Commentary

The Special Court for Sierra Leone's Appeals Judgment in the AFRC case

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The civil war in Sierra Leone (1991-2002) was initially a conflict between the Revolutionary United Front (RUF) rebel forces under Foday Sankoh, and the central government. In 1997, the advance of the rebels led to the establishment of the Civil Defence Forces (CDF), which benefited from the support of the Sierra Leonean government, seemingly to the detriment of Sierra Leone's army. Although the country was still unstable, elections took place and in March 1996, Ahmed Tejan Kabbah was elected president. Beginning in September 1996, Kabbah was subjected to an attempted military coup led by retired officer Johnny Paul Koroma, who was subsequently imprisoned. On 25 May 1997, members of Sierra Leone's army staged a successful coup and installed Koroma as the Head of State, along with his military regime, the Armed Forces Revolutionary Council (AFRC). One of the major political moves of this regime was to involve the RUF in the management of the country, integrating the RUF into the government and establishing a Supreme Council. The three accused in this case, all relatively young officers born between 1965 and 1971, played key roles in the government of Sierra Leone. Alex Tamba Brima, one of the officers who participated in the coup, had the rank of Principal Liaison Officer and was a member of the Supreme Council with responsibility for several ministries. In addition, after the death of the AFRC's second-in-command, Alex Tamba Brima led the forces that attempted to regain control of Freetown in January 1999.[1] Brima (Ibrahim) Bazzy Kamara, another officer who participated in the military coup in May 1997,[2] was also a Principal Liaison Officer[3] and a member of the Supreme Council.[4] He assisted Alex Tamba Brima in commanding forces during the attempted capture of Freetown in 1999.[5] Santigie Borbor Kanu, who played an essential role in the military coup

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1 *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Judgment (Trial Chamber), 20 June 2007 (Judgment), para. 420.

2 Judgment, para. 433.

3 Judgment, para. 435.

4 Judgment, para. 434.

5 Judgment, para. 474.

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in 1997, was rewarded for his involvement with a seat on the Supreme Council.[6] During the conflict, he served as a commander of the armed forces and was in charge of kidnapped civilians.[7] In addition to being instrumental in the military coup and the government of the AFRC, the three accused also discharged military responsibilities under different titles in various regions of the country.

The Ahmed Tejan Kabbah government had been perceived as legitimate by the international community starting with the Economic Community of West African States, given that the government had come to power through an election. Consequently, the AFRC enjoyed neither regional support nor the support of the international community as a whole. In 1998, ECOMOG, the West-African force deployed in Liberia and then in Sierra Leone, ousted the AFRC from Freetown and the surrounding areas, resulting in a number of casualties. The AFRC further intensified its alliance with the RUF and became an entirely rebel movement. Consequently, the Prosecutor indicted those most accountable. Brima, Kamara and Kanu were arrested, although Koroma is still at-large and may well be dead.

On 20th June 2007, Trial Chamber II, composed of Judges Julia Sebutinde of Uganda (Presiding), Richard Lussick of Samoa and Teresa Doherty of Northern Ireland, found the three accused guilty of war crimes and crimes against humanity.[8] Brima and Kanu were sentenced to 50 years' imprisonment, while Kamara received a sentence of 45 years.[9] Unsurprisingly, the three men appealed the judgment in its entirety, introducing numerous grounds of appeal. Because the Trial Chamber had also rejected a certain number of allegations based on defects in the form, the Prosecution also appealed the decision. On 22nd February

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6 Judgment, paras. 507-508.

