Case No. **SCSL-2004-15-A**

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
V.
THE PROSECUTOR OF THE SPECIAL COURT

WEDNESDAY, 2 SEPTEMBER 2009
10.10 A.M.
TRIAL

APPEALS CHAMBER

Before the Judges:	Justice Renate Winter, President Justice Jon Kamanda Justice George Gelaga King Justice Emmanuel Ayoola Justice Shireen Avis Fisher
For Chambers:	Mr Stephen Kostas Ms Rhoda Kargbo Ms Sophie Frediani Mr Joakim Dungel Ms Jennifer Beoku-Betts
For the Registry:	Mr Thomas E Alpha
For the Prosecution:	Mr Stephen Rapp Dr Christopher Staker Dr Nina Jorgensen Mr Vincent Wagona Mr Reginald Fynn Ms Bridget Osho
For the Appellant Sesay:	Mr Wayne Jordash Ms Sareta Ashraph Mr Jared Kneitel Mr Paul Clark
For the Appellant Kallon:	Mr Charles Taku Mr Kennedy Ogetto Mr Mohamed P Fofanah
For the Appellant Gbao:	Mr John Cammegh Mr Scott Martin
For the Office of the Principal Defender:	Mr Joseph Akuna Buckle

Wednesday, 2 September 2009

[Open Session]

[The accused present]

[Upon commencing at 10.10 a.m.]

JUSTICE WINTER: Good morning everyone. Clerk of Court, may I ask you to call the case please.

THE CLERK OF COURT: The case, the Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao.

JUSTICE WINTER: First of all, I would like to make sure that the accused persons can hear me. May I ask you, Mr Sesay, if you can hear me and follow the proceedings through translation?

ACCUSED SESAY: Yes, your Honour.

JUSTICE WINTER: Thank you. Can I - may I ask Mr Kallon if he can hear me and follow the proceedings through translation?

ACCUSED KALLON: Yes, my Lord.

JUSTICE WINTER: Thank you. May I ask now Mr Gbao if he can hear me and follow the proceedings through translation?

ACCUSED GBAO: Yes, my Lord.

JUSTICE WINTER: Okay, thank you. I call now for the appearances. The Prosecutor, please.

MR RAPP: Good morning, Madam President, your Honours of the Appeals Chamber, learned Defence counsel. Appearing today for the Prosecutor is myself, Stephen Rapp, the Prosecutor, but presenting orally during this three-day hearing on behalf of the Prosecution will be Dr Christopher Staker, Dr Nina Jorgensen, Vincent Wagona and Reginald Fynn. Also joining us on the Prosecution side and part of the team is Bridget Osho. Thank you very much, your Honours.

JUSTICE WINTER: Thank you. Now the counsel for Mr Sesay.

MR JORDASH: For Mr Sesay it is myself, Wayne Jordash, Sareta Ashraph, Jared Kneitel and Paul Clark. Good morning.

JUSTICE WINTER: Thank you very much. Counsel for Mr Kallon.

MR TAKU: May it please your Lordships, my name is Chief Charles Taku, I appear for Mr Kallon. With me is my learned colleague and brother Mr Kennedy Ogetto, and also our learned colleague Mr Fofanah, Mohammed Fofanah. We have Aba Usinmensa [phon] who will be here shortly. We will have Mr Kingsley Belle and also one of our colleagues Mr Geoffrey Lawson who is coming to Africa for the first time to support us. Thank you.

JUSTICE WINTER: Thank you very much. Finally, the counsel for Mr Gbao, please.

MR CAMMEGH: Good morning, Madam President. It is John Cammegh, lead counsel for Augustine Gbao, accompanied by my co-counsel Scott Martin and my legal assistant Lea Kulinowski. Thank you.

JUSTICE WINTER: Thank you very much. I would like now to give you a brief summary of the schedule. It is now the appeals hearing in the case of Prosecutor versus Issa Hassan Sesay, Morris Kallon and Augustine Gbao. At the outset, as I said, I will briefly summarise the manner in which we will proceed today and I also would like to draw your attention to the fact that we have a slight change in the schedule tomorrow and the day after tomorrow. I think the Court clerk already has presented you with this new scheme and it will be filed this morning. It most probably has already been filed. My honoured colleagues have it on their desk.

Now, this hearing will proceed according to the scheduling order as I corrected on 31 August and today. Counsel for Mr Sesay will present their submissions on appeal this morning for two hours. Then we will move to the lunch break and afternoon we will continue with counsel of Mr Kallon and we will have a pause then for 20 minutes and finally counsel for Mr Gbao will present submissions on appeal for two hours.

It would be most helpful to the Appeals Chamber if the parties present their submissions in a precise and clear manner. I wish to remind the parties that the Judges may interrupt them at any time and ask questions and/or they may prefer to ask questions following each party's submissions.

I would also like to remind counsel and the parties and the parties - and the Prosecution that we have a very strict schedule, as you have seen, and I would request all of the parties speaking to us to adhere to that schedule.

Thank you very much for your understanding. I would like now to invite the counsel for Mr Sesay. I adhere to my schedule also. I would now like to ask again Mr Sesay to present submissions in support of Mr Sesay's appeal. Please, Mr Jordash, you have the floor.

MR JORDASH: I am grateful, thank you. Could I just enquire as to whether the Court has received the bundle of authorities and decisions which I hope to move through sequentially in the next two hours. We will take - the bundle contains the new authorities which we indicated to the chamber and authorities which are within the various pleadings which have been collated to hopefully move more swiftly.

We will divide our submissions into three parts. The first

two we would refer to as attribution issues; issues which first concern the process generally, errors of law and fact which we submit turned the process into a highly irregular one which undermined from the outset onwards the fairness of the proceedings and the convictions on each and every charge.

The second attribution issues concern, firstly, the joint criminal enterprise and, secondly, the issue of Mr Sesay's conviction for planning the use of a person - of child soldiers to participate actively in hostilities and the third part of our submissions will deal with sentence.

If I may begin with the trial process itself, we submit that the most critical aspects of a fair process were lacking, errors of law and errors of fact which together undermined the fairness of the proceedings, and in particular we submit the problems began with the indictment; basic rules we submit developed at the ICTY and ICTR ignored and disregarded in breach of the Appellant 's right under Article 17(4)(a) to be informed promptly and in detail of the charges and, two, 17(4)(b) the right to have adequate time and facilities for an effective defence. We submit that it started with the defective indictment and the problems rolled on from there.

If I may ask the honourable Court to turn to index 2 of the authorities and the case of Blaskic, Court of Appeal 29 July 2004, we start in this way because this authority was along with Kupreskic, the appeal judgment, the beginning we submit of modern pleading requirements; modern pleading requirements which we submit were in almost all respects disregarded by the Prosecution and disregarded more importantly by the Trial Chamber.

If I could invite your Honours to turn briefly to

paragraphs 207, the Appeal Chamber makes the remark that an accused has the right not only through disclosure of evidence but also through the indictment to be informed of the charges. The Blaskic Court of Appeal rejected the Blaskic Trial Chamber judgment which had viewed the indictment as somehow unimportant in the provision of the Article 17(4)(a) right to be informed of the charges and had deemed that that could be satisfied through the provision of evidence at a later stage.

We submit this is the - I pause there while - I can see that there are the files which we intended your Honours to have. I do apologise. I don't understand what happened. If I can ask your Honours to turn to index 2, Blaskic appeal judgment, paragraph 208, the right, Article 21(4)(a) of the Statute provides that an accused is entitled at a minimum to be informed promptly and in detail in a language which he understands the nature of the charge against him. Article 21(4)(b) requires that an accused be given adequate time and facilities for the preparation of his defence.

Moving on to 209, Article 18(4) and 21(4) of the Statute and Rule 47(c) accord the accused an entitlement that translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in an indictment, but not the evidence by which such material facts are to be proven.

That is the gravamen of our complaint. The indictment does not contain material facts. It contains a summary of the legal classification and a list of formulaic factual allegations and nothing more. It does not contain the material facts.

Paragraph 215, the Appeals Chamber considers that the approach adopted by the Trial Chambers in Kronjelac [phon] is

consistent with the jurisprudence of the international tribunal and lends support for the conclusion that the alleged form of participation of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment. The Appeals Chamber recalls that the practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity. How much worse, we submit, is it when every liability is pled and no material facts are attached to the pleading?

Paragraph 216 dealing with superior responsibility, the accused needs to know not only what is alleged to have been his own conduct giving rise to his responsibility as a superior, but also what is alleged to have been the conduct of those persons for which he is alleged to be responsible. Again, no material facts indicating what Mr Sesay was alleged to have done, no material facts dealing with what his subordinates were alleged to have done, nothing but the barest of legal formulas indicating 6(3) liability.

Turning over the page to 218, what is required at the ICTY and ICTR is summed up in this paragraph in relation to superior responsibility allegations:

"The accused is the superior subordinate sufficiently identified ..." I pause there to say it must be an error of law to only indicate that the subordinates were the whole of the RUF. "... over whom he had effective control in the sense of the material ability to prevent or punish criminal conduct and for whose acts he is alleged to be responsible. The conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been

committed by his subordinates."

I pause there to note nothing in relation to UNAMSIL, nothing in relation to the various attacks found proven against Mr Sesay pursuant to 6(3). Nothing.

Paragraph 219:

"With respect to the mens rea there are two ways in which the relevant state of mind may be pleaded. Either the specific state of mind itself should be pleaded as a material fact, in which case the fact upon which that material fact is to be established are ordinarily matters of evidence and need not be pleaded. Each of the material facts must usually be pleaded expressly, although in some circumstances it may suffice if they are expressed by necessary implication. This fundamental rule of pleading is not however complied with if the pleading merely assumes the existence of the legal ..."

JUSTICE WINTER: Please continue.

MR JORDASH: Paragraph 220, at the heart of this trial process we submit:

"An indictment as the primary accusatory instrument must plead with sufficient particularity the material aspects of the Prosecution case failing which it suffers from a material defect. The Appeals Chamber in Kupreskic examined a situation in which the necessary information to ground the alleged responsibility of an accused was not yet in the Prosecution's possession and stated that in such circumstances doubt must arise as to whether it is fair to the accused for the trial to proceed.

The Appeals Chamber emphasised that the Prosecution is expected to inform the accused of the nature and the cause of the case before it goes to trial. It is unacceptable for it to omit

the material facts in an indictment with the aim of moulding its case against the accused during the course of the trial depending on how the evidence unfolds."

We submit it is as plain as day following night that a trial in which 240, we counted from annex 1 of our appeal brief, 240 charges distinct basis for conviction were omitted from the indictment. Annex A2 contains on our count 147 insufficiently pled charges led through evidence.

This admonishment by the Blaskic Appeal Chamber is expected - is supposed to balance the needs of the Prosecution prosecuting difficult crimes and the fairness of the trial. If the Prosecution didn't have those charges, if it could only lead them later on in the day, that is when the assessment of whether it was fair to proceed should have been made.

The narrow exception which we deal with in ground 6 of our appeal, the narrow exception of when details may be omitted from an indictment deals with what is referred to as the sheer scale rule. Obviously, we submit, that doesn't apply if the Prosecution have the allegations in the form of statements but choose not to disclose them in the indictment or failing that in the pre-trial brief.

The Trial Chamber's error, or one of the errors in relation to the indictment, is plain from paragraph 330 of the judgment where they take cognisance of the fact that the investigations and trials were intended to proceed as expeditiously as possible. We submit that is a clear indication of an error of law. Of course we submit an accused's rights to be informed of the nature and cause, and the rights to adequate facilities, cannot be sacrificed because the trials are expected to begin and the

Prosecution choose not to apply for an adjournment for further investigations.

The effect of this indictment was exacerbated by a ruling by the Trial Chamber which was a fundamental error of law in which, if I may ask you to turn to paragraph 30 of our grounds in which it was decided that provided the evidence coming in was a building block constituting an integral part of and connected with the same res gestae forming the factual substratum of the charges and the indictment, then it could come in because it wasn't new.

There is no such test in international criminal law and in fact that test is at odds with every single piece of interlocutory jurisprudence dealing with the issue of notice of the charges to the accused. What it meant was that every time the Prosecution sought to reinvestigate the case - I say reinvestigate, to actually investigate the case - the evidence produced, however egregious, however incriminating was allowed to be led and that Annex A is the result of that legal mistake.

The Prosecution at paragraphs 2.18 to 2.38 deal with the defects that we allege undermine the fairness of the trial and purport at 219 to submit the Trial Chamber showed a high degree of diligence. We submit there is no evidence of that in the judgment, there is no evidence that they examined all these charges and we submit the charges were such, and of such a volume, that a Trial Chamber exercising diligence would have necessarily understood that this was a problem for the accused to be able to prepare his defence. There is no other case at the international tribunals where this has happened.

Paragraphs 2.20 to 2.23 of the Prosecution response deals

with the issue where the Prosecution suggest that the Trial Chamber had no obligation to return to its original decision on the defects of the indictment which is at - dated 13 October 2003. It was within its reasonable discretion not to return and assess. We submit plainly, hundreds of new charges place an onerous obligation on the Trial Chamber to look back at the decision. All the Trial Chamber had at that early stage were the Prosecution's assertions that "This was all we can do. The nature of this conflict was such we have not been able to obtain greater details."

Clearly, as the trial progressed, the details came through investigation. That placed an onus on the Trial Chamber to stop and at the very least, we submit, have the Prosecution apply to amend the indictment and have the accused given the opportunity to be able to argue what prejudice might arise.

A good example of the prejudice, we submit, is the allegation of mining in Tombodu, the accused's convictions for planning enslavement in Kono. In the indictment, at paragraph 71, the indictment states that between 14 February 1998 to January 2000 AFRC/RUF forces abducted hundreds of civilian men, women and children, took them to various locations outside the district or to locations within the district, Tombodu, Koidu, Wendedu, Tomenday [phon]. At these locations the civilians were used as forced labour including domestic labour and as diamond miners in the Tombodu area.

Focusing for a moment on the diamond mining in Tombodu, that was the substance of the allegations in the indictment. We can usefully compare that with the Trial Chamber's judgment at paragraphs 1247 to 1248 - I beg your pardon, 1246, and one can

see perhaps 20 locations now being considered for mining in Kono. 1247, clear detailed assertion - conclusions concerning mining in various locations. And then we turn to 1251 and we return to the original allegation which was mining in Tombodu.

This is why in ground 35, one of the reasons we allege that the Trial Chamber erred in finding Sesay responsible for enslavement of diamond mining elsewhere, no material facts in the indictment - worse than that, a misleading indictment which alleged mining in one place, Tombodu, alone.

The errors were compounded by misleading evidence in the pre-trial brief. Pre-trial briefs and opening speeches, as your Honours will know, can cure defective indictments in certain limited circumstances.

May I ask your Honours to turn to Annex 3, which deals with the notice we were given in the pre-trial brief on this subject. Page 14, the notice in the pre-trial brief alleged forced labour conscription of hundreds of captured men, women and children, so repeating the generalised comments in the indictment. Throughout 1997 and 1998 - those are the dates that were given - people were routinely captured - I beg your pardon, I am reading from Kailahun.

Page 17, we see there the original indictment allegation of mining. On page 18, we see there in the next column pre-trial brief notice. Still no reference to the Prosecution's case on mining, that found proven against Mr Sesay, and one can see following the annex through - I am terribly sorry, I am looking at the wrong annex. I won't waste much time on this, but Annex 3 is the right annex, page 28, and I won't waste much time but I will ask your Honours to look at that and see how from the

indictment pleading mining in Tombodu, pre-trial brief, no development of such a case found proven against Mr Sesay. Supplementary pre-trial brief no development of the original allegation in the indictment. All the allegations arose through the evidence and we submit that plainly in a trial cannot be right and we submit that there is always and has always been found in the last ten years at the ad hoc tribunals a clear distinction between allegations through notice and allegations dealt with in evidence.

There is no question we submit, therefore, of any defects being cured through pre-trial communications. The pre-trial brief is a model of vagueness and a model of how to mislead the Defence when trying to make sense of a case which has been adequately pled in the indictment. And I would invite your Honours to look at the indictment and we will come back to aspects of it, but invite your Honours to look at the indictment and ask the question: Could the accused effectively prepare with this indictment? The answer clearly, we submit, is no, and as the Prosecution realised early on in the case it was clearly not adequate to even prove a case, which is why they investigated it afresh and why they continued to plead the allegations through evidence alone.

We submit if one looks at our various grounds alleging defects, that is your Honours' starting point for deliberations. It is not simply that there was, as we say in ground 7, an ambiguous suggestion that burning was going to form parts of terror. It is not only that. It is the fact that in the indictment there are no material facts alleged against Mr Sesay relating to burning. It is about the fact that in the pre-trial

brief there are no material facts about what Mr Sesay is alleged to have done. It was misleading from beginning to end.

We say the same in relation to grounds 9 and 10 of the Sesay appeal dealing with the charges in Kailahun and counts 12, 15 and 17. It is worthwhile looking for a moment at Count 8, forced marriage in Kailahun. We submitted in our closing, as your Honours will know, that there had been inadequate notice of the forced marriage count. That at one stage the Prosecution were alleging that it was an offence which was predominantly sexual; at another stage it was an offence which was predominantly about conjugal duties excluding - sorry, not excluding, but with sexual violence secondary almost to the conjugal conduct. That in itself, we submit, is evidence enough of an error of law, but take it alongside the fact that there were no material facts in the indictment, a misleading pre-trial brief and you have a collection of unfairness which of course, we submit, made it impossible for the Defence to know the nature and cause of the details being alleged.

We would also invite you to look at Annex 3 in relation to these allegations. Your Honours know from ground 39 sexual - our grounds - sexual violence counts, and we allege that there was improper pleading, and I am looking at paragraph 294. We allege that the indictment was improperly pled in relation to forced marriages in Kailahun. We submit that in Kailahun that the pleading that an unknown number of women from somewhere were captured by someone in the AFRC and RUF and held somewhere for some coercive purpose, perhaps conjugal, perhaps sexual, with emphasis fluctuating through the case, was manifestly inadequate. Made even more so by this fact: It rests, we submit, on the

evidence of two witnesses: TF1-314 and TF1-093. You will not find reference to those witnesses or their evidence in the indictment. You will not find evidence of those witnesses in the pre-trial brief, or the supplemental pre-trial brief, or indeed in the trial until 2006, and yet if one looks at the date the statements were obtained they were obtained prior to the supplemental pre-trial brief.

So claims to impossibility about obtaining details must be looked at in that light. The Prosecution, for reasons yet unexplained, maintain those statements and chose not to plead them in any of the pre-trial pleadings, but parachuted them in after the sixth trial session; in other words, after 59 witnesses had been called by the Prosecution, after countless opportunities to cross-examine had been lost. No explanation as yet from the Prosecution why that wasn't pleaded or why that was impossible.

They had those statements. They could have pled specimen counts.

If I can ask your Honours to turn to index 5 of our authorities bundle, Kupreskic, the Prosecution will submit that there was no obligation to do such a thing as plead specimen counts. Well, that perhaps is a slightly more controversial submission from us, but what isn't controversial is what Kupreskic said in 2001 in relation to an attempt by the Prosecution to do exactly the same thing in relation to a continuous course of conduct, that of persecution, and you will see the argument there at paragraph 96:

"The Appeal Chamber notes the Prosecution argument that in the case of murder we need to put a list of the individuals that you have killed, but with persecution, because it is a continuous

course of conduct, you don't need to do the same."

The Appeal Chamber robustly rejected that argument in 2001 and it has been robustly rejected in every appeal judgment since, from Blaskic onwards.

Paragraph 98:

"However, the fact that the offence of persecution is a so-called umbrella crime does not mean that the indictment need not specifically plead the material aspects of the Prosecution case with the same detail as other crimes. Persecution cannot because of its nebulous character be used as a catch-all charge. Pursuant to elementary principles of criminal pleading it is not sufficient for an indictment to charge a crime in generic terms. An indictment must delve into particulars."

Reading further down:

"What the Prosecution must do as with any other offence under the Statute is to particularise the material facts of the alleged conduct of the accused that in its view goes to the accused's role in the alleged crime. Failure to do so results in the indictment being unacceptably vague since such an omission would impact negatively on the ability of the accused to prepare his defence."

There was no excuse, we submit, for the indictment to plead continuous charges - and this will be the Prosecution's submission undoubtedly. Continuous charges don't require particularisation. There is no authority for that proposition and, of course, as a matter of logic there couldn't be because of elementary pleading requirements and because the accused logically cannot know what has been alleged if nothing is said about what he is supposed to have done, who he is supposed to

have done it to, who his subordinates might have been, who they are supposed to have done it to.

This is not about whether the Prosecution can name victims. It is not about whether the mass nature of the crimes prevent them from naming victims. The Court will note we make no submission about that. We asked and we challenged the Trial Chamber's judgment as an error of law in relation to the failure to require the Prosecution to plead what it was the accused had done.

This aspect of the process was exacerbated when the trial continued. Ground 4 and 5 deal with that exacerbation. Ground 4 and 5 deal with the failure, we submit, the errors of law which arose in relation to what amounts in ground 4 and 5 to a failure of the Trial Chamber to require evidence of motive and to take it into account. We submit there was no basis in law for declining to order the Prosecution to disclose details of relocation packages to insider witnesses. The niceties of the law have been debated between the Prosecution and the Defence, but it amounts to this: The witness went into the witness box and said, "I have been helped to be relocated by the chief of Prosecutions. I was helped with my immigration status by the chief of Prosecutions. I was helped alongside the FBI to be relocated."

It was a specific request from the Defence to have that material. The Prosecution claimed and the Trial Chamber agreed that the application was not specific enough. We submit that plainly is wrong and what the Trial Chamber did was denied itself at the deliberation stage critical evidence. We submit these were insider witnesses, accomplices. The law requires caution with accomplices. That caution must be more than simply looking

at them with a critical eye. It involves enquiring into why it was they gave evidence.

What might have made their evidence unreliable. The worst perpetrators in this conflict gave evidence in this Court. TF1-045, TF1-366, TF1-362. The Prosecution are yet to say whether any of them received relocation packages. Could a life in another country be an incentive to lie? Could it make evidence unreliable? Of course it could, we submit, and it was an error of law not to order the Prosecution to disclose that.

It was an error of law as we sum-up in ground 5 for the Trial Chamber then to make the suggestion - and we put it no higher than that - that it had considered that evidence of motive and had decided it didn't impact on testimony. It didn't consider the evidence because the Prosecution were not under any obligation because of that error of law to disclose it. It is unclear to us even now why it was that that application for disclosure of what the witness had said was not targeted enough to fall within Rule 68 material.

The process - the irregular process - continued we submit on this vein with a refusal by the Trial Chamber to enquire into payments made to witnesses by the Prosecution.

Now, we don't say that the allegation by TF1-362 when she gave evidence in the Taylor trial that she had received money in an envelope from the Prosecution is necessarily correct, but it was evidence on oath from a witness who has been used to uphold the main plank used to uphold Mr Sesay's conviction for planning enslavement - sorry, planning the use of child soldiers, Count 13, 12.

We say the Trial Chamber had an immovable obligation to

look at that allegation. The Prosecution will say, "Well, you didn't bring that allegation to the Court. This is what the Trial Chamber said. It was too late. The Defence should have brought the allegation to the Trial Chamber earlier. It should have brought it during its own case, or during the Prosecution case." We submit that is plainly wrong.

If, just taking for a moment that that was right, and Defence counsel had been negligent in not raising the point, it is not within the reasonable exercise of a Trial Chamber's discretion to ignore evidence of payments to insider witnesses, and I would invite your Honours to look at the motion where we requested the Trial Chamber to hear evidence concerning the payments.

I raised two witnesses, 334 and 362, although there is ample evidence in the disclosures from the Prosecution, and the revelations in the Taylor case, that there was something amiss in the Prosecution investigation team. We had four witnesses saying they had been given money with no explanation; a remarkable coincidence if there wasn't some truth in it, but as we say, we don't say it is true. We simply say it was an error of law not to investigate and in not doing so the Trial Chamber deprived itself of the very material which would have allowed a proper verdict to have been returned.

334 received 52 payments over the course of his testimony against Mr Sesay. That is what we know that was disclosed from the Prosecution. We don't know if there was anything else. But we do know he was given those 52 payments and we do not know the reason. Information is what the Prosecution say.

Prosecution witness - and looking at index 11 I can just

read it to you if it speeds things up:

"RUF Prosecution witness 334 was given money for meals on days when he wasn't interviewed. He was given a mobile phone to enable the OTP to be in contact with indepth clarification interviews ...". 52 payments, as I have said, "... given money for transport notwithstanding that he travelled to the Court in a Special Court vehicle" and so on and so forth.

It mattered not, we say, that we raised the point late. It was the right time to raise it. The Prosecution - the Trial Chamber say in the decision that we ought to - the Defence ought to have called witnesses. Who could we have called to deal with that point? The right time to raise it was at the end of the case. When a party hasn't called a witness that the Trial Chamber considers to be important in order to clarify its deliberations, it should call the witness.

That is why we described this first plank of our submissions as an irregular process. It is the accumulation of these factors: Defective indictment, charges being led, witnesses saying they have been paid, witnesses relocated. We cannot be surprised that the allegations came drip, drip, drip. I should say rather that they came like an avalanche throughout the case. What was it that brought forward those allegations? It was a fundamental obligation on the Trial Chamber to investigate that. We submit it was an error of law not to do so.

