

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 Dungal
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

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

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

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

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

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

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

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

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

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

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

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

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

29 We will divide our submissions into three parts. The first

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

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

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

22 If I may ask the honourable Court to turn to index 2 of the
23 authorities and the case of Blaskic, Court of Appeal 29 July
24 2004, we start in this way because this authority was along with
25 Kupreskic, the appeal judgment, the beginning we submit of modern
26 pleading requirements; modern pleading requirements which we
27 submit were in almost all respects disregarded by the Prosecution
28 and disregarded more importantly by the Trial Chamber.

29 If I could invite your Honours to turn briefly to

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

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

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

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

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

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

10 Paragraph 216 dealing with superior responsibility, the
11 accused needs to know not only what is alleged to have been his
12 own conduct giving rise to his responsibility as a superior, but
13 also what is alleged to have been the conduct of those persons
14 for which he is alleged to be responsible. Again, no material
15 facts indicating what Mr Sesay was alleged to have done, no
16 material facts dealing with what his subordinates were alleged to
17 have done, nothing but the barest of legal formulas indicating
18 6(3) liability.

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

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

1 committed by his subordinates."

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

5 Paragraph 219:

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

16 JUSTICE WINTER: Please continue.

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

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

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

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

4 We submit it is as plain as day following night that a
5 trial in which 240, we counted from annex 1 of our appeal brief,
6 240 charges distinct basis for conviction were omitted from the
7 indictment. Annex A2 contains on our count 147 insufficiently
8 pled charges led through evidence.

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

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

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

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

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

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

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

29 Paragraphs 2.20 to 2.23 of the Prosecution response deals

1 with the issue where the Prosecution suggest that the Trial
2 Chamber had no obligation to return to its original decision on
3 the defects of the indictment which is at - dated 13 October
4 2003. It was within its reasonable discretion not to return and
5 assess. We submit plainly, hundreds of new charges place an
6 onerous obligation on the Trial Chamber to look back at the
7 decision. All the Trial Chamber had at that early stage were the
8 Prosecution's assertions that "This was all we can do. The
9 nature of this conflict was such we have not been able to obtain
10 greater details."

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

16 A good example of the prejudice, we submit, is the
17 allegation of mining in Tombodu, the accused's convictions for
18 planning enslavement in Kono. In the indictment, at paragraph
19 71, the indictment states that between 14 February 1998 to
20 January 2000 AFRC/RUF forces abducted hundreds of civilian men,
21 women and children, took them to various locations outside the
22 district or to locations within the district, Tombodu, Koidu,
23 wendedu, Tomenday [phon]. At these locations the civilians were
24 used as forced labour including domestic labour and as diamond
25 miners in the Tombodu area.

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

1 see perhaps 20 locations now being considered for mining in Kono.
2 1247, clear detailed assertion - conclusions concerning mining in
3 various locations. And then we turn to 1251 and we return to the
4 original allegation which was mining in Tombodu.

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

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

14 May I ask your Honours to turn to Annex 3, which deals with
15 the notice we were given in the pre-trial brief on this subject.
16 Page 14, the notice in the pre-trial brief alleged forced labour
17 conscription of hundreds of captured men, women and children, so
18 repeating the generalised comments in the indictment. Throughout
19 1997 and 1998 - those are the dates that were given - people were
20 routinely captured - I beg your pardon, I am reading from
21 Kailahun.

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

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

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

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

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

3 We say the same in relation to grounds 9 and 10 of the
4 Sesay appeal dealing with the charges in Kailahun and counts 12,
5 15 and 17. It is worthwhile looking for a moment at Count 8,
6 forced marriage in Kailahun. We submitted in our closing, as
7 your Honours will know, that there had been inadequate notice of
8 the forced marriage count. That at one stage the Prosecution
9 were alleging that it was an offence which was predominantly
10 sexual; at another stage it was an offence which was
11 predominantly about conjugal duties excluding - sorry, not
12 excluding, but with sexual violence secondary almost to the
13 conjugal conduct. That in itself, we submit, is evidence enough
14 of an error of law, but take it alongside the fact that there
15 were no material facts in the indictment, a misleading pre-trial
16 brief and you have a collection of unfairness which of course, we
17 submit, made it impossible for the Defence to know the nature and
18 cause of the details being alleged.

