



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

TUESDAY, 5 AUGUST 2008  
10.05 A.M.  
TRIAL

TRIAL CHAMBER I

Before the Judges:	Pierre Boutet, Presiding Bankole Thompson Benjamin Mutanga Itoe
For Chambers:	Mr Felix Nkongho
For the Registry:	Mr Thomas George Mr Binneh Kamara
For the Public Defender:	Mrs Elizabeth Nahamya
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
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 Mr Scott Martin

Ms Lea Kulinowki  
Ms Charlotte

1 [RUF05AUG08A - MD]

2 Tuesday, 5 August 2008

3 [Open session]

4 [The accused present]

10:09:00 5 [Upon commencing at 10.05 a.m.]

6 PRESIDING JUDGE: Good morning. Good morning, Mr Taku.

7 MR TAKU: Yes, My Lord. Good morning, My Lords.

8 PRESIDING JUDGE: This is for the second accused to  
address

9 the Court this morning.

10:09:37 10 MR TAKU: Yes, My Lord.

11 PRESIDING JUDGE: And I know it is ten past ten so we  
will

12 make sure that you are not -- that your time is not abrogated.

13 MR TAKU: Yes, My Lord.

14 PRESIDING JUDGE: And just to remind you what we've said  
to

10:09:52 15 the other parties yesterday, we expect, and the parties have,

16 indeed, adhered to the time that had been allocated and we  
would

17 expect the same from the second accused and, obviously, if we

18 intervene and interfere and time will be added to you as we  
move

19 long. So we will try, as best as we can, not to interfere  
while

10:10:14 20 you are addressing the Court and also --

hours

21 JUDGE ITOE: I know, President, but not adding five

22 to him.

23 MR TAKU: That is why we made a tactical decision out of  
24 three of us who are here to ask Mr Kennedy to do our  
presentation

10:10:34 25 because, indeed, all of us had prepared something to say but -  
-

26 JUDGE ITOE: In the context of the five hours.

27 MR TAKU: Yes, My Lord. I take the opportunity, My  
Lord,

28 to acknowledge the presence of my learned colleague and very  
good

29 friend, Miss Tanoo, and also Mr Mohamed Fofana is not yet  
here,

1 he will be here, he is with our team, and then of course we  
have  
2 Mr Kennedy. We also have Mr Joe Holmes, Mr Kenneth Ejim and  
Miss  
3 Louisa Songwe and Lois Mbafor. Thank you, My Lord.  
4 PRESIDING JUDGE: These are very interesting names. I  
10:11:18 5 would like to know who they are. I mean, you just mentioned  
6 their names but I see many faces. Mr Ogeto we know, that's  
for  
7 sure. No problem. And Miss Mylvaganam we know as well, so  
this  
8 is okay but the other ones, if they can stand up.  
9 JUDGE ITOE: And the Principal Defender we know.  
10:11:37 10 PRESIDING JUDGE: Yes.  
11 MR TAKU: Joe Holmes. Your Honours, Joe Holmes worked  
with  
12 me in Military II in Arusha and actually also worked as legal  
13 assistant for Hassan Ngeze and also worked in the Military I  
with  
14 Mr Ntabakuze. Now, we also have here Miss Louisa, who is a  
legal  
10:11:56 15 assistant. Mr Kenneth Ejim of the Nigerian Bar, he is also  
our  
16 legal assistant. Miss Mbafor, Your Honours, she is not here,  
and  
17 my most distinguished and acknowledged friend, Mr Mohamed  
Fofana,  
18 is from the Republic of Sierra Leone. Thank you, Your Honour.

19                   PRESIDING JUDGE: Thank you. So --

10:12:14 20                   MR TAKU: He is a lawyer, he is a distinguished lawyer  
in

21                   this country.

22                   PRESIDING JUDGE: Thank you. So, from your presentation

23                   Mr Taku, I understand that neither you, nor Mr Ogeto, nor Ms -

24                   JUDGE ITOE: Mylvaganam.

10:12:23 25                   PRESIDING JUDGE: Thank you.

26                   JUDGE ITOE: Tanoo Mylvaganam.

27                   PRESIDING JUDGE: He has been used to pronouncing your

28                   name; I am not and I apologise. So none of you will be

29                   addressing the Court, it will be your other assistant this

1 morning?

2 MR TAKU: No, Your Honour. Mr Kennedy [indiscernible]

3 Kennedy will address the Court this morning on behalf of  
Kallon.

4 PRESIDING JUDGE: He will, okay.

10:12:54 5 MR TAKU: Yes, Your Honour.

6 PRESIDING JUDGE: That is fine. So you are prepared to  
7 address the Court now?

8 MR OGETO: I am, My Lords.

9 PRESIDING JUDGE: So, we are prepared to listen to you.  
As

10:13:02 10 I say, I just want to remind you what we've said yesterday.  
We

11 would appreciate not a restating of your case as submitted in  
12 your written brief, because we have that, and I won't say that

I  
13 know exactly all the content of your brief but we will look  
into

14 it and we have a good idea as to what is in there but in due

10:13:23 15 course we will, indeed, pay attention and have a complete  
reading

16 of it.

17 So in the limited amount of time that we also have had,  
you

18 appreciate that it was impossible for the Bench to read all  
the

19 final submissions that have been made by all the parties. It  
is



10:13:37 20 an impossible task. But, having said that, I would appreciate  
if  
21 you would focus on particular issues that have been raised by  
the  
22 Prosecution that are of any impact on your case and any other  
23 matter that you wish to raise with the Court. So, having said  
24 that, we are prepared to hear you, Mr Ogeto.

10:14:00 25 MR OGETO: Thank you very much, My Lords. It's a great  
26 honour for me to address Your Lordships this morning in the  
final  
27 submissions for Mr Kallon.

28 Before I embark on the issues that I and my colleagues  
have  
29 prepared for the oral address, I would like, with your

1 permission, very briefly, to respond to some issues that were  
2 raised by the Prosecution yesterday, and which we think are  
3 important in the context of the overall case.

4 My learned friend, Mr Harrison, raised the issue of  
agreed

10:14:57 5 statement of facts and said that we had misrepresented the  
true

6 meaning of that statement of facts, agreed statement of facts.

I

7 wish to note, My Lords, that Mr Harrison did not fully read

the

8 agreed statement of facts and I have copies of the agreed

9 statement of facts, My Lords, if Court Management can help me  
to

10:15:34 10 distribute. It is in the bundle of documents that we have

11 prepared for the Chamber and the parties. Can you give out

the

12 copies, please, for me.

13 My Lords, this document will be at tab number 10 in the

14 bundle that I've handed out to the Chamber and the parties,  
and I

10:17:16 15 wish to refer to paragraph 10 of that document. It is exhibit

16 342, which was tendered, I guess, during the testimony of the  
17 accused Kallon.

18 JUDGE ITOE: Paragraph what is that? You say it's tab  
10?

19 MR OGETO: Tab 10 -- paragraph 10.

10:17:50 20 PRESIDING JUDGE: Paragraph 10 on tab 10?  
21 MR OGETO: Yes, My Lords.  
22 PRESIDING JUDGE: I don't have a paragraph 10 in there.  
23 MR OGETO: The agreed statement of facts.  
24 PRESIDING JUDGE: Yes, but it's not a paragraph. It has  
no  
10:18:01 25 number, it has letters but anyhow, I can count.  
26 JUDGE ITOE: Are you referring to --  
27 PRESIDING JUDGE: Annex 1.  
28 JUDGE ITOE: -- 11991; is that the document you are  
29 referring to, Mr Ogeto?

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1 MR OGETO: 11991, My Lords?

2 PRESIDING JUDGE: Yes, at the top of the page?

3 MR OGETO: Is it entitled "Agreed statement of facts"?

4 JUDGE ITOE: Well, this is an annexes, your tab 10.

Yes,

10:18:26 5 yes, yes, at 26720.

6 MR OGETO: Yes, My Lords. 26721.

7 PRESIDING JUDGE: Yes, yes, that is fine. It's annex H.

8 MR OGETO: Yes, My Lords.

9 PRESIDING JUDGE: Thank you.

10:18:43 10 MR OGETO: Now the paragraph in contention is paragraph  
10

11 of that document and when Mr Harrison spoke about that  
paragraph

12 he omitted -- let me read it out, My Lords.

13 "Between 1 May 1998 and 30 November 1998 Morris Kallon  
was

14 not a RUF and/or AFRC field commander in any location in  
10:19:16 15 Bombali District and did not reside there."

16 What my learned friend Mr Harrison did yesterday was to  
17 omit the key words "AFRC field commander. RUF and/or AFRC  
field

18 commander" and, in our submission, this is the most important  
19 aspect of this paragraph because it has implications for

command

10:19:46 20 responsibility and we have articulated our submissions in this  
in

attention 21 the final brief. The only point I wish to draw to the  
words. 22 of the Chamber is that Mr Harrison omitted these important  
23 The rest of it is in our final submissions in the final brief.  
24 The other issue that I wish to address relates to alibi.  
10:20:27 25 My learned friend Mr Harrison stated that we called witnesses  
had 26 DMK-161 and 039 as alibi witnesses despite the fact that we  
not 27 not given them as alibi witnesses. In other words, they were  
28 in the notice that was filed before the Chamber.  
Harrison 29 My Lords, I do not know where my learned friend Mr

were  
to  
of  
10:21:26  
filed  
in  
argument

1 gets the idea that these were alibi witnesses, because they  
2 not. These are factual witnesses that were called to testify  
3 events relevant to the indictment and relevant to the defence  
4 the accused Kallon. It had nothing to do with alibi and, My  
5 Lords, I wish to refer to the Defence summaries that were  
6 on 30 January 2007, I guess, 30 January 2008. I have enough  
7 copies for the Chamber and the parties. Here, the summaries  
8 respect of these two witnesses DMK-161 and DMK-039 --

9 PRESIDING JUDGE: But, Mr Ogeto, you say that the  
10 in part that, as you say, that they were not listed as alibi  
11 witnesses, and you are saying they were not listed because  
12 were not called as alibi witnesses.

13 MR OGETO: They were not.

14 PRESIDING JUDGE: But they did testify, isn't it, as to  
15 alibi when they gave evidence. Or they did not at all? I am  
--

16 MR OGETO: Not specifically.

17 PRESIDING JUDGE: I have no recollection of that, so I  
18 tell you -- I'm just asking the question; I don't know. I  
19 haven't looked at this evidence at all today or yesterday.

10:23:02 20 MR OGETO: I do not know exactly in what context my  
learned  
21 friend said they were alibi witnesses. But what I can tell  
the  
22 Chamber is that these two witnesses, generally, testified  
23 about --  
24 JUDGE ITOE: That is DMK-161 and DMK-039?  
10:23:22 25 PRESIDING JUDGE: Nine.  
26 MR OGETO: Yes, true. Yes, My Lords.  
27 JUDGE ITOE: 039?  
28 MR OGETO: Yes, My Lords.  
29 JUDGE ITOE: Thank you.

evidence

1           PRESIDING JUDGE: So they did not testify. In the  
2 they gave in Court they did not give any evidence that was  
3 related to the alibi?

4           MR OGETO: No, not at all, My Lords.

10:23:34 5  
am

6           PRESIDING JUDGE: Okay. I am just asking. As I say, I  
7 not challenging you on this. I am just asking if they did.

They

8 may not have been called, as I say, and they may not have been  
9 listed as alibi witnesses, But that did not preclude you from  
10 asking questions or they may have testified even without

asking

10:23:51 10

11 questions about some matters that were related to alibi. I am  
12 just raising that, but I don't know.

alibi

13           MR OGETO: As I said, My Lords, I do not know in what  
14 respect my learned friend, Mr Harrison, categorises them as

10:24:06 15

16 witnesses, but I can tell the Court that these two witnesses  
17 spoke generally about UNAMSIL events at Makuth and they said  
18 Kallon was not present at Makuth.

about

19           PRESIDING JUDGE: Isn't it in part what the alibi is  
20 too?

21           MR OGETO: Sorry?

10:24:26 20

22           PRESIDING JUDGE: Isn't it what the alibi is about?



It  
was  
my  
10:24:37  
maybe,  
touch

21 MR OGETO: Yeah, but they did not say where Kallon was.  
22 is not like they came to say Kallon was not in Makuth but he  
23 somewhere else. They simply said he wasn't there.  
24 PRESIDING JUDGE: Yeah, okay. Well, then, that answers  
25 question. They still talk about the fact that your client was  
26 not there.  
27 MR OGETO: Yes.  
28 PRESIDING JUDGE: But they didn't say where he was,  
29 but they [indiscernible] that is what I meant. So they did

1 upon the issue, I mean, in a collateral way?

2 MR OGETO: That's correct.

3 PRESIDING JUDGE: They may not have been called for that  
4 purpose but they appear -- that's why I say I have some vague  
10:24:56 5 recollection but I don't have that.

6 MR OGETO: Yes, My Lord.

7 PRESIDING JUDGE: Yes, Justice Thompson.

8 JUDGE THOMPSON: The short point is that, legally, what  
is  
9 your submission then? What is the dispute between you and the  
10:25:05 10 other side on this?

11 MR OGETO: They are saying that they are alibi  
witnesses.

12 We never --

13 JUDGE THOMPSON: And your submission legally is that --

14 MR OGETO: Legally, that they are not alibi witnesses.

10:25:13 15 JUDGE THOMPSON: All right. Yes, I mean, I just thought  
we  
16 probably don't want to muddy the waters. I mean, if that is  
your  
17 short submission we --

18 MR OGETO: That is our short submission, My Lord, yes.

19 JUDGE THOMPSON: Yes, quite.

10:25:45 20 MR OGETO: Now, the other issue that I wish to very  
briefly  
21 refer to relates to the Kallon Defence material that was

tell 22 mysteriously found in the Prosecution's computers. Let me  
submission 23 the Chamber that it was not our intention to make the  
24 we made under abuse of process; it was inadvertent and we  
10:26:16 25 apologise for that. Our intention was just to draw the  
attention 26 of the Chamber to that issue.  
27 Let me also point out that we have requested for the  
28 material that was found in those computers and up to now we  
have 29 not received that particular material and we feel that this is  
a

1 serious issue. It's of concern to us and we thought we should  
2 draw the attention of the Chamber to this particular matter.

3 PRESIDING JUDGE: As you know, we are familiar with this  
4 matter because we were notified all along.

10:26:55 5 MR OGETO: Yes, My Lords.

6 PRESIDING JUDGE: By both Prosecution and your party as  
7 well.

8 MR OGETO: Yes, My Lords.

9 PRESIDING JUDGE: But as to what happened to the  
material  
10:27:04 10 we are not aware as well.

11 MR OGETO: We are pursuing it. And, in case there is  
any  
12 outcome, we will let the Chamber know.

13 PRESIDING JUDGE: That's fine.

14 MR OGETO: Thank you. My Lords, let me now go to the  
main  
10:27:21 15 gist of our submissions this morning, and I wish to address  
the

16 issue of superior responsibility as it relates to Mr Kallon.

17 Your Lordships will recall that during the presentation  
of  
18 the Defence case, we expressed deep concern about the lack of  
19 clarity of the Prosecution case in relation to superior

10:28:00 20 responsibility for Mr Kallon. The Prosecution attempted to

most 21 portray Mr Kallon in relation to Kono, for instance, as the  
22 senior officer in 1998 after the retreat.  
23 Our concern flows from the contradictory nature of the  
24 testimonies that the Prosecution has adduced in support of  
this 10:28:43 25 important aspect of their case. It is contradictions that  
have 26 prejudiced the ability of Mr Kallon to defend himself in the  
27 sense that he does not know what exactly is the case of the  
28 Prosecution in relation to superior responsibility.  
29 This dilemma is compounded by the Prosecution  
submissions

1 in their written brief and, My Lords, I wish to refer to  
2 paragraph 308 of the brief, where the Prosecution states that  
at  
3 the outset the assignments of the three accused, including  
4 Mr Kallon, are significant and relevant, and that during the  
10:30:01 5 majority, if not all, of the indictment period the first  
accused  
6 was the battlefield commander and the second accused was the  
7 battle group commander. So that is the contention: That  
during  
8 the majority of the indictment period Mr Kallon held the  
position  
9 of battle group commander.

10:30:33 10 In relation to joint criminal enterprise, which is  
11 discussed in the same paragraph, the Prosecution alleges that  
the  
12 joint criminal enterprise could hardly have been pursued  
without  
13 persons holding those assignments. For the specific case of  
my  
14 client, the Prosecution case is that the JCE could not have  
10:31:07 15 succeeded, could not have been pursued without my client  
holding  
16 the position of battle group commander. And that underscores  
the  
17 importance the Prosecution attaches to this particular  
position  
18 and assignment.

clear 19 At paragraph 211, the Prosecution alleges that it is  
10:31:36 20 that the accused person was one of the most senior commanders  
in 21 the RUF throughout the indictment period. At paragraph 193,  
the 22 Prosecution says the evidence is clear that each of the  
accused 23 held superior positions within the RUF; positions close to or  
at 24 the top of the RUF command structure.

10:32:14 25 In paragraphs 42 and 43 of the Prosecution's closing  
brief 26 there's additional emphasis on this assignment. They state  
that 27 assignment or appointment determined command and control and  
28 showed who was the leader and, therefore, they are saying that  
29 because my client was battle group commander during the  
majority

1 of the indictment period he had control and command.

2 My Lords, I find a lot of solace and comfort in the  
3 assurance by the Chamber that this case is going to be  
determined  
4 on the basis of the indictment that has been filed against my  
10:33:29 5 client. This was consistently reiterated by Your Lordships  
6 during the presentation of testimony in this case. I recall  
his  
7 Lordship, Justice Itoe, remarking that the Prosecution will  
live  
8 or die with their indictment, and that is very comforting to  
me  
9 this morning.

10:34:04 10 I want to refer Your Lordships to paragraph 27 of the  
11 indictment. This paragraph, very clearly, states that the  
second  
12 accused became the RUF battle group commander in early 2000.  
13 Assuming that is correct, and on the basis that the indictment  
is  
14 what guides us in these proceedings, what that means, then --

10:34:58 15 JUDGE ITOE: You say the indictment alleges that he  
became  
16 battle group commander on what date?

17 MR OGETO: Early 2000.

18 JUDGE ITOE: Thank you.

19 MR OGETO: Now, I was saying, that assuming that is



10:35:27 20 correct, My Lords, and given that this indictment is the basis  
of  
21 these proceedings, and in view of the submissions that have  
been  
22 made by the Prosecution in the final brief, what that means,  
23 then, is that the accused Kallon started to have command  
24 authority, control authority in early 2000. That cannot be  
10:35:52 25 disputed.

26 PRESIDING JUDGE: You mean to say, command and control  
in  
27 early 2000 as battle group, assuming the facts establishes  
that  
28 he was battle group commander in 2000?

29 MR OGETO: Yes. And based upon the submissions of the

1 Prosecution that it was assignment and appointment that  
conferred 2 command and authority. That is their case. So --

3 PRESIDING JUDGE: I am not sure their case is really  
4 limited to that but I hear what you are saying.

10:36:30 5 MR OGETO: That is an important aspect of their case, My  
6 Lord.

7 PRESIDING JUDGE: It is. I'm not --

8 MR OGETO: And [Indiscernible]

9 PRESIDING JUDGE: -- I'm saying, as I listen to you,  
it's,

10:36:39 10 to my reading, and again it's not a detailed reading because  
11 there is too much to read --

12 MR OGETO: Yes.

13 PRESIDING JUDGE: -- but my recollection and  
understanding

14 is not limited solely to that. That you say it's an important  
10:36:53 15 aspect, probably.

16 MR OGETO: Extremely important, My Lords. And I agree  
that

17 there could be other aspects but this is the case that we were  
18 notified about by the Prosecution.

19 PRESIDING JUDGE: Yes, but then you also refer to  
paragraph

10:37:06 20 24 of the indictment because this is -- that is where the

relevant 21 allegations concerning your client starts. At all times  
in 22 to this indictment Kallon was a senior officer and commander  
on 23 the RUF junta and the AFRC/RUF forces, so, and then it carries  
24 to paragraph 27 that you've just referred to. So, it's not  
10:37:29 25 necessarily limited --

26 MR OGETO: Yes.

27 PRESIDING JUDGE: -- only to this paragraph 27.

28 MR OGETO: I understand but [microphone not activated]

29 PRESIDING JUDGE: I'm sorry, I may have cut off your

1 microphone.

2 MR OGETO: That seniority -- that seniority that is  
3 discussed in the indictment is pegged to the assignment which  
the  
4 Prosecution alleges.