Moving to ground 12, the pleading of the joint criminal enterprise, and this will mark the end of what we want to address your Honours on at the moment about irregular process. The rest your Honours will find in the brief.

Ground 12, the pleading of the joint criminal enterprise.

I am sure your Honours are very familiar with the issue, having ruled on it in the Taylor case and ruled on it in the AFRC appeal case, and the Prosecution will say that is the end of the matter, but we submit it is not. The problems that everyone has been having with this joint criminal enterprise is because the Prosecution didn't plead the material facts. It is not enough to simply say in an indictment, which is what they did, "This is the joint criminal enterprise; you are being alleged to have committed crimes through it." They have to say what the material facts were. What was it that was being alleged that Mr Sesay had done? What was it being alleged that he was trying to further? What were the actions that furthered the common purpose?

Instead of that, in this case we had the Prosecution serving an indictment without the material facts. At the half-time stage of the Rule 98, changing the pleading to indicate that they were now pursuing joint criminal enterprise 2, the systemic joint criminal enterprise - if I may just take a moment, the Trial Chamber 's error was to consider that new notice as unimportant. What was being alleged in the Rule 98 skeleton was a complete change of the joint criminal enterprise.

If I could ask you, please, to turn to index 15, this is the skeleton which was submitted by the Prosecution at the Rule 98 stage. Paragraph 18 - what we have at paragraph 18 is a complete volte face. We have at the last three lines, "For example the execution of 60 persons detained - investigated and detained by Gbao in Kailahun Town is an example of the first form of JCE, as are the acts of Operation Pay Yourself to which Sesay and Kallon were participants."

At this stage, taking Operation Pay Yourself, pillage was a

means of achieving the joint criminal enterprise.

Turning over the page, "Forced mining, forced farming, forms of enslavement were examples of the second form of the JCE." In other words, they were alleging forced farming, forms of enslavement, forced mining were no longer means to achieve the common purpose of the original joint criminal enterprise, but were now separate systemic joint criminal enterprises, the second category.

JUSTICE WINTER: If I may interrupt you at that stage, if I recall correctly there was no whatever conviction under the second part of JCE, no?

MR JORDASH: That is exactly right. The Trial Chamber decided that that notice, although it was inconsistent with the first, had no impact upon the accused's right to know his case and yet we submit of course it did. This vague joint criminal enterprise, which has been pled on the indictment, with whatever decisions are made about it in the end, is vague. It is not the clearest of defined joint criminal enterprises. To then introduce a whole new description of a joint criminal enterprise at the half-time stage is highly misleading, is not the provision of continuously consistent information.

We know that joint criminal enterprise 2 is very different to joint criminal enterprise 1. Of course, as the Prosecution will say, it is a variant of the first, but its mens rea requirements are different and, in addition to that, it is about a system; a system which must be an overarching criminal system into which the defendant's acts must fit. In other words, forced farming, forms of enslavement were no longer to be considered by the accused as part of the original joint criminal enterprise and

that is the gravamen of our complaint.

The JCE notice continued the misleading information. The joint criminal enterprise - and I focus on pillage again - pillage as a means in the first indictment, pillage as a separate joint criminal enterprise in the Rule 98, pillage by the joint criminal enterprise notice on 3 August 2007 was a final objective; the agreement to terrorise and collectively punish to achieve pillage and to achieve the control of the population. So pillage became in its third manifestation one of the purposes. So it was returned into the original joint criminal enterprise, moved from means to a final objective.

We submit plainly that is not consistent, timely information to the accused which allows an effective defence and it is instructive to turn to - well, it would have been if it was in the brief, but it is not. But if I can invite your Honours to turn and look at the Prosecution closing, which again repeated - and this is an important point, we submit.

The Prosecution closing at paragraph 242 repeated the joint criminal enterprise notice of 3 August 2007 alleging that pillage was in fact the end result of an agreement to terrorise and to collectively punish, so there was no return to the original indictment and the Trial Chamber erred, we submit, in failing to see that the Prosecution had never known its case from beginning to end. If it had, it kept changing it to suit the evidence as it unfolded.

We submit if the Prosecution at the end of a trial of this kind of nature, with this kind of grave crimes, submit at the end of the case that the joint criminal enterprise was a different joint criminal enterprise to that pled in the indictment, that is

as plain, we say, as an indication that the Defence has been irreparably prejudiced. It is at number 17 in the bundle, but I won't ask your Honours to turn it up but invite your Honours to peruse it at a later stage.

No, I will ask your Honours to turn it up, please. Paragraphs 410 at 17 of the - no, it is not there. In the Prosecution closing at paragraph 10 they say what has been alleged was a campaign to terrorise and to collectively punish.

In the Prosecution response to our appeal at 5.9, the Prosecution say despite that closing, the Trial Chamber did not have to be satisfied that a crime was committed with the specific intent to terrorise or collectively punish in order to conclude that the crime was within the JCE. Contrast that with their closing where they, as plainly as plainly can be, say this joint criminal enterprise was a campaign to terrorise and collectively punish. How then do they now in their response submit that the Trial Chamber did not err by demanding that there was an intention to terrorise or collectively punish? The two simply do not jell.

What, we submit, do the Prosecution say today was the agreement? They say in the response, as I have just read, that it wasn't an agreement to terrorise as such. It is noteworthy, we say, at 5.1 - and I am dealing now with both the defects of the indictment ground 12 but also ground 24 and the erroneous interpretation of the JCE doctrine by the Trial Chamber.

At 5.1 of the Prosecution response onwards they note at paragraphs 5.4 - and it is a remarkably opaque description, indicating both the Prosecution's lack of concrete pleading of the joint criminal enterprise but also, more importantly, an

indication of the Trial Chamber's error in defining the common purpose as we allege in ground 24. The Prosecution say:

"The Trial Chamber did not define the objective of taking power and control over the state territory as criminal in itself by virtue of the criminal means used to achieve that objective, but rather gave the proper characterisation to objective and means in accordance with the jurisprudence of this Appeals Chamber."

If I may just have a moment? Could I ask your Honours, please, to turn to index 19. This is the Prosecution's pre-trial brief in relation to the general allegation of what this joint criminal enterprise was supposed to be all about. Page 6, count 1, terrorising the civilian population, "It is the Prosecution theory of the case that the crimes alleged were done as part of a campaign to terrorise the civilian population."

Page 7, paragraph 16, "It is the Prosecution's theory that at various locations the AFRC/RUF engaged in the crimes charged 3 to 13 to punish the civilian population for allegedly supporting President Kabbah's government."

What does it mean, we submit, for the Prosecution to say what this joint criminal enterprise is now? If it was a campaign to terrorise and collectively punish it might make some sense, we submit, legally, even though we submit that it was defectively pleaded by virtue of not including Sesay's material acts.

How was the Trial Chamber to assess criminal liability through the joint criminal enterprise if, as the Prosecution submit, it was a campaign to take over the country through the means alleged? What then was the steps to be taken by the Trial Chamber to assess liability? If it is a campaign to terrorise or

to collectively punish the Trial Chamber's assessment is to take cognisance of a plurality, a group, to ask itself whether that group was acting in concerted action to terrorise or collectively punish, to move from there - and that assessment obviously is done by having regard to the actions of the plurality and the pattern of the crimes - and then the next step would be to ask what was it the accused is alleged to have done? Was it in furtherance of that concretely objectively found plurality acting in concert and then to ask when, at the end of all of that, whether the accused's actions in furtherance of that objective were sufficient to make a finding of significance and thereafter to assess whether that gave rise to an inference of criminal intent?

What did the Prosecution say and what did the Trial Chamber say? And this is the error, we say, is at the heart of their application of the joint criminal enterprise. How do you assess a joint criminal enterprise with a common purpose which is non-criminal, taking over the country, with a collection of crimes said to have been agreed by the plurality? What do you judge significance by? How do you judge intent?

We submit the Trial Chamber erred with this joint criminal enterprise because what it did was what was logical by joint criminal enterprise doctrine, that is, you take the overarching purpose which has been alleged, you look at the means within that purpose, the means by which you reach that purpose and you assess the joint criminal enterprise in that staged way.

The only way to assess this joint criminal enterprise, the one alleged by the Prosecution and alleged by the Prosecution that it was as found by the Trial Chamber, is to take the common

purpose of taking over the country, the non-criminal purpose, and assess significance against it. That is what the Trial Chamber did, we submit, and it is plain because there is no other logical way of doing it. Joint criminal enterprise form 1 requires - and all of them, the Prosecutor at the ICTY have this form - a criminal purpose objective, means by which that objective is reached, assessment of the accused against the purpose, therefore permissible to hold the accused liable for all the crimes within the purpose and by virtue of his significant contribution to the purpose.

That is our submission on the joint criminal enterprise. It logically follows that the Trial Chamber got it wrong, but we don't rely just on logic. We rely upon the way in which they in fact found Sesay liable for these horrendous crimes, hundreds of them, through the joint criminal enterprise doctrine. By looking at the paucity of findings one can surmise that something went very wrong. If we are wrong about the way the Prosecution - the way the Trial Chamber assessed the joint criminal enterprise and the way in which they regarded the common purpose as the taking over the country, in summation, it doesn't matter because in the end, when one looks at what the Trial Chamber did in relation to Sesay's contribution, it just doesn't, we submit, add up.

And it doesn't add up for these reasons: That they were unable, the Trial Chamber, to identify sufficient evidence to base a finding of significant contribution against the Appellant Sesay. As noted in our submissions on ground 24, there was simply no evidence of crimes from May until June of 1997. How was it then - if the Prosecution are right and if the Trial Chamber is right - how was it that they inferred a joint criminal

enterprise without evidence of crimes?

The Prosecution response, 5.16 for that point, is instructive:

"To the extent that there was a gap between the point at which the forces joined in pursuit of the common objective, and the point at which evidence of the criminal means were established, this is not indicative of any error. The accused were convicted only in respect of these criminal means."

Now, I pause there to say that there were no criminal means from May to June found by the Trial Chamber. The first crimes found proven were the terror attacks in Bo in June, so how was it - unless they were taking the common purpose of taking over the country as the criminal purpose, how was it they inferred the joint criminal enterprise?

The Prosecution go on to say, "The Trial Chamber was moreover entitled to consider the role of the Supreme Council in the context of the pattern of atrocities and draw the necessary inferences." There was no pattern of atrocities in that time period.

As accepted by the Prosecution at paragraphs 5.23 of their response, when dealing with the same point, the issue of the failure of the Trial Chamber we say to assess the link between non-JCE members and the joint criminal enterprise members, paragraph 5.23, I will just pick out a sentence:

"The responsibility and leadership role of each accused and their authority and control were established as well as relevant reporting lines. Several crimes committed by these commanders and fighters were linked directly to JCE members such as Bockarie."

That is a very fair assessment. Several of these hundreds of crimes were linked to JCE members. The remainder, the Trial Chamber erred in law by failing to ask the right question. The right question was: Did a JCE member procure a non-JCE member to commit a crime? By its own admission the Trial Chamber never asked the question.

Paragraph 1992 of the judgment:

"However, taking into account the entirety of the evidence and in particular the widespread and systematic nature of the crimes committed, the Chamber is satisfied beyond reasonable doubt that these individuals ...", that is the non-JCE members, "... were used by said members of the joint criminal enterprise to commit crimes that were either intended by the members to further the common purpose ...".

This complaint could - is easily fitted into the first aspect of our submissions, an irregular process, because if you are to hold accused responsible for crimes committed through the joint criminal enterprise liability, and they are committed in large part by non-JCE members, that is not the assessment that is required.

Taking into account the widespread and systematic nature of the crimes, if that was the test that was required, every accused in a war said to have - found to have been a member of a plurality would be guilty of every crime. In a war where the Trial Chamber, a trier of fact, finds that crimes against humanity have been committed, that is widespread or systematic crimes, that would be sufficient, if the Trial Chamber got it right, to find every accused member of a plurality guilty of every single crime.

That plainly cannot be right. And it cannot be right, we submit, and it is not as the Prosecution assert an error of fact that no reasonable tribunal - that a reasonable tribunal could still have arrived at the conclusion that these crimes were committed at the behest of a JCE member. That is not what we are talking about. We are talking about an error of law, a failure to assess. That is why the judgment is transparently a list of crimes with little said about the Appellant Sesay.

What is said about the Appellant Sesay and his contribution is equally as instructive. Taking ground 35, Bo District, Sesay's contribution to Bo District, Bo attacks, terror attacks 1 June 1997 to 30 June 1997, are to be found at paragraph 1015 of the judgment, "Sesay's contribution ..." - and may I invite your Honours to turn to the judgment 1993:

"Sesay's contribution to the terror attacks in Bo found by the Trial Chamber were, 1997 forced mining, at 1999 arrest of Kamajors in Kenema ...", or sorry, alleged Kamajors in Kenema, "paragraph 2000 Bunumbu".

Taking each in turn, 1997 Mr Sesay's contribution to the terror attacks in Bo to the joint criminal enterprise which arose then was forced mining in Kenema which didn't begin until August of that year. So that wasn't a contribution to Bo.

1999, Kamajors arrested in Kenema; those arrests took place in October of 1997 and couldn't have been a contribution to Bo in June.

2000, Bunumbu did not open, as the Trial Chamber found at judgment 1634, until 1998.

In other words, what you are left with - I was about to say what you are left with is Sesay's participation with the Supreme

Council, but that is not right either, because the Trial Chamber found that Sesay did not attend Supreme Council meetings until August of 1997.

In sum, Sesay has been convicted of approximately 400 killings, burning of 500 houses, acts of terrorism, Count 1, and so on on the basis of not a single contribution to Bo. That is the problem with the Trial Chamber's joint criminal enterprise. Simply no evidence of contribution to Bo.

Kenema suffers from equal problems. The Trial Chamber found - the Trial Chamber relied upon the previous findings, which I have just articulated, plus at paragraphs 2052 of the judgment, they detail the beating of TF1-129.

The contribution to Kenema can be summed up in this way: 2055 deals with Sesay's contribution which has been summed up as:

"A significant contribution to the furtherance of the common purpose by securing revenues, territory and manpower for the junta government and by implementing the policy of eliminating civilian opposition to the junta regime. We find that the findings in relation to participation and significant contribution of Sesay and Kallon apply mutatis mutandis to the crimes committed in Kenema."

The crimes committed in Kenema again give an indication of the errors which were made by the Trial Chamber. Membership of the Supreme Council was one element, yet at judgment paragraph 756 the Trial Chamber found that Sesay did not have decision-making power at the Supreme Council. That decision-making laid in the hands of SAJ Musa, Johnny Paul Koroma and some honourables.

The second contribution to Kenema, abuse of the levers of

power, the arrest of three people in Kenema, two of whom the Trial Chamber did not find amounted to a crime against humanity. One, TF1-129, Sesay's acts alone was not sufficient to amount to an inhumane act, but when taken together with other people's acts afterwards was found to amount to an inhumane act.

And, thirdly, Bunumbu again raises its head. Bunumbu, as I indicated a moment ago, as a means of the finding that Sesay contributed to the securing of recruitment to the RUF doesn't work for Kenema either, because Bunumbu by the Trial Chamber's own finding, did not commence until February 1998; that is after the intervention, after the RUF had been pushed out of Kenema.

What we are left with of any significance - and it is not significant we submit for this reason - is the mining found by the Trial Chamber. The Trial Chamber found that Sesay's contribution to the events in Kenema and the crimes committed there was his contribution to the mining.

If I can ask your Honours to turn to 1091, which deals with that conclusion, this is it. This is the Trial Chamber's finding that Sesay planned the mining in Kenema. This was his contribution to the crimes in Kenema dealt with in a single line, "Diamonds were either given to RUF commanders including Bockarie, Sesay and Mike Lamin, or taken by AFRC commanders to senior AFRC official Eddie Kanneh in Kenema."

The single finding to support - aside from three arrests in Kenema - to support the whole crime base of Kenema against Sesay is that he was given diamonds. From that the Trial Chamber inferred that Sesay was in the Supreme Council, the Supreme Council must have planned the mining in Tongo, Sesay received the diamonds and from that an inference was drawn as to his

participation in the horrendous events in Kenema.

And yet at paragraph 760 of the judgment the Trial Chamber found that SAJ Musa was entrusted with the mining unit. At paragraph 761 to 762 they found that the RUF and AFRC had separate command structures and SAJ Musa was in the AFRC and in paragraph 957 the Trial Chamber found that SAJ Musa, Zagalo and Gullit were in charge of the mining.

There was never a finding that Sesay was present in Tongo during the mining. There was no evidence led that he was. There was no evidence looked at by the Trial Chamber and no evidence existed of any decision-making. In fact, as the paragraphs I have just indicated show, the decision-making was found to have been done by others.

No evidence found by the Trial Chamber of any actions by Sesay to supervise or effect the operations in any way; simply allowing in the judgment that he received diamonds. And on the basis of what amounts to three arrests, two of which were found not to be crimes, one arrest and a single line in the judgment - the Prosecution will urge your Honours to look at the judgment as a whole, and I would urge you to do the same, because that is it when it comes to mining in Kenema. And the mining and one arrest was used to support hundreds of crimes through the joint criminal enterprise.

How was it that the Trial Chamber inferred intent to commit hundreds of killings in Tongo, a forced mining system which went on for months, on the basis of a single line of evidence that he received diamonds? We submit it is plainly wrong.

Kono, the same problems again. At paragraphs 240 to 248 of our appeal we deal with that and time is ticking so I will move

as swiftly as I can. Paragraphs 2082 of the judgment - this is the summation of what was found against Sesay as his significant contribution to Kono, and Kono was, aside from 6 January 1999, undoubtedly the largest crime base under consideration in the RUF indictment. Hundreds, if not thousands, of crimes ranging from amputations, killings, burnings, by any stretch of the imagination the worst crimes known to international criminal law.

And Sesay's contribution to that as found by the Trial Chamber was this: Paragraph 2082, his presence in Makeni at the intervention; 2084 endorsing an order by Johnny Paul Koroma during his three-day travel through Kono; 2086 participation in forced mining; 2087 from his base in Kailahun giving orders; 2088 planning or involvement in the Yengema training base. Yengema was in Kono, or - Kono, yes.

Taking each in turn: Paragraph 2082, Sesay's presence in Makeni, the Trial Chamber found that his presence in Makeni at the time of the intervention was tacit approval of looting. As your Honours know, we challenge that finding because we say that that was an error of fact, that no reasonable tribunal could have found on the one hand that Sesay was - looking at 2083 - that Sesay was not actively engaged in the military operation because he had sustained an injury during an attack on Bo. The operation commander Superman was subordinate to Sesay during the attack. No reasonable tribunal, we submit, could have found that he was there injured, not taking part in the operation because of that injury, and then inferred from his presence alone (1) that he planned the attack and (2) more importantly, that there was tacit approval of the looting. Where else would he have been if he was injured but amongst his RUF colleagues during the time of chaos,

violence and criminality?

Taking the second limb, endorsing the order by Johnny Paul Koroma, I won't labour the point but I return to what we submitted at the beginning of the submissions. The evidence relied upon, that Sesay endorsed that order came from one witness, 334, the witness who received all these payments. But that really isn't the real gravamen. The real complaint is this: That at one stage in his account he said Sesay didn't say anything and then later on his account changed to say Sesay endorsed the order from Johnny Paul Koroma.

The error of law was an error of fact - I am sorry, the error of fact was an unreasonable assessment of evidence. The error of law was to not approach the accomplice with the requisite caution. To find beyond a reasonable doubt that Sesay endorsed that order from a man who was an accomplice, who was one of the worst perpetrators in the whole conflict by his own admission, a West Side Boy paid, was of course unreasonable. And that single order, according to the Trial Chamber finding, led to hundreds of crimes. That is the frailty of the conviction.

Participation in forced mining, that was the third limb of the contribution to Kono found against Sesay. Paragraph 2086 in the judgment, paragraph 2086 is what the Trial Chamber found to support his participation in mining. There is not a single piece of evidence to support that paragraph in relation to Sesay:

"The RUF miners' commanders reported directly to Sesay. He visited the mines to collect diamonds, signed off on mining logbooks and transported diamonds to Bockarie and took them to Liberia."

The Prosecution case was never that Sesay was in Kono

during - except for the three days when he passed through taking Johnny Paul Koroma to Kailahun. They didn't lead any evidence to say he was in Kono, except for TF1-263 who was not relied upon by the Trial Chamber. In fact, they found he was mistaken when suggesting Sesay was there in May. There is not a single piece of evidence, as the Prosecution should concede, to show that Sesay was picking up diamonds in the joint criminal enterprise period.

5.43 of the Prosecution response, a curious description, "In relation to Sesay's involvement in Kono, in the mining activities in Kono between 14 February and May 1998, it should be noted that the Trial Chamber found that the practice of forced mining continued throughout 1998."

They don't address the point, because they don't want to make the concession, but the concession they should make is that there is no evidence to support the Trial Chamber's finding.

And the same goes for the next limb used to support Sesay's contribution to Kono, his alleged - sorry, his found involvement with Yengema. Paragraph 2088 the judgment says:

"Bockarie and Sesay ordered the training base to be established at Yengema. Sesay was personally involved in the planning and creation of the base."

This was the final limb relied upon by the Prosecution to find a significant contribution to Kono. As the Prosecution know, the Trial Chamber found that Yengema was not in operation - is not in operation until December 1998, as the judgment at 1646 found.

How was Sesay's involvement, as found in Yengema in December 1998, used to infer planning and the creation of the

Yengema base within the indictment period? Error of fact relied upon by the Trial Chamber to convict Mr Sesay for the joint criminal enterprise. The Prosecution response at paragraph 5.43, "The reference to Yengema must be seen as - in its context as a reference to involvement in the planning and creation of the base." Not a single piece of evidence to say Yengema was being planned or created before April of 1998 and, even if it was, how could that planning itself be a contribution to a crime?

And one more limb which I missed out, but I would like to deal with very swiftly, paragraph 2087, the final limb relied upon to find significant contribution to a joint criminal enterprise:

"From his base in Kailahun District Sesay ordered that all civilians be trained and the SBUs be armed with small firearms. As a result, many civilians from 10 to 25 years of age were trained in Buedu at the time over a two-week period. Sesay himself had SBUs under his direct control, some of which were used on the frontlines."

Not a single piece of evidence in that footnote and in that paragraph relates in any way to Kono.

TF1-314 footnoted there, her evidence was about meetings in Buedu, armed attacks in Kailahun, choosing people to go on missions, SBUs and SGUs and the bringing of people from Masingbi in 1994.

And so we know, we submit, that the Trial Chamber in some way did not apply the joint criminal enterprise doctrine correctly. Now, as I said before, it matters not whether the error we think they made is the error itself. We know there is an error because the contributions which have been identified for

Kenema, Bo and Kono simply don't add up. Take away the errors of the fact and what you are left with is the flimsiest of contributions to huge crime bases.

Kailahun is exactly the same. Sesay's participation is dealt with by the Trial Chamber at 2162. The Trial Chamber once again - and this is a repeat through the joint criminal enterprise findings, "Significant contribution to the furtherance of the common purpose by securing revenues, territory and manpower for the government and by aiming to reduce or eliminate civilian opposition to junta rule." It is a phrase which is seductive but doesn't actually mean anything, we submit, unless there is evidence to support it.

The Trial Chamber found in relation to Kailahun that the contributions which had been found in relation to the other districts applied mutatis mutandis to Kailahun. The only difference - well, it is not a difference, but they relied upon the training at Bunumbu effectively, and the training in Bunumbu, taken at its highest, ignoring what we submit are errors of fact in finding the evidence of TF1-362 credible, reliable, at its highest the Trial Chamber found at paragraph 247 - that seems a bit early. It is a bit early. But they found in any event that over the course of the Bunumbu life 500 people were trained.

Sesay's presence in Kailahun during the indictment period was from the intervention when he arrived with Johnny Paul Koroma to the end of the - and until 20 April when it is agreed between the parties that Sesay left to go to Liberia to take diamonds on behalf of Bockarie, a six-week period in Kailahun, Sesay's contribution to Kailahun summed up by his participation in Bunumbu, a six-week period, if one takes that finding and ignores

the problems with it, that must have been Sesay's contribution to the recruitment of a small fraction of that 500 people. It logically must be the case. We submit that couldn't possibly be a significant contribution to the Kailahun crime base. Training of a small fraction of 900 people - sorry, a small fraction of 500 people. And you will find that number at paragraph 1438 of the judgment.

Those are our submissions on the joint criminal enterprise. At the heart of the joint criminal enterprise liability, as your Honours know, is the collation of evidence of a participation in a joint enterprise which allows a trier of fact to infer criminal intent. From that criminal intent, to commit a concretely found crime, the Trial Chamber - the trier of fact - can then infer intent in relation to what in this case amounts to probably thousands of crimes. The contributions here just simply would not allow a reasonable tribunal to infer criminal intent for these horrendous crimes.

In summation, Sesay wasn't present in Bo. He was found to be present one day in Kenema. In Kono, he was there for three days. In Kailahun, he was there for six weeks at best. And, as I have outlined, that is why the Trial Chamber struggled to find a contribution because there wasn't a sufficient contribution to find beyond a reasonable doubt participation in a joint criminal enterprise however it is defined at this late stage.

