of women and children. See para. 199-222 of the Confidential Kanu Defence Trial Brief SCSL -04-16-T (20094-20285) ("the Kanu Trial Brief")

[99] Para. 2035-2044 of the Judgment.

[100] The Trial Chamber's inquiry on whether Appellant had effective control over the AFRC subordinates, proceeded on the basis the court's earlier findings on the AFRC's organizational structure vis-à-vis the exercise of control by the leadership over the subordinates. In particular, the court reiterated its earlier findings in paragraph 600 of the judgment, which concluded that the AFRC had a well developed chain of command, an effective planning and orders process and a functional disciplinary system in the Bombali

Chamber looked at his involvement in military operations as indicative of command authority.[101]

5.7 This approach is flawed legally in so far as the first leg of the test – a precursor to the second – is predicated on the discredited notion of collective responsibility. Appellant's individual responsibility is inseparably tied to the collective responsibility of the entire AFRC leadership. The approach therefore negates one of the cardinal principles of international criminal law that culpability is personal,[102] and that objective and strict criminal liability is not permissible.[103]

5.8 The approach is also flawed in that it concentrated on the activities of the AFRC, and of the Appellant globally, within the context of the crimes committed in the entire district. The Trial Chamber, as will be illustrated below, failed to properly investigate the activities of the Appellant *individually* and *within the context of each particular set of circumstances*, which the facts of the matter required. The finding of effective control on the Appellant's part should therefore be set aside simply on the basis that the Trial Chamber adopted an approach that is legally flawed.

5.9 Even on its own merits, the Trial Chamber's test, it is submitted, fails to establish effective control. A closer look at the three elements that the court considered in order to establish whether the AFRC had effective control that is: the chain of command; planning and orders process; and disciplinary system, do not sustain a finding of effective control. The findings that the AFRC had a *well-developed*

District, which the court had established as sufficient *indicia* of effective control by the AFRC over subordinates.

[101] Para. 2036-2040 of the Judgment.

[102] Personal jurisdiction in the ITCY and ICTR Statutes specifically relates to natural persons. Also see Daphna Shraga and Ralph Zacklin, *The International Criminal Liability for the Former Yugoslavia*, EJIL Vol. 5 1994, no. 3 at 370.

[103] Cassese, International Criminal Law, 2003, at 209.

chain of command, *an effective planning orders process*, and *a functional disciplinary system*[104] are not supported by the facts on the record.

5.10 There is evidence of *some* organizational structure following the restructuring at Mansofinia. However the witnesses that the Trial Chamber relied upon failed to give a clear and consistent picture of the structure. Their evidence lacks clarity and consistency when analyzed individually and collectively. The evidence of George Johnson and TF1-334, as the Trial Chamber noted, was contradictory with respect to the appointments made at Mansofinia, and more particularly on George Johnson's own role. George Johnson sought to downplay his role in the attacks after Mansofinia, which forced the court to disregard his evidence.[105] The evidence on the AFRC's internal organisation given by Witness TF1-334, which the Trial Chamber subsequently adopted, on the other hand, as will be illustrated below, was so vague and inconsistent with what was transpiring on the ground that it could not be taken seriously.

5.11 Even if it were accepted that the AFRC had a well developed chain of command, less convincing is the conclusion that it had an *effective* planning and orders process. This aspect is particularly important as it potentially could have placed the various leaders in the AFRC into context for purposes of establishing effective control. The evidence on the record however does not justify a finding that the AFRC had an effective planning and orders process. If at all, it was only on paper. The evidence of TF1-334 that the Trial Chamber relied on in coming to that conclusion, it is submitted, was overly generalized and not consistent with the facts on the ground.

5.12 According to the general evidence of TF1-334, the Commander in Chief would give orders to the Chief of Staff who would convey the orders to the Operations Commander, who would pass the orders on to the company commanders, going

[104] Para. 600 of the Judgment.

[105] See para. 583 of the Judgment.

downwards to the foot soldier.[106] The evidence across the entire record, and more particularly, on the internal workings of the AFRC in the Bombali district however, shows that this seemingly impressive chain of command existed only on paper, as a closer look at the specific instances that the Trial Chamber considered would reveal.[107]

5.13 The attack on enemy positions near Mateboi, for instance, was a direct operation between Brima, as the Commander in Chief; the Operations Commander and the Deputy Operations Commander.[108] Command did not come down through the Chief of Staff, nor is there evidence of his involvement in the planning. The 'operation' to attack Gbomsamba, on the other hand was a direct order by the Commander in Chief issued publicly to the troops.[109] Again, there is no evidence of the involvement of the Chief of Staff in the planning or dissemination of the order. Further, as the Trial Chamber even observed, there is also evidence of instances when operations were ordered by the Operations Commander.[110] And, as TF1-334 conceded under cross examination, the Appellant as Chief of Staff would also enforce orders of the Operations Commander.[111]

5.14 Therefore other than his generalized evidence, there is no other evidence of any specific instance where the planning and orders process pontificated by the witness TF1-334 was effectual. A general finding that the AFRC had an effective

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[106] Para 578 of the Judgment.

[107] Witness TRC-01 who testified as a witness of fact although he has a military background and is an officer in the Sierra Leonean Army, observed that the AFRC was generally a disjointed unit that had no clear operations and battle plans. He also observed that it did not have a clear chain of command and orders process system. It had no strategy beyond the need to survive. Transcript, 16 October 2006, p.116-117. The evidence in most instances also shows that most of the actions by the AFRC were orders by Brima AKA Gullit.

[108] Para. 587 of the Judgment.

[109] Para. 588 of the Judgment.

[110] Para. 586 of the Judgment. Also see, George Johnson, Transcript 15 September 2005, p. 63.

[111] TF1-334 Transcript 16 June 2005, p. 67.

planning and orders process system in the Bombali District on that basis alone is therefore, it is respectfully submitted, ill-founded.

5.15 Much as the evidence that the Trial Chamber considered fails to establish an effective planning and orders process, it also fails to establish a functioning disciplinary system within the AFRC in the Bombali district. The Trial Chamber, it is respectfully submitted, again erred in adopting an overly simplistic approach and committed the same mistake of trying to paint a global picture where a separate assessment of each set of circumstances was warranted.

5.16 This global approach, it is submitted, blinded the Chamber to certain facts that were crucial in the assessment of the question of effective control. The questions of the credibility of the evidence aside, the Trial Chamber failed to see that, until the AFRC settled at Rosos after trekking from Mansofinia, there was no discernable disciplinary system. The Chamber, erroneously relied on the infamous 'minus you, plus you' rule declared by the Commander in Chief at Mansofinia as a clear indicator of an active disciplinary system.[112]

5.17 However, a closer look at the evidence would shows that the infamous 'minus you, plus you' rule as originally conceived at Mansofinia primarily related to the crime of desertion.[113] There is otherwise no evidence of any other laws until Rosos.[114] The finding that the AFRC had effective control over their subordinates as they went through places such as Mandaha, Kamagbengbeh, Bonoya, Karina and Mateboi would therefore fall away on that basis.[115]

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[112] See paras 592 and 593 of the Judgment.

[113] Para. 592 of the Judgment. Also see TF1-334 Transcript 14 June 2005, p. 90.

[114] Prosecution TF1-334, Transcript 20 September 2005, at p. 59 para. say, ..."There were no laws that were given to the fighters at Gberibana like us, (sic) Mansofinia to Rosos".

[115] See para. 192 of the Judgment on the AFRC Troop Movement East to West (May 1998- November 1998)

5.18 Until Rosos there was no disciplinary system *per se*. The evidence, at best, hinted of the existence of a Military Police Commander appointed at Mansofinia, although nothing else was said of that office, let alone, its efficacy.[116] George Johnson also alleged that he was appointed Provost Marshal at Mansofinia. His evidence on this aspect, as the Trial Chamber rightly observed, is however highly suspect and should not be believed.[117]

5.19 It was only at Rosos that one could reasonably say that some *semblance* of a disciplinary system was established. It was there that the laws were extended beyond the crime of desertion to include theft of 'government property', rape during operations and refusal to go to the warfront.[118] Only then was George Johnson appointed Provost Marshal. These laws were to be codified and distributed at Colonel Eddie town.[119]

5.20 Even then, the disciplinary *system*, despite the dearth of evidence on its workings or efficacy, appears to have been rudimentary and dysfunctional.[120] Available evidence shows that the 'system' was manned by unqualified personnel;[121] that the practice of justice depended on the whim of the commander rather than the rule of law;[122] as the Trial Chamber observed, the system was fairly arbitrary, and selective; [123] self help was essentially part of the system;[124] and policing duties

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[116] Para. 596 of the Judgment.

[117] George Johnson, deliberately sought to exculpate himself of the crimes that he participated in *en route* to Rosos as one of the commanders of the fighting forces. See para. 583 of the Judgment.

[118] Para. 594 of the Judgment.

[119] Para. 594 of the Judgment.

[120] There is no evidence of the workings or effectiveness of the military police, presumably headed by the Military Police Commander appointed at Mansofinia. Likewise, there is no detailed evidence of the workings or efficacy of the office of the Provost Marshal.

[121] See para. 597 of the Judgment, where the Trial Chamber agreed with the observations of General Prin's report that there were no trained officers within the AFRC to establish a proper disciplinary system.

[122]Para. 598 of the Judgment.

[123] Para 598 of the Judgment.

could be explosive.[125] This picture, with all due respect, hardly constitutes a *functioning* disciplinary *system*; let alone, one upon which effective control could be founded.

5.21 This disciplinary 'system' it is further submitted, was woefully inadequate to contain the wayward elements that the AFRC inherited from the Sierra Leonean Army, as the defence witnesses expert evidence of General Prins, and of Mr. Gbla, whose report was not challenged by the prosecution, observed.[126]

5.22 The Appellant submits further that, given the irregular nature of the AFRC,[127] without an analysis of each particular incident where crimes were committed to establish whether the AFRC leadership, and the Appellant in particular, could have stopped the crimes or punished the offenders, effective control could not be founded on a general overview of the AFRC's organizational structure in the Bombali district.

5.23 The irregular nature of the organization, it is submitted, imported a higher burden of proof, which required the Trial Chamber to look closely at each individual set of circumstances rather than a general overview of the entire organization within the context of the entire district. This follows from the established principle that where one exercises informal authority, the standard of proof is higher than that applicable to one holding an official position of command and serving within a formal and structured system of organization.[128] While it appears from the record

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[124] See TF1-033 Transcript of 12 July 2005, p. 9. Alhaji Kamanda *alias* Gunboot, killed a colleague fighter for raping another's abducted wife.

[125] Para. 597 of the Judgment. Also see George Johnson, Transcript 15 September 2005, p77.

[126] Para. 232 and 233 of the Kanu Trial Brief.

[127] Both the military experts Colonel Iron for the Prosecution and General Prins for the Defence agree that the AFRC was an irregular force that was waging guerilla warfare. Witness TRC-01 also confirms this fact – see Footnote....supra. Also see Transcripts, 16 October 2006, p. 91-92.