7 Judgment, para. 535.

8 Alex Tamba Brima was found guilty of war crimes (acts of terrorism, collective punishments, violence to life, health, and physical or mental well-being of persons, outrages upon personal dignity, conscripting children under 15 years of age into an armed group and/or using them to actively participate in hostilities, and pillage) and of crimes against humanity (extermination, murder, and enslavement) [Judgment, para. 2113]. He was acquitted of counts of rape and other inhumane acts, as crimes against humanity [Judgment, paras. 2114-2115]. Finally, the Trial Chamber excluded the counts of sexual slavery and other forms of sexual violence and other inhumane acts [Judgment, para. 2116]. Ibrahim Bazzy Kamara was found guilty of war crimes (acts of terrorism, collective punishments, violence to life, health, and physical or mental well-being of persons, outrages upon personal dignity conscripting children under 15 years of age into an armed group and/or using them to actively participate in hostilities, and pillage) and of crimes against humanity (extermination, murder, rape, and enslavement) [Judgment, para. 2117]. Kamara was also found guilty on the basis of superior criminal responsibility of rape as a crime against humanity [para. 2118] but the Trial Chamber acquitted him on the count of other inhumane acts [para. 2119], while excluding the same two counts as for Brima [Judgment, para. 2120]. Finally, Santigie Borbor Kanu was found guilty of the same categories of crimes, including war crimes (acts of terrorism, collective punishments, violence to life, health, and physical or mental well-being of persons, outrages upon personal dignity, conscripting children under 15 years of age into an armed group and/or using them to actively participate in hostilities, and pillage) and crimes against humanity (extermination, murder, rape and enslavement) [Judgment, para. 2121]. In addition, Kanu was found guilty on the basis of superior criminal responsibility of rape as a crime against humanity [Judgment, para. 2122]. The Trial Chamber did not enter a conviction for the same two counts as Brima [Judgment, para. 2123].

9 *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Sentencing, Transcripts, 19 July 2007, p. 41.

2008, the Appeals Chamber, composed of Judges Emmanuel Ayoola (Nigeria), Renate Winter (Austria), Raja Fernando (Sri Lanka) and Jon M. Kamanda (Sierra Leone), with Judge George Gelaga King (Sierra Leone) presiding, dismissed all the appeals grounds of the three former AFRC leaders and confirmed their original sentences. The Prosecution's appeal was upheld in part.[10]

This Appeals Judgment warrants careful review, not only because it is the first of the Special Court, but also because the Prosecution's grounds of appeal and the position adopted by the Appeals Chamber constitute new developments in international criminal law. However, this commentary begins by briefly reviewing the Appeals Chamber's rationale for dismissing the appeals of the three appellants. It subsequently examines the Prosecution's two successful grounds of appeal: one in relation to the precision of the pleading in the indictment and the other relating to acts of forced marriage as a separate crime under international law. Finally, this commentary concludes with a brief discussion of other questions of interest that the Appeals Chamber attempted to resolve, without much conviction, in this author's opinion.

1. THE DISMISSAL OF THE DEFENCE APPEALS

The grounds of appeal submitted by the Defence were numerous: Brima introduced twelve grounds of appeal, four of which were abandoned by the Appeals Chamber in the absence of supporting arguments;[11] Kamara introduced thirteen grounds and Kanu presented nineteen. Essentially, the appellants were contesting the Trial Chamber's interpretation of events and the punishment associated with their responsibility. It is important to note that, according to the Appeals Chamber,[12] these grounds of appeal lacked not only substance but also precision, making their dismissal much easier.

In one group, there is a series of grounds of appeal on which the appellants simply did not elaborate, presenting therefore no arguments in support of their appeals.[13] This was most obvious in the challenging of the sentences. The Appeals Chamber concluded that "[t]he mere recital of mitigating factors, as the Appellants have done, without concrete arguments, does not suffice to discharge the burden of demonstrating that the Trial Chamber abused its discretion."[14] It is surprising that counsel would negate the right of appeal by not framing the appeal in such a way that the Appeals Chamber could appreciate the substance of their challenges to the original judgment, unless that was an implicit acceptance of the original judgment.

In a second group, there are the grounds of appeal focused on allegations of abuse in the Trial Chamber's exercise of discretion relating exclusively to grounds

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[10] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-2004-16-A, Judgment (Appeals Chamber), 22 February 2008 (hereafter, "Appeals Judgment").

[11] Appeals Judgment, para. 28.

[12] Appeals Judgment, para. 34.

[13] Appeals Judgment, paras. 124, 139, 222, 226, 229 and 231.