May I address your Honours now on ground 43, child soldiers, the Appellant's conviction for participating - for planning the use of persons under the age of 15 to participate actively in hostilities in Kailahun, Kono, Kenema and Bombali between 1997 and September 2000. We submit the frailties which

we have outlined in relation to the joint criminal enterprise are equally as stark in the assessment by the Trial Chamber of Mr Sesay's responsibility for planning the use of what the Trial Chamber found was thousands of child soldiers and the use thereof.

That is the starting point, we submit, in relation to ground 43. The Trial Chamber found in effect that Sesay is responsible for planning the whole of the RUF use of child soldiers with a corresponding 51 years' imprisonment. I will come back to the number in a moment.

In order, as Brdjanin tells us - Brdjanin Trial Chamber paragraph 354, and it is in your Honour's bundle at index 24, this indicates - this is the law that must be applied when applying planning liability. Paragraph 354 deals with Brdjanin and what was found against him factually, and yet the Trial Chamber went on to find him not responsible for planning. The Trial Chamber in that case were satisfied that the acts and conduct of the accused, in particular a speech - public speeches and decisions of the ARK crisis staff - were aimed at the implementation of the strategic plan that facilitated the commission of the crimes by the relevant physical perpetrators, but yet despite that involvement he was not found responsible for planning, and the reason for that is summed up at 358:

"Although the accused espoused the strategic plan, it has not been established that he personally devised it. The accused participated in its implementation mainly by virtue of his authority as president of the ARK crisis staff and through his public utterances. Although these acts may have set the wider framework in which the crimes were committed, the Trial Chamber

finds the evidence before it insufficient to conclude that the accused was involved in the immediate preparation of the concrete crimes."

We submit in order to find Mr Sesay responsible for planning of all the child soldiers - planning the use of all the child soldiers in RUF territory, then they have to prove that he was involved in the immediate preparation of the concrete crimes at both the preparatory and the execution phases. Bunumbu is simply insufficient. 500 people, some of them children. Even if the Chamber finds that Sesay was, or finds that the Trial Chamber were right to find that Sesay was involved in Bunumbu, it could not amount to preparation of concrete crimes amounting to thousands of child soldiers.

If I may briefly go through the findings, paragraph 1617 is where you will find, your Honours, the thousands abducted substantial - thousands of people were abducted and a substantial percentage of these were children.

First of all, Mr Sesay was found responsible for planning the use of child soldiers between 1997 and September 2000. From 1997 to February of 1998 there is simply no evidence of Sesay involved in any type of activity which could amount to planning. Bunumbu didn't open until February 1998. The Trial Chamber made no findings in 1997 which would or could be anything constituting planning. There was simply no evidence of Sesay having any role in any scheme to prepare or execute the use of child soldiers.

The child soldier findings at paragraph 1664 to 1666 relate to Tongo. No reference to Sesay in that 1997 period.

At paragraph 1638 of the Trial Chamber judgment we get the first piece of evidence which might be probative of some kind of

planning - might. "On about June 1998 Kallon, Superman and Sesay issued orders that young boys should be trained to become soldiers and handle weapons at Bunumbu", but if one reads the next line, "These boys were 15 years of age and above", so that finding is irrelevant.

JUSTICE KING: But the next sentence. Go on to the next sentence.

MR JORDASH: "SBUs, however, were children as young as nine to 11 years of age who were tasked with carrying weapons for the RUF", but no connection to Mr Sesay in that description of a factual circumstance. That SBUs were children is undisputed. That they had anything to do with - that the planning of their use had anything to do with Sesay is disputed and not found on the evidence, we submit.

Error four which we deal with at paragraph 328 of our appeal, this really is the substance of the finding of Sesay planning the use of thousands of children, that he received reports from Bunumbu, paragraph 1639, and that he visited on one occasion, paragraph 1643. The witnesses relied upon, we submit, were wholly unreliable and would have been obvious to a Trial Chamber conducting a reasonable analysis and applying the burden of proof.

One of those witnesses was TF1-362. TF1-362 is the witness who received the envelope of money, or so she says, in the Taylor case. TF1-362 was an accomplice. TF1-362 admitted in evidence that she regarded Sesay as ruining the revolution. TF1-362 in evidence said that she had been beaten unfairly by Sesay. TF1-362 put forward the most absurd of theories, which was that every report which came from the Bunumbu base went through Sesay

before going to Bockarie. The reason for that, so she testified, was because it was an RUF tradition that all reports always went through the second in command, and yet when 1999 came and Foday Sankoh was released and Sesay was the third in command, somehow that tradition was cast aside and, according to TF1-362, the reports suddenly started going through the third in command. It was an absurd theory put forward by an accomplice with motive. Not a single reference to those motives or how the Trial Chamber resolved those doubts in the judgment.

In any event, even if the Trial Chamber's assessment of 362 was regular and proper and reasonable, receiving reports was the sum of what the witness said was Sesay's contribution to the Bunumbu base and the Yengema base - sorry, the Bunumbu base. It wasn't that he had any role apart from that. In fact, the evidence showed he visited - at its highest he visited once.

Conversely, and I will invite your Honours to look at a later stage at our closing brief on this point, there was ample evidence to suggest that the whole system that operated at Bunumbu did not involve Mr Sesay, and I would also invite your Honours to look at the Prosecution response, ground 2, dealing with their suggestion that the Trial Chamber erred in relation to Mr Gbao. The system of Bunumbu is summed up there as involving the G5 and involving Mr Gbao, according to the Prosecution. That is the preparatory stage. The execution stage, there was no suggestion that - and no evidence that - Sesay was involved with the child soldiers when they emerged from Bunumbu.

Receiving reports - and that is why we submit it is absurd - receiving reports was the sum total of the evidence of his involvement with Bunumbu, except attending on one occasion

and issuing an order to the recruits there.

There was a finding - there were factual findings on Sesay's own use of child soldiers. You will find those at 1732 to 1735, and 1736 to 1738, but at 2221 the Trial Chamber found that the Prosecution had failed to particularise those allegations and therefore there was no conviction to flow or no findings to flow because Sesay had been deprived of adequate notice of the charges, which leaves Yengema, was another - was the final plank used to support this enormous finding.

At paragraph 1261, the Trial Chamber found Sesay instructed the Yengema base to be set up. At judgment 1647, the Trial Chamber found that the training commander reported directly to Sesay and then to Bockarie. It is the 362 theory that everything went through - the reports all went through Sesay.

At 1684 - I beg your pardon. And so I leave the point on Yengema there, that it relies upon 362 and this theory. And again, it is simply reporting.

1684 is the actual final plank, it seems, used or relied upon to suggest that Sesay was planning. It is certainly the only other evidence, we submit, that could conceivably be probative of such a liability:

"... dealing with the request by Commander Jalloh to contribute young men to train for the RUF. A thousand youths were registered. Children ranging from boys of 12 to men in their early 20s. The children received military training."

In short, we submit that paragraph, if one looks at the evidence in support, it does not support that finding.

174, who gave - who was relied upon by the Trial Chamber, gave evidence that these boys had been sent to a place called

Bokina in Kailahun in 1999 to be trained and it wasn't the Prosecution case and no evidence was led of any training in Kailahun in 1999 and so it is certainly not relevant to Yengema.

In any event, looking at paragraph 1701, the Trial Chamber concluded in relation to that incident that:

"The Prosecution had not adduced evidence to establish whether this practice involved voluntary or forced enlistment. Although proof of either element would suffice for the purpose of Count 12, in the absence of more detailed evidence in relation to this particular event, the Chamber relies on this evidence to corroborate our finding in relation to the scale and pattern of use of children within the RUF organisation."

That would appear to suggest the Trial Chamber found that factual circumstance sufficiently - insufficiently cogent to use the evidence as anything other than corroboration of the scale and pattern. If that is the finding, then it certainly, we submit, cannot be used to support a finding of greater specificity of planning of child soldiers against Mr Sesay. And so you are left, we submit, with reports to Bunumbu based on an accomplice's testimony with all those frailties, and we submit that that evidence plainly is not sufficient to have found that Sesay planned the use of child soldiers.

Moving finally to the issue of sentence, we submit that the Trial Chamber erred in law and fact in its assessment of the gravity of the offences 1 to 15 and 17. The objectives of sentencing, as we submitted in our sentencing brief at paragraph 10, and which is accepted, those are deterrence and retribution, were not satisfied, we submit, or not achieved with a sentence of 52 years for Mr Sesay.

We also submit that there should have been an additional sentencing objective which should have been given great weight in this case was particularly pertinent to Mr Sesay and that of collective rehabilitation, national reconciliation and the restoration and maintenance of peace. We say that was ill-served by a sentence of 52 years for Mr Sesay, as severe as any other in international criminal law.

In relation to gravity, the specific role by the accused had to be assessed. What role does he play in the commission of the crimes, including the functions and duties and the manner in which these duties were conducted? I won't labour the point, but it has to be said Mr Sesay had no duties to Bo, not present, no direct participation. Kenema, receiving diamonds, one arrest. Everything that happened there happened in his absence. Kono, three days in Kono, thousands of crimes, no direct participation except for the endorsement of the order given by Johnny Paul Koroma. Kailahun, receiving reports from Bunumbu.

We submit that if this joint criminal enterprise is to remain - and we submit it cannot or should not - then his participation could not have been more indirect. The joint criminal enterprise found stretches the bounds of joint criminal enterprise to an unprecedented degree and places Sesay, if one takes as we must the finding of significance as the right one, it takes his participation to the lowest possible level. It could not be, we submit, more indirect. No presence except for days in three districts, six weeks in Kailahun during the joint criminal enterprise duration.

A comparison with other cases of the Special Court is instructive - may I just have a moment, please - especially that

compared to Mr Brima. Mr Brima was found responsible for a huge array of crimes, with no mitigation. Most of the crimes were committed directly. Most of the crimes he was convicted of, which include every crime Mr Sesay was convicted of but for UNAMSIL, and I will come to that in a moment. Brima was present during the burning and the killing of several hundred in Rosos ordering people to kill. The number of victims there were 200. Brima was found responsible for direct orders in relation to sexual violence. Brima was found responsible for planning and ordering the huge crime base of 6 January 1999.

It is simply we submit - and I should add, I have just had it pointed out to me, Brima was in the middle of it personally killing, personally ordering rapes, personally ordering amputations. There is no suggestion of a lack of proximity or a lack of nexus in the case of Brima. A 50 year sentence for Brima. 52 years for Sesay.

A comparison with Morris Kallon. I don't want to trample on his appeal, and I won't, but the comparison has to be made. Morris Kallon --

JUSTICE KING: Just one point on this: Regarding his sentencing, could you just tell me - alert me as to the guiding principles of the relevant provisions in the relevant statutes which govern the question of sentencing. I think that is more relevant than comparing with other sentences in this regard.

MR JORDASH: Certainly. Could I refer your Honour to our sentencing brief, which details these principles. I have dealt with the objectives and the sentencing principles. Firstly, the Trial Chamber must look towards the gravity of the offence. That is why I submit that much guidance as to the Trial Chamber's

error can be found by a comparison with Brima and also with Kallon.

Secondly, the issue of aggravating features. There were no aggravating features found against Mr Sesay.

And thirdly, the [microphone not activated] the balance of probabilities.

That in sum is the approach the Trial Chamber should have taken and we submit they erred in relation to the first and the third in terms of gravity, which obviously involves looking at the participation, the mode of participation, the type of participation of the accused. That is why we say it is fundamental that he was at such a distance in the joint criminal enterprise despite the finding of significance.

And just to complete the answer, your Honour, Article 19 and Rule 101 are the guiding principles, "The Trial Chamber must have regard to certain factors, including the gravity of the offence with which the accused has been convicted and the individual circumstances of the accused."

JUSTICE KING: [Microphone not activated] sentencing I think that is of paramount importance.

MR JORDASH: Yes, indeed. Additionally, the Trial Chamber is required to take into account any aggravating and mitigating factors.

In relation to the comparison with Kallon, Kallon was found responsible for direct participation, murder, violence to life, as well as planning the use of child soldiers, and significantly intentionally directing attacks on the UN peacekeepers in Bombali.

A larger group of direct participation findings against

Sesay and, yes, Mr Sesay was superior in terms of seniority within the RUF, but not significantly so. By the end of the war, Sesay was the interim leader and Kallon was the deputy. There was simply, in our submission, no reason to justify the difference of a 13-year sentence difference in their respective cases.

And the Trial Chamber's error is perhaps made manifest in their assessment of the UNAMSIL charges. Kallon was found effectively guilty of 6.1 participation ordering his men to arrest UNAMSIL peacekeepers and --

JUSTICE KING: I am sorry, I don't want to interrupt you, but will you please address me on the individual circumstances of Sesay.

MR JORDASH: The personal circumstances.

JUSTICE KING: Individual circumstances of Sesay.

MR JORDASH: Well --

JUSTICE KAMANDA: Excuse me, the issues you raised about Kallon are also on appeal in this case, are they not?

MR JORDASH: Yes, they are.

JUSTICE KAMANDA: You may now be seen to be taking it to be proved and the matter to take as serious in trying to mitigate Sesay's sentence.

MR JORDASH: It is significant, we submit, as an indication of the manifestly excessive nature of the sentence that an accused close to his seniority in the RUF.

JUSTICE KAMANDA: What I am saying is that Kallon's appeal is on those points as well.

MR JORDASH: Well, your Honours, I have made the point about Kallon and I am sure your Honours have taken the point and

will make of it what you will.

JUSTICE WINTER: Could you kindly then answer the question of Justice King now?

MR JORDASH: The personal circumstances, certainly.

JUSTICE KING: [Microphone not activated].

MR JORDASH: I beg your pardon?

JUSTICE KING: Having regard to the provisions of Article 19 and Rule 101, the individual circumstances --

MR JORDASH: The individual circumstances.

JUSTICE KING: -- of your client.

MR JORDASH: Yes, I am just trying to find my note. Very good. We submit - perhaps I can answer it in this way: We submit the Trial Chamber erred in three principal respects:

(1) That they failed to take into account his reputation as a moderate.

(2) That they failed to take into account evidence of his actions of benefit to civilians during the war; and (3) actions in bringing the war to an end. And in some ways I can do no better justice to those submissions than by referring to evidence which was ignored by the Trial Chamber.

(3) There was evidence during the trial - and we were informed that we were dealing - we were leading repetitive evidence. There was a huge amount of evidence from civilians attesting to his good acts within the RUF territory. None of it was had regard to.

(4) There was 18 statements which is subject to one of our grounds which were excluded from civilians from far and wide in the Bombali District who attest to actions Mr Sesay took in 1999 to secure their homes along the Kono to Makeni highway. There

was no reason given by the Trial Chamber to disregard it and no reason existed at all, we submit, for not taking it into account in sentence. That evidence demonstrably demonstrated that Sesay's actions, even when having been found committing crime, saved thousands of homes and thousands of people's livelihoods. Disregarded by the Trial Chamber and no reason proffered.

And perhaps if I can finish my two hour stint by referring you very briefly to some of the evidence that was indeed ignored. We repeat the submission we have made in the appeal grounds. There is not a single accused at the international criminal level who has ever been able to rely upon this amount of civilian testimony in his favour, nor is there a single accused we submit who has ever been able to rely upon such a wide-ranging number of witnesses from the SSG Adeniji to ordinary civilians who came in their tens and tens and tens to confirm that what he did during the war assisted them. There is not a single case at the international criminal level where an accused has disarmed a whole rebel movement. There is certainly no case at the international criminal level of somebody who has contributed that much to the peace process and had it completely disregarded by the Trial Chamber.

It is in our submission wrong and unfair for witnesses as far ranging as Father Victor from Makeni who says, "I am in charge of a huge number of diocese in the Bombali District. All of them ..." - I would invite you to look at our sentencing brief on this - "All of them are waiting for Mr Sesay to come back to Bombali. We think he should have a sentence which is sufficient for him to be released at some point during his life."

Paramount chief from Kailahun, paramount chief from Kono,

paramount chief from Bombali, came and gave statements saying, "We acknowledge the seriousness of what he has done. We still think our respective constituents would like to see Sesay back in the community, not just because of what he did in disarming the rebel movement, although that is significant and hugely significant, but for what he did in the war."

We invite you to look at Father Victor's statement. In February 1998 Father Victor met Mr Sesay in the height of the intervention and Sesay assisted him. Father Victor confirmed that in dealing with Mr Sesay, Sesay was an honest and upright and trustworthy mediator.

General Opande confirmed the same.

There is simply no basis for ignoring the tens and tens of witnesses who came to this Court to confirm those details. There is simply no basis for ignoring President Konare of Mali, SSG Adeniji. Simply no basis for ignoring the paramount chiefs who speak to their constituents and say, "When Sesay was around things were much better." Not a single reason proffered by the Trial Chamber to justify why that should not have been taken account in his evidence.

Brima, not a single piece of mitigating evidence, 50 years. Sesay, hundreds of civilians attesting to his good acts, 52 years. It is simply unjust, we submit.

JUSTICE WINTER: Thank you very much. Are there questions from my colleagues? Thank you then, Mr Jordash, for your submissions. It is now time to break for lunch. We will now break for one hour and the hearing will be resumed at 13.10 today. Thank you.

[Lunch break taken at 12.20 p.m.]

[Upon resuming at 13.22 p.m.]

JUSTICE WINTER: Good afternoon. We resume now our hearing with the submissions from counsel for Mr. Kallon. Please, counsel, you have the floor.

MR TAKU: Good afternoon, your Honours. May it please this Honourable Appeals Chamber, we have filed a written brief on behalf of the Appellant, Mr Kallon. We respectfully, my Lords, apply to adopt or rely on that written brief. We received a response --

JUSTICE WINTER: Just a second, please. Could you maybe come a little bit closer to me? Is it better? Could you kindly shift a little bit because, unfortunately, yes, we cannot -- can you please shift the screen a little bit. Thank you. Thanks a lot. Sorry for the interruption.

MR TAKU: Yes, thank you, my Lord. My Lords, we filed a written brief on behalf of the Appellant Kallon. We respectfully apply to adopt and rely on that written brief. We received a written response from the Prosecutor and we filed a reply thereto. We now respectfully, your Honours, make our oral arguments in favour of Mr Kallon's appeal. I propose to use about 30 to 45 minutes to leave the floor for my learned colleague, Mr Kennedy, to make his oral presentations.

Now, my Lords, we go to sub-grounds 24.9 and 24.10 of our appeal, that is about failure to provide a reasoned opinion. The Appellant herein, my Lords, respectfully submits that the Chamber unfairly disregarded reliable and relevant Prosecution and Defence evidence that tended to exculpate him for evidence that tended to inculpate him.

Now, let me be clear. While the Trial Chamber has

discretion in the assessment of evidence, this discretion is tempered by the Trial Chamber's duty to provide a reasoned opinion, which has been considered by international tribunals as a fair trial requirement, Kupreskic appeal judgment paragraph 32.

Due to the selective treatment of evidence, the Appellant submits that the integrity of the entire judicial process against him was irredeemably undermined rendering the trial unfair. The lack of a reasoned judgment is also evident, my Lords, in the Trial Chamber's peculiar organisation of factual determinations and legal conclusions, so-called "the narrative approach", paragraphs 479 to 481 of the trial judgment.

In discussing the accused person's involvement in the particular transaction and assigning responsibility based on the facts proven and purely alleged, the Court first made its factual findings divorced from consideration of the acts or omissions of the accused.

The Court then made legal conclusions as to the nature of the crimes committed with respect to the factual findings, for example whether the facts adduced constitute the particular crime, and they did this completely divorced from the accused.

Next, my Lords, the Chamber discussed the various charges of individual liability to fit into individual responsibility around the facts adduced and legal charges accepted. This methodology appears backwards and lends itself to fitting the charge of liability around the facts proven, especially in the light of the statement of the Trial Chamber at paragraph 2013 of the trial judgment, especially in the light of the statement of the Trial Chamber, that also underlines a sense of pre-determination and I quote, My Lord, that is paragraph 2013 of

the judgment, of the trial judgment:

"Where there is a criminal nexus between such an ideology and the crimes charged and alleged to have been committed, the perpetrators of those crimes should be held criminally accountable under the rubric of a joint criminal enterprise for the crimes so alleged in the indictment."

Such a statement is both inappropriate and inapposite as indicative of a failure of the Trial Chamber to properly analyse facts and law with respect to the individual accused, in particular the Appellant herein. As a result, my Lords, the Appellant submits, with due respect, that the judgment of the Chamber convicting the Appellant cannot be affirmed.

We now move quickly, my Lord, to sub-grounds 2.5, 2.8, 2.12 to 2.24, repudiation of the testimony of the Appellant, Mr Kallon, paragraph 609 of the trial judgment. My Lords, after more than five years of detention and about four years of trial, the Trial Chamber repudiated the testimony of Mr Kallon on the grounds that, "He failed to impress the Chamber as a truthful witness." He was therefore convicted without the benefit of a defence.

Considering the fact that repudiation of the testimony of an accused in a case as serious as this is an extreme measure, we propose to examine the reasons advanced in paragraph 609 of the trial judgment by the Trial Chamber for imposing it on Mr Kallon.

1. The Chamber justified this sanction on the ground that most of "responses and explanations given by him ...", Mr Kallon, "... throughout the proceedings, particularly those concerned with alibi, were implausible afterthoughts and recent fabrications."

The Appellant submits, respectfully, my Lord --

JUSTICE KING: [Microphone not activated].

MR TAKU: My Lord?

JUSTICE KING: Well, where are you quoting from? Paragraph 6 and 9, which parts?

MR TAKU: The very first part of it, my Lord.

JUSTICE KING: What line?

MR TAKU: Let me just read that out.

JUSTICE KING: Because I always try to follow, you know, so if you refer to the paragraph you should say what part of that paragraph you are referring to.

MR TAKU: Yes, my Lord:

"Kallon failed to impress the Chamber as a truthful witness and the Chamber repudiates his testimony."

That is the very first sentence:

"We are of the opinion that most of the responses and explanations given by Kallon throughout the trial proceedings, particularly those concerned with alibi, were implausible afterthoughts and to an extent recent fabrications."

And let me take the opportunity to read the entire paragraph so that I don't repeat many times:

"As an example, TF1-122 testified during the Prosecution case that he had intervened to prevent soldiers taking the property of a woman who had failed to stand still during a flag raising ceremony here in Kenema. Kallon testified to an almost identical incident but does not mention TF1-122, stating rather that he had thwarted attempts of soldiers to steal the woman's property. In the Chamber's view this was a conscious attempt by Kallon to align his testimony to the evidence presented during

the Prosecution case, including attempting to put himself in a favourable light by downplaying or accentuating his role in the incident described by Prosecution witnesses.

In many instances, the evidence that Kallon gives contradicts the weight of credible evidence presented by other reliable witnesses. In some instances, when compared with the evidence accepted by the Trial Chamber as credible, Kallon's dubious account of events is made implausible.

For instance, Kallon testified that in May 2000 he was afraid to arrest Kailondo, who was acting on Foday Sankoh's orders. This is highly unlikely as Kallon was battle ground commander at the time. As such, the Chamber rejected Kallon's testimony, except in instances where that testimony is collaborated by reliable witnesses. We believe the evidence of DAG-111, that he was there and that he perpetrated acts alleged against him in the indictment in Count 15 and that he was not present at Makump camp on 1 May 2000 when UNAMSIL personnel were besieged and being mistreated."

This is where this ground lies, my Lord, if I may make my submissions.

JUSTICE KING: Thank you.

MR TAKU: Thank you, my Lord.

Now, my Lords, we will refer your Lordships respectfully to the relevant portion of the testimony of TF1-122 that the Judges rely on in repudiating Kallon's testimony, and your Lordships will find that Kallon's testimony - Kallon neither lied nor fabricated his testimony, nor was his testimony an implausible afterthought as the tribunal - as the Trial Chamber found. Rather, regrettably, it was the finding of the Trial Chamber that

was fundamentally flawed due to his misrepresentation of evidence on the trial record.

In effect, my Lord, in the transcripts of 8 July 2005, page 71, under cross-examination this is what this witness said about that incident:

"Q. Now, concentrate your mind a bit on Tongo Field.

"A. Okay.

"Q. Your office, your jurisdictional office, extended to Tongo Field?

"A. Yes.

"Q. Indeed. You received a report from Tongo Field.

"A. Every day, yes."

Now, page 94:

"Q. And before I ask the question, witness, you said several times that in the course of your profession you recorded statements from suspects all.

within the five years?

"A. Yes.

"Q. And therefore you have no difficulty in acknowledging your own statements, do you?

"A. No."

Now, let me read paragraph 5 of the statement - part of paragraph 5, that statement that you made to the investigators, and this is what the witness said:

"I saw Morris Kallon in Kenema. I saw Morris Kallon on many occasions. Morris Kallon wasn't that active. He was actually very friendly with the civilians at that time. I saw him stop soldiers from harassing civilians for instance one time, when some soldiers were putting up the national flag, they saw a

woman passing by. The soldiers, one named Junior, the others Idon't remember, stopped her and took her money. Kallon saw this and intervened to help the woman. I don't know Kallon's functions."

Then a question:

"Q. Does that reflect, witness, what you told the Prosecution in this instance?

"A. Yes."

My Lords, this was just one among a plethora of positive and favourable Prosecution witnesses that were adduced throughout the trial in favour of Kallon.

JUSTICE KING: What page is that in the transcript?