[128] *Prosecutor v Galic*, ICTY Trial Chamber Judgment, 5 December 2003, IT-98-29, para. 174. See also *Prosecutor v Oric*, ICTY Judgment 30 June 2007, IT-03-68-T, para. 320, where the Trial Chamber opined

– paragraph 787 refers[129] – that the Trial Chamber was alive to this principle, there is not telling from its findings that it went on to apply the same.

5.24 One the basis of the foregoing, the Appellant contests that the evidence established an organizational structure of the AFRC, which had a clear hierarchy – chain of command; a clear system of making and passing down orders/decisions – planning and orders process; and a working disciplinary system. The finding of effective control should therefore be set aside on the basis of the Trial Chamber's own test. Consequently, to the extent that the finding of effective control on the Appellant's part was predicated on the first leg of the Trial Chamber's test, any finding of guilt under Article 6(3) of the statute must also fall.

5.25 The issue of the AFRC's organizational structure aside, it is also submitted that the Trial Chamber erred in law and fact in finding the Appellant culpable under Article 6(3), as it failed to distinguish his individual guilt from the collective guilt of the entire AFRC leadership, which as indicated above, the second leg of the Trial Chamber's test sought to do. The three incidents that the Trial Chamber relied on – paragraph 2036 through 2040 – to establish Appellant's *de facto* authority, it is submitted, did not assist the inquiry any further and do not support a finding of effective control. Those incidents, if anything, only went to prove the collective responsibility of the AFRC leadership.

5.26 The evidence on the attack on Bornoya only showed that the Appellant was *one of the leaders*.[130] The evidence on the attack on Karina also only went to show that

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that the threshold required to prove knowledge of a superior exercising more informal types of authority is higher than for those operating within a highly disciplined and formalized chain of command with established reporting and monitoring mechanisms.

[129] The Trial Chamber in paragraph 787 acknowledges that the formality of an organization while relevant is not determinative of effective control. The less formal the organization is, the more important it is to look at the superior's *de facto* authority.

[130] Para. 2039 of the Judgment.

the Appellant was *one of the leaders* who led the attack.[131] Only the military attack on Gbinti was led by the Appellant.[132]

5.27 Those three incidents, it is submitted, merely prove the Appellant's presence at the respective places of crime, as one among the leaders. While the attack on Gbinti might establish command authority on Appellant's part, it would however only relate to that particular attack. It would not, it is submitted, justify a general finding that the Appellant had effective control over the activities of the subordinates in respect of other attacks in the district. The attack on Gbinti, it can also be observed, has no bearing on the crimes for which the Appellant was convicted under Article 6(3), in the Bombali district.

5.28 The Appellant concedes that individual responsibility is not excluded by concurrent responsibility of other superiors in a chain of command. In the present case however, as the Appellant's culpability could not be established by virtue of his *de jure* position in the AFRC, it was imperative that his powers or authority be assessed on a case by case basis, taking into account the cumulative effect of his various functions. This is particularly true, given firstly, the irregular nature of the AFRC; and secondly that there is evidence on the record that some of the attacks in the Bombali District were launched without the Appellant's involvement.As the Trial Chamber found in paragraph 1568, most, if not all, of the attacks on

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[131] Para. 2038 of the Judgment. Appellant submits that even the evidence of George Johnson that the Appellant was a member of the headquarters, which took care of all the operations and gave military orders, is sufficient to establish effective control on his part. It still only establishes the collective control of the headquarter group, in which Appellant's position of influence remained unclear. In any event, this piece of evidence is directly contradicted by the evidence of TF1-334, in the same paragraph, who says that the order to attack on Karina and the order to commit atrocities was actually made by Brima, and Kanu was merely present.

[132] Para. 2036 of the Judgment.

civilians and their property in the Bombali district, were explicitly ordered by the (then) First Accused.[133]

5.29 It is therefore submitted that, in so far as the second leg of the test adopted by the Trial Chamber fails to justify a reasonable conclusion that the Appellant had command authority, *de jure* or *de facto*, over the AFRC subordinates in the entire Bombali district, the finding that the Appellant had effective control over the AFRC subordinates in the district must fall. The evidence that the Trial Chamber considered in coming to the finding that effective control had been established, does not support that finding. A reasonable trier of facts, on the basis of that evidence, would not establish 'effective control'.

5.30 The Appellant's liability under Article 6(3) of the statute, was based on the impermissible notion of objective liability in that his guilt was considered within the context of the entire group in relation to the crimes committed in the entire province. To that extent, the Trial Chamber also committed an error of law. But for these errors, the Trial Chamber would not have found the Appellant guilty under Article 6(3) of the statute. All convictions entered against the Appellant under Article 6(3) relating to the Bombali district must therefore be quashed.

GROUND SIX

6. Liability under Article 6(3) – Freetown and the Western Area

6.1 The legal arguments raised under ground 'Five' also apply under this heading *mutatis mutandis*.

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[133] The Trial Chamber found that the acts of violence carried out by members of the AFRC against protected persons or their property in Bornoya, Mateboi, Karina, Gbendembu and Rosos were a series of attacks "explicitly ordered" by the First Accused in order to "shock the whole country and the international community" (Para. 1568 of the Judgment). On that basis, it therefore concluded that the acts amounted to terrorism and collective punishment (Paras 1571 and 1573, respectively).

6.2 In considering the Appellant's culpability under Article 6(3), in respect of the crimes committed in the Freetown and Western Area, the Trial Chamber also adopted the two-pronged approach; firstly looking at whether the AFRC leadership collectively had effective control over its subordinates,[134] before establishing whether the Appellant as one of the leaders, individually, had effective control over the subordinates.[135]

6.3 It has been argued that this approach is legally flawed in that individual culpability is objective in that it is based on the collective responsibility of the entire leadership as a college. On that basis alone, it is submitted that any conviction entered under Article 6(3) with respect to the Freetown and Western Area should be set aside..

6.4 Further, even on its own merits, the test adopted by the Trial Chamber fails to establish effective control. It will be recalled that the first prong of the Trial Chamber's test isolated three elements that were deemed essential to establishing effective control of the AFRC *viz*: command structure; planning and orders process; and the existence or otherwise of a disciplinary system. The Trial Chamber found that the AFRC had a functioning chain of command, *albeit* interrupted,[136] and an effective planning and orders process throughout the advance to Freetown until the loss of State House.[137] The court however failed to establish the existence of a disciplinary system at all.[138]

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[134] Para. 601 through 620 of the Judgment.

[135] Paras 2067-2076 of the Judgment.. The inquiry on whether the Appellant had superior command in paragraph 2067, it can be observed, proceeds on the earlier findings of the court on the AFRC's internal organization *vis-à-vis* the question of whether the leadership, collectively, had effective control over the subordinates.

[136] Para. 611 of the Judgment

[137] Para. 620 of the Judgment

[138] Para. 619 of the Judgment.

6.5 The Appellant contends that once the Trial Chamber failed to establish the existence of a disciplinary system within the AFRC in Freetown and the Western Area, there was no longer any basis upon which effective control could be founded. The three elements that the court considered as indicative of effective control are cumulative. If this Court disagrees with this approach, the Appellant argues in the alternative that the absence of a functional disciplinary system vitiates the other two elements. To the extent that the Trial Chamber could not establish that the AFRC had a disciplinary system in the Freetown and Western Area, no command responsibility could therefore exist. Any conviction entered against the Appellant under Article 6(3) in relation to Freetown and the Western Area must therefore fall on that basis.

6.6 Further, it is submitted that the finding by the Trial Chamber that the AFRC had a functioning chain of command and an effective planning and orders process throughout the advance to Freetown until the troops lost control of State House,[139] is ill-conceived as it is not supported by the evidence on the record. While the witnesses that the Trial Chamber relied on, the question of their credibility aside, related a clear command structure as has been demonstrated above, such a structure existed only on paper.[140] On the ground, the evidence is that the planning and processing of orders did not always follow the elaborate command structure narrated.

6.7 The 'operations' to Waterloo and York, for instance, which the Trial Chamber isolated to illustrate the 'functionality' of the planning and orders process, if anything, exposed a dysfunctional command structure. The evidence is that the attack was planned and organized by Brima who gave a direct order to a subordinate member of the brigade administration who then effected the operation. Upon accomplishing the mission, the commander of the returning

[139] Para. 620 of the Judgment.

[140] Para. 602-604; and para. 606 of the Judgment.

troops reported directly to Brima.[141] . Further, there is also a finding in paragraph 1580 of the judgment that the attack on Freetown was ordered by 'Gullit'.[142]

6.8 Thus the conclusion that there was a subsisting and functional chain of command as well as an effective planning and orders process is based on the mere say so of selected suspect witnesses. As argued under ground Five, the nature of the AFRC and the conditions it was operating under imposed a higher standard of proof. It called for a closer look at each set of circumstances rather than a global overview. Simply on the basis that the evidence on the record does not satisfy the first prong of the Trial Chamber's own test, any finding of command responsibility in Freetown and the Western Area must therefore fall.

6.9 Further any finding of effective control must also fall on the basis of the second leg of the test. It will be recalled that the second leg, building on the first, looked at the Appellant's *de facto* authority. The Appellant submits that the Trial Chamber's erred in its finding of effective control as it started its analysis on the basis of faulty reasoning. The Trial Chamber's analysis of the Appellant's *de facto* position, which focused on his participation in military operations, proceeded on the premise that it had been *found* '[t]hat as Chief of Staff, the Accused Kanu was third in command in Freetown.'[143]

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[141] Para. 613 of the Judgment.

[142] The court found that Gullit ordered that Freetown should be burnt and looted and that 'collaborators' should be killed (Para. 1580). Further, that he ordered the abduction of civilians on the pull out from Freetown (Para. 1583). That, he ordered the collective punishment of civilians at Fourah Bay (Para. 1586). And that he ordered that cutlasses be secured (Para. 1587), after which amputations commenced (Para. 1589). Further that Brima ordered reprisal killings at the Rogbalan Mosque (Para. 1595). That, in the presence of the Appellant – Kanu, Brima ordered that Kissy Mental Home be 'cleared up' – that civilians be killed or amputated and houses burnt, which was done (Para 1599 through 1602). That, at PWD, he ordered the abduction of civilians to attract international attention (Para. 1607). These acts, among others, Trial Chamber found, amounted to the crime of collective punishment (Paras 1611 and 1612).

[143] Para. 2970.

6.10 The Trial Chamber however did not make any finding on the Appellant's position as the third in command in Freetown and the Western Area. The only finding on his position in Freetown and the Western Area was that he was Chief of Staff and commander in charge of civilian abductees throughout the attack on Freetown on 6 January 1999 and the retreat to Newton.[144] Only Witness TF1-334 made the allegation that Appellant was the third in command in Freetown[145]. The Trial Chamber however made no specific findings on the issue. To the extent that the Trial Chamber's inquiry on the Appellant's 'command authority' proceeded on the unfounded basis that he was third in command in the AFRC, any subsequent findings of command responsibility in the Freetown and the Western Area must fall.

