Case No. SCSL-2004-15-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

MONDAY, 4 AUGUST 2008
9.30 A.M.
TRIAL

TRIAL CHAMBER I

Before the Judges:	Pierre Boutet, Presiding Bankole Thompson Benjamin Mutanga Itoe
For Chambers:	Ms Candice Welsch Mr Felix Nkongho
For the Registry:	Mr Thomas George
For the Prosecution:	Mr Stephen Rapp Mr Peter Harrison Mr Charles Hardaway Mr Vincent Wagona Mr Reginald Fynn Ms Elisabeth Baumgartner Ms Bridget Osho Ms Andrea Gervais
For the accused Issa Sesay:	Mr Wayne Jordash Ms Sareta Ashraph Mr Jared Kneitel Ms Chantal Refahi
For the accused Morris Kallon:	Mr Charles Taku Mr Kennedy Ogeto Ms Louisa Songwe Mr Joe Holmes
For the accused Augustine Gbao:	Mr John Cammegh

[RUF04AUG08A - MD]

Monday, 4 August 2008

[Open session]

[The accused present]

09:35:43 [Upon commencing at 9.30 a.m.]

PRESIDING JUDGE: Good morning. May we start with the representation for the Prosecution.

MR RAPP: Good morning, Mr President, Your Honours and learned counsel. Appearing today for the Prosecution is Steven

09:35:58 Rapp, the Prosecutor; Peter Harrison, the senior trial attorney who will be making the oral presentation, together with Vincent Wagona, Charles Hardaway, Reginald Fynn, Elisabeth Baumgartner, Bridget Osho and Andrea Gervais. Thank you very much, Your Honours.

09:36:20 PRESIDING JUDGE: Thank you. First accused.

MR JORDASH: For the first accused myself, Wayne Jordash. Sareta Ashraph will be appearing shortly as will Jared Kneitel and Chantal Refahi.

PRESIDING JUDGE: Thank you. Second accused.

09:36:43 MR TAKU: May it please their Lordships, Charles Taku, for the second accused. With me is my learned colleague Mr Kennedy Ogeto. With us is Ms Louisa Songwe. And Mr Joe Holmes, Your Honours.

PRESIDING JUDGE: Third accused.

09:37:07 MR CAMMEGH: Your Honour, myself John Cammegh for Augustine

Gbao. Later I will be joined by my co-counsel, Scott Martin and our legal assistant, Lea Kulinowski.

PRESIDING JUDGE: Thank you.

MR JORDASH: May I leap to my feet at this stage to offer

my profuse apologies for the delay in filing our closing brief. We did our best but it wasn't quite good enough in the circumstances, but no disrespect was meant by it, obviously. We are sorry for any inconvenience it caused and we offer, like I say, our profuse apologies to both Your Honours and to my learned friends across the room.

PRESIDING JUDGE: We thank you and we have noted that and we will make a decision in due course about that late filing. Thank you.

So, we are now at this very important stage of hearing the final submission. I, we have as you know allocated time for this part of the trial and we will try to restrain from the Bench

asking questions because the time allocated is relatively short and therefore we will try not to intervene or interfere during the oral presentation. If we do have questions, well, we will try to limit them but, in practice we will hear your submission. We may have a short break after that and then determine if we have further questions. If not that will be it. So that is the way we intend to proceed.

09:39:01 So, having said that, are you ready to proceed, Mr Harrison?

MR HARRISON: Yes, we are.

PRESIDING JUDGE: Please do so.

MR HARRISON: I would like to indicate at the outset a

09:39:15 couple of housekeeping matters that we wish to address.

The first is that the Prosecution has not as yet filed its public version of the Prosecution's final trial brief. We regret that. We tried to do it and we will try to have it filed on Wednesday.

PRESIDING JUDGE: Thank you. I think there is only one

party that has filed up to now the final, the public version, but to my recollection there is only one. But that is okay. We didn't expect that it would be done this early, the next day because there is some work associated with that. But we thank you for your comments.

MR HARRISON: The only other matter I wanted to make sure the Court was aware of, and it has to do with the third accused, they kindly provided us with an unredacted version of the final trial brief. As yet, that has not be filed, so the Prosecution -- the only thing that has been filed by the third accused is one that's slightly redacted but it's only very brief excerpts from witness testimony. We have the unredacted version. So the Prosecution is at no disadvantage whatsoever because of the unfiled version that we have. We have everything.

We are going to try to proceed in a manner that the Prosecution deems to be of the greatest assistance to the Trial Chamber. We have provided the Trial Chamber with extensive submissions on the evidence as well as on the law, as have all the other parties, and we have determined that we may be of greater assistance to the Trial Chamber if we were to scrupulously adhere to the direction given to the parties: That was to address only new issues that were raised in the other briefs.

So what we propose to do is to identify those issues of law

that we say are at issue between the parties, so that they are crystalized for the Trial Chamber and can be determined with perhaps a greater degree of convenience than they might otherwise if we didn't identify them for you.

With respect to the evidence that is before the Trial Chamber, the Prosecution does not propose to recite or rely on extracts of that evidence before you today. We are simply saying to the Trial Chamber that you have the record fully before you and it's for you to assess that evidence, to determine the credibility of the witnesses, the weight that ought to be attached to each piece of evidence and to come to a determination on the issues before you, based upon the assessment of the evidence as a whole.

09:42:27 What we would like to address first with you is a number of issues raised in the Defence briefs, raised by all three accused, that have to touch on issues of the indictment. The starting point that we say should inform you, when you are looking at

these issues about the indictment and the allegations that are made about the indictment is from the AFRC Appeals Chamber's decision where they made the comment, at paragraph 63, whether or not an issue relating to the form of an indictment should be reconsidered, should be determined on a case-by-case basis. Having regard to the stage of the proceedings, the issues raised by the earlier decision, and the effect of reconsideration or reversal on the rights of the parties.

And that, we say, puts the issue into context. The Trial Chamber has already advised the parties that it is of the view that the question of challenges to the indictment may be more appropriately dealt with in final submissions, rather than during the course of the trial.

So, because of that, we now have a large number or a significant number of allegations being made about the indictment.

The starting point, we say, has to be from the original

decision approving the indictment, the 2003 decision of the Trial Chamber. In the context of that decision, and for your deliberations, is also determined by Rule 72, because that Rule

09:44:42 makes it clear that any allegation with respect to an indictment should be addressed in a Rule 72 motion. In the Fofana and Kondewa trial judgment, this Chamber stated:

> "The Chamber is of the view that preliminary motions pursuant to Rule 72(B)(ii) are the principal means by which

09:45:15 objections to the form of the indictment should be raised and that the Defence should be limited in raising challenges to alleged defects in the indictment at a later stage for tactical reasons."

PRESIDING JUDGE: Mr Harrison, what is this, I know you

09:45:40 said Kondewa and Fofana but the date of that decision?

MR HARRISON: Yes; the date is 2 August -- sorry, I should have said the judgment, 2 August 2007, paragraph 28 and, in fact, the Trial Chamber is citing a number of decisions from both the ICTY and the ICTR and that, I won't bother to list all the

09:46:03 decisions.

PRESIDING JUDGE: That is all right. I am familiar with the date of the judgment. I thought you meant you were making reference to a decision in the course of the trial, not the final judgment. That's okay.

09:46:17 MR HARRISON: And bearing in mind that it was only the

first accused, who filed the motion pursuant to 72(B)(ii), and also bearing in mind that the indictment was upheld, save for one defect that related to the use of the phrase "not limited to those events," which was contained in several paragraphs of the

indictment, in all other respects, the indictment was upheld and the parties proceeded on the basis of that indictment, as they were entitled to do.

The second motion that was filed with respect to the indictment came from the second accused much later, in March 2008 and in that motion the Trial Chamber declined to deal with the challenges to the form of the indictment and it held that the second accused had failed to make out a prima facie case; that the second accused did not have adequate notice of the allegations against him. And, in that context, bearing in mind the ratio of that decision, we say that res judicata ought to apply. This is a case where there is a decision, where a number

of issues were raised and determined by the Trial Chamber, with the finding that there was no demonstration, by the party, that they did not have adequate notice.

In general, the Prosecution's position is that the accused have not made out a case that there are defects. Secondly, they have not made out a case that they did not have notice, or adequate notice, but we also say certain procedural events are significant, the first of which is that: At no time did the accused seek adjournments with respect to evidence. And it's clear, the Prosecution says, that the parties did have adequate time, particularly in view of the fact that this trial, although it began in 2004, it really was a trial that would have finished in less than 20 months had there only been one trial but prolonged it was the fact that two trials were sitting and we were sitting for six weeks or seven weeks and then there would be six or seven weeks off, so there would have been ample time in which to prepare for any new information. And that is a

significant difference from the case of Brima et al where that trial proceeded just before one Trial Chamber, no other intervening trials to interrupt them, and they would have not have had the same degree of notice.

09:49:40 And the other procedural aspect we say which is of significance is that in this trial there were no applications to recall witnesses but for one application by the third accused to recall two witnesses of the first accused, that application coming in June, I believe, ultimately being dismissed by the

09:50:08 Trial Chamber.

The Trial Chamber, in its judgment in Fofana, also made this statement, which we say ought to govern:

"The Chamber is of the opinion therefore, that counsel for Fofana, should have raised these arguments by way of a

09:50:35 preliminary motion or by raising objections during the course of the trial."

And then this Chamber went on to state what we say is the law:

"Mindful of its obligations under Rule 26bis to ensure the

09:50:57 integrity of the proceedings and to safeguard the rights of the accused the Chamber will nonetheless consider the objections raised by the counsel for Fofana at this stage in the proceedings. It notes, however, that given that Defence has provided no explanation for its failure to

raise the objections at trial, the burden has shifted to the Defence to demonstrate that the accused's ability to defend himself has been materially impaired by the alleged defects."

And that's paragraph 29 of the judgment.

And it's those words in the concluding sentence "to defend himself has been materially impaired by the alleged defects" that we say cannot be satisfied with respect to the assertions being made in the Defence briefs because, throughout this trial, it has always been made known to the Defence that, should they wish an adjournment, it would be made available to them with respect to disclosure of information.

Such adjournments were not sought, and that's the appropriate remedy that should be given. The adjournment can be sought and granted; parties can prepare and the matter proceeds.

Where the party does not wish to have an adjournment, they're

waiving any issue with respect to the lack of notice; they are indicating to the Trial Chamber that they are prepared and able to proceed without difficulty.

09:53:05 Secondly, we say that if there are defects, that they have been cured and the Trial Chamber will know from its previous decisions that in the Ntabakuze case, N-T-A-B-A-K-U-Z-E of the ICTR Appeals Chamber, the ratio was that the Prosecution is obliged to state the material facts underpinning the charges in

09:53:38 the indictment but not the evidence by which material facts are --

PRESIDING JUDGE: What is the exact reference of that decision?

MR HARRISON: Yes. It's Prosecutor and Bagosora. This is

09:53:55 a particular decision involving one of the accused, Ntabakuze. It's ICTR 98-41-AR73, dated 18 September 2006, paragraph 26. I should actually say that it's paragraph 17 and paragraph 26, portions from both and, after making that point, the Trial Chamber then address the issue which we say ought to be

considered, namely, if the indictment is found to be defective, because it fails to plead material facts, or does not plead them with sufficient specificity, the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial.

09:55:02 And we understand that to be at least part of the Trial Chamber's logic in deferring addressing any issues of alleged defects in the indictment because one simply could not make an assessment about the fairness of a trial until the trial's been concluded. So, we are now at that stage. And the Prosecution

09:55:29 says: You can look back on this trial and you can make a determination that the accused was accorded a fair trial, even if you make a finding of defects in the indictment.

We have addressed the Trial Chamber with respect to a number of documents which support notice having been given. We

09:56:04 tried to address the Trial Chamber in anticipation of arguments that we expected, as best we could. Due to the number of alleged allegations in the final trial briefs we see it as being unworkable.

JUDGE ITOE: Mr Harrison, just a question: Are you saying

09:56:24 that notwithstanding the extent of the defect of the indictment that is cured if it is proven? It's entirely cured if it is proven that the trial was fair; is that the submission you are making?

MR HARRISON: That's right. That's what we say the Appeals

09:56:43 Chamber has stated in the ICTR case that I have just referred to.

JUDGE ITOE: Thank you.

MR HARRISON: So, given the circumstances of the comments

made in the final trial brief, what we prefer to do is to try to

address you in a general way, as to the proposed or suggested

defects in the indictment.

The first point that we would like to make is that with

respect to eight of the witnesses, they were witnesses who were

added to the Prosecution trial list by way of motion. And, with

09:57:35 respect to those eight witnesses, they all testified many months

after being added to the list. In some cases it would have been

16 months; other cases it would have been approximately six

months.

But the effect of the motions, in law, is that because they

09:58:01 state the material facts on which the witness would testify they,
in effect, provided notice to the accused of the information. And again, returning to the Ntabakuze case, in this instance it was the Trial Chamber that was speaking, and they found that a Prosecution motion to add a witness, followed by the Chamber's
09:58:34 ruling was, itself, sufficient to clearly inform the accused that the testimony of the witness would be part of the case against the accused. And that the period during which the motion was pending, and between the date of the decision on the motion, and the witness's appearance in Court, that constituted an
09:59:03 adjournment which gave the Defence sufficient time to investigate and to challenge the witness's testimony in accordance with the rights of a fair trial.

So these eight witnesses who are named in the brief, they are TF1-314, TF1-360, TF1-361, TF1-362, TF1-366, TF1-367, TF1-369
09:59:37 and TF1-371 were all significant witnesses in the trial and they appeared to be witnesses who have attracted the greatest amount of concern amongst the Defence final trial briefs.

Having indicated that that's what the Trial Chamber found, that this decision was affirmed by the ICTR Appeals Chamber, and

it is at page 35, sorry, paragraph 35 of the Appeals Chamber's decision where they said:

"A defect in the indictment could be cured through a Prosecution motion for addition of a witness provided any possible prejudice to the Defence was alleviated by, for example, an adjournment to allow the Defence time to prepare for cross-examination of the witness."

In the context of this trial the adjournment was not even necessary because of the fact that this trial could only sit for six or seven weeks and then there would have to be a break to accommodate the other trial. So we suggest that that probably explains, in part, why there never was a need to request an adjournment but, in any event, the parties could have sought one and did not, and the fact that the motion itself is a defacto adjournment, or can be construed as such, is such that any possible prejudice has been alleviated in this trial.

Secondly, we would advise the Trial Chamber that the second accused's motion in March of 2008 was the first application for exclusion on the ground of lack of notice underpinning the

10:01:59 charges in the indictment. And the Trial Chamber's finding with respect to that motion was that, and the date of this motion is -- sorry, the date of decision is 26 June 2008, and I am reading from paragraph 14. The Trial Chamber said:

"In this regard the overriding principle that has consistently applied by this Chamber is that the Defence shall establish a prima facie case that the impugned evidence contained new allegations in respect of which the accused had not previously been put on notice, either in the indictment, in the Prosecution pre-trial brief,

supplemental pre-trial brief, or in other disclosure materials. In the Chamber's view a bare allegation by an accused that the indictment itself was defective will not suffice. A prima facie case must first be made out by the Defence and then it will become incumbent upon the Prosecution to respond to the allegation and demonstrate conclusively that the accused did receive adequate notice

of the allegations against him."

And again, in that decision, the finding was made that the

10:03:21 second accused had failed to make out a prima facie case. We rely upon that decision and say it governs here.

There is significant amount of pleading with respect to locations not specifically being pleaded in the indictment. This topic was specifically addressed in the 2003 challenge to the

10:03:56 indictment, and the Trial Chamber made a finding in that case that the indictment was adequately pleaded and it pointed out in part that the indictment used districts rather than pleading, as the decision says, for example, within the southern or eastern province or within Sierra Leone. And by referring to districts

10:04:38 the Trial Chamber said:

> "This is clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning the phrases such as 'and including but not limited to' would in similar
>
> 10:04:58 situations be acceptable if the reference is likewise to 'locations' but not otherwise. It is therefore the Chamber's thinking that taking the indictment in its entirety it is difficult to fathom how the accused is unfairly prejudiced by the use of the said phrases in the

context herein."

And this is the foundation upon which the trial proceeded.

All of the parties knew of this decision and they proceeded based upon this decision. The effect of it was that when material was made known to the accused, and it identified a location not specifically named in the indictment, they were on notice to cross-examine with respect to that location of the alleged events in that location. And, in fact, they did do so.

So there can be no prejudice by virtue of all parties adhering to that decision from the outset. All were on the understanding that the indictment was valid as it was endorsed and approved of by the Trial Chamber.

It's also part of the geographical and historical circumstances of this trial that, in Sierra Leone, there will be names given to locations which are only a very short distance from another geographic entity.

For example, Wendedu, is only about two miles from Koidu. Now, the Trial Chamber will recall events happening in both of those locations, but the geographic proximity is such that, in

10:07:15 other circumstances, one might identify that as one location but here, in Sierra Leone, the civilians would identify Wendedu by that name.