MR TAKU: My Lord, it's page - the transcript of 8 July 2005, pages 70 and 94.

Now this witness - this witness, my Lords - by his functions, as you heard from the transcript, recorded - kept a record - of crimes committed in Tongo Field and in Kenema and this is the witness testifying about Morris Kallon. That crime diary was tendered as Exhibit 28 and nowhere in that crime diary will you find any mention of Kallon committing any crime, either in Kenema or in Tongo Field, and it carries additional weight because the witness testified that he saw Kallon, he knew him and he described his relationship with civilians.

Now rather, my Lord, than using this evidence to exculpate or acquit Kallon, what did the Trial Chamber do? They used it to repudiate Kallon's testimony, holding that he had lied, it was a recent fabrication, it was an implausible after truth. And, in any case, worse still Kallon was convicted eventually under the charge of joint criminal enterprise for the beating of this

particular witness by some other RUF commanders in the absence of Kallon.

The next point which I make, my Lord, in respect - in respect of the reasons given in paragraph 609, in repudiating the testimony of Kallon, is the use to which the testimony of co-accused witness DAG-111 was put not only in repudiating the testimony of Kallon, but by making a pre-determination of guilt. In other words the sanction that fell against Kallon in 609 was not just a repudiation of his testimony and his conviction without the benefit of a defence, but a pre-determination viewed in the very - in the very paragraph, as you heard, that they said they believe DAG-111 when Mr Kallon was in Kenema - was in Makeni in May 2000 and committed the crimes in Count 15. Additionally, they made another finding that he was not in Makump camp, DDR camp, on 1 May 2000 when UNAMSIL personnel were besieged and being mistreated.

Well, we will address you on this, because somewhere in the proceedings, as we develop our arguments, you will find that they made internally inconsistent findings about whether Kallon was in Makump camp or not. In this paragraph they say he wasn't there. Elsewhere, as we develop our argument, they said he was there and, when he was convicted in paragraph 2290 for superior command responsibility, they said that he wasn't there. He was being convicted for crimes committed in Makeni on 1 and 2 May for which he did not participate. They convicted him for his mere knowledge. We will point out the internal inconsistencies as we proceed.

Now the Prosecutor, in paragraph 307 of his response, states that the Trial Chamber had discretion in rejecting the

testimony of an accused person, but this was not a simple rejecting the testimony of an accused person as such because rejecting has a different connotation from repudiating the defence of Kallon, because nowhere in the entire judgment when Kallon is convicted, wherever Kallon is convicted, do you find any reference whatsoever to the defences put forward by Kallon.

What did Kallon say when they found him guilty for the UNAMSIL counts, or when they found him guilty of other counts? You will not find it in the entire proceedings. And we will submit respectfully, my Lord, it flows from the finding in paragraph 609 that his defence has been repudiated and this we submit was based on a misrepresentation even on the trial record.

Now the evidence of the co-accused witness here, my Lord, the Prosecutor says that there was nothing wrong in relying on the evidence of a co-accused to convict Mr Kallon, but we submit, my Lord, first that evidence did not form part of the Prosecution's case against Mr Kallon. First point.

The second point is this. Throughout the entire proceedings, as you find in our written brief, the Trial Chamber took the principal stand that for the purposes of Rule 82 of the Rules of Procedure and Evidence we do not rely on co-accused adverse evidence or incriminatory evidence to convict the co-accused.

Now, the question is why the dramatic turn around in the course of the judgment in relying on this evidence? So the problem is not about adducing the evidence per se, as the Prosecution says, because in the case when the evidence was adduced the question about the use to which that evidence was put.

We submit, my Lord, the use of that evidence which did not form part of the Prosecution's case, which was highly incriminatory against Mr Kallon, and relying on that evidence in the face of his own prior finding that they would - that the witness was not reliable, let me draw your attention to I think paragraph 578. I think - okay, 578 of the trial judgment, the same Trial Chamber makes this internal inconsistent finding about this witness:

"Having carefully examined the entirety of the evidence pertaining to Gbao's conduct at Makump DDR camp, the Chamber finds the discrepancy between the testimony of DAG-111 and the evidence of Jaganathan and Ngondi to be so significant as to render the testimony of DAG-111 in relation to the events of 1 May 2000 unreliable, the Chamber is unwilling to accept evidence that is contradicted by corroborated testimony of two reliable witnesses. The Chamber has therefore not relied on the testimony of DAG-111 in its findings on this incident."

Now, having made this finding in respect - in other respects with this witness, it is not evident from the judgment but we do not know why the Trial Chamber relied on the similar evidence to make a pre-determination of view and not just a pre-determined view, but as a sanction against Mr Kallon for the conduct the Chamber - the Chamber reproached Mr Kallon based on a misrepresentation of the evidence on the trial record.

And, my Lord, furthermore the Prosecutor also - if you look at the Prosecutor's brief, paragraph --

JUSTICE KING: [Microphone not activated] ... further. I want to be able to follow you. You referred to paragraph 578 --

MR TAKU: Yes, my Lord, of the trial judgment.

JUSTICE KING: -- where the Trial Chamber was dealing with evidence pertaining to Gbao's conduct.

MR TAKU: No, they were dealing with witness - the testimony of DAG --

JUSTICE KING: No, I am talking about what they said. They had carefully considered --

MR TAKU: Yes, my Lord.

JUSTICE KING: -- the entirety of the evidence pertaining to Gbao's conduct.

MR TAKU: Yes, my Lord.

JUSTICE KING: That is they were talking about.

MR TAKU: Yes, my Lord.

JUSTICE KING: And in that regard they were referring to DAG-111.

MR TAKU: His own witness.

JUSTICE KING: Yes, that's right.

MR TAKU: Yes, my Lord.

JUSTICE KING: Not in respect to Kallon, but in respect to Gbao.

MR TAKU: Yes, but also this is about the activities that took place on that particular date. They said that they would not rely on him, on his testimony about the events that took place on the 1st in that particular location on that particular date. That's what they said, my Lord, if I may read. They would not rely on him on his testimony of what transpired on 1 May and now they rely on him against Kallon.

And more important, my Lord --

JUSTICE KING: Why do you keep on saying against Kallon? Because I have just pointed out to you that in paragraph 578 what

they said was that:

"Having carefully examined the entirety of the evidence pertaining to Gbao's conduct at Makump DDR camp, the Chamber finds the discrepancies between the testimony of DAG-111 and the evidence of Jaganathan and Ngondi to be so significant as to render the testimony of DAG-111 in relation to the events of 1 May 2000 unreliable."

MR TAKU: "The Chamber has therefore not relied on the testimony of DAG-111 in finding on this incident."

JUSTICE KING: Yes.

MR TAKU: That is the incident that took place in Makump camp.

JUSTICE KING: Yes.

MR TAKU: The incident that took place in Makump camp.

In any case, my Lord, our main concern is that we were left all along throughout the entire proceedings before the Trial Chamber to believe that the testimony - alleged testimony - of co-accused and his witness would not be used against Mr Kallon and the Trial Chamber consistently ruled in this favour. Now, during the trial, the Trial Chamber now relies on that evidence first as a sanction against Mr Kallon and, secondly, to make a pre-determination of guilt against Mr Kallon.

This is our problem here and we never had any notice whatsoever that that evidence could ever be used against Kallon.

JUSTICE KING: [Microphone not activated].

MR TAKU: Yes, my Lord, so it was in the course of the trial that there was this dramatic turn around by the Trial Chamber and that is our problem.

And the Prosecutor says that - now, the Prosecutor submits

in paragraph 320 of his response brief that:

"The testimony of DAG-111 was not the only testimony that the Trial Chamber relied on to convict the accused in relation to the events in Makump camp and that the Trial Chamber would still have convicted him, nevertheless, based on its finding in paragraph 1789 to 1794 of the trial judgment."

We submit, my Lord, that to the extent - to the extent - that the testimony of that witness was one of the factors in repudiating the testimony of Mr Kallon and make a pre-determination of guilt, all these other findings against Mr Kallon are tainted with the same illegality, with the same prejudice, my Lord, and the Prosecution have not shown why. Your Lordships will excise - will not look at the Prosecutor's - the findings in totality, or the totality of the reasons given, but they will excise part of it and say that they would still have convicted him anyway.

Furthermore, my Lord, we find that in paragraphs 1789 to 1794 the Trial Chamber relied on another co-accused's evidence, Exhibit 212, as the basis of the conviction of Mr Kallon, so whatever - no matter from what angle we look at it, the findings at 1789 to 1794 would still be prejudicial to Mr Kallon to the extent that they relied on Exhibit 212 which was another co-accused's evidence tendered during his defence, disclosed to him by the Prosecutor during his defence and tendered during his defence, and never formed part of the Prosecution's case, and Mr Kallon had no notice that that evidence would ever be used against him because of Trial Chamber principled decisions to the fact that the evidence would not be used and would not be considered against Mr Kallon. We've written copiously about it

in our brief, my Lord.

Now your Lordships see that the Trial Chamber considered this guarantee - this minimum guarantee - of a fair trial when dealing with co-accused in paragraph 521 of the trial judgment. When dealing with the statement of agreed facts, because the Prosecutor conceded to a number of statements of agreed facts in favour of Mr Kallon and these statements of agreed facts support his alibi in many locations and support several of the defences of Mr Kallon, they said that they can only use them when the interests of co-accused is not compromised.

In fact, if in paragraph 521 when dealing with favourable evidence to Mr Kallon they took this - they took this precaution to ensure that the minimum guarantees of a fair trial, guaranteed by Article 17 of the Statute of this Court and Article 14 of the covenant on civil and political rights, was maintained, namely that they would not use these agreed facts favourable to Kallon if they compromised the interests of another co-accused, why on earth, my Lord, would they use the unfavourable evidence adduced by co-accused during their own defence, not forming part of the Prosecution's case, as a basis for the conviction of Mr Kallon?

My Lord, we submit that this was - this compromise was highly prejudicial, my Lord, and that your Lordships will consider this in the course of your deliberations.

JUSTICE KING: I know you have a set time, but I have to follow your argument.

MR TAKU: Yes.

JUSTICE KING: I know you referred to paragraph 521.

MR TAKU: Yes, my Lord.

JUSTICE KING: I would like to know in what context and

what regard you are referring to that paragraph, not just mention it and pass on.

MR TAKU: Yes.

JUSTICE KING: Point out the relevant part of that paragraph in support of your argument so we can follow it intelligently.

MR TAKU: Now that's the last paragraph, my Lord:

"Furthermore, the Chamber notes that not all accused have agreed to the same facts. In such cases the Chamber will only rely on those facts agreed upon if there is no prejudice to the other accused."

Now, this is the guarantee they took to ensure that evidence - favourable evidence - adduced on behalf of a co-accused does not prejudice the other accused.

Now, I cited this just to support my argument with regard to co-accused's evidence - incriminatory co-accused evidence - testimony of DAG-111 and Exhibit 212 that were used as a basis of convicting Kallon. You look at - if I develop my submissions, your Lordships will see very, very clearly that most of the 63 - Article 63 - convictions against Kallon were based entirely on Exhibit 212, that is the exhibit tendered by the first accused for his own defence, and he stated at the time the reasons, the limited purpose for which he tendered that evidence, that he wanted to use the exculpatory pages of the evidence in his own defence and it was disclosed to him in the course of his own defence. It was not part of the Prosecution's case, yet the Judges relied on that to make these findings of guilt against Mr Kallon.

JUSTICE KING: It may not be part of the Prosecution's

case, but isn't it part of the evidence that the Court has to consider? The Court will inevitably have to consider the totality of the evidence. Whether it's part of the Prosecution's case or not is not the crucial thing. It is whether it is part of the overall evidence - the totality of the evidence.

MR TAKU: Yes.

JUSTICE KING: They cannot ignore it.

MR TAKU: Yes, my Lord, they can't ignore it, but not when they have consistently ruled that they will not use the evidence as the basis of conviction in the course of the trial and the Appellant led his defence with this in mind and was confronted with this only at trial.

JUSTICE KING: I am merely pointing out to you --

MR TAKU: Yes.

JUSTICE KING: -- that that evidence was tendered by another accused person.

MR TAKU: Yes, my Lord.

JUSTICE KING: It forms part of the record of the Court and of the evidence before the tribunal. Now, the tribunal has every right to consider the whole of the evidence - the totality of the evidence - brought before it. Isn't that the case in law?

MR TAKU: I agree, my Lord. They considered the totality of the evidence. That is why they made the ruling upon considering the totality of the evidence that this evidence will not be used as a basis of conviction of a co-accused, and they cited that they were doing this pursuant to article - to Rule 82 of the Rules of Procedure and Evidence. They had the legal basis for saying so, my Lord, and they did that consistently in the course of these proceedings.

Having so ruled, that ruling formed part of the decision of the Court. They considered it nevertheless, but at different stages in the proceedings the rule that the evidence will not be used - it should not even be adduced, it should not be used and nevertheless they used it to the prejudice of the accused and that is the basis of our argument on this point, my Lord.

Now that said, my Lords, let me move quickly to another issue. One of the reasons that they repudiated Mr Kallon's testimony, paragraph 609, was that they did not believe him when he said that you could not arrest Kailondo for the crimes he committed in Makeni in May 2000 when Kailondo was acting on the order of Foday Sankoh.

We addressed the Court extensively on that and we do not want to belabour your Lordships. We additionally refer your Lordships to the dissenting sentencing opinion of Justice Itoe, who wrote extensively on this particular issue about this arresting Kailondo, and you will see that, my Lord, our problem is that that was one of the factors they used, that they didn't believe Kallon in arresting him. But they themselves in discussing the conduct of Foday Sankoh said that Foday Sankoh did not obey any particular chain of command within the RUF. He acted the way he wanted, he killed his own assistants, anybody disobeying for instance would be dead. Why would Kallon ever arrest Kailondo when Kailondo was acting under the orders of Foday Sankoh? That said, my Lord, we will not belabour the point. We've addressed you extensively on that.

My Lord, we ask the Court not to consider the footnote - the footnote - to the convictions of Kallon in the UNAMSIL counts reliable. We don't have enough time because my colleague has a

long way to go, but if you refer to the footnotes, my Lord, you find the footnotes do not support the findings in many regards. I do not want to belabour the point, we pointed some of that out in our written brief, you will read that, but the footnotes do not really support the findings against Mr Kallon. In most cases when they refer to a footnote of a radio message sent by Mr Kallon, it was found they were sent by another person or was not even a footnote. It was not a finding. So, your Lordships, you have proper directives about footnotes in each finding made against Mr Kallon and you will find that those footnotes do not support the finding of the Trial Chamber. In that regard it cannot be a reasoned opinion, it cannot be a reasoned judgment, when determinations are made by the evidence or the footnote referred to do not support the findings.

My Lord, let me move very, very quickly to another issue of importance in particular. The Trial Chamber, at paragraph 1857 of the trial judgment, in evaluating the testimony of DMK-161 about the adoption of UNAMSIL Maroa said that this witness was not credible because the witness supported the alibi of Mr Kallon and his testimony was in contradiction of other findings of the Court.

Now, my Lords, this is one of those instances that we would refer to evidence that was disregarded - that was before the Court and which was disregarded - which amply supported the testimony of this witness.

One minute, my Lord. My Lord, I would refer your Lordship to Exhibit 24, page 23, number 23 on the folder. Because this witness has testified, you will find that, Kallon was not aware of these adoptions. When he knew about it for the first time in

Teko Barracks, he said that the UNAMSIL troops ought to be released, and the Chamber found that that was not true.

Now, in Exhibit 34, page 0008105, you have there, my Lords, a radio message dated 5 May 2000. And if I may read that quickly, my Lord.

"Sir, as per instruction, I've arrived at Lunsar to talk to the UNAMSIL contingent that are deployed in the township but, unfortunately, other contingent Zambia have already left. I have found out that many civilians have departed, but I've talked to many of them to return to their homes. We met one UNAMSIL officer, Nigeria. We are now walking hand-in-hand talking to the population and putting situation under control."

This message was sent by Shining Star to SP, and the Chamber found that Shining Star is Komba Gbundema, and SP is Kallon. Now, if at 5 May 2000, in the heat of the hostilities, Kallon was busy sending out someone to Lunsar, to pacify the population, to walk hand-in-hand with the UNAMSIL, indeed, they met the Nigerian UNAMSIL, and they walked hand-in-hand to pacify the population, my Lord, in this particular regard how could the Judges, if they candidly assessed this radio message, how could they have arrived at the fact that Kallon had a criminal intent, Kallon was guilty, when the evidence now shows, clearly, that he was concerned with peace, even in the heat of hostilities and you will find, my Lord, that there are other findings, many other findings in the course of the judgment, I won't belabour you, I have no time, I think I will soon be stopping quickly to let my friend continue, but, you find many other findings in the trial judgment showing that Kallon was a man of peace. He had the name Friend, and Sparrow, that's how they called him, and he used

constantly the Koranic verse, Bilal Karim, and the witness specified that this was to show his resolve to punish any combatant he found within his area who committed crime against civilians.

Now, my Lord, let me move quickly to ground 27; errors relating to civilian status of UNAMSIL.

My Lord, we found that the Trial Chamber spent valuable, wasted valuable and scarce judicial time addressing this issue, and in so doing they conflated the matter of UNAMSIL with our UNAMSOP [phon], and went to so many issues that were irrelevant.

As pleaded in paragraph 166 of the Prosecution pre-trial brief, the issue that fell for determination about the matter of UNAMSIL was Exhibit 99 and that Exhibit 99 is attached -- I think it's reference number 24 on our folder -- it was very very clear, and the Security Council in Articles 9 and 14, in Article 9, they spell out the mandate of UNAMSIL. In Article 14, they spell out the power, the authority of UNAMSIL, and if we look at Article 1 (1)(c) Article 1(c)(i) and (ii) on the convention, UN convention for - on the safety of United Nations associated personnel, Resolution 4959, you will find that they expressly excluded United Nations forces acting under this enforcement power, Chapter 7 of the UN Charter from this convention and therefore, my Lord, the question that arises is not the irrelevant argument that the Trial Chamber brought about self-defence and other issues.

No, for me, I will submit forcefully, that looking at this Security Council resolution, the United Nations forces became or were entitled to the treatment given civilians in conflict only when they were hors de combat, because it cannot be said that the

civilian status - alleged civilian status - flowed from the mandate. That cannot be said. And it cannot also be said that when they left Freetown to Makeni, they went there in self-defence. It cannot be said.

And in any case, the UNAMSIL could only act - execute their mandate consistent with the Charter of the United Nations and Article 51 of the Charter of the United Nations confers the right of self-defence only to state parties. At the time it did not contemplate that no state actors would become an important factor in international relations. That is the case today.

And now the only way - the only way, the only way - that it can be perceived that they acted in self-defence is to give Article 51 a very expansive interpretation. And we submit, my Lord, to do so will be against the UN Charter which does not recognise reprisals or rescue operations.

Indeed, as Professor Max Hilaire has pointed out and attached is his article, the article of Professor Max Hilaire of Morgan State University, that's "The Law Of War Review", it is number 25, he has written comprehensively about this issue, my Lord, that in this particular context it cannot be said that the UNAMSIL personnel went there.

Indeed the witness who testified, General Mulinge, who led that operation from the ZAMBATT, the sector commander who was the commander of Kasoma, he testified - and indeed Kasoma himself testified - that he invoked Chapter 7 authority in that particular context.

Indeed, you find that in the other findings of the Trial Chamber stating that from before May Foday Sankoh was complaining about the conduct of General Jetley, about the conduct of UNAMSIL

personnel, and this is supported by General Garba who testified as a Kallon witness, who was deputy field commander, and was supported by General Mulinge, who was the commander of the forces that were abducted. He was Kallon's witness and testified that he never saw Kallon, he contradicted Kasoma and that Kallon was never introduced to him. He was supported by Brigadier Ngondi, who was the commander in Makeni, and in fact all of them testified the use of force over UNAMSIL was not justified in this particular circumstance. Indeed, they took measures to say that the grievances of the RUF could be addressed without resort to force.

So we submit, my Lord, without more, that in fact in this particular circumstance UNAMSIL were not civilians, they did not acquire the status of civilians, before - before, as I said before - they were hors de combat, and at the time that they were hors de combat, my Lord, that time they were entitled to protection accorded civilians.

I am going to - I have taken too much time, my Lord. That excuse I would love to address, but maybe you will permit me to let my friend continue now so I don't waste our time. I wanted to address the other issue about UNAMSIL, but hopefully my colleague will address them further. Thank you very much for your kind attention.

JUSTICE WINTER: Thank you very much, Mr Kennedy, please. I just would like to remind you for the time. You have one hour ten minutes.

MR OGETTO: Yes, Madam President. Thank you very much. Good afternoon, your Honours, good afternoon, colleagues.

I will start by saying that I wish to adopt some of the

submissions that were made by my colleague, Mr Jordash, my good friend Mr Jordash, in relation to pleading standards of indictments, and also his submissions about the lack of material particulars in the indictment.

I will also wish to adopt Mr Jordash's submissions on the conviction, JCE conviction, with regard to the crime of enslavement in Kono, and also I would wish to adopt his submissions on the misleading nature of the information contained in the pre-trial brief in connection with this crime of enslavement.

I also wish to adopt his submissions in relation to forced marriage in Kailahun, as they relate to pleading standards. I further wish to adopt the submissions on the pleading standards of JCE, generally.

My Lord, having said that, the issue of the facts in the indictment is a critical problem for the accused Kallon. The indictment before you, your Lordships, is extremely broad, and this broadness, if I may call it so, allowed the Prosecution to mould its case along the way, depending on how the evidence unfolded.

And I wish to give a number of illustrations, illustrations that demonstrate the prejudice that the accused person has suffered resulting from the overly broad indictment, resulting from the manner in which the Prosecution moulded its case along the way.

And I would refer to count 14, where the indictment charges the three accused persons for pillage, and the indictment simply says that the accused persons are guilty of looting, and burning, as a result of their acts, and omissions in relation to these

events. Sorry, my Lord. I read it, yes, I will.

UNIDENTIFIED SPEAKER: [Inaudible].

MR OGETTO: That could be a misstatement. But let me read it for the avoidance of doubt on the indictment.

My Lord, I could continue - I will read it - I could continue as they look for the indictment. There are a lot of documents here, there is a lot of confusion.

My Lord, the indictment does not specify the particulars of these acts and omissions - I have got it. Thank you, Mr Cammegh. Count 14 reads:

"At all times relevant to this indictment AFRC/RUF engaged in widespread unlawful taking and destruction by burning of civilian property. This looting and burning included the following."

And then the particulars are given.

JUSTICE KING: See, your exact words were that the indictment alleges that they were guilty.

MR OGETTO: That's --

JUSTICE KING: I would be very surprised - just a minute - I would be very surprised if the indictment alleged what you say they allege, having regard to the experience of the Prosecution. It's the business of the Court to decide on guilt, not the business of the Prosecution. So I knew at once that that couldn't have been an accurate quotation from the indictment. So I think you ought to withdraw that.

MR OGETTO: Thanks for the correction, I withdraw. It's a slip of the tongue, my Lord. So as I was saying, my Lord, the indictment does not give any particulars in relation to this crime, and in an attempt to cure the defects in relation to this

crime, in the indictment, the Prosecution provided information in the supplemental pre-trial brief, at paragraph 533, which in relation to the accused Kallon specified, among other accusations, that Kallon was involved personally in breaking into the National Bank in Bo District in 1998, and looting all the money in that bank.

My Lord, this accusation was again repeated by the Prosecution in his opening statement delivered on 5 July 2004, at page 46. My Lord, we have an extract of the opening statements in our bundle of documents. It will be at number 19. You will notice that the Prosecution reiterates what is in the supplemental pre-trial brief but the accused Kallon broke into the National Bank in Bo, and looted all the money in that bank.

During trial, my Lords, the case against the accused in relation to pillage changed. Through witness statements and witness testimonies, the Prosecution case now was that the accused Kallon looted a bank in Kono; Koidu Town in Kono. You will notice, my Lords, that Koidu is not one of the places listed in the indictment where looting is supposed to have taken place, and I refer to paragraph 80 of the consolidated corrected amendment.

In Kono, the accused was actually charged with looting animals, sheep, so that you have noticed from the Prosecution telling you that the accused is charged with the looting of a bank in Bo and looting of sheep, animals, in Kono. But during trial the case changes and now the accused person is charged with looting money in a bank in Koidu. And of course, there was no evidence adduced in relation to any robbery of a bank in Bo. There was no evidence adduced in relation to the looting of

animals, sheep, in Kono.

And here you find a drastic transformation of the Prosecution case against the accused person, and my Lords, you will notice that this looting of a bank in Kono, which is nowhere in the indictment, which is nowhere in the pre-trial brief, forms the basis of a conviction under Count 14.

Of course, the Defence objected to this during trial. We filed a motion to exclude evidence outside the scope of the indictment, and this motion is contained in our bundle of documents. It's number 22. That motion will challenge this transformation of the Prosecution case.

The second example I will give in relation to the transformation of the Prosecution case relates to counts 3 to 5. The supplementary pre-trial brief, at paragraph 329, in relation to Kailahun, states that the accused was present when 60 civilians accused of being Kamajors were killed, a very very serious allegation. So its presence became critical in the Prosecution case against him. His presence in Kailahun also became critical in relation to the case that he was expected to defend. His presence was then perceived to constitute a significant contribution to the joint criminal enterprise in the Kailahun crime base. But what happened during trial, my Lords?