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

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

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

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

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

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

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

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

5 Paragraph 98:

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

14 Reading further down:

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

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

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

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

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

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

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

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

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

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

22 Now, we don't say that the allegation by TF1-362 when she
23 gave evidence in the Taylor trial that she had received money in
24 an envelope from the Prosecution is necessarily correct, but it
25 was evidence on oath from a witness who has been used to uphold
26 the main plank used to uphold Mr Sesay's conviction for planning
27 enslavement - sorry, planning the use of child soldiers, Count
28 13, 12.

29 we say the Trial Chamber had an immovable obligation to

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

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

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

24 334 received 52 payments over the course of his testimony
25 against Mr Sesay. That is what we know that was disclosed from
26 the Prosecution. We don't know if there was anything else. But
27 we do know he was given those 52 payments and we do not know the
28 reason. Information is what the Prosecution say.

29 Prosecution witness - and looking at index 11 I can just

1 read it to you if it speeds things up:

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

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

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

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

29 Ground 12, the pleading of the joint criminal enterprise.

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

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

21 If I could ask you, please, to turn to index 15, this is
22 the skeleton which was submitted by the Prosecution at the Rule
23 98 stage. Paragraph 18 - what we have at paragraph 18 is a
24 complete volte face. We have at the last three lines, "For
25 example the execution of 60 persons detained - investigated and
26 detained by Gbao in Kailahun Town is an example of the first form
27 of JCE, as are the acts of Operation Pay Yourself to which Sesay
28 and Kallon were participants."

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

1 means of achieving the joint criminal enterprise.

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

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

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

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

1 that is the gravamen of our complaint.

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

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

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

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

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

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

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

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

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

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

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

9 If I may just have a moment? Could I ask your Honours,
10 please, to turn to index 19. This is the Prosecution's pre-trial
11 brief in relation to the general allegation of what this joint
12 criminal enterprise was supposed to be all about. Page 6, count
13 1, terrorising the civilian population, "It is the Prosecution
14 theory of the case that the crimes alleged were done as part of a
15 campaign to terrorise the civilian population."

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

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

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

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

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

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

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

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

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

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

1 enterprise without evidence of crimes?

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

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

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

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

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

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

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

7 Paragraph 1992 of the judgment:

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

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

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

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

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

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

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

23 1999, Kamajors arrested in Kenema; those arrests took place
24 in October of 1997 and couldn't have been a contribution to Bo in
25 June.

26 2000, Bunumbu did not open, as the Trial Chamber found at
27 judgment 1634, until 1998.

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

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

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

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

13 The contribution to Kenema can be summed up in this way:
14 2055 deals with Sesay's contribution which has been summed up as:

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

22 The crimes committed in Kenema again give an indication of
23 the errors which were made by the Trial Chamber. Membership of
24 the Supreme Council was one element, yet at judgment paragraph
25 756 the Trial Chamber found that Sesay did not have
26 decision-making power at the Supreme Council. That
27 decision-making laid in the hands of SAJ Musa, Johnny Paul Koroma
28 and some honourables.

29 The second contribution to Kenema, abuse of the levers of

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

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

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

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

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

1 participation in the horrendous events in Kenema.

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

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

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

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

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

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

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

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

1 violence and criminality?

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

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

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

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

29 The Prosecution case was never that Sesay was in Kono

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

9 5.43 of the Prosecution response, a curious description,
10 "In relation to Sesay's involvement in Kono, in the mining
11 activities in Kono between 14 February and May 1998, it should be
12 noted that the Trial Chamber found that the practice of forced
13 mining continued throughout 1998."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the problems with it, that must have been Sesay's contribution to
2 the recruitment of a small fraction of that 500 people. It
3 logically must be the case. We submit that couldn't possibly be
4 a significant contribution to the Kailahun crime base. Training
5 of a small fraction of 900 people - sorry, a small fraction of
6 500 people. And you will find that number at paragraph 1438 of
7 the judgment.