There's evidence before this Trial Chamber of unlawful killings in Wendedu but Wendedu was not specifically pleaded in the indictment for unlawful killings - counts 3 to 5. This happened in other circumstances, where a location may not have been specifically pleaded for certain counts.

The Prosecution says to the Trial Chamber that, as you go through this assessment of the indictment, it's not simply a

textual approach that has to be adopted, of simply reading the indictment; you have to go through a complete contextual assessment and that means looking at the questioning that took place; looking at when the disclosure was made; and looking at what was in either the supplemental pre-trial brief or the pre-trial brief because all of that informs all the parties as to the notice that they had. And if there was adequate notice, then

there can be no unfairness in the trial, and convictions can be sustained where events are not alleged in particular locations in the indictment.

Again, this theme has been addressed by the ICTR and again it's in the Ntabakuze case. This time it's from paragraph 27, where the Appeals Chamber says: "The location of the crimes alleged to have been committed should be specified in the indictment. However, the degree of specificity required will depend on the nature of the Prosecution's case." As stated in the Ntakirutimana appeal judgment, and I will just pause and spell that. N-T-A-K-I-R-U-T-I-M-A-N-A, where the appeal judgment held:

> "There may well be situations in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations. Any vagueness or ambiguity in the above respects may be cured in certain cases by the provision of timely, clear and consistent information to the Defence."

There are some more specific allegations to do with the indictment that I will try to deal with as briefly as I can before moving on to a broader topic.

One of them is raised in the Kallon, the second accused, final trial brief at paragraph 91, where it refers to the failure to name identities of victims. And this has already been addressed by the Appeals Chamber in the AFRC judgment, at paragraph 41. It says:

"The pleading principles applying to indictments at international criminal tribunals differ from those in domestic jurisdictions because of nature and scale of the crimes when compared with those of domestic jurisdictions.

For this reason there's an exception to the specificity requirement for indictments."

That equally applies here. There was --

JUDGE ITOE: Can we have the reference to the --

MR HARRISON: Yes. Paragraph 41.

JUDGE THOMPSON: Which decision?

JUDGE ITOE: Which decision?

JUDGE THOMPSON: AFRC Appeals Chamber.

MR HARRISON: The AFRC Appeals Chamber.

JUDGE THOMPSON: The date you said?

MR HARRISON: The Appeals Chamber decision was --

PRESIDING JUDGE: This is on the AFRC final judgment?

MR HARRISON: Yes, Appeals Chamber judgment, yes.

JUDGE THOMPSON: Okay. Well, let's have the paragraph then.

10:13:16 MR HARRISON: It's 41.

JUDGE THOMPSON: Thank you.

MR HARRISON: Similar complaints are made with respect to count 12, although the pleading in count 12 makes a reference to throughout the Republic of Sierra Leone, that's the framing of

the geographic aspect of the count. And it's only now that a complaint is being raised with respect to that, and we would say that no issue having been taken before that, in effect, there was a waiver of any concern with respect to a deficiency in the

10:14:21 indictment. A party can't simply --

JUDGE ITOE: A waiver by who?

MR HARRISON: The parties.

JUDGE ITOE: A waiver by the parties.

MR HARRISON: A party can't simply ignore the requirements

of Rule 72, proceed throughout the trial, and then, for strategic reasons, allege defects in the indictment. What has to be determined is if the trial was fair to the accused and, if it was, then there can be no finding that the indictment is flawed.

PRESIDING JUDGE: This waiver, Mr Harrison, as you put it, is a proposition that you are putting forward as such.

MR HARRISON: Yes.

PRESIDING JUDGE: It is not supported, I take it, by any authority that you know of.

MR HARRISON: That's correct.

PRESIDING JUDGE: Because I thought there was, I'm not sure which case but, anyhow, a case where an issue similar to that was raised and the Court mentioned that -- in that decision indeed, it says somehow that these matters can still be raised at the end of a trial but it's a question how the Court is to appreciate it. For example, the prejudice, but it could be that this is a subject matter that did not arise in their mind at the outset but at the end of the trial. Because of the way the evidence came out, this is now a subject matter that may be of concern. So, if I follow your reasoning, it means that even then, if they have

waived they have waived and therefore they are precluded from raising it. So, I mean, that seems to be the logic of your argument, am I right?

MR HARRISON: You are right.

10:16:16 JUDGE THOMPSON: And joining that, in fact, it would seem to, following the Presiding Judge, that then the parties would be foreclosed in raising such an issue on appeal and there seems to be authority that these matters can be raised on appeal. Of course, the question whether they will succeed will depend upon a

10:16:40 variety of factors: Like, why was it being raised at this very late stage. That would be what I understand the rationalisation of the law to be and not there was any conclusive, settled authority on the waiver issue.

MR HARRISON: That is a fair statement. And just to assist

10:17:00 the Trial Chamber, it is discussed in the AFRC Appeals Chamber's decision.

There are certain issues that have been raised which are framed as jurisdictional issues by the accused and I think these can be addressed very briefly because the Trial Chamber would be

10:17:22 quite familiar with these decisions, I think.

The second accused raised an issue bearing upon the term "persons who bear the greatest responsibility" and the suggestion is that that's an issue of jurisdiction that has to be determined by the Court.

10:17:44 This issue was answered by the AFRC Appeals Chamber. It's at paragraph 282 of the Appeals Chamber's judgment, where the Appeals Chamber states that it agreed with the Prosecution when it said that the only workable interpretation of Article 1.1 is that it guides the Prosecution in the exercise of its

prosecutorial discretion, and it is a discretion that should not be exercised by the Trial Chamber, or the Appeals Chamber, at the end of the trial.

The second issue which is raised or framed as a

10:18:34 jurisdictional issue, by the second accused, has to do with the

Lome Accord and whether or not this Court has jurisdiction over the second accused. Again, that is answered by the Appeals Chamber in its decision of 13 March 2004. And the decision simply was that, although Lome might be binding upon the Government of Sierra Leone, the Lome Accord does not affect the liability of an accused, who is to be prosecuted in an international tribunal for international crimes, as stated in the Statute.

There's also an issue that's framed as one going to jurisdiction, but we would have suggested that it's again a pleading issue. It's framed by the second accused, and it's a discussion of common Article 3 and Additional Protocol II and there's a complaint that under certain of the counts, the Prosecution, in stating the count, repeated the heading of the Statute, which would be common Article 3 and Additional Protocol II and then states the crime below that.

Well, the Prosecution's position is that that pleads the crime and the material facts are also pleaded. There's no prejudice to the accused by simply repeating the words of the Statute and, if there is a defect, it's one that was never raised and it's of such a technical nature that there can be no prejudice to the accused.

There's a more substantive issue that we would like to address you on very briefly and that has to do with the Kallon

alibi evidence.

The Prosecution has identified three witnesses in the final trial brief which the Defence appears to be relying upon as being alibi witnesses, and they appear to be DMK-039, DMK-161 and DMK-082. None of those persons were on the list of alibi witnesses.

The Trial Chamber will remember that there was an order issued, in 2007, compelling the second accused to give notice of his alibi and in that list several witnesses were included and the topics on which they were to give alibi evidence was also listed. These three witnesses were not on the list and, in addition for at least one of the witnesses, 082, the topic was not listed either.

So, the first position is that because the alibi notice was given so late into the trial, that the Trial Chamber should discount it, because the rule is that they have to give notice of the alibi before the trial begins.

Secondly, because the witnesses were being relied upon, as alibi witnesses, were not listed in the notice, nor was the

10:23:19 subject matter listed in the notice, then it's open to the Trial
Chamber to exclude that evidence.
PRESIDING JUDGE: But why are you saying so? For the
purpose of your argument I accept that they are not listed but
you didn't object to these evidence or that evidence to be led by
10:23:45 these witnesses at the time.
MR HARRISON: No, there was objection with respect to 082.
PRESIDING JUDGE: But not the other two witnesses.
MR HARRISON: That's right.
PRESIDING JUDGE: So your objection to 082 was based on

what? To the fact that he was not listed?
MR HARRISON: Yes, he was not listed and the subject matter
was not listed.
PRESIDING JUDGE: So that is the objection you raised at
10:24:07 the time?
MR HARRISON: Yes. There's two discrete points that we
would like to briefly address. Both of them are raised by the
second accused.

The first is at page 190 of the final trial brief, sorry,

10:24:35 paragraph 190 of the second accused's final trial brief, and this is in support of an argument that the Trial Chamber make a finding of an abuse of process striking at the integrity of the proceedings and what they are relying upon is an incident where the Prosecution, on a Saturday, found on a computer drive,

10:25:18 certain e-mails from the second accused's Defence team.

As soon as they were noticed, the Prosecution took the step of making sure no one else looked at that file, notifying CITS to prevent access; asking that it be blocked; notifying the Registrar; notifying the Trial Chamber and notifying Defence

10:25:52 counsel.

So we say that it's wholly inappropriate to make the suggestion that there should be an investigation into these facts by the Trial Chamber. Moreover, there's absolutely no suggestion, on these facts, that an abuse of process could be

10:26:25 well-founded. We say it's a spurious allegation.

We also wish to address you with respect to certain representations made about the agreed statement of facts.

Paragraph -- the agreed statement of facts is Exhibit 342 -- and it's paragraphs 9 and 10 which are being relied upon and

they are very brief sentences and they are very similar in their content. They state that, paragraph 9 states: "Between 14 February 1998 and 30 September 1998 Morris Kallon was not an RUF and/or AFRC field commander in any location in Koinadugu District and did not reside there." The agreed statement of fact is that Morris Kallon was not in Koinadugu District and did not reside there.

What is being suggested is that Morris Kallon did not have command responsibility over persons in Koinadugu District. And we say that is wholly untenable. The same wording is used in paragraph 10. The only difference is it applies to Bombali District. The dates are different. It's from 1 May 1998 to 30 November 1998 but it also says in any location in Bombali District and did not reside there.

10:28:36 So the agreed statement is that Kallon was not in either of those districts and did not reside there and that's the extent of the agreed statement of facts.

I now return to broader issues, and I would like to take

perhaps 15 minutes to raise with the Court various concerns expressed about the joint criminal enterprise that's alleged in the Prosecution's case. And again, it's not the Prosecution's desire to recite to the Trial Chamber the facts which it says underpin the joint criminal enterprise and demonstrate it to the Trial Chamber. We rely upon the final trial brief to do that. We are trying to respond to issues raised in the Defence final trial brief.

The first issue that we wish to respond to is a statement made by the second accused, at paragraph 625, that says that joint criminal enterprise did not become part of international

customary law until 1999. We say that is just completely wrong but the reason why they are saying that is because the Tadic appeal decision was in 1999. But what they are overlooking is that the facts in Tadic happened in 1992 and the finding is that the crimes alleged in 1992 were part of a joint criminal enterprise and Tadic and others were guilty under the mode of

liability of joint criminal enterprise for those events in 1992, so, at a minimum, based on the Defence's own case Tadic, joint criminal enterprise would have been part of international customary law at least by 1992.

Of course, this has been confirmed in subsequent Appeals Chamber's decisions, for example, Vasiljevic V-A-S-I-L-J-E-V-I-C, February 25, 2004, paragraph 95, and also Krnojelac K-R-N-O-J-E-L-A-C, 17 September 2003, paragraph 29, both of which state that joint criminal enterprise existed as a form of liability in customary international law in 1992. But they also make reference to various cases from the US Military Commission, referring to trials that took place in 1944 and 1945. Sorry, events that took place in 1944 and 1945.

The Gbao third accused final trial brief makes certain representations which we wish to respond to. The first is that they say there was a defect by not pleading the second type of JCE. The weight of authority is that the first and second type of JCE both go under the heading of "basic" and the third is often referred to as the "extended," so, the first and second are pleaded by making reference to the basic form, and you will find this proposition stated firstly in the ICTR, in the Ntakirutimana appeal judgment, pages 464 and 465, and Vasiljevic appeal judgment, paragraph 98, Krnojelac appeal judgment, paragraph 89.

PRESIDING JUDGE: Do you have the dates of these judgments, Mr Harrison?

MR HARRISON: I will have to provide them to you -- I will provide them to your Chambers during the lunch break, if I may.

10:34:08 PRESIDING JUDGE: Thank you.

MR HARRISON: The second issue raised in the third accused --

JUDGE THOMPSON: Let me ask just one short question. Isn't the confusion here raised by a line of authorities that describes

10:34:28 the second form of JCE liability as systemic, so you have these two lines, two schools of thought: One says that the first and second forms are characterised as basic and then you have the second school of thought that differentiates basic from systemic and characterises the second as systemic and the third is of

10:34:56 course extended? I just wanted to make that point.

MR HARRISON: I am not sure that is quite right because I think in the pleadings --

JUDGE THOMPSON: Yes.

MR HARRISON: -- it's simply the pleading of basic or extended.

JUDGE THOMPSON: No, I think you are right on that. I am just saying there is a line, another line of authority, case law authority, that injected the concept of systemic into this form, and makes it a tripartite form of liability rather than by sort of twofold --

MR HARRISON: Yes, we accept that.

JUDGE THOMPSON: That is the point I am making.

MR HARRISON: The second point from the third accused's final trial brief that we wanted to address was the argument that

the Prosecution notice, which was given on 3 August 2007, pleads a different joint criminal enterprise, or a different common purpose, and we disagree with that.

The finding of the Appeals Chamber, in the Brima case, was that in reading the indictment one has to read the entire document to determine the context and the meaning of the words. And, what the notice does, the notice simply took words from paragraph 43 of the indictment, and words from paragraph 36 and 37, and combined them. And, as a result, the Prosecution did not in any way alter the common purpose.

The notice states that it was further articulating the joint criminal enterprise, and we say that's exactly what the notice did; there's no variation.

There's a final point on joint criminal enterprise that we wanted to address, and that's the assertion that the joint criminal enterprise is only appropriate for small-scale cases and we think that is far from the truth and we think it's exactly the opposite.

This position that we're advancing has been stated in the Brdjanin appeal judgment, paragraph 423, and the spelling is B-R-D-J-A-N-I-N, and it says:

"This matter was addressed by the ICTR Appeals Chamber in the Rwamakuba case in response to a challenge that the concept of JCE was limited to smaller cases. The ICTR Appeals Chamber stated that on the contrary the justice case shows that liability for participation in a criminal

plan is as wide as the plan itself even if the plan amounts to a nationwide government organised system of cruelty and injustice."

And in Brdjanin, the joint criminal enterprise was from October 1991 to December 1995, so it's over a four-year period; it's over a large area and it includes a large number of members within the joint criminal enterprise.

10:39:21 And another example of a joint criminal enterprise that is as large or larger than this case is in Martic, and in Martic, the time period was from 1 August 1991 until at least August 1995. So again, over four years and again, this was a 19 count indictment involving Martic, and the members of this joint

10:40:06 criminal enterprise, in listing them, takes almost half a page. They are listing members; individuals; but they also go on to list members of the Yugoslav People's Army; the army of the RSK; the army of the Republika of Srpska; the Serb Territorial

Defence; local and Serbian police forces and it goes on listing several other organisations. So, in terms of geographic and the number of members, the joint criminal enterprise alleged here is smaller than which we find in other cases.

There's another issue that's raised in the final trial brief by the third accused that we think is worthy of bringing to the Trial Chamber's attention, and it has to do with the discussion of the crime of enslavement, which is found at paragraphs 1302 to 1312 of the third accused's brief. And the first thing that we wish to remind the Trial Chamber of is that enslavement is, of course, a crime against humanity and obviously with a crime against humanity there doesn't need to be an armed conflict.

Moreover, enslavement simply does not exist as a war crime either under the Statute of this Court or under the ICC Statute. As a result, the law of international armed conflict does not

apply.

So you will find in the third accused's brief a discussion of the RUF being allowed to do certain things to civilians but it's erroneous because it starts from the assumption that enslavement is a war crime. You can never enslave civilians. And the discussion of the cases that they undertook in the brief involved Simic, but the difference is obvious because, in Simic, he was charged under the grave breaches provision of the ICTY Statute which is a war crime; it's an International Act and there's a pre-condition to the application of Article 2 of the ICTY Statute, and that is the existence of an international armed conflict.

And the Trial Chamber in Simic made that very clear because this is being spoken of in the context of, some might frame it more broadly as the law of occupation, but, in Simic, what's really taking place is that the Trial Chamber is making clear that in order for any of the conventions, or regulations that apply, there first of all has to be an international armed conflict.

10:45:17 This topic is visited again in the brief filed by the first accused, and they are asking the questions of which parts, or which aspects of International Humanitarian Law apply in or to the conflict in Sierra Leone, and they are starting from the premise that the rights and duties in The Hague Regulations and

10:46:00 Geneva Conventions apply to the RUF. Well, they don't. And the reason they don't is because the RUF was an insurgent group. Because, if you take a quick look at Article 2 of the Geneva Conventions it states:

> "In addition to the provisions which shall be implemented

> in peace time, the present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting parties."

