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

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

FRIDAY, 4 SEPTEMBER 2009
10.00 A.M.
APPEAL HEARING

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 Karen Pfuetzner
For the Registry:	Mr Thomas E Alpha
For the Prosecution:	Mr Stephen Rapp Dr Chistopher Staker Dr Nina Jorgensen Mr Vincent Wagona Ms Reginald Fynn Ms Bridget Osho
For the Appellant Sesay:	Mr Wayne Jordash Ms Sareta Ashraph Mr Paul Clark Mr Jared Kneital
For the Appellant Kallon:	Mr Charles Taku Mr Kennedy Ogetto Mr Mohamed P Fofanah
For the Appellant Gbao:	Mr John Cammegh Mr Scott Martin

Friday, 4 September 2009

[Open session]

[The appellants present]

[Upon commencing at 10.10 a.m.]

JUSTICE WINTER: Good morning, once again. We begin our final day of oral submissions in this case.

Okay. Are there any other changes to the appearances that should be noted for the record? As far as I can see.

MR RAPP: Mr Rashid Dumbuya, one of our interns has joined us, your Honour.

JUSTICE WINTER: Thank you very much.

I am very grateful to the parties that we could, really, in this very touch schedule stick to our time limits and I do hope that this will continue this way today as well. Okay, then I would like to give the floor now for one and a half hours to the Prosecution.

MR STAKER: May it please the Chamber. The Prosecution is presenting three grounds of appeal against the trial judgment. I will be presenting argument first on the first and third grounds and Dr Jorgensen will then deal with the second ground.

I won't occupy the Appeals Chamber with the standards of review on appeal which are dealt with in chapter 1 of our appeal brief. We've dealt with those at length in our response to the Defence appeal. We submit, for the reasons that we've given, that the standards of review are met in relation to the three Prosecution grounds. We don't for a minute suggest that the same rigorous standards do not apply to us.

In relation to all three grounds, we, again, rely fully on the arguments set out in our appeal brief, which are often quite

detailed, a level of detail that we couldn't possibly go into in oral argument. Again, I'm only touching on the main points.

The first Prosecution ground of appeal relates to the Trial Chamber's finding that the joint criminal enterprise between leading members of the AFRC and members of the RUF ceased to exist some time in the end of April 1998. The Prosecution case, as pleaded in the indictment, was that the joint criminal enterprise spanned the entire indictment period. That was limited to a degree in the final trial brief where the period was limited to 25 May 1997 until January 2000, which was the time period found by this Appeals Chamber to be applicable to the AFRC indictment. I refer to the AFRC appeal judgment, paragraph 84.

Our contention is that the Trial Chamber's ultimate finding, that the joint criminal enterprise came to an end in 1998, constitutes an error of law and/or fact. We say that, on the evidence and the findings of the Trial Chamber as a whole, the only conclusion open to any reasonable trier of fact is that the joint criminal enterprise continued in existence at least until the end of February 1999. I say the only reasonable conclusion on the evidence and the findings of the Trial Chamber. Of course, when deciding whether a conclusion - an ultimate conclusion of the Trial Chamber is reasonable, it's necessary to take account, from the appellate point of view, not just the evidence in the case but the intermediate findings of fact that the Trial Chamber made in the course of its reasoning to the extent that they themselves are not overturned on appeal.

The effect of this ground of appeal, if upheld, that the joint criminal enterprise extended at least until February 1999, means that a number of other crimes that were found by the Trial

Chamber to have been committed would have fallen within the joint criminal enterprise and that the accused would therefore also be responsible for those additional crimes.

The crimes in question are dealt with in the Prosecution appeal brief paragraphs 2.170 to 2.179. We have conceded that, in relation to some of these crimes, it may be impracticable to get to the point where additional convictions could be entered. For instance, in relation to districts such as Bombali or Port Loko where crime-base findings were in fact not made by the Trial Chamber. But the additional crimes which we say should be added to the disposition of the judgment are set out in paragraph 2.180 of the Prosecution appeal brief.

The Trial Chamber found - I'm turning now to the findings of the Trial Chamber - that the joint criminal enterprise came into existence soon after the May 1997 coup and the establishment of the joint AFRC/RUF junta. The participants in the joint criminal enterprise were found to include the three accused and other senior members of the RUF and AFRC.

The crimes charged in counts 1 to 14 were found to be within the joint criminal enterprise. However, the Trial Chamber found that in late April 1998 there was a rift - rift was the word they used - between the AFRC and RUF such that the common purpose between the AFRC participants in the joint criminal enterprise and the RUF participants ceased to exist. The nature of this supposed rift is set out in paragraphs 2073 to 2076 of the trial judgment.

As a consequence, it was held that after April 1998, no responsibility could be imputed to the three accused on the basis of JCE liability for criminal acts committed by fighters either

of the AFRC or the RUF. A reason for this was that the Trial Chamber refused to consider whether there was a separate joint criminal enterprise confined to the RUF only after this rift occurred. And the Prosecution doesn't seek to appeal against the Trial Chamber's disinclination to follow that line of inquiry. Our ground of appeal relates only to the continuation of the joint AFRC/RUF joint criminal enterprise as pleaded in the indictment.

The Trial Chamber's findings as to the formation, membership, purpose, continuation and ending of the joint criminal enterprise are set out in paragraphs 2.12 to 2.25 of our appeal brief. What we submit is particularly significant in this respect is the finding that this joint joint criminal enterprise - joint between the AFRC and the RUF - survived even the February 1998 ECOMOG intervention. After the intervention, the junta had been ousted from Freetown. As the Trial Chamber found in paragraphs 2067 to 2072, the junta was no longer in power, it was unable to use governmental or administrative authority.

In paragraph 2069, it was said that a drastic strategic change was required. But despite this, it found that, effectively, the same participants continued in the same joint criminal enterprise to achieve the same objectives by the same means. This finding is found in paragraphs 2073 to 2081 and especially paragraph 2070.

At paragraphs 2077 to 2081, the Trial Chamber also found that the three accused in this case were part of the plurality forming that continuing joint criminal enterprise. I note that at paragraph 2081, on one reading, at least, even Judge Boutet accepts that the accused Gbao was part of that plurality although

he dissented and found that he was not a participant. On one reading, Gbao was part of the plurality but didn't participate.

But at paragraphs 2082 to 2110, the three accused in this case were found liable on the basis of joint criminal enterprise in this period after the ECOMOG intervention in May 1998.

But it then proceeded to make its findings in relation to this rift. This is found in paragraphs 817 to 820 and 2073 to 2076 of the trial judgment. The Trial Chamber found that after this rift the AFRC had its own separate plan to reinstate the army. However, in our submission, there is no suggestion in the trial judgment that either group abandoned the purpose of taking power and control over the territory of Sierra Leone. After April 1998, that was still the intention of the AFRC, and after April 1998, that was still the intention of the RUF.

We say further that after the end of May 1998, on all of the evidence and the findings of the Trial Chamber in the case, the AFRC had not abandoned the purpose of committing crimes in order to achieve that objective, and on the evidence and all of the findings in the case, nor had the RUF abandoned the intention of committing crimes in order to achieve that objective. So, effectively, what the Trial Chamber's finding meant was that there were now two separate JCEs. The AFRC was pursuing its, and separately and independently, the RUF was pursuing its own separate joint criminal enterprise.

So, thus, although we had this single joint joint criminal enterprise, as I put it, that survived even the ECOMOG intervention, and although both groups continued with the same objective by the same means thereafter, somehow the Trial Chamber found that there was a rift in April 1998 that led to a parting

of the ways of members of these two groups.

Now, we set out in our appeal brief what we say are the main categories of errors committed by the Trial Chamber in reaching that conclusion. Again, in the limited time, I will summarise what these are.

The first is dealt with in paragraphs 2.42 to 2.62 and 2.63 to 2.86 of the Prosecution appeal brief. These paragraphs relate to the findings of the Trial Chamber on the evidence before it establishing that after April 1998, regular contact continued between the AFRC and RUF commanders, that fighters belonging to both groups were intermingled, that military operations were carried out together and that AFRC commanders, up to the highest ranks, such as Gullit, took advice and orders from the RUF high command, particularly during the 1999 Freetown invasion.

The Trial Chamber's finding show that even after the mistreatment of Koroma and Gullit in Buedu and the execution by Kallon of two AFRC fighters in Kono, Gullit and the AFRC troops participated in the joint AFRC/RUF mission to attack Sewafe Bridge sometime in late April 1998.

It is submitted that it's unreasonable to conclude that Gullit and the AFRC would have participated with the RUF in the Sewafe Bridge attack if it was events prior to that attack which were found to have caused the rift.

According to the Trial Chamber's findings, following Gullit's departure from Kono, he later resumed and maintained communication with the RUF except for the period when his radio operator was captured and he lacked the microphone and despite SAJ Musa's orders to the contrary. The evidence was, SAJ Musa instructed him not to be in communication with the RUF. In

defiance of that order, he was. And once the logistical problem had ended, the problem of having no microphone, Gullit again spoke to Sesay and Kallon. He explained to Bockarie his non-communication being for logistical reasons, and Bockarie spoke of the RUF and SLA as being brothers.

The fact, we say, that this period of non-communication was a period of inability to communicate and the fact that communication occurred once again when this became possible makes it unreasonable to conclude that the period of non-communication in any way signalled that the joint criminal enterprise had ended.

The Trial Chamber found that in August 1998, after the failure of the attempted recapture of Koidu from ECOMOG in an attack led by Superman and code named the Fitti-Fatta mission, Superman, with a contingent of RUF fighters, joined SAJ Musa in Koinadugu District. The Prosecution submits that for the reasons given in paragraphs 2.53 and 2.54 of the Prosecution appeal brief, the only reasonable conclusion is that Superman continued to work in concert with SAJ Musa and the RUF high command during which time SAJ Musa also worked in concert with the RUF high command.

The Trial Chamber found that a joint training base was established at Koinadugu. The Trial Chamber found that in the first week of December 1998, Bockarie convened a strategic meeting at Buedu attended by senior members of the RUF and that coordinated planning between Superman and Sesay ensued. And on 24 December 1998, Superman and his fighters joined with Sesay in a combined successful attack on Makeni commanded by Sesay.

The Trial Chamber found that following SAJ Musa's death on

23 December 1998, Gullit contacted Bockarie to request reinforcement for the attack on Freetown. The Trial Chamber found that Bockarie did order the reinforcement but the timing of the order could not be established with certainty. The Trial Chamber found that Bockarie ordered Sesay to deploy RUF Rambo to assist Superman in Lunsar to secure the Lungi axis towards Freetown. A group of RUF troops led by RUF Rambo and Superman were found to have moved from Lunsar to the Waterloo area following Bockarie's order to Sesay to deploy RUF Rambo to Port Loko to assist Superman. It was found that ECOMOG troops blocked the path of the RUF troops from Waterloo to Freetown and that heavy fighting ensued.

Our submission is that, regardless of how effective or otherwise it may have been in practice, the only conclusion open to any reasonable trier of fact is that, contrary to what the Trial Chamber found, there was genuine cooperation over military reinforcement during the Freetown invasion between RUF members of the joint criminal enterprise such as Bockarie and AFRC members such as Gullit.

The Trial Chamber found that Gullit contacted Bockarie several times before attacking Freetown and that he was promised RUF reinforcement. The Trial Chamber further found that the AFRC troops delayed their advance for approximately one day before continuing towards Freetown. During that time, Gullit continued to contact Bockarie and was repeatedly promised reinforcement. The Prosecution submits that the only reasonable conclusion was that Gullit also intended to cooperate in the RUF attack on Freetown and that it was only logistical constraints that prevented this.

The Trial Chamber found that in this period, Gullit received advice, if not orders, from Bockarie. In particular, Gullit radioed Bockarie to inform him that the AFRC were retreating from Freetown and Bockarie told Gullit that he should not accept Kabbah's request for a ceasefire made over the radio.

I've referred to just some of these findings briefly, but I would, as I say, rely on the full detail set out in the Prosecution appeal brief.

The next main category of errors we say relate to the Trial Chamber's finding that after April 1998, the AFRC contemplated their own plan to reinstatement the army which did not involve the RUF. We say that the evidence before the Trial Chamber did not establish that any AFRC commander other than SAJ Musa had or supported this plan. In particular, even if SAJ Musa did have this plan, there was no evidence that any other AFRC members went along with it. I refer to the evidence that Gullit was in communication with the RUF despite SAJ Musa's orders to the contrary. There is evidence referred to in footnote to 257 of our appeal brief that after the death of SAJ Musa, which was before the Freetown invasion began, the plan to reinstatement the army did not continue. We submit, this was a plan of SAJ Musa's alone, on the evidence.

A further point, and I'm referring now to paragraphs 2.94 to 2.109 of our appeal brief, is that the evidence and the findings of the Trial Chamber established that even during the junta period and the period after in which the JCE was found to exist, there was friction between various members of the joint criminal enterprise, between the AFRC and the RUF, but also within those factions itself. We submit that there is no basis

for assuming that a single incident of fractiousness or a single dispute in April 1998 must have put an end to the joint criminal enterprise.

In particular, on legal principles of joint criminal enterprise, we submit that there is no need for joint criminal enterprise liability for there to be harmony within a group. There is no requirement for there to be any clear chain of command. Chains of command may be relevant to Article 6.3, superior responsibility. It's not relevant to joint criminal enterprise.

Again, if I can draw a simple analogy with the kind of situation that might arise in national law. Suppose you have a group of people who are engaged in a joint enterprise, an organised crime ring that may be involved in drug smuggling or extortion or gun-running or anything else, a group of people may have the common intent to pursue this criminal activity and they may jointly be contributing to and participating in this criminal activity, but at the same time as they are all doing this, there may be frictions and rivalries between members of the group. It may even be that certain members of the group are trying to oust each other from the group. It may be that two members of the group are contesting each other for leadership or one is trying to topple the leader and to take over. It may be that two separate members of the group claim to be the leader but neither will acknowledge the authority of the other. We submit that none of this is relevant to joint criminal enterprise liability. We have dealt at length of what the elements of JCE liability are, and they are the elements that need to be addressed with reference to the findings made by the Trial Chamber.