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

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

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

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

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

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

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

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

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

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

18 First of all, Mr Sesay was found responsible for planning
19 the use of child soldiers between 1997 and September 2000. From
20 1997 to February of 1998 there is simply no evidence of Sesay
21 involved in any type of activity which could amount to planning.
22 Bunumbu didn't open until February 1998. The Trial Chamber made
23 no findings in 1997 which would or could be anything constituting
24 planning. There was simply no evidence of Sesay having any role
25 in any scheme to prepare or execute the use of child soldiers.

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

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

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

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

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

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

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

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

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

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

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

1 and issuing an order to the recruits there.

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

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

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

18 1684 is the actual final plank, it seems, used or relied
19 upon to suggest that Sesay was planning. It is certainly the
20 only other evidence, we submit, that could conceivably be
21 probative of such a liability:

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

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

28 174, who gave - who was relied upon by the Trial Chamber,
29 gave evidence that these boys had been sent to a place called

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

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

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

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

23 Moving finally to the issue of sentence, we submit that the
24 Trial Chamber erred in law and fact in its assessment of the
25 gravity of the offences 1 to 15 and 17. The objectives of
26 sentencing, as we submitted in our sentencing brief at paragraph
27 10, and which is accepted, those are deterrence and retribution,
28 were not satisfied, we submit, or not achieved with a sentence of
29 52 years for Mr Sesay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 A larger group of direct participation findings against

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

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

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

14 MR JORDASH: The personal circumstances.

15 JUSTICE KING: Individual circumstances of Sesay.

16 MR JORDASH: Well --

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

19 MR JORDASH: Yes, they are.

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

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

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

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

1 will make of it what you will.

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

4 MR JORDASH: The personal circumstances, certainly.

5 JUSTICE KING: [Microphone not activated].

6 MR JORDASH: I beg your pardon?

7 JUSTICE KING: Having regard to the provisions of Article
8 19 and Rule 101, the individual circumstances --

9 MR JORDASH: The individual circumstances.

10 JUSTICE KING: -- of your client.

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

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

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

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

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

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

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

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

29 Paramount chief from Kailahun, paramount chief from Kono,

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

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

12 General Opande confirmed the same.

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

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

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

29 [Lunch break taken at 12.20 p.m.]

1 [Upon resuming at 13.22 p.m.]

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

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

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

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

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

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

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

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

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

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

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

1 the judgment, of the trial judgment:

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

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

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

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

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

1 The Appellant submits, respectfully, my Lord --

2 JUSTICE KING: [Microphone not activated].

3 MR TAKU: My Lord?

4 JUSTICE KING: Well, where are you quoting from? Paragraph
5 6 and 9, which parts?

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

7 JUSTICE KING: What line?

8 MR TAKU: Let me just read that out.

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

12 MR TAKU: Yes, my Lord:

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

15 That is the very first sentence:

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

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

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

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

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

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

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

21 JUSTICE KING: Thank you.

22 MR TAKU: Thank you, my Lord.

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

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

3 In effect, my Lord, in the transcripts of 8 July 2005, page
4 71, under cross-examination this is what this witness said about
5 that incident:

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

7 "A. Okay.

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

10 "A. Yes.

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

12 "A. Every day, yes."

13 Now, page 94:

14 "Q. And before I ask the question, witness, you said
15 several times that in the course of your profession you
16 recorded statements from suspects all
17 within the five years?

18 "A. Yes.

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

21 "A. No."

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

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

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

5 Then a question:

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

8 "A. Yes."

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

12 JUSTICE KING: What page is that in the transcript?

13 MR TAKU: My Lord, it's page - the transcript of 8 July
14 2005, pages 70 and 94.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR TAKU: Yes, my Lord.