The evidence clearly demonstrated that the accused was never in Kailahun, both Prosecution and Defence testimonies clearly demonstrated that the accused was never in Kailahun when this crime was committed. It was quite clear that at the time this crime was committed the accused was in Bo. This was around the retreat from Freetown and the accused was in Bo fighting the ECOMOG, trying to recapture Bo.

And the Trial Chamber acknowledges this at paragraph 1397, page 418 of the Trial Chamber judgment, which means, my Lords, that at the time this crime was being committed in Kailahun, the accused person may not even have been aware that this crime was being committed or was about to be committed.

Having realised that the accused person was not in Kailahun when this crime was committed, the Prosecution theory changed. The Prosecutor now argued for you to be found liable under JCE you don't have to be present. So then the question is: What is the purpose of the notice that the accused person was given in relation to his presence in Kailahun?

The Prosecution is now changing, saying: You do not have to be present. Joint criminal enterprise does not require your presence, you will be liable anyway. Unfortunately, my Lords, the Chamber adopted this theory and convicted the accused person for the killing of the 60 Kamajors in Kailahun; notwithstanding the fact that he, the accused, was not present as charged; notwithstanding the fact that it wasn't proven that he even knew about the commission of this crime; notwithstanding the fact that it wasn't even proven that the accused person had any link, any control over the perpetrators of this heinous crime in Kailahun.

Significantly, my Lords, this is a crime that was committed by Sam Bockarie, the all powerful RUF commander over who the accused, Kallon, had absolutely no control.

So the question we ask again: What is the purpose of notice if the Prosecution can change its theory of the case at will, and if the Chamber can adopt such a change to the detriment of the accused person?

A related issue concerns the crimes of sexual slavery and

forced marriage in Kailahun. And, once again, the supplemental pre-trial brief alleges that the accused person is guilty of this crime in the context of the joint criminal enterprise as a result of his frequent presence in Kailahun.

Now, my Lords, during trial there was absolutely no evidence of the frequent presence of the accused person in Kailahun. Notwithstanding this, the Trial Chamber changes tack and says it is not necessary for the accused person to have been present in Kailahun for him to be guilty of this crime. So again, what is the essence of the notice that he received about his regular visits, his regular presence in Kailahun? It serves no purpose, causes a lot of prejudice to the accused person.

The case of Bo, my Lords, is one of extreme concern to the Appellant. And let me give you, give some background. At the time the crimes in Bo were committed, the accused person was not in Bo; he was based at Teko Barracks in Makeni, and this is acknowledged by the Trial Chamber. The accused person, Morris Kallon, had not become a member of the Supreme Council. This is acknowledged by the Trial Chamber. It was never shown that the accused person ever went to Bo when these crimes were committed, and these crimes were committed during the month of June. The accused person moved to Bo in August of 1997, about two months after these crimes had been committed.

What does the supplemental trial brief say about this crime in relation to the accused person Kallon? It says he was present in Bo when the crimes were committed between May and June 1997, and for that reason he must have contributed significantly to the commission of the crimes. On the basis of this information, my Lords, that he was present in Bo, the accused person proceeded

to defend himself and to deny that he was ever in Bo. He called a number of witnesses, specifically Hassan Deko; he testified in public. Hassan Deko was a senior member of the Kamajor group. He came and testified in favour of the accused person and confirmed that during the time the crimes in Bo were committed, the accused person was never based there.

So what does the Trial Chamber do in the judgment? They ignore the notice that the Prosecution gave to the Appellant and instead decide that it was not necessary for the accused person to have been present in Bo for him to be found guilty under JCE. And again, we ask the same question: What was the purpose of the notice that he received, that he was present in Bo, and for that reason he was being held liable for the crimes that were committed in Bo? That notice does not serve any purpose. The Trial Chamber's position causes prejudice, irreparable prejudice, because the accused person has been misled to defend himself, and yet that Defence is irrelevant.

The third example that I want to give, and I am doing this because it is important for your Lordships to understand the gravity of the defects in this indictment and the gravity of the misrepresentation that the accused person has been subjected to, and which has caused him to tremendous prejudice.

The theory of the Prosecution case in relation to the Appellant Kallon is that he was one of the most powerful persons in the RUF movement, and this is really the thesis that informs all the convictions against Mr Kallon. In support of this theory that Mr Kallon was one of the most powerful people in the RUF, particularly during the JCE period, the Prosecution pleads, at paragraph 25 of the indictment, that the accused was deputy area

commander between May 1996 and April of 1998. It is not specified which area he was commander, deputy area commander, but let's leave that for a moment.

The indictment goes further to say that between April 1998, and about December 1999, the accused was supposed to occupy the powerful position of RUF battlefield inspector and that in that position he was subordinate to only very few people within the RUF.

Now, these two positions were very critical to the Prosecution case, and that is why they plead them in the indictment. The Defence case from the very outset, my Lords, was that the accused person was not as powerful as the Prosecutor would have wanted to portray him. In fact, the Defence case was that and is up to now that the second accused never occupied these two positions, deputy area commander and battlefield inspector.

The Prosecution during their case failed to adduce any evidence to demonstrate, to prove, that the accused person held these two positions. Having realised this failure, the Prosecution changed their theory. They now said positions are not important anyway. The accused person was trained in Liberia, together with the others, he is a vanguard, and for that reason he was powerful. So, during the Prosecution case now, the concept of a vanguard, the concept of training in Liberia emerges. This concept is not pleaded anywhere in the indictment.

The Prosecution abandons the two positions, now introduces the concept of a vanguard. And the Chamber adopts this in the judgment. The Chamber actually omits to make any reference to the indictment in relation to the assumed powers of the

Appellant. Instead, the Chamber says, agreeing with the Prosecution, that the second Appellant was a vanguard, and therefore powerful, and therefore without more, contributed significantly to the joint criminal enterprise.

My Lords, this is very worrying because we are now faced with a situation where we have a concept in respect of which we were not able to defend ourselves. A concept that emerged during the Prosecution case, in the middle of the Prosecution case, and a concept that is not even clear. So, once again, a demonstration of how the Prosecution case has been moulded along the way depending on how the evidence unfolded, and depending on how the Prosecution failed to prove what may have been pleaded in the indictment or in the supplemental pre-trial brief.

My Lords, I wish now to very quickly move to another area, and this relates to the Appellant's conviction under 6.3 for events in Kono, and the first events I wish to deal with relates to the alleged forced marriage of witness TF1-016. Details of our submissions are contained in ground 13 of our appeal brief, but the gist of this crime is that the Appellant Kallon was found guilty as a superior because of the alleged forced marriage of TF1-016 by a fellow called Kotor.

My Lord, as a preliminary issue, this crime is not pleaded anywhere in the indictment. This crime does not appear anywhere in the opening statement, pre-trial brief, or supplemental pre-trial brief. In fact, the testimony of witness TF1-016, by way of her statement, summary of her statement which is attached to the supplemental pre-trial brief, does not even mention the Appellant Kallon, which means Kallon had absolutely no notice that he was supposed to defend himself against the alleged forced

marriage of this woman by this person named Kotor.

What is more important, my Lords, is that the Trial Chamber found Mr Kallon guilty of this crime despite the fact that the elements of superior responsibility in relation to this crime were completely lacking.

It is alleged, my Lords, that this crime took place at a place known as Kissi, Kissi as in Kono District. There is no evidence, my Lords, that Kallon had command authority over fighters in Kissi. In fact, the Chamber notes, at paragraph 834 of the judgment, that Kallon was one of the several senior RUF commanders who had no discrete combat units or forces assigned to their command. That is one conclusion that the Chamber makes.

At paragraph 835, the Chamber states that Kallon was assigned to defend the Makeni/Kono highway against advancing ECOMOG. There is no evidence absolutely that Kissi, where this crime was committed, was within Makeni/Kono highway, where Kallon was assigned. At paragraph 836, the Chamber concludes that Kallon was assigned to a place called Guinea Highway. Again, there is no evidence that Kissi came within the jurisdiction.

JUSTICE KING: You said there is no evidence.

MR OGETTO: Sorry, my Lord.

JUSTICE KING: You said there was no evidence.

MR OGETTO: There is no evidence, yes, my Lord.

JUSTICE KING: But I was just looking at the paragraph you cited.

MR OGETTO: Which one, my Lord?

JUSTICE KING: This is 835.

MR OGETTO: Yes, my Lord.

JUSTICE KING: "Nonetheless, the Chamber finds that Kallon

was an operational commander, who gave orders which were complied with by troops. He was assigned to an area known as Guinea Highway." You said there was no evidence and then there is a footnote 166, and that footnote refers to the transcript of 20 October 2004, J Johnson, page 6, transcript of 11 April 2005, those were the pieces of evidence that the Trial Chamber referred to and yet you say there is no evidence.

MR OGETTO: My point is slightly different.

JUSTICE KING: What is your point?

MR OGETTO: We admit that the Chamber made a finding that Kallon was assigned to Guinea Highway. The point I'm making is that Kissi is different from Guinea Highway, and any jurisdiction, any control powers at Guinea Highway, could not possibly have extended to Kissi. Kissi is totally different.

JUSTICE KING: I was just referring to the paragraph you quoted, 835.

MR OGETTO: Yes, my Lord.

JUSTICE KING: Now, if you read the paragraph --

MR OGETTO: Yes.

JUSTICE KING: -- you will see what I am talking about.

MR OGETTO: It doesn't talk about Kissi, my Lord.

JUSTICE KING: Well, read it. Don't ask me. You look at it and tell me what you think about it.

MR OGETTO: None --

JUSTICE KING: That is why I referred you -- you referred to it, and I've drawn your attention to what I have seen there.

MR OGETTO: Yes, my Lord. Nonetheless, the Chamber finds that Kallon was an operational commander who gave orders which were complied with by troops. Then it continues. I think we

should read the entire paragraph. It continues:

"He was assigned to an area known as Guinea Highway. Kallon was entrusted with a particular responsibility of defending the Makeni/Kono highway against advancing ECOMOG and Kamajor troops. In this capacity he would instruct commanders to undertake ambush-laying missions on the basis of orders from Superman."

So this, in my submission, my Lord, is quite restricted. Kallon was assigned to Guinea Highway with a very specific purpose. He was supposed to be at the Makeni/Kono highway, in charge of laying ambushes. And my submission is that that did not extend his powers to Kissi which was far away.

JUSTICE KING: But the point I'm making is: That paragraph says nothing about Kissi.

MR OGETTO: It doesn't.

JUSTICE KING: That's the point I'm making.

MR OGETTO: And I agree with you, my Lord.

JUSTICE KING: And you see, what they are saying there, in support of what they are saying, they referred to the evidence with regard to another location, but you quoted that paragraph, 835, when you made your submissions about Kissi. I am merely telling you that that paragraph does not say anything at all about Kissi.

MR OGETTO: The reason why I quoted this is to show that although Kallon had some command powers, those command powers were in respect of a different area, other than Kissi.

JUSTICE KING: That might be so, but it does not say that he did not have anything to do with Kissi in that paragraph. Or that he had something to do with Kissi in that paragraph. It

only speaks about Guinea Highway.

MR OGETTO: Yes, but I think the Chamber had the obligation to make a finding as to whether his powers at the Guinea Highway, or Makeni/Kono highway extended to Kissi.

JUSTICE KING: Yes, but it's not in that paragraph. That paragraph deals with Guinea Highway.

MR OGETTO: And that is what is lacking. We are saying we have no evidence that Kallon had any command powers at the Kissi Town.

Can I proceed, my Lord?

JUSTICE KING: Yes, proceed. I will stop you when I'm not clear about a certain point and it will be your legal obligation to elucidate portions that I do not see and to make them quite clear.

MR OGETTO: I quite -- I agree with that, my Lord.

JUSTICE KING: Very well.

MR CAMMEGH: My Lords, I'm terribly sorry to interrupt, and I apologise to my learned friend. Mr Gbao is very anxious to leave to go to the restroom, with your Honour's leave.

JUSTICE WINTER: This is agreed.

MR CAMMEGH: Thank you.

MR OGETTO: My Lord, in relation to this issue again, I wish to cite paragraph 2149 of the judgment, and that paragraph is to the effect that although Kallon was a senior commander of the RUF, he did not occupy a formal position within the operational command structure of the RUF, and, more importantly, the paragraph specifies that it is not clear to what extent Kallon received reports on the actions of troops throughout Kono. So the Chamber doubts if Kallon was in a position to receive any

reports from all parts of Kono.

JUSTICE KING: But that paragraph is in your favour. [Inaudible] I was saying that that paragraph, for once in your submission, seems to be in your favour, because the Trial Chamber is in fact holding and finding that the Prosecution in that regard had failed to prove their case.

MR OGETTO: And that's why I'm quoting it.

JUSTICE KING: Yes. That is why I say for once.

MR OGETTO: Thanks. I've wasted a lot of time.

JUSTICE KING: No, I am not saying that. Go on.

MR OGETTO: Thank you.

So, my Lord, having concluded that it is not clear whether Kallon received reports from throughout Kono, it's our humble submission that there is no basis for holding Kallon liable for the actions and the crime of this man called Kotor, when there is no evidence that Kallon knew about this crime, assuming he was Kotor's superior.

The Chamber says, in its reasoning, that Kallon is guilty of this crime because the crime of forced marriage was widespread in Kono and the whole of Sierra Leone, and that the second accused had reason to know of the fighter who committed - of the fighters, not one - of the fighters who committed this crime at Kissi Town. Our submission, my Lords, is that the Chamber applied the wrong test.

The second accused was never found guilty of the crime of forced marriage generally in Kono, and the whole of Sierra Leone. He was found guilty of a specific crime involving an identified victim and also a very clearly identified perpetrator.

JUSTICE KING: What do you have to say about the Trial

Chamber's finding as stated in paragraph 2148? What would be your submissions on that? You can read it out aloud so that we can all follow.

MR OGETTO: Yes.

"The Chamber found that Kallon occupied a supervisory role with respect to the civilian camps and we are therefore satisfied that Kallon had actual knowledge of the enslavement of civilians there."

Here they are talking about --

JUSTICE KING: Carry on, carry on to the end.

MR OGETTO: "The Chamber is further of the view that the commission of the crime of forced marriage was widespread in Kono District and indeed throughout Sierra Leone and we find that in the circumstances Kallon had reason to know of the fighters who committed this crime at Kissi Town."

And this is the point I was making, my Lord. That we should make a distinction between Kallon being found guilty generally of forced marriages, and Kallon being found guilty of the crime of a specific individual. In the first case, knowledge can be deduced from circumstances, general circumstances. The widespread nature of the crime.

In the second case, where you are talking about an individual who committed a crime in a small town, away from where the accused person was, the test should be whether Kallon actually knew of the commission of this specific crime, by this specific perpetrator, and that is why paragraph 2148 does not cure the defect, or the error that the Chamber committed.

And, my Lord --

JUSTICE KING: [Inaudible] as I told you earlier, it was

for this Court to make that decision, not you. You can only submit. I am merely pointing out paragraph 2148 to give you an opportunity to bring that as part of your submission and to explain that finding in terms of the contrary submissions you are making, because the very important phrase there, it says, "And indeed throughout Sierra Leone. And we find that in these circumstances Kallon had reason to know of the fighters, of the fighters who committed this crime at Kissi Town."

He had knowledge, according to this. I am not saying they are right. I am merely saying this is what they found and what is your response to that, vis-à-vis those findings?

MR OGETTO: My response then would be, if they are talking about knowledge, then there should be evidence of this knowledge. It cannot be presumed. There should be evidence of the knowledge and our submission is that there is no evidence on the record that Kallon had knowledge of this crime, and I am making this submission, my Lords, because we are talking about a specific individual who committed this crime, or specific. A few individuals. We are not talking about a crime that has been committed, you know, the entire area of Kissi; we are talking about a specific crime. And in that case, our submission is that evidence of knowledge is important. You cannot just presume that because the crimes are widespread you will know about a specific crime that has been committed at a particular place.

One minute, my Lord.

My Lord --

JUSTICE KING: [Inaudible] solve a lot of problems. Now, with regard to joint criminal enterprise, are you saying that the accused must be present at the scene of the crime? If you are

not saying that, what are you saying?

MR OGETTO: I am not saying that, and if that is the impression I give I am very sorry.

JUSTICE KING: I am not saying you give the impression. I said if you are not saying that, what are you saying? You see, you made several submissions --

MR OGETTO: The gist --

JUSTICE KING: -- about your client not being present at the scene of some crimes. With regard to JCE, I want to know your own submissions with regard to presence of an accused persons at the scene of a crime.

MR OGETTO: Presence may be evidence of contribution, although it may not be conclusive.

JUSTICE KING: In other words, does an accused person under joint criminal enterprise have to be present at the scene of the alleged crime?

MR OGETTO: He doesn't have to be present.

JUSTICE KING: Very well.

MR OGETTO: But the issue in our case is slightly different. The Prosecution case against Mr Kallon was that he was at specific places where the joint criminal enterprise was committed. That is the notice that he received. We are not saying that it is mandatory that --

JUSTICE KING: No, it's such a general question with regard to joint criminal enterprise.

MR OGETTO: Yes.

JUSTICE KING: You know, your understanding of joint criminal enterprise, whether in fact, if an accused person wasn't present at the scene where the crime was committed, and provided

the other elements of joint criminal enterprise have been proved, whether according to you that accused person is not guilty?

MR OGETTO: No, he can be guilty, if the others are proved.

JUSTICE KING: I see. That's all I wanted to know, is he guilty.

MR OGETTO: Yes, and in our case, my Lord, our submission is that --

JUSTICE KING: You've answered the question. That's all I wanted to know, so I don't misunderstand you.

JUSTICE FISHER: If I may interrupt as well, with a follow-up question: If you acknowledge that the Trial Chamber was correct when they gave the opinion that presence at the scene of the crime was not necessary, am I understanding your argument correctly that you feel that the notice was misleading and therefore wasted the Defence's time because you put on evidence to dispute it; is that your point?

MR OGETTO: That is my point, exactly.

JUSTICE FISHER: But, nonetheless, as you've already acknowledged, presence is also relevant to participation, and I suspect it might also be relevant as to sentencing. So the fact that you did have notice that that was the allegation it would still, it seems to me, non-prejudicial to you to establish the evidence that you did, and I guess I can't see what the prejudice is here, and if you could explain that to me, please.

MR OGETTO: The prejudice, my Lords, is that the Prosecution presents a specific case that you are supposed to defend and you defend that case. You know that you are being charged because you are present at a specific crime location, but in the course of the Prosecution case, the theory changes, and

now your presence is not necessary. In my humble submission, that causes a lot of prejudice because the case has now changed from what it was at the beginning to another case, and the purpose of an indictment in that case becomes completely hopeless, and my submission is that this should not be allowed because what then would be the purpose of an indictment which tells you this is the case you are facing, but in the course of the Prosecution case it changes and your presence is now dispensed with. In my humble submission, that causes serious prejudice.

JUSTICE FISHER: I think I understand your argument, and thank you. Let me ask you another question in regard to superior responsibility: Are you saying that the standard is that they must know if it's a specific crime or know or have reason to know?

MR OGETTO: I think the standard is that they either have to know, or have reason to know.

JUSTICE FISHER: Okay. So, you've addressed the issue that he -- that there is no evidence that he knew.

MR OGETTO: Yes.

JUSTICE FISHER: And what is your submission as to why you believe there is no evidence that he had reason to know? Because, as I understand it, that's what the Trial Chamber found.

MR OGETTO: Yes. The Trial Chamber found that the accused had reason to know about this crime because it was widespread. Our submission is that the fact that the crimes were widespread is not sufficient to put the accused person on notice of a crime, a single crime, that has been committed in a small town, far away from where he was.

JUSTICE FISHER: Okay, I understand that part of your argument. Are you further saying that there is no evidence in the record to establish that there might be other reasons why he had, as the Trial Chamber found, reason to know?

MR OGETTO: Absolutely no evidence, in our submission.

JUSTICE FISHER: Okay, thank you. Now I understand your position.

MR OGETTO: My Lords, in relation to joint criminal enterprise, our submission is that the accused person has been convicted merely because of his association with the RUF. The Prosecution did not prove any significant contribution to the various crimes committed in the various crime locations. I have given the example of Bo, where the Chamber states that the accused person is guilty of the crimes in Bo because he was a member of the Supreme Council at the time the crimes were committed.

The Chamber contradicts itself because it admits that the accused person became a member of the Supreme Council after August of 1997, and these crimes in Bo were committed in June. Apart from that membership of the Supreme Council, which does not exist, there is no other evidence pointed out by the Chamber that will constitute significant contribution by the accused of the crimes in Bo. Significantly, my Lord, it is important to note that after the accused moved to Bo, and after he became a member of the Supreme Council, after August 1997, there were no crimes charged in respect of Bo.

The same thing applies to Kailahun. There is absolutely no evidence that the Chamber points to that will constitute significant contribution by the accused to the crimes committed

in Kailahun. The Chamber does not demonstrate at all how the accused person shared the intent to commit crimes in Kailahun with the perpetrators; no evidence at all is given.

In relation to Kenema, my Lords, the Chamber points to the presence of the accused in Tongo Field, and relies on the testimony of one witness, the hearsay testimony of one witness, TF1-035. This witness was not able to identify the accused person. He did not know the accused person and this is an issue that the Defence raised and which the Chamber never resolved and, therefore, it was not reasonable, it was not open to the Trial Chamber to conclude that the accused person was in Tongo, and that because of his presence in Tongo, resulting from the testimony, hearsay testimony of a single witness, he contributed significantly to the crimes under the JCE mode of liability.

The other aspect that the Chamber employs to find the accused guilty under JCE for the crimes in Kenema relates to mining. It is important, my Lords, to note that while the Chamber lists officials of the RUF and the AFRC who were involved in official mining for the junta government, the accused person is not listed as one of those persons. The only reference of the accused person in relation to mining in Tongo relates to his private mining. There was evidence that the accused person was involved in private mining and, in our submission, my Lords, that cannot constitute any contribution to the crimes committed in Kenema under the joint criminal enterprise theory.

In relation to Kono, the Chamber found the accused guilty of crimes committed by non-members of the joint criminal enterprise. There was no demonstration by the Chamber how the accused person contributed to the commission of these crimes

which were committed by non-members of the joint criminal enterprise and, my Lords, we have dealt with this extensively in our written submissions, and I don't want to make additional submissions on that because of time.

I will now go to sentencing, because of time, and very quickly, point out to this Honourable Appeals Chamber that the Trial Chamber erred in ignoring a number of mitigating circumstances, mitigating factors, and we have indicated those mitigating factors in our written submissions. Our submission is that the Trial Chamber has no discretion to ignore a mitigating circumstance once it has been established as such.

A further submission is that the Trial Chamber misinterpreted its powers under Rule 101 [inaudible] in the sense that it deemed that Rule to give it power, to decide which mitigating factors to take into consideration and which ones to ignore. Our submission is that that Rule does not grant the Trial Chamber that power.

I will refer your Lordships to a number of authorities in our bundle, number 5 in the bundle. It's an ICTY decision --

JUSTICE AYOOLA: Before you go there, let me ask this, please.

MR OGETTO: Yes, my Lord.

JUSTICE AYOOLA: Who determines whether a factor is mitigating or not?

MR OGETTO: It is the Chamber, my Lord.

JUSTICE AYOOLA: Thank you.

MR OGETTO: Can I explain, sir, because I know where you are coming from, my Lord. Can I explain something?

JUSTICE AYOOLA: I am answered but you can go on.

MR OGETTO: The Chamber has the discretion to decide which, what a mitigating factor is. Once it makes that determination, then it must take that particular mitigating factor into consideration. So what I'm saying is that once they establish that this is a mitigating factor, they do not have a discretion to ignore that particular mitigating factor, and in our case we are saying they determined a particular, some specific mitigating factors but decided to ignore them altogether, not comment on them. They did not attach any weight to them. So they ignored them completely and we are saying they have no discretion, they have no power to do that under the Rule.

And, my Lord, case number 5 in the bundle, this is a decision of the ICTY, Kordic, 17 December 2004, it relates to behaviour in detention. My Lord, our submission is that the Trial Chamber ignored the fact that the accused person Kallon presented evidence in mitigation about his exemplary conduct in detention, and which the Trial Chamber acknowledged was a mitigating factor, but proceeded to attach no weight to it.

The next one is number 7 on the list, to the same effect that detention conduct is a mitigating factor. Number 9 on the list, my Lords, post-conflicts conduct, the Chamber once again, as you will note in our written submissions, ignored to consider the Appellant Kallon's post-conflict conduct, although it recognised that it constituted a mitigating factor.

My Lord, number 10, sorry, number 10 deals with a different issue. Now, because of time, my Lords, I would like to point out a number of authorities on joint criminal enterprise.

JUSTICE KING: [Inaudible].

MR OGETTO: I have finished sentencing because of time.

JUSTICE KING: There is one question before you finish. You are still within your time. Justice must be seen to be done.

MR OGETTO: Yes, my Lord.

JUSTICE KING: You know. You've quoted these ICTY and so on, the authorities. What is the fundamental principle, as far as this Court is concerned, with regard to mitigation in sentencing the accused? What is the paramount and overriding factor?

