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SCSL-04-16-A
(1772-1786)

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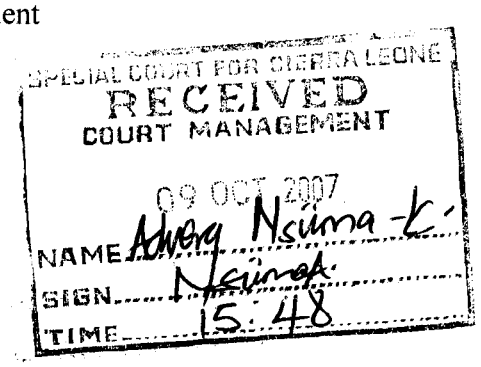
SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

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

Registrar: Herman von Hebel, Registrar

Date: 9th October 2007



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

Case No. SCSL -04-16-A

Public Document

SUBMISSIONS IN REPLY - KANU DEFENCE

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INTRODUCTION

Further to "Kanu's Submissions to Grounds of Appeal" (the Appellant's Appeal Brief) filed on the 13th September 2007, pursuant to Article 20 of the Statute of the Special Court for Sierra Leone (the Statute) and, Rules 108A and 111 of the Rules of Procedure and Evidence of the Special Court (Rules of the Court);

And further to the "Response Brief of the Prosecution" (the Prosecution's Response) filed on the 4th October 2007, pursuant to Rule 112 of the Rules of the Court;

The Appellant – Kanu hereby files his "Submissions in Reply" to the Prosecution's Response pursuant to Rule 113 of the Rules.

Kindly take notice that in these, "Submissions in Reply", **KANU,** shall for consistency and ease of reference, be referred to as **THE APPELLANT.**

Kindly take further notice that, for ease of reference, the Appellant shall, with respect to the submissions made herein, adopt the headings in the Prosecution's Response.

Alleged procedural errors

1. The effect of the words "those bearing the greatest responsibility" – paragraphs 2.38 to 2.68

1.1 Under this heading, the Prosecution contests the Appellant's submission that the Trial Chamber erred in holding that the greatest responsibility requirement established a jurisdictional threshold. The Prosecution argues that the Trial Chamber was correct in its findings in paragraphs 640 to 659 of the Judgment.[1]

1.2 The Prosecution argues that the Trial Chamber correctly interpreted Article 1(1), in light of the *travaux preparatoires*, in coming to the conclusion that the greatest responsibility requirement merely articulated prosecutorial discretion. Any other interpretation, the Prosecution argues, would not make sense[2] or would be unworkable[3].

1.3 Regarding the interpretation of Article 1(1) in view of the *travaux preparatoires*, the Appellant reiterates the submissions under ground one of his Appeal Brief. The Appellant finds it curious that the Prosecution, while conceding in paragraph 2.43 of its Response, that Security Council rejected the Secretary-General's "most responsible" formulation, and '[s]ubsequently indicated its desire to retain the expression "persons who bear the greatest responsibility" in Article 1(1), would nonetheless continue to suggest that the Security Council however, '[e]xpressed no disagreement with the opinion of the Secretary-General that the relevant wording must be seen "not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of prosecution strategy and in making decisions to prosecute in individual cases"'.

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[1] Prosecution Response, para. 2.40

[2] See for instance, Prosecution Response, para. 2.46

[3] See for instance, Prosecution Response, para. 2.51.

1.4 The Appellant submits [with all due respect] that it defies logic to suggest that the Security Council accepted the interpretation of a principle it rejected. The Appellant submits that the interpretation that the Secretary-General proposed specifically related to the "most responsible" formulation and once that formulation was rejected, there was nothing to interpret. The Prosecution cannot simply transplant an interpretation that was specifically proposed with respect to one principle and apply it to another without an express indication that that is what the drafters intended. The Appellant submits that there is nothing in the letter by the President of the Security Council to support the suggestion that the Council agreed with the Secretary-General that the 'greatest responsibility requirement' would all the same articulate prosecutorial discretion. If anything, the Security Council underlined the need to streamline the personal jurisdiction of the Court by focusing on those who played a leadership role.[4]

1.5 The Appellant therefore submits that the Prosecution, as with the Trial Chamber, misinterpreted Article 1(1) as it, in deed, articulates a jurisdictional threshold.

1.6 The Prosecution's argument that, if the greatest responsibility requirement were a jurisdictional requirement, then the "persons responsible" formulation of the equivalence of Article 1(1) in the ICTY statute would also amount to a jurisdictional threshold requiring the Accused's guilty to be established at the pre-trial stage, is therefore misplaced.[5] The Prosecution fails to make a distinction between the question of jurisdiction, which in this instance, could be determined by the establishment of a threshold, and the question of the Accused's guilt which turns on the merits; two separate issues, which the Appellant fails to understand how the Prosecution mixed them up?