6.11 Secondly, on the evidence, it is impossible to sustain a finding that he could have arrested the situation that was prevailing in Freetown and the Western Area prior to the fall of the State House to ECOMOG. The evidence that the Trial Chamber largely relied on – set out in paragraphs 2070 and 2071 – to establish the Appellant's position only went to show that he was one of the leaders in Freetown.[146] At best, it merely established collective responsibility and did not prove command authority on Appellant's part over the entire force in Freetown and the Western Area. The instances that the Trial Chamber referred to as illustrating the Appellant's command authority,[147] it is submitted, do not justify a general finding of superior responsibility over the AFRC troops in Freetown and the Western Area. The fact that the Appellant was part of headquarters; or that he attended meetings of the commanders; or that he announced the AFRC takeover of Freetown and introduced himself as the Chief of Staff, it is submitted, says

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[144] Para. 535 of the Judgment.

[145] TF1-334, Transcript 13 June 2005, p. 60.

[146] The evidence merely showed that the Appellant was one of the senior leaders based at AFRC headquarters at State House; that a meeting of commanders was held at State House on the evening of the 6th January; and that he announced the fall of Freetown to the AFRC and introduced himself as the Chief of Staff.

[147] Paras 2072-2074 of the judgment.

nothing of his command authority other than reinforcing that he was Chief of Staff; a very influential role in the AFRC, or in any conventional army for that matter, but generally devoid of *command authority*.

6.12 That the Appellant, in certain instances issued orders which were followed does not assist the case much. Firstly, some of the orders – for instance – the order to the military police to dispose of piled up decomposing corpses at State House,[148] were orders that are consistent with the functions of the office of the Chief of Staff. Secondly, that the Appellant issued orders that were followed, is in itself not sufficient indication of command authority or effective control. It could, among other things, reasonably suggest that the Appellant wielded substantial influence over the troops who were predominantly AFRC loyalists, both in his administrative capacity as the Chief of Staff and as a former 'honourable' and member of the council.

6.13 It is therefore submitted that no basis was established for a finding that the Appellant had effective control in Freetown and the Western Area for a conviction to be entered under Article 6(3) of the statute. A reasonable trier of facts, it is respectfully submitted, would not have reached that conclusion on the basis of the available evidence. Had the Trial Chamber not erred in any one or more of the ways highlighted above, it would not have convicted the Appellant on the basis of command responsibility. Any conviction entered against the Appellant under Article 6(3) relating to the crimes committed in Freetown and the Western Area must therefore be quashed.

6.14 On the basis of the submissions made under Grounds 5 and 6 above, it is submitted that convictions entered against the Appellant under; Count 1 – Acts of Terrorism; Count 2 – Collective Punishment; and Count 6 – Rape, under Article 6(3) of the statute of the court, must be quashed on the basis that effective control has not been established.

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[148] Para. 2073 of the Judgment.

GROUND SEVEN

7. Mistake of Law: Crimes Relating to Child Soldiers (Article 4(c) of the Statute

7.1 The Appellant submits that the Trial Chamber erred in law in dismissing the argument that the absence of criminal knowledge on his part vitiated the requisite *mens rea* to the crimes relating to child soldiers. (Paragraph 732 refers. Also see paragraph 1251).

7.2 In dismissing the argument that the Appellant did not possess the requisite criminal intent to the charge of conscripting children under the age of 15 years or using them in armed conflict, as this was a common practice within the Sierra Leonean Army, the Trial Chamber observed that:

> [It was not] persuaded that the defence of mistake of law can be invoked here. The Rules of customary international law are not contingent on domestic practice in one given country. Hence, it cannot be argued that a national practice creating an appearance of lawfulness can be raised as a defence of conduct violating international norms. Even though concluded that the Rules of customary international law are not contingent on domestic practice in one given country, the Trial Chamber concludes in paragraph 731 that, the domestic law of Sierra Leone defines a 'child' as a person under 16 years of age.

7.3 Respectfully, the Trial Chamber misconstrued the argument. The argument was not that the conscription of children under the age of 15 years of age was not a crime under international law because it was acceptable practice in Sierra Leone. The Appellant accepted that it was a crime under international law; only that he was not guilty of the same as he lacked the necessary criminal intent. The approach by the Trial Chamber, it is submitted, adopted an unwarranted strict liability approach.

7.4 That the Sierra Leonean government nurtured a practice that promoted the conscription of under age children is not in dispute. Both prosecution and defence witnesses agreed on this aspect. Prosecution Witness TF1-296,[149] for instance confirmed that the children at Brookfields Hotel (February-March 1999), were amongst the fighting forces recruited by Government of Sierra Leone and paid by the government.[150] The Government of Sierra Leone also acknowledged in its report to the Committee on the Rights of the Child that there was no minimum age for recruitment of persons into the armed forces 'except provision in the Geneva Convention that children below the age of fifteen years should not be conscripted into the army.'[151] In 2000 the Committee on the Rights of the Child noted that Sierra Leone had not taken any measures to address this issue. Further, the UNICEF Global Report published in 2001 states that Sierra Leone's position is that children can be recruited at "any age with consent" and refers to Section 16(2) of the Royal Sierra Leone Military Forces Act, 1961.[152]

7.5 Defence expert Osman Gbla, in his report of 11 October 2006, which was not contested by the Prosecution, and to that extent, accepted by the Prosecution, also made the same observations.[153] He noted that:

> Despite its track record of having ratified a number of international legal instruments bordering on the prevention of underage recruitment into the military, the Sierra Leone Government has not done much to prevent the recruitment of children into the Sierra Leone military. This is the case because the Sierra Leone military at various periods has a record of child recruitment. This is not necessarily out of a clearly thought policy but one dictated by various

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[149] Transcript of 4 October 2005, p. 114 (lines11-29) – 115, (lines 1-3)

[150] The expert gave many examples that the Government of Sierra Leone itself did not comply with international standards on the prevention of child soldiers; see, *inter alia*, Transcripts of 5 October, 2005, p. 14 (lines 5-9).

[151] The Initial Report of States Parties: Sierra Leone 1996 CRC/C/3/Add. 43 par. 28.

[152] See Dissenting Opinion of Justice Robertson on the Recruitment of Child Soldiers, para. 31, pp 24-25

[153] Report of Osman Gbla, Exhibit D37, para. 33, p.15; Also see para. 34-37, p.16.

circumstances at certain period of the country's history. One senior Sierra Leone military officer interviewed confirmed this point in noting that: the recruitment of children into the Sierra Leone military is not a deliberate government or military policy. The war circumstances created a fertile ground for the practice of involving children in the military. This latter view is not implying that the war started the practice of recruiting children into the Sierra Leone military.[154]

As far back as to the days of one party rule especially under the reign of late President Siaka Stevens (1978-1985) voluntary enlistment into the military slowly gave way to enlistment through political connections. Politicians and well-connected persons were given a number of cards, which they gave out to young men of their choice to join the Army. This system produced a serious diminishing of military standards as characters of all shades were recruited into the force irrespective of prevailing military requirements.[155]

Recruitment of children into the military however assumed an unprecedented character during the war first under the military under the reign of Joseph Saidu Momoh. President Momoh did not only inherit a military that was under paid, indiscipline, demoralized and poorly trained but one that was also confronted with a rebel war. The Army at the time was about 3000 in strength and 364 of these were in Liberia as part of ECOWAS Ceasefire Monitoring Group (ECOMOG). This precarious situation among other things compelled Momoh to embark on a crash military recruitment drive advocating for vigilantes to join the force thus sidelining military recruitment standards and procedure.[156]

The military regime of the National Provisional Ruling Council under the leadership of Captain V. E. M. Strasser inherited the legacy of sidestepping military recruitment procedures in his bid to swell up the military force to face the rebels. He continued the practice of enlisting vigilantes including the Sierra

[154] Report of Osman Gbla, Exhibit D37, para. 33, p.15

[155] *Ibid*, Exhibit D37, para. 34, p.16

[156] Report of Mr Gbla, Exhibit D37, para. 35, p.16

> Leone Border Guards (SLBGS) into the military. Most of these members were under 15 years.....[157]
>
> This background saw the infiltration of a number of children into the military through a variety of ways including backdoor enlistment. This was an enlistment practice that encouraged the replacement of deceased soldiers with child recruits that were given official status in the payroll. What was even more disturbing was the fact that these recruits were given crash training for three months instead of the nine months minimum period for such normal trainings. In most cases, they were trained only in the four rules of war-planning, advance, attach and retreat.[158] The practice of recruiting children into the military continued even during the period of the democratically elected government of Alhaji Ahmad Tejan Kabbah of Sierra Leone People's Party that came to power in 1996.[159]

7.6 The Appellant therefore submits that this established practice of recruiting children into the military seriously impacted on the awareness within the military and more particularly, on his own understanding of the lawfulness or otherwise of the crime in international law. This, it is submitted, was compounded further by the absence of proper training on international humanitarian law, especially on the conscription of children under the age of 15 into the army, within the Sierra Leonean Army.

7.7 While it is admitted that international criminal law is genre of international law that transcends the notion of sovereignty and imposes direct duties and obligations on the individual rather than the state, the fact that the Sierra Leonean government brazenly violated international law by promoting the conscription of children under the age of 15, created the impression among its citizens that this was legal. This is particularly so given that, generally, citizens learn of their international obligations primarily through the state.

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[157] *Ibid*, para. 36 p.16

[158] *Ibid*, para.37, p.16

[159] *Ibid*, para.38, p. 16

7.8 The Appellant therefore submits that at all material times, he lacked the requisite criminal intent as he believed that his conduct, going by the prevailing local practice, was legitimate.

7.9 While mistake of law is generally not a defence, the Appellant submits that the present case represents one of the few instances when it is acceptable. As Dinstein observes, in certain instances, 'there may be no choice but to admit that, as a result of mistake of law, *mens rea* is negated.'[160] Further, that '*mens rea* can not be negated if the illegality is obvious to any reasonable man.'[161] Article 32 of the Statute of the International Criminal Court, which statute is generally representative of international customary law, also acknowledges that mistake of law may exclude criminal responsibility where it negates the mental element required by a crime. In *casu*, given the conduct of the Sierra Leonean government, the illegality of the conscription of children under the age of 15 or using them in armed conflict was not obvious to a reasonable man in Sierra Leone. The circumstances of the case, therefore make a classic case where the defence of mistake of law should be acceptable.

7.10 Alternatively, the Appellant argues that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment. The state of international law in 1996 regarding the criminalization of the enlistment of under age children was doubtful.[162] Accordingly, the Appellant should have been given the benefit of the doubt.[163]

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[160] Distein J. The Conduct of Hostilities under International Armed Conflict (2005), 245

[161] *Ibid*

[162] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary General, S/2000/1234, 22 December, 2000, para. 3

[163] SCSL-04-14-AR 72(E), *The Prosecutor v. Sam Hinga Norman*: Dissenting Opinion of Justice Robertson on the Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment).