10:37:53 5 PRESIDING JUDGE: That is your position. That is fine.  
We  
6 will listen to you. I don't want to interrupt you. I just  
want  
7 to make sure that I understand clearly what your position is  
in  
8 this respect, Mr Ogeto.

9 MR OGETO: Yes, My Lords. So, My Lords, it's important  
to  
10:38:07 10 then understand what Prosecution witnesses testified to in  
11 relation to this issue and it's important also to point out to  
12 the Chamber that the Prosecution admits that, paragraph 211,  
that  
13 its witnesses were unable to agree on the exact positions of  
14 assignment held by the accused. And then what is interesting  
is

10:38:53 15 that at paragraph 191 the Prosecution makes what I consider,  
with  
16 due respect to them, a very bizarre submission. They  
acknowledge  
17 the contradictions in their testimonies by Prosecution  
witnesses  
18 but they say that these contradictions are, in fact, a

19 demonstration of credibility.

10:39:25 20 JUDGE ITOE: This is paragraph what, Mr Ogeto?

21 MR OGETO: Paragraph 191, My Lords.

22 JUDGE ITOE: Thank you.

23 MR OGETO: It's a difficult argument to follow how

24 contradictions, in the testimonies of Prosecution witnesses,  
on

10:39:41 25 an important issue in the proceedings, can be a demonstration  
of

26 credibility. But, be that as it may, My Lords, the confusion

27 that has been created by Prosecution witnesses, regarding the

28 position that Kallon held in the relevant periods of the

29 indictment is truly confounding, and I wish to start with the

Your  
period.  
10:41:11  
explain  
testimony.  
10:41:43  
Jordash,  
this  
10:42:19  
366,  
was

1 testimony of TF-371. TF-371, a very senior RUF officer, as  
2 Lordships know, stated before Your Lordships that Mr Kallon  
3 became battle group commander of the RUF before the junta  
4 That is a big and significant contradiction of the indictment.  
5 When 371 was confronted with testimony to the contrary,  
6 documentary testimony to the contrary, he wasn't able to  
7 the basis for his saying that Mr Kallon was battle group  
8 commander before the junta period. He persisted to make that  
9 allegation throughout the proceedings, throughout his  
10 The other witness is TF1-366. Your Lordships are also  
11 familiar with this witness. My good learned friend, Mr  
12 yesterday made extensive submissions on the credibility of  
13 witness, and I don't wish to repeat what he said. So this  
14 witness said that Mr Kallon was battle group commander in Kono  
15 from March 1998. Incidentally, these two witnesses, 371 and  
16 also stated that Kallon was the overall commander in Kono in  
17 1998, after the retreat, and, of course, this is despite the  
18 overwhelming testimony to the contrary.  
19 We have documentary evidence; we have Exhibit 7, which

10:43:04 20 prepared by witness TF-167. We have salute reports from Sam  
battle 21 Bockarie which clearly indicate that Mr Kallon was not the  
22 group commander in Kono in 1998. In fact, we have a salute  
23 report from Superman -- I think it's Exhibit 36 -- 32, My  
24 Lords -- where Superman himself says he was in control of Kono  
in  
10:43:46 25 1998, and this is an exhibit that was tendered by the  
26 Prosecution, and in that exhibit Superman actually condemns  
27 Mr Kallon for frustrating his efforts to fully control Kono.  
28 My Lords, when 371 was confronted with this exhibit, he  
29 stated it was not true but he had no basis for saying it was  
not

1 true. And, My Lords, this is a document that was written by  
2 Superman, addressed to Foday Sankoh, and 371 could not explain  
3 why Superman would impersonate himself to the leader of the  
4 movement.

10:44:55 salute

5 JUDGE ITOE: What exhibit are you referring to, the  
6 report? Is it exhibit 32?

7 MR OGETO: 32, My Lords.

8 JUDGE ITOE: 32.

9 MR OGETO: 32, yes.

10:45:21

10 JUDGE ITOE: Thank you.

There

11 MR OGETO: My Lord, I am told 32 is a radio message.

have

12 is also a salute report addressed to the leader and we also

13 35, Exhibit 35, which is also a salute report.

is

14 PRESIDING JUDGE: That is the one you referred to which

10:45:40

15 the salute report by Bockarie; isn't it?

16 MR OGETO: By Bockarie.

17 PRESIDING JUDGE: Exhibit 35.

18 MR OGETO: Yes, My Lords, by Bockarie.

19 PRESIDING JUDGE: Yes.

10:45:48

20 MR OGETO: And, My Lords, those exhibits are quite clear

overall

21 that Mr Kallon was not battle group commander, he was not



also 22 commander in Kono at that time, after the retreat. There is

23 Exhibit 9.

24 PRESIDING JUDGE: That is the [indiscernible] Exhibit 9?

10:46:16 25 MR OGETO: Yes, My Lords.

26 PRESIDING JUDGE: By 167, is it?

witness 27 MR OGETO: Yes, My Lords, yes. My Lords, what is  
28 surprising about the Prosecution case is that we have a

071 29 like TF-071, who was in Kono after the retreat, and witness

1 was very clear about the position held by Mr Kallon. He  
stated  
2 quite clearly that Mr Kallon was neither the overall  
commander,  
3 nor the deputy; he was an officer present in Kono. In fact,  
071  
4 even stated that Mr Kallon did not have any control, any  
10:47:13 5 authority over people like Rocky CO. And 071, as Your  
Lordships  
6 know, was a witness who dealt with civilians on a regular  
basis,  
7 by virtue of his duties, and is a witness who would have  
known,  
8 very clearly, the position held by Mr Kallon. And therefore,  
he  
9 was quite clear that Mr Kallon did not hold the positions  
10:47:56 10 testified to by 371 and 366.

11 Now, whereas 371 and 366 say Kallon was the overall  
12 commander, 361 and 360 state that Kallon was the deputy to  
13 Superman. But something interesting about 361 is that during  
14 cross-examination by the Kallon Defence the witness admitted a  
10:48:41 15 prior statement that he had made to the effect that he did not  
16 know Mr Kallon well, while in Kono. Mr Kallon did not have a  
17 radio, while in Kono, and Mr Kallon did not have a radio  
because  
18 he did not have an area of responsibility in Kono. That is  
what  
19 361 said.

10:49:20 20  
Kono,

21  
have

22  
because

23  
place

24  
10:50:02 25

26

27

28

29  
of

So, the question is: If you have a radio operator in  
who does not know Mr Kallon well, who says Mr Kallon did not  
a radio, and who says that Mr Kallon did not have a radio  
he did not have an area of responsibility, then, how do we  
the testimony of 371, who was in Buedu? How do we place the  
testimony of 366, who, as we have demonstrated, has a clear  
motive to accuse Mr Kallon? And there is also something  
interesting about 361 and 360.

360 says, in his testimony, that during the retreat from  
Freetown to Kono, Mr Kallon was in Makeni. 361, a colleague

1 360, both were radio operators --

2 PRESIDING JUDGE: Yes, Mr Harrison.

3 MR HARRISON: Can I just, because there is a large  
gallery

4 here, pass a note to the Court clerk so that it can be  
conveyed

10:51:16 5 to the Trial Chamber, so that it's clear what the problem is  
that

6 is arising right now?

7 PRESIDING JUDGE: It has to do with protective measures?

8 Well, maybe I missed something but there is nothing I've heard  
up

9 until now that would raise concerns, but maybe you did.

10:51:50 10 MR HARRISON: There is only a very small number of

11 people --

12 PRESIDING JUDGE: Who occupied those positions, yes.

13 JUDGE ITOE: There were many radio commanders in the

14 evidence of -- in the entire evidence that was adduced by the

10:52:07 15 Prosecution, so I don't think, when there is a reference, in  
my

16 opinion, I don't think that there is a reference to radio

17 commanders, there is -- it identifies any particular one.  
That's

18 the way I reason, on a first view, you know, of that. I

19 honestly, I, who, we who are very familiar, you know, are not

10:52:30 20 even able to place who it is, you know, so how would the  
public?

21                   PRESIDING JUDGE: Anyhow, we have noted your concerns,  
22                   Mr Harrison and, Mr Ogeto, I just remind you there are  
protective  
23                   measures as you know, [indiscernible] all, I would say most of  
24                   these witnesses, if not all of them, and obviously when you  
10:52:53 25                   mention the function vis-a-vis a particular individual, I  
mean,  
26                   it may, and by putting the two together, disclose some  
27                   information that you did not intend to do but just some  
caution.  
28                   MR OGETO: I appreciate that, My Lords, and I was truly  
29                   conscious of it but I take your point, My Lords.

1           So, I was relating the testimonies of 361 and 360 and I  
was  
2           saying that during the retreat, 360 and 361 --

3           PRESIDING JUDGE: Try again.

4           MR OGETO: Yes; is it okay now?

10:53:51 5           PRESIDING JUDGE: Yes, it's okay now, yes.

6           MR OGETO: So, 361 and 360 were both in Makeni during  
the  
7           retreat, and both of them travelled to Kono together. They  
were  
8           actually close friends. What is interesting, My Lords, is  
that

9           360 says Kallon was in Makeni all the way to Kono and that  
Kallon  
10:54:26 10          was actually the interface, that is the term he uses, he was  
the  
11          interface between the soldiers and the civilians.

12          361 doesn't know anything about this. In fact, 361 says  
13          that during the retreat from Freetown to Kono, Kallon was not  
in  
14          Makeni, he was in Liberia, and that Kallon only came back to  
Kono

10:55:01 15          a week after the arrival of the troops in Kono, and that  
Kallon  
16          actually did not find JPK in Kono.

17          It's important to note that 360, on the other hand, and  
18          both of them were in Kono at that time, 360 says Kallon was in  
19          Kono. Kallon was with JPK in Kono, and that Kallon, indeed,

10:55:47 20 attended meetings convened by JPK in Kono.  
21 So here you have two witnesses living together,  
performing  
22 the same function, an important function, but saying or giving  
23 information that is extremely contradictory. So one wonders,  
My  
24 Lords, who is picking the truth and what is interesting is  
that  
10:56:29 25 the Prosecution is relying on all these witnesses. They are  
all  
26 in the brief. And the Prosecution does not assist the Chamber  
in  
27 any way by suggesting to the Chamber as to who should be  
28 believed. So they are leaving it to Your Lordships to  
untangle  
29 the puzzle.

1           Very interesting again, 371 says that when the  
retreating  
2           forces arrived in Kono, Kallon left with JPK to Buedu. He  
stayed  
3           in Buedu, together with 371 and Sam Bockarie, for close to two  
4           months; two or three months. That's what 371 says, that  
Kallon  
10:57:43 5           was not in Koidu after the retreat at least for about two  
6           months -- he was in Buedu -- and this is a senior RUF officer,  
we  
7           cannot say that he forgot. He was very positive. We cannot  
say  
8           he did not know Kallon, he mistook him; he knew him.  
9           366 contradicts 371. 366 says he was constantly with  
10:58:22 10          Kallon in Koidu. Who do we believe? And what kind of case is  
11          this where the accused does not know exactly what to defend?  
Is  
12          he supposed to defend himself in relation to Buedu, that he  
was  
13          there for two months? That he was with the High Command in  
Buedu  
14          for two months? Is he supposed to defend himself in relation  
to  
10:58:55 15          the allegations of 366, that he was in Kono throughout,  
16          committing offences?  
17          It is simply not possible, My Lords, to defend  
yourselves  
18          in the light of such allegations; in the light of such



19 contradictory allegations; and this is compounded by the fact  
10:59:20 20 that the indictment is not clear.

21 I will give you another example, My Lords, about the  
22 difficulties we have.

23 PRESIDING JUDGE: Yes, but, Mr Ogeto, isn't it indeed a  
24 question of reasonable doubt? If that is the case, and the  
10:59:40 25 evidence is so confusing being these kind of contradictions as  
26 such, questions for this Court to assess credibility and then  
27 make a determination. So, you say he chooses to know the  
case,  
28 well, the case is what you have, the allegations. If what the  
29 evidence is brought is evidence that does not support the

1 allegation, well, the Court will have to act accordingly. I  
2 mean, isn't it a question of -- you are alleging these --

3 MR OGETO: It goes to the --

key

4 PRESIDING JUDGE: -- to describe contradictions between  
5 witnesses.

11:00:09

6 MR OGETO: Yes, My Lords, and I am sorry, My Lords. My  
7 submission is that this really goes to the root of the  
8 Prosecution case. It shows the nature of the fabrications  
9 against Mr Kallon because you cannot have key witnesses giving

11:00:26  
indictment

10 such contradictory testimonies, particularly when the  
11 is not clear. It creates enormous difficulties for the  
12 person, and this is what I'm trying to establish.

accused

13 And what is more worrying, My Lords, is that the  
14 allegations made by these two witnesses, 371 and 366

11:01:03  
who

15 particularly, contradict the indictment. These are witnesses  
16 have been presented by the Prosecution but they contradict the  
17 indictment. So, what do we say? We can only conclude that

the

18 Prosecution has not proved its case as spelt out in the  
19 indictment.

11:01:42  
does

20 And it creates difficulties because the accused person

21 not know the exact position that is being attributed to him,  
22 because this has serious consequences, implications for  
command  
23 responsibility. How does he defend himself? Was he battle  
group  
24 commander? Was he a mere officer? Was he the overall  
commander  
11:02:09 25 in Kono? Was he the deputy in Kono? It's difficult to defend  
26 yourself in the light of this kind of testimonies.  
27 And, My Lords, I wish to refer you to an authority, an  
ICTY  
28 authority --  
29 PRESIDING JUDGE: Is this contained in your brief,  
written

1 brief?

2 MR OGETO: No.

3 PRESIDING JUDGE: It's another one?

4 MR OGETO: It's not.

11:02:40 5 PRESIDING JUDGE: Okay. And it is not in the binder  
that

6 you have provided the Court with?

7 MR OGETO: It is.

8 PRESIDING JUDGE: It is?

9 MR OGETO: It is in the binder. I cannot place my hand  
--

11:03:05 10 it's in my own binder.

11 JUDGE ITOE: Why don't you continue and give it to us

12 later.

13 MR OGETO: Let me continue, My Lords.

14 JUDGE ITOE: So that you don't burn off your time.

11:03:17 15 MR OGETO: Yes. I'm really burning it. My Lords --

16 PRESIDING JUDGE: Yes, Mr Ogeto, please carry on.

17 MR OGETO: Yes. My Lords, the other issue that I wanted  
to

18 raise relates to the offence of looting, and the reason why I  
am

19 raising this is because it shows the nature of the Prosecution

11:04:20 20 once again.

21 Mr Kallon is charged with, according to the witnesses at

not 22 least, with looting a bank in Kono. Now, of course, this is

brief. 23 pleaded in the indictment, and it's not in the pre-trial

brief 24 PRESIDING JUDGE: And not in the supplementary trial

11:04:55 25 either?

26 MR OGETO: It is not there, My Lords.

27 JUDGE THOMPSON: When you say he is charged with --

28 MR OGETO: Maybe I used the wrong term.

29 JUDGE THOMPSON: Precisely because if it's --

1 MR OGETO: Yes, I used the wrong term.

2 JUDGE THOMPSON: Because if he is charged with and it's  
not  
3 pleaded in the indictment I find it difficult to process the  
two.

4 MR OGETO: It's a bit clumsy My Lords, I agree.

11:05:12 5 JUDGE THOMPSON: Well, a rather random thought.

6 MR OGETO: He was accused by witnesses --

7 JUDGE THOMPSON: Yes.

8 MR OGETO: -- for robbing a bank in Koidu.

9 JUDGE THOMPSON: In other words, evidence was led to  
that.

11:05:27 10 MR OGETO: Evidence was led, yes, My Lord.

11 JUDGE THOMPSON: But there is nothing in the indictment,  
12 you say --

13 MR OGETO: Nothing in the indictment.

14 JUDGE THOMPSON: All right.

11:05:27 15 MR OGETO: Nothing in the pre-trial brief.

16 JUDGE THOMPSON: Thanks.

17 PRESIDING JUDGE: When you say nothing, you mean nothing  
18 specific about a bank being robbed?

19 MR OGETO: Nothing specific about a bank being robbed  
by, I

11:05:38 20 say Mr Kallon.

21 PRESIDING JUDGE: Yes, yes.

22 MR OGETO: And the notice we received and this is --

23 JUDGE THOMPSON: And for a greater degree of clarity --

24 MR OGETO: Yes.

11:05:44 25 JUDGE THOMPSON: -- no specific or corresponding charge  
in

26 the indictment?

27 MR OGETO: Corresponding in terms of?

28 JUDGE THOMPSON: Well, if you say there is evidence led  
--

29 MR OGETO: Yes.

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1 JUDGE THOMPSON: -- is there a disconnect between what  
was  
2 adduced in Court and the road map which is the indictment?

3 MR OGETO: Okay. The road map is not very clear because  
it  
4 talks about looting generally.

11:06:09 5 JUDGE THOMPSON: I see. Quite. That is what I am  
trying  
6 to process.

7 MR OGETO: Yes.

8 JUDGE THOMPSON: Yes, quite.

9 PRESIDING JUDGE: But there is allegation in the  
indictment  
11:06:15 10 on the count 14 about Kono District.

11 MR OGETO: Yes, there is. I don't -- there is no doubt  
12 about it.

13 PRESIDING JUDGE: I just want to make it clear as well,  
for  
14 our own understanding --

11:06:26 15 MR OGETO: Yes, My Lords.

16 PRESIDING JUDGE: -- that there is no confusion on that  
17 issue.

18 MR OGETO: Yes, yes.

19 PRESIDING JUDGE: Your specific issue is that although  
11:06:33 20 there are allegations of looting there is no allegation of  
21 looting of a bank in Kono?



22 MR OGETO: In Kono.

23 PRESIDING JUDGE: During that period of time.

24 MR OGETO: Yes.

11:06:42 25 PRESIDING JUDGE: Okay.

26 MR OGETO: And all the witnesses who testified --

27 JUDGE THOMPSON: And the issue is specifically relating  
to

28 your client?

29 MR OGETO: Yes, My Lords.

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1 JUDGE THOMPSON: Yes. Thank you.

2 JUDGE ITOE: The issue is what is your position about  
the

3 lack of specificity of looting in relation to a particular  
bank,

4 as far as the submissions you are making are concerned? There  
is

11:07:07 5 a general allegation of looting in Kono. You are saying that  
6 there is no specific allegation about looting a bank?

7 MR OGETO: By Kallon, yes.

8 JUDGE ITOE: Yes, by Kallon.

9 MR OGETO: Yes. Yes.

11:07:21 10 JUDGE ITOE: Where do you stand? What submission are  
you

11 making in this regard?

12 MR OGETO: The submission I am making is that the  
13 indictment ought to have pleaded the fact that Mr Kallon  
robbed a

14 bank. It is not enough to talk about looting generally or  
11:07:37 15 looting in Kono without saying it was Mr Kallon who robbed or  
who

16 looted the bank.

17 JUDGE ITOE: Thank you.

18 MR OGETO: More fundamentally --

19 JUDGE ITOE: I don't want to go any further in these  
11:07:49 20 matters.

21 JUDGE THOMPSON: Let me go further.  
22 MR OGETO: Yes, My Lord.  
23 JUDGE THOMPSON: In shorthand legal language --  
24 MR OGETO: Yes.  
11:07:55 25 JUDGE THOMPSON: -- the indictment is defective.  
26 MR OGETO: Defective.  
27 JUDGE THOMPSON: Right.  
28 MR OGETO: Extremely defective.  
29 PRESIDING JUDGE: And on this particular issue, it is

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1 defective, if I can pursue that because this is here an  
2 allegation through witnesses by the Prosecution of a specific  
3 crime being committed by your client.

4 MR OGETO: Yes.

11:08:11  
looting

5 PRESIDING JUDGE: It's not just looting as general

particular

6 in Kono but this is a particular act of looting, at a  
7 time, by your client, your client himself?

8 MR OGETO: Yes, My Lord.

9 PRESIDING JUDGE: Is it what you are saying?

11:08:25

10 MR OGETO: Yes, [overlapping speakers] it is.

11 PRESIDING JUDGE: This evidence implies directly your  
12 client at one specific time?

13 MR OGETO: Yes.

14 PRESIDING JUDGE: Committing himself those crimes?

11:08:34

15 MR OGETO: Yes, My Lords.

that

16 JUDGE ITOE: And you are saying that we don't have a  
17 pre-trial brief here, you know, a supplemental brief. I don't  
18 want you to refer to that. Are you telling the Chamber that

indictment,

19 specific looting was not pleaded as it was not in the

11:08:58  
trial

20 also in the pre-trial brief or even in the supplemental pre-

21 brief.

22 MR OGETO: Yes.

23 JUDGE ITOE: Looting of the bank.

24 MR OGETO: Yes, My Lord.

11:09:09 25 JUDGE ITOE: Of the bank.