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[4] See letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S2000/1234, para. 1.

[5] Prosecution Appeal Brief, para. 2.47.

1.7 Further, the argument by the Prosecution above is oblivious of the fact that the most responsible formulation in the ICTY statute has since been translated into a jurisdictional threshold following the adoption of the Court's completion strategy, pursuant the indictment review procedure under Rule 28 of the ICTY's Rules of Procedure and Evidence, as argued in paragraphs 1.18 to 1.19 of Appellant's Appeal Brief.

1.8 In view of the ICTY indictment review procedure which, as submitted in paragraph 1.19 of the Appellant's Appeal Brief, entails a preliminary review by a panel of judges, whether an Indictee before the tribunal, *prima facie*, constitutes one or more of the most senior leaders suspected of being the most responsible for crimes within the jurisdiction of the Court, in line with new jurisdictional threshold pursuant the Court's completion strategy, the Appellant finds it incredible that the Prosecution would still insist that a pre-trial judicial review of the 'greatest responsibility requirement', would be unworkable and unprincipled.[6] Interestingly, the Appellant notes that the Prosecution's Response does not specifically address the issue of the ICTY's preliminary indictment review procedure, save to persist brazenly that it is impossible to review the Prosecutor's powers at the pre-trial stage.

1.9 Based on the example of the ICTY preliminary indictment review process under Article 28, the Appellant submits that the Prosecution's argument, which forms the basis of its submission under this ground, that it is unprincipled and impractical that Article 1(1) could be seen as a jurisdictional threshold subject to judicial review at pre-trial stage, or any other stage, is ill-conceived.

1.10 With regard to the Prosecution's argument of waiver – paragraph 2.56 – the Appellant submits that the issue at hand is of such fundamental importance to the case such that even if the Appellant were estopped from raising it on Appeal, in the interest of justice, or alternatively, to avoid occasioning an injustice to the

[6] See for instance, Prosecutions Appeal Brief, paras 2.46; 2.52 -2.53.

Accused, the Appeals Chamber should *priori motu* consider the issue. Alternatively, that the importance of the issue not only to the present case but also to all the other cases before the Special Court, should constitute special circumstances.

1.11 The Appellant therefore persists that the Appeals Chamber finds that the greatest responsible requirement is a jurisdictional requirement and that the Trial Chamber erred in not making that determination before finding him guilty of any crime.

Alleged defects in the form of the indictment

2. Pleading of crimes alleged to have been "committed" – paragraphs 2.69 to 2.91

2.1 Paragraphs 2.77 to 2.80 of the Prosecution's Response clearly lay out the issue under this Ground of Appeal. The question for determination is simply whether the Trial Chamber was correct in finding the Appellant guilty of crimes that it found: (1) were defectively pleaded, and (2) which defects, it also found were not "cured", simply on the basis of waiver.

2.2 The Prosecution argues that, on the basis of waiver, the Defence's challenge under this ground can only succeed if the Defence can show that the defects in the indictment materially impaired its ability to prepare a defence.[7] The Prosecution argues that the Appellant fails in this respect.[8]

2.3 The Appellant submits that in a case of the magnitude and complexity as the one he was facing, not only involving a multiplicity of charges, but also covering a relatively wide territorial and, temporal jurisdiction, the requirement for specificity in the indictment was ever more imperative. Therefore, that a failure to

[7] Prosecution Response, para. 2.86.

[8] Prosecution Response, para. 2.89.

plead the indictment in sufficient detail as would have informed him of the exact nature of the case against him, coupled with a failure to cure the defects by way of post-indictment disclosures, only to confront the full particulars of the case against him at trial, naturally impaired him in the preparation of his defence in a substantial way. No better scenario illustrates the legal principle, *res ipsa loquitur*.

2.4 The Appellant submits that it should stand to reason that where the law requires that certain information should be furnished to the Accused before trial so that he is fully appraised of the case against him and is therefore better placed to adequately prepare his defence, failure to do so until the presentation of evidence at trial would materially prejudice the Accused in the preparation of his defence. The nature of the prejudice is one that, in most instances, cannot *post facto* be pointed out as a matter of evidence. Rather, it is primarily a matter of having been in a better position to adequately prepare (including the necessary investigations and research) had one been sufficiently warned of the exact nature of the case against him before hand.

2.5 Under those circumstances, the Appellant submits that it would be ill-advised to put too much capital to the fact that the Defendant failed to object to the evidence, or even that he cross examined on it. As the Trial Chamber found in *Ntagerura*, it is normal under such a situation [where the Accused is confronted with evidence not pleaded in the Indictment for the first time at trial] for the Accused to defend himself against those facts.[9] Further, as argued in the Appellant's Appeal Brief, in the circumstances of the present case, the evidence that was led was not manifestly irrelevant. It was relevant for other purposes, and the Prosecution does not challenge that it its Response.