A further point which is dealt with in paragraphs 2.110 to 2.126 of the Prosecution appeal brief is that the findings of the Trial Chamber and the evidence established that even after April 1998, the AFRC and RUF continued to have common interests and were interdependent in the achievement of the purpose that both continued to have, which was, namely, to take power and control over the whole of Sierra Leone.

I have referred to the evidence. What we say is, the inconsistent finding of the Trial Chamber that there was somehow two separate joint criminal enterprises is after April 1998, one involving the AFRC, one involving the RUF - we submit that on the evidence and the findings of the Trial Chamber, neither of those two groups realistically would have been capable of taking control of the country without the cooperation of the other. They needed each other.

Furthermore, if they had been capable of taking control independently of the other, in fact, they would have been two mutual rivals for power, because for one to take power on their own necessarily is to act at odds with the purpose of the other group. It's to frustrate the other group's purpose of wanting to be the ones to take power. They would have, in fact, been two mutually hostile, rival competing groups, and that, we say, is inconsistent with the evidence and the findings of continuing cooperation between them, in particular in relation to the Freetown invasion.

We say that the continuation of the common plan, purpose or design is further evidenced from the release by the AFRC troops when they were in Freetown of high profile RUF prisoners from Pademba Road Prison and the efforts to search for Sankoh. We

submit, the attempted release of Sankoh by the AFRC is inherently inconsistent with the notion and the finding that the AFRC were competing with the RUF to take control of the country.

A further point dealt within paragraphs 2.127 to 2.129 of the Prosecution appeal brief is the fact that the Trial Chamber, when finding that the joint criminal enterprise ended in April 1998, placed considerable reliance on the evidence of the accused Sesay. We submit that a reasonable trier of fact could not have placed such reliance on this evidence.

The issue of cooperation between the AFRC and RUF during the Freetown invasion was clearly linked to Sesay's own conduct and criminal responsibility. In the circumstances, we submit, no reasonable trier of fact could have relied on evidence of an accused in that situation to make findings of fact unsupported by other evidence and, indeed, against the weight of all of the other evidence and findings in the case.

A further point made at paragraphs 2.130 to 2.141 of the Prosecution appeal brief is that, on the findings of the Trial Chamber on the evidence before it, even after April 1998, the pattern of crimes committed by both AFRC and RUF forces, with the aim of taking control of the country, continued to be the same. This pattern included the widespread and systematic attack on the civilian population and atrocities against civilians, the burning of homes and towns, looting, forced recruitment and forced labour.

Finally, I will refer to paragraphs 2.142 to 2.148 of the Prosecution appeal brief. We say that, ultimately, the Trial Chamber did not apply correctly the principles of joint criminal enterprise responsibility. The Trial Chamber held that after

April 1998 there was insufficient evidence that senior members of the AFRC and RUF acted jointly because the evidence showed only that they remained in sporadic contact and cooperated occasionally. The Trial Chamber appeared to be concerned with the extent to which RUF commanders had control over AFRC fighters in the attacks after April 1998.

As I say, issues of control are not relevant to joint criminal enterprise liability and issues of the extent of contact between participants in a joint criminal enterprise are similarly not material elements of joint criminal enterprise liability.

For all of these reasons and the reasons in the Prosecution appeal brief, we submit that on the evidence and findings of the Trial Chamber, the only conclusion open to a reasonable trier of fact is that the joint criminal enterprise which the Trial Chamber found to exist until April 1998 continued in existence beyond April 1998 and the only remaining question is whether the accused continued to be participants in that joint criminal enterprise. The Prosecution submits that the only reasonable conclusion is that they did.

Our first primary submission in this respect, the criminal responsibility of the accused, is the important point that if we succeed in the submission I have made, there was, in fact, one single joint criminal enterprise that began before April 1998 and continued afterwards - we're not saying that there was another new joint criminal enterprise after April 1998; rather, the Trial Chamber found that the same criminal enterprise that existed before the intervention continued after the intervention until April 1998. We say it continued further beyond that until after the Freetown invasion.

Now, if that is the case, it means that on the findings of the Trial Chamber relating to the pre-April 1998 period, the accused were participants in the joint criminal enterprise, and prior to April 1998, the accused made a substantial contribution to the joint criminal enterprise and, therefore, they are criminally responsible for all crimes committed within the joint criminal enterprise regardless of when they occurred, whether before April 1998 or afterwards.

We submit, it's not the case that you are only liable as a participant in a joint criminal enterprise if it can be shown that you contributed to the joint criminal enterprise on the particular day the crimes were committed or in the particular period. The only possible exception to that would be if it were possible to show that one of the accused somehow actively withdrew from the joint criminal enterprise in a way that the withdrawal was legally effective to terminate their responsibility for participation in it.

I think this principle of withdrawal from a joint criminal enterprise is one that exists in the general criminal law in most legal systems. Just by way of example, we have included a recent authority from the English Court of Appeal dealing with the principles in the English law. That's R v Mitchell [2008] EWCA Crim 2552, which is in the Prosecution bundle of authorities that we handed out. The case is quite long and I won't read it all, but there's a particular quote which I think perhaps sums it up quite well, which is, in fact, taken from a previous case, Mitchell and King. It's in paragraph 26 of the case we've handed out. It says:

"A person who has done an act which makes him potentially liable for a crime" - such as participation in a joint criminal enterprise, contribution to it - "cannot relieve himself of responsibility by a mere change of mind. Once the arrow is in the air, it is no use wishing to have never let it go - 'Please God, let it miss.' The archer is guilty of homicide when the arrow gets the victim through the heart. The withdrawer, it is true, does not merely change his mind; he withdraws. But is that relevant if the withdrawal has no more effect on subsequent event than the archer's repentance?"

We submit that if someone is a participant in a joint criminal enterprise to take over the country by criminal means, it's not enough for that liability to cease for the person somehow quietly just stop making contributions to it. It's necessary for an active act of withdrawal to happen.

We've handed up another authority, a textbook, which summarises the principles. It's actually an Australian text. It's useful because it also refers to certain authorities from other jurisdictions such as New Zealand and England. Again, it emphasises the point that active withdrawal is necessary, a positive act of withdrawal.

Now, we submit that that would be sufficient to establish the ongoing criminal liability of the three accused in this case for participation in the joint criminal enterprise if it extended beyond April 1998.

We submit that, in any event, there is findings of the Trial Chamber of continued contribution of the accused to the joint criminal enterprise in the period after April 1998. We submit, takes the form of participation by the accused in crimes

after that time, which we say, on the evidence and the findings of the Trial Chamber, on the only reasonable conclusion, were crimes within the joint criminal enterprise. I will refer to these only briefly. I can cite the paragraphs of the trial judgment.

Paragraph 2116, Sesay was found criminally responsible for planning enslavement of hundreds of civilians to work at mines at Tombodu and throughout Kono District from December 1998 to January 2000. Paragraph 2133, enslavement of an unknown number of civilians at Yengema training base from December 1998 to 30 January 2000. And 2230, planning the use of child soldiers in Kailahun, Kono and Bombali Districts from 1997 to September 2000.

In the case of Kallon, paragraph 2120, he was found responsible for instigated the killing of Waiyoh, who was a civilian woman, in May 1998 in Wendedu. Paragraph 2151, Kallon was found responsible under Article 6.3, superior responsibility, for forced marriages of TF1-016 and her daughter in Kissy Town in May/June 1998 and the RUF fighters who enslaved hundreds of civilians in camps throughout Kono District between February and December 1998, and paragraph 2234, planning the use of child soldiers in Kailahun, Kono and Bombali Districts from 1997 to September 2000.

In the case of Gbao, at paragraph 2036 of the trial judgment, Gbao was found to be involved in the planning of the enslavement of civilians for use on farms in Kailahun. A relevant finding is at paragraph 2037, that Gbao also worked very closely with the G5 in Kailahun Town to manage the large-scale forced civilian farming that existed in Kailahun between 1996 and 2001. We would say that constitutes a substantial contribution

to the enslavement crimes post-April 1998 listed in paragraph 2156 of the trial judgment, item 5.1.3 (i), (ii), (iii) and (iv).

In the view of the limited time, I'm content, otherwise, in relation to the Prosecution's first ground of appeal, to rely on our written submissions, unless I can be of further assistance to the Bench on that.

JUSTICE WINTER: Any questions?

JUSTICE AYOOLA: My question relates to the continued JCE after the rift, as you put it. I can see the active participation of Bockarie, but what is your strongest evidence that the three accused persons here did in fact participate in the Freetown invasion?

MR STAKER: It's not our case that the accused participated in the Freetown invasion. The Prosecution case is that there was a joint criminal enterprise to gain control of the country by means including the commission of crimes. So that was the joint criminal enterprise.

We say that joint criminal enterprise continued from its inception, after the military coup that brought to junta to power, and that that single enterprise continued in time after the ECOMOG intervention, after April 1998 until after the Freetown invasion. We say that on the evidence and the findings of the Trial Chamber, the three accused in this case were participants in that joint criminal enterprise and are therefore responsible for all crimes committed within the joint criminal enterprise regardless of whether they personally were involved in particular individual crimes within it. That is the concept of joint criminal enterprise liability. And that they are therefore responsible for crimes committed in the Freetown invasion even if

they personally weren't in Freetown or didn't personally - weren't personally involved in those specific crimes. They were a part of the joint criminal enterprise; all JCE participants are responsible.

JUSTICE WINTER: Thank you very much.

MR STAKER: I turn then to the Prosecution's third ground of appeal which relates to the acquittal of the three accused on count 18, taking of hostages. Count 18 was one of the counts that related to the attacks on the United Nations peacekeepers. It's dealt with in particular in paragraphs 1749 to 1969 and 2238 to 2299 of the trial judgment.

The accused were charged on four counts in relation to the attacks on peacekeepers, counts 15 to 18. All three were convicted on count 15, and Sesay and Kallon were also convicted on count 17, but all were acquitted on count 18, taking of hostages. The reason why they were acquitted on count 18 was because the Trial Chamber held that there was a legal element of the crime of taking of hostages that was not satisfied on the evidence. We submit that the error of the Trial Chamber was in identifying that element. In short, the element was that a threat must be communicated to a third party, simply that harm will come to the hostage if some demand is not met. We submit that it is not an element of the crime that any demand must be communicated to a third party.

Now, if the Appeals Chamber is with us on that point of law, we will reach the point that the Trial Chamber erred in law in finding that that additional element existed, the next question will be whether on the evidence in the case as a whole and the findings of the Trial Chamber the only conclusion open to

a reasonable trier of fact is that the three accused in this case satisfied all the elements of taking of hostages.

If the Appeals Chamber answers both of those questions in the affirmative, the result will be that the acquittals of the three accused on count 18 will be reversed and that convictions will be substituted for count 18.

Our submission, though, is that, even if the second question is answered by the Appeals Chamber in the negative, even if we do not succeed on the second question so that the acquittals are not reversed, our submission is that the Appeals Chamber should nonetheless address the first question, namely, whether there was an error of law. I refer to paragraphs 4.120 to 4.121 of our appeal brief.

We submit that the Trial Chamber made a very clear finding of law on the legal elements of hostage taking and that finding of law has been directly challenged by the Prosecution in its notice of appeal. We submit, therefore, that it's not a mere abstract or hypothetical question.

We further submit that there is very little case law on the crime of hostage taking in international humanitarian law, and that if the Trial Chamber's decision remains uncorrected, it's likely to stand as one of the very few precedents in international criminal law on the elements of hostage taking. We submit that it's a matter of general importance to international criminal law that any error of the Trial Chamber in this respect be corrected by the Appeals Chamber whether or not the error actually affected the final verdict in the case.

So I begin by addressing this legal question. The error, we say, is contained in paragraph 1964 of the trial judgment, and

I will read it out. It says:

"However, we find that these threats made to the captives" - in other words, the captured UNAMSIL peacekeepers had threats made to them, that the Trial Chamber said that, "These threats made to the captives are not sufficient to prove the remaining elements of count 18. The offence of hostage taking requires the threat to be communicated to a third party with the intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the captives."

We say this is wrong. We say it's sufficient, as a matter of law, for a threat to be communicated to the captives whether or not that threat has ever been communicated to any third party. The practical difference we would say is this, again, to give a hypothetical example: Suppose that the accused intends to compel a third party, let's say in this case the international community or the Government of Sierra Leone, to act or refrain from acting in a certain way and decides the way to compel them to meet my demand is to capture some United Nations peacekeepers and to threaten them with harm "if my demands are not met". If with that intention peacekeepers are captured and the peacekeepers know that they are being detained for this purpose, we say at that point the crime of hostage taking has been committed even though as yet no threat has been communicated to a third party.

Now, in practice, in almost all cases, a threat will be communicated to a third party, but it may be in some cases it isn't, possibly because the captured peacekeepers escape before it's possible for any threat to be communicated or possibly because the plan is superseded by events. Say the peacekeepers are captured to secure the release of somebody from prison, and

before the threat is communicated, that person is released from prison anyway. They say, "No need for our plan any more. We'll let the peacekeepers go." So in that case the situation is over, no threat has ever been communicated to third party, but we say, because the victims were detained with that purpose and were detained for a period with that purpose, that is sufficient to constitute the crime of hostage taking.

We also say that it's possible for the intent of hostage taking to be formed even after the capture happens. So it's possible that individuals are detained for a reason other than to compel a third party to act in a certain way, but then during the period of their detention, the decision is made, "Well, actually, we could, by threatening harm to these people, force the government or the international community to act in a certain way." If that intention is formed during the period of captivity of the victim, we say that it's at the point that that intent is formed that what might previously be a lawful or unlawful detention of the victims, it may be unlawful detention under another provision of international humanitarian law or it may be lawful if requirements of legality are met, but at the point the intention is formed during the period of captivity, at that point the crime of hostage taking is satisfied.