26 MR OGETO: In fact, My Lords, that is the point I was

27 coming to.

28 JUDGE ITOE: All right. Okay.

29 MR OGETO: The notice, the notice we received in the

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1 pre-trial brief relates to the looting of the National Bank in  
2 Bo, not in Kono. So there is a divergence between the notice  
3 that we received and the testimonies that were tendered before  
4 the Chamber.

11:09:38 5 JUDGE THOMPSON: The subsidiary notice? Because --

6 MR OGETO: Yes, subsidiary.

7 JUDGE THOMPSON: -- speaking precisely --

8 MR OGETO: Yes.

9 JUDGE THOMPSON: -- it is the indictment which is the  
11:09:48 10 governing or controlling notice?

11 MR OGETO: Yes, My Lords.

12 JUDGE THOMPSON: Right.

13 MR OGETO: Yes. And the reason I am making this  
submission

14 is because the Prosecution say that they have gone to great  
11:09:59 15 lengths to cure the defective indictment. I admit that an  
16 indictment can be cured in certain circumstances but,  
according  
17 to Kupreskic the cure must be clear, timely and consistent.

18 Now, the question one may want to ask in this particular  
19 instance is whether there has been a cure. The Prosecution  
says

11:10:39 20 witness statements are sufficient to cure a defective  
indictment.

21 We disagree. But even assuming that argument is correct, is  
the

22 test in Kupreskic satisfied? Clear, consistent and timely  
23 information in relation to this allegation of looting. Not at  
24 all because the notice that the accused Kallon received  
relates  
11:11:07 25 to the looting of a bank in Bo and not in Kono.

26 PRESIDING JUDGE: And the notice about Bo was a notice  
27 alleging Kallon in Bo?

28 MR OGETO: Yes.

29 PRESIDING JUDGE: So it was specific to Kallon but to

1 Kallon in Bo?

2 MR OGETO: In Bo. That is the only notice we received.

3 PRESIDING JUDGE: Okay.

4 MR OGETO: And in relation to Kono, where you expect  
notice

11:11:31 5 in the pre-trial brief in relation to looting of the bank by  
6 Kallon, there is a different kind of looting ascribed to  
7 Mr Kallon.

8 The pre-trial brief says, the supplementary pre-trial  
brief

9 says that Mr Kallon was involved in the looting of sheep,  
11:12:04 10 animals. That is the notice we received, so we were prepared  
to

11 defend this; he looted sheep in Kono, not money from a bank.  
So,

12 My Lords, you can see the difficulties that we have in trying  
to  
13 defend this case.

14 I wish to refer Your Lordships very briefly to some  
11:12:39 15 jurisprudence because I don't have time. My learned friend,  
16 Mr Jordash, did a good job on this but I have additional  
17 jurisprudence that I wish to refer to Your Lordships in  
relation

18 to the issue of notice, and witness statements, as a mode of  
19 curing a defective indictment.

11:13:23 20 JUDGE ITOE: We would appreciate if they are not in any  
of



21 your folders --

22 MR OGETO: Yes.

23 JUDGE ITOE: -- we would appreciate, even after you have

24 referred to them here, that you submit to the Chamber legal

11:13:35 25 officers --

26 MR OGETO: Yes, I will.

27 JUDGE ITOE: -- all the jurisprudence you are relying

on.

28 MR OGETO: Yes, My Lords.

29 JUDGE ITOE: And I am saying this, you know, to -- I

think

1 it would help us, from all the parties.

2 MR OGETO: Thank you, My Lords.

3 JUDGE ITOE: Prosecution and all the Defence teams,  
please.

4 MR OGETO: Thank you, My Lords. I will oblige, My  
Lords.

11:13:56 5 The first authority I wish to refer to your Your  
6 Lordships --

7 PRESIDING JUDGE: And it is not in the binder you gave  
us  
8 this morning either?

9 MR OGETO: It is.

11:14:06 10 PRESIDING JUDGE: It is? Okay.

11 MR OGETO: Yes, it is. Only that my assistant is not  
here  
12 to tell me exactly where it is, My Lords, but in due course I  
13 will --

14 PRESIDING JUDGE: We have copies of it.

11:14:14 15 JUDGE ITOE: But you can summarise it, Mr Ogeto.

16 MR OGETO: That is what I want to do, My Lords. Yes.  
It  
17 says, My Lords, this is a decision, an ICTR decision, on  
18 Ntabakuzi interlocutory appeal on questions of law. It is  
dated

19 18 September 2006 at paragraph 26. The Chamber say:

11:14:40 20 "Where a Trial Chamber considers that a defective

Prosecution 21 indictment has been subsequently cured by the  
22 it should further consider whether the extent of the  
23 defects in the indictment materially prejudice an  
accused's 24 right to a fair trial by hindering the preparation of a  
11:15:02 25 proper Defence."

26 My Lords, even where the Prosecution alleges that the  
27 defects in the indictment have been cured, this jurisprudence  
28 confers upon the Chamber the authority to explore the matter  
29 further, to determine whether, in view of the extent of the

1 defects, the Defence has been hampered in its efforts to mount  
a  
2 proper defence. So it's not enough for the Prosecution to  
say:  
3 The defects have been cured. The Chamber has the discretion.  
4 The Chamber has the power to explore this matter further.

11:16:02 5 My Lords, the Prosecution states that we did not ask for  
an  
6 adjournment; we did not -- we cross-examined witnesses,  
7 Prosecution witnesses. My Lords, that does not waive the  
right  
8 of the Defence to plead prejudice at the end of the case. And  
9 the ICTR has also considered this issue, a similar issue, and  
11:16:53 10 this is the case of Prosecution versus Muhimana, judgment of  
28  
11 April 2005. That will be in tab 5, My Lords, of the bundle.  
12 And, My Lords, on a similar issue the Chamber stated as

follows:  
13 "The analysis of prejudice to the accused is not  
dependent  
14 on whether the accused manages to call any witnesses in  
11:17:37 15 rebuttal if the accused is not given clear and timely  
16 notice of specific allegations he or she is not in a  
17 position to appreciate or understand the full case to be  
18 met."

19 So it's not enough to say you suffer no prejudice  
because

11:18:05 20 you called witnesses; you called Defence witnesses to rebut  
the  
21 Prosecution case. It's not enough to say you cross-examined  
22 Prosecution witnesses. It is important that the Prosecution  
23 provides, through the key documents, which is the indictment,  
24 probably the pre-trial brief, a clear case that the accused  
has  
11:18:33 25 to meet.

26 The other jurisprudence, My Lords, relates to witness  
27 statements, and I think my colleague, Mr Jordash, has already  
28 dealt with that and there is no need for me to repeat what he  
has  
29 said. I simply adopt the jurisprudence that Mr Jordash cited  
to

1 Your Lordships.

2 So, now, I will move to another issue. I don't seem to  
3 have much time.

4 JUDGE ITOE: I think you still have about some 30  
minutes

11:19:24 5 to go, from my computation.

6 MR OGETO: Thank you, My Lords.

7 JUDGE ITOE: From when you started.

8 MR OGETO: Thank you, My Lords.

9 JUDGE ITOE: I say from my computation. I may be wrong.

11:19:33 10 MR OGETO: In that case let me --

11 PRESIDING JUDGE: There is no split decision on this.

12 MR OGETO: Thank you, My Lord. It's always good to hear  
13 there is consensus, unanimity.

14 PRESIDING JUDGE: That's fine. You have -- but if you  
keep

11:19:46 15 speaking though, you may not have another 30 minutes so --

16 MR OGETO: We will deduct it from the overall.

17 Your Lordships, in that case, let me point out some  
other

18 additional jurisprudence on witness statements, and this is --

19 JUDGE ITOE: But can you -- you referred to one --

11:20:07 20 MR OGETO: Yes, My Lords.

21 JUDGE ITOE: -- which you said you were adopting that  
was

22 cited by learned lead counsel Mr Jordash.

23 MR OGETO: Yes, My Lords.

24 JUDGE ITOE: Can you refresh the Chamber's memory on  
this,

11:20:33 25 please?

26 MR OGETO: This, I generally said that Mr Jordash --

27 JUDGE ITOE: I thought you were referring to a  
particular

28 case on which Mr Jordash may have relied in making his

29 submissions on this point?

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1 MR OGETO: No, I don't have them here.

2 JUDGE ITOE: You don't have them here. All right. Go  
3 ahead.

4 MR OGETO: I simply adopt that generally, the  
jurisprudence

11:20:37 5 jurisprudence that he cited. But I have another useful, I  
guess,

6 useful jurisprudence. Prosecutor v Ntakirutimana, it is  
appeals,

7 ICTR Appeals Chamber judgment, 13 December 2004.

8 JUDGE ITOE: What date, please?

9 MR OGETO: 13 December 2004. The Chamber said:

11:21:10 10 "The test is not directed to the clarity and consistency  
of

11 the Prosecution's evidence as disclosed to the accused  
but,

12 rather, the clarity and consistency of the Prosecution's  
13 announcement of the material facts it intends to prove."

14 So, quite clearly, My Lords, it is not the evidence that  
is

11:21:39 15 important; it is not the timely disclosure of evidence that is

16 important; it is the timely and clear and consistent  
information

17 in the indictment, in the pre-trial brief, and probably in the  
18 opening statement that is important.

19 And further with this, there's another decision,  
Prosecutor



11:22:12 20 v Bagosora. This is a decision on Ntabakuze's motion for  
21 exclusion of evidence, 29 June 2006, at paragraph 6. That is  
at  
22 tab 9 in the bundle and this is what the learned Chamber said:  
23 "The presence of a material fact somewhere in the  
24 Prosecution's disclosure does not suffice to give  
11:22:58 25 reasonable notice. What is required is notice that the  
26 material fact will be relied upon as part of the  
27 Prosecution case and how."  
28 So it's not sufficient to say that you have disclosed  
29 witness statements; that the allegations are somewhere in  
those

jurisprudence

only

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misrepresentations

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11:25:40

1 statements and that that is sufficient notice. The  
2 says, no, you have to give notice of the allegations and how  
3 those allegations relate to the accused person and you can  
4 do that by way of the indictment, pre-trial brief or opening  
5 statement.  
6 My Lords, let me now move to a slightly different issue.  
7 minute, My Lords. Now, in the Prosecution's final brief, the  
8 Prosecutor has made what we consider serious  
9 of the evidence and I think it is important for me to point  
10 out to the Chamber.  
11 At paragraph 438, the Prosecution alleges that the  
12 of a pregnant woman was cut open by rebels in the presence of  
13 second accused to determine the sex of the child. My Lords,  
14 submission is that this is a totally misleading submission.  
15 a misrepresentation. The testimony on this issue is that this  
16 pregnant woman had been stabbed. The stomach had been slit by  
17 the time the accused arrived on the scene. That is what the  
18 evidence states.

because 19                   And this misrepresentation, My Lords, is important  
11:26:29 20                   it has got serious implications for the liability and  
21                   responsibility of the accused and, as my learned friend  
this 22                   Mr Jordash said, there are several sad misrepresentations in  
23                   brief.  
of 24                   JUDGE ITOE: It is not enough to say there are several  
11:26:47 25                   these representations. I mean, misrepresentations I think --  
26                   MR OGETO: I am giving further examples, My Lords.  
27                   JUDGE ITOE: The Chamber needs to have been guided. I  
28                   suppose we are so guided in your final briefs.  
have 29                   MR OGETO: No, we didn't have it, My Lords, we didn't

1 it. We didn't have it at the time we were --

2 JUDGE ITOE: Well, you have the time now to do that very  
3 very rapidly in order to let us know. Although we have all  
the  
4 evidence before us and we will look through it but you may  
submit

11:27:15 5 on that.

6 MR OGETO: Yes, My Lords. And this is what I am doing.  
My  
7 Lords, the [indiscernible] misrepresentation relates to the  
8 testimony of TF1-288 and DIS-310. These are witnesses who  
were  
9 abducted and taken to Yengema, in Kono. One is a Prosecution  
11:27:52 10 witness, the other is a Defence witness.

11 At paragraph 1197 of the Prosecution final brief, the  
12 Prosecution alleges that these two witnesses saw the first and  
13 second accused about four times visiting and giving orders to  
14 TF-362. That statement, My Lords, is not correct. DIS-310,  
who  
11:28:34 15 is a Defence witness --

16 JUDGE ITOE: That he saw the first and second accused  
doing  
17 what?

18 MR OGETO: Visiting Yengema and giving orders to  
19 Prosecution witness TF1-362. Now, the Prosecution says that  
11:28:53 20 these two witnesses corroborate each other. The true state of

so

21 the evidence, My Lords, is that this allegation was made by  
22 TF1-288. DIS-310 contradicted the Prosecution witness TF-288,

23 it's not correct for the Prosecution to allege that both  
24 witnesses stated that my client visited Yengema four times.

11:29:31 25 JUDGE ITOE: Can you take that again please; who  
26 contradicted who?

27 MR OGETO: The Defence witness.

28 JUDGE ITOE: DIS-310?

29 MR OGETO: 310.

SCSL - TRIAL CHAMBER I

1 JUDGE ITOE: Yes.

2 MR OGETO: During his testimony before Your Lordships  
3 contradicted TF1-288. Whereas TF1-288 stated that my client  
4 together with the first accused visited Yengema, DIS-310 never  
11:30:12 5 gave such testimony. In fact, he denied any knowledge of my  
6 client visiting Yengema at that time. So, it's not correct  
for  
7 the Prosecution to allege that both witnesses stated that my  
8 client went to Yengema and this also has serious, serious  
9 implications.

11:30:38 10 PRESIDING JUDGE: But did you, I haven't checked the  
11 footnote as to the reference in the transcript because all of  
12 these, that evidence, is obviously footnotes making reference  
to  
13 transcripts.

14 MR OGETO: Yes.

11:30:49 15 PRESIDING JUDGE: So is this an improper interpretation  
of  
16 the evidence or this is -- the evidence is not there?

17 MR OGETO: The evidence is not there at all.

18 PRESIDING JUDGE: It's not there at all?

19 MR OGETO: It's not even, it's not even an improper  
11:31:03 20 interpretation, My Lords. It is not there. DIS-310 was quite  
21 clear because we cross-examined him at length on this issue,  
and

22 he was quite categorical, quite clear. That my client, he did  
23 not see my client there.

24 The other issue, My Lords, relates to the selective  
nature

11:31:40 25 in which the Prosecution has picked its witnesses in relation  
to

26 certain serious allegations and one example is TF-035. The  
27 Prosecution alleges that the second accused participated in  
28 killings at Cyborg Pit, but there is no mention by the  
29 Prosecution of the fact that 035 was actually relying on

1 hearsay -- I'm not saying hearsay is not admissible -- but  
it's  
2 not clear why the Prosecution would prefer to rely on the  
hearsay  
3 testimony of 035 and ignore the testimony of TF1-367 who gave  
4 direct testimony on this, who was a senior officer of the RUF.

11:33:01 5 JUDGE ITOE: TF?

6 MR OGETO: TF1-367.

7 JUDGE ITOE: 367?

8 MR OGETO: Yes, My Lords. So the Prosecution prefers to  
9 utilise the testimony of TF-035 which is hearsay, as opposed  
to

11:33:24 10 TF1-367 and, as Your Lordships may recall, TF1-367 was very  
clear

11 that my client was not in Tongo. My client was not in Kenema  
at

12 the time of the killings in Tongo and, in fact, he emphasised

13 that my client was nowhere near there. So the Prosecution

14 doesn't point this out to the Chamber. And also, My Lords, in

11:34:06 15 relation to Tombodu, at paragraph 522 of the Prosecution final  
16 brief, the Prosecution relies on --

17 PRESIDING JUDGE: What is that?

18 MR OGETO: Sorry, My Lords 522.

19 PRESIDING JUDGE: 522.

11:34:26 20 MR OGETO: Yes. As Your Lordships are aware the  
21 allegations in relation to Tombodu are fairly serious



22 allegations. These are allegations that were made by 366,  
23 allegations that are not corroborated in any material sense.  
And  
24 allegations that are contradicted by what I may call more  
11:35:01 25 credible Prosecution witnesses. So, what the Prosecution does  
is  
26 rely on 366 in relation to Tombodu, and ignore the others,  
like  
27 071, who does not implicate my client in Tombodu, who is quite  
28 clear about the command structure in Tombodu. 167, who also  
29 testified on this issue and was quite clear about the command

1 structure. 334 and 012.

2 Now, My Lords, these are all Prosecution witnesses who  
gave  
3 contradictory evidence, in my submission more credible  
evidence,  
4 and the Prosecution chooses to rely on the testimony that  
11:36:06 5 [indiscernible criminal with a clear intention to level  
6 accusations against my client, at all material times.

7 The Prosecution talks about, and I am sorry to go back  
to  
8 the issue of statements, the Prosecution says that statements  
are  
9 an important aspect of notifying an accused person of the case  
11:36:44 10 that he faces.

11 But the Prosecution makes interesting submissions about  
My  
12 these statements; statements from their own witnesses. And,  
the  
13 Lords, if you look at paragraph 57 to 66 of the final brief,  
14 Prosecution says --

11:37:08 15 JUDGE ITOE: 50?

16 MR OGETO: 57 to 66, My Lords. The Prosecution takes a  
witness  
17 very defensive position regarding the accuracy of their  
18 statements, the statements they took from their witnesses.  
And  
19 this is what they say:

11:37:35 20 For instance, at paragraph 59, George Johnson, and this  
is  
21 a witness who testified in public, I think, George Johnson  
22 testified that his statements were not read back to him after  
the  
23 interviews for him to check the accuracy. Paragraph 60, some  
of  
24 the investigators who interviewed witnesses were from  
countries  
11:38:03 25 outside Africa. Paragraph 64. There is no reason why a  
person  
26 suffering from post-traumatic stress disorder cannot be a  
27 perfectly reliable witness. Any discrepancies in the  
Prosecution  
28 evidence, sorry, My Lord. So, My Lords, the Prosecution is  
29 critical of their own statements. They are saying they may  
not

Prosecution 1 be accurate. And these are the same statements the  
2 wants us to rely on as notice to the accused person regarding  
3 extensive allegations about the accused person and we have made  
4 submissions on this in our final brief and we don't want to  
11:39:01 5 repeat it.

II 6 My Lords, I now want to talk about Additional Protocol  
7 and common Article 3, regarding the existence of an armed  
8 conflict. I know Your Lordships took judicial notice of --

You 9 PRESIDING JUDGE: But this is in your brief; I know.  
11:39:52 10 have addressed this issue.

11 MR OGETO: Okay.

12 PRESIDING JUDGE: But you are not precluded from further  
13 arguments, if you want to put that forward, that's fine. I'm  
14 just mentioning that because you have a big five minutes left  
to  
11:40:05 15 you, so if this is what you want to do, that's fine with me.

16 JUDGE ITOE: I agree.

17 PRESIDING JUDGE: But I know it is in your brief but  
maybe  
18 you want to add something. Whatever. On this one this is  
your  
19 call so.

11:40:18 20 MR OGETO: It's all right, My Lords. If it's clear in  
the  
21 brief I won't --  
22 PRESIDING JUDGE: Well, I mean, I know it's in your  
brief.  
23 Whether it is clear or not I cannot say. However, I am saying  
it  
24 is in the brief. And I know it is there, and I know you have  
11:40:27 25 argued this, but it's just to tell you that there is five  
minutes  
26 left, Mr Kennedy, so --  
27 MR OGETO: I understand, My Lords. Can I consult for a  
28 minute, My Lords?  
29 PRESIDING JUDGE: Yes, you may, please.

1 MR OGETO: My Lords, the Prosecution, at paragraph 1181,  
2 states that Defence witness DMK-444 testified that Kallon was  
3 involved in several allegations involving Major Ganese. My  
4 Lords, this is not correct at all, and I think it is important  
11:41:58 5 for Prosecution and Defence to be candid with the Chamber.

6 Defence witness DMK-444 very clearly stated before the  
7 Court that he actually did not even know Mr Kallon. So, for  
8 Prosecution now to misinterpret the testimony of that witness,  
to  
9 say that he alleged Mr Kallon was involved in the abduction of  
11:42:32 10 Ganese, is completely unacceptable, My Lords, in my humble  
about  
11 submission. I agree DMK-444 was cross-examined generally  
Kallon,  
12 some board of inquiry, which may have made reference to  
was  
13 but this witness did not specifically, positively say that it  
Ganese.  
14 the accused Kallon who was involved in the abduction of

11:43:16 15 PRESIDING JUDGE: But that paragraph, I mean, depends  
how  
16 you read it because that paragraph says DMK-444, for instance,  
17 said he knew from reports through the board of inquiry. I  
mean,  
18 this is obviously from report. He didn't know personally. It  
19 was from the Board of Inquiry and then says that on May 1 the

11:43:37 20 second accused did so-and-so. So this is clearly spelt out  
that

21 this witness knows from the report, not has any personal  
22 knowledge. This is, at least this paragraph you have just  
23 referred to, so --

24 MR OGETO: Yes, but if you go further, My Lords, the  
11:43:52 25 evidence is presented in a way to suggest that the Defence  
26 witness actually knew that it was the accused person who was  
27 involved in the abductions.