[14] Appeals Judgment, para. 315.

concerning the evaluation of evidence. According to the appellants, the evidence presents many contradictions, both between witnesses and within the testimony of the same witness, which should have led the Trial Chamber to question the appellants' accountability. Rightly, the Appeals Chamber reminded the appellants that the existence of contradictions in the evidence does not automatically undermine the credibility of witnesses.[15]

Along these same lines, one of the appellants raised a specific case which is worth mentioning. Kamara contested whether he could be held criminally responsible for the acts of officers and soldiers over whom he had no control. He referred specifically to commander Mohamed Savage (alias *Changabulanga)* who was notoriously unpredictable. According to the Appeals Chamber, Savage's erratic character was not a bar to finding that Kamara had effective control over him and was therefore liable on account of his superior criminal responsibility.[16] The Appeals Chamber was also unconvinced by the argument that in reality there was competition for control between the two movements (RUF and AFRC)[17] to the extent that neither could be considered to control the situation.

Staying within the scope of the Trial Chamber's discretion in the evaluation of evidence, the Appeals Chamber paid particular attention to the testimony of accomplices in the alleged crimes. According to the arguments put forward by the appellants, this sort of witness was inexorably tainted and should therefore not be believed by the judges. The Appeals Chamber observed that, in this respect, qualifying as an accomplice does not mean that a witness has been charged with a specific offence, as was stated in the Trial Chamber's judgment.[18] The Appeals Chamber further explained how a Trial Chamber could assess the reliability of accomplice evidence, indicating that it should not be automatically excluded or discredited based solely on the witnesses' status as an accomplice. Thus the Appeals Chamber considered that it is always cautious, when presented with a witness who was an accomplice, to seek to corroborate his testimony.[19] Consequently, the Appeals Chamber concluded that the appellant's argument was extreme, exaggerated, and not in keeping with the law, and that the Trial Chamber judges did not err in their evaluation of the evidence.

The appellants did however prevail on certain points, although this did not affect their sentences. For example, the Appeals Chamber recognized that the Trial Chamber "double-counted" by repeating facts concerning the role of the accused in the alleged offences.[20] This is a minor victory compared to the success of several of the grounds of appeal of the Prosecution.

15 Appeals Judgment, paras. 120-121, and 250.
16 Appeals Judgment, para. 259.
17 Appeals Judgment, para. 262.
18 Appeals Judgment, para. 127.
19 Appeals Judgment, para. 129.
20 Appeals Judgment, para. 319.

2. THE SUCCESS OF TWO OF THE PROSECUTION'S GROUNDS OF APPEAL

The Prosecution entered nine grounds of appeal against the Trial Chamber's judgment. These related to the responsibility of the accused in certain localities, to the participation of the accused in a Joint Criminal Enterprise (JCE), to incriminating acts classified as slavery, and to the position adopted by Trial Chamber judges regarding the rule of duplicity and cumulative convictions.[21] The Prosecution enjoyed notable success with regards to two grounds of appeal: the precision of the indictment and forced marriage as an inhumane act under international law.

2.1. THE PRECISION OF THE INDICTMENT

The Appeals Chamber referred to the applicable law concerning the precision of the indictment, principally based on the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), but also on the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR). It noted that the continuity between the two tribunals produced increasingly coherent judicial unity in international criminal law. The Appeals Chamber also specified the conditions under which these types of questions can be brought before the Chamber.[22]

The Prosecution raised three elements relating to the precision of the indictment. First, the Prosecution contested the locations which the Trial Chamber did not consider to be specified in the indictment. Next, the Prosecution asked the Appeals Chamber to reconsider the Trial Chamber's position regarding the JCE because of both a non-justified reconsideration and a legal error *vis-à-vis* the aim of the JCE. Finally, the Prosecution criticised the Trial Chamber's analysis of double incriminations for the same charge.