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

10 MR TAKU: Yes, my Lord.

11 JUSTICE KING: That is they were talking about.

12 MR TAKU: Yes, my Lord.

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

15 MR TAKU: His own witness.

16 JUSTICE KING: Yes, that's right.

17 MR TAKU: Yes, my Lord.

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

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

27 And more important, my Lord --

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

1 they said was that:

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

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

10 JUSTICE KING: Yes.

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

13 JUSTICE KING: Yes.

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

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

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

25 JUSTICE KING: [Microphone not activated].

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

29 And the Prosecutor says that - now, the Prosecutor submits

1 in paragraph 320 of his response brief that:

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

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

17 Furthermore, my Lord, we find that in paragraphs 1789 to
18 1794 the Trial Chamber relied on another co-accused's evidence,
19 Exhibit 212, as the basis of the conviction of Mr Kallon, so
20 whatever - no matter from what angle we look at it, the findings
21 at 1789 to 1794 would still be prejudicial to Mr Kallon to the
22 extent that they relied on Exhibit 212 which was another
23 co-accused's evidence tendered during his defence, disclosed to
24 him by the Prosecutor during his defence and tendered during his
25 defence, and never formed part of the Prosecution's case, and Mr
26 Kallon had no notice that that evidence would ever be used
27 against him because of Trial Chamber principled decisions to the
28 fact that the evidence would not be used and would not be
29 considered against Mr Kallon. We've written copiously about it

1 in our brief, my Lord.

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

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

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

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

26 MR TAKU: Yes.

27 JUSTICE KING: I know you referred to paragraph 521.

28 MR TAKU: Yes, my Lord.

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

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

3 MR TAKU: Yes.

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

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

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

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

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

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

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

6 MR TAKU: Yes.

7 JUSTICE KING: They cannot ignore it.

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

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

14 MR TAKU: Yes.

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

17 MR TAKU: Yes, my Lord.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 UNIDENTIFIED SPEAKER: [Inaudible].

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

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

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

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

15 And then the particulars are given.

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

18 MR OGETTO: That's --

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

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

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

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

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

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

1 animals, sheep, in Kono.

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

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

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

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

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

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

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

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

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

29 A related issue concerns the crimes of sexual slavery and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 marriage of this woman by this person named Kotor.

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

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

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

20 JUSTICE KING: You said there is no evidence.

21 MR OGETTO: Sorry, my Lord.

22 JUSTICE KING: You said there was no evidence.

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

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

26 MR OGETTO: Which one, my Lord?

27 JUSTICE KING: This is 835.

28 MR OGETTO: Yes, my Lord.

29 JUSTICE KING: "Nonetheless, the Chamber finds that Kallon

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

8 MR OGETTO: My point is slightly different.

9 JUSTICE KING: What is your point?

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

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

17 MR OGETTO: Yes, my Lord.

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

19 MR OGETTO: Yes.

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

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

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

24 MR OGETTO: None --

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

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

1 should read the entire paragraph. It continues:

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

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

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

15 MR OGETTO: It doesn't.

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

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

18 JUSTICE KING: And you see, what they are saying there, in
19 support of what they are saying, they referred to the evidence
20 with regard to another location, but you quoted that paragraph,
21 835, when you made your submissions about Kissi. I am merely
22 telling you that that paragraph does not say anything at all
23 about Kissi.

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

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

1 only speaks about Guinea Highway.

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

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

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

10 Can I proceed, my Lord?

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

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

16 JUSTICE KING: Very well.

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

20 JUSTICE WINTER: This is agreed.

21 MR CAMMEGH: Thank you.

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

1 reports from all parts of Kono.

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

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

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

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

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

11 MR OGETTO: Thank you.

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

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

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

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

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

4 MR OGETTO: Yes.

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

9 Here they are talking about --

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

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

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

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

28 And, my Lord --

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

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

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

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

25 One minute, my Lord.

26 My Lord --

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

1 not saying that, what are you saying?