28 PRESIDING JUDGE: In the portion where he says he had  
heard  
29 of the events that they were held hostage, that part? Anyhow,  
we

1 will --

2 MR OGETO: There is an extensive discussion of that My  
3 Lords, yes. Now the other issue I want to raise, My Lords,  
4 relates to the command position of Mr Kallon during the

UNAMSIL

11:44:36 5  
command

event. Our submission is that Mr Kallon did not have any

6 authority, any command control right from the time he received  
7 the message from Foday Sankoh, on 16 April 2000, which message  
8 was clearly a warning to Mr Kallon to keep off UNAMSIL

affairs.

9 From that date Mr Kallon was not in a position to exercise

11:45:22 10  
adduced

command authority over any perceived subordinates in Makeni or  
11 anywhere else in Sierra Leone. The Prosecution has not

12 evidence --

13 PRESIDING JUDGE: And on this particular issue, you say  
14 that, Mr Ogeto, based on the fact of this direction,  
instruction

11:45:50 15  
about

or whatever you want to call it, communication from Sankoh to  
16 Kallon, on 16 April, and this is regardless of the evidence

17 the rank and position and function he may have occupied?

18 MR OGETO: Yes. Rank is important; I agree.

11:46:15 20

19 PRESIDING JUDGE: But your position is because of this  
communication he received from Sankoh at the time.



21 MR OGETO: Yes, My Lords.

22 PRESIDING JUDGE: Whatever his position rank and so on.

23 MR OGETO: Yes. Yes.

24 PRESIDING JUDGE: He didn't play. He stayed out of it  
11:46:25 25 essentially. He did not exercise whatever it was.

26 MR OGETO: And he was not capable of exercising any  
27 command.

28 PRESIDING JUDGE: And why is it he was not capable?

29 MR OGETO: Because of the directions from Sankoh and  
from

1 the instructions given to other commanders, like Kailondo and  
2 Komba Gbundemba, he wasn't able to control the course of  
events  
3 in Makeni and any other place in Sierra Leone at that time.

4 PRESIDING JUDGE: So what are your final comments, Mr  
11:47:15 5 Ogeto, before -- we will break after this and we may have a  
few  
6 questions for you and we will come back after this break.

7 MR OGETO: Let me look at my notes, My Lords.  
8 One comment, My Lords, relates to count 14 and I adopt  
the  
9 submission made by my learned friend Mr Jordash on the issue  
of

11:48:18 10 the Prosecution trying to utilise burning, the evidence of  
11 burning, in support of count 1 and 2. I fully endorse the  
12 submissions made by my very able friend, Mr Jordash, but I  
want  
13 to add something, My Lords, and this relates to --

14 JUDGE ITOE: You are running out of time, Mr Ogeto.

11:48:47 15 MR OGETO: Yes.

16 JUDGE ITOE: I mean, you can't continue forever.

17 PRESIDING JUDGE: Your final comment, please.

18 MR OGETO: Yes. The comment relates to the way these  
has

19 been framed. AFRC, that is count 14, AFRC/RUF engaged in  
11:49:11 20 widespread unlawful taking and destruction by burning of  
civilian

21 property. Our submission is that unlawful taking and  
destruction  
22 by burning of civilian property is conjunctive so you cannot  
23 separate, you cannot separate unlawful taking, which is  
looting,  
24 from destruction by burning, so that essentially you cannot  
use  
11:49:55 25 burning as evidence in isolation from unlawful taking.

26 And, My Lords, if you look at count 12, for instance, on  
27 child soldiers, the framing is disjunctive. It's quite clear.  
28 It's disjunctive but in this one it's conjunctive, so you  
cannot  
29 separate the two. That is our submission. So, if the

1 Prosecution, assuming they were correct, wanted to use this  
count  
2 in support of 1 and 2, then it has to be unlawful taking,  
which  
3 is looting, and destruction by burning; both of them.

4 PRESIDING JUDGE: But we have ruled on the Rule 98 that  
11:50:54 5 burning could not constitute and was not part of looting. So,  
we  
6 have ruled that. Looting did not include burning.

7 JUDGE THOMPSON: Is your submission in line with our  
ruling  
8 or you have a different appreciation of the law?

9 MR OGETO: I am asking Your Lordships to reconsider your  
11:51:17 10 ruling.

11 JUDGE THOMPSON: I see. To reconsider our ruling?

12 MR OGETO: Yes, My Lords. In terms of what I consider  
to  
13 be the literal interpretation of this phrase.

14 JUDGE THOMPSON: Would you be able to supply some  
11:51:29 15 authorities to persuade us in that direction?

16 MR OGETO: To reconsider?

17 JUDGE THOMPSON: Yes.

18 PRESIDING JUDGE: Yes. And therefore to reconsider at  
this

19 very late stage of the trial and overrule our Rule 98 decision  
11:51:42 20 which would change the picture for everybody at this juncture?

21 JUDGE THOMPSON: Yes. Quite right.

22 PRESIDING JUDGE: Do you think it would be an  
unacceptable

23 means?

24 MR OGETO: Yes, I can, My Lords.

11:51:51 25 PRESIDING JUDGE: I am not saying, I am not even raising  
26 whether or not legally we should -- we have the authority to  
do

27 it but, that aside, just on the fairness of the process --

28 JUDGE THOMPSON: Yes.

29 PRESIDING JUDGE: -- you think it would be fair?

in 1 MR OGETO: I have seen a discussion of that, My Lords,  
2 the AFRC case.

3 JUDGE THOMPSON: Yes.

Trial 4 MR OGETO: And that issue has been dealt with by the  
11:52:11 5 Chamber and also the Appeals Chamber.

6 JUDGE THOMPSON: You are virtually asking us to adopt  
7 the --

8 MR OGETO: Yes, My Lords.

9 JUDGE THOMPSON: -- position of the Trial Chamber in the  
11:52:19 10 AFRC decision?

11 MR OGETO: It's persuasive, My Lords, and I'm saying it.

12 JUDGE THOMPSON: I see.

13 MR OGETO: Yes.

14 PRESIDING JUDGE: Very well.

11:52:24 15 JUDGE THOMPSON: Yes. Thanks.

we 16 PRESIDING JUDGE: Thank you. We thank you. As I say,  
17 may have a few questions for you when we come back. So we  
will 18 break now for a short time. Thank you.

19 [Break taken at 11.52 a.m.]

12:17:10 20 [Resuming at 12.18 p.m.]

21 PRESIDING JUDGE: Mr Ogeto, we do, indeed, have a few

you.

22 questions and Justice Thompson will raise a few issues with

23 Justice Thompson, please.

12:18:15 24 JUDGE THOMPSON: Thank you, Presiding Judge. Learned  
25 counsel, your final trial brief does raise some quite serious

26 problems or issues with the form of the indictment. In other

27 words, there are several allegations as to the form of the

28 indictment and then, given your several legal submissions on

the

29 alleged defects and deficiencies in the indictment, where do

you,

1 as a matter of law, draw the line between one, the legal  
2 requirement to plead material facts and, two, the prohibition  
3 against pleading evidence in an indictment? For my purposes,  
two  
4 short legal submissions will suffice. In other words, that's  
the  
12:19:20 5 way I perceive it. Those serious allegations that you've  
raised,  
6 the deficiencies in respect of the indictment seem to require  
the  
7 Chamber to exercise its judicial, collective judicial mind and  
8 also individually on where do we draw the line between the  
9 requirement, in terms of legality, to plead material facts  
and,  
12:19:49 10 two, the legal prohibition against pleading evidence in an  
11 indictment?

12 MR OGETO: Thank you, My Lord, for the question. I  
think  
13 the answer of this lies in the jurisprudence and I think one  
14 cannot give a blanket answer to that. I think it's a question  
12:20:13 15 that ought to be considered on a case-by-case basis. And if I  
16 may give an example, in relation to my client, the Prosecution  
in  
17 their final brief alleges now that my client is responsible  
for  
18 killing 18 individuals in Kono.

19 Now, the jurisprudence requires that where there is an



12:20:48 20 allegation that the accused person killed, and you are talking  
21 about a limited number of people, then it's incumbent upon the  
22 Prosecution to plead the identity of the victims, and here I  
am  
23 not talking about names -- they may not have names -- but at  
24 least provide some identifying information. That is a  
material  
12:21:16 25 fact that ought to be pleaded.  
26 The other material fact is the date when the killing  
took  
27 place. The other material factor is where the killing took  
28 place. Now, other details will be questions of evidence but,  
in  
29 a nutshell, in relation to killing, those are the particulars

1 that ought to be pleaded and, in our case, the Prosecution  
2 talks about killing 18 people. At this late stage in the  
3 proceedings, having not provided any particulars, like the  
4 identities of these victims; when they were killed; and where  
12:22:16 5 they were killed, those were not provided -- we got that by  
way  
6 of statements.

7 Now, in relation to looting, for instance, the example  
8 I give, the fact that it is the accused person who was  
involved  
9 in the looting, that ought to be mentioned in the indictment,  
or  
12:22:41 10 at least if it is not mentioned in the indictment then it  
ought  
11 to be mentioned in the pre-trial brief, that the accused  
person  
12 was involved in looting a specific bank on a particular date  
in  
13 Kono.

14 Now, the difficulty we have in relation to this, and on  
12:23:07 15 killings, for instance, My Lords, the opening statement in  
this  
16 case alleges that my client was involved in the killing of one  
17 person in Kono over a sheep. That is what is contained in the  
18 opening statement. But now we have submissions in the final

18

19 brief that actually my client was involved in the killing of  
20 persons. There may have been evidence but we are saying that  
21 that evidence is not sufficient. The identities of the 18  
22 individuals ought to have been pleaded because we are talking  
23 about a limited number of people, we are not talking about a  
24 large number of people.

12:23:53  
my

25 The other example is the Kamachendeh killings, for  
26 instance, where the Prosecution alleges in the evidence that  
27 client was involved, one way or the other, in the killing of  
101  
28 civilians in Kono. Now, this is a large number of people --  
we  
29 do not expect identities -- but at least the Prosecution ought  
to

1 have pleaded that my client was involved in the killing of 101  
2 people, in Kono, at a specific place in Kono. This was never  
3 pleaded. And to make it worse, as I have said, the only  
4 allegation pleaded, the only allegation discussed, rather, in  
the  
12:24:41 5 opening statement, relates to the killing of one person. So  
one  
6 may want to know why would you want to specify one person in  
the  
7 opening statement as opposed to 101? A massacre, that is my  
8 answer.  
9 JUDGE THOMPSON: Well, thank you. And the short, the  
last  
12:25:03 10 question is a much shorter one. Do you agree that the case  
law  
11 authorities on the subject of defects in the form of the  
12 indictment generally, and the requirement for the pleading of  
13 material facts to be done with much specificity and  
14 particularity, turns on the key distinction of how the concept  
of  
12:25:37 15 specificity and particularity is applied, having regard to  
16 domestic criminality and criminality alleged at the  
international  
17 level or is this a narrow interpretation of the jurisprudence  
on  
18 the subject because I have studied this carefully and it would  
19 seem to me that this is a key distinction that, in fact, it is

12:26:06 20 possible that some of the deficiencies alleged in this  
21 indictment, if they were to be put through a judicial  
22 kaleidoscope, in the context of domestic criminality might, in  
23 fact, be legally sustainable? That's my short second  
question.

24 MR OGETO: I agree with you entirely, My Lords, that the  
12:26:30 25 jurisprudence on International Criminal Law makes that  
26 distinction quite clearly and it does that because of the  
massive  
27 nature of the killings and atrocities that are subject of  
28 International Criminal Law and that it may not be possible to  
be  
29 as specific as you can be, if you are dealing with crimes in

1 municipal law. But again, as I said earlier, this is dealt  
with  
2 on a case-by-case basis. You cannot say that there are  
general  
3 requirements that cut across the board, and the Rules require,  
4 for instance, that where Prosecution has information about  
12:27:19 5 identities, for instance, they should provide that  
information.  
6 It's understandable where they don't have that  
information  
7 where, for instance, there was mass killings somewhere, they  
will  
8 not be expected to provide particulars. But where you are  
9 talking about a limited number of victims, in a place like  
Koidu,  
12:27:45 10 for instance, a limited geographical area, then ideally the  
11 Prosecution should provide that information because there is  
no  
12 reason why they should not provide it. Why should they not  
13 provide it in the indictment and wait for witnesses to testify  
to  
14 provide it, because they were tempted to provide it through  
12:28:05 15 witness statements? That is the dilemma we find ourselves in  
and  
16 the Prosecution really ought to explain why it is difficult  
for  
17 them to provide this information in the indictment because  
that

call 18 is what the Rules ideally require, why they wait until they  
19 their witnesses late in the day to provide this information.

12:28:28 20 PRESIDING JUDGE: Mr Ogeto, you do refer to the rule  
21 requires; what is the rule you are making reference to?

the 22 MR OGETO: It is the rules that have been enunciated by  
23 jurisprudence of international criminal law, the principles  
24 rather. Probably my use of the word "rule" is not quite  
correct.

12:28:46 25 PRESIDING JUDGE: And by this you mean the principles  
that 26 you have referred to in some of the case law this morning?

27 MR OGETO: Yes, My Lords.

28 PRESIDING JUDGE: That is what you mean by the rule?

29 MR OGETO: Those are the principles. I use the word

1 "principles" instead of rules.

2 PRESIDING JUDGE: I am just asking the question because  
3 "rule" -- maybe there is a rule somewhere we that are not  
4 familiar with that you know of, so --

12:29:03 5 MR OGETO: No, no, that is not what I meant, My Lords.

6 PRESIDING JUDGE: That's okay. Thank you very much.

7 JUDGE ITOE: Are you also referring to the -- the  
reference

8 to specificity, as to the content of the indictment, when you  
are  
9 talking of the rules that you have referred to, and that have

12:29:20 10 been enunciated in the jurisprudence of international criminal  
11 jurisdictions?

12 MR OGETO: Yes, My Lords. I am specifically referring  
to

13 the indictment and that there are certain basic requirements  
as

14 to what should be pleaded in the indictment, like identities  
of

12:29:40 15 victims, where they are available.

16 JUDGE ITOE: I have just a very short question, you  
know,

17 for you.

18 MR OGETO: Yes, My Lord.

19 JUDGE ITOE: The Prosecution has made a very strong  
point



12:29:59 20 about the alibi which you have raised for your client, and it  
is  
21 the Prosecution's position that you did not give enough  
notice,  
22 sufficient notice about these witnesses, and that they didn't  
23 have a resume of the evidence that was going to be led by  
these  
24 alibi witnesses, and they refer specifically to DMK-039, DMK-  
161  
12:30:40 25 and DMK-082. What would be your response to this in the light  
of  
26 what we know the law is on relying on an alibi which you have  
27 specifically pleaded and for which you raised, you called  
28 evidence to prove, and I am raising this also, maybe you may  
29 subsidiarily respond, given what arose this morning about,  
your

1 argument that even though a particular witness testified  
2 generally about Makeni and said Kallon was not there, he was  
not  
3 really an alibi witness because he did not, he did not, after  
4 stating that your client was not there, indicate where he was?  
I  
12:31:50 5 want a focused reply on this, you know, to clarify my thoughts  
on  
6 how I would wrestle after this with the issue of the alibi  
that  
7 you have raised, and which is very seriously contested by the  
8 Prosecution.

9 MR OGETO: My Lords, as I stated in the morning, we did  
not  
12:32:23 10 call DMK-161 and 039 as alibi witnesses and that we are not  
11 relying on them as alibi witnesses. That is our position.  
And  
12 that if those witnesses came before the Chamber and gave  
evidence  
13 that Prosecution interprets to be alibi witnesses that does  
not  
14 deprive the Chamber of the power to rely on that evidence  
simply  
12:32:59 15 because Prosecution considers it to be alibi evidence.

16 Now, these two witnesses, as I said in the morning, came  
17 and gave a factual appreciation of what happened in Makuth,  
and  
18 there are many other witnesses, apart from those two, who gave

19 similar testimony, and these were not alibi witnesses.

12:33:24 20 In relation to DMK-082, submissions were made when this  
objected 21 witness testified before the Chamber. The Prosecution  
on 22 to the testimony of that witness and we made arguments based  
23 section -- Rule 67(B) and Prosecution was allowed at that time  
24 the statement that had been made by the witness because their  
12:33:57 25 objection was based on the fact that they didn't have notice  
of 26 the specific issues that the witness was going to raise in  
27 relation to alibi and, for that reason, they wanted a detailed  
28 statement, which we provided to the Prosecution, and our  
29 submission is that any prejudice that they may have argued was

didn't

1 cured by the provision of that statement. In fact, they  
2 demonstrate any prejudice. And I find it interesting that  
3 Prosecution is talking about notice here when they are saying  
4 that Defence shouldn't raise the issue of notice in relation

to

12:34:37 5 their testimonies and they are alleging that --

mean,

6 JUDGE ITOE: This is an alibi. This is an alibi. I  
7 what is the purpose of an alibi in law? I think the necessity  
8 for notice, the necessity for notice --

9 MR OGETO: Yes.

12:34:49 10 out

JUDGE ITOE: -- is to allow the adverse party to carry  
11 an investigation as to the locations which you allege were

where

12 your client was present. If you say he was not in location A,

as

13 alleged by the Prosecution, and you say he was in location B,

as

14 we saw it, Masingbi I think was the place where you say he

was,

12:35:45 15 the

with DMK-082, then, enough notice is supposed to be given to  
16 Prosecution for them to investigate whether the allegation is  
17 true or whether what you -- your assertion that he was not in  
18 Makump or in Masingbi is true. That is the purpose of the

the 19 notice. Are you saying that not providing that notice cures  
12:35:51 20 situation, even if the Prosecution are given the latitude to  
even 21 further cross-examine, or even to rely on the statement or  
in 22 if you served the Prosecution with that notice that belatedly  
as 23 the course of the trial? That is the challenging issue as far  
24 I see it and I think it needs to be addressed.  
12:36:24 25 MR OGETO: I agree with you, My Lords, that sufficient  
26 notice is important, but it's also important that Prosecution  
27 establishes actual prejudice. It is not enough for the  
upon 28 Prosecution to say that his testimony should not be relied  
29 because the alibi was given late. They must demonstrate that

1 they have suffered prejudice as a result of the late delivery  
of  
2 the alibi and, in this case, my submission is that no  
prejudice  
3 has been established by the Prosecution.

4 PRESIDING JUDGE: This goes to prejudice of the  
Prosecution  
12:37:06 5 or it goes essentially to the credibility of the alibi? You  
say  
6 it goes to prejudice, if any, to the Prosecution?

7 MR OGETO: No, no, I was responding to the issue raised  
by  
8 Justice Itoe.

9 PRESIDING JUDGE: Yes, about the notices. I mean --

12:37:20 10 MR OGETO: Regarding investigations, My Lord, because  
there  
11 is also the aspect of investigations. If they are able, have  
12 enough time to investigate this alibi.

13 PRESIDING JUDGE: Yes, it's one aspect of it.

14 MR OGETO: Yes.

12:37:33 15 PRESIDING JUDGE: But the requirement that alibi be  
16 disclosed at the first, at the earliest opportunity has to do  
17 obviously with credibility of this particular defence, as  
such,  
18 and relative to that obviously is the ability to investigate  
the  
19 facts surrounding this particular alibi.

12:37:50 20 MR OGETO: On the issue of credibility I think that is a  
21 matter for the Chamber to evaluate.  
22 PRESIDING JUDGE: It's because we are talking of  
prejudice  
23 to the Prosecution, but I understand what you are saying.  
24 MR OGETO: Yes, My Lord.  
12:38:03 25 PRESIDING JUDGE: Prejudice, in what you are raising has  
to  
26 do with the ability or not to investigate in due course.  
27 MR OGETO: Exactly, My Lord.  
28 PRESIDING JUDGE: The facts.  
29 MR OGETO: Yes.