Relating to the non-specified locations in the indictment, the Prosecution affirmed that the Trial Chamber incorrectly reconsidered an interlocutary decision on its own initiative without giving the Prosecution the chance to present arguments. Regarding this last element the ground of appeal succeeded to the extent that the Appeals Chamber only supported the Trial Chamber where they witheld facts each time that the evidence was introduced in order to assess the general elements of alleged crimes, namely the existence of an armed conflict and the general or systematic character of the attacks against the civilian population.[23] Regarding the substance of the ground of appeal, the Appeals Chamber affirmed that it falls within the discretion of the Trial Chamber to reconsider a previous decision in specific conditions established by the jurisprudence.[24] However, when a Trial Chamber decides to reconsider a previous decision, it should inform all parties in order to hear their eventual arguments, especially the party that will be

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21 Appeals Judgment, para. 27.
22 Appeals Judgment, paras. 37-45.
23 Judgment, para. 38; Appeals Judgment, para. 49.
24 Appeals Judgment, para. 63.

disadvantaged by the reconsideration. According to the Appeals Chamber, the parties should have been given an opportunity to be heard on the matter pursuant to a general principle of law ("natural justice").[25] But the Appeals Chamber concluded that such a breach did not invalidate the decision because, in its opinion, the limited impact of the factual findings related to the locations of the criminal events appeared to be justified.

The other element of the Prosecution's challenge to the indictment was the joint criminal enterprise.[26] In the opinion of the Trial Chamber judges, the indictment was defective in its form because of the non-criminal character of the purpose of the alleged JCE ("to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone and in particular the diamond mining areas"[27]). It is also necessary to highlight here that it emerges from a change of opinion because during the pre-trial proceedings the question was raised and dropped by a Trial Chamber that was differently composed. Once again, using the jurisprudence of the two *ad hoc* Tribunals and the Rome Statute, the Appeals Chamber recalled the elements of a JCE that must be pleaded in an indictment, upholding the ground of appeal.[28] In the opinion of the Appeals Chamber, even if the objective of the JCE is not obviously criminal, the means chosen by the accused for the realisation of the JCE's objective can be criminal. Accordingly, the Appeals Chamber affirmed that the objective of a JCE can be interpreted in two ways: either the objective of the JCE itself falls within the competence of the Tribunal or the JCE must contemplate crimes within the Tribunal's competence as a means of achieving its objective.[29] However, in the interest of justice, the Appeals Chamber found that there was no need to make further factual findings or to remit the case to the Trial Chamber.[30] It is conceivable that in this case, the limited mandate of the Special Court and the widely-supported completion strategy together could serve to obscure the collective expression of the interest of justice.

Finally, regarding the Prosecution's ground of appeal pertaining to duplicity for the same charge (a familiar argument, particularly in common law), it must be borne in mind that the Trial Chamber considered that the Prosecution included both the crime of sexual slavery and the crime of other inhumane acts within the same charge, in violation of the obligation of precision. This appears to be a new practice in the jurisdiction of the international criminal tribunals. The Appeals Chamber initially endeavoured to limit the debate to the question of precision of the charges as included in the indictment,[31] in order to conclude that,

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25 Appeals Judgment, para. 64.

26 It should be noted that the accused Kanu also entered a ground of appeal relating to a joint criminal enterprise. In his opinion, if the Trial Chamber concluded that his aim was unsound it should have rejected the indictment in its entirety since the allegation of participation in a JCE was central to the case against him. Appeals Judgment, para. 69.

27 Appeals Judgment, para. 15.

28 Appeals Judgment, paras. 75-79.

29 Appeals Judgment, para. 80.

30 Appeals Judgment, para. 87.

31 Appeals Judgment, para. 101.

contrary to the claims of the Prosecution, the rule against duplicity was present in the jurisprudence of the international criminal tribunals.[32] With this principle established, the Appeals Chamber concurred with the Trial Chamber that there was a defect in the indictment. However, the Appeals Chamber enumerated the multiple consequences of this opinion,[33] concluding that the Trial Chamber erred in its complete rejection of the defective charge. In the Appeals Chamber's opinion, taking into account the evidence presented, the Trial Chamber judges should have retained the offence of sexual slavery within this count.[34] Again, the Appeals Chamber determined that no miscarriage of justice had taken place because the Trial Chamber relied upon the evidence of the defective charge in order to enter convictions for another count, namely outrages upon personal dignity.[35]