2.6 The Appellant therefore submits that the defect in the indictment materially impaired him in the preparation of his defence in that it left him 'embarrassed' in

[9] *The Prosecutor v Ntagerura, Bagambiki, Imanishwe*, ICTR-99-46-A, para. 160

so far as the exact nature and extent of his culpability for "committing" was not adequately disclosed. Without prior notice of when his culpability for "committing" would be brought into issue, given the complexity of the case and the intertwining of the charges and the evidence, the Appellant until the evidence was presented at trial remained in the dark and was thus denied a chance to adequately prepare his defence. There could be no worse impairment in the preparation of one's defence than confronting a case against you for the first time at trial.

2.7 Appellant therefore persists with his appeal under this ground.

Alleged errors of the law

3. Cumulative Convictions – paragraph 3.44 to 3.58

The Appellant submits that the Prosecution misconstrued his argument under this ground. The basic point that the Appellant makes under this heading [to borrow the words of Justice Hunt and Justice Bennouna] is that, the fundamental function of the criminal law is to punish the Accused for his criminal conduct, and only for his criminal conduct. Therefore that, while multiple convictions based on the same criminal conduct may be entered to describe the full culpability of the Accused or to capture the totality of his criminal conduct, the court should be wary [again to borrow from Justice Hunt and Justice Bennouna] of convicting and punishing the Accused for crimes which have a distinct existence only as a purely legal and abstract matter.[10] The Appellant therefore persists with his submission that the Trial Chamber, in passing a fifty-year global sentence against him, erred in emphasizing *the **counts** on which the Appellant was found guilty.*[11] Rather, the Court should have focused on the Appellant's criminal conduct, which if however

[10] Separate and Dissenting Opinion of Judge Hunt and Judge Mohamed Bennouna, *Čelebići* Appeal Judgment, para. 27, discussing the issue of cumulative convictions.

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

looked at from a purely legalistic point of view, constituted a multiplicity of counts.

Other alleged errors of fact

4. Individual responsibility of Kanu for enslavement crimes – paragraphs 6.58 – 6.66

4.1 The Appellant contests the Prosecution's submissions under this heading and persists that it has not been established beyond a reasonable doubt that he planned or participated in the planning of the enslavement crimes. The Appellant submits that it cannot be reasonably inferred from the nature of his participation in the enslavement crimes that he also participated in the planning process. Neither would that be the only reasonable conclusion open on the facts of the matter. The Appellant submits that "participation" itself constitutes a separate crime under Article 6(1) of the Statute and that, that is also a reasonable conclusion that could be reached.

4.2 The Appellant submits that the argument would still hold true even if his participation were considered in conjunction with the factors enumerated in paragraph 6.65 of the Prosecution's Response. These factors, it is submitted, do not in any way impact on the question of the Appellant's responsibility for "planning" the enslavement crimes.[12] As the Prosecution rightly concedes, they at best, indicate that the Appellant had substantial influence in the AFRC, which is not in dispute. Therefore, even if those factors were coupled with the Appellant's "participation" in the enslavement crimes, that would not lead to the ***only reasonable conclusion*** that the Appellant was involved in the planning of the enslavement crimes.[13] As indicated above, the Appellant could simply have been responsible for "committing" the enslavement crimes.

[12] Prosecution Response, para. 6.65.

[13] Para. 6.66 of the Prosecution Response refers.

Alleged errors in sentencing: general matters

5. The effects of the amnesty in the Lomé Agreement – paragraphs 7.29 to 746

The Appellant refers to paragraphs 7.29 to 7.46 where the Prosecution vehemently contests the argument that the Lomé Agreement enjoyed overwhelming international support and submits that it is rather convenient for the Prosecution to look at the Amnesty agreement in isolation when the issue was specifically pleaded in conjunction with the Truth and Reconciliation Commission (TRC) which undisputedly enjoyed overwhelming international support. The Appellant therefore submits that even if it were contested that the Amnesty Agreement enjoyed overwhelming international support, the same would still hold true of the TRC.

The Sentence imposed on Kanu

6. Alleged failure to consider "the greatest responsibility" – paragraph 8.63 to 8.68

6.1 The Appellant contests the Prosecution's submission that "it is implicit in the Trial Chamber's Judgement that the Trial Chamber found that Kanu was one of those bearing the greatest responsibility within the meaning of Article 1(1) of the Statute". (footnote omitted)[14] The Appellant submits that there is nothing in paragraphs 655 to 659 of the Trial Chamber's judgment to support that conclusion. In any event, that conclusion is ill-conceived as the Trial Chamber made no finding that the greatest responsibility was a jurisdictional requirement.