We also say and we submit - this is really commonsense - it's irrelevant to the crime of hostage taking whether the intent to compel a third party to act in a certain way ever succeeds or not. We submit that's obvious. So suppose, for instance, the victim is taken hostage, the perpetrator says to the government, "Do this or we will kill the hostage," if the government says, "Well, we think you're bluffing, so we're not going to do it,"

and the perpetrator says, "Yes, actually, we were bluffing," and they let the victim go, we say the crime of hostage taking is still been committed. The victim was detained with that intent. And the harm against which the crime of hostage taking exists is the harm to the individual victim, apart from anything else. The fact I'm a victim being held in captivity, knowing that they are liable to come to harm if demands are not met by a third party over which they have no control, whether or not the victim knows or not, or whether in fact or not a threat has yet been communicated to a third party.

Now, we make this submission, as I say, as a matter of what we submit is commonsense, but there are also authorities to support the Prosecution position. These authorities are set out in the Prosecution appeal brief and I won't go into all of it in detail. We have authorities from international criminal tribunals which appear not to address the point specifically. We would say, the international criminal tribunal authorities are ambiguous, at best, but they certainly do not support, we would say, the conclusion reached by the Trial Chamber that communication of a threat to a third party is a legal element of the crime. These authorities, which include, for instance, the ICC elements of crimes, which themselves were referred to in the trial judgment at paragraph 240, the Kordic and Cerkez appeal judgment and the Blaskic appeal judgment, they didn't expressly deal with this question. We submit that if they don't support us, they simply are of no help at all. We submit, on one reading, they are certainly consistent with our position.

But the more direct authorities, we say, are found elsewhere. We cite what we refer to as the Lambert commentary in

paragraph 4.31 of our appeal, which is a commentary on the Hostages Convention.

Another international convention, not necessarily an international humanitarian law convention, but we also cite an authority from Triffterer, which refers to the fact that the crime of hostage taking in the ICC Statute was taken from the Hostages Convention. It indicates in very clear terms that communication of a threat to a third party is not a legal requirement for the crime of hostage taking under the Hostages Convention.

We also refer to a case Simpson v Libya, a decision of a United States Circuit Court of Appeal, which, again, referring to the Lambert commentary, makes the very expressed finding that communication of a threat to a third party is not a legal requirement.

Then we have also in an appendix to our appeal brief set out a very large number of authorities from different national jurisdictions. These include legislation, but also where relevant some case law from some countries. It is an eclectic mix, we submit, of different legal systems of the world. It's also a mix of authorities on the crime of hostage taking as an ordinary crime under national law, but some of these authorities also deal with the crime of hostage taking in national legislation in implementation of the Hostages Convention, and some of these are also national legislation in implementation into national law of the International Criminal Court Statute.

We submit that they are all - apart from one in relation to Canada, which I'll come to in a minute - apart from this, we would say that they consistently refrain from making any

suggestion that communication of a threat to a third party is a requirement. Some of them make quite clear, in particular, some of the case law, for instance, from Germany, states quite expressly that communication of a threat to a third party is not a legal requirement and that the crime of hostage taking is committed at the very point in time at which a person is detained with the intent of holding them as hostage.

Perhaps the most direct authority on the issue of the crime of hostage taking in international criminal law is found, in fact, in a decision of the Constitutional Court of Colombia, which was dealing with the issue of the constitutionality of legislation in that country implementing the crime of hostage taking in the ICC Statute. This is found at page 155 in one of the annexes of the Prosecution appeal brief. In fact, I will read from it. It says:

"Based on the customary definition of the international crime of hostage taking, as indicated in the preceding paragraph, and as crystallised in the definition of the elements of crimes of the International Criminal Court, the Chamber observes that the petitioner has reasons in submitting that the requirement that conditions for liberating or keeping a hostage safe are directed towards the other party in an armed conflict as provided for in the criminal code is unconstitutional. In fact, this requirement is not provided for in the customary norms which incorporate the definition of the elements of this war crime, thus introducing said condition would narrow the scope of application in the crime in question and would unjustifiably reduce the scope of protection as established in international humanitarian law since it would leave those hostages unprotected

for which conditions are not uttered to the other party in the conflict..."

And so on.

JUSTICE KING: Could you please read the preceding paragraph, where the ingredients were said to have been listed.

MR STAKER: "The requirement of this crime that the deprivation of liberty of the hostage is a condition for the fulfilment of demands uttered to the other party in the armed conflict is unconstitutional."

Now, as we say, we have found a contrary authority in Canada. That, we submit, to the best of my knowledge, is a provision implementing the crime of hostage taking under Canadian national law. I'm not aware that it's specifically a provision implementing a norm of international humanitarian law.

We then do come to the factual question, if the legal question is resolved in the way that the Prosecution contends of whether on the evidence as a whole the only conclusion open to any reasonable trier of fact is that the three accused are individually responsible for the crime of hostage taking, in the circumstances of the limited time we have, and we have an additional ground of appeal to be dealt with by my colleague, I would be content to rely on the Prosecution's written submissions in relation to that issue.

Unless I can be of further assistance, I would invite the Chamber to call on my colleague to present the Prosecution's second ground of appeal.

JUSTICE FISHER: I just want to clarify a remark that you made because I think it may lead to something that you may not intend. In giving the example of the harm to the individual

victim, you indicated, I think, and perhaps I misunderstood you, that the harm was that the victim himself knew of the threat and that he knew of the intent of the captors to compel a third party by virtue of his being held hostage. Are you suggesting that the element that is set out in your submission in 4.55, where it says that one of the elements is that there is a detention of and threat to the victim, are you suggesting that that threat has to have those two prongs in order for it to meet the requirements that you've set out in 4.55?

MR STAKER: Our primary submission would be no. There are references in some of the authorities to the need for a threat. It doesn't say a threat to a third party. And on the facts of this case, the Trial Chamber found that there had been a threat to the victims. So it's in the context of the facts in this case that we say a threat to the victim is sufficient.

But our primary submission would be that it's not necessary even to have that. If a person is detained with the intent of subjecting that person to harm or the threat of harm in order to compel somebody to act, then, as a matter of plain language, I think it can be said that the victim is under threat. Many of the national authorities we refer to do not contain a requirement even of a threat to the victim. Some authorities may. So I think I'd say our primary submission is, even a threat to the victim is not required. If we're wrong in that, then a threat to the victim is sufficient, but a threat to the third party is not required.

JUSTICE FISHER: Okay. So the threat, according to your position, is either expressed or implied to the victim.

MR STAKER: In fact, we would say it's inherent in the

intent. That even if a victim doesn't know why they have been detained, if the detainer has that intent, that in itself may be sufficient, although that may be an unusual case.

JUSTICE FISHER: And the point that you made about the victim knowing that his fate is in the hands of a third party over whom he has no control, you're not suggesting that that's an element that's part of the threat.

MR STAKER: No. We say that's one of the values that the law against hostage taking is designed to protect, but it's not the only value. We would say that it's not required there necessarily be a harm to that specific value in order for the crime to exist, but we say that if the victim knew but the third party didn't, there would be a harm to that value and, therefore, that would be sufficient for the crime to be made out.

Another harm we would say is that people who are at liberty walking the street shouldn't be at risk of being captured and detained by people who intend to use them as hostages. And we would say that harm has been infringed, there's been a violation of that value by the mere detention of a person with the perpetrator's intent even if the victim personally doesn't even know why they're being detained.

JUSTICE FISHER: Okay. Thank you.

MR STAKER: Thank you.

JUSTICE WINTER: Thank you very much.

Could I now call on Ms Jorgensen.

MS JORGENSEN: Thank you, Madam President.

Your Honours, the Prosecution's second ground of appeal relates to the acquittal of Gbao under count 12, which is the child soldiers count. I should start by saying that, as with our

other grounds, we rely on our written briefs which set out our arguments in full and also our authorities comprehensively.

This ground is directed against the finding in paragraphs 2235 and 2236 of the trial judgment that Gbao is not responsible under Article 6.1 of the Statute for conscripting persons under the age of 15 into the armed forces of the RUF/AFRC or using children under the age of 15 to participate actively in hostilities.

In these two short paragraphs, the Trial Chamber dismissed all modes of liability under Article 6.1. In fact, no express reference was made to any mode of liability and the only implicit reference was to the mode of liability of planning. This is a notable contrast to the other crimes charged and found to have been committed by members of the AFRC and RUF forces, and in particular in respect of other crimes, the mode of liability of joint criminal enterprise was considered.

In our submission, the Trial Chamber's failure to give consideration to all relevant modes of liability constitutes an error. We submit that had the Trial Chamber done so, the only conclusion reasonably opened to it would have been to find Gbao liable under count 12 for the crime of conscription and use of child soldiers, which is referred to in paragraphs 1708 and 1747 of the judgment.

The first and primary basis on which we say the Trial Chamber should have reached this conclusion is on the basis of Gbao's participation in the JCE which was found to have existed between May 1997 and April 1998. Additionally, if our ground one is upheld, we submit that Gbao should be held responsible for committing, as a participant in the JCE, the count 12 crimes that

the Trial Chamber found to have been committed after April 1998.

The Prosecution consistently alleged JCE liability in respect of count 12 for all three accused. The Trial Chamber expressly found that the crimes charged in count 12 were within the JCE, and this conclusion was supported by many of findings of fact which we've set out in our brief. Gbao was found by the Trial Chamber to be a participant in the JCE.

He was in particular found to have been directly involved in the planning and maintaining of a system of enslavement. This system of enslavement was found to involve forced military training, which included the training of children. It follows, therefore, we submit, both as a matter of law and on the basis of the Trial Chamber's findings and the evidence in the case, that Gbao is responsible for the count 12 crimes as a participant in the joint criminal enterprise.

In support of these submissions, we rely primarily on the Trial Chamber's actual findings. We're not seeking to reverse intermediate findings. Our submission is that the Trial Chamber failed to reach the conclusion that was reasonable on the basis of those findings.

The Trial Chamber made numerous findings as to the clear and consistent pattern of abductions, training and use of child soldiers within the RUF, describing it as being entrenched, institutionalised, well organised and conducted on a large scale at the highest level of the RUF organisation.

The pattern involved campaigns to capture and abduct civilians, including children, bringing them forcibly to Kailahun where they were screened to determine their suitability for combat operations, forcibly training them for military purposes

and then deploying them to different areas to perform a variety of tasks such as conducting armed patrols, serving as bodyguards or perpetrating crimes against civilians.

These widespread and systematic crimes, including the conscription and use of children in hostilities, were found to be for the benefit of the RUF and the junta in furthering the ultimate goal of taking over political, economic and territorial control in Sierra Leone.

This pattern continued after April 1998, as the need for manpower was still critical for the RUF/AFRC operations to succeed. In particular, it was found that children were being trained as Small Boys Units and Small Girls Units at Bunumbu training base in Kailahun District, and these activities were transferred to Yengema training base in Kono District from December 1998, which operated until the end of the disarmament process.

Children under the age of 15 were found to have participated in both the attack on Koidu Town in December 1998 and in the Freetown invasion in January 1999.

We say that JCE liability would follow even if Gbao was not found to have made a significant contribution to the count 12 crimes themselves. In our submission, he need only be found to have made a significant contribution to the JCE in the sense of a preparatory or contributory act in relation to its criminal means.

However, we submit that Gbao did make a significant contribution to the crimes of conscription and use of child soldiers. Our reasons for this submission are set out in full in our brief, and I'll only provide a summary of some of the key

findings of the Trial Chamber that we rely upon.

Gbao was found to have held a position of power and authority in Kailahun where an elaborate system of forced labour was being conducted. He was found to be a person of status, being a vanguard, and having a close relationship with Sankoh. He had the assignment as overall security commander, or OSC, throughout the indictment period. He was found to have supervised and advised the Internal Defence Unit, the intelligence office, the Military Police and, significantly, the G5, and received copies of reports sent by security units. He was found to have had considerable influence over these bodies even though this was not found to amount to effective control.

It was found that his function was to oversee the G5, and this was the very unit that was in charge of the recruitment and training and received civilians before screening them. He was found to have performed a role of maintaining and enforcing discipline, law and order in RUF-controlled zones, which we submit ensured that RUF policies, including the recruitment of children, were implemented.

He was found to have travelled widely within Kailahun District to visit different areas behind the front lines and to report on whether the MP and G5 units were doing their jobs properly. Finally, it was found that in the period between April 1998 and December 1998, there was intensive recruitment going on, and during this phase, Gbao maintained the same positions - same assignments and authority in Kailahun as he did before April 1998.

With these findings - and this isn't intended to be an exhaustive list, it's explained further in our brief. These

findings go far beyond demonstrating Gbao's de jure status in the RUF.

We submit, they establish that Gbao played an important role in the supervision, coordination and monitoring of the recruitment process. We submit, it cannot have been a reasonable conclusion that his oversight functions fell short of the screening and training of children. We note that if Gbao lacked the respect of certain fighters, this has no bearing on his actual role and does not preclude his participation in the joint criminal enterprise for his involvement in the system of enslavement which included the conscription and use of child soldiers.

In our submission, count 12 is closely related to count 13, which is the enslavement count. It should be recalled that the Trial Chamber found that both the abduction for specific use within an organisation and forced military training could constitute conscription as both practices amount to compelling a person to join an armed group even though the evidence pertaining to the course of conduct as a whole was considered.

Evidence in a case may clearly be relevant to more than one count. We submit, the Trial Chamber was entitled and, indeed, required to have regard to any relevant findings relating to any other count that was also relevant to count 12.

The child specific crimes of conscription or use in hostilities clearly overlap with and complement other crimes, and the harm suffered by the victim in those cases includes enslavement. The system of enslavement that was found by the Trial Chamber to exist in Kailahun District, in respect of which Gbao was held to be individually criminally responsible as a

participant in the JCE, was intimately related to the forced military training of both adults and children. The connection, we submit, was most evident through the screening process. This system was managed by the G5, over which Gbao had a supervisory role.

In our brief we have presented a number of alternative argument under different modes of liability. Our main alternative argument is based on the mode of liability of planning. I won't go through these alternatives in any detail. But under the mode of planning, we submit that Gbao should have been held liable for planning the system of forced conscription of children under the age of 15 in Kailahun District from 1996 to December 1998. It's our submission that a proper consideration of Gbao's position, role and functions would leave open no other conclusion than that Gbao participated in the execution, administration and running of a plan designed to use civilians as forced labour in Kailahun, and this included the military training of children under 15.