10:46:58 It's only in that circumstance where they apply. Article 3 applies to internal and international. That law has been modified but, with respect to all of the other conventions, it's still the case that the application is to the high contracting parties. And although it's obviously not binding upon this Trial

10:47:31 Chamber there was a finding by the AFRC Trial Chamber that the armed conflict in Sierra Leone was non-international and the Trial Chamber will recall evidence from witnesses, in particular

the witness Hederstedt, who prepared the expert report, who repeatedly referred to the RUF as an insurgent group. So the evidence is overwhelming that the RUF was an insurgent group.

PRESIDING JUDGE: So are you suggesting that, assuming for the purpose of your position that it is an insurgent group, are you suggesting that at no time could that be changed over a period of time and it could not become an occupying power or because of the evolution and time passing by and so on? I'm just trying to get some clarification on your position in this respect. So the fact that they were insurgent at the beginning would never change their stature, so I can put it this way: Is this your position in this respect?

MR HARRISON: That is part of it but the other part is that the other conventions only apply to the high contracting parties.

PRESIDING JUDGE: And you could never be high contracting parties and they were not, and they could not be.

MR HARRISON: That's correct.

PRESIDING JUDGE: So that is your position?

MR HARRISON: Yes.

PRESIDING JUDGE: Thank you.

MR HARRISON: This also is raised in the context of pillage, which was count 14, and it was raised in the first accused's brief at paragraph 674 and 676. The first observation the Prosecution makes is that when one is talking about the law of military necessity that, too, is carefully regulated and confined to certain conduct.

10:50:24 The general proposition is that there is no general immunity of civilian property which is different from civilians. Civilians can never be a military objective and could never be a direct target, even if it would serve a military purpose. Property, on the other hand, can be a military objective. But, 10:50:54 military objectives are limited to those objects which, by their nature, location, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralisation offers a definite military advantage.

The evidence you have in this case, the Prosecution says, 10:51:22 is clearly different: That there was no military objective to the looting of properties from civilians.

PRESIDING JUDGE: This definition you just gave on military

objective, is it part of your final brief or the brief on Sesay?

I don't recall but I know there's reference to that.

10:51:46 MR HARRISON: Yes, I believe it's in the Prosecution's brief, but I can advise you that it's also taken from the Kordic and Cerkez appeal judgment, which was 17 December 2004, paragraph 53.

PRESIDING JUDGE: Thank you. Before -- but the, I know you

are addressing these matters that have been raised by the first accused in the context of pillage, and this is what you are addressing at this particular moment, but isn't it the prerequisite to this particular argument is that you accept that

10:52:31 they were an occupying power and because they were an occupying power they were entitled to do these kinds of things; isn't that the essence of the first accused's position in this respect?

MR HARRISON: No, the Prosecution doesn't accept that it was an occupation.

10:52:45 PRESIDING JUDGE: I know, but the argument presented by the first accused in respect of this position is based upon the fact that they were, they claim, an occupying power and hence they were entitled to do certain things, being an occupying power. So you are saying they were not because, and furthermore, you are 10:53:04 addressing some of these issues separate and apart from being an occupy power? Am I --

MR HARRISON: Yes, that's right.

PRESIDING JUDGE: -- misstating your arguments?

MR HARRISON: That's correct.

10:53:16 PRESIDING JUDGE: Okay.

MR HARRISON: And if I didn't indicate it, the passage is I think from the first accused's brief page 674 to --

PRESIDING JUDGE: 676.

MR HARRISON: -- 676.

10:53:28 With respect to the military objectives, I would just like to make a couple more brief points on that topic because indiscriminate attacks are prohibited by Additional Protocol I, and this is a well-established rule of customary international law in all armed conflicts.

The attacks on civilian property that are not military objectives therefore cannot be justified by military necessity. And, in addition, all forms of wilful and unlawful appropriation of civilian property, carried out during the armed conflict, is plunder, and this includes both large-scale seizures and appropriation by individual soldiers for their private gain, and plunder is prohibited under Additional Protocol II.

The evidence that you have, for example, of Operation Pay Yourself, or the taking of rice, or taking of possessions of civilians was, in the Prosecution submission, clearly unlawful as it was not needed for the conduct or carrying out of any military operation and, indeed, the Prosecution would say that it was more serious as it deprived the already poor population, civilian population that is, of its means to survive.

In the remaining time that we have available to us, the Prosecution's intention is to address some specific assertions of law made about the various counts by different accused, and we are doing this on the understanding that it may help the Trial Chamber to focus on the differences between the parties on the issues of law. The issues of fact are apparent through the final

trial briefs.

The Prosecution has, in its effort to describe the crimes that it says took place, relied upon that evidence which it says demonstrate the acts having taken place, and the role of the accused in those acts; the Defence briefs have also exhaustively gone through the evidence and provided their assessment.

The issues of law that we say need to be considered by the Trial Chamber begin with counts 3 to 5, and, in particular, the extermination count.

There is an assertion made by the Sesay -- the first accused final trial brief -- which says that the element of massiveness means that a mass killing, in the meaning of a large scale, is necessary. This Trial Chamber, I think, is familiar with some arguments on this from before, but, for your guidance, the element of massiveness required for a finding of extermination may result from an aggregate of all killing

incidents charged in an indictment as opposed to the suggestion that it must be a large-scale incident. It doesn't need to occur in a concentrated manner, or over a short period of time. Authority for that can be found in the Brima trial judgment, paragraph 686.

With respect to count 6, there is a discussion entered into about consent, and the Prosecution says that that's at odds with the law. The Defence, again this is from the first accused final trial brief, at paragraph 85, they are suggesting that the Prosecution have to prove a lack of consent under count 6, rape. we say that that is not consistent with the law that's been established. We say that the law is that the perpetrators intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur and that the victim did not consent, that being a statement from the acquittal motion, the Rule 98 motion in this trial, pages 21 to 22.

And then the ICC elements of crime state that the invasion, this is element 2, invasion was committed by force or by threat of force or coercion and was that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment or the invasion was committed against a

person incapable of giving genuine consent. And that is reproduced from page 21 of the Rule 98 decision in this case. We say there's -- the evidence is consistent in this trial with persons being in situations where they would be incapable of giving genuine consent.

There's another issue raised with respect to count 8 and, in part, it's a pleading point but it's also a point of law, we think.

The starting point is that when the Appeals Chamber, in Brima, dealt with count 8, they observed, at paragraph 181, that looking at it as a preliminary issue they say that the Prosecution may have misled the Trial Chamber by the manner in which forced marriage appeared to have been classified in the indictment. And I think it's important to note, "classified in the indictment," the heading it went under. It went under sexual crimes. And then the Appeals Chamber observed the indictment classifies count 8, other inhumane acts, along with counts 6, 7

and 9 under the heading "Sexual Violence."

Under this heading, in paragraphs 52 to 57, the indictment

11:01:34 alleges acts of forced marriages. This categorisation of forced

marriages explains but does not justify the classification by the

Trial Chamber of forced marriage as sexual violence.

They then go on to say:

"Notwithstanding the manner in which the Prosecution had

11:01:54 classified forced marriage in the indictment, and the

submissions made by the Prosecution on this appeal, which

is inconsistent with such classification, the Appeals

Chamber will consider the submissions made as an issue of

general importance that may enrich the jurisprudence of

International Criminal Law."

So, we say that the same approach should be adopted here.

There's an issue of classification. If it is a pleading issue or

a defect in pleading it's of such a nature that the Appeals

Chamber has already approved of going forward and assessing the evidence and the law on that point. We say that because of the technical nature of the defect, of the alleged defect, that it does not even amount to a defect in the indictment.

And, as we say with other allegations that are being made about the indictment that, in this instance, as with the others, there is no evidence of prejudice to the accused.

The Prosecution would like to address you briefly on some of the submissions on the law regarding war crimes and I think I can complete within perhaps 15 minutes, 20 minutes.

The first issue we wanted to draw to the attention of the Trial Chamber is with respect to count 1, the acts of terrorism count.

The suggestion being made by the Defence is that an act or threat cannot be considered terrorism unless the Prosecution proves that it caused death or serious injury to body or health within the civilian population. We say that's not a correct statement of law.

And, in fact, we think the correct statement of law is found in the Fofana and Kondewa appeals judgment, at paragraph 352, and what that statement instructs us is acts of terrorism may therefore be established by acts or threats of violence independent of whether such acts or threats of violence satisfy

the elements of any other criminal offence. Not every act or threat of violence, however, will be sufficient to satisfy the first element of the crime of acts of terrorism.

The Appeals Chamber is of the view that whilst actual terrorisation of the civilian population is not an element of the crime the acts or threats of violence alleged must nonetheless be such that they are at the very least capable of spreading terror.

So the threshold is: Are they capable of spreading terror, not whether or not there actually is terror. And they go on to say whether any given act or threat of violence is capable of spreading terror is to be judged on a case-by-case basis with the particular context involved.

And the words that assist you, in interpreting this, are that terror should be understood, consistent with other international jurisprudence, as the causing of extreme fear.

Now, before I leave count 1, there's a matter which

11:06:48 involves count 14 and count 1. Count 14, the Trial Chamber will recall, the Prosecution framed that as looting and burning. The Prosecution relies upon the evidence of burning as crimes under count 1.

The Defence, the first accused, in paragraph 113, is 11:07:33 indicating that the crimes within count 14 are not capable of constituting terror, and we understand them to also be saying that terror is pleaded and must be proven by evidence that the crime caused death or serious injury. We think that's not right, and the Prosecution did try to set this out for the Trial Chamber 11:08:19 at paragraph 1044 of its final trial brief but the Prosecution, in reality, is relying upon the Appeals Chamber decision in Fofana, where first of all it talks about the actus reas of the crime, and acts of terrorism may be proved by acts or threats of violence, and acts or threats of violence may comprise not only

of attacks but also threats of attacks against civilian

populations.

And this is consistent with the ICRC commentary on Additional Protocol II which says that count 1, or acts of terrorism, covers not only acts directed against people but also acts directed against installations, which would cause victims terror as a side effect. So, any act which could cause terror as a side effect is capable of founding a conviction under count 1, in the Prosecution's submission, and the relevance of the acts of burning would be that the massive scale of the burning would cause terror amongst the civilian population or, at a minimum, was capable of causing terror amongst the civilian population; the home owners, the dwelling owners, as well as other civilians in the area.

11:10:06 I was going to move to a different count. I am not sure if I should briefly --

PRESIDING JUDGE: Yes. No, but before you do, I remember within your brief that you do refer to evidence of many witnesses that have testified about in relation to pillage as such. You

11:10:32 refer to whoever giving evidence about looting and burning. So the reason why you have referred to the burning, given the fact that we've said in our Rule 98 decision that it does not apply, burning is not part of pillage, and pillage is separate and apart, so you are, in making these references to burning to

11:10:57 support your contention that the burning aspect of it doesn't constitute pillage but is an element that the Court should consider when determining the -- when assessing terror under count 1; am I --

MR HARRISON: That's correct. And if I can just fill in

the point: In the AFRC trial judgment what took place was that the Trial Chamber looked at the acts of burning and that was one of the basis for making a finding of guilt.

JUDGE THOMPSON: In other words, it's of evidentiary

11:11:32 significance?

MR HARRISON: Of course it is, you are right, but we were just trying --

JUDGE THOMPSON: Nothing else, without more?

MR HARRISON: I am not sure I followed you.

11:11:43 JUDGE THOMPSON: Well, without more in the sense that it doesn't form part of the gravamen of the offence of pillage.

MR HARRISON: Yes, of course. You are right.

JUDGE THOMPSON: Quite.

MR HARRISON: I thought you were talking of acts of terrorism. Of course you are right.

JUDGE THOMPSON: Yes.

MR HARRISON: The evidence, if the evidence is that they pillaged, they looted goods from a house and then burnt it down, as from a prospective of evidence it's really one event. As a prospective of analysing crimes, it's two potential crimes.

JUDGE THOMPSON: Thank you. Thanks.

MR HARRISON: The next point that we were going to draw to the Trial Chamber's attention is with respect to counts 5, 10 and 17. That's the charge of Article 3A, violence to life, health and physical or mental well-being.

This is raised by the first accused at paragraphs 118 and 119. It's raised similarly by other accused but, for the sake of convenience, we are simply trying to focus on the first accused's brief at this point.

At 118 and 119 of the first accused final trial brief the Defence is suggesting that the elements of the crime of murder, this is as a war crime, and as a crime against humanity, are identical with one exception; that being that the general 11:13:28 requirements for the application of these provisions must be met, the chapeau elements.

The Prosecution says that there is a difference and it is in paragraph 419 of the final trial brief, but the difference really has to do with the mens rea distinction. And we say there 11:13:54 is a difference: Namely, that the mens rea is that the mental element of murder, under common Article 3, is broader because it includes recklessness. So we say under common Article 3, recklessness falls within but, as a crime against humanity, it does not. And the authority for this proposition is the Celebici 11:14:40 trial judgment, and it's actually paragraph 439, and the Trial Chamber made a finding that the necessary intent, the mens rea it was addressing, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of 11:15:17 the accused to kill or inflict serious injury in reckless disregard of human life. And that, we think, makes it clear what the expansion is. It's in reckless disregard of human life. And

we say that is a distinction which can inform the Trial Chamber in analysing the differences between the counts under 3 and 5.

The pillage count, I tried to address you on two points at the same time: One was the military necessity and one also had to do with the nature of the RUF as an insurgency and I feel as if the Trial Chamber already took that point and I don't propose to raise it again.

I should have indicated to you that the issue of military necessity is, in fact, in our final trial brief, at paragraph 968.

The last count, where we have significant comments, is count 12.

There is a suggestion made by the first accused that the mens rea for count 12, the child soldiers count, is one where there must also be knowledge on the part of the accused that the child is under the age of 15, and that he or she may be trained

for combat or used to participate actively in hostilities. So what we disagree with is the suggestion that there must also be knowledge on the part of the accused. We say the law is different.

This proposition is taken from the dissenting opinion of Mr Justice Robertson in the decision here dealing with the child recruitment.

The Prosecution's suggestion to the Court on the proper statement of law that has to be complied is found at paragraph 763 of its final trial brief but, if I could just briefly state it for you.

JUDGE ITOE: 700 and?

MR HARRISON: 763.

JUDGE ITOE: Thank you.

MR HARRISON: The proposition that we think is well-founded in law is that the level of knowledge that an accused must have, with regard to the age of the child, again this is turning solely on the mens rea requirement, would be satisfied if it were established that the accused was willfully blind to the facts, or circumstances, that would bring his or her actions within the

provisions of these offences. That the mere belief that the victim is over an age is not a defence if the victim is, in fact, under the age. The awareness of the perpetrator may, we would suggest, include a dolus eventualis, a situation in which the perpetrator did not know that the child was under 15 but thought this might be possible and proceeded in its conduct regardless.

There are several authorities referred to in the final trial brief which I will not take you to now.

JUDGE ITOE: Mr Harrison, what would you say about the issue of mistaken identity, or a mistaken evaluation of the age of the child, given his physical appearances and features?

MR HARRISON: I think that is covered in the words that I used because what we are suggesting is that where the perpetrator thought this might be possible, that the child was under 15, and went ahead with his conduct, if he has no thought whatsoever, if he's given information even that the person is 20, then that's a different circumstance. But where --

JUDGE ITOE: Because, mark you, mark you in these proceedings, in these proceedings, it has been argued that you might be stunted but not necessarily under the age of 15. I just

wanted to factor that reflection into your arguments and to see how you can respond to that.

MR HARRISON: We would suggest that the nature of the crime is such that, similar to where we drew the distinction to the Court of how recklessness can be part of the mens rea of murder, where an accused ignores information, and proceeds with conduct, that that should attach criminal liability. And we say that proposition is supported by a number of authorities which are referred to in the trial brief. I chose to raise it here because

there are a couple of other points that we wanted to make about count 12 as well and if I can just take you on to those as well.

There's a suggestion, by the first accused, that the Statute should be read somewhat differently from what some of us have been doing, and it appears as if they are suggesting that you should use the words "to participate actively in hostilities"

as a qualifier for the other two forms of liability. So we have enlistment; we have conscription; and then we have to participate actively in hostilities.

11:23:08 So what we understand them to be saying is that there is a qualifier, so that you are enlisted but you must also participate in active hostilities; you are conscripted but you must also participate in active hostilities; and we think that is wrong on any reading of the Statute.

11:23:33 The contention, the word "the use" that is in the Statute, the use of children under the age of 15, is one that makes it clear that you have three separate modes of liability. One is enlistment; one is conscription; and the third one is to use to participate actively in hostilities and the third one does not

11:24:14 qualify. It's not an attachment to the first two.

JUDGE THOMPSON: Can we take that up a little. Can also there be another perspective to say that what you have categorised as a qualifier may well also be a separate and distinct offence?