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

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

7 MR OGETTO: The gist --

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

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

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

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

18 JUSTICE KING: Very well.

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

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

26 MR OGETTO: Yes.

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

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

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

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

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

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

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

17 MR OGETTO: That is my point, exactly.

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

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

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

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

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

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

20 MR OGETTO: Yes.

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

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

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

5 MR OGETTO: Absolutely no evidence, in our submission.

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

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

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

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

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

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

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

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

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

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

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

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

20 JUSTICE AYoola: Before you go there, let me ask this,
21 please.

22 MR OGETTO: Yes, my Lord.

23 JUSTICE AYoola: Who determines whether a factor is
24 mitigating or not?

25 MR OGETTO: It is the Chamber, my Lord.

26 JUSTICE AYoola: Thank you.

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

29 JUSTICE AYoola: I am answered but you can go on.

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

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

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

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

28 JUSTICE KING: [Inaudible].

29 MR OGETTO: I have finished sentencing because of time.

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

3 MR OGETTO: Yes, my Lord.

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

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

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

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

18 JUSTICE KING: Very well.

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

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

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

28 JUSTICE KING: What did you say?

29 MR OGETTO: Due regard.

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

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

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

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

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

13 MR OGETTO: Yes, that is what I said.

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

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

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

28 MR OGETTO: I don't know that --

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

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

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

6 JUSTICE KING: That is not what you said.

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

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

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

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

13 MR OGETTO: A minute, my Lords.

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

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

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

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

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

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

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

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

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

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

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

9 MR OGETTO: Yes, my Lord.

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

19 JUSTICE WINTER: Any more questions? Justice King?

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

27 MR OGETTO: Yes, we do.

28 JUSTICE KING: Thank you. Okay.

29 MR OGETTO: Can I explain for that?

1 JUSTICE KING: Yes, yes. Go ahead.

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

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

16 MR OGETTO: No, that attempt was not made.

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

19 MR OGETTO: No, the reason why --

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

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

25 JUSTICE KING: I see.

26 MR OGETTO: I just wanted to be clear.

27 JUSTICE KING: I see very well. Very well.

28 MR OGETTO: I wanted to be very clear.

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

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

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

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

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

19 JUSTICE WINTER: Okay. Then, there are no more questions.
20 Then we will now thank the Defence for their submissions, and we
21 will have a 20 minutes break and we will resume our hearing at
22 15.35. Thank you.

23 [Break taken at 15.26 p.m.]

24 [Upon resuming at 15.48 p.m.]

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

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

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

2 JUSTICE WINTER: It will certainly not be your prejudice.

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

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

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

14 Can I begin with ground 8? Ground 8 contains, I think some
15 19 or so sub-grounds. I'm not going to approach all of them, but
16 there are some that deserve some concentrated effort. And of
17 course the first one is 8(a) wherein we claim that Augustin Gbao
18 was denied a right to a fair trial by virtue of the finding that
19 he was part of the plurality of persons significantly
20 contributing to the joint criminal enterprise by way of or in his
21 guise as an ideologist.

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

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

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

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

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

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

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

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

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

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

20 JUSTICE WINTER: Please continue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Two relevant findings were made by the Trial Chamber in
21 respect to this, and once again classified as an act of terror I
22 repeat and remind the Trial Chamber of their words at paragraph
23 2047 in relation to acts of terror not being found in the parts
24 of Kailahun District where Gbao was.

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

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

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

13 The first one is this: I think it was TF1-369, an expert,
14 testified as to the fact of forced marriages and sexual offences
15 taking place during the junta period. The difficulty with that,
16 and we argue this I hope exhaustively within I think it's ground
17 2 of our appeal, is that the Trial Chamber themselves had found
18 that expert evidence should not be permitted to go to an ultimate
19 issue, and an ultimate issue would be one's intent.