Furthermore, we would submit that the only conclusion open to a reasonable trier of fact is that Gbao was aware of the substantial likelihood that children under 15 were being screened and sent for military training or other tasks within the RUF.

We have also presented arguments under the mode of liability of aiding and abetting. We would submit that Gbao should also have been found - well, as an alternative argument, he should have been found liable for aiding and abetting the crimes committed outside Kailahun if he was found liable for planning the crimes within Kailahun. As a further alternative, we submit, he should have been found liable for aiding and

abetting all the count 12 crimes. The details of these arguments are set out in our brief. We have explained how the different elements of those modes of liability are satisfied.

But this ground of appeal is predicated upon Gbao being individually responsible for the count 12 crimes under Article 6.1 of the Statute. For JCE responsibility and responsibility for planning or aiding and abetting, it does not need to be established that the accused had effective control over the direct perpetrator.

In contrast with superior responsibility under Article 6.3 of the Statute, JCE liability, planning and aiding and abetting do not depend on whether the accused had the power to issue orders to the direct perpetrators to enforce discipline or on whether the accused received reports from the direct perpetrators. A position of authority is not a legal requirement for liability under these other modes, although it may be a relevant factor.

There was no finding that Gbao disapproved of the use of child soldiers. We would submit that Gbao's willingness to continue holding this position of authority and influence demonstrates that he was not a passive or reluctant participant in the crimes involving the conscription and use of child soldiers. Rather, by his actions, as found by the Trial Chamber, we submit that he incurs individual criminal responsibility under count 12. For these reasons, we are asking the Appeals Chamber to reverse his acquittal on this count.

Your Honours, those are my submissions. Unless I can assist further.

JUSTICE WINTER: Thank you very much.

Any questions? No. Then, thank you.

So, in this regard, we are now a little ahead of time, ten minutes. Would you like to have a break? Then I will break for ten minutes now. Thank you.

[Break taken at 11.18 a.m.]

[Upon resuming at 11.31 a.m.]

MR JORDASH: Madam President, thank you.

I'm going to address for most of the hour the submissions the Prosecution makes on ground 1, and in the last five minutes, my learned friend, Mr Clark, who is not in the court at the moment, will deal with a few matters arising from the Prosecution's ground 3, the UNAMSIL count 18.

I will take my time with the joint criminal enterprise because what I submit has relevance to many of our appellate submissions and as well as relevant to the Prosecution's appeal, and in three ways we say the Prosecution appeal on ground 1 must fail. Firstly, because of the errors of law made by the Trial Chamber which makes the Prosecution submission untenable. Secondly, because of the factual findings made by the Trial Chamber which makes the Prosecution's submission untenable insofar as they do not support a finding of a plurality existing after March 1998 acting in concert to commit crimes. I will not address that in detail. We will rely upon our brief which details the factual issues. Then, finally, the third aspect I will deal with are the factual findings which make it untenable that Mr Sesay contributed to any joint criminal enterprise after March of 1999.

Now, if I may - and I will return to the example given by my learned friend yesterday, Mr Staker, involving A, B and C. I

want to go further back than Mr Staker did and just involve A and B, first of all. This is directed to demonstrating that the joint criminal enterprise as found or as put forward by the Prosecution doesn't work in this case and hasn't been applied properly by the Trial Chamber in this case.

If A and B agree to a rob and bank and B agrees to be a look-out, the common purpose is the robbery of the bank, the agreement to commitment a crime. B may say to the trier of fact, "I'm not responsible. I was just driving the robber, A, away," but the Prosecution say, "No, B, you drove the robber away after agreeing to pursue the crime of robbery. Therefore, even though you did not enter the bank, you are responsible for what happened in the bank," B has contributed significantly to the furtherance of the crime, the common purpose, the robbery.

The Prosecution would plead that as A and B agreed to rob a bank. That's the purpose. But they could plead it in this way: A and B agreed to rob a bank to take the money. In that circumstance, robbing the bank would be the means; the overall objective would be taking the money. That doesn't make taking the money the common purpose, because A and B could have gone to the bank and withdrawn their money and taken the money away. That would be a non-criminal purpose. It's their money. The Prosecution do not set out to prove simply that A and B are taking the money. They set out to prove the crime of robbery in order to take the money.

In the AFRC appeal, your Honours decided, in our submission, precisely that. That the common purpose is the objective with the means. The means are the crimes as in robbing the bank; taking over the country is the taking of the money.

The purpose is, really, the robbery, or in this case, the crimes, not the taking over of the country.

A, B and C now. This is an example which Justice Cassese uses constantly to describe JC 1 and JC 3, and we'll come to that in a moment. It's in our response to the Prosecution appeal on ground 1. A and B sit down with C and agree to commit a robbery, to pursue a common purpose, the robbery. But A and B reach a separate agreement to also use guns to kill somebody in the bank. In that situation, there are possibly two - I beg your pardon, there were three JCEs. There were two potential JCE 1s. A and B and C agree to the rob the bank, that's one, JCE 1. A and B agree to kill, that's the second.

The third joint criminal enterprise is joint criminal enterprise 3 involving C. C agreed to rob the bank. He says, "I didn't agree to the killing." But the Prosecution say, "Well, you knew A and B were going to rob the bank, you agreed to that, and A and B, you also knew, had guns and, therefore, it was reasonably foreseeable from your agreement to rob the bank that, indeed, a killing would take place. You are, therefore, responsible under JCE 3 for the killing." In other words, joint criminal enterprise 3 is always contingent upon an original agreement to commit a crime.

I submit, your Honours will agree with this, that if A and B and C had met earlier on and talked about a robbery and C had said, "I want nothing to do with this. I'm going home," and he goes home, and A and B go to the bank and rob it, and during that robbery, somebody is killed, the police turn up later at C's house and they say to him, "You're responsible for the killing," and he then is tried and the trier of fact finds he, C, did not

agree to the robbery, of course, it must follow that C is not responsible for the killing pursuant to JCE 3 because he has never even agreed to the robbery. I'm not Gbao's counsel, but that's the Gbao situation.

That's what the Prosecution are attempting to do. They're attempting to stretch to unbelievable limits this JCE theory. What they're doing is effectively removing the substantive elements of the crimes because they're saying, under JCE 3, you can be responsible without agreeing a crime of robbery, in the A, B and C example. The reason that C would be responsible if he'd agreed the robbery would be because it was foreseeable from that agreement. In our submission, that's plain.

Joint criminal enterprise is, as your Honours know, nothing other than a way of inferring intention from a common purpose and holding an accused liable for crimes committed in pursuance of that purpose. It's as simple as that. The Prosecution don't have to prove with an overarching purpose each and every crime committed on the way because the intention is inferred from the common purpose and the pursuit of it and actions in pursuit of it. In other words, joint criminal enterprise is an agreement, first and foremost, to commit a crime. It is an action to further that in pursuance of that crime and JCE 3 is contingent upon that agreement.

The indictment, if I may invite your Honours to turn to it at paragraph 36. Paragraph 36 of the indictment says:

"The RUF, including Sesay, Kallon and Gbao, and the AFRC, including Brima, Kamara and Kanu, shared a common plan, purpose or design, joint criminal enterprise, which was to take any actions necessary to gain and exercise political power and

control over the territory of Sierra Leone, in particular diamond mining areas."

Paragraph 37, looking at the final sentence on that page:

"The crimes alleged in this indictment include unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures were either actions within the joint criminal enterprise or were a reasonable foreseeable consequence of the joint criminal enterprise."

In other words, it's for the trier of fact to make a decision when looking at the totality of the evidence what the nature of the agreement was in the first instance. Were the crimes within the agreement or did they perhaps arise as a foreseeable consequence of it? There is no other type of joint criminal enterprise in international criminal law.

I note as an aside at this point, more confusion in the Prosecution pleading because at that 37, your Honours will note, what they're alleging is that counts 3 to 5, counts 13, 10 to 11, 6 to 9 and 12 and 14 are within the joint criminal enterprise. What's missing from there are counts 1 and 2, terror and collective punishments. That might, in our submission, be hugely significant, because what we say was intended at one stage was that the crimes just listed were the means by which a campaign of terror or collective punishments was furthered. We've had a volte-face from the Prosecution, and I'll come back to that in a moment. So once the Trial Chamber in this case decided crimes 1 to 14 were within the joint criminal enterprise, they cannot then have also been reasonably foreseeable from it because the plurality agreed all the crimes.

Now, dealing with the pleading, what would be pled in the robbery example? You wouldn't plead the purpose was taking the money from the bank, and I've mentioned that. It's because it's a non-criminal purpose. Equivalent to taking power of Sierra Leone, it's non-criminal. It doesn't work in JCE theory. It's not useful to establish criminal liability, because I can pursue taking over the country for ever and a day and you will not be able to infer criminal intent without an agreement to commit crimes.

So what would be the purpose to be pled in the robbery example? It would be robbery. In A, B and C, the example there, the thing that unites them, the overarching agreement, is the robbery.

You could, of course, the second option, plead a joint criminal enterprise, as I've said, to kill. All of those who explicitly or implicitly agreed, the Prosecution could allege are guilty of that joint criminal enterprise in pursuit of a common purpose to kill.

Joint criminal enterprise 3 would arise and could be pled in relation to the first option, pleading of a robbery as a common purpose with the killing arising foreseeably as a joint criminal enterprise 3.

The fourth option, which is the option which the Prosecution now support to try to uphold the convictions, you could plead robbery and killing as the common purpose.

JUSTICE AYOOLA: Excuse me. Maybe you should clarify before you go further, it is good to use the term robbery, but what is robbery?

MR JORDASH: Robbery, where I come from, England, is the

taking of money with the use of force during or before to effect the taking of money.

JUSTICE AYOOLA: So it's not just taking of money, taking of money with the use of force?

MR JORDASH: Exactly.

JUSTICE AYOOLA: So it relates to actually taking of a country with the use of force, and in the use of such force, crimes such as these are contemplated?

MR JORDASH: Well, in this way, robbery, we would say, is the crimes in this indictment. And the taking of the money from the bank, although important when pled by a Prosecution, in terms of what the Prosecution must prove, robbery to take money, it doesn't make sense to simply prosecute the taking of money. And in this instance, the taking over the country doesn't make sense as a crime. What makes sense is, if there was the agreement to commit the crimes in order to do it. That's how we put our position. I don't know if that answers the question?

JUSTICE AYOOLA: Please go on.

MR JORDASH: Thank you.

JUSTICE WINTER: I would like just to give you an example concerning Cassese. Would it not be possible that you stretch a little bit Cassese's example into things Cassese didn't want to prove with his example? If you speak about robbery and robbery is by definition a crime that uses violence, and if you have in the example that two of the three have guns, it means that the implication that those guns can be used is foreseeable, no?

MR JORDASH: Indeed. Yes, your Honour.

JUSTICE WINTER: And in this regard, foreseeability would be - for foreseeability, the third one would be liable.

MR JORDASH: Yes.

JUSTICE WINTER: And this was not what Cassese wanted to prove with this example. Cassese wanted to prove that liability can be a means in JCE. That is what he wanted to prove, and not to say that there is another JCE, if the two of them said, "Okay, we are going to kill," because that is a consequence that has to be already known by the third one and he would be only not liable, according to the theory, if he withdrew. And in this example, withdrawal is never ever mentioned anywhere in any of the evidence, as far as I know.

MR JORDASH: Well, in order to withdraw, one has to agree in the first instance, and I go back to the Gbao example. Gbao cannot withdraw from something he's never agreed to join in the first place. Is that the point? Am I not addressing your point? May I seek clarification?

JUSTICE WINTER: No. The point is that we have, on the one hand side, in that example, and I stick to the example, we have three persons. Two persons agree not only to rob but also to kill. But was this foreseeable, yes or no, by the third person? If they have a gun, and if the third person knew that they have a gun, it was foreseeable, or not?

MR JORDASH: Yes.

JUSTICE WINTER: Okay.

MR JORDASH: If the gun was loaded, perhaps. But if it wasn't loaded, then --

JUSTICE WINTER: And this is the point.

MR JORDASH: If he didn't know --

JUSTICE WINTER: Yes. And this is the point you never addressed and nobody has until now. That is what I would like to

submit. Has it been foreseeable because the third person knew that there were guns, or were the guns hidden so that he couldn't know? I think that is a point that you should have addressed now.

MR JORDASH: I completely agree that if A and B set off with guns that C believed were not loaded, it would be difficult to prove his liability pursuant to JCE 3. In fact, it would probably be impossible to prove it.

JUSTICE WINTER: Okay. Thank you. Go on.

MR JORDASH: Yes. The fourth option of pleading, which is the one I suggested was being pushed forward by the Prosecution now, would be a pleading in the A, B and C example of both robbery and killing as the core agreement. In that instance, they would have to prove that A, B and C all agreed, shared the intention to commit both robbery and killing. That's significant for this indictment - well, it's significant for this trial judgment. It is significant because this is what the Prosecution now rests their case upon. If they say --

JUSTICE AYOOLA: Let's assume that A and B shared that intention, but C did not share that intention, but he foresaw - there was foreseeability - would you say he would not be culpable?

MR JORDASH: Well, if he didn't share the intention to rob the bank, he wouldn't be there. He would have gone home. There would be no evidence whatsoever of his participation in the core common purpose and therefore - he might have gone home and said, "I can foresee that someone is going to be killed, but I don't want anything to do with this," and therefore he would be, of course, not guilty even if he foresaw that a killing was going to

occur, because it's not just an agreement, it's action in furtherance of that agreement, and C has taken no action.

JUSTICE AYOOLA: Let's assume that he had no intention, he did not share the intention to kill, but he shared in the intention that violence may be offered and it so happened that the violence led to the killing. He foresaw it. He did not have that intention, but he foresaw that as one of the means contemplated. He did not want to be part of that, but, nevertheless, he foresaw it, and he did not actively withdraw. He continued to support the enterprise, as you describe it, by his conduct.