7.11 The Appellant submits that the point at which the crime of "conscripting or enlisting" crystallized into a crime in international law was after the 17th July 1998, following the conclusion of a five week diplomatic conference in Rome which established the Statute of the International Criminal Court. In its resolution on the Rights of the Child in December 1998, the United Nations General Assembly specifically recognizes the contribution of the Rome Statute of the International Criminal Court as a key document making possible the ending of impunity for conscription of child soldiers.[164]

7.12 The use of specific grounds to criminalise an act not otherwise within the purview of criminality has to be distinguished from the use of the grounds of criminalization to define the seriousness of the newly created crime in relation to other crimes. As opined by Judge Shahabudden, [t]hus there could be atrocious acts which were not punishable at international law. To make them punishable at international law, it was necessary to identify a juridical criterion linking them to the legitimate interests of the international community in a manner that could rationally overcome an objection that, under international law as it then existed, the acts fell within the exclusive competence of the State in which they were done or whose subjects were victims of the act[165]. The Appellant submits that the stages of contextual formulation to criminalise conscription or enlistment of children below the age of 15 was lacking until July 2002 with the coming into force of the Rome Statute.

7.13 The concept of conscription or enlistment went from abhorrence to criminalization in 2002 when the Rome Statute came into force. The Appellant submits that international criminal rules, being still at rudimentary stage of development, the Trial Chamber should have applied the *nulla poena sine praevia lege poenali* principle in favour of the Appellant.

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[164] *Ibid*, para. 42.

[165] *Tadic*, Judgement in Sentencing Appeals, Separate Opinion of Judge Shahabudden, p.38

7.14 Appellant submits further that overriding principle of legality, expressed the Latin maxim, *nullum crimen sine lege*, should have been applied in his favour in this matter. The *nullum crimen sine lege* principle aims at preventing the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission[166]. Inherent in this principle is the requirement of specificity; the prohibition of ambiguity; the prohibition of retroactive application; or application by analogy.[167]

7.15 Any conduct, no matter how abhorrent, is not unlawful unless there is a criminal law against it in force at the time it is committed. In this regard, Article 15 of the International Covenant on Civil and Political Rights states that: '[n]o one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed.' And as Justice Robertson put it: the principle of legality, sometimes expressed as the Rule against retroactivity, requires, that the defendant must at the time of committing the acts alleged to amount to a crime have been in a position to know, or at least readily to establish, that those acts may entail penal consequences. Ignorance of the law is no defence, so long as that law is capable of reasonable ascertainment. The fact that the conduct would shock or even appall decent people is not enough to make it unlawful in the absence of prohibition.[168]

7.16 The meaning and scope of the principle of *nullum crimen sine lege* has been elucidated in the jurisprudence of the European Court of Human Rights (ECHR). The essence of the court's findings regarding this principle is that it should be 'construed and applied...in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.' In case of *Streleyz, Kessler*

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[166] *Prosecutor v. Zejnil Delalic, Mucic, Delic and Landzo (Celebici case)*, Case No. IT-96-21-T, para. 313, 16 Nov. 1998.

[167] *Ibid*, paras. 402, 408-13.

[168] *Ibid*, para 3, p. 10

and Krenz v. Germany, the ECHR examined the contours of the principles in Article 7(1) by reaffirming the principles set out in *S.W. V. United Kingdom* where it was stated that:

> [a]s the Court held in its *Kokkinakis v. Greece* judgement of May 25, 1993 (Series A no. 260-A, p. 22, para. 52), Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgement the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the Courts' interpretation of it, what acts and omissions will make him criminally liable.[169]

7.17 The question of the crystallization of the crime of the conscription or enlistment of under age children into international criminal law aside, the question then is, whether the Appellant – Kanu, at the time of conduct would have been in a position to ascertain that his conduct was criminal under international law. To borrow Justice Robertson's words, under the circumstances where the state was the chief culprit, whether the law was capable of reasonable ascertainment. Further, whether the elements of the offence were tolerably clear to the Appellant Kanu, including the necessary mental criminal intent. .

GROUND EIGHT

8. Cumulative convictions

8.1 In the alternative, the Appellant argues that the Trial Chamber erred in law in imposing a global sentence of fifty years imprisonment. This sentence does not

[169] Archbold, International Criminal Courts, Practice, Procedure & Evidence, 2003 Edition, para17, p.455

reflect that the cumulative convictions entered against him were accordingly discounted for sentencing purposes. While it is admitted that it was well within the Trial Chamber's discretion to enter a global sentence for all the conviction entered, the imposition of such a global sentence did not vitiate the legal requirement that the accused should not suffer any prejudice resulting from the multiple convictions. The global sentence should therefore have been adjusted to reflect the extent of the multiple convictions.

8.2 While cumulative convictions based on the same criminal conduct are generally permissible, if each statutory provision involved contains a materially distinct element not contained in the other; the entire process must however always be guided by the need to be fair to the accused.[170] This 'fairness' to the accused is guaranteed by the caveat that, where multiple convictions are entered for the same criminal conduct, the potential unfairness to the accused is addressed at the sentencing phase.[171] In those circumstances, the courts have traditionally ordered that sentences for the respective cumulative convictions should run concurrently, and not cumulatively.[172] Where global sentences have been imposed, the courts have always ensured that the cumulative convictions reflect in the sentences. This follows the basic logic that what is punishable under international criminal law is proven criminal conduct regardless how it is technically pleaded, or under how many legal headings the criminal conduct can be catalogued.[173]

8.3 In *casu*, while it is admitted that it was within the discretion of the Trial Chamber to impose a global sentence on all the convictions entered, it is submitted that the

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[170] *Celebici*, para. 412

[171] *Prosecutor v Delalic and Others*, Case No IT-96-21-PT, Decision on Motion by the Accused Zejnil Delalic based on the Form of the Indictment, 2 Oct 1996 para. 24 quoted with approval in the Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, Celebici Appeal p.311, para. 9. Also see *Prosecutor v Tadic*, Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, para 17.

[172] See for instance, *Aleksovski Appeal*, pp 59-60, 24 March 2000.

[173] *Tadic*, Decision on the Defence Motion on Form of Indictment, supra.

global sentence imposed, severe and excessive as it is, does not reflect that the cumulative convictions were considered at all for purposes of sentencing. The sentence, it is submitted, reflects the *convictions entered* and not *the underlying criminal conduct* punishable at law. This, it is submitted, reflects in the sentence itself, as well as in the Trial Chamber's deliberations, both on the merits of the case and in the sentencing judgment.

8.4 While the Trial Chamber considered the issue of cumulative convictions in its judgment on the merits, as well as in the Sentencing Judgment, respectfully, there is nothing in those discussions to show that the Trial Chamber was wary of the obligation upon it to ensure that no injustice would be occasioned to the Appellant on account of the multiple convictions. In the judgment on the merits, the Trial Chamber only discussed the permissibility of cumulative conviction under international law. It did not discuss the issue of potential prejudice to the accused, [174] presumably as the issue did not arise at that stage. In the sentencing judgment, where the issue would have been addressed in detail at the instance of the parties, especially the accused, or of the court's own volition. The issue was however not addressed directly.

8.5 Again, the Trial Chamber did not address the issue of cumulative convictions impacting on the sentence to the extent that the convicted person should not be prejudiced by the multiple convictions. The court only dwelt on the issue of the permissibility of a global sentence on all the convictions entered. While in that discussion, the court acknowledged that the global sentence must reflect the overall culpability of the offender so that it is both just and appropriate,[175] that discussion, it is submitted, only related to the issue of the permissibility of a global sentence. It did not directly address the issue of cumulative convictions, which is distinct from the issue of the imposition of a global sentence.

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[174] Chapter XII of the Judgment, pp 565-569.

[175] Paragraph 12 of the Sentencing judgment.

8.6 The operative clause of the sentencing judgment, it is submitted, confirms that the Trial Chamber, with all due respect, was oblivious of the duty upon it to ensure that the Appellant should not suffer any prejudice resulting from the cumulative convictions. The Trial Chamber, it can be noted, imposed a single term of imprisonment of fifty years *for all the counts on which the Appellant was found guilty.*[176] The global sentence apparently related to all the convictions that were entered against the Appellant – Kanu. No concessions were made for the cumulative convictions.

8.7 The sentence itself, it is submitted, also suggests that the court did not caution itself against occasioning an injustice to the Appellant on account of the multiple convictions. Respectfully, had the Trial Chamber looked at the criminal conduct of the Appellant and not the number of criminal convictions entered, it would have crystallized the multiple convictions entered into just about a handful acts of criminal conduct as would make the penalty unduly excessive and disproportionate. The same acts of murder, for instance, underlie the conviction under Count 4 – Murder – a crime against humanity, punishable under Article 2(a) of the statute, as well as Count 5 – Violence to Life, in particular Murder – a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the statute of the court. The very same incidents of murder in relation to the attack on Karina, to the extent that they were part of a widespread and systematic attack on the civilian population, also underlie the conviction under Count 3 – Extermination – a crime against humanity, punishable under Article 2(b) of the statute. [177]

8.8 The same incidents of rape also underlie the crime of Rape – Count 6 – a crime against humanity, punishable under Article 2(g), and the crime of Outrages upon Personal Dignity, a violation of Article 3 common to the Geneva Conventions and

[176] Sentencing Judgment (Disposition) p. 36.

[177] See para 2107 of the Judgment.

of Additional Protocol II, punishable under Article 3(3) of the statute.[178] The crimes of Collective Punishment and Acts of Terrorism, both violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Articles 3(b) and 3(d) respectively, *inter se*, share the same criminal conduct; at the same time sharing the same criminal conduct with the underlying charges in Article 3(a) (murder and mutilation) and Article 3(e) (outrages upon personal dignity). Thus, just about four separate acts of criminal conduct, namely murder; rape and other sexual offences; burnings and looting; and mutilation and other bodily harm, effectively account for the 11 Counts that the Appellant was convicted for.

8.9 Respectfully, Appellant does not by any means wish to demean the gravity of the offences or the suffering caused. The gravity of the offences cannot be overemphasized. Appellant only raises the issue of his criminal conduct in relation to the cumulative convictions entered against him and argues that, as a matter of law, they should reflect in the sentence imposed. The severity of the sentence imposed, it is submitted, does not reflect that the multiple convictions entered against him were considered at all for purposes of sentencing.

8.10 It is therefore submitted that the multiple convictions entered against the Appellant are not permissible in that they occasioned an injustice on him. The sentence imposed, is grossly excessive, it does not, for all intents and purposes, reflect the cumulative charges entered against the Appellant. Appellant will therefore pray that the sentence be set aside and substituted with a more appropriate penalty that reflects the Appellant's criminal conduct and not the number of convictions entered against him.