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

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

1 and abetting, knowing offences were going to be committed, or
2 failing to stop or punish them", in other words, classic 6.1 and
3 6.3 liabilities. Within a joint criminal enterprise acts and
4 conduct, we say, is defined as participation in the joint
5 criminal enterprise and sharing the intent of the perpetrators.
6 So, in short, this --

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

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

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

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

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

15 MR CAMMEGH: Expert evidence.

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

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

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

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

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

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

4 JUSTICE KING: No, from the judgment itself.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 we refer the Chamber to our comments in relation to farming

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

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

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

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

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

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

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

10 Several Defence witnesses, from particularly I think the
11 Sesay team, and I believe the Gbao team, testified to such but
12 were ignored as were, ironically, various Prosecution witnesses.
13 036, 114, 113 and 367 all discussed the notion of work for food
14 or payment in kind. And, as a final point, one exhibit, I think
15 produced during Mr Jordash's cross-examination of 330, one
16 exhibit was a document which indicated in terms the fact that
17 330, a town commander, I think, was being paid, his villagers
18 were being paid, for I think brushing the CDS's farm on one
19 occasion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 It's extraordinary, it's deplorable and it's unforgivable,
12 and it stains the whole nature and raison d'être of this tribunal
13 if it's allowed to lie, we say. I'm sorry to get emotional, but
14 25 years is a long time for a 62 year old man.

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

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

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

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

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

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

7 That is my argument in relation to that.

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

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

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

1 all.

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

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

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

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

29 The second actus reus finding was that Gbao had

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

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

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

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

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

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

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

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

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

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

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

18 Further we argue that the non-interference couldn't
19 possibly amount to a substantial contribution to the commission
20 of the crime against Jaganathan. Gbao hadn't entered the camp,
21 he had never been found or seen to be issuing orders to the 30 or
22 40 men who were alleged to have come with him. He tried to
23 placate Kallon earlier. He was still outside the camp when
24 Jaganathan was abducted. We give a whole list of reasons to
25 justify that point, as we do our third point on this issue, that
26 we argue the substantial contribution could not - well, there
27 wasn't one, but even if there was - it couldn't possibly be seen
28 to have had a significant legitimising or encouraging effect on
29 the principal perpetrator.

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

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

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

19 As I have said, it was found by --

20 JUSTICE WINTER: Twenty minutes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 responsible for his direct involvement in it." If he could get
2 25 years with that concessionary type of sentiment being
3 expressed by the Trial Chamber, goodness alone knows what he
4 would have received if his criminality had been found to be more
5 serious.

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

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

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

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

1 Finally on this issue of aggravating factors, two points:
2 First of all, being a senior RUF at Makump should not be found to
3 be sufficient to show an aggravating feature without a
4 concomitant showing of effective control. All the evidence
5 showed that Gbao had no control over Kallon at all, or the
6 fighters who committed the crimes. It's notable that the 30 and
7 40 soldiers with Gbao were specifically said by Jaganathan not to
8 have got involved in the trouble at all, which indicates that
9 those who did were obviously outside Gbao's control. He had no
10 power of control. He tried to prevent the thing escalating,
11 failed to do so. It's therefore wrong to attribute an
12 aggravating factor to him on the basis that he had some kind of
13 effective control. He clearly, we say, didn't.

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

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

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

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

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

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

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

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

1 25 years imprisonment, individuals in other trials, I'm
2 featuring - I'm referring mainly to Fofana and Kondewa in the CDF
3 trials - received far less.

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

14 He received 15 years imprisonment. Kondewa was found to
15 have aided and abetted crimes in Tongo, the hacking to death and
16 arbitrary killings and shooting at civilians. He was the high
17 priest of the Kamajors. He was found guilty on both Article 6.1
18 and 3. Within one, the large scale and barbaric nature was cited
19 by the Trial Chamber - I believe the Appeal Chamber - and the
20 vulnerability of the victims was emphasised. He received
21 20 years.

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

1 which suggested very much the contrary.

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

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

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

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

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

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

9 JUSTICE KING: Yes, I have.

10 JUSTICE WINTER: Okay, Justice King, please.

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

17 MR CAMMEGH: Thank you.

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

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

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

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

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

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

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

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

6 I hope that answers the question, my Lord.

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

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

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

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

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

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

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

26 MR CAMMEGH: I'm obliged, my Lord.

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

29 Yes, please.

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

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

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

15 MR TAKU: Thank you, my Lord.

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

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

24 [Whereupon the hearing was adjourned at 17.47
25 p.m. to be reconvened on Thursday, 3 September
26 2009 at 10.00 a.m.]

27
28
29