MR JORDASH: Potentially he would be liable under joint criminal enterprise 3, and that was, I think, Madam President's point, which is that if the violence agreed upon that C knew about was, for example, the use of fists, B produces a gun in the middle of the bank robbery, C, with horror, steps back, he cannot have reasonably foreseen the use of a gun because he had no idea A and B were carrying guns. He wouldn't be liable under JCE 3. He would be liable for a robbery involving the use of fist-type violence.

JUSTICE WINTER: Only under the condition, as I said before, that the gun was not visible. Usually guns are visible, no?

MR JORDASH: Indeed. It would be completely contingent on what C knew about the original agreement to commit the robbery.

JUSTICE AYOOLA: Suppose the plan had been discussed so there is no question of speculation about it. The plan had been discussed, but although he wanted to go along with the rest of the plan, he didn't have the intention that the plan should go to

the extent of killing people. But he foresaw that as part of the totality of the enterprise that was likely.

MR JORDASH: Then he's guilty under joint criminal enterprise 3 because he has committed himself, taking action in furtherance of the common purpose, the robbery, with the foreseeability that this contingent violence would arise. He is liable for joint criminal enterprise 1 and joint criminal enterprise 3.

JUSTICE WINTER: Please continue.

MR JORDASH: Thank you. So when the Trial Chamber find that the crimes were within the common purpose, what they're saying is, every member of the plurality agreed to each and every crime. Every member of the plurality intended it, intended each of the sub-crimes. Every member pursued a contribution to each crime and every member intended each crime.

As with the robbery and the killing, if they're pled within the agreement, the Prosecution have to prove a contribution to both. Here they have to do the same and the Trial Chamber had to find the same. Again, I repeat, there is no other type of joint criminal enterprise in international criminal law.

It's worthwhile - I hope your Honours don't mind if I mention the Taylor indictment, because the problem isn't, as your Honours have always recognised in the Taylor decision and in the AFRC decision, the problem per se isn't the indictment, although we allege material facts are absent, but the bald description of the joint criminal enterprise, there's nothing wrong with it. A campaign, as in the Taylor indictment, to terrorise, an overarching purpose. The crimes were committed, it is alleged, in pursuit of the overarching purpose. Nothing wrong with that.

That's the pleading which the Prosecution should have pled or should have pursued once having pled it, but they didn't.

They pursued all sorts of things, but what was found was not a joint criminal enterprise with the purpose of terrorising or collective punishing, but a purpose containing the sub-crimes. That's the problem with the Prosecution position.

It's not a problem, as your Honours have found with the AFRC indictment, it's not a problem with the Taylor indictment. It will be if the Trial Chamber ignores the campaign to terrorise and simply takes the crimes and says, "Everybody agreed to all of them," but we then have to prove a significant contribution to each of them. That's the joint criminal enterprise liability.

May I take your Honours to Tadic. I think it must have been a slip of Mr Taku's tongue yesterday because he'd suggested, I thought, that Tadic wasn't as I've just described it. It is. Tadic, the first finding of joint criminal enterprise in international law, has been followed rigorously ever since. It hasn't changed. It's still the same. A joint criminal enterprise - the Tadic case is behind you. I think your Legal Officer left it there. I'm not even sure I need you to turn it up, except to say that, as per every single joint criminal enterprise in international criminal law, there is an overarching joint common purpose. A criminal purpose.

With Tadic, it was a common criminal purpose to rid the Prijedor region of the non-Serb population by committing - in other words, by the means of committing inhumane acts. Your Honours will see and I will just refer to it very briefly to save time, but you will see from our reply to the Prosecution's appeal, we refer to Simic at paragraph 18, an overarching plan,

forcible takeover of the town of Bosanski Samac and the persecution of non-Serb civilians. So persecution to forcibly transfer. Forcible transfer being a crime under the Statute.

We refer to Krstic at paragraph 20, exactly the same. I won't waste time, but there isn't a joint criminal enterprise in international criminal law without an overarching common purpose. That's the point of it, that one holds an accused liable for the crimes committed in pursuit of it because one can infer an intent to commitment those crimes by the pursuit of the purpose which relies upon the commission of crimes along the way.

Joint criminal enterprise does not, as the Prosecution suggests, alleviate any responsibility to prove intent for the underlying crimes. Of course it doesn't. You can't hold the appellant Sesay responsible for all crimes in Freetown unless you can infer it from the pursuit of a criminal purpose. Or else, how can you, when he wasn't present - when he wasn't in Freetown, when he didn't take steps in furtherance of it, how do you infer intent to commit those towns of crimes unless he's pursuing a common criminal purpose which is meant to be effected by criminal means.

JUSTICE KING: Before you leave Tadic, can you look at paragraph 220 of Tadic and the penultimate sentence in that paragraph. How do you understand that sentence, starting with "What is required"?

MR JORDASH: "What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but, nevertheless, took that risk."

JUSTICE KING: How do you relate that to this case?

MR JORDASH: Let me just read the paragraph to make sure I have it right. It's joint criminal enterprise 3. It's when - if you go to the beginning of the paragraph, it deals with the first type of - it deals with all three categories in this paragraph. The first is the joint criminal enterprise found here, all crimes within the purpose as found by the Trial Chamber. Secondly, the systemic, the concentration camp type JCE, which we're not obviously dealing with. And then third, that - in fact, it's worth, I think, just reading it:

"With regard to the third category of cases, it is appropriate to apply the notion of common purpose only where the following requirements concerning mens rea are fulfilled. The intention to take part in a joint criminal enterprise and to further individually and jointly the criminal purposes of that enterprise and the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of common criminal purpose."

It's the classic definition of joint criminal enterprise 3.

Again, I won't read the section in our brief, but if one turns to our response at paragraph 42, we lay out at length Judge Cassese's description of the third category. Identical to ours; completely different to the one put forward yesterday by the Prosecution.

Now, if I may deal with a subsidiary point. One of the most powerful reasons why the joint criminal enterprise cannot be upheld - and it relates to the paragraph 1992. 1992, if your Honours recall, dealt with what we say is an error of law by the Trial Chamber in failing to analyse whether crimes by non-JCE members could be imputed to JCE members. We allege, but that

paragraph is clear evidence that the Trial Chamber failed to conduct the necessary analysis, an error of law. It's relevant to these submissions, of course, because what the Prosecution would have to do to get home on this JCE appeal is show that the errors we're alleging were not made, but they would also have to show that the crimes committed by non-JCE members had been analysed by the Trial Chamber to have been committed in response to being procured by JCE members. 1992 undermines that because it's clear the Trial Chamber never did it in relation to the crimes we were convicted of, but they also never did it in relation to the events or most of the events in Freetown and Bombali and Koinadugu.

But as significant is another paragraph. Could I ask your Honour said to turn up 2080. It's further evidence that the Trial Chamber also fell into error, as does the Prosecution, in putting forward this conflation of JCE 1 and JCE 3. What it says is this - it's dealing with the crimes of Rocky, Rambo and Savage and Staff Sergeant Alhaji. This is the Kono crime base. These perpetrators were by far the worst and infamous within Sierra Leone, and rightly so:

"The Chamber is not satisfied that between 14 February 1998 and the beginning of May 1998, CO Rocky, Rambo RUF, AFRC Commander Savage and his deputy Staff Sergeant Alhaji were members of the joint criminal enterprise. The Chamber, however, finds that they were directly subordinate to and used by members of the joint criminal enterprise to commit crimes."

This is the key sentence: "Used by members of the joint criminal enterprise to commit crimes that were either intended by the members to further the common design or which were a

reasonable foreseeable consequence of the common purpose."

In other words, the Trial Chamber has made no finding that is discernable from the Trial Chamber judgment that the crimes committed by these men were within the common purpose. What they say is, "We're satisfied some of them are and we're not satisfied others are," but fail to say which ones were which. Fatal, we say, to the joint criminal enterprise in the whole of the RUF territory. Fatal particularly to the crimes in Kono. But fatal when it comes to the Prosecution appeal, because if that is the Trial Chamber's approach - if that was the Trial Chamber's approach to the crimes and the crimes by the non-JCE members, they have failed to conduct the requisite analysis and they've failed to apply the requisite law.

Now, the Prosecution recognised this problem and they recognise it now, even though we won't hear them say it. And it's plain, we say, that they recognised the problem. In their appeal - and your Honours will recall that the appeals were filed on the same day - the Prosecution were effectively taking the common purpose as the taking over of the country and the crimes were to them the means. That's why we say, both the Trial Chamber took the common purpose as taking over the country, that was an error of law, and to be fair of the Trial Chamber, that's the Prosecution's fault because that's the case the Prosecution were putting. If one looks at the Prosecution appeal at 2.30, you will see the way they describe it. They say:

"Furthermore, it is manifestly evident from the Trial Chamber's findings that after the end of April 1998, the RUF continued to commit similar crimes to further that purpose, including by means of terrorising the civilian population."

What purpose were they referring to? The taking over of the country. Paragraph 2.31:

"Prosecution submits, it is similarly manifestly evident from the Trial Chamber's findings that at the end of April 1998, the AFRC continued to have the purpose of taking power and control over the territory of Sierra Leone."

2.32 is even more stark:

"Furthermore, it is similarly manifestly evident from the Trial Chamber's findings that after the end of April 1998, the AFRC continued to commit similar crimes to further that purpose, including by means of terrorising the civilian population."

Now, for fear of taking a cheap point, the Prosecution's answer to that will be, "Well, that's just a matter of the way we were expressing ourselves. We never lost sight of the fact that it was the crimes." But then why not at any stage in the appeal that we've heard today, in the submissions we've heard over the last few days, in none of the pleadings whatsoever have we had the Prosecution addressing what contribution is judged against. Because to them it was the purpose. They received our brief alleging that that was an error of law and they changed tack. They changed tack, then suggest, actually, the purpose is the crimes within - all of the crimes falling within the overall objective of taking over the country.

That's why, as I said yesterday, they continuously lapse into generalities when dealing with that point. Because, if I just illustrate that change of tack, in the reply, the Prosecution reply, once they'd received the appellant Sesay's brief alleging an error of law, suddenly it's, at paragraph 2.5:

"The accused must be found to have intended the criminal

means which together with the objective constitutes the JCE. However, the accused's own contribution need only be a contribution to the JCE and not necessarily a contribution to the criminal means."

What does it mean "a contribution to the JCE" if it's not in the jurisprudence? It's a contribution to a common purpose, a criminal common purpose. That's what we're looking for. And if the Trial Chamber didn't find it, if they didn't find a significant contribution to a criminal purpose, then what the Prosecution is asking you to do is create a new form of JCE, which is entirely, of course, within your Honours' discretion. Of course it is. And novelty is obviously no basis for not sometimes progressing the law, but it would, in our submission, trample over 15 years of work from the ICTY and ICTR, and it would be completely in the opposite direction that the JCE liability has been developed.

The ICTY and the ICTR have realised, after a period in the '90s, that this was getting out of control. The JCE was becoming too wide. It was making it too easy for the Prosecution to prove their case. It was removing the burden of proof. So one looks at the recent cases of Brdanin, Kvocka and so on, your Honours will see how they're applying it much more rigidly, because it's good for the Prosecution to know the case, it's good for the Prosecution to plead it, and it's good for criminal justice that it's applied strictly. What the Prosecution are asking you to do is fundamentally flawed, fundamentally unfair.

If I may go on to illustrate that further. If I can ask your Honours to turn to the Prosecution appeal at 2.513, which deals with the participation of Sesay. Now, as I said at the

beginning of this, we rely upon our submissions in the written pleadings to deal with the factual allegations - the allegations of factual errors the Prosecution say the Trial Chamber made.

What I want to focus on for a moment is what the Prosecution say is sufficient to find Mr Sesay responsible under the joint criminal enterprise liability for crimes after April 1998. They say, at 2.153, it's the global sentence which we've heard many times: "The position of power, authority and influence, roll, rank, close relationship and cooperation with Bockarie." But it doesn't tell you anything. That paragraph clearly doesn't give you concrete acts that Sesay takes. It's a summary and nothing more.

What they do in 2.154 to 2.161 is detail basically two contributions - two principal contributions to the thousands of crimes committed by the AFRC from April 1999, and it's two. 2.154 is enslavement in Kono and - sorry, the enslavement in Kono as charged in count 13 and, two, at paragraph 2.155, it's the substantial contribution to the use of persons under 15 to participate actively in hostilities.

So what they say is that, by finding that those crimes were properly found - and we obviously say they weren't - that you can infer intention from those two things for everything else post-April 1999. The arm chopping in Freetown. The rapes in Freetown. The horrible, horrible crimes, from the Prosecution's position, you can infer from enslavement in Kono and the use of child soldiers. It doesn't work because there is no overarching criminal purpose. What they would have to show is that the Trial Chamber made findings which show a significant contribution to a criminal purpose, which then means they can infer a criminal

intent for everything else.

It should be said at this stage as well that the Prosecution do not ask you to substitute the conviction for finding enslavement in Kono for a JCE finding. So they're asking you to, if you like, double count there. You can uphold a sentence of 50 years for enslavement and you can also find it as a significant contribution to the new joint criminal enterprise. The same with child soldiers, they're asking you to double count.

But, in any event, as going back to my initial example of robbery and killing, if you plead common purpose containing two crimes, you have to prove the intent in relation to both. You have to prove a significant contribution in relation to both. Here, this section on continued participation of Sesay, does not deal with crimes other than enslavement and child soldier use.

So we submit that even if your Honours were to find that there was concerted action of a plurality in pursuit of these crimes in the indictment, one couldn't find Mr Sesay responsible because the requisite findings have not been made by the Trial Chamber in relation to almost all of the sub-crimes.

If I may simply wrap up this section and turn to Mr Clark. That submission, the principal submission we've just made, must apply to the whole of the joint criminal enterprise liability found in this case. That's why we submit that Sesay's participation was erroneously found, because the Trial Chamber had a duty to go through the crimes and infer intent from participation in them. Not a single piece of evidence in this case of Mr Sesay endorsing or supporting, we say, amputations. Yet, I think a 50-year sentence for it. And so on. We could go through the crimes.