SCSL - TRIAL CHAMBER I

1 MR TAKU: Your Honours, if I may assist my colleague in  
2 this regard? My Lords, the argument the Prosecutor raised  
here  
3 is basically the same argument the Prosecutor raised when he  
4 applied for Mr Kallon to comply with the Rules, interpretation  
to  
12:38:37 5 Your Lordship, in relation to the same arguments,  
[indiscernible]  
6 at the time. Indeed, Your Honours would inquire as to the  
7 reasons for the late disclosure of that information. As Your  
8 Honours will remember, the reason which was given then was  
9 because of protective measures that were in place. And there  
was  
12:38:55 10 no bad faith in doing so. There was no attempt to conceal  
this  
11 information.  
12 And, Your Honours, in your recent decision, in giving  
seven  
13 days to the Kallon team to comply, to give that information,  
14 permitted the Kallon team to give the pseudonyms at least of  
the  
12:39:14 15 witnesses. And Your Honours went further to say that the  
16 Prosecution would suffer no prejudice because that information  
at  
17 the time was enough to conduct the investigation.  
Furthermore,  
18 Your Honours, Your Honour will remember that Mr Kallon gave  
19 evidence, alibi evidence in his own defence which was not



12:39:31 20 challenged and if he gave that evidence there was no reason  
for  
21 him to bother the Court by calling --  
22 JUDGE ITOE: Mr Taku, are you sure it was not  
challenged,  
23 evidence that Mr Kallon gave in terms of his alibi? Are you  
24 sure, are you certain that the Prosecution did not challenge  
that  
12:39:49 25 evidence in cross-examination?  
26 MR TAKU: Your Honour, I say --  
27 JUDGE ITOE: In cross-examination.  
28 MR TAKU: They didn't challenge the alibi of Mr Kallon.  
29 They challenged his witness. In any case, Your Honours, a  
number

witness  
Prosecutor  
12:40:17  
people,  
also  
12:40:39  
areas  
11  
12  
13  
14  
15  
16  
17  
18  
19

1 of factors arose in this case that made the call of this  
2 not necessary. You have Exhibit 7 and you also have Exhibit 9  
3 and other exhibits, especially Exhibit 7 in which the  
4 detailed the movements from Kono prior to Freetown, mid-level  
5 officers and senior officers that commanded this group of  
6 and also the statement of agreed facts that had taken away the  
7 necessity to call witnesses in certain locations, and simply  
8 because there was no reason for Mr Kallon to call evidence in  
9 respect of locations in which the Prosecution provided no  
10 evidence, so we provided the witnesses in respect of those  
11 especially --

here.

12 PRESIDING JUDGE: Yes, but we are dealing with alibi

13 MR TAKU: Yes.

14 PRESIDING JUDGE: I mean, what has that to do with that?  
15 It is at a very specific period of time, as such. We are not  
16 talking about in Kono in 1997 or 1998. Here, we are talking  
17 in  
18 2000.

19 MR TAKU: Well, the notice of alibi confirms the whole  
location  
period and different locations. It's not only about one

12:41:02 20 only. And that is why I refer to this evidence. We have the  
21 notice here. We talk about Kono, Koinadugu, Bombali District  
in  
22 Sierra Leone.

23 PRESIDING JUDGE: Yes.

24 MR TAKU: So we are saying that, one, the Prosecutor  
12:41:13 25 himself introduced evidence that tended to show that Mr Kallon  
26 wasn't in those locations or, in the course of the trial, we  
27 discovered that enough evidence have not been called by the  
28 Prosecutor, there was no reason to call witnesses to come and  
29 bother the Court. We called the witnesses that we indicated

1 where necessary and that is why we called the witnesses, Your  
2 Honours, in respect at least -- in respect of Makuth and about  
3 the witness from Masingbi, Your Honours will understand the  
issue  
4 was resolved. The Prosecutor himself presented to Your  
Honours a  
12:41:48 5 manner of resolving the issue by asking that the witness  
6 statement be made available to him. It was made available to  
him  
7 and therefore he was able, Your Honour, thereafter  
8 to cross-examine this witness. I think these issues --  
9 JUDGE ITOE: We have always said here that we don't go  
by  
12:42:01 10 the compromises between the Defence and the Prosecution; it  
11 depends on whether the Tribunal adopts that compromise. We  
are  
12 not bound by such compromises. We are bound by issues of law,  
13 you know, as to whether what has happened or what has  
transpired  
14 between the parties on both sides of the aisle has any legal  
12:42:32 15 foundation and, at the end of it, as we are addressing  
ourselves  
16 in this final brief, I think all the issues are on the table.  
17 MR TAKU: Yes, Your Honour.  
18 JUDGE ITOE: And we thought that you should adequately  
be  
19 able to throw some light on this very important aspect of your

12:42:52 20 case as far as the Makump incident is concerned.  
21 MR TAKU: Your Honour, thank you.  
22 JUDGE THOMPSON: I think I join Justice Itoe in this,  
that  
23 what we now have is everything is open season now because we  
are  
24 being called upon to revisit issues like alleged defects in  
the  
12:43:16 25 indictment. We are being called upon to re-consider certain  
26 aspects of our previous decisions in respect of the entire  
trial,  
27 so I don't see why issues of that nature, regardless of  
whatever  
28 position the Prosecution might have taken, should not be also  
29 open season, so that everything now is considered in the  
totality

1 of the evidence before the Court.

2 MR TAKU: Your Honours, with due respect, Your Honours,  
3 just like you remember the witness who testified about the  
person  
4 Mr Kallon in Masingbi came to testify, the Prosecutor  
objected.

12:43:57 5 Your Honours made a recent ruling on the spot about the  
6 admissibility of that alibi. The Prosecutor had objection  
they  
7 were prejudiced, to object to any of these witnesses  
testifying  
8 at the time they did. The Prosecutor did not.

9 JUDGE ITOE: Did we not talk of weight at that time,  
when

12:44:15 10 we were making -- I don't quite remember what happened but  
didn't  
11 we, even in allowing it, go -- talk of the weight to be  
attached  
12 to his testimony at the end of the case and when assessing the  
13 entirety of the evidence?

14 MR TAKU: Well, Your Honours, I don't have that, it's in  
12:44:37 15 the transcript, what -- a ruling from the Bench at that point  
in  
16 time. Your Honours will look at it. What my submission now -

17 JUDGE ITOE: We will indeed because it's a very  
important  
18 issue.

19 MR TAKU: My objection now, Your Honours, is this: At  
the  
12:44:53 20 time that this evidence was being given the Prosecutor will  
have  
21 forgotten about [indiscernible], I did not have the time to  
22 investigate this alibi in respect of this witness. The  
23 Prosecutor never did that. The Prosecutor cannot wait, Your  
24 Honours, until it comes at this point in time and say that it  
was  
12:45:11 25 late. Now, if it was late, what were the consequences? He  
26 hasn't told you that that alleged lateness impeded his ability  
in  
27 order to investigate alibi. He didn't say so. That is not  
his  
28 submission, they say, Your Honour. So we say that you object  
at  
29 that point and the Court would have made a decision about  
whether

1 that witness can testify about alibi or not. Be that as it  
may,  
2 Rule 67 nevertheless says that even if a notice of alibi is  
not  
3 given it doesn't preclude the Court, in the interests of  
justice,  
4 to weigh the probative value of the alibi and make -- and  
12:45:44 5 determine the possible [indiscernible] of the Court.

6 JUDGE ITOE: I agree with you entirely there.

7 PRESIDING JUDGE: And this is what we are going to do.

8 JUDGE ITOE: I agree with you entirely.

9 MR TAKU: Thank you, Your Honour.

12:45:54 10 JUDGE ITOE: And that is just what we are going to do.

11 MR TAKU: Thank you, Your Honours.

12 PRESIDING JUDGE: I just have one more question for Mr  
13 Ogeto in respect of this particular witness, DMK -- I think it  
is  
14 162 but I may be wrong with my number here but the witness  
that  
12:46:04 15 was --

16 MR OGETO: 161, I think.

17 PRESIDING JUDGE: 161. The witness that was -- you say  
is  
18 not alibi although he did testify about the non-presence, as  
19 such. You say that we should not rely, that you are not  
relying



12:46:16 20 on that fact for the purpose of the alibi, so how is the Court  
to  
21 consider that evidence as a whole? I mean, this witness has  
22 testified about using a factual scenario that existed. So are  
we  
23 to ignore all of that evidence or just to say in your view we  
24 should ignore whatever part of his evidence that relates to  
12:46:37 25 alibi?

I 26 MR OGETO: No, that is not what I meant, My Lords. What  
27 meant is that this witness was not presented as an alibi.

28 PRESIDING JUDGE: Yes, but the fact that he is presented  
or  
29 not, if he does testify as to this issue, so this is, I mean,  
it

1 is an issue that we should ignore; that is what you are  
saying?

2 MR OGETO: No, I am not -- that is not what I mean, My  
3 Lords. What --

4 PRESIDING JUDGE: Please make it clear so I understand  
what  
12:47:04 5 you mean.

6 MR OGETO: From my interpretation, from my  
interpretation,

7 this witness never testified to anything that may be  
considered

8 as alibi because my understanding of an alibi is when a  
witness

9 comes before the Chamber and says: Mr Kallon was not there  
and I

12:47:28 10 know where he was.

11 PRESIDING JUDGE: But if he has only half of that  
answer,

12 he says I know he was not there, this is not alibi?

13 MR OGETO: That is what every witness says. All Defence  
14 witnesses say that.

12:47:41 15 JUDGE ITOE: Even in that situation does it or doesn't  
it  
16 have the effects, some of the effects of an alibi? The side  
17 effects of an alibi?

18 MR OGETO: It has some of it, My Lords, and it's  
difficult

19 to draw the line because many witnesses will come here and say

12:47:53 20 Kallon was not there, Sesay was not there, and they are not  
21 considered alibi witnesses because if we did that then every  
22 witness is an alibi witness.

23 JUDGE ITOE: No, we are not saying that. I mean, all we  
24 are saying, we are putting it in context, in the context, you  
12:48:08 25 know, of this particular -- of your client's case.

26 PRESIDING JUDGE: You have given notification on behalf  
of  
27 your client that there was an alibi that he wasn't there.  
That  
28 is one part of the alibi that has been put forward and you  
have a  
29 witness that you called that says, indeed, he wasn't there but

1 you say it is not alibi because he didn't go the next step to  
say  
2 where he was.

3 MR OGETO: Yes, My Lords.

4 PRESIDING JUDGE: Well, okay. I understand what you are  
12:48:34 5 saying. Well, I will appreciate in due course. Thank you.  
We  
6 have no further questions for you, Mr Ogeto, so you will feel  
7 relieved that --

8 MR OGETO: Very relieved, indeed.

9 PRESIDING JUDGE: So, we do not intend to proceed with  
the  
12:48:52 10 third accused at this particular moment. We will proceed this  
11 afternoon at 2.30.

12 MR CAMMEGH: Your Honour, could I just make a -- it's  
13 probably the last thing Your Honours want to hear but it's a  
14 heart-felt request. Given that we are right at the end of  
these

12:49:10 15 proceedings, and given the shear amount of preparation that  
has  
16 gone into my final address, I would be very grateful if Your  
17 Honours would consider giving me an extra 15 minutes. 15  
18 minutes, proportionally speaking, may not have been an awful  
lot

19 more for my two learned friends but for me, proportionately  
12:49:37 20 speaking, it's an awful lot more and it just means that I  
would

fashion 21 be able to address you in, I hope, a rather less rushed  
to 22 in a more impactful way and, overall, I think I might be able  
23 do justice to my client and various --

be 24 PRESIDING JUDGE: There seems to be agreement that you  
12:49:58 25 given 15 minutes but I know the way, but having given you 15  
employ 26 minutes, will not, doesn't mean necessarily that you must  
27 all of it but it will give you that flexibility.

28 MR CAMMEGH: I am very much obliged.

29 PRESIDING JUDGE: So, indeed.

1 JUDGE ITOE: One of the rare unanimities in our Chamber  
2 decisions.

3 PRESIDING JUDGE: So we will hear with much attention  
your  
4 submission at 2.30 this afternoon.

12:50:42 5 MR CAMMEGH: Thank you.

6 PRESIDING JUDGE: Thank you. Court is adjourned.

7 [Luncheon recess taken at 12.50 p.m.]

8 [RUF05AUG08B - MD]

9 [Upon resuming at 2.40 p.m.]

14:39:10 10 PRESIDING JUDGE: Good afternoon. Mr Cammegh, it is now  
11 your turn to deliver the final submission. It is 10 to 3, so  
we  
12 have an hour and 15 minutes from this moment for you --

13 MR CAMMEGH: Is that a joke, Your Honour?

14 JUDGE ITOE: You say it is what?

14:40:39 15 PRESIDING JUDGE: 20 to.

16 JUDGE ITOE: I volunteer to be the timekeeper, so as to  
17 time Mr Cammegh, you know, properly.

18 PRESIDING JUDGE: I meant to say we were ten minutes  
late  
19 from 2.30. So, having said that, I will ask you if you are  
ready  
14:40:59 20 and prepared to address the Court?

21 MR CAMMEGH: Yes, I am. Thank you very much, Your  
Honours.

22           PRESIDING JUDGE: Please proceed.

23           MR CAMMEGH: Your Honours, my learned friends. It's a

24 privilege, in fact, to be the last to speak on the evidence in

14:41:16 25 this case that has kept us here for so long. And I'm very

26 fortunate going last that the Gbao team, ably assisted as I  
have

27 been, the Gbao team has been able to perhaps put together a

28 cogent critique of the Prosecution brief, and I hope to  
deliver

29 that now with a sense of balance, a sense of fairness in a way  
as

1 to demonstrate, with the greatest of respect, that however you  
2 look at the Prosecution's final brief, texturally or  
3 contexturally, it fails.

4 After the calling of some 80 or so witnesses in all that  
14:42:20 5 time it fails to sustain proof beyond reasonable doubt against  
offence 6 our client, Augustine Gbao, that he committed any single  
7 with which he has been charged.

8 That is a bold claim. It's one that I made I think in  
my 9 opening to the Defence case some time ago. With the passage  
of 10 time, the passage of the Gbao Defence case, it's one that with  
14:42:46 11 conviction I repeat today.

12 The difficulty, again I say this with the greatest of  
has 13 respect, upon close inspection, is that the Prosecution brief  
14 failed to adequately, in some areas we would say to faithfully  
15 reflect the actuality of the evidence that we have heard, and  
14:43:12 16 part of my purpose over the next hour-and-a-quarter will be to  
17 try to illustrate our serious misgivings about the way some of  
18 the evidence has been presented, and I hope to do that, as I  
19 said, with a sense of balance because we are not afraid of the  
20 Prosecution case. We urge Your Honours, and I think this is  
14:43:32 the

21 theme behind what I'm trying to say, we urge Your Honours, we



our 22 urge Chambers, everybody who is charged with the analysis of  
but I 23 final brief, to examine it, to take it apart, dismantle it,  
14:43:59 24 hope you will find that we haven't resiled, we haven't hidden  
25 from the height of the Prosecution case on any single count.  
how 26 We've expressed the Prosecution case and then we've expressed  
27 we intend to deal with it.  
in 28 In short, what we have tried to do is identify the case  
29 our brief and meet it but what I'm going to try to do now is -  
-

1 will no doubt be the passing reference to what is in our brief  
2 but what I am going to hope to do now is deal with some of the  
3 matters that have been raised in the Prosecution's brief that  
the  
4 Court has received.

14:44:42 5 This has been an enormous case. How does one distill  
it?

6 How does one break it into its constituent parts in a  
manageable  
7 way in order that we can reach satisfactory verdicts?

8 In our submission, there is a process that can be  
employed  
9 and I hope that we've elucidated this in our final brief.

14:45:06 10 The first step, we would suggest, is to weed out the  
because  
11 evidence that is worthless, and I say worthless advisedly  
crossing  
12 it's our submission that witnesses who have been criss-  
all  
13 with inconsistencies and proven lies must be worthless. It's  
we  
14 very well talking about corroboration but there are witnesses,

14:45:33 15 suggest, who have transgressed over what is reasonable.  
They've  
16 crossed the line beyond which really nothing, no credibility  
17 should be attached to anything that they have said. It's too  
18 dangerous and it's wrong. I'm talking about witnesses such as  
19 TF1-108, 366, 117. In our brief we list about six at the

14:46:06 20 beginning who we say, and we explain --

21 JUDGE ITOE: Mr Cammegh, can you take them again?

22 MR CAMMEGH: Your Honour, these are just random but I  
think

23 I said 108, 366, 1 --

24 PRESIDING JUDGE: 117.

14:46:18 25 MR CAMMEGH: Yes. There were more, and our brief deals  
26 with those, and of course it's not my purpose to revisit too  
much

27 of our brief. But if I can pick one of those, 366, who I  
believe

28 was the longest in the witness box, in the entire Prosecution

29 case -- I think I am right about that -- 29 material

1 inconsistencies were identified in his evidence in relation to  
2 what he said against Augustine Gbao alone. This really isn't  
3 good enough, and I don't think I need to dwell on the point.

4 Similarly, the second stage that we would suggest would  
be  
14:47:01 5 to remove erroneous misrepresentations of the law as it  
currently  
6 stands.

7 JUDGE ITOE: Mr Cammegh, you said 29 inconsistencies?

8 MR CAMMEGH: Yes.

9 JUDGE ITOE: Concerning just what he said about your  
14:47:14 10 client?

11 MR CAMMEGH: About Gbao from 366, yes.

12 JUDGE ITOE: Thank you.

13 MR CAMMEGH: There is a case, I think I am pronouncing  
it  
14 right, Hajicinovic, ICTY, 22 April of this year, at paragraph

14:47:31 15 191. We have copies here for distribution afterwards if  
anybody

16 wishes to see it. The Prosecution have relied on that case --

17 JUDGE THOMPSON: Just a minute; you said the second  
18 methodology was to remove?

19 MR CAMMEGH: To remove erroneous representations of the  
14:47:47 20 current law from the Prosecution brief. We suggest that the  
21 Prosecution have misstated what was held in Hajicinovic in  
their

the  
on  
14:48:10  
They

22 brief and, forgive me, I don't have the paragraph to hand in  
23 Prosecution brief where this is cited but in their brief the  
24 Prosecution stated that that case held that there is a burden  
25 the Defence to prove that there was no effective control.  
26 didn't notice that the Appeals Chamber at the ICTY, in fact,  
27 overruled the Trial Chamber's ruling at paragraph 191 and held  
28 thus:  
29 "The burden of proving beyond reasonable doubt that the

1 accused had effective control over his subordinates

2 ultimately rests with the Prosecution."

3 Your Honours --

4 PRESIDING JUDGE: But were they doing -- pardon me --

14:48:42 5 dealing at that time with, if I am not mistaken, the issue was  
6 whether or not there existed a presumption arising from the  
fact

7 that the person did occupy a position of command and therefore

8 some cases seemed to have moved in the direction of indicating

9 that might be a presumption of control. This kind of scenario

14:49:05 10 and that decision that you are quoting has stated no such

11 presumption exists so -- and clearly said the burden is on the

12 Prosecution and there is no presumption. There is facts and

13 circumstances the Court needs to look at but there exists no

14 presumption. At least that's my recollection of reading it.

14:49:26 15 It's a recent case that you're --

16 MR CAMMEGH: It's a recent case. It's one that  
obviously I

17 haven't had much opportunity to digest other than to take what

I

18 thought was the rationale or the ratio from it. If it's

capable

19 of another interpretation, as I said, the authorities are here

14:49:41 20 and we are more than happy to distribute them afterwards, but

21 that was our understanding, that it effectively overturned the

22 Trial Chamber's original ruling.

23 But if I can move on. If one weeds out these erroneous

24 issues, witnesses and what have you, we suggest that there  
really

14:50:00 25 isn't a great deal of credible case left.

26 The Prosecution opened this case very high; I've made

27 comments about that. And it was true that at the beginning of

28 this case they seemed to be very anxious to portray what was  
the

29 story, the big story linking Charles Taylor in Liberia with  
what

1 was going on in Sierra Leone, and they called Liberian  
witnesses.  
2 One remembers General Tanu, and the other Liberian whose name  
and  
3 number for a moment I forget, to try to suggest this was an  
4 internationally generated conflict, but as day-by-day went by  
the  
14:50:42 5 coherence of that theory, we suggest, fell away and in the end  
6 the Prosecution were as if flailing around in the dark for a  
case  
7 against Augustine Gbao. And examples for that, I will go back  
to  
8 TF1-117 whose evidence seemed to fly in the face of everything  
9 but just for one example.  
14:51:02 10 He maintained that Augustine Gbao was in Makeni in  
February  
11 of 1998 probably involved in Operation Pay Yourself, looting,  
12 burning and what have you, at the same time as the welter of  
13 Prosecution evidence suggested that Mr Gbao was in Kailahun  
Town  
14 at the time of the Kamajor murder.  
14:51:25 15 330 said that, who stated in evidence he had been with  
Gbao  
16 for more than three years, said that Gbao remained in Kailahun  
17 until disarmament, flying in the face of a welter of evidence  
18 agreed by the Defence that from February of '99 Gbao was  
living  
19 in Kailahun. And what of the -- I am sorry, Makeni.