6.2 Further, the Appellant submits that the Prosecution misconstrued his argument under this heading. Paragraph 8.66 of the Prosecution's Response refers. The

[14] Prosecution Response, para. 8.65.

Appellant's argument is simply that he should have received a lighter sentence as he does not bear the greatest responsibility within the contemplation of Article 1(1) of the Statute.

7. Alleged failure to consider mitigation circumstances

Sentence imposed on Kanu amounts to a life sentence

7.1 The Appellant refers to the paragraph 8.71 of the Prosecution's Response, as read with paragraphs 8.8, 8.10 and 8.28, and submits that a fifty-year sentence on its own, irrespective the "arbitrary factor of the age of the convicted person at the time that sentence is imposed" effectively amounts to a life sentence. That, by any standard, a fifty-year prison term is effectively a life term, which the Statute deliberately excluded.

Appellant statement of remorse

7.2 The Appellant refers to the Prosecution's Response, paragraphs 8.84 to 8.86 and persists with his claim that his oral statement at the sentencing hearing showed genuine remorse. The Appellant submits that the Prosecution's argument in paragraph 8.84 is flawed both in law and in logic in so far as it suggests that an accused person must constantly show contrition throughout the trial process. The argument leaves no room for repentance in the proverbial 'eleventh hour'. Further, while contesting the allegation that his statement showed denial rather than contrition,[15] the Appellant submits that, "an accused can [still] express sincere regret without admitting his participation in a crime, and that is a factor which may be taken into account" [i.e. in mitigation].[16]

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[15] Prosecution Response, para, 8.84.
[16] *The Prosecutor v Vasiljević*, IT-98_32-A, Appeals Chamber Judgment, 25th February 2004.

7.3 Thirdly, with respect to the submission in paragraph 8.85 of the Prosecution's Response, the Appellant submits that the Prosecution proceeds on factual assumptions that are not founded on the record. The Appellant submits that the Trial Chamber found that he lacked genuine remorse solely on the basis of his statement at the sentencing hearing. There is nothing in the Chamber's sentencing judgment to show that the Trial Chamber considered other factors such as his demeanor, or other "circumstances of the case as a whole". Under those circumstances, the question is simply whether a reasonable trier of fact, on the basis of the Appellant's statement, would have concluded that the Appellant showed genuine remorse. The Appellant submits that a reasonable trier of fact, for reasons given in his Appeal Brief, would have found his statement manifesting genuine remorse.

Alleged failure to consider post conflict conduct – paragraphs 8.91 -8108

7.4 With respect to the Prosecution's argument under paragraph 8.98, that the statement of Defence witness C1 should be disregarded on the same basis that the Trial Chamber refused it the opportunity to adduce new evidence relevant to sentencing at the sentencing hearing, the Appellant submits that the Prosecution overlooks the difference in the evidentiary burden of proof between the Prosecution and the Defence at the sentencing stage. It is common cause that the Prosecution must prove aggravating factors beyond a reasonable doubt, while the Defence only need to prove mitigating factors on a balance of probabilities. On that basis, the Appellant submits, the same standard cannot also be expected on the admissibility of evidence for sentencing purposes at the sentencing stage.

7.5 With respect to the question of the Appellant's participation in post-conflict peace initiatives, while the Prosecution appears to question the veracity of the claims,[17] it in fact challenges the Appellant's motive in participating in those initiatives and

[17] Prosecution Response, para. 8.97

argues that he was driven by self interest.[18] Other than to challenge the allegation as baseless, the Appellant also submits that the question of his motive is immaterial in this instance. What is important is his positive contribution to the peace process.

7.6 The Appellant submits that the evidence of his contribution in post-conflict peace initiatives is well-documented in reputable sources referred to in his Appeal Brief, which for reasons given in paragraph 7.4 above should be admissible. Further, that those initiatives, on a balance of probabilities, are sufficient proof of mitigating factors.

Wherefore the Appellant persists with his Appeal as set out in his Appeal Brief.

Respectfully submitted,

Silas Chekera.

[18] This argument is manifested in the excerpt from the transcript of the sentencing hearing recited in paragraph 8.99 of the Prosecution's Response.

List of cited Authorities and Documents

ICTY Case Law

The Prosecutor v Delalić et al., (*Čelebić case*), IT-96-21-A, "Judgment", Appeals Chamber, 20 February 2001, "Separate and Dissenting Opinion of Judge Hunt and Judge Mohamed Bennouna".

Prosecutor v Vasiljević, IT-98-32-A, "Judgment", Appeals Chamber, 25th February 2004.

ICTR Case Law

The Prosecutor v Ntagerura, Bagambiki, Imanishwe, ICTR-99-46-A, "Judgment", Appeals Chamber, 7 July 2006.

Other Documents – UN

Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S2000/1234.