11:24:40 MR HARRISON: Yes. We were trying, we are using the word "qualifier" because we are just trying to articulate what we understand to be the first accused's position. We say it is a separate offence. There's no --

JUDGE THOMPSON: Very well. I just wanted to factor that

particular aspect that since we, generally in law, when we are dealing with a system of count charging, do not really use language as "qualifiers." We talk about whether the count charges a separate and distinct offence, or one offence, or so many offences. That was why I just came in, to just put it in that conventional and orthodox perspective.

MR HARRISON: Yes, I understand the suggestion.

JUDGE ITOE: But, Mr Harrison, if we go by your disjunctive interpretation of those three offences, I mean, you are saying they are three offences, but can there be any use of children under 15 to actively participate in combat activities without their having been enlisted or recruited?

MR HARRISON: Yes.

JUDGE ITOE: I mean, I am following, I am taking you on this because of the arguments that have been made by the first accused on this issue.

MR HARRISON: That is a fair point. I think the distinction really turns upon one of evidence. It may well be the case that there will be evidence of a person under the age of

11:26:34 15 being used in combat activities. There may not be evidence of
when the person actually conscripted or enlisted, or the background of that conscription or enlistment and, in that context, you would have proof of the offence through the mode of used to participate in combat activities. Logically, I take your
11:27:01 point, that if one is being used in combat activities it seems to follow that you have already either been conscripted or enlisted but the question may turn more on evidentiary issues where there's no doubt that the person under 15 is being used to participate in combat activities but there may be a shortage of

evidence with respect to that.

JUDGE THOMPSON: But if it's tripartite, if we have here three separate and distinct offences, if one takes that perspective, then it follows logically that each of them creates
11:27:41 liability, If there's evidence to support it.

MR HARRISON: Yes, that is the Prosecution position.

JUDGE THOMPSON: Quite right. I mean, one cannot run away from that, because there may be some other arguments, that if each is a separate and distinct offence, it means that each of them, if there is evidence to support that, then each does create liability, criminal liability. I would see it that way. I mean, clearly, you can, as you've said, conceive of a situation where someone can take part in hostilities without having gone through any formal process; could be abducted to do that.

11:28:23 PRESIDING JUDGE: But I'm -- it's not clear in my mind, anyhow, at least, on my own personal perspective, what you mean by this because, if you are, we are talking here of child soldiers, so if you have a person under the age of 15 enrolled, enrolled to do what? I mean, the mere enrolment has to be for

11:28:50 some purposes. If you enrol, whatever it means, I'm not getting into the definition of it, but enlisting, or enrolling a child, if you have only that process, as such, if you claim they are two distinct offences technically, it has to be for some purposes. Otherwise, why do you call them child soldiers? I mean, there's

11:29:15 got to be some connection of that nature.

MR HARRISON: I think the wording, I probably should have taken you to the wording of the Statute first, and I apologise for not doing that, because the wording of the Statute is "conscripting or enlisting children under the age of 15 years

into armed forces." I'm just saying, if we can just pause right there, and this is an artificial pause I've just created --

PRESIDING JUDGE: That's fine.

MR HARRISON: -- so it's not conscripting into a social club; it's conscripting or enlisting child under the age of 15 years into armed forces, and either conscripting or enlisting would be a mode of liability so long as it's of children of the age, under the age of 15 into armed forces.

PRESIDING JUDGE: That is fine.

MR HARRISON: The final --

PRESIDING JUDGE: No, that's okay. That answers my query in this respect so --

JUDGE THOMPSON: It complicates the matter for me because I am not familiar -- the language here seems to be unorthodox. I would have thought that what you charge in a count in an indictment, when you look at the count system of an indictment it

is an offence, an actus reas and actually, I'm not sure whether I come along with you when you say that in count 12 what we have there are modes of liability. What, in my humble position are crimes; they are charges. They are not modes of liability in the same sense in which we talk about individual criminal responsibility, command responsibility or JCE, otherwise we get into some difficult legal --

MR HARRISON: I apologise. That was a poor choice of words on my part. I should not have used the term "modes of liability."

JUDGE THOMPSON: Thank you.

MR HARRISON: The CDF --

PRESIDING JUDGE: Mr Harrison, do you have much more? I

know we have intervened and therefore we will grant you an excess of a few minutes. That's fine.

MR HARRISON: No, I don't. If you just allow me I think five or ten minutes I think I will be finished.

PRESIDING JUDGE: Yes, that's fine.

MR HARRISON: I was just going to draw to your attention a passage that was handed to me by my colleague. Again, this is from the Fofana appeal judgment. They use the term "modes of recruiting" and that was my error for saying "modes of liability." The term is "modes of recruiting children" are distinct from each other and liability for one form does not necessarily preclude liability for the other. And they go on to say that separate findings should be made in respect of each mode of recruiting, which we think is the appropriate approach to take.

11:32:00
11:32:29

The last or second last point I wanted to make on count 12 is that there's a suggestion that the motivation for joining is a factor, and we say that that's wrong. We say it's an absolute prohibition and the absolute prohibition applies to children under the age of 15. So, even if it's a voluntary act, we say that the prohibition applies and we also say that it's stated law on this point, that the child's consent is not a valid defence and that statement of law was made in the Fofana et al appeal judgment at paragraph 150. It was also made by this Trial Chamber in the Fofana and Kondewa decision at paragraph 192.

11:33:22
11:33:52

The last point on count 12 is that there is a submission that providing military training to children, without more, should not attract criminal liability. So it's permissible to train a child but, after that, there may be liability but we say

that the law is different. We say that Trial Chamber II made a specific finding in the Brima et al trial judgment that forcing children to undergo military training, in a hostile environment, constitutes illegal use of children pursuant to Article 4(C) of the Statute, and that's a finding that was rendered at paragraph 1278 of the Brima et al trial judgment.

The final topic that we wanted to address has to do with counts 15 to 18. And, again, we say this is a topic where the parties have provided you with comprehensive assessments of the evidence. And really, we wanted to confine ourselves to advising you about the Article in the Statute. It's Article 4(B) and our point is quite a simple one.

Article 4(B) is a unique creation of the drafters which applies to peacekeepers. The law that might exist for civilians is not the same. 4(B) creates a criminal offence and it's a protection that goes beyond the one granted to civilians in

International Humanitarian Law. The prohibition is an absolute one where intentionally directing attacks against personnel, installations of persons involved in a peacekeeping mission, in accordance with the Charter of the United Nations, is an offence as long as they are entitled to the protection given to civilians.

So the Prosecution's suggestion to the Trial Chamber is that you are likely to get very limited assistance by perceiving it, as the Defence has, as one that's synonymous with prohibitions regarding conduct towards civilians. This is a unique Statute that was designed specifically to address this issue.

We think the rest of the points that follow from that would

be self-evident to the Trial Chamber. We can indicate that we have concluded our submissions. We thank the Trial Chamber. We thank the parties for the attention they've offered to us.

PRESIDING JUDGE: We thank you, Mr Harrison. We will

11:39:09 pause, and we will come back and we will determine if we have some further questions of you before you can finally conclude.

Mr Jordash, you know the way we intend to proceed. We don't intend to hear from you this morning. We will go to 2.30.

After we come back we will see what questions we have, if any,

11:39:33 for the Prosecution and then we intend to hear you by 2.30 this afternoon.

MR JORDASH: That's a big relief.

PRESIDING JUDGE: I have no doubt. So, having said that, we will pause and we will come back shortly. Thank you.

11:39:48 [Break taken at 11.40 a.m.]

[RUF04AUG08B - MD]

[Upon resuming at 12.10 p.m.]

PRESIDING JUDGE: Mr Prosecutor, we do not have many questions but I do have a few.

12:11:13 I want to make sure I do understand the position of the Prosecution on the joint criminal enterprise mode of liability. And I will refer here more specifically to your submissions and I refer to paragraph 235 of your submission, the introduction, and it reads: "The joint criminal enterprise time period is between

12:11:39 25 May 1997 and January 2000." And you refer to a time period found by the Appeals Chamber in Brima et al.

Do I take it that this is the position of the Prosecution, that the only joint criminal enterprise is the one comprised in

that period of time and this is the joint criminal enterprise of,

according to the Prosecution's position, a joint criminal enterprise of the three accused with the Brima and company; this is essentially the position of the Prosecution?

MR HARRISON: Yes. We --

12:12:22 PRESIDING JUDGE: On the joint criminal enterprise.

MR HARRISON: -- took the finding of the AFRC Trial Chamber to be dispositive on that.

PRESIDING JUDGE: So, we can take from that that there is no joint criminal enterprise, from the Prosecution's perspective,

12:12:41 for the period going from '96 to May '97. If any crime has been committed by any of the accused it would have been committed, according to your position, on the mode of liability by any other mode but not in accordance or pursuant to a joint criminal enterprise?

12:13:01 MR HARRISON: That's correct.

PRESIDING JUDGE: And the same would apply for any crime allegedly committed by any of the accused after January 2000?

MR HARRISON: That's correct.

PRESIDING JUDGE: So any crime committed after that no joint criminal enterprise.

12:13:14

MR HARRISON: That's correct.

PRESIDING JUDGE: On this joint criminal enterprise during the period that you say there was, indeed, a joint criminal enterprise, the joint criminal enterprise or the common enterprise at that time was a continuum? In other words, it's the same common enterprise that started and began in May 1997 and continued throughout until January 2000?

12:13:23

MR HARRISON: That's correct.

PRESIDING JUDGE: All right. That clarifies issues that I had. And, outside of that, I have no further questions for you, unless my brothers and colleagues have. Justice Itoe? No? So we thank you, Mr Prosecutor, for your presentation and that

concludes our questions and we are satisfied with your answers to clarify these matters for us.

Mr Jordash, as I said before, we will not ask you at this moment to make your submission. We will adjourn until 2.30 this afternoon at which time we will expect you to make your presentation. We will just -- I would like to remind you on behalf of the Court of our instructions about the oral presentation, that it should be as focused as possible and we would appreciate not to have a repeat of your written final brief because we have it and we have read part of it at least, and we would like as much as possible that it be focused to respond to novel issues that have been raised or some issues that you felt that you should emphasise but certainly not a repeat of what you have in your final brief.

MR JORDASH: Certainly.

PRESIDING JUDGE: I appreciate. Thank you. Having said that, the Court will adjourn until 2.30 this afternoon. Thank you.

[Luncheon recess taken at 12.15 p.m.]

[RUF04AUG08C - MD]

[Upon resuming at 2.30 p.m.]

PRESIDING JUDGE: Good afternoon. Mr Jordash, are you ready to make your presentation?

MR JORDASH: I am, Your Honour, yes.

PRESIDING JUDGE: So, we were provided with a binder with all sorts of documents in it. I take it this is essentially what

you are going to be doing this afternoon or do we need to follow in that book or what is the instruction?

MR JORDASH: Well, it's provided really to assist to enable Your Honours, if Your Honours wish, to reference some of the remarks I will make. I think the material will be familiar to you. I considered doing it without but I felt I might be able to explain myself better with some of the material.

PRESIDING JUDGE: Thank you. Again I repeat what I said this morning. I urge you to try to not repeat what you have in your final written brief but to address any issue that has been raised or that you feel are not sufficiently clear in your final brief given what has happened in the submission this morning and all of that in two hours. Thank you.

MR JORDASH: The majority of it I hope is directed towards
14:42:54 the Prosecution's closing brief.
PRESIDING JUDGE: Fine.
MR JORDASH: Your Honours, and my learned colleagues, I stand to deliver a closing address for Mr Sesay with a degree of
discomfort and fear; discomfort because the way in which the
14:43:16 Prosecution have approached the issue of defects in the
indictment means that it is difficult to know exactly how to
defend my client; and fear that my client will be convicted for
not what was originally conceived in the Prosecution's mind or
notified to the Defence at the outset of the trial but what has
14:43:45 been adduced throughout.
There is no --
JUDGE ITOE: Mr Jordash, our minds are very open on all the
issues that have been raised.
MR JORDASH: Thank you for that indication.

JUDGE ITOE: I think I would like to assure you and that is

our position. There is no question of talking of a conviction at this point in time.

MR JORDASH: No, I am simply expressing my own fears, Your Honour and, of course, the greater fear is that of my client's.

We'd hoped that the Prosecution closing brief would make it clear, even at this stage but, sadly that's not the case. We have lots of crimes which have never been in doubt and we have accused who occupied various positions in the RUF, again not really, as far as my client is concerned, in doubt, but little by way of categorisation, clear material facts.

How is it Mr Sesay is supposed to have incurred criminal responsibility? But, of course, it's not too late and, as Your Honours have indicated, Your Honours are alive to these issues and, in my submission, the only solution is to dismiss a large number of material factual allegations. And, in fact, I would submit, in relation to Mr Sesay, the majority of factual allegations because they have occurred throughout and after the commencement of the trial.

Now, the Prosecution advance certain propositions in relation to what they clearly recognise is a problem. At paragraph 93 they assert that Rule 47 requires no more than they have done. Paragraph 104, they make the distinction between material facts but not evidence. In 105, they say we were on notice of all the charges. 106, we had the opportunity to prepare. 108, the second accused was the only one who applied to

exclude testimonial evidence. Paragraph 112, it was clear that all the offences were within Sierra Leone. Well, that we don't dispute. 113, it was clear to the accused that the named

locations where the acts took place were not exhaustive, which I roughly translate into the accused were informed that they would not be informed of all the charges. 115, the Prosecution was entitled to proceed at trial on the basis that the indictment was not defective.

14:46:59

These submissions, these propositions are easily dealt with by the Prosecution's own authority and, in truth, there is no authority which supports the Prosecution's proposition. I've said it before and I say it again: There is no proposition. There is no authority which supports the Prosecution proposition.

14:47:18

Could I ask Your Honours to turn to paragraph, sorry, index A of the binder and it's the case which was referred to by my

learned friend this morning at length but it does not support the Prosecution proposition that somehow, what has happened here is normal, permissible or fair.

If I may urge Your Honours to turn to paragraph 21. The ICTY Appeals Chamber has explained that in some instances a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. However, only a limited number of cases fall within this category.

And then, further down, the Appeals Chamber of the ICTY notes that the risk of prejudice is the key; is the defining feature. It's not enough for the Prosecution to say: Well, we were entitled to proceed. Well, maybe they were, maybe they were not. What matters is the prejudice which has accrued through the course of the trial and it has to be said at the behest of the Prosecution and their strategy.

Paragraph 26. The Appeals Chamber agrees that when the indictment suffers from numerous defects there may still be a risk of prejudice to the accused even if the defects are found to be cured by post-indictment submissions.

14:49:01 In particular, the accumulation of a large number of material facts not pleaded in the indictment reduces the clarity and relevancy of that indictment which may have an impact on the ability of the accused to know the case he or she has to meet for the purposes of preparing an adequate defence.

14:49:24 Paragraph 30. In this connection the Appeals Chamber stresses that the possibility of curing the omission of material facts from the indictment is not unlimited. Indeed, the new material facts should not lead to a radical transformation of the Prosecution's case against the accused. The Trial Chamber should

14:49:46 always take into account the risk that the expansion of charges, by the addition of new material facts, may lead to unfairness and prejudice to the accused.

This is key, this next sentence we submit. "Further, if the new material facts are such that they could on their own

14:50:02 support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead

to unfairness or prejudice to the Defence."

Paragraph 33 gives, as Your Honours can see, further qualification. Allegations, in the second paragraph there, of physical perpetration of a criminal act by an accused must appear in an indictment. On the other hand, less detail may be acceptable if the sheer scale of the alleged crimes make it impracticable to require a high degree of specificity in such

matters as the identity of the victims and the dates for commission of the crimes. Many acts attributed to an accused fall in the spectrum between these two extremes.

I pause there at this point to say Dr Kamara, Fonteh Kanu, Foday Kallon, the ECOMOG soldier allegedly killed in Buedu, TF1-113's son, TF1-108's wife. How could these not have been pled in the indictment? The notion that this occurred because the crimes occurred on such a large scale must be rejected out of hand.

Turning over the page, 36. I beg your pardon. Sorry, 35, and this again is key. The second paragraph there. I know

it will take some time but I will read it because it's important. "Whether the Prosecution cured a defect in the indictment depends of course on the nature of the information the Prosecution provides to the Defence and on whether the information compensates for the indictment's failure to give notice of the charges asserted against the accused. Kupreskic considered that adequate notice of material facts may be communicated to the Defence in the Prosecution's pre-trial brief during disclosure of evidence or through proceedings at trial. The timing of such communications, the importance of the information to the ability of the accused to prepare his defence and the impact on newly disclosed material facts on the Prosecution case are relevant in determining whether subsequent communications make up for the defect in the indictment."

This is key.

"As has been previously noted mere service of witness statements by the Prosecution pursuant to the disclosure

requirements of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial."

The truth is what has happened should not have happened, in my submission. The truth is that the indictment should have allowed my investigator to go into the field and effectively prepare his defence. He should have been able to go to Kono and start preparing and do it effectively. Instead, he could have gone to Kono, gone to four or five towns and it would have stopped then. He would have been left to ask: Do you know Mr Sesay? Did he commit any murders whatsoever in this town? That is it. That's not effective preparation.