14:51:44 20  
ride

What of the strange way the Prosecution seem to try to  
21 every horse in relation to unit command.

22 141 told the Court Gbao was a G5. He said in Court "he  
23 himself told me." The Prosecution similarly in their brief  
24 employ 330 who also said that Gbao was supposedly a G5, having

14:52:08 25  
that

been with him for three years who, nevertheless, I think in  
26 cross-examination for Mr Jordash, went off his script saying

Taylor,

27 it was Morie Fekai, in fact, who took orders from Prince

28 the boss of the G5, having previously said that Fekai was

29 receiving his orders from Gbao, an inconsistency there, and I

1 will be coming on to plenty of inconsistencies later on.

2 The Prosecution similarly have used in their brief 113  
to

3 testify that Gbao was head of the G5, a woman who lived in  
4 Kailahun Town for four years, and we suggest should have known

14:52:43 5 better, should have known that he was overall IDU,  
particularly

6 given the fact that her nephew, Francis Musa, was Mr Gbao's  
7 nephew. I am sorry, Mr Gbao's deputy.

8 PRESIDING JUDGE: Again, just to warn you of --

9 MR CAMMEGH: I understand.

14:53:01 10 PRESIDING JUDGE: -- being careful about this kind of  
11 relationship as --

12 MR CAMMEGH: I do understand, Your Honour. I don't  
think

13 that will happen again.

14 So the Prosecution attempt to use, in various paragraphs  
of

14:53:13 15 their brief, the convenient evidence that Gbao was head of the  
G5  
16 which we suggest was simply not the case.

17 Similarly, they suggest that he was, where it suits  
them,

18 head of the Military Police. 168, who, as I recall, gave the  
19 statement of 175 pages to the Prosecution in April 2003, came

14:53:39 20 back in February of 2006 and mentioned Gbao for the first time  
as

21 the overall MP and the most senior man in Kailahun.

Before

22 I should say this while I am on the subject of MP.

23 I was receiving instructions in this case I cross-examined

24 witness TF1-361 and erroneously put it to him that Mr Gbao was

14:54:03 25 head of the MP. That was a mistake by me at a time when I  
wasn't

26 receiving instructions, and I am sure the Prosecution wouldn't

27 wish to take advantage of that. It was one of the things that

28 happened. If anyone's to blame it's Mr Gbao, and I'm sure he

29 recognises that. What about TF1-371? He flies in the face of

1 the idea that Gbao was boss of G5 or MP because he confirmed  
2 there were separate structures for the G5 and the MP and the  
IDU  
3 and, moreover, there was TF1-071, who you remember submitted  
4 those two exhaustive and highly detailed command charts,  
Exhibits  
14:54:45 5 20 and 21, which showed unequivocally there were separate  
units  
6 with separate commanders but interestingly failed to name  
7 Augustine Gbao on the chart in any capacity at all.

8 As I said, having weeded out the bad witnesses, errors  
of  
9 law and various confusion, we have to come to the sure  
conclusion

14:55:08 10 that the case against Gbao is going to be difficult to prove.  
11 There have been many misrepresentations of facts in the  
12 Prosecution's brief, we suggest. I'm just going to take one  
or  
13 two of them now.

14 The first one, and this is fairly random, is that the  
14:55:25 15 Prosecution brief alleges, at paragraph 1183, that Mr Gbao was  
in  
16 charge at Magburaka at the time of the UNAMSIL incident of 2  
May  
17 and they cite Colonel Ngondi's evidence at 29 March 2006, page  
18 38, where he said: "Gbao was there" -- sorry, we cite, we  
cite  
19 this. "Gbao was there and Alfred in charge of Magburaka was

14:55:54 20  
March,

there." If one looks at that citation at page 38, on 29

Prosecution

21 it's quite clear that the Prosecution are wrong in suggesting  
22 that Gbao was in charge. The sentence reads: "Gbao was there  
23 and Alfred in charge of Magburaka was there" but the  
24 appear to perhaps misinterpret the sentence.

14:56:11 25  
particular

PRESIDING JUDGE: Sorry, could you repeat that

26 reference?

"Gbao

27 MR CAMMEGH: Yes. It's 29 March 2006, at page 38.

Another

28 was there and Alfred in charge of Magburaka was there."

29 one, and I will come into more detail in misrepresentations

UNAMSIL

1 later. This is just to set out the theme.

2 The Prosecution claimed, again in relation to the

3 attacks, that DAG-111, Gbao's driver, had said that Gbao fired

4 his weapon at the DDR camp. It's absolutely not the case. I

14:56:48 5 will give Your Honours the paragraph, the Prosecution's

6 paragraph, later on in this speech for that item.

7 Not only is evidence misrepresented but it's used

8 selectively, we say, in a discerning manner or a  
discriminatory

9 manner. For example, TF1-041 is said, at paragraph 225 of the

14:57:09 10 Prosecution's brief, to be "reporting to Gbao as were all the

11 other security units" but he neglects to say that 041 also

said

12 in evidence that he didn't even know who Gbao was before the

end

13 of 1998. The way the Prosecution put it they seem to be --

it's

14 implied that for years, for the whole length of the indictment

14:57:33 15 period, he knew Gbao was being reported to. It's not taken in

16 its right context.

17 Secondly, TF1-071, at paragraph 222, Prosecution brief,

it

18 is claimed by the Prosecution that Gbao was chief of security

in

19 1998. They neglect to say that later in his evidence 071 said

he

14:57:56 20 had never heard of Gbao before 2000, corroborated by that  
chart

21 I've just told you about, and he didn't even meet him until  
about

22 2001.

23 There are material allegations, we say, that are without  
24 foundation. The classic one being the allegation that Gbao  
14:58:14 25 should be held responsible via individual responsibility, on  
26 counts 10 and 11 for physical violence, without averring any  
27 allegations against him individually. I challenge anybody to  
28 find anything in the brief that accuses Gbao of that.

29 I want to concentrate, if I may, on the issue of

1 credibility of Prosecution witnesses because I think everyone  
2 would agree that that has probably been the most spoken about  
3 feature in this trial and, in particular, I would like to flag  
up  
4 this recurring theme of late additional allegations. And Mr  
Gbao  
14:58:57 5 has been a victim of these as much, we would say, as anybody.  
6 I start with perhaps the Prosecution's star witness,  
7 TF1-371, who occupied the highest position within the RUF of  
any  
8 of their insiders. Your Honour, we deal with this in our  
brief  
9 and I will hope to pass over the references so I just deal  
with  
14:59:20 10 this quickly, if I can.  
11 Two weeks after he was -- forgive me, I'll start again.  
He  
12 testified in August, July and August 2006. He was first  
proofed  
13 by the Prosecution in December 2005 and by the time that we  
had  
14 what, by early July he produced more than 100 pages of  
statements  
14:59:43 15 and material. Nowhere in those 100 pages had he said anything  
16 about Gbao in his guise as overall security commander or IDU  
17 commander being "horizontal or parallel to the area  
commander."  
18 Suddenly, bingo. Two weeks before he -- two weeks before he



document 19 testified in here, I think it's July 5th, he produced a  
15:00:06 20 that said that Gbao was horizontal or parallel to area  
21 commanders. Where did that come from and why?  
Gbao 22 TF1-330, his first statement given in 2003, announced  
23 was someone as the leader of those who investigated. He was  
24 proofed again in 2004. Didn't say a word about Gbao. In  
March 25 2006, when he testified, he said, well, maybe the Prosecution  
15:00:28 26 forgot that he had told them, in fact, on a previous occasion,  
27 that Gbao had ordered civilians to work over a period of three  
28 years. That he had been a major part of his, 330's life for  
29 three years, and that Gbao had been ordering Morie Fekai to  
pass

1 orders in the G5.

2 Incidentally, he made a mistake. Again, I think it was  
3 Mr Jordash's questioning. He reverted, we say, to the truth

when

4 he said it was Morie Fekai "who was over us. He told us to

15:01:07 5 cultivate that farm. He had his own boss Prince Taylor." Why  
6 was it though, that 330 came up with this late disclosure  
7 impuning Augustine Gbao and why was it that when he was  
8 testifying 330 couldn't even remain true to it?

touched

9 TF1-168, a brief mention of Augustine Gbao -- I've

15:01:28 10 on him already in his famous 175 page interview in April 2003  
to

11 Corrine Dufka. He said in that 175 page document just this:

"I

12 saw Gbao once in Kailahun Town." February 2006, three months,  
13 two-and-a-half months before he testified. Suddenly Gbao is

the

14 overall MP commander. He is the most senior commander in

15:01:49 15 Kailahun Town. He was the one that passed Sam Bockarie's  
message

saw

16 that the killing should take place down to John Aruna "and I  
17 him every day." Where did that come from so late in the day?  
18 And why?

Gbao

19 TF1-045, he'd made no mention whatsoever of Augustine

15:02:13 20 until June 2005. He testified in November. I forget how long  
he  
21 had been giving statements to the Prosecution but it had been  
for  
22 quite time. TF1-314 we say who is shattered through her lack  
of  
23 credibility; several statements before the trial in which she  
had  
24 given a hearsay account that Superman and Gbao had planned an  
15:02:38 25 attack on Makoth. In additional information, just before the  
26 trial, it changes. It is suddenly Kallon, coincidentally a  
27 defendant, and Gbao who was making the attack at Makoth. In  
28 evidence it's Kallon and Gbao at Makump. Why? How can this  
29 happen?

SCSL - TRIAL CHAMBER I

Gbao

1 TF1-141 gave five separate statements. He mentioned  
2 in a very incriminating way in his last, leading to emotion  
3 the Gbao team. How did that happen? TF1-054, he mentioned  
4 and Kallon again in relation to the killing of, I think it was  
5 Demby, a chief in Bo, but two years had passed since his first  
6 statement to the Prosecution before he named Gbao as one of  
7 perpetrators. And that, Your Honour, can be seen at page 30  
8 31, transcript 1 December 2005.

from

Gbao

Pa

15:03:11

the

to

said

15:03:33

10 it. It's in there. I don't know what those Pas up there are  
11 doing" or "check your notes, counsellor." What is the  
12 Prosecution's response?

brief

failings

15:03:52

the

13 They say at paragraph 65 and the following in their  
14 that the investigation work was a struggle. There were  
15 on the part of the investigators. There were translation  
16 problems and other challenges. Well, we refer the Court to  
17 case of Kayishema, ICTR Trial Chamber, paragraph 78, which we  
18 cite at paragraph 270 and 271 of our brief. It was held thus:

19 "It's not for the Trial Chamber to search for the  
reasons  
15:04:21 20 to excuse inadequacies in the Prosecution's  
investigative  
21 process."  
22 Well, Your Honours, we can supply that authority later  
on.  
23 We can --  
24 JUDGE ITOE: Mr Cammegh, we did appeal this morning,  
when  
15:04:32 25 you weren't here, that the parties should submit authorities  
26 which they are relying on.  
27 MR CAMMEGH: I am sorry, I did hear about that.  
28 JUDGE ITOE: If they are not, if they are not already in  
29 the folders which -- feel free to supply them, you know.

was a  
There

1 MR CAMMEGH: I will when I sit down. Your Honour, it  
2 late decision to include that, and I apologise for that.  
3 won't be any more, by the way. There's only the two.

15:04:58

4 PRESIDING JUDGE: And we would like to know if that  
5 decision you are quoting is at trial judgment or --

6 MR CAMMEGH: Trial.

of  
only  
them

7 PRESIDING JUDGE: It's a final judgment or in the course  
8 a trial? A decision -- and this is why we need to have not  
9 the name but the date because it is very difficult to track  
10 down.

15:05:12

did,  
it  
back

11 MR CAMMEGH: Your Honour, I can pass it up now, but I  
12 as I said, it's a trial judgment. It's 1999. I don't believe  
13 was subject to appeal, but we can check that, and I will get  
14 to you on that by the end, if I can.

15:05:26

of  
defendant

15 PRESIDING JUDGE: That's fine. That's okay. Yes, yes.

16 MR CAMMEGH: Now, what we say is this: That regardless  
17 the authorities, neither is it nor should it be for the  
18 to suffer by failings in the investigative process, if that is

19 the reason why so many statements against our client seem to  
have  
15:05:46 20 been bettered in time. It's a bit like a layer cake; you put  
21 another layer on. The icing on the top in 168's case was:  
Gbao  
22 is the overall MP commander. I saw him every day. Roll back  
23 three years and it was "I saw him once." That is the point we  
24 are getting at.  
15:06:04 25 Contrast that, if you will, with the unimpeached, candid  
26 and well-demeanoured group of largely educated and erudite  
27 individuals, some of whom of course had been insiders, who  
28 testified for Augustine Gbao. I think there were seven of  
them.  
29 Not a single one of them, we submit, was controverted in

1 cross-examination. Not a single one of them was found to be  
2 telling lies. Not a single one appeared to give an  
inconsistent 3 statement.

4 Demeanour is important, and who can forget the demeanour  
of

15:06:54 5 someone like 110, the first one who walked into the room. In  
6 particular of 080, who met the' Prosecutors questions by  
looking

7 at him square in the face, not in a challenging way, but in a  
8 candid, sure and certain way. 101, the lady who testified,  
who

9 was commended by the Bench and at the end, 111, a meek, mild  
15:07:19 10 character, who stuck to his guns and gave evidence right at  
the

11 end under stern cross-examination from Mr Fynn, with a  
12 wonderfully spontaneous and I would say, I would suggest to  
you,

13 utterly true account of what happened when he was asked to  
drive

14 a truck to Kono and what happened to him when he got back when

15 Augustine Gbao was annoyed with him for disappearing without  
16 permission. There is a great difference, we say, in the  
manner

17 in which the two parties testified.

18 Can I now go count-by-count through the indictment.  
And,



on 19 Your Honour, I'm doing well so I think we are going to finish  
15:07:57 20 time. There is not much I want to say about count 1. There  
was 21 nominal evidence against Mr Gbao on count 1. I don't want to  
say 22 there was none because we might have missed some, so let's  
just 23 say it was nominal. That being the case why is it, we  
24 respectfully ask, at paragraph 1079, the Prosecution claim  
thus:  
15:08:21 25 "By virtue of their superior position within the RUF  
for 26 hierarchy they, all three defendants, are responsible  
27 terrorism."  
it's 28 Well, you need some evidence. I might be wrong, maybe  
be 29 there. We haven't found it and we suggest that count should

1 dismissed.

2 Similarly count 2. It's pleaded that Gbao is guilty of  
3 collective punishment in relation to the Kamajors, the basis  
4 being that Gbao allegedly ordered Kamajors to be screened for,

15:08:53 the

5 that he allegedly passed down the order from Sam Bockarie for  
6 executions to take place and on the basis that he was present  
7 when the shooting happened. Well, we refer Your Honours to

the

8 points that we made in the brief on that matter. We'd say

only

9 to add this: That collective punishment, to our knowledge,  
10 requires specific intent. We suggest that that intent was  
11 never -- there was never even an attempt to make out that  
12 specific attempt throughout the Prosecution's case and,  
13 accordingly, count 2 should be dismissed against Gbao.

15:09:16

14 More controversially, we move to counts 3 to 5 and the

15:09:37 needs

15 issue of Kono raises its head. I don't think the Chamber

when

16 to be reminded of the controversy that 371's evidence caused

Kono.

17 he testified that the IDU may have known about killings in

18 It led to emotion; I know that we don't need to revisit that.

the

19 Perhaps it's worth me saying at this point that 371 was

15:10:04 20 highest ranked Prosecution witness. He had been given  
immunity  
21 from prosecution. That was dealt or dwelled on at some length  
in  
22 cross-examination, as was the fact that he was caught out  
lying  
23 about attempting to partake in an arms' deal in Dananon, Ivory  
24 Coast in 1996.

15:10:26 25 The evidence that the Prosecution wished to place before  
at 26 the Court I think is this: It's what 371 said at 24 July 2006  
27 page 19:  
28 "The IDU at that point in time, who I cannot recall, the  
29 IDU commander at that time knew about it."

1 He'd already indicated that he felt that Gbao and Sesay  
2 knew about the atrocities in Kono.

3 Well, let's leave aside the arguments that I raised in  
the  
4 motion because they are now moot for these purposes, but move  
to

15:11:04 5 the Defence, the Sesay witness DIS-188, who was a unit  
commander

6 and I think we can all remember which unit he commanded.

7 Now, on 2 November of 2007, I cross-examined this man  
and I

8 just want to cite one or two items from his cross-examination  
9 which we suggest deals with the point of Gbao knowing about  
what

15:11:35 10 happened in Kono, once and for all.

11 At page 14, on 2 November, he had been discussing a man  
12 called Sheku Coomber, who was the IDU man based, commander  
based

13 in Buedu.

14 "A. Yes, Sheku Coomber was based in Buedu.

15:11:58 15 "Q. At the time that the reports came through from  
Kono?

16 "A. Yes.

17 "Q. Okay. And was he the local IDU commander in Buedu?

18 "A. Yes.

19 "Q. Was he quite close to Bockarie?

15:12:11 20 "A. Mmm, yes.

21 "Q. And can you confirm I think that during this period  
22 Augustine Gbao was based in Kailahun Town?

23 "A. Yes."

24 And he makes it clear in his testimony, both before and  
15:12:24 25 after that, that Sheku Coomber received a radio report direct  
26 from Kono, which he acted on by passing it to Bockarie. Page

16,

27 I suggested to him:

28 "Q. But the IDU and the G5 simply were unable to do  
their

29 jobs properly in Kono during that time, weren't they?

1 "A. Yes.

2 "Q. And as you've indicated there was no question of a  
3 Joint Security Board investigation being able to operate  
in  
4 Kono at that time?

15:12:59 5 "A. Yeah.

6 "Q. You told Mr Jordash that you (this man was based in  
7 Pendembu at the time) received a message in a letter; is  
8 that right?

9 A. From?

15:13:01 10 Q. With a message from Kono?

11 "A. Yes, from someone in his unit. (He names the  
unit).

12 "Q. And you acted on that immediately, did you?

13 "A. Yes."

14 And finally this: I asked him:

15:13:17 15 "Q. Is this the case: That as soon as you had felt  
that  
16 you had confirmation you acted by informing Bockarie?

17 "A. The leader, yes."

18 This is in relation to the letter. This is the other  
item  
19 of communication. The first was a radio message direct to  
Buedu,  
15:13:30 20 the second was a letter that this unit commander received  
21 elsewhere in Kailahun District.

22 "Q. Right. Now are you able to say whether or not  
23 Augustine Gbao, Sam Bockarie, are you able to say  
whether  
24 or not Sam Bockarie had already been told what was going  
on  
15:13:51 25 by the time you forwarded your report to Bockarie? Had  
he  
26 already been informed of the trouble in Kono?  
27 "A. I can't tell.  
28 "Q. You can't tell. So it's possible he could have  
been  
29 informed already?

1 "A. Yes."

2 Now, what this all means, I am sorry if it doesn't make  
3 much sense at first hearing, but what it all means is that  
people  
4 were doing their best to quell what was going on in Kono, but  
the

15:14:17 5 loop didn't contain Augustine Gbao at that time.

6 The IDU man in Buedu, Sheku Coomber, received a radio  
7 message which he gave to Bockarie immediately. And, as the  
8 testimony goes on to say, Bockarie acted immediately in  
9 withdrawing two individuals from Kono District.

15:14:35 10 The second one was a letter which was handed by -- given  
by

11 hand to 188 which he also himself acted on immediately, Gbao  
not

12 being in the loop and that, I hope, deals with the suggestion  
13 that Augustine Gbao was aware of any crimes being committed by  
14 named individuals in Kono at that time, and I hope I can move  
on,

15:14:58 15 having established that, and giving Your Honours the  
references.

16 I must say that this didn't find its way into our brief.

17 The final point I would like to make on Kono is this:  
We

18 called the witness who himself, as you remember, was an RUF

19 insider unit commander, DAG-080, who confirms, on 6 June, page



15:15:24 20 this year, reports were not being sent, so far as he was  
aware,  
21 from Kono.  
22 So, what we have is isolated reports taking place, not  
part  
23 of a system but isolated reports going to various recipients -  
-  
24 well, Sheku Coomber/Bockarie and 188 being the other one, in  
15:15:45 25 different towns, both are being acted on immediately they are  
26 received, Gbao not being in the loop.  
27 But, even if one was to believe that Gbao did receive  
28 reports, what power to punish did he have? 188 made it clear  
29 within that same transcript that he did not have liberty to  
act

suppose

1 without Bockarie's permission, and nor did Gbao, which I  
2 is a point that also could be levelled when one looks at the  
3 Kailahun killings, and I move on to that now.