Contribution found does not enable an inference of criminal intent in relation to those crimes, and that's the Prosecution defect which is responsible for that, because they tried to ride two horses at the same time. They pled an indictment and declined to say what it meant, and what we are dealing with with the joint criminal enterprise now is the results of that failure, in our respectful submission.

Unless there are any questions, I will leave it to Mr Clark to deal with ground 3 of the Prosecution appeal.

JUSTICE WINTER: No questions. Thank you very much.

Mr Clark, please.

MR CLARK: Thank you, my Lords. If it's a convenient time to start, I'll begin straightaway. Thank you.

In addressing the Prosecution's appeal in relation to hostage taking, my submissions will relate to two confusions, two principal confusions, which we suggest explain the error in their appeal. The first of those, which is the first I'll address, is the distinction between a legal element of a crime and the evidence which goes to support it. The second confusion relates to the distinction, as I'll demonstrate, which is well established at international criminal law, as well as domestic law, between intention and purpose.

So to get to the first of those, may I refer you, first of all, to paragraph 240 of the trial judgment, which sets out clearly at the outset the Trial Chamber's conception of the law in relation to hostage taking:

"In addition to the chapeau requirements for establishing a war crime, the Chamber holds that the specific elements of the offence of hostage taking are as follows:

(i) the accused seized, detained or otherwise held hostage one or more persons;

(ii) the accused threatened to kill, injure or continue to detain such persons;

(iii) the accused intended to compel a state, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an implicit condition for the release of such persons."

Likewise at paragraph 241, I won't read it out, but it makes equally clear that those are the legal elements of the crime as far as the Trial Chamber sees it. Similarly thereafter at 242.

Now, the decision was made, it seems clear, from paragraphs 1964 and 1965 of the judgment, that the key factor in the Prosecution's reasoning was the lack of communication of a threat.

Now, having already established what their conception of the law is, that isn't affected by this, but, nevertheless, 1964 and 1965 and the surrounding paragraphs, address the evidence which, in the Trial Chamber's view, establish the fact that there should be an acquittal for this crime. So, clearly, they do rely on the fact that there was no communication of threat. And it's admitted that in the following paragraphs, it's somewhat unclear what their conception of the law should be if you take those paragraphs in isolation. But in line with the Bench's observations of international criminal law and those of the Prosecution, the idea here is to take the judgment as a whole, just as it is to take the case as a whole, and they return to what is the appropriate understanding of the law immediately

thereafter at 1969, which contains a purer statement of the law rather than an explanation of what evidence went to underpin their conclusions. And at paragraph 1969, which I will also leave to the Bench to read in light of the shortness of time, it's clear from that that there's no element of necessary communication of crime at all.

But the point is, and this is the important distinction, no hostage taking was found on these facts for the reason of lack of communication on these facts. As Dr Staker in his submissions highlighted, in almost all cases there will be communication. In the Prosecution's submissions to date and in Dr Staker's submissions that we heard, the one example of where that could possibly be otherwise is if the hostages escaped. Now, that didn't happen on these facts, and remember that this is an application of evidence for these facts.

In the Defence's submission, the only plausible interpretation of how it could be established that the purpose of the crime, which is set out in the legal requirements is achieved, is if that threat was communicated.

This leads me on to the references to domestic law and in that vein to the relationship between intention and purpose. Now, it's clear, as Dr Staker also highlighted, that most of the - in fact, the vast majority of the domestic law sources cited in the Prosecution's annex B do not refer to the need for communication. That's clear.

But they also, as he also recognised, do not - mostly, they do not refer to the hostage at all. In fact, as was set out in our response to the Prosecution appeal, there are three categories of laws to which the Prosecution refer. The first of

those are those which do refer to the detained person. The second, however, are those which explicitly refer to a third party, a government, et cetera, as is the case in relation to Canada, admittedly, and no others.

Now, the third category, and this is important, are those which refer to no audience for the threat stated at all. This is particularly important because it's this category of the law, this version of hostage taking, which is repeated in international criminal law, which is directly stated in the Blaskic trial judgment at paragraph 158 as mentioned at paragraph 154 of our response to the Prosecution.

Now, the language used in Blaskic, likewise in that wide range of domestic jurisdictions to which the Prosecution refer, is of a threat carried out in order to or so as to. The language of purpose. This is not the language of intention, otherwise the word "intention" would be used, as it frequently is, in the elements of crimes both throughout domestic law and international criminal law. The use of "in order to", "so as to", et cetera, purpose-type requirements, is clear in international criminal law, as is the distinction between purpose and intention.

Now, the law on joint criminal enterprise establishes that quite clearly. But without getting back into those murky waters, I'll make another reference to an analogy with domestic law in order to clear things up somewhat.

The case of Woollin in English criminal law establishes what intention really means. It establishes a difference between intention and purpose. It may well not be the purpose of somebody who kills to carry out a murder, but, nevertheless, they may be convicted of murder if they have foresight of a virtual

certainty.

If, for example, I'm in the Court, I decide that - I happen to own the building and I decide that I want to claim on the insurance, I'm also aware that the passes to the doors aren't working adequately, and I know that I can get out, I'm not really sure, I don't really care, if the rest of you can get out. But the point is, I can get out, and as a result of that, intention would be imputed to me for murder as a result not of the fact that my purpose is to kill, but as a result of the fact that my purpose is to claim on the insurance.

So what is the purpose then of the crime of hostage taking? Now, Dr Staker referred to the idea that it may be the value of protecting the hostages. This was without any authority. It was more a matter of deduction. But it's also clear on the face of the Hostage Convention, as it's clear in the jurisprudence that I've cited so far, the Hostage Convention again as cited at paragraph 155 of the Sesay response, that the purpose behind having a prohibition on hostage taking is nothing at its root to do with concerns of welfare over the victims. Yes, they gain protection as a result, but why not protect them through some other crime? The concern is to prevent third parties being used as a means of achieving a political objective, and for that reason, the threat, realistically, must be communicated, above all, to a government or to an international organisation, et cetera. We can see situations in which that threat may be implicit, but, nevertheless, that's the reason why the crime exists.

It's clear that the need for the threat, as much as the purpose is important, is also very clear in the domestic

jurisprudence. What's less clear is its audience, and for that reason, and that reason alone, on the specific facts of this case, the only way in which it could have been found in the Trial Chamber's view that the hostage taking was done in order to achieve the objective as set out in the legal element of the crime was if the communication of a threat occurred.

Thank you, my Lords.

JUSTICE WINTER: Okay. No questions. Thank you very much.

We have now reached our time. I had 12.30 and it's now 12.33. We have now to go to lunch, and we will come back at 1.30 from lunch to continue. Thank you very much.

[Lunch break taken at 12.33 p.m.]

[Upon resuming at 1.31 p.m.]

MR OGETTO: My Lords, good afternoon. We'll start our submissions by responding to Dr Staker's submissions in support of the Prosecution's ground of appeal on this.

I'm going to be very brief, my Lords, because a lot of submissions have been made in relation to the issues surrounding joint criminal enterprise, and it's not my intention to generate more heat.

I'll start by submitting that, once again, the Prosecution conflicts the activities of the RUF and those of the accused person. You look at the Prosecution appeal brief, there's a concentration of submissions largely on the activities of the RUF and the AFRC which are completely detached from the second appellant. The intention or the intent of the second appellant is not discussed and his practical assistance to the alleged joint criminal enterprise is not established beyond reasonable doubt.

In relation to the Prosecution's submission that the JCE extended beyond April 1998, the Defence submission is that that submission is misplaced. It has no basis on the trial record, no basis in relation to the findings of the Trial Chamber. It's our submission that the evidence at trial and the findings of the Trial Chamber clearly indicate that the accused Kallon lacked any intent to jointly act with the AFRC after April 1998, assuming there was any joint criminal enterprise even before that, and we have addressed these issues quite extensively both in our appeal and our response to the Prosecution appeal.

I want to point out to the Appeals Chamber a finding of the Trial Chamber that clearly indicates that after the retreat from Freetown to Kono, the accused Kallon cannot be said to have possessed a joint intent, together with the AFRC membership, to commit any crimes.

At paragraph 817 of the Trial Chamber judgment - and I read that, my Lords, with your permission:

"In April 1998, shortly after the junta forces were pushed out of Koidu Town, Gullit returned to Kono District and assumed command of the AFRC from Bazzy. The relationship between the AFRC and RUF in Kono District was fractious. Kallon had executed two AFRC fighters and attempted to prevent the AFRC from holding mass parades asserting that the AFRC had no right to assemble as the RUF was the only true fighting force in Kono. These tensions coincided with sustained military pressure from ECOMOG on the RUF and AFRC positions."

So, quite clearly, my Lords, we have very strong evidence here which negates any intent on the part of the appellants to jointly act with the AFRC. One may argue that this is one

incident, an isolated incident, but the fact of the matter is, there's no evidence on the record that after this incident, as found by the Chamber, Kallon at any time reconciled with any membership of the AFRC.

We submit that even assuming that there was JCE before this incident, this constitutes a withdrawal by the accused Kallon from any such joint criminal enterprise.

The second point that we address regards the fact that in the appeal, in relation to joint criminal enterprise, the Prosecution is basically challenging the factual findings of the Trial Chamber. And as your Lordships know, in order for a party to challenge the factual findings of the Trial Chamber, the burden of proof is fairly high. The party must establish that no reasonable trier of facts could reach the factual conclusions that are being challenged. It's our humble submission that the Prosecution in this case in their appeal has not been able to discharge this burden.

It's our further submission that the Prosecution adopts a selective and, with due respect to them, self-serving analysis of the Trial Chamber record and the evidence at trial in order to argue that there was an error of fact in the way the Chamber analysed its evidence. My Lords, we have dealt with this issue very extensively in our response to the Prosecution appeal at paragraphs 40 to 93 of our brief, and I don't want to go into details because of lack of time.

The other point that I wish to discuss very briefly relates to circumstantial evidence. As your Lordships know, circumstantial evidence is often used in international criminal proceedings, even in national proceedings, but the rule is that

in order for a Trial Chamber to rely on circumstantial evidence, the guilt of the accused person must be the only inference from that particular set of circumstantial evidence. And you will notice in the Prosecution appeal brief, and also in the submissions made this morning by my learned friend, Dr Staker, they rely on circumstantial evidence to conclude that this joint criminal enterprise went beyond April 1998.

Our submission is that that is not the only reasonable inference from the evidence on the record. Again, we have discussed that very extensively at paragraphs 40 to 93 of our response to the Prosecution brief. And in relation to that, which, of course, has been discussed quite extensively in international criminal trials, I would refer your Lordships to the Ntagerura judgment of the ICTR. It's an Appeals Chamber judgment of 7 July 2006, paragraph 399. We have quoted that particular judgment at footnote 85 of our brief.

Finally, my Lord, it's our submission that the Prosecution, in their appeal, have not demonstrated that the Trial Chamber erred and that it was not reasonable for the Trial Chamber to have come to the conclusion that the joint criminal enterprise ended in April of 1998.

Thank you very much.

JUSTICE WINTER: I do thank you.

Any questions? No? Then thank you very much.

I would like now to give the floor to Mr Taku.

MR TAKU: Thank you very much, my Lords. Before I submit on the Prosecution's head ground of appeal, I would just like to ask your Lordships to reflect on the divisibility of JCE that the Trial Chamber found and the Prosecutor has not appealed against

that. In other words, the Appeal Chamber has found that there were certain crimes that were committed only by the RUF and some by the AFRC, and to that extend there was divisibility of JCE and the Prosecutor has not appealed at that. You will look at it in due course.

In respect, my Lords, of the hostage taking, we submit, my Lords, this ground of appeal is without merit. And we submit so, my Lords, on the grounds that after considering the jurisprudence surrounding the crime of hostage taking, the Trial Chamber in this case concluded that the offence of hostage taking implies a threat to be communicated to a third party with intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the captives.

The appellant asserts, my Lords, that this conclusion is eminently reasonable and consistent with established jurisprudence that targets the particular nature of harm occasioned by the act of hostage taking and distinguishes it from the harm occasioned by other crimes of unlawful detention such as abduction. Indeed, the Chamber's enunciation of elements of the crime of hostage taking is consistent with the judgment of the Appeals Chamber for the International Criminal Tribunal for the former Yugoslavia in the Prosecutor v Vlasic, IT 95-14, appeals judgment, paragraphs 638 to 639, 29 July 2004.

In this case, the Appeals Chamber stated that:

"Additional element is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained."

Which must be a threat either to prolong the hostage's detention or to put him to death intended as a cohesive measure

to achieve the fulfillment of a condition. The Prosecutor v Vlasic, my Lords, paragraphs 638 to 639, 29 July 2004, this is the situation of the elements of the crime of hostage taking appears to be a reasonable determination of the actus reus of the crime of hostage taking as it includes certain defining acts, including the issuance of a threat to a third party that distinguishes it from other crimes associated with involuntary detention such as kidnapping or detention.

Moreover, the definition properly distinguishes the crime of hostage taking from the lawful detention of any of the combatants done pursuant to the Geneva Conventions. To further the logic of the Prosecutor this morning would be to make this crime a specific - no - would be to make this crime a crime of strict liability, the mere detention with intent becomes a crime of - almost a crime of strict liability. I don't think that is consistent with sound jurisprudence.

If I can find the Trial Chamber's iteration of the elements of the crime of hostage taking accepted by certain jurisprudence would also be consistent with the principle of specificity, which provides that:

"A. Criminal rules must detail specifically both the objective elements of the crime and the requisite mens rea with the aim of ensuring that all those who may fall under the prohibitions of the law know in advance precisely which behaviour is allowed and which conduct is proscribed;

B. Where two criminal provisions are violated by the same criminal conduct, only a conviction under the more specific provision should be upheld."

Prosecutor v Norman, decision of preliminary motion based

on lack of jurisdiction, paragraph 40, 8 May 2004. See also, my Lords, Prosecutor v Mucic, case number IT-96-21, appeal judgment 20 February 2001.