And the pre-trial brief in this case exacerbated the problem. But what it did was, it took vagueness and it misled the accused. I will refer you, just very briefly, to what was said in a section or two. Your Honours will see, from page 13 of the pre-trial brief, Kono District, dealing with unlawful killings, 6.1 responsibility. Amongst other things the accused is said to have told civilians at a public meeting he was present to ensure that diamonds were mined to finance the movement. All civilians must cooperate. He said that disciplinary measures would be taken against those working in the mines.

6.3. Amongst other things it's alleged that he is

frequently present at the diamond mines, travelled with Bockarie to Liberia in January 1998 to secure arms and so on and so forth. It was being alleged, when we were told of the case, that Mr Sesay was effectively resident or present in Kono on a regular basis. That was the basis of his liability. Personal participation, direct commission, present and instead what we had

led was TF1-263, who is the only witness who places Mr Sesay at the Guinea highway during the diamond period, or at all in 1998 after he had retreated to Kailahun, and returned in December 1998. And instead what we had was the addition of new witnesses, TF1-361 who, in an elaborate attempt to implicate, suggested Sesay was present at Buedu at all times, passing messages every day to Mr Bockarie.

How does that indication, in this pre-trial brief, match what is now being alleged?

Well, we know that the Prosecution still rely on 263. It's

difficult to know why but they do. But that is the case which was pled. No suggestion he was sitting on Bockarie's lap, delivering messages to him.

The Prosecution, we submit, confuse evidence with allegations. You cannot use witness statements and supplementary statements to plead a case because it subverts the very notion of a criminal trial which relies upon a clear distinction between allegations and evidence to prove. Without allegations, there is no criminal trial. There is no process because what do you judge an accused's guilt by? If there is no starting point there is no exercise of a burden of proof. There is simply evidence and the question becomes: Is it true. Which is not the fundamental first question in a trial. The first question is: Have the Prosecution met their burden. And the Prosecution suggest that it's okay because, well, we filed a notice of additional witnesses. It's worth looking at the accuracy of that proposal.

If I can ask Your Honours to turn to B of the file, you will see there the kind of notice that was given in relation to these witnesses. It's worth having a look at 361, at page 6 of

that, Your Honours, page 6903. A statement from witness TF1-361 was obtained on 11 June 2004 and what we have then is his function is when he was trained; the fact he will give direct evidence on individual criminal responsibility of the accused; eyewitness evidence of Sesay supposedly executing men in Makeni travelling north to the Koinadugu group before and then it stops there.

PRESIDING JUDGE: Where are you reading from now, Mr Jordash?

MR JORDASH: Sorry, I'm reading from page 6 --

PRESIDING JUDGE: 6903?

MR JORDASH: 6903, the bottom of the -- I was actually paraphrasing for speed, but it's that --

PRESIDING JUDGE: So you were paraphrasing TF1-361?

MR JORDASH: Yes, Your Honour.

PRESIDING JUDGE: Yes, okay.

MR JORDASH: So the Prosecution cannot say that everything was cured by the provision of additional evidence in the additional witness statement. They cannot argue that because it doesn't -- it isn't borne out by the facts.

The truth of the matter is 314, 360, 361, 362, 366, 367,

371, six of the new witnesses led during the case, with volumes of new material allegations, are the mainstay of the Prosecution case. Not alleged at the beginning of the case, not alleged at any stage of the case; simply led in evidence.

Witness statements, supplementary statements, are not enough.

So the Prosecution say: Well, no prejudice. It again does not take long to dismiss that.

Could I ask Your Honours to turn to the Sesay application for abuse of process, which was filed on 24 April 2007. I don't obviously intend to go into the body of it but I do intend to refer Your Honours to the annex of it.

15:00:29 You see, the Prosecution put much weight on the fact that nobody applied for an adjournment. I put our case in this way. This was a trial which lasted four years. Some of it may have been my fault but it lasted for four years, so we were stuck in a

difficult position, between a rock and a hard place; do we apply for an adjournment and keep delaying the trial and our clients remain in prison or do we do the best we can?

But that is not really the pith of the submission. The pith of the submission is this: That the Prosecution misunderstand what the prejudice that can accrue really is. It's not just a case of whether you have resources to investigate, although that's clearly a problem. It's not just a case that you would need time to prepare cross-examination, although that is obviously a problem. The problem is deeper than that, and it's this: You allege five murders at the beginning of the trial. Effective cross-examination rebuts it, so the Prosecution go back to their insiders, they reinterview them and they produce five more. How do you cross-examine the witnesses who have gone before on the veracity of those allegations or the strength of it? You can't. It's obvious, in my submission. You can't adduce evidence through major witnesses through a trial and then say no prejudice. Of course you can't. How could we cross-examine all the witnesses beforehand? I won't take you through the annex but Your Honours can see a flavour there of the disadvantage we say occurred by virtue of new allegations coming

through the trial.

366, halfway through the Prosecution case, claimed to have been reporting to Sesay. Not corroborated except in a vague sense of he was Sesay's bodyguard and would have been reporting to him. How many witnesses had gone before we lost the opportunity to cross-examine on those allegations?

And so we are left in a situation, and I go back to my earlier remarks, I cannot defend against a case such as that because I know I have not done my job because I know there are witnesses I could have cross-examined and I was not able to because of the Prosecution and their strategy.

The suggestion that we didn't, for the first accused, apply to exclude the oral testimony, must be equally disregarded. We applied time and time again to exclude written testimony. There was little point in standing up when the evidence came out in Court to object again, and so we didn't. We did the best we could.

And the only way, and as I indicated when I started was, the only way to rectify this is to, in my submission, one, not permit the Prosecution to allow, not permit the Prosecution reliance upon these new allegations, and I hesitate because a

thought came to me here.

The Prosecution, in each of those motions to exclude, claimed that the evidence did not increase the incriminatory nature of the case against Sesay so there is a second limb to my application, which is this: If they stay in no additional sentence must accrue, if we get to that stage, because if the Prosecution's view does not increase the incriminatory nature of the evidence.

But the main submission I have is this: That the Prosecution must be held to the Prosecution pre-trial brief. It must be held to what's in there; it must be held to the question of whether they proved it. If they haven't that is the end of the matter, whatever the rest of the evidence, in my submission, and whatever the feelings are with Your Honours as to what the rest of the evidence proves, if it doesn't prove the pre-trial brief that's the end of the matter, in our submission, and that's

the only way we say fairness can be brought to this trial.

15:04:40 And so, what happened when the Prosecution couldn't meet the pre-trial brief, what happened was they went back to their insiders and they reinterviewed. That, in my submission, is obvious. TF1-361 statement went from ten pages to 47 proofing. Proofing witnesses.

15:05:04 JUDGE ITOE: You said TF1?

MR JORDASH: 361.

JUDGE ITOE: Thank you.

MR JORDASH: And what happened then was that the Prosecution case --

15:05:14 JUDGE ITOE: You say it went from how many pages?

MR JORDASH: Ten to 47.

JUDGE ITOE: Thank you.

MR JORDASH: And it's important with that witness because he is the main link, they say, that Sesay had with Kono, the

15:05:32 crime base of Kono, and we dispute any link with that crime base between February and June of 1998. And so what happened again, what happened as well was that this case became something it was never supposed to be, and that is this: It became a case of insiders against Mr Sesay. I remind Your Honours what Mr Crane

said when he opened this case:

"This case will be proven by witnesses, again the brave and courageous people of Sierra Leone who step forward to meet and slay the beasts of impunity with the righteous sword of the law. Additionally" -- additionally I emphasise -- "we will bring in members of the inner circle of this joint criminal enterprise who will testify against these war crimes indictees. This situation in some ways we will have to dance with the devil to put into proper context the complete yet truthful picture."

So what happened was this: It was supposed to be proven by civilians with the assistance of insiders. The civilians didn't have a case against Mr Sesay except for three or four whose evidence, we submit, is demonstrably unreliable. 093, 141, evidence which, when contrasted against other evidence, just doesn't make sense. 093 claimed to have been in Kailahun with a senior commander who we know, in 1998, was not there. Sorry, in 1996 she claimed to be there. We know that commander was not there.

What the Prosecution did was look to these civilians and

said: We can't prove it through civilians because civilians do not point the finger at Mr Sesay. Let's go to his erstwhile colleagues from the rebel group. We will get them to prove the case against him.

15:07:31 But the Prosecution's approach, you see, it persuaded me at least, that perhaps Mr Sesay had been sitting in some far distant place in Sierra Leone, never emerging from his house, issuing orders to minions on the ground and that is why civilians were not featured in the Prosecution case pointing their finger at

Mr Sesay.

But, as Your Honours know, it's clearly not the case. It's clearly not the case because of the number of civilians who do know Mr Sesay, who have come to Court to testify on his behalf

15:08:09 from every district in Sierra Leone, have come here to say: That is not the man the Prosecution say he is. What do we have in opposition to that? Insiders. 045, removed from mining pits,

arrested by Mr Sesay and General Opande. 362, who admitted she was -- disliked Mr Sesay because he ruined the revolution. 366, removed from the mining pit by Mr Sesay for brutality.

So what the Prosecution have done is turn this trial against Mr Sesay into personal enmities between ex-colleagues played out in a Courtroom accusing, pointing the finger at the very man who was stopping them committing crimes. No civilians, just suspect insiders grateful for not being prosecuted themselves; grateful for any benefits which accrued to them as a result of testifying.

I refer you to 366, who admitted on the few honest things that witness said, how he had been suffering before he came to the Special Court and now he would do everything for the Special Court because they had given him a place to sleep, food to eat, for the first time things were okay. The bargain: Point the finger at the man who stopped him from committing crime.

And the further away you get from hostility to Sesay, personal hostility within these insiders, the further away you get from the allegations. And so, when you go to 041, we don't suggest that he had the same motivation against Mr Sesay, although we don't suggest he was telling the truth either in all forms, he still had a job to do, but 10 July 2006, 041,

concerning Makeni, line 25:

"Q. Now, you say you instructed (this was my question) by Mr Sesay to go to Makeni. Did he inform you that he expected civilians who remained in Makeni to be looked after and protected?" Over the page.

"A. Yes, that one he told me.

"Q. So he told you that he wants civilians to come out of the bush, to be able to live in the town; is that correct?

"A. Yes.

"Q. That the bush was effectively a bad place to live and people in Makeni ought to be able to live in their houses?

"A. Yes.

"Q. That the RUF should work with civilians and not against the civilians?

"A. Yes.

"Q. That harassment of civilians was not going to be tolerated?

"A. Yes ."

And then the witness, I won't read it all, but it is there

15:11:22 for 10 July, pages 81 to 84. Question on page 84, line 9:

"Q. The only time you were aware that he didn't take action was the killing of that Pa; is that what you said?

"A. Yes, yes. He was beaten in Makeni. Did not care, nobody. They did not do anything."

15:11:38 Now, I don't diminish the death of anyone but apparently the Prosecution insider who has not got the same hostility to Sesay says he did everything he could, except for one thing. In Makeni, January to March 1999 when, as Your Honours know, the evidence is that there were lots of troops there committing

crimes. This man was doing everything he could, according to a witness who does not have the same hostility.

The same goes for 078. 078 confirmed, in the clearest of terms, Mr Sesay did everything he could for civilians. 174,

15:12:20 slightly ambiguous witness in some areas but effectively concluded that when Sesay was around things were much, much better. 371, confirmed Pendembu civilians lived well.

So this is what the Prosecution have done. They have

turned this case into a personal enmities being played out in the courtroom. The further away you get away from them the less Mr Sesay is implicated.

And the reason for that is obvious. I go back to the defects because they couldn't prove the case without these insiders.

And so what we have is people who are prosecuting Mr Sesay, who would never ever ever, in a million years, have the same civilian support that Mr Sesay has and has been able to rely upon during this case.

And that is important, we submit, as we've submitted in the closing brief, in a number of ways. It can be dismissed as character or it can be taken notice of. It can be taken notice of in the ways we have indicated. It impacts on mens rea in a very significant way, in a very significant way because what is being alleged is, I think this is what is being alleged, and I will get to the joint criminal enterprise in a moment or two, is that he was -- Mr Sesay was terrorising and collectively punishing civilians every step of the way from May 1997 to January 2000.

And so, civilian testimony is of course the best way in

which we can know whether that is true or not, because whilst the Prosecution can put to witnesses, to [indiscernible] insiders, were you motivated by the RUF ideology, and so on and so forth, what are the civilians motivated for? What are they motivated to
15:14:25 come, in their tens and tens and tens, to support Mr Sesay, the brutaliser, the terroriser, the punisher of Sierra Leone, and why, the Prosecution did not have the same support. I would submit, in the strongest of terms, there is not any accused in this Court, in any international court, accused of such grave
15:14:55 crimes who can have a stream of civilians coming to say it's not true. And that is mens rea. That is mens rea. It is not character, it is mens rea. It shows his intention was not to terrorise. If it was just one or two civilians then of course it could be done for personal reasons. It could be done for moments
15:15:18 of charity. When you have tens and tens, at a time when you are supposed to be brutalising a population, it just doesn't make sense and that is what is missing from the Prosecution case. It's missing from the Prosecution closing brief. You will not find much mention of actual mens rea. What you get is lots of

15:15:41 crimes; Sesay's position; thereby he must be guilty. Not so, we say.

And the point can be demonstrated, the paucity of the evidence against Mr Sesay of his personal acts can be demonstrated through paragraph 1088 of the Prosecution brief.

15:16:07 It's the section which deals with collective punishment and the suggestion that Mr Sesay contributed to collective punishments. Sorry, it's 1080. Collective punishments, this is what the Prosecution say, if you go over the page, back to 478, liability under Article 6.1 and 6.3 of the Statute, collective punishment.

And it goes on from 1080 to 1085. And I may, I don't think I've missed anything, but this is really what it amounts to. Sesay's contribution as summed up here, under collective punishment.

1081, apparently he was present in Kailahun during the killing of

15:17:10 the Kamajors. I should correct what it says there. 1081.

TF1-168 and TF1-045 did not allege Mr Sesay was present during the killing of the Kamajors. TF1-045 had put it in his original statement and admitted, when he was in the witness box, it was not true. There you see the hostility of that man although he turned back at the final hurdle. But that is it. Mr Sesay present at the killing of the Kamajors.

15:17:37

And then if we go forward, 1085, the order that Sesay was alleged to give, that if the forces were to pull out from Kono he should ensure that nobody should come and stay in Kono and ensure that Kono should be burnt down.

15:17:59

Well, I am confident Mr Sesay will be found not guilty of being present at the killing of the Kamajors. The evidence is overwhelming that he wasn't there. He couldn't have been there. The timing of it is just all wrong and 1085, collective punishment, to actually issue an order to burn Kono for a military reason, which is denied, is not about collective punishment. There is no punishment for an act committed. There is no punishment for any act. It's simply a wrongful order to burn down a town for military reasons.

15:18:20

15:18:52

And that is the --

PRESIDING JUDGE: Can you repeat that last, the very last statement you had?

MR JORDASH: Well, what I would submit is that if there was an order to burn down Kono --

PRESIDING JUDGE: But you are saying there was no order, but should we find that there was? You are saying?

MR JORDASH: If there was one -- well, there are a number of allegations made about orders to burn down Kono. But if Your Honours are relying upon this suggestion here by TF1-360, that the first accused told the second accused that if the forces were to pull out from Kono he should ensure that nobody should come and stay in Kono, when looked at with the totality of the evidence, that was an order which was to stop ECOMOG basing in Kono.

So, it's not necessarily unlawful, we would submit. It might have been militarily necessary, it might have been. Even if it wasn't, it was an order to burn Kono which had nothing to do with punishing civilians. It was, at best, a disproportionate military attack on a civilian object.

PRESIDING JUDGE: So you are saying that to burn a town

like Kono would be and could be, in your submission, a military objective, a Sierra Leonean town?

MR JORDASH: If it was defended --

PRESIDING JUDGE: This is what you are submitting?

MR JORDASH: Yes, I am. I am submitting it's possible because the definition of what's militarily necessary rests on two things, it seems. One is that the place is defended, and that comes from The Hague regulations, and you will find that in the brief, and one is that it offered a military advantage. And it may have been both. It was clear, well, it wasn't defended, let's face that fact, but it might have been militarily advantage. But, to be honest, we say we didn't do it, so whether you categorise it one way or another we say we didn't do it and

its military advantage does seems a little dubious.

JUDGE THOMPSON: But if you are taking the best of both worlds, what is the first position? Let's have that clear. If

you want the benefit of both worlds, I mean, which you are entitled to do, what is the first position then?

MR JORDASH: Well, the first position is that Your Honours have to look at the surrounding evidence, the nature of the warfare, the military advantage which might have accrued to the RUF based there, and ask Your Honours whether there was a sufficient military advantage to justify it as a military attack.

PRESIDING JUDGE: But to go there, we have to accept before that that there were indeed an occupying power that had some authority. So I mean, there's some preliminaries before you get there. If I follow, anybody that would be in that situation and they decide that this is a fair objective and we attack it, so I am -- you are shaking your head but I have to hear what you have to say.