GROUND NINE

9. Responsibility for Crimes of Enslavement under Article 6(1)

[178] *Ibid.*

9.1 The Appellant respectfully submits that the Trial Chamber erred in law and fact in finding in paragraph 2095 that the Appellant was guilty of slavery in all the three forms pleaded in the Indictment. There is no evidence on the record to justify that conclusion. While there is evidence that the Appellant participated in a 'system' that promoted 'some' form of slavery, there is no evidence that these were carefully planned actions, and more particularly that the Appellant was involved in the planning of those crimes. Respectfully, a reasonable trier of fact would have seen that the Appellant only managed a *system* (in the loose sense of the word) that presided over the commission of those crimes in his capacity as Chief of Staff. At the most, that the Appellant only acquiesced to a situation that encouraged 'some' form of slavery.

9.2 'Planning' as the Trial Chamber rightly held, implies that one or more persons contemplate designing the commission of a crime at both the *preparatory* phase and the *execution* phase. The involvement of more than one person however, it is submitted, is not tantamount to collective responsibility, nor does it make collective responsibility permissible at law. The individual participation of the each of the co-conspirators must still be established.

9.3 With respect to all the three forms of slavery pleaded in the Indictment namely, forced labour; sexual slavery; and the conscription of children under the age of 15 years into the armed group or using them to participate actively in hostilities, it is submitted that there is no evidence of any elaborate scheme. Rather, on the totality of the record, the evidence reasonably suggests that these were prevalent practices across the board, largely born out of necessity than design, which in the case of the AFRC faction, fell upon the Appellant to *manage* in his capacity as the Chief of Staff. The same practices, it might be observed, were also prevalent within the RUF and other factions of the AFRC that were not directly associated with Appellant's group. On that basis, the Appellant contests that the only

reasonable inference that could be drawn from the systematic commission of the crimes on a large scale is that these were planned actions.[179]

9.4 Any inference that goes to the guilt of the accused person, it is submitted, must be proved beyond a reasonable doubt. It is not sufficient that a reasonable conclusion may be reached from the evidence; such conclusion must be the *only* reasonable one available from the evidence. If there is any other conclusion, which is consistent with the innocence of the accused, he must be acquitted.[180] In *casu*, the episodes of slavery for which Appellant was convicted, were uncoordinated acts that became so prevalent they had to be managed. It fell upon the Appellant in his capacity as the Chief of Staff in charge of the civilians to manage the situation within the AFRC faction. On that basis the Appellant could not be convicted for the planning the criminal acts in question.

9.5 Even if it were established that there was a deliberate plan to enslave the civilian population for the three purposes pleaded in the Indictment, the Appellant submits that there is no evidence that the Appellant was involved in the preparatory stages with respect to each of those crimes. With respect to the crime of forced labour, the only evidence is that, in his capacity as Chief of Staff, the Appellant presided over civilian affairs. With respect to the crime of sexual slavery, the only evidence on record is that he managed a system that promoted some form of sexual slavery. The same applies to the crime of conscription where the Appellant was only involved in the training. Respectfully, these acts do not constitute *planning* within the meaning of Article 6(1).

9.6 It is therefore submitted that it has not been established that the Appellant played a part in the planning of the crimes, if they were planned at all. The inference drawn by the Trial Chamber that the crimes were planned respectfully, does not establish that the Appellant was party to the planning process. At best, the

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[179] Para. 3090 of the Judgment.

[180] *Delalic et al.*, Appeals Chamber Judgment, 20 February 2001. p. 458.

evidence on the record implicates the Appellant in the execution stage to the extent that he was involved in the training of children under the age of 16 years and also that he was managing a system that promoted the exploitation of women for sexual purposes. Any conviction entered on the basis that the Appellant was involved in the planning of the crimes of slavery pleaded in the Indictment must therefore fall on that basis.

9.7 The conviction entered against the Appellant on the basis that he planned the crimes of slavery, namely forced labour; sexual slavery; and the conscription of children under the age of 15 years into the armed group or using them to participate actively in hostilities, must therefore be quashed.

10. GROUND TEN

Joint Criminal Enterprise – Paragraph 56 through 85 of the judgment

10.1 The Appellant submits that having found in the Pre-Trial Decision that 'the Indictment in its entirety, is predicated upon the notion of a joint criminal enterprise...,[181] the Trial Chamber erred in law in not quashing entire Indictment once it had found in paragraph 85 of the Judgment that Joint Criminal Enterprise as a mode of criminal liability, had been defectively pleaded in the Indictment.

10.2 The Appellant submits that, from the way the Indictment was pleaded, the thread of Joint Criminal Enterprise ran through the entire Indictment such that, once it was found that the principle was not properly pleaded, the entire Indictment could not stand. Put differently, that the notion of Joint Criminal Enterprise was not severable from the Indictment.

10.3 By allowing the matter to proceed on a defective Indictment, the Appellant was prejudiced substantially in the preparation of his defence, as at all material times,

[181] *The Prosecutor v. Brima, Kamara, Kanu*, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1st April 2004, para. 52, p. 21.

he was not sure of the exact nature of the case that he was facing. The Appellant will recall the point made earlier that, on two occasions, the Prosecution was given the opportunity to address the defects in the Indictment, through Defence Pre-trial Motions, but did not take up the opportunities.[182]

C. GROUNDS OF APPEAL RELATING TO SENTENCE

The Appellant submits that the Trial Chamber erred in law and/or in fact with respect to the global sentence of a single term of imprisonment of fifty years for all the counts on which he was found guilty. Had the Trial Chamber not erred in the manner that it did, it would have passed a less excessive sentence against the Appellant.

11. GROUND ELEVEN

The Trial Chamber failed to give adequate weight to mitigating factors

11.1 The Appellant notes that this ground is a generic ground that encompasses all the mitigating factors that were pleaded at sentencing, viz: his relatively low position, training; absence of knowledge of criminality; his role in protecting women and children; lengthy proceedings; good behaviour in the Army with no previous convictions and character evidence; the fact that his trial "circumvented" the amnesty granted him; his role in the Commission for Consolidation of Peace, his role in the "May 8th incident" where he gave assistance to the British troops in a fight against the RUF in protest of the RUF's continued violation of the Lome Peace Agreement Accord; his role after the 1999 Lome Peace Accord; and his statement during the sentencing hearing.

11.2 To avoid repetition, only those grounds that were not pleaded separately in the Appellant's Notice and Ground of Appeal, will be canvassed under this ground.

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[182] Footnote 55 *supra*.

The Sentence imposed is so inordinately high as to approximates a life term

11.3 The Appellant submits that the sentence imposed is inordinately high and so excessive that it induces a sense of shock. The sentence effectively approximates a life term, which the drafters of the Statute deliberately excluded.

11.4 The Appellant notes that, unlike in the ICTR or ICTY, neither the Statute of the Special Court nor the rules provide for a life sentence.[183] This omission was deliberate. The Appellant submits that the drafters of the Statute of the Court deliberately eschewed the penalty of a life term in the same manner that they rejected the death penalty.

11.5 Under those circumstances, the Appellant therefore submits that it was unreasonable of the Trial Chamber to sentence him, 42 years old at the time of sentencing, to a term of imprisonment of fifty years, as it effectively approximates a life term. If the Appellant serves his entire sentence, he would be 92 on his release. The sentence is unduly harsh and excessive; it negates the spirit of the Statute of the Court.

The Appellant's Relatively Low Position as a mitigating factor

11.6 As will further be argued below under the grounds relating to the "greatest responsibility" requirement and the principle of "hierarchy of relative criminality", the Appellant submits that the Trial Chamber erred in failing to take into consideration his relatively low position in the AFRC within the broader context of the conflict, compared to the other two convicted persons. The Appellant submits that it was often his popular name "55" which unjustly brought him to fame rather than his actual position of leadership. Prosecution Exhibit P85 illustrates this point. It concerns a commentary by Radio Netherlands on 21 January 2000, entitled "A Day in Rebel Territory." The reporter in that broadcast

[183] Art. 19 SCSLSt. Also see Rule 101 of the Rules

described a trip that he made with the Appellant and Alex Tamba Brima, the Third Accused in the court *a quo*, among other persons. They traveled after curfew time, and ran into several roadblocks. However, it was the name "55" which saved them time and again. "Each time, 55 replied, "A friend – 55", the soldiers greeted him enthusiastically… .[184]

11.7 Appellant submits that the name "55" was apparently famous, not so much because of his position or actions, but because he was a popular man within the army. People for instance knew "55" more than his co-accused in the *court a quo*, even though, as the Trial Chamber found, they were superior to him in the chain of command during the entire period in the Indictment. [185]

11.8 When one compares the Appellant to his co-accused in the court *a quo*, who as the Trial Chamber found were held the famous public liaison officer positions (PLOs) in the AFRC government, and who later in the jungle were the First and Second in Command of the AFRC faction, it is clear that the Appellant held relatively lower position. Consequently, he should bear less responsibility and this should have reflected in the sentence.

Lengthy Proceedings:

11.9 The Appellant contends that the length of time it took to conclude proceedings in this matter caused him unbearable anxiety and mental anguish, it should have been considered in mitigation. The Appellant submits that the delays in most instances were not of his making. The delay were caused *inter alia*, by: (i) the fact that Trial Chamber 1 approved the Indictment against him and dismissed the Defence Motions on defects in the form the Indictment was pleaded; and (ii) the fact that Trial Chamber II dismissed the Defence argument relating to Joint Criminal Enterprise in its Rule 92 Motion. The Trial Chamber could have

[184] Kanu Sentencing Brief, para. 103.
[185] Kanu Sentencing Brief, para. 105, Trial Chamber Judgment, para. 510-511; Also para. 437 where the Trial Chamber refers to witness TF1-045 stating that Kanu was not one the top commanders, superiors.

disposed of the JCE argument at an earlier stage of the proceedings. By failing to do so, the Defence therefore had to prepare and present evidence on the issue of JCE, which it could have avoided.[186] The Appellant therefore submits that the failure by the Trial Chamber to dispose of JCE at that material time prejudice his rights under Rule 26(*bis*) of the Rules of Procedure and Evidence. It unnecessary lengthened proceedings thereby causing unnecessary anxiety. Appellant submits that the Trial Chamber ought to have considered this in mitigation.

The Trial Chamber erred in failing to acknowledge Appellant's Role in Protecting Women during the conflict

11.10 The Appellant submits that the Trial Chamber erred in failing to recognize his role in the protection of women and children during the war as mitigating. Even the witnesses called by the Prosecution testified to the Appellant's role in protecting women and children.[187] Some of the charges under his care included AFRC family members who had fled from Freetown following the ouster of the AFRC government. These people often consulted the Appellant when they had problems related to their welfare.[188] Witness TF1-334 also testified of the exhortation by the Appellant to the AFRC soldiers to take care of the women.[189] The Appellant's role in the protection of women and children therefore should have been considered in mitigation, and thus the Trial Chamber .erred in failing to consider this factor.