MR OGETTO: It's simply that mitigating circumstances are taken into consideration in the context of other factors, like aggravating circumstances.

JUSTICE KING: So the individual circumstances of the accused, you don't think that's important?

MR OGETTO: They are very important, and this is what I'm talking about. Detention is individual circumstances. Post-conflict conduct is individual circumstances, in my submission, and this is what I was submitting on.

JUSTICE KING: Very well.

MR OGETTO: So, my Lords, we have pointed out a number of other mitigating factors that were ignored by the Chamber. We have also pointed out in our brief, written brief, that the Chamber failed to give due regard, or to attach due weight to the remorse that was expressed by the accused person, and we urge the Appeals Chamber to look at that remorse again.

JUSTICE KING: Why do you say they failed to give any regard to the remorse expressed by the accused?

MR OGETTO: Not any. I did not say "any", my Lord.

JUSTICE KING: What did you say?

MR OGETTO: Due regard.

JUSTICE KING: Why do you say they failed to give due regard?

MR OGETTO: They should not have given him 40 years, my Lord.

JUSTICE KING: Yes, but they could have given him 100. Why I say that, I'm not saying they should give him 100 but when you say they didn't give any due regard, are you in a position to say that?

MR OGETTO: I never said "any" due regard.

JUSTICE KING: No, I didn't say any due regard. You are splitting hairs over nothing. You see, you say they didn't, the Chamber did not give due regard.

MR OGETTO: Yes, that is what I said.

JUSTICE KING: Exactly. So what is your basis for saying that? I mean, you made your submissions. The Chamber obviously considered your submissions and came to sentencing the accused. Why do you say they failed to give due regard? What is your reason for saying that?

MR OGETTO: My submission, my Lord, is that despite the remorse that was genuine, which the Chamber acknowledged was genuine, and despite the fact that the Trial Chamber actually even noted that it is unusual for accused persons charged with international crimes to express remorse, they proceeded to hand down what, in our view, in our very respectful view, was a very harsh sentence.

JUSTICE KING: You can say that, but don't say they didn't pay due regard.

MR OGETTO: I don't know that --

JUSTICE KING: What is your basis for saying that? You

can't say because they gave a sentence of over 50 years they didn't pay due regard. All you can say, you complain and say that having regard to what you have submitted, you are of the opinion that the sentence was excessive.

MR OGETTO: That is exactly what I'm saying, my Lord.

JUSTICE KING: That is not what you said.

MR OGETTO: You are just putting it in different words, my Lord, in my humble submission.

JUSTICE KING: [Overlapping speakers]. Some people --

MR OGETTO: In my humble submission we were simply [overlapping speakers].

JUSTICE KING: Very well. All right, go on, then.

MR OGETTO: A minute, my Lords.

My Lords, the last point that I wish to deal with relates to UNAMSIL, Count 17. Now, my Lords, the Appellant was found guilty under 6.3 mode of liability for the killing of four UNAMSIL personnel.

Now, this particular crime, my Lord, was never pleaded in the indictment. The supplemental pre-trial brief contains no details of this crime and, my Lords, there is absolutely no excuse why the Prosecution did not plead this information in the indictment. We are dealing with a very limited number of victims, four victims. A crime that took place within a very limited period of time, not more than four days, and therefore the Prosecution cannot hide behind the normal excuse that they cannot give particulars where there is a protracted conflict or where the number of victims is enormous.

This failure, my Lord, to provide particulars caused irreparable prejudice to the accused in their response, in the

Prosecution response to our brief. The Prosecution says that the defect in the indictment was cured because the Defence was supplied with witness statements that particularised this crime.

My Lord, as you know, and as we have noted in our written brief, the disclosure of written statements is not sufficient to provide notice to an accused person. In other words, witness statements are not a substitute for the indictment.

Having said that, my Lords, if you look at footnote 92 of the Prosecution response brief, it is clear that the Prosecution had the statement, witness statement of Ngondi, Prosecution witness Ngondi, whom the Prosecution alleges provided information constituting notice. They had this statement as early as February 2003, and this was before the accused persons were actually arrested.

Now, they did not disclose this statement to the Defence until March, until February 2006, three years later. And the time they disclosed this statement was in the middle of the Prosecution case. It is not clear, my Lords, why the Prosecution did not include the information in this particular witness statement in the indictment. It is also important to note that there were several amendments to the indictment before trial, and yet the Prosecution did not deem it fit to plead these particulars in relation to the killings of UNAMSIL personnel in any of the indictments.

It's also important, my Lords, to note that the testimony of Ngondi discussed only two killings, and this is acknowledged by the Trial Chamber at paragraph 1829. In relation to the other two killings, the Chamber relied on the testimonies obtained during cross-examination of Defence witnesses, and these are

Defence witnesses Ali Hassan and General Opande, and the Chamber will note this at paragraph 1829, footnote 3520.

So, my Lords, the accused person, resulting from the failure to plead this information in the indictment, suffered prejudice and we urge this Honourable Appeals Chamber to find that that prejudice invalidates the conviction of the accused under Count 17.

JUSTICE WINTER: If you come to the end, now.

MR OGETTO: Yes, my Lord.

So, my Lord, in summing up, I will urge your Lordships to find that the accused person's rights have been violated. Irreparable prejudice has been caused resulting from convictions which are based on a defective indictment, an indictment that was never cured in the normal way in which indictments are cured and, as a result of this, several of the convictions against the accused person have been invalidated, and we urge your Lordships to hold so. Details are contained in our written submissions. And I thank you, my Lords, for the time.

JUSTICE WINTER: Any more questions? Justice King?

JUSTICE KING: You know, you were talking about irreparable prejudice with regard to your client - I think Mr Kallon - that certain material facts were not stated in the indictment, but you also went on to say that sometime in 2006, when the Prosecution was giving evidence, the relevant evidence was disclosed. Do you still maintain in those circumstances irreparable, and I stress the word, the adjective, irreparable prejudice was done?

MR OGETTO: Yes, we do.

JUSTICE KING: Thank you. Okay.

MR OGETTO: Can I explain for that?

JUSTICE KING: Yes, yes. Go ahead.

MR OGETTO: The reason why I say that, my Lord, is that these statements were disclosed about a month before the testimony of this witness, Ngondi, and in those circumstances, my Lord, it wasn't possible for the accused person to effectively prepare his defence. More importantly, this is information that was disclosed in the middle of the Prosecution case, when other witnesses had testified on these UNAMSIL events and the Appellant actually lost the opportunity to cross-examine the other witnesses who had testified in relation to these allegations. That is the prejudice that we suffered.

JUSTICE KING: All right. I have listened to your point. But did you make any attempt to recall those witnesses for cross-examination on the point? Did you make any such application to the tribunal, to the Trial Chamber?

MR OGETTO: No, that attempt was not made.

JUSTICE KING: All right. You don't have to -- I was just asking whether you did. If you didn't --

MR OGETTO: No, the reason why --

JUSTICE KING: -- you are not obliged to. It's for the Prosecution to prove its case. I only asked whether you did, for my knowledge. You are not obliged to.

MR OGETTO: Yes. The reason why I was consulting is because I was not here at that time.

JUSTICE KING: I see.

MR OGETTO: I just wanted to be clear.

JUSTICE KING: I see very well. Very well.

MR OGETTO: I wanted to be very clear.

MR TAKU: My Lord, may I explain, because I was here.

First, this is not clear, timely and consistent disclosure. Secondly, we filed a motion to exclude all this evidence. I did not know at the time the Court declined putting the burden on us, and it is only at the time of the judgment that the Court recognised some of the issues that were raised. For example, the question of personal commission of Kallon, it was only in the course of the trial that at paragraph 399 it says the personal commission of Kallon was never pleaded and that the Prosecution would have no reason why they could not have pleaded that.

So, you see, these are issues we raised in the course of the trial. We filed a motion to exclude the evidence. In fact we were diligent in that and, in any case, the witness statements of Ngondi and others are not clear, timely and consistent disclosures.

JUSTICE KING: Don't misunderstand my question. The onus is always on the Prosecution, not on the Defence to prove its case beyond reasonable doubt.

MR TAKU: Thank you, my Lord. Thank you.

JUSTICE WINTER: Okay. Then, there are no more questions. Then we will now thank the Defence for their submissions, and we will have a 20 minutes break and we will resume our hearing at 15.35. Thank you.

[Break taken at 15.26 p.m.]

[Upon resuming at 15.48 p.m.]

JUSTICE WINTER: Good afternoon again. We are resuming now our hearing with the submissions from counsel of Mr Gbao. Mr Cammegh, you have the floor for two hours.

MR CAMMEGH: My Lady, my Lords, good afternoon. I don't know whether it's an advantage or indeed a disadvantage to be

going last on a day when we've all heard so much argument.

JUSTICE WINTER: It will certainly not be your prejudice.

MR CAMMEGH: I hope it's to my advantage. I also hope that the Appeals Chamber has had an opportunity over the past month or two to study and assimilate the appeal brief which I am privileged to put before this Court. I say privileged because its content contains - I hope it will be agreed - a range of both sophisticated and clear arguments which are largely devoid of emotive hyperbole which largely focus on facts, on sensible, common sense arguments. And I think this is perhaps a stage of the proceedings where it is not necessarily about the lawyers, because we can all put forward sophisticated and clever, clever arguments for time immemorial. This is a time when, once again, as has constantly been a theme of the Gbao defence case, an appeal to common sense and fairness is what should be the overarching submission of my defence team.

There are, regrettably, we say, because one takes no pleasure in it, a series of unfair findings or positions taken by the Trial Chamber which, to a large extent, we suggest, has represented or gone to represent what can only amount to be a miscarriage of justice in various aspects of the Trial Chamber's findings. We, or I particularly, this afternoon, hope to address some of those. I'm constricted, of course, by time, but I would be grateful if my Lady, my Lords could indulge me for the rest of the day. I hope to divide the arguments up into those comprising the convictions that fell under the umbrella of joint criminal enterprise. I then want to move, and place not quite so much emphasis on the UNAMSIL conviction, Count 15, and then finally to sentence.

One of the themes of this submission is that by virtue of his sentence of 25 years imprisonment, pursuant to joint criminal enterprise, a conviction which I characterised in sentencing arguments as having been rendered despite Mr Gbao never have fired a single shot and never having ordered a single shot to be fired is a matter that I hope to place some emphasis on at the end of my submission. Indeed, I hope to also address the fact that a similar concurrent sentence was imposed upon Mr Gbao for Count 15 which, when one boils it down to its harsh and distinct reality, represented nothing more, we say, than the aiding and abetting of two assaults on two individuals neither of whom, of course, lost their lives. That is the preamble. I now hope to -- I now propose to launch into the submission proper.

Can I begin with ground 8? Ground 8 contains, I think some 19 or so sub-grounds. I'm not going to approach all of them, but there are some that deserve some concentrated effort. And of course the first one is 8(a) wherein we claim that Augustin Gbao was denied a right to a fair trial by virtue of the finding that he was part of the plurality of persons significantly contributing to the joint criminal enterprise by way of or in his guise as an ideologist.

It's a dramatic claim, I know, but nevertheless we say that it is one which is compelling, and that is that by virtue of that finding, and by virtue of the joint criminal enterprise convictions, each one of them, each single one of them flowing from that ultimate finding that Gbao was an ideologist, we say that Gbao was denied a fair trial.

The reasons are very simple, and I'm sure you are familiar with the reasons I am about to posit, but I will repeat them.

They are these: That - and I would like to adopt the words and the dissent of Mr Justice Boutet, if I may. This is not something I want to take cynical advantage of; it's just that I suggest he puts this rather well. The indictment being of the road map of the Prosecution case, he said and I quote, in his dissent, "Over the course of this four-year trial, it was never the Prosecution case that the revolutionary ideology of the RUF advocated the commission of crimes in order to achieve the goal of taking power and control over Sierra Leone, nor did the Prosecution argue that Gbao played a vital role in putting this criminal ideology into practice."

Your Honour - my Lords, my Lady, it simply boils down to this: A fundamental precept of any fair criminal trial is that the defendant should know the nature of the case against him. Mr Gbao was never given adequate or sufficient notice that the Prosecution case was that he was an ideologist. Not a single witness -- in fact, let me go back even further.

The pre-trial brief, the indictment, Mr Crane's opening of the case five years ago in July, not a single witness of the hundred or so Prosecution witnesses who testified, not a single word in the final trial brief, not a single word in oral submissions last August, not once did the Prosecution venture that as their case. Not a single witness testified to it.

And so it is with surprise -- it was with surprise and disappointment that we discovered that that was the concept on which the umbrella, the joint criminal enterprise, the significant contribution of Gbao is found. Despite that, he received 25 years imprisonment. That is a finding which we urge the Chamber to overturn. It is a necessary consequence of that

overturning that the entire panoply of joint criminal enterprise against Gbao must fall because the significant contribution, the vital ingredient without which JCE must fall cannot possibly be seen to be made out for the simple reason that the fact was never pled and it was never testified to. It's as simple as that.

Let it not be said that I stand here in any way apologising or advocating or sympathising with anything that the RUF did. That would be very far from my personal position. It would be very far from the way in which the Defence have put their case. It is simply in pursuit of a fair trial that we make this point.

Following on from that, and in the alternative, ground 8(b) is where we suggest, well, we put it as a fact that the fact-finding that Gbao trained all RUF recruits within the indictment period is false.

Paragraph 2170 of the judgement refers to -- I'm afraid I can't read my own writing, but there's the reference to Gbao being a strict adherent to the RUF ideology and gave instructions on its principles to all new recruits of the RUF. Not a single witness. Shall I pause?

JUSTICE WINTER: Please continue.

MR CAMMEGH: Thank you. Not a single witness came forward with that testimony. And, in fact, that finding at 2170 is ironic, given the Chamber's earlier contradiction of itself at paragraph 655, where they said, "It appears that most RUF received scant ideological training and were unaware of the basic proclaimed objectives of the RUF movement." A stark contradiction, the one contradicting the other. The answer, we say, is simple, given the burden and standard of proof: No evidence that Mr Gbao trained anybody.

Again, I hesitate to do so but I must. Judge Boutet referred to the lack of evidence in support of such conclusion. Yet it is that instruction on which the foundation of the majority's finding on joint criminal enterprise against Gbao lies. Just to confirm that, if one would turn to paragraph 270 of the sentencing judgement, the Trial Chamber definitively characterised Gbao's major contribution to the joint criminal enterprise, and I'm using their words, as "an ideology instructor," elsewhere as forced farming, his role in forced farming, that also within the JCE.

If the Chamber is not impressed by my opening argument in relation to failing to plead ideology, if the Chamber is not impressed by my alternative argument about training of recruits, then ground 8(c) we say is just as forceful, because we claim that the finding that Gbao acted in concert with the plurality of the RUF and the AFRC was patently wrong.

Now, to be a participant and for criminal liability to be found against the participant of the JCE, one must be found to be part of the plurality of persons acting in concert together. Such was found against Mr Gbao. But we say the finding was perfunctory. Why? Well, if one were to look at a series of findings that we refer to in ground 8(c) it becomes plain. I don't want to repeat them all.

But it's notable, and these were findings. This is not evidence; these are findings. Gbao's name was not mentioned in the account of RUF fighters and commanders coming from all over Sierra Leone to join the juntas in Freetown. Gbao was not a senior member of the AFRC Supreme Council. In fact, he wasn't a member at all, unlike other defendants in this case. No evidence

that he participated in meetings, no findings. No findings that he held a responsible position in the junta government or agreed to join it, or that he was part of the RUF fighters that joined the AFRC fighters across the country, or that he cooperated in Kenema or that he cooperated in Kono. Yet he was still found to be part of the plurality, the key words being "acting in concert with other senior members of the RUF and AFRC." And I say the word "senior" advisedly because the Trial Chamber ruled that one had to be a senior member to be part of the joint criminal enterprise. I think that was in paragraph 1992.

My rhetorical question is this: If Gbao's name is absent from all of those findings which basically circumscribe the junta in action following May 25, 1997, how then could he be found to be a member of the plurality? How could he be found to be acting in concert with the AFRC? And just so that we are sure, the issue as to his seniority is also equally addressed we say by Trial Chamber findings listed in our same sub-ground had no effective control over the security units. Only senior military officers were on the Supreme Council. Gbao was not at meetings. It was not his responsibility or power to investigate crimes. There are a series that I could continue into which indicate inferentially he could not possibly be found to be a senior member. One of the most important being, of course, that he never even went to Freetown. He remained in Kailahun Town all the time. The sole executive and legislative authority remained in Freetown, the Supreme Council. There is no evidence and no findings as to how the RUF apparatus interacted with the Supreme Council.

TF1-371, the most senior RUF commander, if I can use that

word, of all -- I think he's familiar to the Chamber -- himself testified that he only heard about the member of the RUF after the intervention. That's February 1998. The significance of that, of course, being that that was the closing date, so far as the Chamber were concerned, as to the operation of the joint criminal enterprise: 19th of February 1998. So we say Gbao not a member of the plurality acting in concert with the AFRC.

The next sub-ground that we come to, and it's another alternative if the Chamber is not impressed by those that I put forward already, is that the Trial Chamber failed to make findings as to how joint criminal enterprise members used or employed the principal perpetrators of crimes committed on the ground. Common sense dictates, of course, that many crimes were committed over this country during the junta period and outside that period; heinous crimes committed by many faceless and nameless people, with a far greater number of victims at their hands.

It would be arbitrary, we say, for the fact that those crimes being committed should immediately and inferentially be imputed to any of the defendants, unless two very important prerequisites are made out: Firstly, the trier of fact should establish that a crime committed by a principal perpetrator not belonging to the JCE should only be imputed to a JCE member acting in accordance with a common plan if there's an evidential link. The case of Krajisnik, which states that evaluation of this link between a JCE member and the perpetrator on the ground has to be looked at subjectively case-by-case. The sort of evidence that one should be looking for and we say the Trial Chamber did not look for in Gbao's case would not have been able

to find anyway because there was a lack of evidence is explicit or implicit request of instigating, ordering, encouraging, et cetera. A detailed reasoning is necessary. It wasn't there. We attach, I think it's Annex 1 to our argument, in which we list a series of crimes and offences which were arbitrarily imputed to the defendants without those links being established. It's Annex 2.

Secondly, even if there is a link, of course for joint criminal enterprise to be made out, one has to remember that there needs to be a common purpose; the crimes have to be committed in furtherance of a common purpose. Common sense to that, of course, is that opportunistic crime, of which no doubt there was a great deal during that time in this country, cannot be roped into the JCE. The crimes have to be committed pursuant to the common purpose of taking control of the country.

An example of where such a finding was not made and where an offence was arbitrarily imputed to Mr Gbao was a series of horrific attacks in Tikonko. It's referred to in paragraph 993 of the judgment. Tikonko is in Bo District. I will cut the details short. There were, I think, two attacks which resulted in the deaths of something like 200 people. They fell like leaves, according to TF1-004. Five hundred houses were burned, imputed to these defendants, yet no link from the evidence and indeed the Trial Chamber didn't establish one in their findings, to the AFRC, to the RUF, simply they wore red bandannas, they were heavily-armed fighters wearing military uniforms. With respect, an arbitrary finding like that pays scant regard to the requirements of a Chamber fairly evaluating the facts. I'm sorry, I didn't put that very well but I think the point is made.

I'd like to move along to ground 8(j). This we say is extremely important. What we suggest here is -- and once again it's another alternative, should my previous arguments not be adopted. We suggest that the Trial Chamber erred in fact by finding Gbao individually criminally responsible using the wrong standard of mens rea. If I can explain.

In paragraph 265, the Trial Chamber held that the intent to commit the crimes must be shared by all the participants in the JCE. The Trial Chamber also ruled that offences in Bo, Kenema and Kono were found to be Form 1 basic joint enterprise crimes; that is, with a particular intent that the crimes be committed. In fact, they found that all counts, counts 1 to 14, were intended, they were Form 1 JCE crimes. Conversely and contradictorily, however, when it came to Gbao in relation to various findings in Bo, Kenema and Kono, and they can be seen in the sub-ground, it was found Gbao did not intend those offences, those means of achieving the common purpose.

Joint criminal enterprise, or the mental element to joint criminal enterprise, can be expressed in three ways: The first is the basic one, where one intends crimes to be committed. The second one for our purposes doesn't matter. The third one is that there is no such intent, the other ingredients of the notion of JCE are fulfilled, but the member of the JCE doesn't have the intent, simply he is imputed to reasonably foresee that such an offence might take place and he continues to take the risk anyway.

It was held that it was that Form 3 JCE that applied to Gbao's mens rea in relation to those two crimes. An analogy would be this, and this is where the nonsense of it lies. And

it's an opportunity, we say with respect, for this Trial Chamber to tidy up and clarify the law on joint criminal enterprise for the future of the development of this type of justice, because it is clear there is great confusion. And this is a great opportunity for this notion to be tidied up and clarified for future use.

If a group of people sit around a table, nine of them agree, "Well, we'll go to Bo and kill everybody," one of them says, "I don't want to do it. I don't agree." The people in Bo are killed anyway. The tenth person who didn't agree reasonably foresaw that it would happen, and he probably continued in the JCE, taking the risk that it would happen because he wanted to pursue the joint goal, the common purpose. But it doesn't mean that he intended it to happen. The importance of that is that he's no longer acting in concert with the other nine. That's the fallacy of mixing up two separate forms of mens rea with the same actus reus.

I hope that the way this is cited in ground 8(j) is better than the way I've just orally put it because I'm in a hurry, but I do commend that ground to the Chamber because it makes sense, and the alternative, and the way it's been left by the Trial Chamber makes, with respect, patent nonsense. It becomes almost impossible for an accused to extricate himself from the crime if the mens rea is going to be twisted around in that way.

I want to move now to 8(o). Here we suggest that the Chamber erred in fact by finding that Gbao shared the intent of the principal perpetrators in Count 1 in Kailahun District. That was terrorism. The Chamber is aware that particularly relevant so far as Gbao is concerned was the killing of the Kamajors. We

say, and I hope this is adequately posited in our appeal brief, that the Chamber finding Gbao shared the intent in relation to Count 1, the intent of the principal perpetrators, still failed to recite explicit findings demonstrating Gbao's requisite intent within the joint criminal enterprise for that execution to be carried out.

But perhaps my best point at this juncture is this: It is in fact another contradiction within the Trial Chamber's judgment. At paragraph 2047, the Chamber, notwithstanding their finding that Gbao did have that intent, shared the intent of the perpetrators of Count 1, wrote this: Bearing in mind that Gbao's conviction on Count 1 applies to Kailahun District only, not outside, they wrote, "The Prosecution has failed to adduce evidence of acts of terrorism in the parts of Kailahun District that were controlled by the RUF," and then they go further, "and where Gbao was located."

That paragraph in itself absolves Gbao, we say, of criminal liability for Count 1. How can he be found to share the requisite intent if, on one hand, if on the other hand the Trial Chamber are saying in the parts of Kailahun District where Gbao was, well, the Prosecution have failed to adduce acts of terrorism, not only against him but against the RUF as a whole. So if the co-defendants avail themselves of this argument, then so be it. It applies to each of them as it applies to Gbao. Still Augustine Gbao received 25 years for his culpability on that count.

Now, if I am asked to go further and examine the issue of did he have the intent? Was this simply a clerical error by the Trial Chamber in citing this finding at 2047, then I can, because

if one casts one's mind back to what happened with the Kamajors and the way the evidence came out at this trial, it is significant, of course, and again it's Mr Justice Boutet who, within his -- what he terms as his fundamental dissent to this finding, recalls that the first group of civilians to be arrested at Kailahun Town - I think there were 40 or so of them - were investigated by Augustine Gbao to see whether they were Kamajor infiltrators. He investigated them and he released them.

The second group, who were sadly killed, I think 65 in all, were also subject to a Joint Security Board investigation. Augustine Gbao was part of that investigation. Augustine Gbao, I think the evidence came out, authorised their paroling in the evenings. It was Sam Bockarie, however, who intervened, spontaneously, it would seem, and ordered that those alleged Kamajors should be executed.

As Mr Justice Boutet wrote in his dissent, and as we averred all along, it is difficult to infer that Gbao intended to facilitate the killings, particularly in the absence of any convincing evidence. If anything, the evidence quite clearly goes to the contrary: Augustine Gbao did what he could to ensure those people were investigated and had already freed the first batch.

The second issue in relation to ground 8(o), and again I'm talking about acts of terrorism, is in relation to sexual violence. It was found arbitrarily again, we say, and we plead this under the same sub-ground 8(o), that Augustine Gbao, it was found that Augustine Gbao had the requisite intent under Count 1 in relation to acts of sexual violence. It is not arbitrary for us to claim that that finding was made in the entire absence of

any discussion in the Trial Chamber's judgment whatsoever, and we would respectfully challenge anybody to find otherwise.

Ground 8(p) is where we suggest that the Trial Chamber erred in fact by finding Gbao shared the intent of the principal perpetrators of Count 2, that being the collective punishment count. Once again we submit that the Trial Chamber failed to show, by reference to any direct or circumstantial evidence, that requisite intent. The offence in question must inferentially be again the killing of the Kamajors and we repeat the arguments that I just put forward.

Similarly, ground 8(q) is where we suggest that a similar erroneous finding in relation to Gbao's intent was made concerning the principal perpetrators of Counts 3 to 5. Again, these are the unlawful killings. And I simply repeat what I've said before, reminding the Appeal Chamber again, the Chamber's finding that the Prosecution failed to adduce evidence of acts of terrorism in the parts of Kailahun District that were controlled by the RUF and where Gbao was located.