2.2. FORCED MARRIAGE AS ONE OF THE OTHER INHUMANE ACTS

In the initial judgment, the Trial Chamber had dismissed the count of forced marriage as an 'other inhumane act'. It was the majority ruling that the evidence introduced by the Prosecution for this count was of a sexual nature and therefore should have been included with the count of sexual slavery.[36] In the opinion of the dissenting judge, the crime of forced marriage is serious enough to be included in the residual category of 'other inhumane acts'. In this author's opinion, the majority and the minority approached the issue from different angles; the majority did not contest the grave nature of the alleged acts because it considered that the acts constituted a crime against humanity,[37] whereas the minority did not specify whether it perceived the position of the majority to be as just described. The minority went so far as to say that the position of the majority could be construed as a refusal to determine the gravity of forced marriage.[38] In other

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[32] Appeals Judgment, para. 103.

[33] Appeals Judgment, para. 108: "[…] the Appeals Chamber considers that the remedies available to the Trial Chamber included:

(i) quashing the count;
(ii) ordering that the Indictment be amended;
(iii) directing the Prosecution to elect to proceed on the basis of one of the two offences in the duplicitous count;
(iv) upon a review of the entire case, determining which of the two offences charges in the count the Appellant had defended fully, having regard to the manner in which the defence case had been conducted; and
(v) refusing to consider evidence of one of the two charges so as to eliminate the duplicity of Count 7."

[34] Appeals Judgment, para. 109.

[35] Appeals Judgment, para. 110.

[36] Judgment, para. 711.

[37] In addition to these developments in the judgment itself, one of the judges within the majority submitted a separate opinion wherein she further developed the position of the majority, which strengthens the above assertion. See Judgment, Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88(C).

[38] Judgment, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), para. 15: "The majority, in adopting this approach, has consequently declined

words, the dissent addresses a question other than the substance of the decision of the majority, unless one presumes that the text of the judgment does not reflect the totality of the majority opinion. Yet the Trial Chamber's conclusion on this issue results from a legal analysis that does not seem to originate only from a singular majority position. Indeed, the Trial Chamber, in its description of the applicable law, specified that the residual category of 'other inhumane acts' would not include crimes of a sexual nature since there was already a specific category within which sexual crimes were fully integrated.[39] In her dissenting opinion, Judge Doherty stressed the importance of the evidence presented to the Trial Chamber in order to illustrate that there is more to forced marriage than sexual acts. In her opinion:

> [t]he crucial element of 'forced marriage' is the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim. […] I am satisfied on the evidence that the conduct considered as 'forced marriage' results in serious harm to the mental and physical health of the victim.[40]

Although these two approaches do not always coincide, it is actually easy to agree with both of them. However, the Prosecution did not share this opinion.

According to the Appeals Chamber, the Prosecution misled the judges by including the charge of forced marriage as an inhumane act in a general category related to sexual violence and moreover the Prosecution repeated this categorisation in its written submissions during the appeals proceedings. Nevertheless, the Appeals Chamber chose to address this issue because of its importance to the development of international criminal law.[41] A noble ambition, certainly, but it is still surprising to see it so clearly expressed in a judicial decision adjudicating a particular case, since it is quasi-legislative in nature. The Appeals Chamber proceeds to review the jurisprudence of international criminal tribunals relating to the residual category of 'other inhumane acts', concluding that the Trial Chamber's interpretation, which excluded all crimes of a sexual nature, was erroneous because it was excessively restrictive.[42] This strong and firm conclusion, generates a two-fold question. First, Article 2(g) of the Statute of the Special Court relating to sexual violence incorporates a "residual sub-category"[43] meaning that the Trial Chamber could not limit the law to the extent

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to determine whether 'forced marriage' is of sufficient gravity to meet the requirements of an 'other inhumane act' as per Article 2(i) of the Statute."

39 Judgment, para. 697 : "The offence of 'other inhumane acts' pursuant to Article 2(i) of the Statute is a residual clause which covers a broad range of underlying acts not explicitly enumerated in Article 2(a) through (h) of the Statute. In light of the exhaustive category of sexual crimes particularised in Article 2(g) of the Statute, the offence of 'other inhumane acts', even though residual, must logically be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity. Listing the underlying acts exhaustively would only create undesirable opportunities to evade the letter of the prohibition."