Family Situation as mitigation

11.11 The Appellant submits that the Trial Chamber failed to attach due weight to his family circumstances in mitigation. That family circumstances constitute

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[186] Kanu Sentencing Brief, para. 142
[187] TF1-334, Transcript, 16 June 2005, p. 62-63.
[188] Kanu Sentencing Brief, para. 139. p. 49.
[189] TF1-334,Transcript, 15 June 2005, p. 15-17

mitigating circumstances is established in law.[190] Witness C1, indicated that Appellant's daughter is very close to him. Her mother died during the war and she was living with the aunt until recently when the aunt also passed away. Appellant's mother also passed away while he was in his detention. His daughter is therefore now mainly dependant on him, both financially and emotionally. It will therefore be of great importance to his daughter's future, if the Appellant had the opportunity to play a more significant role in her life. The Appellant also has a girlfriend whom he intends to marry and raise a family with after serving his term.

11.12 Appellant submits that a reasonable trier of facts would find these facts justifying that the Appellant be given a second chance. The sentence imposed in this case, respectfully, does not.

The Trial Chamber erred in failing to consider the Appellant's Good Character

11.13 he Appellant submits that the Trial Chamber erred in failing to attach any weight to the evidence relating to his character in mitigation. In *Ruggiu,* the Trial Chamber acknowledged that 'the accused was a person of good character imbued with ideals before he became involved in ideals in Rwanda'. It then proceeded to find that 'there [were] good reasons to expect his re-integration into society.'[191] In the *Tadic* Sentencing Judgment, the Trial Chamber noted that the Accused was a law abiding citizen and who seemed to enjoy the respect of his community and who was an intelligent, responsible and mature adult [...] capable of compassion towards and sensitivity for his fellows...[192]

11.14 n *casu*, Defence Witness C-1, described the Appellant as someone who 'was always there for the weak and defenseless'. Someone who, 'strived very hard to

[190] *Oric* Sentencing Judgment, para. 120
[191] *Ruggiu*, Judgment and Sentence, 1 June 2000, paras 67-68.
[192] *Tadic* Judgment in Sentencing Appeals, para. 59.

feed the hungry.' Someone who 'would protect the children and make sure they would be fed.'[193] Respectfully, this should have been considered in mitigation.

11.15 The Trial Chamber also had further character evidence before it, which it ignored. The Chamber thus erred in failing to take into consideration Appellant's good behaviour in the Army in mitigation. Defence Exhibit D-11, the Appellant's Army Discharge Book, which was signed on the 18 June 2002 and admitted in evidence, indicated that:

> Corporal Kanu offered a loyal, faithful service to the RSLMF. His approach and respect for authority have always been outstanding. I can strongly recommend that if given the opportunity by any employer he will measure up to the task.[194]

11.16 The Appellant submits that the recognition of his 'loyal, faithful service' in the army, should have counted as a mitigating factor that went to his character, in the determination of his sentence. The Trial Chamber's finding that the Appellant's service in the Army without incident could not to be a mitigating factor, but rather, was merely a duty,[195] failed to appreciate the meaning and extent of mitigation. Mitigation is considered in perspective to cover areas where the court can exercise discretion based on the conduct of the accused. Thus the courts have defined "mitigating circumstances" as those which compel it to reduce the sentence likely to have been imposed on the accused person.[196] In *casu*, the Trial Chamber proceeded as if the Appellant was asking to be rewarded for his impeccable record in the army, which was not the case.

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[193] Statement by Witness C1, Annexed to Kanu Defence Sentencing Brief.

[194] Kanu Sentencing Brief, para. 150 citing Exhibit D-14.

[195] *Ibid*, para. 134.

[196] *Akayesu* Sentencing Judgment, 2nd October 1998, para. 5; Also see, *Seruhuago*, 5th February 1999, para.38.

11.17 Finally, the Appellant submits that the Trial Chamber erred in failing to consider his lack of previous convictions as a mitigating factor.[197] Lack of previous convictions, is 'a factor to be taken into account for mitigation'.[198] In *Ruggiu,* the Trial Chamber considered that the fact that the accused had no previous criminal record constituted mitigating circumstances to be considered in the determination of an appropriate penalty.[199] That the Appellant had no previous criminal records therefore should have been considered in mitigation.

The Trial Chamber erred in not considering the Appellant's Statement of Remorse

11.18. The Appellant submitted that the Trial Chamber erred in holding that he was not remorseful when he, in fact, showed remorse in his statement at the Sentencing Hearing. The statement that was made by the Appellant, impromptu as it was, came from the heart and exuded genuine remorse. The Appellant expressed his genuine remorse before the Court in the following manner:

> Your Honours, what we are saying now in Sierra Leone is that peace and reconciliation for all that had suffered in this war. Those that have died, we pray that God send them to eternal life and those who have been victims, [we] are asking for mercy, ...yes, we've prayed that Sierra Leone forges ahead.[200]
>
> Some of us were and [had] a low rank in this army and we are under command and supervision. All that we need to know was: yes sir, yes sir.[201]
> We are coming back to ask the Sierra Leone people to forgive us. We ask for mercy. We did not know. In Sierra Leone everybody was angry. Civil Society,

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[197] Para. 133 of the Sentencing Judgment

[198] *Nikolic*, Sentencing Judgment, 18 December 2003, para. 265

[199] *Ruggiu,* Judgment and Sentence, 1 June 2000, paras. 59-60

[200] Sentencing Hearing, Statement of Kanu, Transcripts of 16 July 2007, p. 88, Lines 17-21

[201] *Ibid*, p. 89, Lines 24-27.

> everybody was angry...but now we pray that this peace that we have got be sustained; that it becomes everlasting.[202]
>
> That Your Honours, you that sitting there, judge us fairly we are sorry, that you consider that we are just youth, so if you send us to life imprisonment, Your Honours, we pray that [the] three [of you] would not accept that and consider that we are youths.[203]
>
> We are going to pay the price for peace and we pray that the three of you, Justice Sebutinde, Justice Doherty and Justice Lussick, that you use your good offices as elders, mothers and fathers.[204]

11.19 The courts have generally been ready to accept accused persons' statements at the Sentencing Hearing, in mitigation, where they express genuine remorse. In *Sikirica et al*, the Trial Chamber took account of Dragan Kolundzija's statement to the Chamber during the Sentencing Hearing, in which he apologized in the following terms: "I express regret and remorse for all the acts, including my acts in situations when I could have done more and didn't. I am aware that this is no compensation to my own people of Prijedor, but I do hope that I will be contributing to a new beginning. My remorse will certainly not remove the scars of a painful past, but I sincerely hope that it will help heal the wounds." In the Chamber's opinion his expression of remorse was sincere and was taken into account in mitigation.[205]

11.20 In *Todorovic*, The Trial Chamber also took into consideration in mitigation, Stevan Todorovic's expression of remorse, which it accepted as sincere.[206] In *Vasiljevic*, the Appeals Chamber opined that an accused could express sincere

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[202] *Ibid*, p. 90, Lines 9-12.

[203] *Ibid*, p. 90, Lines 13-17.

[204] *Ibid*, p. 91, Lines 6-9.

[205] *Sikirica et al*, Sentencing Judgment, 13 November 2001, para. 230.

[206] *Todorovic* Sentencing Judgment, 31 July 2001, para. 114.

regrets without admitting his participation in a crime. In that a case, the Trial Chamber considered a number of factors put forward by the Appellant as mitigating circumstances, including his repentance or remorse.[207]

11.21 The Appellant's statement at the Sentencing Hearing was genuinely remorseful. The genuineness of the statement becomes clearer when considered against the background of his conduct subsequent to the conflict. In the *Babic* case, Judge Mumba opined that, 'a mitigating factor need not minimize the serious criminal conduct for which a person is convicted, no such standard exists in law. A mitigating factor affects penalty, not liability. *The realization of wrongful conduct, coupled with acts which halt or reverse the continuation of crimes should be sufficient to mitigate penalty.*'[208](Emphasis Added) In the *Jokic* case, while the Trial Chamber did not accept as a separate mitigating factor, Jokic's conduct after the crimes, it considered the information as evidence of the sincerity of his remorse.[209]

11.22 It is therefore important to recall the Appellant's peace building initiatives after the war, as discussed in detail in paragraph 16, where it was noted that the Appellant participated in number of initiatives, including the Lome Peace Accord and the Commission for the Consolidation of Peace. The Appellant therefore submits that his statement at the Sentencing Hearing, viewed in conjunction with his conduct after the war, shows that he appreciated the errors of his ways and expressed genuine regret. While he could not turn back the clock, he apologized to the victims, pleaded for mercy and implored the society to forge ahead peacefully. That is a clear sign of genuine remorse and should have been considered in mitigation.

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[207] *Vasiljevic* Appeals Judgment, para. 177.

[208] *Babic*, Judgment on Sentencing Appeal, Partially Dissenting Opinion of Judge Mumba, para. 5.

[209] *Jokic* Sentencing Judgment, para. 91, cited in *Blagojevic*, Appeal Judgment para. 330.

11.23 By failing to find remorse in the Applicant's statement, the Trial Chamber therefore imposed an unreasonably high standard of proof of remorse. A reasonable trier of facts under the circumstances would, on a balance of probabilities, have found the Appellant's statement remorseful.

11.24 In *Bralo*, the ICTY Trial Chamber held that; the acceptance of certain circumstances as mitigatory in nature does not detract from the gravity of the crime committed, nor diminish the responsibility of the convicted person or lessen the degree of condemnation of his actions.[210] Indeed, such circumstances may be unconnected with the commission of the crime itself, and can arise many months or years after the event. While aggravating circumstances must be proved beyond a reasonable doubt, mitigating circumstances need only be proved on a balance of probabilities.[211]

11.25 The Appellant therefore submitted that the Trial Chamber erred in law and fact in finding that he lacked genuine remorse for the crimes that he committed. Appellant submits that his statement at the sentencing hearing viewed in conjunction with his conduct after the conflict shows that he was genuinely sorry for his actions during the war. A reasonable trier of facts, on the totality of the circumstances, would have found that the Appellant was full of remorse.

12. GROUND TWELVE

The Trial Chamber placed undue emphasis on Retributive and Deterrent elements of punishment

12.1 The Appellant submits that the Trial Chamber imposed a sentence that unduly emphasizes the retributive and deterrent aspects of punishment and pays no regard whatsoever to the rehabilitative element, which should have instructed the court

[210] *Bralo*, Sentencing Judgment, 7 December 2005, para. 4.

[211] *Celebici* Appeals Judgment, para. 590.

especially in the context of Sierra Leone.[212] The sentence manifestly negates the spirit of reconciliation and reconstruction espoused in the Amnesty Agreement and evinced through the Truth and Reconciliation process.