Accordingly, in this case the definition adopted by the Trial Chamber should be rectified because with each additional element it constitutes the more specific than the definition by the Prosecutor. Accordingly, the Appeals Chamber should rectify the definition reiterated by the Trial Chamber and affirm the appellant's acquittal under this charge.

Kordic and Cerkez, Trial Chamber, my Lord, the Chamber reviewed the crime of hostage taking along with the crime of taking civilians as hostages which it deemed to be identical. The Chamber noted the following. Hostages was defined in the hostages trial, Wilhelm List and others, as:

"Those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future conduct of the population of the community from which they are taken."

Paragraph 306, my Lords. The ICRC commentary to Article 75(2)(c) of the additional protocol 1 expanded the definition of hostages in the hostages case to include:

"Persons detained for the purpose of obtaining certain advantages."

See again Kordic and Cerkez, trial judgment, paragraph 306.

Article 12 of the International Convention Against the Taking of Hostages defines the crime in the following terms:

"Any persons who seizes or detains and presumes to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a state, an international

organisation, a natural or juridical person or a group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostages."

Kordic and Cerkez, Trial Chamber judgment, paragraph 306.

This crime is listed as well under grave breaches in Article 147 of the Geneva Convention number 4. The ICRC commentary thereto provides:

"The taking of hostages: Hostages might be considered as persons illegally deprived of their liberty, a crime which most penal codes take cognisance of and punish. However, there is an additional feature; that is, the threat either to prolong the hostage's detention or to put them to death, the taking of hostages to death shall be treated as a special offence. Certainly, the most serious crime would be to execute hostages, which, as we have seen, constitutes willful killing. However, the fact of taking hostages by it's arbitrary character, especially where accompanied by a threat of death, is in itself a very serious crime. It causes in the hostage and among his family the mortal anguish which nothing can testify."

Again, cited in Kordic and Cerkez, trial judgment, paragraph 311. The Chamber determined that:

"The crime of taking hostages, of civilians as hostages (and of taking hostages generally) constitutes unlawful deprivation of liberty, including the crime of unlawful confinement."

Kordic and Cerkez, paragraph 312:

"The additional element that must be proved to establish the crime of unlawful taking of civilian hostages is the issuance of a conditional threat in respect of the physical, mental

well-being of civilians who are unlawfully detained."

Kordic and Cerkez, trial judgment paragraph 318.

"The ICRC commentary identifies the additional element as a threat either to prolong the hostages' detention or to put him to death."

In the Chamber's view, such a threat must be intended as a cohesive measure to achieve the fulfillment of the condition. The Trial Chamber in the Vlasic case phrased it in these terms:

"The Prosecution must establish that at the time of the supposed detention the alleged senseless act was perpetrated in order to obtain a concession or gain an advantage."

Kordic, paragraph 318.

Additionally, and:

"Individual permits the offence of taking civilians as hostages when it proceeds to subject civilians who are unlawfully detained to inhumane treatment or death as a means of achieving the fulfillment of the condition."

Paragraph 314:

"Moreover, in the context of an international armed conflict, the elements of the offence of taking of hostages under Article 3 of the Statute are essentially the same as those of the offence of taking civilians as hostages as described by Article 2H."

Kordic 320.

My Lords, having said what I've said so far, I will address other issues which the Prosecutor raised because the Prosecutor ventured into the evidence in this case and the Prosecutor submitted - was relying essentially on the findings that were made in count 15 in the trial judgment, relying on those facts,

the findings of fact to support his appeal.

But, my Lords, we submit that the Trial Chamber found that the intention, the mens rea of count 15 is specific intent. That is, the judges' specific intent, and we submitted that there was no finding of this specific intent in the convictions in count 15. So the question now is, which intention is this - is the Prosecutor asking your Lordship to rely on when he says that it was committed with intent? Is it the intention that is required for count 15 on which he relies - the fact on which he relies and the finding on which he relies, or some other criminal intention or the ordinary criminal intention? He did not address you on this.

Now, with regards to the other issues of fact that he relied to, we, respectfully, my Lords, rely on our response brief to the Prosecutor's appeal. We dealt with these issues very comprehensively. We don't intend to repeat all of them, but some merit special attention.

In paragraphs 4.91 to 4.101 of the appeals brief - Prosecutor's appeal brief, he lists a catalogue of Article 6.1 findings against Mr Kallon under the heading "Responsibility of Kallon under 6.1". This brief of the Prosecutor was filed on 1 June 2009.

At paragraph 2.42 and 2.43 of the Prosecutor's response to the Kallon's appeal brief filed on 26 June 2009, he concedes to the Trial Chamber's finding that, consistent with the finding in paragraph 399, that the personal commission of Kallon was effectively three deaths. And the Prosecutor concedes further to the Trial Chamber's finding that the Trial Chamber undertook to make a cure, and there was a cure only in one respect: The

attack on Salahuedin who never testified.

But the point here, my Lords, is this: This, therefore, means that all the catalogues of 6.1 findings that the Prosecutor relies on in paragraph 4.92 to 4.101 were never found to be cured by the Trial Chamber and, therefore, to that extent, we submit, my Lords, that having not cured - the indictment not having been cured in respect of all those 6.1, special commission by Mr Kallon of the crimes, no valid conviction can lie from the findings in those regards.

I will venture to say, my Lords, that you also consider this fact because the Trial Chamber found that under custom of international law, joint criminal enterprise is a form of 6.1 liability, and in particular the first category. So if the personal commission of Mr Kallon, the pleading was found to be defective and there was no cure but for one instance, it means that all other convictions must be set aside, and the Prosecutor will be in error to ask your Lordships to rely on those convictions - the findings on those convictions in order to overturn the acquittal of Mr Kallon in count 18.

Now, my Lords, with regard to the 6.3 liability that he refers to in support, the findings, your Lordships would be surprised to find that, on the basis of the same facts and the same findings, the Trial Chamber found that in those cases of personal commission that were referred to, Kallon personally committed them. But in respect of 6.3, your Lordships will be referred to the findings in paragraph 2290 that the Trial Chamber found that he did not personally participate. He merely had knowledge, in particular the crimes committed in Makeni and Magburaka on 1 and 2 May. So I don't know how your Lordships

will resolve the internal inconsistencies here with findings of fact.

Now, my Lords, there is an issue that I will take this approach because the Prosecutor talks about that, he talks specifically about the abduction of Maroa. I do not intend to get into any controversy whatsoever. It has not been my style for this, over 25 years of practice and over 10 years at the ICTR. I will not go into any controversy, but I will invite your Lordships to read the transcripts.

We stated in our response brief that we ask your Lordships to read the transcript of DHU-111. It is at number 13 of the folder that we handed over to you today. You read the entire transcript of that witness, and this will be in relation to Maroa, and you will find that DHU-111, who was a witness for the third accused, and, remember, it is on his evidence that the Trial Chamber in paragraph 609, one of the witnesses repudiated the testimony of Mr Kallon and made the finding of guilt in count 15 was that they believed this witness.

Apart from the objection we raised about him giving incriminatory evidence against Mr Kallon, and apart from the findings of the Trial Chamber as well, we will respectfully ask you to read the entirety of this transcript, because it talks about a man Kailondo.

He says, when Kailondo came, he abducted the Kenyans, and these Kenyans were, of course, the Kenyans. In other words, he doesn't talk specifically about Mr Kallon. He was one of the participants in the crimes in Makump camp, because he ferried the combatants to and fro. He was the one who went and invited Kailondo to come, and Kailondo came with about 60 to 70 other

combatants in addition to the other combatants who were on the spot.

When you read that in that regard about the abduction in Maroa, what would immediately alert your mind would be that Maroa would never have been anywhere to see Kallon abducting any other the person, let alone Jaganathan to identify Kallon as the one who abducted Jaganathan because he had been intercepted by Kailondo and his men.

And it strikes me that neither the Prosecution nor any other person, not even the Trial Chamber, is talking about the central role of Kailondo, even though in paragraph 609, one of the reasons they repudiated the testimony of Kallon was that the Trial Chamber did not believe Kallon when he said he was unable to arrest Kailondo for perpetrating crimes under the order of Foday Sankoh. That said, my Lords, I won't go further on this point.

I will ask you to look at the pleadings on this particular Makump camp, what took place at Makump camp. When you look at the pleadings, in particular, paragraph 571 of the supplemental pre-trial brief, you'll find, my Lord, very, very clearly that it's stated therein that the third accused led the attacks on Makump camp, not Kallon. You'll find that very clearly.

And if there was no pleading with specific reference to Makump camp with regard to Kallon, how can it be that he was found guilty? He had no notice. And this compounds the fact that it was also found that his personal commission of those crimes was never pleaded.

So, my Lords, I would very respectfully ask your Lordships to read this transcript. In our response brief, we make that

request and we will make the copies available. You'll find that in the folder we put in the table of contents. We've referred to several pieces of evidence. That's exhibit 339, the exculpatory evidence from the trial which we tendered, because we raised the questions of identification which we complained were never dealt with, were simply ignored or disregarded. That exhibit clearly states that there were at least two other Morris Kallons in the RUF. And we raise this, as you'll know that in Kupreskic, questions of identification are serious issues, and the standard set by the Trial Chamber itself for dealing with identification, they never followed in order to resolve this issue.

The Prosecutor also alleged that Kallon opposed disarmament. We submit on this very, very comprehensively because we've got three reasons. In March, I think exhibit 33, number 10, Colonel Puresh, who was the commander of the MILOBS in Makeni, contacted Kallon about establishing the camps in some locations in Makeni and elsewhere. Kallon talked to Mr Foday Sankoh through Mr Issa Sesay. He asked for a further reply. In fact, the conclusion, "Please, sir, I await your further reply." There was no act of opposition to the disarmament.

Again, you will also find that - we're still in our brief - Brigadier Ngondi stated that the house in which the camp was situated was Kallon's personal property. That's what Colonel Ngondi said. How would Kallon lead, in the light of that evidence, an attack to destroy his own property? So Kallon had an interest to secure the disarmament because UNAMSIL were his tenant according to his testimony of Brigadier Ngondi, which we stated.

And, also, the letter of threat from Foday Sankoh to Kallon. "Kallon, please do not be fooled. There will be no disarmament. Do not be fooled. Now, if anything happens, I will hold you personally responsible." Now, this can only be from someone who perceived or had information Kallon was cooperating with the disarmament. It is not evidence of opposition of Kallon to the disarmament process, my Lords. So, my Lords, the cooperation of Kallon with the disarmament demonstrates that the mens rea has not been proved.

And, finally, my Lords, on the question of JCE, we would refer your Lordships - we dealt with that comprehensively at ground 2 of our appeal and we would ask your Lordships to read that.

I thank you very much, my Lords. If there are any questions, I'm prepared to answer right now.

JUSTICE WINTER: Thank you very much.

Any questions?

JUSTICE KAMANDA: Just on a point of clarification. You commenced to address by reference to the divisibility of JCE. I want you to come back to that point and make it clearer.

MR TAKU: Yes, my Lord. It's actually a finding by the Trial Chamber which my colleague will get the paragraph right away. They started their finding by saying that there was a divisibility of JCE and that they recognised that certain crimes were committed only by RUF without participation of AFRC, and other crimes were committed by AFRC without participation of the RUF, and that they were not going to make any findings in the JCE in that respect.

In fact, if the Prosecutor's appeal were to make sense,

they would have started from there because there is clear evidence that at some point in time they went their respective ways. One of the reasons being the finding that Kallon executed two members of the AFRC and so he didn't want them to hold muster parades. And, my Lords, it defeats commonsense to say that if one of the reasons that exacerbated the suppression was Kallon's conduct, that Kallon was a member JCE with people who from that moment were his enemies and they felt so serious about that to the extent that they moved to Koinadugu and went over to Bombali.

You'll also see the statement of agreed facts between Kallon and the Prosecutor. It was tendered as an exhibit in this case. In this statement of agreed facts, the Prosecutor agreed that Kallon was never in Koinadugu or Bombali. He did not control any person there. He had no control over whatever troops were going there. In fact, let me refer your Lordships with regard to this statement of agreed facts, my Lords.

So, in this case, it is the Trial Chamber that made this finding of divisibility of JCE. So we're saying that, having regard to those findings, which have not been challenged by the Prosecutor, that certain crimes were capable of being committed - or were committed or perpetrated only by the RUF or by the AFRC, they cannot find the RUF liable for crimes committed by the AFRC.

For example, the crimes committed in Freetown, the expert witness who testified here on forced marriage and who was in Freetown and who led the demonstration and who was - testified that the RUF did not take part or did not participate in the crimes in Freetown. And several Prosecution witnesses gave this evidence. Junior Lion, for example, gave this evidence. That was the Prosecutor - exactly by the Prosecutor himself.

Exhibit 7 is the list of junior commanders - senior and junior commanders that took part in that time at Freetown that moved through Koinadugu, Bombali to Freetown. Kallon is not one of them, my Lords, on that list tendered by the Prosecution.

Exhibit 9 [indiscernible] the Prosecutor about the command structure of the AFRC and RUF in Kono. Kallon is not one of them. Mr Kallon was relegated to Sewafe Bridge to lay obstacles. So I would ask your Lordships to look at this exhibit very, very closely, my Lords.

JUSTICE KING: Where is the reference?

JUSTICE WINTER: Did you hear the question?

MR TAKU: Yes, my Lords. I am trying to get the reference.

Paragraph 353:

"The Chamber considered that the identity of all participants and continuing existence of the joint criminal enterprise over the entire time period of this indictment are not elements of the actus reus of the joint criminal enterprise that needs to be proven beyond reasonable doubt by the Prosecution; therefore, they are not material facts upon which the conviction of the accused rests."

The title, my Lords, is the "Divisibility of a Joint Criminal Enterprise".

Now, paragraph 354, you will see the last two paragraphs towards the end:

"In the Chamber's considered opinion then, a joint criminal enterprise divisible as to the participant's time and location. It is also divisible as to the crimes charged had been within or the foreseeable consequence for the purpose of the joint criminal enterprise."