MR JORDASH: Well, it's my fault because our submissions in the brief are not as clear as they could be but --

PRESIDING JUDGE: I am not referring to your brief, Mr Jordash. I'm just referring to your argument now. I know you have expanded on that in the brief. I'm not trying to take you by surprise by my questions here. I just want to understand clearly what you are conveying to the Court now. But Justice Thompson just asked you what is your first option. I may be wrong in that, but I thought your first option was and is that your client never issued such instruction; am I right?

JUSTICE THOMPSON: Quite right.

MR JORDASH: Exactly.

PRESIDING JUDGE: And therefore, whatever the witness says we should not believe this witness because he never did it.

MR JORDASH: Absolutely.

PRESIDING JUDGE: If we were to accept that you say even then, then you go in your second --

JUDGE THOMPSON: Yes. I mean, that is why I used the analogy of the best of both worlds.

MR JORDASH: Exactly.

JUDGE THOMPSON: Quite right.

15:22:55 MR JORDASH: We expand on this in the brief and argue why it is almost exclusively unreliable, for the reasons mainly that it's, one, uncorroborated; two, contradicted and three, the witness himself, TF1-360, dances around from being present at a meeting to not being present at a meeting to eventually settling

15:23:25 on being present at a meeting in which he did hear, he said,

Sesay give the order to burn. And you will see the problems that the Prosecution have there, that the Prosecution don't go into that lack of credibility. They simply state something which sits somewhere between the middle but it's not clear what TF1-360 was saying except that he decided in the end he was present at the meeting. But, yes, I think we can concede that it's unlikely to have been a proper military attack but, at best, as I said, a disproportionate one rather than anything to do with punishing civilians. But the point I make really in relation to this is that is as much as the Prosecution took out the brief to summarise Mr Sesay's contribution to punishment.

And I would also refer Your Honours to paragraphs 1204, 1207 and 1217 of the Defence brief, and what you see there is the Prosecution dealing with the Port Loko crime base. Why I'd refer

you to that at this point is this: That without the insiders that evidence is effectively given by civilians. The best that

can be said about Sesay, taking the Prosecution evidence at its highest, is that he was playing football with Superman some distance away, and it's obviously unreliable, but that is what happened when the Prosecution sought to prove a crime base through civilians. They had Superman there. They had Superman's men there. They had Sesay playing football and that is why, returning back to my theme, the insiders played such a prominent role.

And so we say the right application for burden of proof means that insiders cannot, in the context of this case, be taken as final proof of guilt.

Now throughout this brief there is reference to corroboration. Now, of course I am aware that corroboration is not legally required, and that is a sensible rule, of course it is, but it is also sensible that we look beyond that principle and ask ourselves whether evidence from insiders ought to be corroborated, given the obvious personal motivations and, two, whether when they are describing such significant events, it doesn't make common sense if they are not corroborated because, despite the Prosecution's best efforts, even though they have interviewed and reinterviewed and reinterviewed their insiders, there is no coherent story against Mr Sesay which is corroborated by their fellow insiders. The case hangs by a thread. And it hangs by a thread which is given by various insiders from the

junta, through the retreat, through to Kailahun, Kailahun, Pendembu, Kono, back to Makeni, Freetown. And it hangs by a thread of almost always a single witness and almost always a

single insider, and almost always a single insider contradicted by other insiders. That is why the Prosecution's closing brief opts not to choose which story; they simply rely on all of them.

In my submission, the correct application of burden of
15:27:29 proof means you can't. You have to ask the question, in my submission, whether accusing Mr Sesay of being in touch with Kono and ordering all issues in Kono can really rest on TF1-361.

Whether -- just a moment, please, if you can just give me a moment -- whether 371's allegation that all the RUF diamonds went
15:28:11 to Bockarie, Sesay and Kallon can really rest on a single insider, especially when other insiders, such as 045, report a very detailed account of the command structure in the administration, namely, asking for permission from Kati and Eagle

to mine. Kati reported to the brigade commander in Kenema, who reported to the Army Chief of Staff, who reported to the Defence Chief of Staff, who reported to JPK. That is, Your Honours, 23 November 2005, page 19 to 23.

Whether the Prosecution case can rest on 371 when TF1-036 says the diamonds would be reported to Bockarie. That is 28 July 2005, at page 53. Whether the Prosecution case against Mr Sesay to prove crimes against humanity and war crimes can really rest on a single witness, 360, claiming that Sesay was at a meeting at Flamingo Nightclub in Makeni and ordered Operation Pay Yourself when TF1-366 says something different, and no one from that alleged meeting at the Flamingo Nightclub is there to corroborate. Whether the Prosecution case that Sesay was in Kono during 1998 can rest on TF1-263, and no one else has seen him.

TF1-334, meeting where Sesay apparently sat next to Johnny Paul Koroma and said: Yes, let's get rid of the civilians from

Kono, let's burn it, when no one else confirms that meeting and, in fact, 360 tells a different story than 366 who was present or claims to be present didn't hear that order at all. And I could go on but I won't because Your Honours have our brief.

15:30:23 But the point is this: That corroboration is not needed but when you are dealing with these insiders that change their stories backwards and forwards, whose implication increases as they near the courtroom and spend time in the Prosecution's custody, corroboration makes absolute sense, especially, in my

15:30:44 submission, if the Defence -- the accused can rely upon such a body of civilian evidence which tells a different story.

And to buttress my submissions, I would say this: There is an extra reason to distrust these insiders, because every time an exhibit is produced, a document which purports to describe an

15:31:13 order or so on, it tells a different story. So we have TF1-362 who claims that all the orders came through Sesay for Bunumbu training base. Who claims, in this convoluted and ridiculous, in my submission, account that everything went through Sesay and yet, if Your Honours look at the training base exhibit, at tab G,

15:31:44 and I note not produced in our case but produced in the Taylor case, produced in the Taylor case to prove that Bockarie was in command of Bunumbu, and we found them because we read the

transcripts, not produced in our case.

PRESIDING JUDGE: But it's not in evidence in this case.

15:32:06 MR JORDASH: It is, Your Honour. We applied to put them in. The Prosecution agreed. Mr Harrison very kindly --

PRESIDING JUDGE: It is in evidence?

MR JORDASH: Yes. You can see exhibit numbers there at G. Order to Exhibit 309, Exhibit 310, 311.

PRESIDING JUDGE: Yes, yes, okay. I have them.

MR JORDASH: Every time there is documents, almost always they tell a different story to what the insiders did. 361, oh, it was a hierarchial chain of command. We never reported outside

15:32:40 of command. We always went through Mr Sesay. We have exhibits 32 and 33 from radio log books which tell a completely different story. TF1-367, all the reporting of the diamonds, he was the boss, Mr Sesay was the commander. We never did anything without him. And then we have an exhibit from JSU, Exhibit 107, a report

15:33:06 from the JSU to Peter Vandy about the loss of diamonds and the investigation into the loss of diamonds.

So every time, in my submission, there is a piece of paper which doesn't support the insiders but it exposes them for what they have tried to do and that is why we say the case against 15:33:38 Mr Sesay should be approached with the utmost caution and, in fact, he should be found not guilty and, at the very least, when considering his guilt or innocence, those insiders, those people who were annoyed with him for a variety of reasons, should be approached with absolute caution.

15:34:02 As, in my submission, should the Prosecution's attempt to criminalise this whole war. And that, in my submission, is what they are trying to do when it comes to trying to prove Sesay's guilt. Because, it's easier to criminalise the war and then run an overarching joint criminal enterprise against Mr Sesay and 15:34:31 then what happens is, you can say anything he does furthers that joint criminal enterprise. You don't need to worry about his mens rea. You don't need to worry about his participation. As long as he was there; as long as he was doing military things, it's enough.

Let me take Your Honours to the joint criminal enterprise in the Prosecution brief at paragraph 242.

Now, it's our submission that the Prosecution do not understand their own JCE. They haven't understood it from the outset and they have, as we've indicated in the brief, chopped and changed and it's been done for a very specific reason, which is to implicate the first accused.

Now, Your Honours can see 242, they expressed the joint criminal enterprise there as a campaign of terror and collective punishments in order to pillage the resources of Sierra Leone. I won't rehearse the arguments we have advanced in our pre-trial brief at 198 but I will make the following remarks, just very quickly.

Your Honours know from our pre-trial brief, sorry, our closing brief, that we allege that the JCE should be dismissed as defective. And, in our submission, it's plain that the Prosecution, it's unassailable that the Prosecution have said different things at different times.

My learned friend this morning, for the Prosecution, argued that, as I understood it, that the JCE, the notice which came on 3 August didn't materially or didn't change anything but was

taken from the indictment, in our submission, is plainly not right.

So our submission is this: Number one, the JCE that was pleaded changed from two to three and back to two. It changed in its alleged purpose from the indictment which was as expressed at paragraph 242 of the Prosecution brief; terrorise and collectively punish to the Rule 98 stage where it became lots of small JCEs, JCE 1s, JCE2s and JCE3s and then, finally, it changed

again and, throughout this, what we had was a change of what was alleged to be foreseeable.

That is key, in our submission, that you cannot change the purpose of the joint criminal enterprise, changing it and then expect the accused to know what is being alleged. You cannot change the purpose without also changing JCE3, what is foreseeable. Everything spans from the purpose. You change that, you change JCE3. What is foreseeable to Mr Sesay in

relation to his criminal purpose, JCE1, obviously changes when the purpose changes because the starting point is different.

The Prosecution didn't deal with what was said at the 98 stage and that is the clearest example of how they chopped and changed. And, in our submission, that is another aspect of this case which really ought not to have happened and the JCE should be dismissed.

And if I can take you further through this brief of the Prosecution to 306, you can see what is happening is the Prosecution allege lots of military activity, lots of crimes, and, within that, there is reference to Sesay's participation and what they term criminal enterprise, but little by way of comment about mens rea.

And again, that's the purpose of this overarching joint criminal enterprise, because, if you plead that and then you just lead lots of crimes, they hope you will accept all those crimes and then you will say: Well, anyone taking part in these military operations, if crimes are being committed by others, you must have been trying to further that enterprise but, of course, that's not true.

You see that at paragraph 306, please. They say, the

second sentence: "Terrorism and collective punishments are included within the joint criminal enterprise from the outset."

This, in my submission, is again unclear. Is terrorism and collective punishments the purpose or is it now included within the joint criminal enterprise? It's not clear, in our submission, to us.

The Prosecution must prove a plan. They must prove a criminal plan to terrorise and collectively punish and the accused participation in that plan with the right and correct intention to further the criminal plan. And, in our submission, Sesay's participation in it has to be approached with a degree of caution. It has to be approached at all times, we submit, in light of other activities.

It's not enough we would say to simply say: Look, he assisted to re-attack Tombo after January 6. No crimes were committed. No allegations of crimes were made but that is a contribution to January 6. Why? Because there is a criminal purpose in the whole thing.

Well, let us take a step back, as I suggest we must, and ask what was Sesay doing elsewhere at that time? So that would

have been approximately the third week of January and you have heard, as I have read, what TF1-041 said Sesay was doing in Makeni. Taking action against everything except for one killing.

So when you look at his alleged contribution to re-attack Tombo at that time, it cannot be looked at in isolation from activities which indicate, which allow an inference of mens rea. Protecting civilians down the road, doing everything he can, according to the Prosecution evidence, military activities in Tombo, that does not, in our submission, allow an inference that

he was contributing to a joint criminal enterprise.

So looking at paragraph 308, the bottom there.

"During the majority if not all the indictment period, the first accused was the battlefield commander" and so on. "The joint criminal enterprise" over the page, "could hardly have been pursued without persons holding these assignments, assisting or contributing to the execution of the common purpose."

That must be approached with a degree of caution. Again, what was Sesay doing elsewhere? What was he doing with his functions? What was he doing with civilians elsewhere before an inference can be drawn that military activities were designed to further a criminal enterprise?

And the same goes for paragraph 309 and 310, diamond mining. It's not enough to simply allege diamond mining and say: Well, the RUF needed money. The RUF needed to get weapons. We know that. It's uncontroversial. But simply finding digging for diamonds on its own is not sufficient as an inference when balanced against other activities that the accused was doing. And there the Prosecution, at paragraph 309, and this is, in my submission, what is happening here is that there is a confusion between the common purpose of gaining and exercising political power and control over the territory of Sierra Leone with a joint criminal enterprise, to collectively punish and terrorise. Two different things.

15:43:57 What the Prosecution do in these JCE section is shift --

JUDGE THOMPSON: Please repeat that submission. There is a confusion between?

MR JORDASH: Well, in my submission, the Prosecution conflate the two. They conflate the joint criminal enterprise to

collectively punish and terrorise.

JUDGE THOMPSON: Yes.

MR JORDASH: With the common purpose of fighting to gain and exercise political power and control over the territory of Sierra Leone.

15:44:23

JUDGE THOMPSON: Thank you.

MR JORDASH: One is a crime, one is not.

JUDGE THOMPSON: Not.

MR JORDASH: It's critical then that the Prosecution, it's critical for Your Honours, I would submit, that the starting point for Mr Sesay's liabilities is to analyse his mens rea. It's the only way, in our submission, to keep the two separate. To keep the conflation which benefits the Prosecution from actually implicating an innocent man.

15:44:32

15:44:59 So, turning over the page to 311, you can see there that, halfway down the page at that paragraph, they planned, it's his evidence, the Prosecution shows -- the Prosecution says "Furthers the joint criminal enterprise. They plan the capture of Kono

under the first accused's command, and the ammunition is shared

15:45:24 amongst the commanders."

Well, again, where were the crimes on that attack on Kono?

Wouldn't the best proof of Mr Sesay's intention to collectively

punish and terrorise be crimes committed on that attack, on the

few attacks which he led with a large degree of autonomous, or

15:45:56 autonomously, where are the terror, where is the terror, where is

the collective punishment? It was a military attack designed to

take Kono. And that is, again in my submission, the fallacy of

the Prosecution case. You cannot simply ignore what happened

when Sesay was acting in military operations or in a base such as

Pendembu and pretend it doesn't matter. It does matter.

According to TF1-045 what had been planned was Operation Spare No Soul, Operation No Living Thing. In Buedu in November

of 1998 is a meeting involving the first accused and then off he

goes apparently to further the purpose of terrorising and collectively punishing and yet the Prosecution do not, cannot allege that any serious crimes were committed. In fact, the ubiquitous TF1-366, the man who did everything he could to implicate the accused, even he conceded that on that operation Sesay had ordered that anyone who looted would be executed. Is that Mr Sesay's contribution to the criminal purpose?

And this is also borne out by 071, who, at -- on 25 January 2005, when asked about this attack, made it quite clear, at page 88, that there had been a meeting before the attack. Mr Sesay arrived and was organising it. Prisoners of war had been taken, which again tells a lie to what TF1-371 said, which was that Operation No Living Thing had been planned in December of 1998, which involved the taking steps to make sure no prisoners of war survived, which again contradicts the evidence of TF1-045 who claimed it was to actually kill all civilians as well as prisoners, but it tells a lie to both accounts. TF1-071.

"And during the attack there were some prisoners of war taken and captured; is that right?

"A. They were captured. They were not killed. Yes, I saw living human beings.

"Q. Were there instructions (page 90) by Sesay to make sure that civilians were not killed?

"A. Yes.

"Q. Civilians, prisoners of war should not be killed?

"A. Not at all."

When Sesay was addressing the troops. AND so, we see, whenever we move away from the blithe descriptions of military action and we get to what is actually happening and Sesay has any autonomy we can see clearly what his mens rea was.

I won't belabour the point but, going over the page to 311, we have there the same allegations about trading for diamonds, going to see Charles Taylor, and I would make the additional point at this stage here that, if civilians were being enslaved, and we submit for the reasons we put in our brief the Prosecution haven't proven that is the case, in terms of diamond mining, the Prosecution still have to prove that that was done with the intention to terrorise and collectively punish the population. In our submission that's another step which the Prosecution will have some difficulty with.

Clearly, if enslavement in the diamond mines is designed,

or would have been designed to obtained diamonds which would have been designed to take over the country but to terrorise and collective punish is another step, indeed, and I won't go into the closing brief of the Defence but we make our submissions there about TF1-367's evidence, and the fact that he confirmed that even at its height in 1998 there was less than 60 people being enslaved. We make the point there in our brief, but less than 60 people. An inference of collective punishment and terrorism, we would submit that is an inference too far.

Paragraph 324, again arms shipment, again the Prosecution want to use this overarching joint criminal enterprise to suggest anything to do with the war is of some significance. In our submission, it's not. And that's clear, in our submission. Over

the page, at 328 -- is anyone very hot because I am very hot? Has the air conditioning broken down?

JUDGE ITOE: Maybe from your end.

MR JORDASH: 328 --

15:52:28 JUDGE ITOE: You are in very intense activity. I am sure that is why.