On this issue, Counts 3 to 5, because I would like to deal with this comprehensively if I may, the Trial Chamber made two particular findings: Firstly, that Gbao intended the death of the Kamajors as a consequence of his failure to halt the executions. One can only assume that the Trial Chamber there are suggesting it was a willful failure. That in itself had -- or perhaps gives the implication that Gbao had a power to stop the executions.

Once again, we refer then to a contradiction within the Trial Chamber judgment in which they write at paragraph 268, in relation to the question of whether he had any power to do such a

thing, Gbao did not have the ability to contradict or influence the orders of men such as Sam Bockarie, and they placed some emphasis on the fact that Sam Bockarie was someone that one could not mess with in that part of the world. It therefore requires some creative thinking to see how murderous intent can be imputed to one who saved the lives, it would seem, of more than 45 people and was actively engaged in the intent to free the other 65.

I should have said sentence judgment, I'm reminded, paragraph 268 of the sentencing judgment. Mr Justice Boutet found that, "Gbao's ability to exercise his powers effectively ..." I'm sorry, it was the Trial Chamber who found, "Gbao's ability to exercise his powers effectively in areas where Bockarie ordered the commission of crimes is doubtful." A finding of guilt then to Counts 3 to 5 is not surely the only reasonable inference that could have been drawn from the facts which the Trial Chamber themselves found.

Ground 8(r) refers to Counts 7 to 9. And one again we aver that Mr Gbao cannot be said to have shared the intent of the principal perpetrators.

Two relevant findings were made by the Trial Chamber in respect to this, and once again classified as an act of terror I repeat and remind the Trial Chamber of their words at paragraph 2047 in relation to acts of terror not being found in the parts of Kailahun District where Gbao was.

Even if the Appeal Chamber were to reject that, then we address it in other ways. First of all, the two findings pursuant to the guilty findings in 7 to 9. First, they found that Gbao had the requisite intent for rape within the context of forced marriage to further the joint criminal enterprise goals.

Secondly, they found that by virtue of his role as an ideologist forced marriages must have been a logical consequence to the pursuance of the goals prescribed in the RUF ideology. I hope my ideology argument, the one I opened with, ground 8(a) deals with that. But returning to the finding that he had requisite intent for rape within the context of forced marriage to further the RUF's goals, may I tackle the issue in this way?

We say that guilt cannot possibly be inferred from the facts, from the evidence, but even if one was tempted to infer guilt, one must look at the findings of fact that led to the finding that he had that intent and see whether they appear legitimate.

The first one is this: I think it was TF1-369, an expert, testified as to the fact of forced marriages and sexual offences taking place during the junta period. The difficulty with that, and we argue this I hope exhaustively within I think it's ground 2 of our appeal, is that the Trial Chamber themselves had found that expert evidence should not be permitted to go to an ultimate issue, and an ultimate issue would be one's intent.

At paragraph 538 of the Trial Chamber's judgment there was what appeared to be a definitive ruling in relation to the employment of experts and the type of evidence flowing from them, and I quote, "The Trial Chamber has accepted the evidence of such experts insofar as it relates to their areas of expertise and does not make conclusions on the acts and conduct of the accused." So conclusions on acts and conduct should not be derived on expert evidence alone. It is not enough.

What is acts and conduct? The Trial Chamber described it as "personal commission, planning, instigating, ordering, aiding

and abetting, knowing offences were going to be committed, or failing to stop or punish them", in other words, classic 6.1 and 6.3 liabilities. Within a joint criminal enterprise acts and conduct, we say, is defined as participation in the joint criminal enterprise and sharing the intent of the perpetrators. So, in short, this --

JUSTICE KING: I am sorry, you referred to paragraph 538.

MR CAMMEGH: I've just lost my page, my Lord. Can I just find it again?

JUSTICE KING: I just, you know, I just want to know in what regard.

MR CAMMEGH: I've taken it as 538 of the trial judgment.

JUSTICE KING: Yes. What was your point? I was trying to follow.

MR CAMMEGH: Expert evidence.

JUSTICE KING: Yes. What are you saying about that?

MR CAMMEGH: That expert evidence taken in isolation cannot be used to go to the ultimate issue, intent or guilt, wherein the evidence given relies to a defendant's acts and conduct. And acts and conduct is defined by the Trial Chamber as I've just listed them, the classic commissions within 6.1 and 6.2 and within a joint criminal enterprise it's participation in a JCE or evidence of one's shared intent with the perpetrators who actually did the crime.

JUSTICE KING: Are you saying that's to be found in 538?

MR CAMMEGH: The definition of acts and conduct isn't. It's the ruling in relation to the fact that expert evidence may not be used in such a way as conclusions can be drawn from their evidence in relation to acts and conduct.

JUSTICE KING: Could you read the relevant portion please, sir.

MR CAMMEGH: Well, the note that I have, my Lord, is --

JUSTICE KING: No, from the judgment itself.

MR CAMMEGH: Yes, yes. At 538, it's the phrase where the Trial Chamber indicates that it is, and I quote, "Has accepted the evidence of such experts insofar as it relates to their areas of expertise and does not make conclusions on the acts and conduct of the accused."

So what it does is it restricts the use for the purpose of general findings to just that, general findings. So if an expert, for example, said there was a culture of rape in certain areas in Sierra Leone during the war, that is fine. What is not permitted is for the expert to, in essence, see inside the head of a particular individual defendant, and what is not permitted is for the Trial Chamber to make inferences from what the expert evidence -- expert witness says in relation to the acts and conduct of the accused, whether he was committing an offence, instigating it, et cetera, or for the purposes of the JCE finding, whether he was participating in a JCE or shared the intent of the perpetrators on the ground. So that was one basis, we say an improper basis, on which the Trial Chamber found Gbao's guilt on Count 6 to 9.

The second one, as we gleaned from the Trial Chamber judgment, was the wrongful use of DIS-080. It was -- the Trial Chamber stated in their judgment that, "According to DIS-080, forced marriage took place in Kailahun District. In actual fact, he didn't say that. And in any event, he was found to be not credible in any event; the witness requiring corroboration. So,

again, a witness from which a finding could not properly be made against Gbao, or indeed against any of the defendants.

Thirdly, testimony relating to events outside the junta period was adopted in order to return these verdicts against Gbao in 7 to 9. One witness is the subject of that. It's TF1-114 who testified to events after the indictment period. Again, all of this is catalogued in our appeal brief.

The final basis on which what we say an erroneous finding on intent on 7 to 9 was found was the evidence adopted by the Chamber from a rash of witnesses. I - perhaps no need to go through them now - all of whom were found to lack credibility and to require corroboration. None of them was corroborated. And when I say "corroboration", I mean corroboration in relation to evidence that they gave as to Gbao's acts and conduct, the same definition to acts and conduct equally applying.

In short, what we submit in relation to Counts 7 to 9, extremely unpleasant findings here, is that there were no other findings in the Trial Chamber's judgment that were capable of supporting the ultimate finding that Gbao shared the criminal intent for rape within the context of forced marriage in order to further the goals of JCE and that therefore that or those counts should be dismissed as against our client.

Sub-ground 8(s) makes the same point in relation to Count 13. Once again, we suggest that there was no proper finding based on evidence to return a guilty verdict to Count 13, enslavement, no proper findings to Gbao's alleged shared intent with the perpetrators. Enslavement was categorised through this trial of course as including farming, mining and military recruitment.

The Chamber found that forced labour was the logical or a logical consequence of the ideology that Gbao imparted. I hope that my arguments in relation to ideology deal with that preliminary finding. The second finding that they made more pertinently to Augustine Gbao was that he was directly involved in planning or maintaining a system of enslavement and therefore it could be inferred that he had the requisite intent to further the goals of the JCE.

Here we have to go into the facts a little. Again, it is our earnest hope that the arguments which I have put, 1, 2, 3, 4, one an alternative to the last one, have already in essence killed off the idea that Augustine Gbao was within the JGE. But if I haven't done that, and if the Chamber still wants to consider Gbao's culpability or not in relation to Count 13, then a brief overview of the findings pursuant to which they made that -- came to that verdict have to be examined.

They're recorded in detail in ground 8(s). Firstly, in relation to involvement with farming in Kailahun District, there were only three witnesses, in fact - and this is explained in our brief - who testified that Gbao was involved in such farming during the junta period, and of course at all times one must remember that it's during the junta period because that is the period during which the JCE was found to be extant by the Trial Chamber, May the 25th '97 to 19th of February '98. Those three witnesses were TF1-108, 330 and 366.

A series of other witnesses gave evidence on the point, though not against Gbao individually. They're detailed in our brief. I don't address them now because they all appeared to give evidence in relation to events post the junta period and

therefore post the operation of the JCE. 108 was found - I repeat it's 108, 330, 366. 108 was found to require corroboration in relation to his acts and - in relation to evidence of Gbao's acts and conduct. That would include Gbao's intent as a member of the JCE, of course. 108 was found to be -- well, indeed, he was, severely impeached. There's no need for me to go into the detail there, but perhaps the most gravely impeached witness of the trial.

A second witness who testified personally against Gbao on this issue was 366, who was impeached to such a degree that I think it was Mr Justice Thompson who off-the-cuff during his testimony said, "He's virtually repudiating the record contradicting himself so many times." Found to be lying so many times.

The third witness was TF1-330, who testified to Gbao having a personal farm. However, he didn't testify that anybody was forced to work there. And so when one looks at those three witnesses, it is impossible, we say, to draw the reasonable inference that Gbao was party to forced farming.

There are other notes and other comments that we make on that subject in our appeal brief, and perhaps for the sake of time I won't visit them now. I hope the point has been made already to a sufficient degree.

Even if, though, Augustine Gbao was found to have a farm on which he forced people to work, the question has to be asked: How was that -- how could that be said to be in furtherance of the joint criminal enterprise? Because one must always remember the act has to be in furtherance of the JCE, even if it's committed, for the JCE to hold.

Apart from making the generic, it would appear, finding that he significantly - and I'm sorry I don't have the reference to this but it's cited under our sub-ground - a significant contribution to maintain the strength of the RUF force, the Chamber failed singly to describe how forced farming in Kailahun District would have made a significant contribution to the junta's hold on power.

And as for Gbao's involvement, I think the highest it got so far as 330 was concerned, was he was producing food for his own consumption. Once again, the question begs to be answered: How could that possibly, in isolation, be found to be in furtherance of a JCE?

According to Mr Justice Boutet, and it's a dissent that we again adopt, there was a limited relationship between enslavement of civilians in Kailahun District and the furtherance of the goals of the JCE. There was insufficient evidence to conclude that the only reasonable inference to be drawn is that enslavement was directed to achieving the JCE goals.

And he drew a stark contrast with the events in Tongo Field in Kenema, where evidence of forced farming involving the deaths of many people, mining of diamonds there, of course, was quite clearly found to be within the common purpose and in furtherance of that common purpose, common goal.

Thirdly, mining. There were a variety of witnesses who testified to mining going on in Kailahun District. I must repeat again, we are dealing with Kailahun District so far as Gbao's culpability is concerned. But none of them were capable of showing that mining took place in JCE, we say.

We refer the Chamber to our comments in relation to farming

and, indeed, in relation to military recruitment. I hope it can be found from the way the brief has addressed those issues that no proper findings could have been made in respect to those two activities.

Coming to the end of our submissions on joint criminal enterprise, I'd like to move ahead now to ground 11. Having just dealt in some detail with the notion of enslavement, I should perhaps approach the issue of enslavement from another alternative ground of appeal.

Some of the arguments that I just evinced were on the hypothetical basis that enslavement was taking place in Kailahun Town and that Augustine Gbao had his own farm, all of which of course is denied, but we are in a luxurious position, we hope, to mount the appeal on a series of hypotheses as alternatives. Ultimately, though, we suggest, and this is our ground 11, that the Trial Chamber from the start erred in law and fact in finding the existence of enslavement in Kailahun District at all pursuant to Count 13 because they failed to show its existence according to the proper standard of proof.

Why do we say that? Well, the first point we would like to make is that it would appear to be contradictory to the notion of enslavement, particularly in respect of forced farming, that the Trial Chamber should, on the other hand, find that civilians were paid in kind for their labours.

They found, at paragraph 1384, that the RUF attempted to establish good relations with the civilian population of Kailahun District. I'm sorry, the actual quote is this, forgive me. "There was no apparent discrimination in the distribution of medical care and education to civilians and fighters." So it

would seem from that finding that such aid was not restricted to a privileged few, but to a wider section of the community.

There are findings in the judgment, and forgive me for not having the precise notation at hand but it can be found in our brief, in relation to the opening of schools right down to the provision of chalk for blackboards, and the finding that parents - and this is important - that parents gathered food to contribute to free education; medical treatment in return for work.

Several Defence witnesses, from particularly I think the Sesay team, and I believe the Gbao team, testified to such but were ignored as were, ironically, various Prosecution witnesses. 036, 114, 113 and 367 all discussed the notion of work for food or payment in kind. And, as a final point, one exhibit, I think produced during Mr Jordash's cross-examination of 330, one exhibit was a document which indicated in terms the fact that 330, a town commander, I think, was being paid, his villagers were being paid, for I think brushing the CDS's farm on one occasion.

Now, we have an Annex 3. It's a spreadsheet of what we say are serious -- several findings being corrupted by factual errors. I won't go into that in detail here. The point is made.

More pertinently, I should make this point: That Gbao, we say, played no personal role in illegal farming in Kailahun District, and I refer to the fact that only three witnesses ever testified to him farming in Kailahun District, and I've already dealt with those as to why it would be wrong to use those in order to derive such a conclusion.

Even if the Chamber were minded to accept 330, the witness

who said that Gbao had a farm but neglected to mention people being forced on that farm, we say that taken at its highest, his evidence could not be seen to indicate that Gbao contemplated designing the commission of forced farming at both the preparatory and execution phases in order for criminal responsibility for planning farming to be found.

All that 330 actually said, which led to this finding that Gbao planned forced farming, and that was listed as a contribution of Gbao's at paragraph 270 of the sentencing brief, along with his role as instructing ideology, those are the only two major contributions cited in the sentencing brief, all 330 actually said was that Gbao -- I'm sorry, he, 330, was required to hand food to someone called Morrie Fekai, who would hand it to Gbao, who would hand it to Sesay.

We say, and I rely more on the brief than my oral submission now because I have to move on, but that piece of evidence by itself, for that is all there was, cannot possibly be said to amount to planning the design and commission that both preparatory and execution phases of forced farming, forced labour.

Gbao's alleged farm I've already dealt with. I should make the point that nowhere in the indictment was it suggested that Gbao had a farm or used forced labour on it, so it may be said that such an allegation is defective in the first place.

In relation to mining, as I've said, there was no evidence really on the point. There was certainly no evidence the AFRC and RUF supervised it. We make that point in our Annex 3. It was never said by 330, contrary to the Chamber's finding, that civilians were forced to work there, and the finding that it was

Gbao and Pa Patrick who oversaw forced mining in Kailahun District we say is entirely wrong and indeed contradicted by the Chamber's own finding elsewhere at paragraph 1422 that it was Pa Patrick alone. The fact that not a single diamond was ever discovered in Kailahun District during that time is of equal importance, we say.

And finally on joint criminal enterprise, I want to just -- ground 12, convictions in Counts 7 to 9 do not constitute acts of terror.

It was of course alleged in the indictment that they did. I want to deal with this briefly. At paragraph 1351, in relation to forced marriage, the Chamber found the pattern of sexual enslavement was a deliberate system intended to spread terror by mass abductions of women.

It's ironic then that I remind the Chamber of what the Trial Chamber said at paragraph 2047, that the Prosecution has failed to adduce evidence of acts of terrorism in the parts of Kailahun District that were controlled by the RUF and where Gbao was located. Therein it seems the Chamber themselves are satisfied that Gbao did not commit any acts of terror himself, nor that they took place in the relevant part of Kailahun District. What does that say about Count 7 to 9 at all?

The final point I'd like to make is this: This offence requires a specific intent, not just acting in the likelihood that this type of thing might happen. The Trial Chamber never considered the fact that a lot of these sexual offences that no doubt took place, far from being part of the consequences of a common design or anything like that, were not in fact simply opportunistic ways of satisfying one's sexual desire. We say

that that sort of opportunistic nasty crime was endemic at that time, but that is what it was. To suggest that it was part of a plan to terrorise the population, endorsed and encouraged from above, we say is fanciful and would simply make no sense.

And finally on this I should remind the Chamber that the Trial Chamber in the AFRC case found that in those particular cases, so far as that trial was concerned -- so we might be dealing with separate locations; we might not. But they found that the primary purpose behind the commission of sexual slavery was to take advantage of the spoils of war. Inferentially then, surely not a preordained act of terror designed to terrorise the population into submission. I am sure the point is argued better on paper. I'm conscious of the time and I would like now to move on.

And if I may, I'd like to move on to the portion of the Trial Chamber's judgment that refers to the UNAMSIL offences. And it's necessary that I spend a little time on this because, as I am sure the Appeal Chamber is aware, this produced the highest level of controversy in the RUF trial.

As my basic standpoint, I would like to remind the Appeal Chamber that Mr Gbao was found guilty on Count 15, attacks on UN peacekeepers. We have cited what appears to be 14 separate crimes within the ambit of Count 15, and our brief is clear and itemises them 1 to 14. Mr Gbao received 25 years imprisonment for his part in the UNAMSIL crimes, yet he was found to have been criminally involved in just, to be generous to the Prosecution, two of them. That's the assault of a man called -- a UN peacekeeper. I forget his rank. I think it was a Major Saludin and his role in the assault and abduction of Major Jaganathan.

Neither of them, thankfully, were seriously injured, and although Jaganathan was abducted, neither of them were -- apparently suffered too much. Saludin, of course, was not abducted at all.

Against that background, I have to refer the Chamber to ground 14 of our appeal. Herein, we aver that the Trial Chamber erred in refusing to respond to the third accused's submission that the Prosecution's refusal to disclose the statement of a Kenyan major, who I think it would be wrong to name during these proceedings, constituted an abuse of process.

On 22 July of last year the Trial Chamber issued their written decision on our request to stay proceedings as a result of the Prosecution's failure to disclose that statement in a timely manner.

In short, and I'll go into this in some detail in a moment, but they found that there was no violation of Rule 68, and pursuant to that they chose not to investigate the larger and wider issue of whether an abuse of process occurred. What we say is this, plain and simple:

That in June of 2004, the Kenyan major was interviewed by the Office of the Prosecutor. One can only assume that he was interviewed for a reason. One can only assume that a high-ranking individual, who not only was there when the abduction allegedly took place, but was alleged to be one of the victims, was therefore a highly prized and critical witness.

One can only assume that when Mr Crane opened this case in July of 2004, in which the defendants were collectively referred to as "hounds of hell and dogs of war", unfortunate and we say unprofessional language for a Chamber of this stature, he was aware of that statement and yet, during the opening of that case,

he went on to suggest that one of the crimes that Augustine Gbao had committed was the assault and abduction of UN peacekeepers.

What he didn't tell the court was that the Kenyan major gave a statement which indicated in terms that Augustine Gbao could not possibly have had the mens rea to commit the offences on the 1st of May because he was never implicated in any offences after the 1st of May and never implicated in any offences outside Makump DDR camp, before, during or after the offences for which -- or the events for which he was subsequently convicted.

One can only assume that the statement was analysed, it was evaluated. What we don't know is why it wasn't disclosed to the Defence until 20 October 2006. It's about two weeks after the Rule 98 bis proceedings closed, 28 months after the statement was written. This, I'm afraid to say, because it gives me no pleasure to put it in these terms, was a deplorable state of affairs that struck right at the integrity, not just of these proceedings, but in a fledgling world of international criminal justice, at the very future, at the very raison d'être, the very justification of these proceedings at all, because what are these proceedings worth unless they are seen to be fair and unless the defendants are given a chance at a fair crack of the whip against the machinery of the Office of the Prosecutor which, as we all know, is blessed with resources far greater than ours?

We did our best, but being able to mind read what the Prosecution had behind the scenes was, I'm afraid, beyond our powers. But I want to make it quite clear as to what the Kenyan major said in his statement because it is going to be, we say, incumbent on the Appeal Chamber to take a bold decision, because we say that it is not too late for the proceedings to be stayed

in relation to these allegations, and that indeed is what should be done.

The statement is still, sadly, not entirely unredacted and, in fact, we would invite the Prosecution to consider whether they would like to furnish the Chamber with an unredacted copy tomorrow because there may be details on there that further benefit the Defence. We don't know.

Now, one of the criticisms leveled at the Defence was that we weren't onto this. We received it in October of 2006 and didn't become aware of its presence until, I think it was April or May of last year. I could give reasons as to how that happened, but I'm not going to because what goes on behind closed doors in defence teams shouldn't become part of the proceedings.

The Court is probably aware that lead counsel in the Gbao team did change at some point, and I'm not going to say any more. That doesn't, however, justify or excuse the fact that the Prosecution to this day have given nobody an explanation as to how this remarkable failure occurred.

In the proceedings that were generated last year before the Trial Chamber, all they said was -- or all they made was the concession that, "It should have been disclosed earlier." But there was never an explanation. What did the major say? He said, and I think we've annexed the statement to our appeal brief, that he saw -- that he was there with Gbao when Morris Kallon arrived shooting into the air; that the shooting stopped when Gbao restrained Kallon.

Now, bear in mind of course that Augustine Gbao has been found guilty of aiding and abetting this offence. He said Morris Kallon then slapped Saludin, that Gbao tried to stop him. That

after the RUF took Jaganathan away, the Kenyan major followed with peacekeepers in a vehicle, but the RUF stopped them down the road, looted them, beat them. It only stopped when Augustine Gbao arrived. Augustine Gbao told the RUFs there to return the peacekeepers' weapons, but they refused.

Gbao received 25 years imprisonment by virtue of the Trial Chamber's finding that at some point during these events he developed both the mens rea and the actus reus to attack the two peacekeepers I've mentioned.

JUSTICE WINTER: Sorry to interrupt, very shortly. This evidence you have cited now was not admitted, true?

MR CAMMEGH: No, it wasn't. It wasn't. And, my Lady, I will go into the reasons why. What is crucial, and the Chamber will see this within the statement, is that there is the line Kallon, Gbao and X, redacted, did X to resolve the situation. It actually is a sentence which remarkably serves the benefit of Mr Kallon just as it does Mr Gbao.

Now, in a separate ground I'm going to discuss the culpability in relation to Gbao on these offences, but I'm hoping at this opening juncture to persuade the Court to, in effect, de novo examine our complaint in the hope that the entire allegations can be stayed in any event. I'll go into the evidence in a little bit more detail in due course.

But it is hard, if that man did give evidence, if he had given evidence, it might have been quite hard for the Trial Chamber to have found, if that witness had testified and come up to proof, that Mr Gbao - and indeed at that point Mr Kallon - had the mens rea and the actus reus to commit the offences in relation to Saludin and Jaganathan.

The Prosecution put the statement away and instead what they did, albeit - almost, it would seem, as a substitute - was call Colonel Ngondi, who was the Kenyan major's direct superior, who testified to a hearsay conversation he had with that major who was reporting the shooting, et cetera, on the scene. Ngondi was not clear as to who it was who had abducted the Kenyan major.

The second witness was Jaganathan himself who gave an account which was clearly relied upon by the Trial Chamber in order to convict Gbao. He claimed, ironically, that Augustine Gbao appeared at Teko Barracks in Makeni after the Kenyan major had been -- implicitly after the Kenyan major had been stopped on the road, escorting the Kenyan major, who was bleeding from the mouth, at which point Mr Gbao retrieves rifles from the boot of his car. One might have thought that had the Kenyan major referred to that in his statement, it might have been more worthy of belief.

The prejudice here, of course -- it was found that there was no material prejudice on the basis of the Defence's tardy complaint -- but if the major had testified, it would have been tantamount to getting Gbao off the hook. If the statement had merely been disclosed, Jaganathan could have been confronted with it in cross-examination. So could Ngondi. We were deprived of that.

I'm not going to say any more for the purposes of the abuse argument, and I don't want to indulge in any flowery language as to how this offends the spirit and development of this type of international justice, but it does. And rather than hide behind the bushel of "Oh, there's no prejudice because the Defence were late in complaining about it," why is it that the Prosecution

don't just front it up and say, "You're right, we failed to disclose it. This is why. I'm sorry, we were wrong, and because we were wrong we will do the honourable thing and we will agree for these proceedings to be stayed."

But they don't do that; they continue, knowing that they have this document that doesn't help Gbao; it absolves him. And they are happy to run the risk of him receiving 25 years for an offence which a senior Kenyan officer, not only on the ground but someone who has alleged to have been a victim by another witness, says did not happen.

It's extraordinary, it's deplorable and it's unforgivable, and it stains the whole nature and raison d'être of this tribunal if it's allowed to lie, we say. I'm sorry to get emotional, but 25 years is a long time for a 62 year old man.

There was an important decision at the ICC last year in the case of Lubanga. Mr Justice Adrian Fulford said this:

"It is sufficient that where there is a violation ... " I'm sorry, in relation to the test for abuse, rather than talk about material prejudice, he appears to widen the ambit of the Judge's discretion.