12.2 While a Trial Chamber may properly consider deterrence as a factor that might influence its determination of an appropriate sentence, it should not give "undue prominence" to that element in the overall assessment of an appropriate sentence.[213] Rehabilitation of the offender is also considered a legitimate purpose of punishment and should not be given "undue weight".[214] In the *Babic* case, for instance, the Trial Chamber held that, it would be unfair, and would ultimately weaken the respect for the legal order as a whole, to increase the punishment imposed on a person merely for the purpose of deterring others. Therefore, in determining an appropriate sentence, the Trial Chamber should not have accorded undue prominence to deterrence.[215] In *Krnojelac,* the ICTY Trial Chamber also cautioned that, whilst the principle of public deterrence is relevant in determining the appropriate sentence, care should be taken not to accord it "undue prominence."[216] In *Erdemovic*, the Trial Chamber held that the accused (then 26 years old) who had been 23 years at the time of the commission of the offences, was no longer a threat to the public and '...should be given a second chance to start his life afresh upon release, while still young enough to do so'.[217]

12.3 Within the context of Sierra Leone, the Appellant further submits that the Trial Chamber ought to have been guided by the other extra judicial initiatives that were adopted after the war. While not a bar to the jurisdiction of the Special Court, the Amnesty Agreement that was signed between the Government of Sierra

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[212] See paras 13 -18 of the Sentencing Judgment.

[213] *Tadic*, Judgment in Sentencing Appeals, 26 Jan. 2000, para. 48.

[214] *Delalic et al*, Judgment, 20 February 2001 (Celebici Appeals Judgment), para. 806.

[215] *Babic*, Sentencing Judgment, 29th June 2004, para.45.

[216] *Krnojrlac*, Judgment, March 15 2002 para. 505.

[217] *Erdemovic*, Sentencing Judgment, March 5 1998.

Leone and the warring factions, and the Truth and Reconciliation Process, should have instructed the court that the people of Sierra Leone, and the international community, which overwhelmingly supported the initiatives, were no longer entirely bent on retribution. Rather that they were more intent on reconciliation and reconstruction. The same spirit was underlined by the Security Council which envisaged one of the court's underlying functions as the building of peace and reconciliation.[218] Under those circumstances, the Trial Chamber therefore misdirected itself in overly emphasizing the retributive and deterrent elements of punishment.

12.4 The Trial Chamber thus failed to strike the appropriate balance between the need to show "that the international community is not ready to tolerate serious violations of international humanitarian law and human rights", and the need to "influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced.",[219] A reasonable court would not have imposed a global prison term of 50 years in a situation where the surviving victims, the relatives, the general public in Sierra Leone, as well as the international community had clearly indicated their desire to bury the past and forge ahead with peace and reconciliation.

12.5 Under the circumstances, the conclusion by the Trial Chamber that, 'that International Criminal Tribunals have noted that unlike the case in domestic courts, rehabilitation cannot be considered as a predominant consideration in determining a sentence, as the sentencing aims of national jurisdictions are different from the aims of international criminal tribunals,[220] was misplaced.

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[218] Security Council Resolution 1315 (2000).

[219] Para. 16 of the Sentencing Judgment.

[220] Ibid, para. 17

13. GROUND THIRTEEN

The Amnesty Agreement constituted a mitigating factor

This argument has been canvassed under Ground Twelve. Save to reiterate that in the context of Sierra Leone, the Amnesty Agreement should have been considered in mitigation, it is not necessary to repeat the argument under this heading.

14. GROUND FOURTEEN

The Trial Chamber erred in not considering the "greatest responsibility" requirement as a mitigating factor

The Appellant submits that the Trial Chamber erred in paragraphs 115 and 116 of the Sentencing Judgment in dismissing the argument that the fact that the Appellant did not bear the "greatest responsibility" under Article 1(1) of the Statute constituted a mitigating factor. The Appellant refers to the arguments under Ground One hereto and reiterates that it is clear from the Statute of the Court and the preparatory documents that the intention of the legislators was to try those who bear the greatest responsibility, by virtue of their leadership position. The Appellant thus submits in the alternative that, if the "greatest responsibility" requirement is not a jurisdictional issue, the fact that the Appellant did not fall into that category of "persons who bear the greatest responsibility", should at least have been considered as mitigating, as it reduces the degree of his blameworthiness within the context of Article 1(1).

15. GROUND FIFTEEN

The Trial Chamber failed to consider the General Chaos in Freetown as a Mitigating factor

15.1 The Appellant submits that the Trial Chamber erred in paragraphs 123 and 124 in disregarding the fact that there was general chaos in Freetown during the time that most the crimes were committed as a mitigating factor. Appellant submits that it is established that such consideration generally constitutes a mitigating factor and should have been considered in this case. The Trial Chamber failed to establish why it was distinguishing the present case.

15.2 In the *Oric Trial Judgment*, the Trial Chamber considered the difficult circumstances in which the convicted person had to operate as an important mitigating factor. In *Delalic et al*, the Appeals Chamber considered as mitigating, *inter alia*, '... the harsh environment of the armed conflict as a whole.'[221] In *Ruggiu*, the ICTR Trial Chamber took note of the absence of authority as a factor in favour of the accused.[222]

15.3 In *casu*, the Trial Chamber having established in many instances that there was a general state of chaos in Freetown still went on to disregard that fact as mitigating.[223] As if derogating from the established position, the Trial Chamber found that, 'the battle field is always chaotic and therefore this fact cannot be considered as mitigating.' Respectfully, the Trial Chamber failed to understand that the chaotic situation in Freetown impacted on the Appellant's 'material ability' to prevent or punish the crimes that were being committed by his subordinates. While that might not excuse his guilt under Article 6(3), it should diminish his blameworthiness.

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[221] *Delalic* et al, (AC), para. 827.

[222] *Ruggiu*, Judgement and Sentence, 1 June 2000, para. 76, p. 14.

[223] See, for instance paras 420, 555 and 2067 of the Judgment.

16. GROUND SIXTEEN

The Trial Chamber erred in not considering the Appellant's post-conflict conduct as a mitigating factor

16.1 The Appellant submits that the Trial Chamber erred in disregarding his conduct after the war as a mitigating factor. The Appellant submits that it is established in international law that post-conflict conduct may be considered as a mitigating factor.

16.2 In the *Plavsic* case, Trial Chamber accepted Plasvic' post-conflict conduct as a mitigating factor. After the cessation of hostilities, she had demonstrated considerable support for the Dayton Agreement (the 1995 General Framework Agreement for Peace in Bosnia-Herzegovina) and had attempted to remove obstructive officials from office in order to promote peace.[224] In the *Jokic* case, while the Trial Chamber did not accept as a separate mitigating factor, Jokic's conduct after the crimes, it considered the information as evidence of the sincerity of his remorse. The Trial Chamber also credited the accused for his post-war 'participation in the political activities programmatically aimed at promoting a peaceful solution to the conflicts in the region.'[225] In the *Oric* case, the Trial Chamber considered that the accused's cooperation with the Stabilization Force in BiH (SFOR) by 'providing information on a regular basis that enabled them to assess potential threats to the security of their forces as well as sections of the population in Bosnia', as a mitigating factor.[226] In *Blagojevic*, the Appeals Chamber held that conduct of the accused that promoted reconciliation in the former Yugoslavia could be considered as a mitigating

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[224] *Plasivic* Sentencing Judgment, para 85-93.

[225] *Jokic* Sentencing Judgment, para. 91, cited in *Blagojevic*, Appeal Judgment, para. 330.

[226] *Prosecutor v. Oric*, (TC) Judgment, para. 765.

circumstance whether or not it was directly connected to the harm the accused caused.[227]

16.3 The Appellant further submits that, within the context of the Statute of the Special Court, the drafters intended that the court should pay special attention to post-conflict conduct. This intention is clear in Article 1(1). According to this provision, in deciding on the choice of those who bear the greatest responsibility for the crimes punishable under the statute, special consideration should be given, among others, to those leaders who, in committing the crimes, threatened the establishment of and implementation of the peace process in Sierra Leone. Thus the provision, while not excusing those who were guilty of crimes, by contra-distinción, also emphasizes the role played by those who promoted the implementation of the peace process. By specifically condemning those who threatened the implemenation of the peace process, the drafters surely meant to recognise the efforts of those who did the opposite, that is, those who promoted the peace process. This reasoning also follows from the intention of the Security Council that the Special Court would also 'contribute to the process of national reconciliation and to the restoration and maintenance of peace.'[228]

16.4 The Appellant therefore submits that the role he played in post-conflict Sierra Leone should have been considered in mitigation. In this regard, the Appellant contends that he played a significant role in the implementation of the peace process in the country as illustrated below:

The Appellant's Role immediately the after the War

16.5 The Appellant submits that there is ample evidence on the record that the he made a positive contribution after the 1999 Lome Peace Accord. One of the Appellant's significant contributions was that he negotiated the release of

[227] *Blagojevic* Appeal Judgment, para. 330.

[228] Security Council Resolution 1315 (2000).

captured children after the war. According to Witness TF1-334 the Appellant went to the West Side to collect children to be released in Freetown.[229] Defence Witness C1 further confirmed that the Appellant played a vital role in the peace process. In his words the Appellant was the one who 'told SAJ to come out, to lay down their arms and make peace with the government.' The Witness further stated that he was 'present when Kanu said to SAJ that whilst Gullit and others were arrested in Kailahun, to lay down their arms and bring peace to the country.'(sic)[230]

16.6 The Appellant contends that he was the first soldier to come out of the bush to help build confidence between the government, the ex-SLAs and the RUF, as well as the UNAMSIL contingent in Freetown and the ECOMOG. Together, they worked towards bringing peace back to the country. When the 'West Side Boys' proved intransigent and held the UN peacekeepers and civilians captive, the Appellant and four others helped out with disarming and assisting in cooling off tensions in order to safeguard the peace process. They were to be commended by the UN Special Envoy Francis Okello, who noted the important role they played.[231]

The Appellant's Role in the Commission for the Consolidation of Peace

16.7 The Appellant further contends that he played a significant role in post-conflict Sierra Leone in his capacity as a member of the Commission for the Consolidation of Peace (CCP), which was created to oversee the implementation of the Lome Peace Accord. As a member of this Commission, the Appellant assisted Chairman Johnny Paul Koroma to bring all warring factions to the negotiation table. He also played an important role in the "DDR process" after the war, and IMATT training including, negotiations in Makeni for the former

[229] Sentencing Brief para. 89 citing Transcript TF1-334, 16 June 2005, p.91-92.

[230] Transcript 16 June 2005, p.91-92, Kanu Sentencing Brief, para. 90, p.33.