MR JORDASH: 328, the first accused, the paragraph there, the second to bottom line:

"The first accused used the weapons and he went to the front to fight against ECOMOG. Sesay had command and control over all the RUF fighters, who were thousands."

I will deal with that remark, if I need to. But there we have first accused using weapons to go to fight ECOMOG. There we have the first accused, paragraph 329, going to the water quay where there is a ship with ammunition and some rice and the ammunition was used by the RUF, the soldiers and the STF to fight."

And so it goes on. 332. Bottom of the paragraph:

"The guns and cartridges were loaded onto vehicles brought to Freetown and distributed to Mosquito in Kenema in front lines, front lines, in Bo and Freetown."

This is why I submit mens rea is all important. These are the kind of activities that the Prosecution want to base inferences of guilt. Distributing weapons to front lines in Bo and Freetown.

And 338, TF1-334 said the Supreme Council was responsible for carrying out the day-to-day activities of the government.

28 And there we have, I think, the start of the Prosecution is joint

29 criminal enterprise, and we have their own witness saying that

1 the Supreme Council is discussing the misbehaviours of

2 honourables regarding looting and harassment of civilians. This

3 is the joint criminal enterprise to terrorise and collectively

4 punish. In our submission, it doesn't really stand up. What

15:54:27 5 stands up is small groups under the command of certain commanders

6 committing, we concede, terror and collective punishments; small

7 groups which the Prosecution have not proven who they were,

8 except a few, or how they, in fact, are corrected to Mr Sesay. I

9 go back to the submission the Prosecution made that Mr Sesay was

15:55:06 10 in command of thousands of RUF commandoes. Well, in my

11 submission, it will not take Your Honours long to dismiss that as

12 the basis for command responsibility.

13 We take Your Honours to TF1-345. The same point there

14 about Sesay going on an operation to attack Bo. Military

15:55:36 15 command. Yes, he was one of the highest commanders on the

operation to Bo. It was not disputed that Mr Sesay had been injured in Bo. It was not disputed that he was injured in Bo trying to prevent looting.

Get or scratch below the surface of his military activities, in our submission, you will find what his real inference -- what his real mental state was.

Now, turning to page -- to paragraph 353, and Your Honours will be relieved I won't be taking you through the whole brief.

This so-called meeting, after the capture of Koidu, attended by the first accused, Superman and others, Johnny Paul Koroma said that Kono should be defended because it would draw the attention of the international community and he would be able to get diamonds from Kono so as to be able to support the movement.

For reasons we outlined at 755 to 787 in the closing brief,

we dispute this meeting. But, we would submit at this stage that the Prosecution should not be allowed to rely upon burning as

support for count 1. It goes back to the same defects point. The indictment says, and it's clear, in our submission, that count 1 and count 2, and I -- this has been dealt with in the brief but it's important, in our submissions, that the indictment is looked at carefully and it is alleged there not as the Prosecution allege right in their closing brief that the evidentiary basis of count 1 was intended to include non-enumerated acts.

Count 1 as alleged in the indictment and the pre-trial brief alleges that the crime set forth, I am looking at paragraph 44, crimes set forth below in counts 3 to 14 was the campaign to terrorise the civilian population. And the same is true of the pleading in relation to collective punishment. It's the enumerated crimes. That's the pleading and it's also echoed in the pre-trial brief. Again, it's the enumerated crimes which form the constituents of the basis of count 1 and count 2.

PRESIDING JUDGE: There were some comments from the Appeals Chamber on this issue, not about the RUF. I am talking of this issue of crimes because you know how we ruled on that in the CDF.

MR JORDASH: But the important distinction there was that the pleading included -- I am just trying to find our submissions on this. Yes, in the CDF case, and yes, the Appeals Chamber looking at the CDF case said that the Prosecution had specifically pled the other acts, namely, threats to kill,

destroy and loot as a campaign to terrorise. That is absent from ours.

PRESIDING JUDGE: Yes. But they had a similar --

MR JORDASH: Except that but that is the key. They said in our case it's the enumerating crimes. They said in the CDF case it's the enumerated crimes and the kill, destroy and loot as the campaign to terrorise. That's the --

16:00:05 PRESIDING JUDGE: And based upon that you are saying therefore the Prosecution, because the burning is not a crime alleged and therefore the burning should not be allowed to be considered for these particular counts. That is the difference you are contending between this scenario and the one in the CDF,

16:00:24 given the decision of the Appeals Chamber.

MR JORDASH: Well, the decision in the Appeals Chamber was predicated upon that particular phrase, which was in the CDF indictment.

PRESIDING JUDGE: Indeed, it was in the CDF indictment.

16:00:37 MR JORDASH: And it is not in this indictment; in fact, the opposite is in this indictment. It is exclusively pleaded as containing only the enumerated crimes and burning is not now included in the pillage. And that's why we say --

PRESIDING JUDGE: Yes, but the wording in the CDF said

16:00:52 including. It was not in. So, an interpretation could be somewhat different from the one you are saying, so, the language used in the CDF indictment was crimes committed "including," so it was not "and" the threats to kill and so on and so on. I am sorry, I may have cut your microphone.

16:01:15 MR JORDASH: I don't blame you. Well, if I understand Your Honour correctly, the CDF indictment used the phrase "including."

PRESIDING JUDGE: Yes.

MR JORDASH: Is that -- yes. Which again is not in the RUF indictment.

PRESIDING JUDGE: After the words, I don't have the CDF

with me, the indictment, but after the words similar to the ones that you find in paragraph 44 here, as crimes set forth in paragraphs whatever they were in the CDF, and then there were the words "including" threats to kill, destroy and so on and so it was not "and' but it was "including."

MR JORDASH: Yes. Well, neither "and" nor "including" is --

PRESIDING JUDGE: It's different. Well, that's okay.

16:02:11 MR JORDASH: [Overlapping speakers] in our indictment.

PRESIDING JUDGE: I am not trying to put you in a difficult predicament here. I just want to make sure you are not misled by this.

MR JORDASH: Certainly. Our submission is straightforward.

16:02:25 That if the Prosecution intended it to include other things than the enumerated crimes they would have included a caveat or an inclusionary phrase which would have given notice to the accused that they should expect other acts which did not form the enumerated crimes to be in the final analysis held and used as

16:02:52 evidence of count 1 and count 2.

Could I ask Your Honours to turn to paragraph 359, please.

Regrettably, we do submit that the Prosecution's closing brief has to be approached with a degree of caution.

There are a number of aspects of it which are not as

16:03:43 straightforward, shall we say, as they should be. Paragraph 359, the first accused summoned Superman to Buedu for briefings and to receive ammunition in order to prepare for the Fiti Fata mission which was an unsuccessful attempt to retake Koidu. Of course, the Prosecution do not indicate that that evidence is disputed by

360 and even the omnipresent 366 who both say he wasn't at the meeting.

In our submission, it is significant that the Prosecution are constrained to rely upon such uncorroborated and contradicted

16:04:29 evidence to prove Sesay's contribution to this alleged joint criminal enterprise.

I would also add this: That, in relation to my earlier submissions about the lack of corroboration, for the Prosecution insiders, and the documentary evidence which disproves their

16:04:55 account, the converse can be said for the first accused. He said he wasn't at the meeting. TF1-360 said he wasn't there either;

as did 366. First accused said he wasn't attending meetings in Buedu, in 1998. There are exhibits which confirm important meetings involving Lawrence Womandia and Bockarie where the accused is not present.

16:05:33

In our submission, the Prosecution should not have simply stated that assertion without indicating that it is one story and one story which is not corroborated.

Your Honours, paragraph 372. We return to the theme of the RUF, November, December 1998 further in the JCE. And it is important, in our submission, to note that this is what the Prosecution say is the beginning of the new plan to attack Freetown. They say with the cooperation, the collaboration, the co-ordination with the Koinadugu groups and we say nothing of the sort.

16:06:21

16:06:50

Now, ignoring for a moment the absurdity of TF1-371's account that Gullit and Superman popped down to Kailahun in December 1998 for a meeting, we refer you back to 071's account of the attack on Kono. We refer you to the Defence evidence

which deals with what Sesay did from Kono to Makeni and we refer you, once again, to 041: Sesay was doing everything in Makeni.

PRESIDING JUDGE: When you say Sesay, Kono to Makeni, you mean the attack on Kono and on Makeni, during that timeframe.

16:07:48 MR JORDASH: Yes. In particular though, the civilian evidence of all the efforts made by Sesay to set up lawful administrations, administrations which protected civilians, it cannot, in our submission, be genuinely disputed that this is what he was doing on this so-called Operation No Living Thing.

16:08:10 So whatever the correctness or otherwise of that plan it certainly wasn't implemented by the first accused and should, we say, be taken into account when asking what contribution, if any, he made to the January 6 attack.

And the same applies to any consideration of aiding and

16:08:35 abetting. It comes down in the end to contribution and mens rea and we refer you, as we have done in the brief, to the Blagojevic and Jokic, which is in Your Honour's file, and deals with the issue -- it's in Your Honour's file at index I, which deals with the issue of aiding and abetting after the event.

16:09:07 JUDGE ITOE: Index what?

MR JORDASH: Index I, Your Honour. And --

JUDGE ITOE: I don't appear to have an I. I have a J. It's written like a J. It's an I really. That's okay.

MR JORDASH: And the suggestion that somehow any assistance offered on a retreat, although it's disputed not only by testimony but also by Exhibit 227, whatever the intention, it didn't happen as indicated by 227 but, in any event, the Prosecution need to do a little more, we say, than simply say the RUF helped the SLAs in Freetown to retreat. And this is the

ongoing --

PRESIDING JUDGE: I am sorry, I missed what you were saying about 227. What --

MR JORDASH: 227, which I think is in the file as well, yes, it is, it's over the page at index J, and the top of the page there, date 15 January. For the avoidance of doubt, we say this document is almost certainly not authentic. It's almost certainly not authentic for a number of reasons, not least of which the Prosecution refused to indicate provenance. But, two, you will see on the first page the suggestion that the RUF were

only in Waterloo on 8 and 9 January, which again is not borne out by witness testimony and is not -- it's clear it couldn't be correct but, in any event, over the page, 15 January 1999, the so-called agreement to attack Jui and Kossoh Town, so that the men could meet up with the SLAs in Freetown and the RUF just didn't, it seems even on this document, happen.

And so, whatever the intention, the assistance wasn't there. We've dealt with this at length in our brief but the assistance, whether the retreat, or whether Red Goat, Rambo or any other allegation, I think there is one allegation that, from 263, Sesay was supplying arms and capturing men in Freetown, sorry, in Makeni to go to Freetown. The Prosecution rely upon that, which is curious. But, in any event, 263 says: Well, actually, I decided not to go in the van. I jumped off at Lunsar because that is where Superman was going to be based. And so this is the kind of evidence which the Prosecution rely upon, which clearly does not support any agreement to assist or any actual assistance.

You will find that, Your Honours, 7 April 2005, page 31,

263, and you will find that in the Prosecution brief at paragraph 377.

And you see over the page, 379, the supposed contribution of the first accused coming to Waterloo and telling Five-Five and others that they should fight together to clear Hastings and then to Freetown. This evidence came from TF1-366. Again a conflation, we say, between legitimate activity and joint criminal enterprise activity. And the Prosecution omit once again the significance of military attacks which do not focus on civilians and those which do.

We submit that it is not possible to infer Sesay's intention as being to further the joint criminal enterprise. It is possible to infer that he was trying to take over and exercise some sort of power within Sierra Leone. His actions on that Kono to Makeni highway indicate the kind of power which he was intending to exercise .

If I can ask Your Honours to turn to paragraph 403 on page 177, and there is a reference there to the first accused continuing as a member of the joint criminal enterprise, and it's a reference to, I think, 1998, when, or shortly thereafter, the killing of the Kamajors by Bockarie, when the first accused continued as the member, it says, of the joint criminal

enterprise.

Well, again, we refer you to what was happening in Pendembu. We refer you to what the civilians who came said was happening then. That is not remaining a member of a joint criminal enterprise. It's remaining a member of the RUF, and doing things which are completely at odds with criminal activity, we say.

Your Honours, could I ask you to turn to 407. It's submitted that -- we confess to not understanding the Prosecution's approach here. There appears to be a development of the notion of joint criminal enterprise, an interpretation of the appeals judgment which came out in the AFRC trial. Can I just collect myself. Sorry, could I ask Your Honours to turn to paragraph 623. It's, as I said, we confess we are not sure what the Prosecution approach is to the joint criminal enterprise as a result of these remarks.

The Prosecution note that the Appeals Chamber concluded

that it was sufficient that the crimes committed as the means of achieving its objective reflect the common plan, design for the purpose of a joint criminal enterprise which is inherently criminal. Given the finding of the Appeals Chamber in the AFRC case that not only the objective but also the means to achieve that objective constitute the common criminal enterprise underlying the joint criminal enterprise. The crimes charged in count 6 to 9 clearly constituted an essential means of the RUF criminal design in which each of the accused participated.

16:17:51 16:18:11 16:18:32

We don't understand why 9, 6 to 9 have been picked up, and we don't understand, from paragraph 624 when they say:

"Further, the mens rea requirement is fulfilled as the three accused who intended to take part and contribute to the common plan also intended to commit the crimes charged under counts 6 to 9."

It appears, in our submission, that the Prosecution's approach is to allege the joint criminal enterprise, terrorise and collectively punish but then perhaps seek to rely upon individual joint criminal enterprises which are defined by the

enumerated counts. But I confess I might be wrong about that, but that is how we read these paragraphs.

And if it be right that that is the case then again there is further confusion in this joint criminal enterprise. But if Your Honours decide not to dismiss the joint criminal enterprise then we would say then that that must be the next point, the next standpoint of the Prosecution's, which is to say: We have to prove an intention to commit the individual crime and an intention to further the criminal enterprise, as part of the joint criminal enterprise. So the accused would have to contribute, would have to agree to the crime, would have to agree to the common purpose of collectively punishing and terrorising.

And if I can conclude my remarks about the joint criminal enterprise in this way:

16:20:08 In our submission, it is difficult to allege the joint criminal enterprise to both terrorise and to collectively punish.

It is difficult, well, it creates difficulties for the Prosecution we say and these difficulties are these. That it's conjunctive. So what the Prosecution say was the common plan was

16:20:38 an agreement to both terrorise and collectively punish. That is

the common state of mind, so say the Prosecution.

And, in our submission, if that is right, if you find Mr Sesay was not or did not agree to collectively punish, then joint criminal enterprise liability for him must fall because whatever the agreement it's a separate agreement, it's not the agreement which is alleged as conjunctive of terrorising and collective punishment. That is going back to my earlier submissions about collective punishments.

The paucity of evidence against Mr Sesay in relation to

collective punishment makes that very significant. If he didn't agree to do both, then the criminal enterprise he was part of is different to the one alleged and different to the one alleged against other accused and other detainees and others referred to by the Prosecution.

16:21:48

And if I can finish by wrapping up with some comments about command responsibility. I don't know if Your Honours are thinking of taking a break?

PRESIDING JUDGE: After you have finished.

16:22:09 MR JORDASH: I thought you might say that. Just give me a moment. If I could just have a moment, please.

Having dealt with JCE in a roundabout way, obviously we can't say everything we want to say, we would submit, similarly, that the Prosecution have failed to establish any command

16:23:06 responsibility over the perpetrators of crime.

The Prosecution's brief, in large part, fails to, fails to prove what it is Mr Sesay should have done. What was his responsibility? Who were his subordinates? How did he fail to act to prevent? How did he fail to act to punish?

16:23:52 The Prosecution's submissions are largely summed up in this way: That they allege de jure responsibility, and appear to regard that as sufficient. Hence why we have remarks in the closing brief such as: Mr Sesay was responsible, in command of thousands of RUF troops. Clearly, that cannot be correct. So

16:24:22 the Prosecution failed to name subordinates; failed in the indictment; failed in the pre-trial brief and failed during evidence. Failed even to name groups bar a few.

PRESIDING JUDGE: According to you, is this a requirement?

MR JORDASH: To name subordinates?

PRESIDING JUDGE: Yes.

MR JORDASH: Absolutely a requirement. It's not required to prove the names of the subordinate but it is required to prove the group.

16:25:10 PRESIDING JUDGE: There has to be a relationship between the accused and whoever?

MR JORDASH: Yes.

PRESIDING JUDGE: But does that mean that they need to name the group or the individuals or if sufficient indicia, sufficient

16:25:14 information is there to establish this relationship? You follow me?

MR JORDASH: Yes, I do.

PRESIDING JUDGE: I mean, if the crime has been committed by fighter X, as such, do we need to know it's fighter X, if we

16:25:31 are satisfied that fighter X is RUF and he was in this particular structure?