15:16:24  
brief,

4 We submit that we have already anticipated all of the  
5 Prosecution's submissions on the Kailahun killings in our

witnesses

6 but we do urge Your Honours once again, please, to pay the  
7 strictest attention to the credibility, or not, of the

against

8 who the Prosecution called in support of that allegation

15:16:53

9 Mr Gbao, which we anticipate is founded mostly on 63 liability  
10 rather than anything else.

think

11 There was 168, I've already dealt with him. I don't

and

12 I need to repeat the oddities which occurred in his evidence  
13 in his previous statements and, of course, that's dealt with  
14 exhaustively in our brief.

15:17:12  
suggested

15 But there was also 113, TF1-113. TF1-113, as I

against

16 in our brief, might have had a personal motive or grudge

sorry,

17 Augustine Gbao. It was suggested by a Prosecution, I am

--

18 Defence witness -- I think it was DIS-069 but I can't be sure

19 that she may have received some sort of encouragement from the  
15:17:41 20 Prosecution. That is something which I am not going to take  
21 further here. The evidence spoke for itself and it's not a  
line  
22 which I'm necessarily proponing at this time.  
23 But 113 was, on the face of it, a dangerous witness  
except  
24 when you look at the chronology of what she told investigators  
15:18:05 25 and the Court, we see a different picture. From 2003, in  
26 chronological order, her account of the number of people she  
saw  
27 Sam Bockarie kill at the roundabout in Kailahun goes like  
this:  
28 Two, seven, two, eight. "I've not said a different thing" she  
29 said when I asked her why that was. "Were you there, madam?"

1 Asked Mr Justice Itoe at that point. Well, it's a question  
that  
2 I might have wanted to ask myself. In fact, we suggest she  
3 probably wasn't there because she admitted lying, when I  
4 suggested to her that she was lying when she told the Court  
she  
15:18:50 5 actually counted 65 dead bodies. She actually said, "Yes, I  
am  
6 lying." How can a witness, who confesses to lying, having  
taken  
7 the oath in a trial as grave as this, testifying on an offence  
as  
8 sickening as this, be held against any defendant? In our  
9 submission her testimony must be banished from any further  
15:19:17 10 consideration.  
11 045, similarly, remarkable confusion. He actually  
claimed  
12 to have been one of the shooters and yet he didn't mention Sam  
13 Bockarie being there at all; and then he contradicted himself.  
14 First of all, saying he saw all 65 and later saying in his  
15:19:38 15 evidence, we deal with this in our brief, so I'm not going to  
say  
16 cite the references, later saying in his brief, he couldn't  
17 where the balance 55 died. Utterly confusing.  
18 And then there is 366 who, we submit, really we needn't  
19 deal with any further here. Those 29 inconsistencies are not  
all

15:19:57 20 dealt with in our brief but many of them are, and we submit  
that

21 he was not a witness worthy of belief.

22 Now, a further concern that we have derived from the  
23 Prosecution brief is this. There's a footnote number 1408 in  
24 relation to the Kailahun killings which reads like this:

15:20:18 25 "All Prosecution witnesses said that the Kamajors were  
26 civilians although the RUF, in particular the third  
27 accused, suspected they were Kamajors."

28 There it is, bold as brass, a declaration like that. No  
29 reference given whatsoever. And it's certainly not a claim  
that

1 we could remember ever hearing or reading in the transcripts.  
2 These things are dangerous and it is going to give Chambers  
and  
3 Your Honours' assistants a lot of hard work because we suggest  
4 that this is only the tip of the iceberg. I haven't got time  
to  
15:20:53 5 go through all of them and that amplifies the danger, because  
if  
6 I can't flag them all up, then we have to trust people in  
7 Chambers to identify them all and I am sure they have got more  
8 important things to be doing.  
9 JUDGE ITOE: Well, no, they are very focused on this  
case,  
15:21:09 10 Mr Cammegh, I can assure you.  
11 MR CAMMEGH: They probably prefer to be focused on --  
12 JUDGE ITOE: They do their job.  
13 MR CAMMEGH: Yes, I have no doubt they will. It will be  
14 laborious.  
15:21:22 15 Now, the Prosecution claims superior responsibility in  
evidence  
16 paragraph 524 but realistically, we have heard so much  
it  
17 about Bockarie's dictatorial personality et cetera, et cetera,  
18 became boring. Who was Mr Gbao to punish? Surely not Sam  
19 Bockarie. And given what 188 said, and the tenor of evidence  
as

15:21:45 20 we heard, would Gbao have had the power to have punished  
anybody?

21 We, I think 70-odd pages in our brief, describe how the IDU  
22 fitted in with other units; how reporting and ordering et  
cetera

23 intermingled and basically established with very little retort  
24 from the Prosecution in their brief, by the way, how Augustine  
15:22:06 25 Gbao didn't have the power to prevent or punish wrongdoing of  
there

26 members of other units, let alone combatants. We suggest  
awful

27 is no question of superior responsibility applying in the  
28 case of the killing of the Kamajors, whether Gbao is found to  
29 have been there or not.

1 Another set of killings that alleged by the witness  
2 TF1-108, in our brief we have cited why that man is not worthy  
of  
3 credit. He gave two non-corroborated accounts of Mr Gbao  
being  
4 involved. The first, the killing at a court barri in  
Kailahun,  
15:22:47 5 and the second the killing of his brother pursuant to a forced  
6 labour march which Gbao had ordered. We submit, Your Honours,  
7 for reasons I won't go to in depth here, that 108 impeached  
8 himself to such an astonishing degree that Your Honours should  
9 not belabour yourselves with considering any of his evidence  
10:23:10 10 against any defendant. Besides which, there was no  
corroboration  
11 of those allegations from anybody.  
12 Furthermore, at paragraph 486, the Prosecution claimed  
that  
13 in Bombali District TF1-041, said the last of the December  
1998  
14 attack, it was the murder of an elderly gentleman, I think in  
15:23:32 15 Makeni, it was reported to Gbao and Gbao didn't appear to act  
on  
16 it. We submit that not only is TF1-041 not credible, for  
reasons  
17 I will go into later on, in connection with the UNAMSIL  
incident,  
18 the indictment, paragraph 51, makes no allegations of unlawful



19 killings in Makeni beyond 30 November 1998 and because the  
date  
15:23:56 20 of the killing is not specified we submit there is no case to  
21 answer on that.  
22 Moving then to counts 6 to 9; forced marriage.  
23 I have to go back to TF1-366 because he is about as good  
as  
24 it gets from the Prosecution. In cross-examination he  
15:24:19 25 admitted --  
26 JUDGE ITOE: Mr Cammegh, which one is this? TF1 --  
27 MR CAMMEGH: 366.  
28 JUDGE ITOE: 366. Okay.  
29 MR CAMMEGH: In cross-examination he admitted that no,  
Gbao

1 had no wife in Makali or Masingbi, as he had originally  
2 suggested. The Prosecution brief, however, neglects to refer  
3 Your Honours to that admission in cross-examination. Whilst  
it  
4 asserts that Gbao had a forced wife in Kailahun Town, in  
15:24:54 5 cross-examination 366 said Gbao did not. I am sorry, he never  
6 said Gbao had a forced wife in Kailahun Town at all; it's a  
7 misrepresentation of the records.

8 It's certainly an innocent mistake but it's a dangerous  
9 one. We also submit in relation to forced marriage that there  
is  
15:25:19 10 a disingenuous use of DAG-101's evidence that -- that lady who  
11 had a position in the RUF -- when she said that WACs were at  
the  
12 front lines helping combatants.

13 Well, what is in the word "helping" that is suggestive  
of  
14 forced marriage? The Prosecution didn't even cross-examine  
her  
15:25:44 15 on it. The count should be dismissed.

16 Counts 10 and 11, physical violence. I've already  
referred  
17 to that. Nominal, if any, because we can't find any evidence  
18 alleged against Gbao in relation to amputations and what have  
19 you. And yet, as I've already highlighted, the Prosecution  
claim

15:26:04 20 that Gbao should be held individually responsible along with  
the  
21 other two defendants. No evidence, Your Honours, we say and  
it  
22 should be dismissed.  
23 Count 12, the use of child soldiers, is covered against  
24 Gbao, at least I think, in paragraph 824 of the Prosecution  
brief  
15:26:23 25 and they rather misleadingly give an inventory of insiders who  
26 they say saw all three accused with child soldiers. It's just  
27 when you actually look at the paragraphs that follow, to say  
that  
28 these -- and I will go through them in a moment -- but to say  
29 that all of them saw all three accused with child soldiers is

1 absolutely wrong. The insiders named are 045, 366, 036 and  
367.

2 So taking them in turn, 045 made no mention of Augustine  
3 Gbao with child soldiers. 366 did, which I will come on to in  
a  
4 moment. 036 made one general blithe comment Gbao had child  
15:27:20 5 soldiers, without any specifics whatsoever, and we submit that  
6 that really isn't something that could be rightfully used  
against  
7 Mr Gbao.

8 367 made no claim whatsoever that Augustine Gbao had  
child  
9 soldiers, and returning to 366, there are some unacknowledged  
15:27:39 10 misrepresentations in the Prosecution brief and, again, I'm  
not

11 suggesting any malfeasance on the part of the Prosecution.  
It's  
12 an error. We have all been working under a tremendous  
pressure,  
13 almost to the bounds of human endurance, and mistakes are  
going  
14 to happen, but it's a pity that they happen in this arena at  
this

15 time. He alleged Gbao had child soldiers or was with child  
16 soldiers in Kono, paragraph 787 of the Prosecution brief, but,  
in  
17 cross-examination 366 admitted that Gbao was never in Kono.

17  
18 November 2005, page 84.

19 Two. Contrary to the Prosecution claim 366 never  
alleged  
15:28:34 20 that the boys were under 15 or that Gbao was with boys under  
15,  
21 and forgive me, we deal with this now in our brief, and I  
haven't  
22 got the citation but it's there under child soldiers. What  
366  
23 actually said was that he didn't know their ages and that  
there  
24 were "so many." It's not actually evidence at all because the  
15  
15:28:57 25 year age threshold isn't met by him. Why did the Prosecution  
26 include that?  
27 Other witnesses, these are the non-insiders, so they  
also  
28 cite as testifying that Gbao had child soldiers. TF1-113, at  
29 paragraph 803 in their brief, there is just a blind claim:

1 Augustine Gbao had child soldiers in Buedu. There is no  
2 citation, and we can't find the reference either. Fourth  
3 misleading entry. TF1-141, again I'm afraid I haven't got the  
4 Prosecution brief reference to him, but in our brief it's at  
15:29:38 5 paragraph 1145. He said, he talked about boys but he said he  
6 didn't know their ages. He said they were older than him, and  
7 memorably he said they had a bigger volume than he did,  
8 describing them as being bigger. How can that be evidence?  
9 Five, TF1-314, who we submit is -- her credibility was  
destroyed  
15:29:59 10 beyond recall -- and I have written a long section on that in  
the  
11 brief.  
12 According to the Prosecution, at paragraph 929, Gbao  
used  
13 SGUs in Buedu. Now, either this is a woeful error or it's a  
14 desperate misrepresentation because I'm going to read the  
15:30:18 15 following extract from my cross-examination of this woman at 7  
16 November 2005, page 37:  
17 "Q. You told us earlier on when you said you never saw  
18 Augustine Gbao in Buedu -- do you remember telling us  
that  
19 earlier?  
15:30:31 20 "A. Yes.  
21 "Q. So it follows, doesn't it, that if you didn't see

Augustine 22 Augustine Gbao in Buedu you could not have seen  
wouldn't 23 Gbao with some SBUs in Buedu; that would be fair,  
24 it?  
15:30:47 25 "A. Yes."  
26 It was funny. If it wasn't funny it would just be  
27 desperately sad, but that is the evidence that the Prosecution  
28 are forced to lead. It doesn't get off the ground.  
29 Six. TF1-263, paragraph 824.

SCSL - TRIAL CHAMBER I

1           In their brief, Prosecution say that she makes an  
2           allegation against Gbao. She doesn't even mention him. I  
3           mentioned in my opening some time ago that Mr Gbao had fear.  
4           Mr Jordash used the same word yesterday. This is why. This  
is  
15:31:23 5           what we are talking about. This is exactly what we are  
talking  
6           about.

7           Can I move on to count 13, forced labour. At paragraph  
8           953, the Prosecution suggest that TF1-141 was sent to Bunumbu  
9           training base after Augustine Gbao had screened him. The  
15:31:42 10          Prosecution suggest that the screening was to divide the  
11          civilians up for various tasks, but if one looks at what 141  
12          actually said, it was to screen for enemies. 12 April 2005,  
page  
13          20. And what he then said was that he had been in Kailahun  
Town  
14          some time. I can't remember how long -- I think it might have  
15:32:06 15          only been a few days. He was taken by surprise early one  
16          morning, he said, by -- he said combatants who matched him off  
--  
17          my words not his, to the training base.

18                 Now, that's all very well and good and it may be that  
19                 somebody committed a criminal offence there, I don't know, but  
15:32:27 20          there is no -- where is the link to Augustine Gbao? And where  
is



21 the evidence that Augustine Gbao had any sort of effective  
22 control over the combatants anyway, even if it is true? When  
you  
23 look at the welter of evidence that we cite in our brief to  
24 demonstrate that Gbao had no command and control over  
combatants,  
15:32:47 25 over anybody else, other than those people below him in the  
IDU.  
26 Unimpeached Defence evidence, trotted that out witness after  
27 witness; unimpeached.  
28 And then we had this, from the Prosecution, at paragraph  
29 912. Apparently 141, we must have missed it, said the biggest

1 farms belonged to the three accused and Sam Bockarie. There  
is  
2 no citation, and we can't find it. It may, again, it's  
probably  
3 just a human error but it's a whopping great human error if it  
4 is. We have done our best to find it, we couldn't. We will  
be  
15:33:33 5 corrected if we are wrong, because we don't want to take an  
6 unfair point; that is the last thing we want to do.

7 In relation to the rest of the allegations on count 13,  
8 Your Honours, we respectfully suggest that you look at our  
brief.

9 Count 14, pillage. The Prosecution use TF1-117 who we  
say  
15:33:54 10 was utterly fanciful in the evidence that he gave to allege  
that  
11 Gbao was involved in Operation Pay Yourself. I touched on  
this  
12 earlier on.

13 The whole Prosecution, the whole case, we agree with it,  
is  
14 that Gbao was in Kailahun Town at that time. Indeed, and this  
is

15 ironic, even 117 himself testified that he was told to take a  
16 message to Gbao, in Kailahun Town, to get him to receive  
Johnny  
17 Paul Koroma which had to have been in February 1998. It's  
almost  
18 as if 117, who we suggest, without wanting to be patronising,

19 because he was a man who went through a terrible time and was  
15:34:42 20 forced to take drugs at a young age, may well be particularly  
21 disturbed and given his evidence, without wanting to be  
22 patronising, there are aspects to it which really do seem to  
be  
23 quite fanciful.

24 We suggest he is inherently unreliable. That evidence  
15:34:59 25 cannot be used. The Prosecution say, well, Mr Gbao, in the  
26 alternative, failed to punish the looting and by omission  
27 therefore he is aiding and abetting. Well, we ask: How on  
earth  
28 could he have stopped what was going on on the highway from  
29 Makeni to Kono? And what power would he have had anyway?

1           Counts 15 to 18 are on the thorny subject of UNAMSIL  
which  
2           has of course exercised this Court, and the Gbao Defence team  
in  
3           particular, for much of the last three months. And what I  
want  
4           to do now, I hope with candor, and accuracy, is fairly reflect  
15:35:45 5           the evidence that this court has heard on this topic over the  
demonstrate  
6           years without any tricks or bending of the facts, to  
7           that the Prosecution case is replete with dangerous  
8           inconsistencies and factual errors. But, first of all, I have  
to  
9           suggest sadly once again that there have been some very  
serious  
15:36:13 10          misrepresentations by the Prosecution in their brief.  
but  
11          The first one is this -- and I've mentioned it already  
12          I want to put these in as a package -- they are not  
exhaustive,  
13          there are more, but we are constrained by time.  
in  
14          The first one is that Gbao, at paragraph 1183, Gbao was  
15:36:33 15          charge of Magburaka. It appears that the Prosecution want to,  
as  
16          it were, nail Gbao for everything that happens in Magburaka  
after  
17          2 May, which we suggest is wholly inappropriate. They suggest  
in

abduction 18 their brief, at paragraph 1183, in the context of the  
Ngondi 19 of Major Rono that Gbao was involved. They quote Colonel  
15:36:59 20 from 29 March 2006, page 38.  
21 "They were telling me (Ngondi) they were telling me that  
22 the RUF" -- sorry, I will start again.  
23 "They were telling me that the RUF and Gbao was there  
(this 24 is during Rono's abduction) and Alfred in charge of  
15:37:18 25 Magburaka was there."  
26 Now, however you look at that sentence, you can't, in  
our 27 submission, conclude that Gbao was in command at Magburaka.  
The 28 way it's worded is quite clear it was Alfred but, thereafter,  
the 29 Prosecution, in their brief, attempt to attribute all

1 responsibility for what happened at Magburaka at Gbao's door.  
We  
2 say that is either desperate or reckless. It really doesn't  
bear  
3 scrutiny.

4 DAG-111, as I have already said, in their brief at  
15:37:53 5 paragraph 1170 assert that DAG-111 said --

6 PRESIDING JUDGE: But I would like to -- just to  
interject  
7 here. I am just reading this particular paragraph that you  
are  
8 alluding to, 1183, and what the Prosecution is saying is that:

9 "Major Rono and three soldiers had allegedly been  
abducted

10 earlier by the third accused who was at the time in  
15:38:13 charge  
11 of the situation at Magburaka at the time."

12 To be in charge of the situation does not necessarily  
mean  
13 that you are what you are alleging to say, so I was  
questioning

14 the nuances, I agree, but they are not alleging what you are  
15 saying they allege, saying, and I am quoting from the  
15:38:32 paragraph  
16 in question. So it may be misleading as well, so I --

17 MR CAMMEGH: Well, this is the problem. We never quite  
18 know what they mean, but what they do is they quote Ngondi.

And,

read 19 in my submission, the allegation that Your Honour has just  
15:38:52 20 out is probably founded, it can only be founded on this quote  
21 from Ngondi, which tends to go the other way. In other words,  
read 22 the allegation that the Prosecution make, that you've just  
23 out, is we say groundless because the only evidence on or  
from 24 surrounding the topic is that sentence that I've just read  
15:39:13 25 Ngondi.  
26 PRESIDING JUDGE: Yes, but it's different. What I am  
of 27 saying to you, this is quite different to say he was in charge  
28 the situation, whatever the situation means. It's quite  
29 different then to say that he was the commander as such, at

1 Magburaka. It's not what the allegation says, and that is not  
2 what this paragraph is saying.

3 MR CAMMEGH: Well, if that's right --

4 PRESIDING JUDGE: Well, anyhow, this is certainly one  
15:39:35 5 reading of it. This is --

6 MR CAMMEGH: I don't want to take unfair points. This  
is

7 how we read it and that is the citation that the Prosecution  
8 appear to rely upon. And, if we are wrong about that, we are  
9 wrong, but it's the interpretation that we gave to it. We  
have

15:39:52 10 to, obviously, play devil's advocate with ourselves. We have  
to

11 look at the worse case scenario, or the worst possible  
12 interpretation. That was how we thought it could have been  
seen

13 to Mr Gbao's detriment. But it's a matter for Your Honour,  
and

14 I'm not going to dwell on it or seek to argue it further.

15:40:11 15 I've already mentioned 111 being misquoted, saying that  
he

16 saw Gbao fire shots at the DDR camp. In actual fact, the  
17 cross-examination from Mr Fynn went like this, at 19 June

2008,

18 at page 30:

19 "Q. Would I be correct to suggest that Augustine Gbao  
also



15:40:30 20 fired shots?  
21 "A. No."  
22 The third, what we say is a misrepresentation, takes  
place  
23 at paragraph 1162. Joseph Mende, I think he was 044, was the  
24 UNAMSIL personnel who the Prosecution claimed was having  
heated  
15:40:49 25 negotiations with Gbao on 17 April. In fact, in  
26 cross-examination, well, the Prosecution neglected to put in  
27 their brief, in cross-examination Mende admitted that he was  
150  
28 metres away from the discussion which was an argument between  
29 Mr Gbao and Colonel Poraj Wijinski [phon]. That is at 29 June

1 2006, page 8.