[231] Kanu Sentencing Brief, para. 91, p. 33.

fighters to come back under government control.[232] Even the Trial Chamber conceded this when it noted that, 'it appear(ed) that the AFRC had the intention to bring lasting peace to Sierra Leone after six years of civil strife.'[233]

16.8 As a member of the CCP the Appellant worked very closely with UNAMSIL, and assisted with the reintegration of ex-combatants back into their communities. As a committee member, the Appellant supervised the training of combatants into varying trades. The CCP, it can be noted, scored a major success in April 2000 when a Confidence and Trust Building Conference for Ground and Battalion Commanders held in the southern town of Bo ignited mass voluntary disarmament by pro-government militiamen. This provoked deep reflections by young combatants from all the factions on the catastrophic effects of war on the country and their own future.[234]

The Appellant's Role in the May 8th Incident

16.9 The Appellant also highlights his role in the so called May 8 Incident where he and others, assisted the British troops who were engaged in a fire fight with RUF rebels in Freetown. The Appellant and others were summoned by Johnny Paul Koroma and asked to save the people from the RUF rebels. They were able to defuse the tension that threatened the fragile peace in Sierra Leone.[235]

16.10 On the basis of the foregoing, the Appellant submits that the Trial Chamber erred in not finding these factors as mitigating circumstances. Having conceded in paragraph 25 of the Sentencing Judgment that such factors as 'the behavior or

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[232] Kanu Sentencing Brief, para. 94, p. 34, citing Sierra Leone: Time for a New Political and Military Strategy, 11 April 2001.

[233] Trial Chamber Judgment, para. 75.

[234] Kanu Sentencing Brief, citing D. Bright, Implementing the Lome Peace Agreement, Conciliation Resources (September 2000).

[235] *Ibid*, para. 100, citing Relief Web, Sierra Leone: Calm Returns after Protests.

conduct of the accused subsequent to the conflict' or his 'assistance to the detainees or victims' would constitute mitigating circumstances, the Trial Chamber erred in not recognizing the Appellant's positive contribution to the peace process after the war as a mitigating factor.

17. GROUND SEVENTEEN

The Trial Chamber erred in failing to consider the Appellant's Lack of Proper Military Training as mitigating

17.1 The Appellant submitted that the Trial Chamber erred in paragraphs 125 and 126 in finding that his lack of proper military training was not a mitigating factor. The court failed to appreciate that the point raised did not relate to the Appellant's culpability but that it was only raised in mitigation.

17.2 The Appellant's lack of proper military training, especially on international humanitarian law, while not an excuse regarding his culpability, impacts on the degree of his blameworthiness. His conduct under the circumstances was not a brazen disregard of the law, but rather, behavior born out of ignorance. In the *Serushago* case, the ICTR Trial Chamber considered a lack of a formal military training as a mitigating circumstance.[236] In the *Oric* case, the court considered the Accused's limited military experience as a mitigating factor.[237] In *casu*, the Trial Chamber therefore ought to have considered the Appellant's limited military training as a mitigating factor.

17.3 The Appellant underscores in this instance that the acceptance of lack of proper military training as mitigating factor does not detract from the gravity of the crimes committed, nor diminish his responsibility or lessen the degree of

[236] *Serushago*, Sentencing Judgment, para.37, p.11.

[237] *Oric* Judgment, para. 757.

condemnation of his actions.[238] Rather, it helps explain the background and circumstances under which the crimes were committed. A reasonable trier of facts would therefore find the lack of training relevant to the Appellant's conduct, and while not excusing his actions, would consider it mitigating.

17.4 The Appellant therefore submits that the Trial Chamber failed to attach due weight issue, having found in many instances that the AFRC generally suffered a lack of proper training. In paragraph 539 of the Judgment, the Trial Chamber found that, '[t]he AFRC was a less trained, resourced, organized and staffed than a regular army.'[239] It also found in another instance that, '...on the evidence adduced, the AFRC commanders dispensing "jungle justice" were not trained in military law and no formal procedures were in place for trying offenders and determining appropriate penalties. Rather, the system appears to have been fairly arbitrary.'[240] The Trial Chamber also found that, '...the AFRC faction suffered from lack of trained soldiers from which to fill senior positions and accepts that senior AFRC members were entrusted with multiple areas of responsibility.'[241]

17.5 The Appellant submits that he was 25 years[242] old when he joined the army and had only very limited training before he was sent of to the war front. His military experience was therefore very limited. Appellant submits that that factor should have been considered in mitigation.

18. GROUND EIGHTEEN

Absence of Criminal Knowledge with respect to Count 12

18.1 The Appellant recalls the arguments made in Ground Seven on this issue, and incorporates them to the extent that they apply hereto. As an alternative to

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[238] *Bralo,* Sentencing Judgment, 7 December 2005, para. 4.

[239] Trial Chamber Judgment, para. 539

[240] Ibid, para. 597,

[241] Presiding Judge Julia Sebutinde, Transcript of 20 June 2007, p.9, Lines 16-20

[242] Indictment, para. 6.

Ground Seven, Appellant submits that with respect to Count 12 on the recruitment and use of child soldiers, the Trial Chamber erred in paragraph 127 and 128 of the Sentencing Judgment in failing to find the absence of criminal knowledge on his part as a mitigating factor. Respectfully, the Trial Chamber by holding that, 'the rules of customary law are not contingent on domestic practice in one country', misconstrued the argument to be one relating to culpability when it was only raised in mitigation. The Trial Chamber failed to appreciate that the acceptance of certain circumstances as mitigatory in nature does not detract from the gravity of the crime committed, nor diminish the responsibility of the convicted person or lessen the degree of condemnation of his actions.[243]

18.2 It has been argued on the merits of the case that the Appellant's lack of criminal intent to the charge of the recruitment and use of child soldiers which vitiated the requisite *mens rea* to that charge. Alternative to that argument, the Appellant submits that, if it is found that his lack of knowledge that the recruitment and use of child soldiers was an international crime, did not vitiate the requisite *mens rea* for that crime, then it should, at least be considered in mitigation, as it reduces the degree of his blameworthiness. This is particularly true in a situation where the government of Sierra Leone, as argued above, was the main culprit, and had established a bad precedent. Under the circumstances, the Appellant submits that it would be asking too much to expect him to have known more about international law than the state. The Appellant therefore submits that his lack of knowledge of the criminality of his conduct with respect to the recruitment and use of child soldiers should have been considered in mitigation.

18.3 The Appellant submits that the conduct of the government of Sierra Leone on the recruitment and enlistment of under age children nurtured and engendered a belief in its subjects, including him, that the practice was acceptable. It therefore affected his conduct during the war. While that might not be a full defence, Appellant submits that a reasonable trier of facts would find it mitigatory.

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[243] *Ibid.*

19. GROUND NINETEEN

The Trial Chamber erred in failing to apply the Hierarchy of Relative Criminality in Sentencing the Appellant

19.1 The Appellant submits that the Trial Chamber erred in not applying the principle of 'hierarchy of relative criminality' in sentencing the Appellant. The Appellant notes that as a general sentencing principle, heavier penalties should be imposed on those who have committed the gravest crimes and whose responsibility for those crimes is highest. The Appellant submits that it was therefore incumbent upon the court in sentencing, the then 3 Accused, to develop an appropriate tariff reflecting their varying culpability given their relative roles and their respective positions of authority in the AFRC. This is particularly so in view of the "greatest responsibility" requirement in Article 1(1) of the Statute of the Special Court. The greatest responsibility requirement as argued under Ground One above, instructed the court to primarily consider one's leadership position relative to the commission of the crimes.

19.2 The Appellant submits that his role, responsibility and position in the AFRC hierarchy do not justify the lengthy sentence that was imposed. The Appellant contends that he was not a high ranking official and should therefore not have been sentenced on a level appropriate to such individuals. In any event, among the then 3 Accused in the AFRC case, the Appellant, as the Trial Chamber established, was the lowest. While it was established that the then First Accused was the first in command, followed by the Second Accused, the Trial Chamber was unable to establish the Appellant's exact position other than that he was a 'senior commander' in the AFRC fighting force.[244]

[244] Para. 526 of the Judgment.

19.3 In *Tadic*, the ICTY Appeals Chamber considered the Appellant's relatively low position in the chain of command in considering an appropriate sentence. The court held that *while the criminal conduct underlying the charges of which the Appellant was convicted was incontestably heinous, his level in the command structure, when compared to that of his superiors*, i.e. commanders or the very architects of the strategy of ethnic cleansing, was low.[245] (Emphasis added) The Appeals Chamber accordingly found that a sentence of more than 20 years imprisonment for any count of the Indictment on which the Appellant was convicted was excessive and could not stand.[246]

19.4 The Appellant's relatively low position in the hierarchy of authority must also be construed in the context of superior orders, which the Trial Chamber in the *Kambanda* case held may lead to mitigating factors. Article 6(4) of the Statute of Special Court also provides that, '[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.' In this regard it therefore germane to recall the finding by the Trial Chamber largely based on [247] Prosecution witnesses' evidence that in most instances, the Appellant was basically executing orders of Brima, as the First in Command.[248]

19.5 The Appellant submits further that the Trial Chamber over emphasized *the criminal conduct underlying the charges of which the Appellant was convicted* which it found *was incontestably heinous* rather than *his level in the command structure, when compared to that of his superiors*.[249]

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[245] *Tadic*, Judgement in Sentencing Appeals, para. 56.

[246] *Ibid*, para.57.

[247] Para. 1568 of the Judgment.

[248] See Footnotes 133 and 142 *supra*.

[249] See for instance paras 34 -36 of the Sentencing Judgment. Also see para. 99.

19.6 The Appellant therefore submits that the Trial Chamber erred in failing to apply the 'hierarchy of relative criminal culpability'. Had it applied the principle, it would have been obliged to impose a lesser sentence on the Appellant than his the then co-accused. That the Appellant, who was the most junior of the then 3 accused, should bear one of the severest penalties, it is submitted, amounts to a miscarriage of justice.

20. On the basis of the foregoing, the Appellant contends that had the Trial Chamber not erred in any one or more of the above grounds, it would not have passed so harsh a sentence against him. It would have passed a lesser penalty commensurate with his degree of blameworthiness. Appellant further submits that a reasonable trier of facts in considering these grounds would have found them mitigatory and would have been persuaded to impose a lesser sentence than the one given in this case.

D RELIEF SOUGHT

21. In appealing against the Judgment and Sentence, the Appellant seeks the following relief:

22. With respect to the convictions entered against him, that such convictions be quashed on the basis of any one or more of grounds 1 through 9 above.

23. With respect to the sentence, depending on the honourable court's determination of the Appellant's case on the merits, that the learned Appeals Chamber substitutes the sentence with a lesser custodial term as it might deem appropriate, regard being had to the mitigating factors in this case. In any event, that the Appeals Chamber substitutes the sentence given with a lesser penalty cognizant of all the mitigating factors in the case.

24. The Appellant submits that in this case, the Appeals Chamber has all the relevant information before it such that, in the event that it upholds any one or more of the submissions made above, either with respect to the convictions entered or with respect to mitigation, it is not necessary to remit the matter back to the Trial Chamber for a determination of an appropriate sentence under the circumstances. The Appellant submits that the Appeals Chamber is disposed to deal with the matter and should exercise its discretion accordingly.

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