40 Judgment, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), paras. 53 and 57.

41 Appeals Judgment, para. 181: "[…] the Appeals Chamber will consider the submissions made as an issue of general importance that may enrich the jurisprudence of international criminal law."

42 Appeals Judgment, para. 185.

43 Article 2(g): "Rape, sexual slavery, enforced prostitution, forced pregnancy and **any other**

that potential crimes would be excluded from prosecution in the future. Criticism made by the Appeals Chamber regarding this consideration is unjustified. Next, the Appeals Chamber, when referring to existing jurisprudence on the issue of a principal residual category, only referred to Trial Chamber judgments in cases where crimes of a sexual nature were concerned.[44] Yet the Trial Chamber judgment was not bound by any of those precedents. In addition, and here the criticism of the Appeals Chamber again seems to be unjustified, the precedent is based on statutes that do not comprise the residual sub-category of Article 2(g) as contained in the Statute of the SCSL.[45] In other words, the assertion of the Appeals Chamber is not persuasive, because of the existence of a residual sub-category in Article 2(g) of the Statute of the SCSL. The actual critique of the Trial Chamber should have pointed out that the judges did not limit their analysis of the principal residual category to their judicial confines established by a Statute whose formulation differs considerably from other instruments of international criminal law (which do not include two residual categories for crimes against humanity).[46] The reasoning of the dissenting judge provides the only way out; if forced marriage is not exclusively an act of a sexual nature, it must be included in the principal residual category. Fortunately, the Appeals Chamber tackled this issue, developing its opinion[47] based on the definition proposed by Judge Doherty.[48] This major ground of appeal contesting the original judgment did not affect the situation of the accused, since the Appeals Chamber considered that the crimes in question had already been taken into account by the Trial Chamber.[49]

Nevertheless, the Prosecution was not entirely successful with its grounds of appeal. In certain cases, the Appeals Chamber systematically dismissed the Prosecution's grounds of appeal, reasoning that their consideration would have no effect in this particular case. For instance, the Appeals Chamber rejected the

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form of sexual violence" (I emphasise the residual sub-category which should be distinguished from the principle residual category in Article 2(i) "[o]ther inhumane acts.")

44 Appeals Judgment, para. 184, footnotes, page 277 ("sexual and physical violence perpetrated upon dead human bodies"), 279 ("forced undressing of women and marching them in public"), 280 ("forcing women to perform exercises naked"), and 281 ("[…], sexual violence […]").

45 Neither the ICTY Statute (Article 5, relating to crimes against humanity), or the Statute of the ICTR (Article 3, relating to crimes against humanity) include a sub-category "any other form of sexual violence". The two statutes include the crime of rape without any further specification. In these situations, the judges did not have an alternative to the principal residual category, which is contained in both their statutes and that of the SCSL.

46 It should be noted that the Rome Statute of the International Criminal Court also includes two residual categories in its Article 7, which relates to crimes against humanity. "[…] (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or **any other form of sexual violence of comparable gravity**; […] (k) **Other inhumane acts** of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

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

48 Appeals Judgment, paras. 193, 195-196.

49 Appeals Judgment, para. 202.

Prosecution's critique of the absence of cumulative responsibility for both the acts committed by the accused and the acts commited by their subordinates[50] and the Prosecution's argument to acknowledge that the events supporting the allegation of slaverly also constituted crimes of terrorism and collective punishment.[51]

3. CONCLUSION

In light of these major developments regarding the Prosecution's grounds of appeal, it is necessary to conclude by highlighting that the Appeals Chamber discussed both the discretion of judges and the discretion of the Prosecutor in its judgment.