2 Four. Paragraph 1221, there is the allegation that Gbao  
3 stormed the DDR camp on 17 April with 25 to 30 men. The only  
4 evidence on that point, unless we are wrong, and we think

we've

15:41:28 5 checked everything, is that 042 Ganese, said it is with a few  
6 armed men. That is evidence that we reject in any event and

also

7 runs contrary to what Colonel Ngondi said about Gbao's

behaviour

8 on 17 April, which we cite I think twice in our brief. I am  
9 afraid I don't have that reference here.

15:41:51 10 1221,

11 assembled and organised at the Caritas Makeni for the attacks

on

12 the DDR camps and the KENBATT positions. The citation that

they

13 give from TF1-314 bears no relation to that quote.

14 PRESIDING JUDGE: Before you go further, are you saying  
and

15:42:15 15 suggesting that, I am reading at 1163 of their brief, and it's  
16 really in reference to just one quote that you have mentioned,  
17 that's Major Ganese Jaganathan --

18 MR CAMMEGH: Yes.

19 PRESIDING JUDGE: -- he testified how on 17 April 2000,  
the

15:42:30 20 first day of demobilisation at Makeni, a group of 25 to 30 RUF  
that's 21 combatants arrived on truck led by the third accused. So  
22 what is the -- the number comes from that and the quote is  
looked 23 Jaganathan transcript 20 June 2006, page 57, so, I haven't  
24 at these pages, but that's the reference, so are you saying  
this  
15:43:03 25 is not what that page is saying?  
few 26 MR CAMMEGH: What actually the witness says was that a  
27 went to the camp. That -- the allegation is that Gbao stormed  
28 the camp with 25 to 30. In the transcript we noted that  
although  
29 Gbao allegedly arrived at the camp or outside the camp with 25  
to

with 1 30 he went to the camp -- Ganese says he stormed the camp --  
2 "a few." In other words, there is a distinction.

3 PRESIDING JUDGE: But that is what he says. The third  
4 accused, with a few armed combatants stormed into the camp.  
That

15:43:27 5 is what he says two lines down.

6 MR CAMMEGH: Well, Your Honour, I am at a disadvantage  
7 because I don't have the transcript in front of me.

8 PRESIDING JUDGE: Anyhow, I just read to you that he  
9 testified that on 17 April, the first day, a group of 25 to 30  
15:43:40 10 RUF combatants arrived on truck led by the third accused.

11 MR CAMMEGH: Yes.

12 PRESIDING JUDGE: The RUF overall security commander.  
They

13 jumped out and lined up in front of the DDR camp. The third  
14 accused with a few armed combatants jumped into the camp  
15:43:54 15 threatening to dismantle all the tents. This is what is  
quoted.

16 MR CAMMEGH: But that is our point, Your Honour. We say  
17 there is a serious distinction between 25 to 30 that arrived  
18 truck, allegedly, and the few that go into the camp. Ganese,  
19 according to the Prosecution brief, said that Gbao stormed the

15:44:14 20 camp with all of them, 25 to 30 -- I think it's paragraph  
1221.

The

21                   PRESIDING JUDGE: Oh, I see. So it's not a misquote.

or

22                   misquote by the Prosecution you are saying is that they say he

23                   stormed with a few combatants while the witness says with 20

24                   25. It's the opposite.

15:44:31 25  
25

                  MR CAMMEGH: What we are saying is that he turns up with

26                   to 30.

27                   PRESIDING JUDGE: Yes.

28                   MR CAMMEGH: Ganese says he turns up with 25 to 30. The

29                   active storming the camp takes place with "a few."

1           PRESIDING JUDGE: Yes.

2           MR CAMMEGH: So it's not implicitly all of them; it's a  
3           few. The Prosecution however, in their brief, at paragraph  
1221,  
4           aver that Gbao stormed the camp with 25 to 30, not a few, and  
15:45:03 5           that's the difference.

6           PRESIDING JUDGE: I follow you. You are in a different  
7           paragraph. I am still at 1163 and you are at 1221.

8           MR CAMMEGH: Can Your Honour award me 90 seconds for  
that,  
9           please?

15:45:56 10           PRESIDING JUDGE: Justice Itoe is the timekeeper, as you  
11           know.

12           JUDGE ITOE: And, Presiding Judge, I am doing my job. I  
am  
13           following his argument very closely as well.

14           MR CAMMEGH: I think I have got about 12 minutes left.  
15:46:20 15           Your Honours, those are what we suggest are misrepresentations  
16           and I want to emphasise we are not suggesting they are  
17           deliberately misleading. It's the human condition; we can't  
work  
18           18 hours a day and get everything right. And I've seen a lot  
of  
19           people across the room are doing that as well as people here  
15:46:42 20           were, but it's dangerous because these are documents of record

going 21 and they are the documents on which you and your -- I was  
working 22 to say subordinates -- people in Chambers are going to be  
23 on in this case.  
24 Now, if we look at other witnesses, we wish to make the  
15:47:02 25 suggestion that the only two allegations left, which are  
capable 26 of conviction in relation to Augustine Gbao, are the  
allegations 27 of the abductions of Major Rono and Major Maroa. And I say  
that 28 in the light of the following eight witnesses who we say are  
very 29 badly damaged, some beyond recall, if not all of them.

1           Again TF1-366. The way he delivers his chronology of  
2 events alone, we suggest, rules him out of contention as a  
3 creditable witness on this issue, because the fighting at  
Makump  
4 and Lunsar simply couldn't have taken place at the same day.  
15:47:48 5 Lunsar followed Makump after the ZAMBATT had been alerted.  
6           Secondly, TF1-360 was another witness who I think the  
words  
7 were "what you said is a tissue of lies isn't it" and he  
replied  
8 "yes." Very dangerous to rely on a witness who makes that  
kind  
9 of concession.  
15:48:13 10           Thirdly, TF1-071 he, we say, lied in relation to  
Augustine  
11 Gbao leading attacks on 1 May 2000 in Lunsar. There were no  
12 activities in Lunsar on that day. For reasons I have already  
13 dealt with, both here and in the brief, we suggest that  
numbers  
14 four and five, TF1-117 and TF1-314 have been totally  
discredited.  
15:48:41 15           Six, TF1-041, again, his chronology completely wrong.  
The  
16 Zambians hadn't even contemplated fighting at the point that  
he  
17 said that they were.  
18           Joseph Mende, 044, number seven, didn't see Gbao after



but 19 April 2000. I am not suggesting that any lies followed that

15:49:01 20 how could he give evidence when he hadn't seen Gbao?

21 Number eight, TF1-174, he too lied. He said that he saw  
22 pushing children into the truck to send them off to fight at  
23 Lunsar having earlier told the Court that he had just heard a  
24 report to that effect, not that he'd seen it. We suggest

those

15:49:21 25 witnesses cannot be relied on.

26 What then of Major Maroa. Well, we have worked hard to  
27 exculpate Augustine Gbao in relation to the abduction of Major  
28 Maroa, since April. Leaving everything else aside we suggest,  
29 Your Honours, that DAG-111 did that all by himself.

1           Secondly, Major Rono, very little has been made of this  
man  
2           in this trial. The evidence is the evidence that I read out  
3           already in relation to Magburaka. If I said the abduction of  
4           Major Maroa, I should have said the aiding and abetting of  
that  
15:50:03 5           abduction, by the way. With Rono, that account, the account  
from  
6           Ngondi was hearsay, but, which might be admissible but it  
didn't  
7           state, if one looks at the record of what Ngondi said, it  
didn't  
8           state that Gbao was responsible; just that he was there.  
9           Secondly, it's a hearsay account which denotes no clear  
15:50:28 10          knowledge as to who the source was. And I think it's probably  
11          fair, isn't it, to suggest that hearsay, where we know the  
12          source, as opposed to hearsay that's just coming from the  
ether,  
13          is more reliable.  
14          Thirdly, given Gbao's conduct, the conduct that we  
suggest  
15:50:49 15          he exhibited at Makump, on 1 May, even if he had been there  
when  
16          Major Rono was abducted, which was the day after, which we  
deny,  
17          but even if he had, who is to say that he wasn't trying to  
stop  
18          that one as well? There is nothing to gainsay that theory.  
Our

19 conclusion then on UNAMSIL is this:

15:51:13 20  
that

We've tried to demonstrate, over the past few months,

and

21 Augustine Gbao committed no single offence, ordered the  
22 commission of no single crime in the Makeni area in the first  
23 week of May and thereafter in Kono in 2000, or that he aided  
24 abetted, he planned or instigated any criminal offence either.

15:51:38 25  
a

We hope to have shown this Court beyond -- well, its not  
26 our burden -- but we hope to have shown this Court that there  
27 simply isn't any basis on which he could be held to have been  
28 willing participant on any mode of liability.

29 And lastly on UNAMSIL --

1           PRESIDING JUDGE: On UNAMSIL, I just would like to ask  
you  
2           a clarification of what you said. You said that the evidence  
of  
3           Ngondi is hearsay, and you mentioned something of not knowing  
the  
4           source and therefore it's impossible. So, I thought the  
evidence  
15:52:13 5           did disclose the source of what he heard; it was his radio  
6           operator or somebody from his unit communicating with him, or  
7           something like that, but I haven't looked at this evidence  
last  
8           night.

9           MR CAMMEGH: I'll read it out. This is the line on  
which I  
15:52:26 10          based that. It's for Your Honours, I am obviously taking a  
11          Defence perspective: "They were telling me that the RUF and  
Gbao  
12          was there and Alfred in charge of Magburaka was there."

13          PRESIDING JUDGE: But they, these are his own people  
that  
14          [indiscernible] see to; isn't that what he is saying?

15:52:43 15          MR CAMMEGH: Supposedly but "they," of course, is a  
16          ubiquitous term, and it is hearsay and there is no  
confirmation  
17          as to who "they" were. And, moreover, of course, there's no  
18          confirmation as to who they got that information from. Your  
19          Honour, it's a matter for you. We don't --

15:53:03 20                   PRESIDING JUDGE: No, that's okay. I just -- that does  
not  
21                   accord with my recollection as to it was an unknown person all  
of  
22                   a sudden telling him something but we will look at the record  
in  
23                   this respect and make our own assessment. We appreciate it.  
I  
24                   thank you.

15:53:17 25                   MR CAMMEGH: Thank you. If the Court finds that  
Augustine  
26                   Gbao went to the DDR camp earlier on 17 April we refer Your  
27                   Honours, I am so sorry, I don't have the reference, but we  
cite  
28                   it twice in our brief, what Colonel Ngondi said about Gbao's  
29                   behaviour that day ending with the line "I commend him for  
that."

1 No evidence, we suggest, in the light of that evidence from a  
2 highly respectable individual, that Gbao committed any offence  
at  
3 that place or that he left there having arrested anyone or  
4 attacked anything et cetera, et cetera and who is to say that  
the  
15:54:00 5 same result may have been seen if Kailondo and others had not  
6 turned up to the camp at Makump on 1 May.

7 PRESIDING JUDGE: So what are we to make out of this  
8 statement? I'm trying to follow the logic that you are  
advancing  
9 now.

15:54:23 10 MR CAMMEGH: Well, the point is this. Given what Ngondi  
11 said about how the --

12 PRESIDING JUDGE: Yes, is this 17 April?

13 MR CAMMEGH: Yes. Given what Ngondi said about how Gbao  
14 behaved at the camp on the 17th, where he concluded -- I've  
got  
15:54:38 15 it here thanks to Mr Martin -- I will read it.

16 "On the 17th (and they weren't even ganged up or  
gathered  
17 up at the reception centre for disarmament, which was at  
18 Makeni) there the topmost person who I met there was  
19 Augustine Gbao. He couldn't give me the reason why  
they're

15:54:54 20 not going to do that (disarm), and as usual we had a lot  
of

21 understanding and respect for one another with Augustine  
22 Gbao. We talked about it, and he said he so sensed that  
23 our reception centre should remain and since the  
24 disarmament is for the long-term we should, each party  
15:55:13 25 should report, give a report to their higher  
headquarters  
26 on what's going on in the crowd. That there was no need  
of  
27 having combatants demonstrating in town."  
28 He was asked:  
29 "Would you agree it was Augustine Gbao on the RUF side  
who

1           was instrumental in urging those people to disperse  
2           peacefully on the 17th? Yes, yes, yes Gbao. I commend  
him           3           for that."

4           And my point then is this: I'm not going to repeat the  
15:55:41 5           evidence that we heard from 111 about how Gbao behaved at the  
6           Makump camp on 1 May. We admit he was angry when he got there  
7           but calmed down having discussed matters and so forth.

8           The comment that I made is this: The evidence has been  
--           9           and this isn't controversial -- the evidence is that Kailondo

15:56:00 10          turned up in a Land Rover, and that is when things went  
downhill           11          very rapidly indeed. My point is, well, if Kailondo hadn't  
12          turned up, if he had stayed put in Makeni as Augustine Gbao

had           13          asked him to do so through, I think it was Ishmael, then isn't  
it           14          a reasonable inference to draw, if one accepts what DAG-111  
has           15          told the Court, that there would have been no trouble at all?

15:56:26 16          Which brings me to the end of the review of the  
evidence.           17          And, at the end of this long trial, perhaps it's time to draw

the           18          line under why Augustine Gbao is here and focus a little bit  
more



19 on why we are here, and it's a poignant moment. I was trying  
to  
15:57:06 20 think of an amusing anecdote, such as the one when travel sent  
me  
21 to the wrong country on my first trip out here, landing me in  
22 Conakry without any visa or money or anything, but it doesn't  
23 seem appropriate to make any amusing comments at this stage  
24 because this process, this trial has been a very poignant  
event,  
15:57:32 25 particularly for those of us who have been here all along.  
26 I would like to say that it's been a lot of fun but it  
27 hasn't. It's been hard relentless work, often in the face of  
28 great adversity, which I would suggest means that certain  
people  
29 who have dedicated so much time to it deserve a great deal of

1 respect and commendation.

2 One doesn't come here for the money or the easy life or  
the

3 sunshine. One comes here for a higher value than that, to  
ensure

4 not that, not just that justice is seen to be done but that  
those

15:58:11 5 of us who are charged with taking care of it in this fledgling  
6 jurisdiction ensure that it is done.

7 My job, as I often shock juries at home, is to say --  
well,

8 it is this: It's not to win at all cost; it's no Defence  
9 lawyer's job to win at all costs; it's to ensure the  
Prosecution

15:58:36 10 case is tested, filtered; it's to ensure the defendant's case  
is

11 heard and understood and then to leave it to the tribunal of  
fact

12 to do what they want with it. It's to try to ensure that no  
13 unfairness is allowed in to hurt the process.

14 There are those who say, of course, that the Special  
Court,

15:58:57 15 and they are probably right, came here to educate this part of

16 the world and to uphold the rule of law and so it is and that  
is

17 the privilege which must not be abused.

18 There is also the aspect of course that I think many of  
us

19 learn an awful lot ourselves about living in a country like  
this,  
15:59:20 20 and observing it first hand the suffering and in many ways the  
21 quiet dignity that people display here.  
22 Mr Jordash mentioned something that Mr Sesay said the  
other  
23 day. There is one thing that I remember that Mr Gbao said to  
me,  
24 which is something I shall never forget. He said: It's out  
of  
15:59:41 25 adversity that the greatest bonds between men are often  
formed.  
26 And I suggest that is absolutely right. That is what I will  
take  
27 with me from this place and this trial.  
28 I hope that what we have done here is to lay down some  
kind  
29 of legacy, to put some sort of history down in the development  
of

of

1 this sort of law. I also confidently hope after this review  
2 the evidence, which I hope can be seen to be fair and  
3 appropriate, that we've earned something else: And that is at  
4 the end of this proceedings Mr Gbao will receive his freedom

back

16:00:23 5 again. Thank you very much.

no

6 PRESIDING JUDGE: Thank you. We will break again for a  
7 short pause -- I say short -- it will be short; I will suggest  
8 more than ten minutes and then we will be back to see if we  
9 further questions. Thank you. The Court is adjourned.

have

16:00:43 10 [Break taken at 4.00 p.m.]

11 [Resuming at 4.20 p.m.]

12 PRESIDING JUDGE: Mr Cammegh, you may feel relieved; we  
13 have no questions for you.

14 MR CAMMEGH: Thank you.

16:19:02 15 final

16 PRESIDING JUDGE: And we thank you very much for your  
17 presentation. We appreciate your comments and the assistance  
18 you have provided to the Court with these comments. We thank you  
19 very much.

you

19 MR CAMMEGH: Thank you.

16:19:15 20 PRESIDING JUDGE: Before we conclude, I would like to

to  
putting  
16:19:33  
well

21 express on behalf of the Chamber our thanks and appreciation  
22 all of you for in particular the efforts you have put in  
23 these final briefs together, and for your very timely  
24 presentation in your final submissions in Court. We have  
25 appreciated all the assistance you have indeed provided to us.  
26 Now, as you can imagine, the work remains with us to  
27 complete. But, in the mean time, I would like to express as  
28 our thanks to those of you who have devoted so much time and  
29 attention and effort to get to this point in time where we are

1 now close to making the final decision about this RUF trial  
and  
2 we wish to thank people from both Prosecution and Defence in  
this  
3 respect.

4 I am informed that some of you will depart tomorrow and  
not  
16:20:09 5 come back, so, those of you, I am not sure who in particular  
but  
6 I understand that some will not come back. And, well, for  
those  
7 of you, as I say, we have appreciated your efforts, your  
8 professionalism and everything you have done in this trial to  
9 assist the Court.

16:20:27 10 It's been a long trial. It has been going on for many  
many  
11 years as such, and I know some of you have been with us right  
12 from the beginning. So again, our thanks and appreciation and  
I  
13 would like also to express our thanks from the Bench for Mr  
Rapp  
14 to have attended this final submission. It is appreciated.

16:20:46 15 Thank you very much.  
16 So I know a few names. I know Mr Harrison, I  
understand,  
17 is departing soon, if I think "soon" means tomorrow and is not  
18 likely to come back anyhow. We thank you, Mr Harrison, for  
your

19 participation. I am not sure who else in the Prosecution.

16:21:02 20 Mr Hardaway, I think, is leaving tomorrow as well. What about

21 Mr Wagona? No, you are staying and Mr Fynn you are staying

22 obviously. So, all of those leaving good luck in your future

23 endeavour and it has been a pleasure having you in this Court.

24 Thank you again.

16:21:21 25 And the Defence, I am coming to you, Mr Taku, don't  
worry,

26 I can only address one side at a time so I will start with the

27 first accused Mr Jordash. Again, thank you for your

28 participation and your efforts and assistance to this Court.

It

29 has been, as you know, a very challenging effort and endeavour

1 and we've appreciated all of it, so, thank you very much and I  
2 don't know who in your group will be coming back but, anyhow,  
it  
3 will be a pleasure to see you sometime in the future, whatever  
4 the future means, and I obviously deliberately do not mention  
a

16:21:57 5 time only to say that don't expect anything in August and  
don't  
6 expect anything in September. So, after that, we shall see.

7 So, Mr Taku, again, thank you very much. I know you  
have  
8 been a participant at distance at times but we have enjoyed  
your  
9 participation and your presence here and we appreciate your  
help

16:22:17 10 and assistance as well. So you were standing up to say  
something  
11 or --

12 MR TAKU: Yes, Your Honour. We will be filing the  
public  
13 version of our brief, negotiating with the Public Defender to  
14 very kindly permit my legal assistant Mr Joe Holmes to remain  
15 around for at least a week and do the redactions

16:22:34 15  
[indiscernible]  
16 before leaving back to England. Thank you, My Lord.

17 PRESIDING JUDGE: Thank you, Mr Taku, and Mr Cammegh as  
18 well, we thank you very much for your able assistance. And we  
19 wish you and all of you good luck in the future. Thank you



16:22:47 20 indeed.

21 And I would like to express our thanks to our own people

22 here and to our legal staff but for them the work is only

23 starting so it's not the end, it's only the beginning of the  
road

24 before we get to the end, but the Court Management deserves

16:23:06 25 special consideration and thanks because they have done a

26 tremendous job with the final briefs to provide us with as  
timely

27 distribution, whenever it was timely, but at least for us it  
was

28 delivered as soon as it was feasibly possible, and I know they

29 devoted many hours and they worked late at night on many  
nights

I

1 to do that, and we have appreciated very much that service and  
2 thank you all from the Court Management.

The

3 Having said that, thank you all. The Court is adjourned  
4 until the final judgment in the fall. Thank you very much.

16:23:43

5 Court is adjourned.

p.m.]

6 [Whereupon the hearing adjourned at 4.23

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