"It is sufficient that this has resulted in a violation of the rights of the accused in bringing him to justice." I've explained, I hope, amply what the violation was.

"The question to be addressed is whether proceedings with the Prosecution under any or all of the counts brought against the accused would contravene the Court's sense of justice."

That is what I'm appealing to today; due to pre-trial impropriety or misconduct. My Lady, my Lords, I'm not even going to suggest it was mala fides. It might have been someone

accidentally dropping it behind a cupboard. It doesn't matter. It happened. And we were deprived the opportunity to test the evidence. However, perhaps I'm being generous, because one cannot avoid the smell of suspicion at something that was done deliberately and should never, ever have been permitted to happen again.

That is my argument in relation to that.

The final argument on the counts is our ground 16, where we suggest, we submit, that the Trial Chamber did not properly find the requisite actus reus or mens rea whilst convicting Gbao of aiding and abetting certain alleged attacks against Major Saludin and Lieutenant-Colonel Jaganathan. This is a little complicated, and if I appear to be reading it, I apologise, but like everything else, this is, I hope, exhaustively and comprehensively recorded in our hard copy appeal brief.

I want to start with the findings of fact that were the foundation upon which this conviction was found. It was found, and I do apologise, the references will be in our appeal brief. I don't have the actual references to the Trial Chamber judgment here. But what was found was that Gbao went to the camp at Makump on 1 May with 30 or 40 armed men in the light of five RUF having been what he suspected to have been forcibly disarmed.

Secondly, it was found that Gbao spoke to various individuals, including Jaganathan, at the scene, and one of the quotations from that conversation was, "Give me back my men or I will not move an inch from here." Important to note that Gbao was standing on the road outside the camp when he said those words. There was never any suggestion, and there has never consequently been any finding, that Gbao ever entered the camp at

all.

The third finding is that Ngondi told Maroa, who was a peacekeeper, to go to the scene. This is a Major Maroa. After Major Maroa arrived, it was found that Morris Kallon arrived firing a gun and that Gbao tried to calm him down.

The fourth pertinent finding here is that Morris Kallon was found to have entered the camp, to have assaulted Saludin and Jaganathan. Gbao remained outside. As Jaganathan passed Mr Gbao, being taken by Morris Kallon, he tried to speak to Gbao, who merely did not make any move and was seen to be holding by then an AK-47.

Sadly, the only eyewitness of Gbao's arrival at the scene and his consequent behaviour right up to the abduction, the only unbroken testimony, was that of a Defence witness, DAG-111, who was not impeached at all during the course of his evidence by co-defence counsel or indeed by the Prosecution or indeed by the Trial Chamber, but for reasons not explained, sadly, his testimony was ignored when it came to the Trial Chamber's ultimate findings. We don't put that in as a ground of appeal as itself but it is something that we say was unexplained and unfortunate.

What were the legal findings that flowed from the factual findings? They were, firstly, in relation to actus reus, the act of arming himself with an AK-47 amounted to Gbao's tacit approval of Kallon's attacks on Saludin and Jaganathan, and that by so doing, he had a substantial effect on the perpetration of the crime that was about to take place, or that was taking place or had taken place. I'll deal with that in a moment.

The second actus reus finding was that Gbao had

deliberately fomented an atmosphere of hostility and orchestrated the armed conflict at the camp. I will, of course, deal with these in turn but it's necessary that we go through them one by one. As far as mens rea is concerned, it was found that the only reasonable inference to be drawn was that, as Gbao took up arms, he had the requisite mens rea for the attack and intended to assist Morris Kallon thereby in its commission.

What do we say is wrong with those factual and legal findings? First of all, this: We submit that the Trial Chamber did not find that Gbao made a prior agreement with Morris Kallon to attack the peacekeepers. Why? Well, even if it's right, even if it was properly found that Augustine Gbao tacitly approved or encouraged the assaults on Jaganathan and Saludin, his act of taking up an AK-47 and standing passively while Jaganathan asked him for help as Kallon was leading him to Kallon's car happened after, according to the evidence, both the UN peacekeepers Saludin and Jaganathan had been assaulted.

Now, common sense dictates that it is obviously required for any ex post facto aiding and abetting that the agreement has to be extant, in existent, at the time of the execution of the crime. It's not something that can be made later on and retroactively imputed to a crime that's already taken place. It's common sense.

We referred to an authority, I think, Blagojevic on that point and, in fact, at paragraph 278 of the Trial Chamber's judgment, the Trial Chamber appeared to make the same legal finding. It's not controversial, we say, it's a pure common sense and well-established precept of law. But without such a finding of a prior agreement, that is to say an agreement before

the assaults took place, then we say that the finding that Augustine Gbao aided and abetted the assaults at all must be arbitrary. The evidence of the agreement is not made out. You can't agree to something after the event.

The second argument that we raise is a very simple one, and that is that in arming himself with an AK-47, Gbao could not possibly be found properly to be tacitly approving or encouraging Kallon to commit the assault on Saludin. Why not? Because the offence had already taken place. The evidence and the findings were that Kallon went into the camp, punched Saludin, came out again and then I think got involved with Major Jaganathan. How can Gbao be found to have tacitly agreed to an assault on a man inside a camp? Incidentally, I emphasise inside the camp. Gbao was always outside. There's no evidence that he even saw Saludin being assaulted, much less that he'd spoken to Kallon to make an agreement, and in fact there was never any evidence produced and no finding made that Gbao and Kallon even so much had a conversation that day prior to Kallon's arrival at the camp.

And what of the evidence that -- and the findings that Augustine Gbao actually tried to restrain Morris Kallon from shooting and from beating Jaganathan at a later stage? These findings, these ultimate findings of guilt we say fly in the face of common sense.

We also, and this is where it gets quite complicated, we state, we aver that the Chamber erred in finding that the actus reus and the mens rea of Count 15 was established by Gbao's acts because his actions at the camp did not substantially affect the commission of those two assaults.

I'm going to deal with this very briefly because I see time

is running out, but I do urge the Court to study this part of ground -- whichever ground it is. To put it simply, we say this: Actus reus, as I've already said, the act of taking up the gun was found to amount to tacit approval or encouragement of the assaults. In order for that finding to be made, for tacit approval to be indicated by in essence someone just standing there with a gun and doing nothing, there has to be a finding that Gbao would have had a kind of superior authority over Kallon such that by his non-interference he could rightly be seen to be tacitly approving and encouraging of Kallon's acts.

Well, common sense here of course is that Kallon was the battle group commander. He was way above Gbao in the hierarchy. And in actual fact when Jaganathan was asked, "Was there anything Gbao could have done to have stopped your -- Kallon taking you away at this point?" He himself said, "No, he couldn't." "Why?" "Because of the" -- and I quote, "hierarchy of the RUF "and that Gbao was, "powerless".

Further we argue that the non-interference couldn't possibly amount to a substantial contribution to the commission of the crime against Jaganathan. Gbao hadn't entered the camp, he had never been found or seen to be issuing orders to the 30 or 40 men who were alleged to have come with him. He tried to placate Kallon earlier. He was still outside the camp when Jaganathan was abducted. We give a whole list of reasons to justify that point, as we do our third point on this issue, that we argue the substantial contribution could not - well, there wasn't one, but even if there was - it couldn't possibly be seen to have had a significant legitimising or encouraging effect on the principal perpetrator.

There were no findings that Gbao's presence would have been seen as encouragement to commit the offences. And again I reiterate what I said about him trying to placate the perpetrator. And finally on this sub-issue, no findings that the perpetrator knew of the aider and abettor, that's Gbao's, tacit approval.

The second limb of actus reus was that Gbao orchestrated the conflict, fomenting an atmosphere of hostility. Well, very briefly, I say this: There was no criminal conduct until Kallon arrived. Gbao's highest threat was he wouldn't move an inch from the road. He stayed outside for a whole hour before the trouble broke out. He came unarmed. He was never seen to issue orders. He tried to cool down Kallon. No attempt by him to harm the peacekeepers and no evidence that he and Kallon had been in contact prior to the events.

Mens rea is the third issue that the Trial Chamber found and then, thankfully, I can move off UNAMSIL and hopefully finish for the last half an hour on sentencing.

As I have said, it was found by --

JUSTICE WINTER: Twenty minutes.

MR CAMMEGH: Is it 20? Then my co-counsel has made a grave error.

Mens rea was deemed from - or Gbao's intent was deemed from the - forgive me, I'll read it out again. "The only reasonable inference to be drawn is that Gbao had the requisite mens rea as he took up arms." I hope I've sort -- I've dealt with this point already, to be found to have the intent of supporting offences that already happened by holding an AK-47 would, we say, make no sense. Saludin had already been assaulted, as I said, and in

relation to Jaganathan, the account on which the Judges made that finding of mens rea and intent was simply this: Jaganathan saying that when he was being taken to the car by Kallon, Gbao was standing there with an AK-47 and made no move. "He suddenly," and I quote "sobered up, didn't respond when Jaganathan tried to speak to him, just froze, stood statue-like." We say that far from indicating an intent or a tacit approval, that would be consonant with Jaganathan's explanation on Gbao's behalf that he was afraid of the hierarchy of the RUF, that he was powerless, and it conforms with the general cowardly reputation that Gbao had. I hope the points are clear. They're better explained in the brief.

I'd like very briefly to move to sentencing. I believe I have about ten minutes. Twenty. Thank you.

Ground 18 is where we claim that the Trial Chamber were manifestly excessive in their sentence, overstating criminal culpability in Augustine Gbao, and understating the mitigating nature of acts during -- by him during and after the war, as well as other issues.

I was reminded by Mr Justice King earlier on of the founding sort of authorities or -- yes, authorities to sentence. And, of course, we are aware of those.

Essentially, the Chamber has to consider features of gravity, features in aggravation, and those that could be found to be mitigating factors. Sub-ground A of 18 is where we claim that the Trial Chamber did not correctly assess the gravity of Gbao's alleged crimes. Gravity, of course, includes an overview of scale and brutality of the accused's role, of the degree of suffering of the victims, and their overall vulnerability.

Our objections are several. First of all, I won't go into too much detail here but we submit that in terms of gravity, the Trial Chamber wrongly included findings of various crimes which Gbao had actually been acquitted of. In Annex 3 we list 22 examples where, although Gbao had been acquitted as a JCE member, he appeared to have been sentenced as such in the sentencing judgment.

It is sensible and fair that in assessing gravity, one's individual circumstances must be paramount, even those convicted within a JCE. In particular, what we find is that Gbao being acquitted of many offences outside Kailahun, in Bo, Kenema and Kono, particularly pursuant to Counts 1 and 2, he appeared nevertheless to have been sentenced for those.

More remarkably, we say, is in relation to the UNAMSIL attacks, Count 15, where the Trial Chamber appeared, perhaps accidentally, to take account of all of the criminality that emanated from events following 1 May 2000 rather than the two matters for which Gbao was convicted on that day. As I've said, there were 14 separate attacks that we were able to find. Those are catalogued in Annex 5.

Other errors, we find that in relation to forced marriage, as I've said before, the finding of guilt on those counts seemed to be purely based on impermissible evidence from an expert. It would appear that consequently sentencing has been based on the impermissible expert -- or impermissible findings from an expert's evidence.

Similarly, in paragraph 113 of the sentencing judgment, it appears that Gbao was sentenced for various offences in Kono taking place outside the JCE, and in relation to enslavement,

paragraph 370 of our appeal deals with where we suggest findings wrongly attributed to Gbao in relation to enslavement were sentenced as well.

We suggest also that the sentencing judgment did not accurately reflect the gravity of Mr Gbao's conduct. It failed to acknowledge his limited role in the JCE. I've already been through the factors which I suggest show that he wasn't a member of the plurality, and I repeat those there. As I have already said, convicted of not having -- nevertheless not having fired a shot and never having ordered a shot to be fired. Twenty five years however, for membership of the JCE.

We say that the Trial Chamber failed to take note of their own finding that Gbao did not personally commit any crimes in any district, including Kailahun District, a fairly remarkable finding when one considers the trial has taken five years; that he was not directly involved and didn't directly participate in any crimes in Bo, Kono, Kenema. And there are other features there listed which I commend to the Court, which I don't have time to go through now. Despite that, he received 25 years imprisonment, based on instructing ideology and a limited role in planning forced farming. This is according to the paragraph 270 of the sentencing judgment. That was the limit of his involvement in the JCE.

His conduct in relation to Count 15, we say was particularly remarkable or, rather, the sentence was particularly remarkable, particularly as the Trial Chamber in their sentencing judgment at paragraph 264 said this, "The Chamber recognises that Gbao was not primarily responsible for the attack and may not have been able to prevent it, although he remains criminally

responsible for his direct involvement in it." If he could get 25 years with that concessionary type of sentiment being expressed by the Trial Chamber, goodness alone knows what he would have received if his criminality had been found to be more serious.

I move now to ground 18(B), where we deal with aggravating factors. I'm going to make this very short, but an aggravating factor was found in relation to the aiding and abetting Count 15 insofar as Gbao was seen to be tacitly approving or encouraging the attack by Kallon on Jaganathan, thereby aiding and abetting it.

In order to find that tacit approval, as I've already indicated in arguments on that relevant ground, Gbao needed to be found to have had superior authority such as non-interference amounted to tacit encouragement. We say, of course, that that is a prerequisite to the offence -- or to the actual ingredients of the offence. It can't additionally be said to be an aggravating factor.

Secondly, the aggravating factor was attributed to Gbao's act based upon his leadership position alone, not actions demonstrating how he abused his position. I'm sorry, that's our appeal point. We say that the aggravating factor was wrongly attributed to Gbao's acts based on his leadership position alone, and no reference was made to how his actions might have demonstrated how he abused his position.

In short, the Trial Chamber failed to show how he abused his position and therefore failed to show how an aggravating feature could be derived. Again, the better argument is seen in our relevant sub-ground.

Finally on this issue of aggravating factors, two points: First of all, being a senior RUF at Makump should not be found to be sufficient to show an aggravating feature without a concomitant showing of effective control. All the evidence showed that Gbao had no control over Kallon at all, or the fighters who committed the crimes. It's notable that the 30 and 40 soldiers with Gbao were specifically said by Jaganathan not to have got involved in the trouble at all, which indicates that those who did were obviously outside Gbao's control. He had no power of control. He tried to prevent the thing escalating, failed to do so. It's therefore wrong to attribute an aggravating factor to him on the basis that he had some kind of effective control. He clearly, we say, didn't.

I've already said that there is no proper finding to the effect that Gbao abused his position, and I'll say no more about that subpoint here.

I'm clearly going to run out of time when it comes to the rest of our objections to the sentence. I'm going to list them very, very briefly and I hope they're self-explanatory.

First of all we say that the Chamber accepted Gbao's age and the fact of his lack of previous convictions as mitigating but rejected one extremely important issue and that is the supreme likelihood that he's going to serve his sentence abroad. As I've said, he's 62 years old. One knows about life expectancy of Sierra Leonean individuals. One knows that he's probably very well-treated in custody now, but that's not actually the point. The point is he has a family, he has children, he knows he's likely never to see them again if the sentence is upheld, unless the UN are able to stump up the money for his family to fly out

and visit him wherever he is. And that, of course, makes an additional point.

We say that his personal and family circumstances were entirely ignored, the poverty of his family. Also ignored, we say, and should not have been, was the fact that 25 years really does amount in his case to a life sentence; life meaning life. Little regard -- no regard was paid to his health. He's now been diagnosed as being a diabetic, his general character, and more importantly, to his work in the release of those 35 Kamajors who survived the atrocity committed by Sam Bockarie.

Again, I commend the appeal brief to the Chamber in respect of mitigating factors. I remind the Chamber that in the words of Mr Justice Boutet, "My learned colleagues have overstated the culpable criminal conduct of Augustine Gbao by passing 25 years imprisonment sentence."

I'd like to briefly say a word about disproportionality and then I will gladly finish. I take the point of Mr Justice King this morning. But it is extremely important within the ambit of Article 19.2 in sentencing that not only the gravity but the individual circumstances of the accused should be taken into account. In other words, one should look at the -- or give priority to individualising the sentences, looking, in other words, at the totality principle.

I would argue on Gbao's behalf that it is in fact part of the individual circumstances that where someone is found guilty - let's take the UNAMSIL issue for example - of doing no more than tacitly approving of the minor, for that is what they were, assaults on two men and the abduction of one of them, it is within his individual circumstances, that whilst he receives

25 years imprisonment, individuals in other trials, I'm featuring - I'm referring mainly to Fofana and Kondewa in the CDF trials - received far less.

I don't want to labour this point because it's a little easy to make and I don't want to take a cheap point, but it's a very important one. Fofana aided and abetted the murder and cruel treatment in Tongo Field, aiding and abetting the killing of more than 200 people, including a 12-year old boy; the hacking to death of 20 men and the shooting in the crowd of civilians inter alia. He was the Director of War of the CDF. He was found guilty under Article 6.1 and 3 and was found to have significantly meted out brutality on unarmed civilians who were found to be very vulnerable.

He received 15 years imprisonment. Kondewa was found to have aided and abetted crimes in Tongo, the hacking to death and arbitrary killings and shooting at civilians. He was the high priest of the Kamajors. He was found guilty on both Article 6.1 and 3. Within one, the large scale and barbaric nature was cited by the Trial Chamber - I believe the Appeal Chamber - and the vulnerability of the victims was emphasised. He received 20 years.

Gbao received 25 years for participation in a joint criminal enterprise which was found to exist on the basis of evidence that was never proffered and never pled. He was given 25 years for what would appear to be the retrospective agreement or retroactive agreement being imputed to him of the minor assaults of two men, one of whom was later abducted, both of whom of course survived and lived to tell the tale, in the teeth of the existence of a statement that we were not allowed to use,

which suggested very much the contrary.

It is right to say that one has to be very careful when talking about disproportionality in comparing one sentence to another, and there's a good reason for that. It is that, rightly, sentences have to be individually assessed to individuals and individual criminality. That is why I make the point about Kondewa and Fofana, and that is why I say that the very fact of those sentences appear to set a benchmark above which Mr Gbao towers with his 25 years for criminality that barely gets off the floor.

In order, and I again don't want to appear confrontational, but in order for this Chamber to retain its legacy as a Chamber that trades in fairness and equity, that upholds human rights of the accused just as it has spent years attempting to uphold the human rights of the victims of this terrible war, victims of the terrible crimes of the RUF, it is incumbent, I suggest, on this Chamber to return not just sentences, because of course I'm hoping that Mr Gbao will be absolved of the crimes for which he's been convicted, it is incumbent on this Chamber to properly consider the propriety of convictions, and if after due consideration the Chamber doesn't agree with the Gbao team's submissions, then we respectfully suggest it's incumbent on this Chamber to pass sentences that are realistic, that are representative of the criminality and that are humane, above all to represent itself as a tribunal which is capable and anxious to provide the type of justice in which so much has been invested over these years.

I hope that the appeal brief that we have presented does a much better job than I've done this afternoon at putting these

cases, and on that issue I have to pay tribute to my team whose skillful and remarkable input into Gbao's defence has been a privilege to work with, and I pay tribute to them. That is all I have to say.

My Lady, my Lords, I commend our appeal brief to the Court. Thank you very much.

JUSTICE WINTER: I do thank you, but first before I let you go, is there any questions from the Bench?

JUSTICE KING: Yes, I have.

JUSTICE WINTER: Okay, Justice King, please.

JUSTICE KING: Yes, Mr Cammegh. Bearing in mind the pledge you made in limine not to indulge in emotive hyperbole - I think that was your expression - I would be interested to know your reaction to what the Trial Chamber said in the last sentence of paragraph 1992 of their judgment, and for ease of reference I'll read it out for you.

MR CAMMEGH: Thank you.

JUSTICE KING: It says there, "The Chamber is satisfied that the non-members who committed crimes were sufficiently closely connected to one or more members of the joint criminal enterprise acting in furtherance of the common purpose that such crimes can properly be imputed to all members of the joint criminal enterprise when the other conditions for liability are fulfilled." What are your views or your reactions?

MR CAMMEGH: "Non-members of the joint criminal enterprise," that is the key phrase there. As I discussed in ground 8(d), such a finding is permissible, provided it's not generic and arbitrary. As I said, in order to impute criminality to a member of a joint criminal enterprise -- sorry, I'll start

again. In order for the acts of a non-member of the joint criminal enterprise, in other words, a perpetrator, a principal perpetrator, to be imputed to any named member or any of the members of the joint criminal enterprise, two prerequisites have to be satisfied, we submit: The first is that there should be proper findings issued pursuant to properly-received evidence that links the relevant member of the joint criminal enterprise to the relevant non-member, the perpetrator on the ground.

That can be done, and I think it was the case of Krajisnik that states that it has to be looked at on a case-by-case basis. It can be done by the existence in evidence of indirect or direct commands, instigation and what have you.

What the Trial Chamber did over and over again was simply to arbitrarily attribute various crimes, and the one in Tikonko was the one that I just randomly quoted, to order the members of the joint criminal enterprise, without making reference to evidence that established that link and without making findings of the same. But that's only one prerequisite.

The second one, as I said, is that those crimes, the crimes in question by the perpetrators or the non-members that my Lord refers to, need to be found to have been committed in furtherance of the common purpose of the joint criminal enterprise. So evidence of both limbs needs to be required before that criminality can be imputed to the relevant member of the JCE.

In relation to the common purpose argument, what is important, and in a country like Sierra Leone this of course is of paramount importance, is that that crime is shown to be pursuant to the joint criminal enterprise. During the war in this country I don't think anyone would deny that opportunistic,

evil crimes took place all over the country at all material times, and it's those crimes that have to be isolated. Those are the crimes that should not arbitrarily be brought within the joint criminal enterprise and that is why the requirement to show that the crime was within the common purpose has to be fulfilled.

I hope that answers the question, my Lord.

JUSTICE KING: Well, it's gone a great way to being helpful. Sometimes I try to find out the distinction between joint criminal enterprise and superior responsibility. It seems to me that sometimes joint criminal enterprise seems to be so open-ended when you compare it with responsibility, the superior responsibility. What are your views on this?

MR CAMMEGH: Indeed, we agree. And that is why, and I don't want to appear patronising to the Chamber, but this is an ideal opportunity for the Chamber to clarify and to confirm the extent to which joint criminal enterprise may operate because we suggest that there is a tendency now to use it as a kind of a catch-all dragnet in which crimes may be imputed to defendants in the absence of more direct evidence.

In relation to 6.3 accountability, we are lucky, of course, in that Mr Gbao was absolved of any responsibility or liability under that concept, but that is an entirely different concept. It is one that anticipates the accused or anticipates guilt in someone who has a command and control over individuals, who is aware that crimes are being committed or has reason to know that crimes are being committed or going to be committed by those individuals and does nothing about it. It's an entirely separate and different form of liability.

Keeping the two separate is, of course, important, and by

very reason of the fact that it is impermissible to find culpability under joint criminal enterprise under 6.1 and criminal culpability under -- command responsibility under 6.3 is impermissible.

I repeat, and I gave an example as to where the Appeals Chamber has a tremendous opportunity to assist the development of the law of JCE. There was one particular example in our appeal in which, as I said, Augustine Gbao was imputed to be guilty of offences outside Kailahun District, not by virtue of intent within joint criminal enterprise but by virtue of some sort of reasonable foreseeability in circumstances where the Trial Chamber had already unequivocally ruled that all of those offences, indeed, every single offence pertaining to every single count, 1 to 14, was basic intent, Form 1 JCE. And this, we say, is an opportunity for the Appeals Chamber to say that never again may a Trial Chamber return a guilty verdict on a basic form of JCE using the mens rea from Form 3, reasonable foreseeability instead of intent. Because, as I said earlier on, if someone doesn't intend something, merely reasonably foresees it, it means he cannot be said to be acting in concert with those who did. And a judicial precedent in that area, we say, is crying out to be made.

JUSTICE KING: Thank you. You've been succinct and you seem to have kept your pledge of being -- of not indulging in emotive hyperbole. Thank you so much.

MR CAMMEGH: I'm obliged, my Lord.

JUSTICE WINTER: Any other questions from my colleagues? No.

Yes, please.

MR TAKU: May it please your Lordship, I rise to make this very special application, my Lord, because of some of the observations from the submissions my colleague made in respect of my client, Mr Kallon.

I would like to remind you that this issue arose right from the Trial Chamber, is subject of appeal for which we have submitted, as far as Count 15 is concerned, the pleadings were that Mr Gbao led the attacks, not Kallon, and I wanted to make an oral motion immediately for the Court to put this submission in different compartments, if not to completely rule on whether antagonistic defences are permitted at this point in time or if we're given time tomorrow to make submissions on the matter.

JUSTICE WINTER: You will have time tomorrow, as is in the schedule for tomorrow.

MR TAKU: Thank you, my Lord.

MR CAMMEGH: I'm sorry, I thought my Lady was addressing me. I'll sit down.

JUSTICE WINTER: This brings us now to the conclusion of today's schedule. I just hope that the wish of Mr Cammegh that the Appeals Chamber will be capable of showing that it was worth the money invested will be fulfilled; otherwise, the hearing will resume tomorrow at ten o'clock. Thank you, and the Appeals Chamber will be rising now.

[Whereupon the hearing was adjourned at 17.47 p.m. to be reconvened on Thursday, 3 September 2009 at 10.00 a.m.]