MR JORDASH: Yes. Well, I think the answer to that is that I expressed it rather clumsily. Of course the group doesn't have to be named in that it has to be -- it has to have a name -- but

it has to be sufficiently identified so that the relationship between Sesay and that group can be properly assessed so that Your Honours can be sure there was a superior and subordinate relationship, and also so that Your Honours can be sure that he had the, at the time, the material ability to prevent or punish crime. And that, in our submission, requires much more than simply saying the men in Freetown, during the junta, were your responsibility, you as the battle group commander. But you may be satisfied if, for example, the Prosecution say: Well, you were responsible for Rocky CO and his five men who were there and

they committed this crime.

We obviously say that is not correct but obviously a specific group, doing a specific thing, which can be identified could be sufficient. But what we have in this case is a failure to do that in most cases.

We have a long list of crimes. We have some commanders

named but, in most parts, we don't have who it was committed the crimes; whether individuals or a particular group. In most parts we don't have any indication of what it is Mr Sesay was supposed to have done. What was his duty, if any, to intervene and what was his ability, if any, to intervene? And Your Honours will see that from the Prosecution brief and, in my submission, it indicates, very clearly, that the Prosecution struggled with this aspect of the case because they do not, in fact, say.

16:27:56 They indicate at various paragraphs, for example paragraph 193, that Mr Sesay had de facto and de jure authority over many subordinates. They indicate at paragraph 831 that he had effective control and authority over RUF combatants. Paragraph 958, they indicate effective control by virtue of his de jure position, and they indicate such things as combat operations which they say indicates effective command. But what they don't do is take a crime, say who did it, and then go on to explain what Sesay's relationship was to it. And if I can take you in the last 15 minutes to the various --

16:28:55 PRESIDING JUDGE: Did you say in the last 15 minutes?

JUDGE ITOE: Are you sure you have up to 15 minutes?

MR JORDASH: Didn't I start at quarter to?

PRESIDING JUDGE: Maybe you did. Maybe you did.

MR JORDASH: Various interruptions means I must be given an

extra 15.

PRESIDING JUDGE: I did not look at the clock when we walked in. It may be it was quarter to and therefore --

MR JORDASH: Maybe ten to.

16:29:25 PRESIDING JUDGE: Ten to, so.

MR JORDASH: But I will be able to wrap up quite soon.

PRESIDING JUDGE: We will say 15 minutes.

MR JORDASH: Thank you. Freetown and junta, the Prosecution say, at paragraph 198, TF1-362 said that during the

16:29:39 junta all the instructions came from Sesay. 196, that Sesay had considerable influence over Bockarie and 191 that Sesay was in charge of Freetown when Bockarie was not there and 191 where the ubiquitous remark that Sesay had command and control over thousands of RUF fighters.

16:29:57 If I can take you to the Defence brief which indicates at various places held how wrong these suppositions are. And, in particular, this paragraph 482 of the Defence brief. You will see there reference to Bockarie's life being threatened and him

leaving Kenema. So even Bockarie had trouble controlling the events and controlling certainly the AFRC during the junta period.

You will see at 485, Supreme Council, reference there to cross-examination of TF1-371 and the suggestion that Bockarie did not even have complete or even perhaps effective control of Superman who had hundreds of men. You see from 498 the same thing. In our submission, it's quite plain that the Prosecution have failed to prove who were Mr Sesay's subordinates during the junta period. Battle group commander, yes, but who in the Prosecution's mind was his actual subordinate? They, I think, do

allege that Boys in Kenema was his subordinate but, in our submission, that clearly cannot be right, that the superior/subordinate relationship can be proven by simply alleging that he was at one point Sesay's bodyguard. We've indicated in the brief that if Boys was in Kenema or Tongo forcing people to mine, the structure in Kenema was such that

permission had to be sought from the likes of Kati and Bockarie, which would have placed him under their command and not Sesay. The Prosecution haven't said what is it Sesay should have done if, indeed, Boys was present in Kenema. They haven't said what his duty was, in relation to Boys, in terms of how he should or could have intervened.

16:32:27

They deal with the Tongo location by saying, at paragraph 517, that he had bodyguards as representatives in Tongo, therefore knew about the killings. They deal at 518 with the suggestion that reports were coming to him, Sesay, by subordinates and they allege that that is sufficient to prove command responsibility for events in Tongo. We submit, quite clearly, that is not the case.

16:32:56

If Your Honours turn to 646 of the Defence brief, where we deal with the chain of command in Tongo. We deal at 613 with the meetings held by Bockarie to prevent and punish crimes. We deal with the issue of the caretaker committee at 616 and we deal with the reporting of crimes to the committee. This is on the Prosecution evidence, not Defence evidence, and we deal with TF1-060 at 617 conceding that Bockarie was not even aware of many of these crimes and so the Prosecution have failed to prove that Sesay had any duty or any obligation to intervene in the Tongo location.

16:33:18

16:33:49

The same applies to Kenema. Paragraph 512 of the Defence brief. A clearly laid out administrative structure. We don't deny that Sesay went to Kenema during the junta period but going there and being present as the battle group commander is quite different to having the ability to intervene. It is quite different to being in control of everyone in Kenema and the Prosecution have failed both to prove who his subordinates were, their identities, and they have failed to prove that he had the duty to intervene in the event in Kenema.

16:35:02 Kono was particularly significant, we would say, and in 1998, February to June of 1998, what the Prosecution at its best we say have proven is that reports would come to Sesay. What they haven't proven is that: Number one, any of the people in Kono were anything other than de jure subordinates; two, we say

16:35:35 they haven't proven that he had any duty or responsibility to intervene. In particular, it is clear, we say, that he didn't have a duty to intervene. Could I just have a moment, please?

I beg your pardon. It is particularly significant, we say, that the Prosecution failed to establish that the JSU, in Kailahun, or in Kono, had anything to do with Mr Sesay. What they have proven was that, or what they may have proven at its highest, is that reports would be sent to Sesay, at the same time as the reports would be sent to Bockarie. But the evidence shows, we submit, that what would, at its highest happen, is that reports would come to the JSU members. We deal in our brief with how those overall unit commanders would report to Bockarie.

We heard from, for example, TF1-036, a man who truly should have known what was happening, who confirmed that the overalls reported to Bockarie and also said that the reports would be sent

at times to the battlefield commander, which was Sesay.

You will find that at 11 July 2006, at pages 11 to 20. You see from 114, and 28 April 2005, that the MP commander would report directly to Bockarie, according to 114. You will see from

367 that the IDU, he said, would make a recommendation to the area commander or the battalion commander. If the area commander or battalion commander failed to act the IDU would report to the leader or the battlefield commander and that is as good as it gets in terms of establishing that Sesay had a role with the JSU.

That is, in our submission, what the Prosecution must established. They have to establish two things in relation to Kono, we say: One is that he had the ability to recall commanders or that he had the ability to act on reports in some way. The very fact that reports go directly to Bockarie, even if they go to him, doesn't establish a duty on him to act. It would be, in our submission, slightly absurd if there was an expectation that Sesay would have to send the same report to Bockarie that Bockarie had already received and which Sesay would know he had already received. So all the evidence points to Bockarie recalling Rocky, Kallon, Superman and 371 also deals with general ability to recall. Not one person, even 371, attributes, except in a generalised way, the ability to recall Sesay. Sorry, to recall at the hands of Sesay.

So there is no ability to recall, no right to intervene or no need to intervene with reports and the Prosecution, we say, have failed to prove that he had, therefore, any duty in relation to Kono or any failure to act on that duty, and may I refer Your Honours to DIS-188, at 1 November 2007: All overall unit

29 commanders reported directly to the leader. So that is MPs, that

1 is IDUs, that is IOs, all the parts of the JSU reported to
2 Bockarie directly and informed, as DIS said, other authorities.
3 DIS-149 makes similar remarks at 5 November 2007, page 80
4 to 83, and made the remark on 6 November 2007, at page 29, made
16:41:13 5 the same -- DIS-149 -- G5 units would report to the overall
6 commanders. We know from TF1-036 the overall commanders reported
7 to Bockarie. DIS-281, the same, at 12 December 2007. According
8 to the command structure all the overalls reported to Sam
9 Bockarie. DIS-149 a similar tale, 5 November 2007, page 96 to
16:41:48 10 98.
11 And it's our submission that Mr Sesay had no duty in
12 relation to Kono. We submit that if he had had a duty he would
13 have exercised it as he exercised it in Pendembu, which is where
14 his authority lay; as he exercised it in Kono when he went on his

16:42:22 December mission; as he exercised it in Makeni in 1999; as he exercised it in Kono in 2000. And we would say the overwhelming evidence of that exercise of command responsibility, when he has it, proves, beyond a reasonable doubt, that if he did have authority he would exercise it properly.

16:42:48 And so, we submit when the final analysis of May is made of all the evidence, that Sesay should be found not guilty on every count. That, returning to my theme, that the overwhelming civilian support for Mr Sesay speaks volumes about the man he is. The overwhelming civilian support undermines any suggestion that

16:43:19 he had the mens rea for the crimes, it undermines the suggestion that he was part of a joint criminal enterprise.

In my submission, the case against him is weak because it relies upon insiders who were incapable or so these are telling a story consistently. The Prosecution have failed to prove a

corroborated account from these insiders.

And as I finish my closing I thought it appropriate to sum up what Mr Sesay said to me two days ago when I saw him and he asked me, well, I asked him what he thought of the Prosecution closing, and as word-for-word as I remember it he said: Prosecution do not want the truth. Why would they put TF1-263 in the brief suggesting I was commander of the PC camp in 1998? They have money and power and yet they do this to me. If the Court convicts me because of the insiders how will the Court be credible? What will be the legacy? And, in my submission, never a truer word spoken. Thank you for the time.

PRESIDING JUDGE: Thank you, Mr Jordash. We will break shortly as we did this morning and determine if we have any questions for you. When I say shortly, we will not be more than 15 minutes. So, thank you.

[Break taken at 4.45 p.m.]

[Upon resuming at 5.08 p.m.]

PRESIDING JUDGE: Mr Jordash, we only have a few questions. I should say I only have a few questions. My first question has to do with, in your submission this afternoon, you do refer and you invited the Court, with respect to the pre-trial brief of how we should apply our mind to this, and should look at -- what contained in the pre-trial brief and during the assessment. However, there has been, on the order of the Court, a

17:08:43 supplemental brief with much detail attached to it so -- and it was done early on in the process. I don't have the dates with me but I would say even before the trial started. So, I take it that when you are talking of the pre-trial brief you are talking of the pre-trial and supplemental or you limited your comments

only of the pre-trial brief before the supplemental? I say this because there were, I would say, more content in the supplemental than there was in the original pre-trial and it had some annexes attached to it. But your comments applies, when you said
17:09:20 pre-trial, it comprehends, it is to be understood both pre-trial and supplemental?

MR JORDASH: Yes, exactly.

PRESIDING JUDGE: My other question has to do with your submission on the occupying power. I take it, and you are using
17:09:35 the word "hybrid." I would like to know what you mean by hybrid, meaning that this is a mix of international and internal

conflict; is it what you mean?

MR JORDASH: Yes.

PRESIDING JUDGE: And what's -- how can it be hybrid at the same time? So, I'm a bit --

MR JORDASH: Well, we submit there are features of both. There are, it is alleged, international components. In fact, the whole case against Taylor is predicated upon his command and participation in the conflict.

PRESIDING JUDGE: You mean the case against Taylor? Not the --

MR JORDASH: Yes.

PRESIDING JUDGE: -- case against these accused here? Taylor is not an accused in this trial here.

MR JORDASH: But he does figure, and the Prosecution do say that from the outset it was his doing that led to the troops crossing into Sierra Leone. They do say that his involvement continued throughout the conflict. They do say that he was the man who was responsible for providing the ammunition and

weaponry. They do say that there were men from his command within Sierra Leone at various times, jungle, for example during the junta and they do say that his --

JUDGE ITOE: You are referring to the NPFL. The NPFL?

17:11:13 MR JORDASH: Yes, but in some ways it doesn't matter what the title of his men were, more that it was, according to the Prosecution, this international intervention, if you like, which was pivotal to the continuation of the conflict. So, in some senses, that is the international component. There are of

17:11:42 course, as my learned friend pointed out this morning, internal characteristics; the Sierra Leonean contingent, as insurgents. The Sierra Leonean RUF being in the various areas in Sierra Leone conducting the war and so on.

So there is, we would submit, plainly a mixture, a hybrid

17:12:17 of international and internal conflicts but, in some ways, it's -- our submission is not wholly predicated upon that hybrid. Our submission, in terms of the RUF being an occupying force, at least in Kailahun, is predicated upon the authority which they exercised in that area. It was a relatively stable force. It

17:12:47 was exercising functions which amounted to an occupation. That it was therefore obliged to conduct itself within the general body of International Humanitarian Law, which would apply to both, well, to international [indiscernible] conflicts.

So our submission is not predicated on necessarily this being either an international conflict or it being a hybrid conflict. It's predicated as much on the fact that in the -- I find myself in some ways in an ironic position because we, as the Defence, are arguing that the convention should apply, and the Prosecution are arguing that it shouldn't. And we say, well,

let's look beyond the formal categorisation of internal and internationalised conflict and say: What is the vacuum left in terms of the application of International Humanitarian Law if the Court doesn't look at the conventions and say, well, what were the rights and duties of a force, which was in authority, in Kailahun, for so long? And our submission says, well, clearly, there is a vacuum there. If you treat the RUF as simply an internal force, then International Humanitarian Law doesn't really cover what it's supposed to do and, in my submission, you cannot have or you shouldn't have -- what we are asking Your Honour to do is in effect extend the law. There isn't a

convention five maybe there should be --

PRESIDING JUDGE: Because in 96, I mean, the facts, I don't think this is disputed, it's the government of -- the Kabbah government that is in power and therefore the Government of -- Sierra Leone has a government. Our obligations being imposed, international obligations, as such, being imposed on the government, and the government is the government of the country, of the Republic of Sierra Leone. Agreed on the fact that there are some parts of the country that they did not control completely.

Now, whether or not the party occupying this particular part of the country, or occupying -- I won't say occupying, let's say controlling that part of the country, whether or not they wish to apply International Humanitarian Law, there's no thing against that. I mean, they can apply whatever protective measures they want to apply to the populations they control. Now, to say that, to jump from that to being an occupying power, or these kind of -- and to say that it had to apply to them and

they had to apply it because, this is the difficulty I have. But I am just trying to be guided by you, what you mean by this, Mr Jordash. Justice Thompson, you have a question?

JUDGE THOMPSON: I can't resist intervening too myself because now that you've developed this theory, because it seems to me, how do we the Judges advise ourselves in terms of our enlightenment on this particular subject? Where do we go for the reservoir of knowledge of principles? Do I go to Brownlie's principles of international law to find some of these principles about the role of an occupying power and its legitimising influences? Would there be -- because I am interested in sort of guiding myself as to the basic legal principles. Would that be one of the sources? I'm not going to ask you to give me some ideas but, if you can sort of agree whether Brownlie's international public international law would help, or some other material, just to refresh oneself as to the legitimising influences and obligations and liabilities of an occupying power in this kind of situation.

MR JORDASH: Well, it may be that there is no particular text which is better than --

JUDGE THOMPSON: Brownlie?

MR JORDASH: Than any other in the sense because what we are asking you to do is simply say --

JUDGE THOMPSON: I studied Brownlie so much. I find it extremely useful because of its precision and clarity.

MR JORDASH: Well, I didn't study that. But what I would say is that the starting point is this: That it doesn't, in this developing field, where there is a continuation of the merging of rules between internal conflicts and external conflicts, that we

are asking the Court to --

PRESIDING JUDGE: To continue that forward.

MR JORDASH: -- continue that process because, because it cannot be right that a force, internal or otherwise, but internal in this case, in a place like Kailahun for over ten years, does not have or should not have obligations to its civilians, and it is right, in our submission, that those obligations should be defined by the Court when looking at criminal responsibility because the alternative is that Your Honours say: Well, we are not applying the spirit of the conventions because it didn't

apply. We are just going to rely upon common Article 3, which is very broad, and not very particularised and represents the best that could be agreed amongst states at that time.

We say it's not quite good enough to describe a situation like this, where the RUF were the de facto government for many years, and should have obligations to its civilians, and we say this is precisely what courts like this are for, to develop the law and say what protects civilians more, but also to explain to future forces, such as the RUF, what their obligations are. That is the development, we say, of customary law which it's the looking at what's crystallised, looking at the movement to merging the rules and applying common sense.

JUDGE THOMPSON: It's that kind of invitation that I am excited about. That is why I asked where do I begin?

MR JORDASH: I think protection of civilian objects which dictate, in our submission, that the RUF in Kailahun must have had obligations.

JUDGE THOMPSON: Thank you.

MR JORDASH: The alternative is civilians would be left

without protection in terms of food, health and so on.

PRESIDING JUDGE: Thank you very much, Mr Jordash. Justice Itoe? That concludes our questioning of you. We thank you very much for your submission. The Court will adjourn until tomorrow and tomorrow we will start at 10 o'clock to hear submissions by the second accused. Thank you very much. The Court is adjourned.

[Whereupon the hearing adjourned at 5.20 p.m., to be reconvened on Tuesday, the 5th day of August 2008 at 10 a.m.]