Regarding the discretion of the judges, the Prosecution challenged the fact that the Trial Chamber did not consider the cumulative responsibility of the accused for both their actions and the actions of their subordinates. The Trial Chamber judges in effect affirmed that these two forms of responsibility are mutually exclusive within the same event,[52] which was not the opinion of the Appeals Chamber. The Appeals Chamber asserted that, if the conditions are filled for each form of responsibility, the Trial Chamber must take into account the compound responsibility when considering sentences for the accused.[53] The respective sentences could be combined, but being found guilty of both forms of responsibility could also serve as an aggravating circumstance when determining the sentence. Moreover, the refusal of the Appeals Chamber to modify the sentences in this case seems to support the latter conclusion of rejecting cumulative convictions.

It was one of the accused who raised the question of the Prosecution's discretion in the implementation of the prosecution, contesting the fact he was one of the "persons who bear[s] the greatest responsibility for serious violations" committed in Sierra Leone,[54] meaning that the Prosecution would have erred in the exercise of its discretion.[55] The Appeals Chamber seems to consider that

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[50] Appeals Judgment, para. 169: "[…] the Appeals Chamber is of the opinion, taking all the circumstances into consideration, particularly having regard to the length of the sentences imposed, that it becomes an academic exercise and also pointless to adjudicate further on minute details […]."

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

[52] Judgment, para. 800: "Article 6(1) and 6(3) of the Statute denote different categories of individual criminal responsibility. Where both Article 6(1) and Article 6(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, it would constitute a legal error invalidating a judgment to enter a concurrent conviction under both provisions. Where a Trial Chamber enters a conviction on the basis of Article 6(1) only, an accused's superior position may be considered as an aggravating factor in sentencing."

[53] Appeals Judgment, para. 215.

[54] This criterion is contained in Article 1 of the SCSL Statute: "The Special Court shall […] have the power to prosecute persons who bear the greatest responsibility for serious violations…"

[55] This argument has also been raised before two *ad hoc* tribunals, with regards to the transfer of indictments to national jurisdictions. See Rule 11b*is* of the Rules of Procedure and Evidence of

this discretion falls outside of its authority; the Prosecution has the competence to determine who is most responsible and the Chambers have the competence to try these individuals.[56] This ruling is particularly surprising considering that the Appeals Chamber stated that the long and expensive trial proved beyond a reasonable doubt that the accused had committed serious crimes. Therefore, the reasoning of the accused that the Prosecution erred in its discretion should be considered as a desperate attempt to escape justice.[57]

This last point brings us back to the architect of the AFRC, Johnny Paul Koroma. Although he is clearly among those who bear the greatest responsibility for the atrocities committed in Sierra Leone, he remains at large. If he is not deceased, it is certain that following the Trial Judgment and now the Appeals Judgment, he will be even more reluctant to appear before the Special Court or may, with the help of his protectors, redouble his efforts to conceal his identity. Thus, the Prosecution's discretion still has a practical limit, even if the Special Court judges refuse to set a legal one.

Translated from French by Anna de Vries

these two jurisdictions. See also: Somers S., "Rule 11 *Bis* of the International Criminal Tribunal for the Former Yugoslavia : Referral of Indictments to National Courts", *Boston College International & Comparative Law Review* 30 (2007), pp. 179-181; Fomété J.-P., "De l'articulation entre le national et l'international à la lumière de la stratégie d'achèvement du Tribunal pénal international pour le Rwanda", *African Yearbook of International Law* 14 (2006), pp. 130-131; Adjovi R., "Le transfert d'affaire sous l'article 11 *bis* du Règlement de procédure et de preuve du Tribunal pénal international pour le Rwanda : l'affaire *Michel Bagaragaza*", contribution présentée à une journée d'étude de CREDHO-Sceaux, novembre 2006 (www.credho.org); Fomété J.-P., "Countdown to 2010: A Critical Overview of the Completion Strategy of the International Criminal Tribunal for Rwanda (ICTR)", Decaux (E.), Dieng (A.), Sow (M.) (dir.), *From Human Rights to International Criminal Law. Studies in Honour of an African Jurist, the Late Judge Laity Kama – Des droits de l'homme au droit international pénal. Études en l'honneur d'un juriste africain, feu le juge Laity Kama*, Martinus Nijhoff Publishers, Leiden / Boston, 2007, p. 369.

[56] Appeals Judgment, para. 281.

[57] Appeals Judgment, para. 283-284.