Thereafter, the Chamber went ahead to state that in this regard they will not consider crimes committed solely by the RUF as within the JCE or those committed solely by the AFRC within the JCE.

Thank you, my Lords.

JUSTICE WINTER: Any other questions? Thank you very much.

I would then call on the Defence for Gbao for one hour.

MR TAKU: My Lords, I'm sorry, look at paragraph 368, in particular, with regard to divisibility of JCE.

MR CAMMEGH: May it please the learned members of the Court, I want to try to respond to the three grounds of appeal raised by the Prosecution as they relate to Mr Gbao this afternoon. It may be that I don't have time to get to ground 1, but I do intend to open with our response to ground 2 and then move on to ground 3.

The second ground of the Prosecution's appeal in respect to Gbao is that the Trial Chamber erred in law or fact in finding that Gbao was not individually criminally responsible for the conscription of child soldiers.

The submission is detailed and I hope not to labour the Court too much, but I'm afraid it does involve a trawl through several issues and arguments. I will deal with them as painlessly as I can.

To open the argument, we respectfully adopt two positions taken by the Trial Chamber. I will deal with them in due course, but they are significant to us. As I say, we do adopt them.

The first one is that apart from one instance when Gbao was found to have loaded former child soldiers on to trucks, there was, and I quote at paragraph 2235:

"No other evidence that Gbao participated in the design of these crimes."

The Trial Chamber also stated at 2237, and we adopt the following:

"The Prosecution has failed to establish that Gbao was in a superior/subordinate relationship with the perpetrators of these crimes, and therefore Gbao is not liable under Article 6.3 for the conscription of persons under the age of 15 into the RUF or the use of children under the age of 15 by the RUF to actively participate in hostilities."

The Prosecution raise three points. My learned friend this morning for the Prosecution concentrated on Gbao's alleged membership of the joint criminal enterprise in order to support their ground of appeal. They also made reference to arguments in relation to suggesting the Trial Chamber erred in finding that Gbao did not plan conscription or, alternatively, did not aid and abet it. I would like to deal with those two points in some detail first, if I may.

The Prosecution, in respect to planning, claim in their appeal the following: That the only reasonable conclusion open to any reasonable trier of fact is that Gbao is criminally responsible for his participation in the planning of the conscription system found to have been put in place in Kailahun District from 1996 to December 1998. They claim in particular, first of all, that the Trial Chamber failed to consider Gbao's role or conduct in planning forced labour in Kailahun District.

It's well-known, of course, that it has been found that Gbao planned a system of enslavement in Kailahun District. What my learned friend did not do this morning, however, was point out

that in relation to forced military training, which was a subheading under the generic heading of enslavement, no findings were made by the Trial Chamber. Of course, it's inherent within the definition of forced military training, we say, that that would involve military recruitment and, in particular, recruitment of alleged child soldiers.

Nevertheless, the Prosecution appear to have relied on the generic finding of enslavement, whilst ignoring that in fact the only finding made within that was that Gbao was planning forced farming. They appear to be, we say, wrongly relying on the finding of forced farming in order to suggest that there should equally be a finding of conscription of child soldiers.

I repeat the point: There was no finding in relation to forced military training under count 30, enslavement; therefore, that is not a connection or an argument the Prosecution are entitled to make.

The Prosecution also argue that the Trial Chamber erred by failing to find that by virtue of Gbao's position of authority in Kailahun District, he contributed to the commission of count 12.

In support of that argument, as was done today, they refer to a finding of - I'm sorry, I must be careful with my language. They refer to evidence of screening of civilians in Kailahun District by the G5 in Gbao's presence.

It is critically important, before I continue, to point out that the witness - the only witness - who testified to that was TF1-141. It is critical to make clear that that witness's testimony was not relied on by the Trial Chamber in its judgment against Gbao on count 12; in other words, whatever he said in relation to screening was not adopted by the Trial Chamber.

That, nevertheless, is a bridge that the Prosecution wish to use in order to lay the connection between Gbao's presence at screening to Gbao's work in the conscription of child soldiers. It is a link which the Prosecution are again, we say, not entitled to make.

We say if one wants to discuss this issue further, that first of all Gbao's presence at what amounted to the witnessing of one purported screening by the G5s cannot amount to planning. It should be said also that what the screening was lacked definition. It was unclear as to who were being screened, why they were being screened, et cetera.

The second point I would like to make in relation to the supposed screening, a fact that wasn't found by the Trial Chamber, was that TF1-141 was nevertheless found not to be wholly honest. The Trial Chamber stated in their judgment that he was found to have testified both fancifully and implausibly at times to the extent that he was required to be corroborated as to acts and conduct of the accused. He wasn't corroborated on the issue of screening.

Thirdly, and perhaps most powerfully while we're on this particular topic, at paragraph 2034 the Trial Chamber was definitive that Gbao was found conclusively to have no effective control over any security units, including the G5, and we would say that it's implicit in that that he could not have had any control over the perpetrators of count 12.

My learned friend listed wholesale a series of items this morning indicating areas of influence that Gbao might have had. I will deal with those in due course, but we say definitively that the Chamber was always clear that Gbao didn't have effective

command and control.

On the subject of military training - on the subject of Gbao's role, the Prosecution also had this to say in that ground. I think I've just covered this, in fact. They linked Gbao to forced military training by virtue of his role and position in Kailahun District. They suggest, as was done this morning, that he had a supervisory role over the security units. They suggested he had a role in relation to RUF discipline, as was put this morning.

I would like to mention five points.

First of all, the judgment repeatedly referred to Gbao's lack of respect from within the ranks of both senior and junior commanders within the RUF. His ability to exercise power in areas where Sam Bockarie was present in Kailahun was doubtful. No role in military action was found; no attendance at meetings; no ordering, planning; never at the front lines; was not superior, even in his guise as overall IDU commander, to any military officers.

It's very important to bear those items in mind and those findings in mind when set against what was argued this morning.

It was found - and this is my second point - specifically that Gbao had no control over the G5 or any of the security units. He had no superior/subordinate relationship with the perpetrators of count 12 crimes: No power formally to issue orders - or informally - to the overall G5 commanders or G5 staff; no power to initiate investigations against G5 in his guise as overall security commander, and I quote at paragraph 664 this wholesale finding: "All RUF members" - and I emphasise the word "members" - "within an area fell under the authority of the

local area commander", not somebody in a security unit like that.

While I'm on the topic of G5, I would like to mention something else which has significant import, I would suggest. At paragraph 675 the Trial Chamber found, and I quote:

"G1 was in charge of recruitment and training of fighters. It was not until sometime in 1999 that the G5 became in charge of recruitment."

There again there is no evidence of Gbao's involvement with G1. I mention that because, of course, the Prosecution's case has always been that when it comes to screening and military recruitment, in particular recruitment of alleged child soldiers, it was the G5 who were in the position of influence.

The third point I would like to make - and I apologise that this may sound exhaustive, but it's very important to counter the persuasive - or apparently persuasive arguments that were put forward this morning in relation to Gbao's alleged supervisory roles. My point is to demonstrate that the term "supervisory role" had de facto no teeth whatsoever and when one looks at the judgment, as I'm sure the Appeal Chamber has, I'm sure that is not a controversial comment.

So my third point is this: That Gbao did not receive copies of reports from security units. The Prosecution cite the Trial Chamber that Gbao:

"...received a copy of all the reports sent by the security units, even if there was no obligation to report to him."

But they quoted that in their appeal brief, we suggest, out of context, because the Trial Chamber equally found that Gbao received - and this is extremely important, particularly when we touch on the issue of JCE - Gbao received no reports from Bo,

Kenema, and Kono security units at any time during the operative period of the indictment.

There were no findings specifically that Gbao received G5 reports within Kailahun District itself. There was no evidence that he received any reports from anywhere at any time in relation to the conscription of child soldiers, but even - even - if there were - which there weren't - but even if there were such findings, then we remind the Appeal Chamber that Gbao was held definitively to have no control over G5. So as I just said, all the security units, including the G1, and the operational commanders of security units reported to the high command; never to Mr Gbao.

The fourth point to address this issue is this: That the Trial Chamber did not find that Gbao worked closely with the G5 pursuant to the conscription. I think the Prosecution would like to suggest otherwise. In support of that averment I say this - and I cite the actual finding on the point - which is that Gbao also worked closely with the G5 in Kailahun Town to manage not the conscription, but, I quote, "The large scale forced civilian farming that existed in Kailahun."

That, of course, we dispute, as I hope ground 13 of our appeal has made clear. The point there, of course, is that there were no findings to the extent that Gbao worked closely with the G5 in relation to child conscription.

The fifth and final point in response to the allegation that Gbao planned the conscription is this. That in addition, we say that it's illustrative that Gbao's role in enforcing discipline was in fact contrary to what has been suggested by the Prosecution; was, in fact, found to be strictly limited. He

couldn't initiate investigations. That's a finding. The IDU commander was found only to be able to start one upon the orders of either the battlefield or the battle group commanders or area commanders lower down the command chain.

As overall security commander, he couldn't even invoke the inception of a joint security board of investigation. It was the high command only that could set that in train. Most investigations at local level were found to be without any input from Mr Gbao. He had no independent right to take any disciplinary action against any fighter or even any member of any of the administrative security units. He could only recommend punishments; he could not enforce them or order them. Indeed, he was never in a position to issue orders to fighters or members of the security units.

These are all definitive findings, and I cite them laboriously in order to counter the suggestion this morning that he had some type of generic supervisory power over anybody within the RUF.

The second limb of the Prosecution's appeal in relation to count 12 in the alternative is that Gbao aided and abetted conscription. First of all I want to deal with Kailahun District, because it was suggested that Gbao's conduct in Kailahun District amounted to aiding and abetting all crimes within count 12, whether found to have been committed within or without Kailahun District itself.

The prosecution posits this claim on the basis of Gbao's perceived position and authority by which an inference should be drawn, they say, that he must have aided and abetted these crimes by virtue of his physical presence in Kailahun District.

Presumably, they rely inferentially on the evidence of TF1-141 of that. As I've already said, that is not permissible. They say that his noninterference or his acquiescence, perhaps, could have amounted to tacit approval.

Well, when the Prosecution state that the superior position and authority in Kailahun District of Gbao cannot be disputed, we actually suggest it is a very controversial matter to suggest. He had no authority, as I've been at pains to point out, and therefore their argument must fail on the basis of position and authority.

That's Kailahun.

In Bombali District the Trial Chamber found one finding: That Mr Gbao loaded supposed former child soldiers on to a truck at the ICC premises. From that, the Prosecution suggest, Gbao must have clearly facilitated and assisted in the commission of the crime of the use of child soldiers. We say that a close inspection of the facts and the findings reveal that such a suggestion can only be a factual impossibility.

I'll deal with those facts in a moment and deal with them very briefly, but in any event the Prosecution's suggestion and use of that example of loading children on to a truck is not assisted by a further Trial Chamber finding, which reads as follows:

"This finding alone was insufficient to constitute a substantial contribution to the widespread system of child conscription or the consistent pattern of using children to actively participate in hostilities."

Nevertheless, the Prosecution in their appeal brief suggests that the only reasonable conclusion was that the

children that Gbao had taken from the ICC in Makeni were subsequently used in combat for the RUF.

We suggest - and now I'm going to turn to the factual impossibility - that that suggestion cannot be made out and would not provide a suitable basis on which the Appeal Chamber could overturn the conviction.

The reason is this, that the evidence in the case - and I believe the findings were consonant with it - was that the fighting between the RUF and UNAMSIL on the Makeni to Lunsar Road took place on 3 May 2000. The next day, 4 May, fighting broke out in Lunsar. This is very important.

The Prosecution suggest that that fighting on the 3rd and on the 5th must have included those alleged former child combatants who had been allegedly loaded by Gbao on to the back of a truck at the ICC in Makeni. For that reason, the Prosecution claim that the Appeal Chamber should approach the question of whether or not Gbao aided and abetted the conscription of those children.

We say that factually it is an impossible conclusion to draw in any event, because according to the witness TF1-174, until 6 May - that's two days after the fighting in Lunsar - all 320 children were still at the ICC and that he only noticed some had gone missing on his return on 14 May. Of course, the Appeal Chamber may well retort: Well, what about 174's claim that they were put on to the back of the trucks?

We would respond to that in this way. In examination-in-chief, 174 said that he had discovered that children had gone missing only on his return on the 14th. It wasn't until he was cross-examined when he appeared to change

tack and say that he was there when Gbao did this thing. The two, of course, are mutually and fundamentally inconsistent and, we suggest, cannot be relied upon to support any type of finding. In any event, I remind the Appeal Chamber of what the Trial Chamber said in relation to it being insufficient on its own to constitute a substantial contribution to the widespread system of child conscription.

So for those reasons we suggest that the claim on the basis of aiding and abetting must fail. And as a side issue, I should remind the Appeal Chamber that Gbao was accosted by senior military members of the RUF in relation to his facilitation of the re-opening of the ICC in - I think it was March of 2000. He signed a paper unbeknownst to the military command to the RUF in Makeni at the time and was - I think the word was "molested" for it later on.

I think it was the evidence of Colonel Ngondi that tends to suggest or emphasise Mr Gbao's desire to rehabilitate children at that time rather than press them into battle. We say that's a side issue that probably is illustrative of the objections that I have to the Prosecution's appeal on that basis.

I don't wish to spend much time on this, because it's been discussed at length already elsewhere, but the third basis of the Prosecution's appeal was that Gbao was involved in the commission of count 12 as a member of the joint criminal enterprise between May '97 and April '98. Their arguments in fact mirror those that they posit in relation to Gbao's alleged planning of the commission of count 12.

I'll deal with this briefly. First of all, or we suggest that Gbao in any event did not significantly contribute to the

joint criminal enterprise as a whole. We've explained that in our ground 8 and its 19 sub-grounds. As such, he was not a joint criminal enterprise member and therefore could not have made a significant contribution.

Secondly, we have argued elsewhere that Gbao didn't share the intent. The Prosecution suggest that Gbao's intent can be made out because of his physical presence in Kailahun Town, presumably during the screening, his position of power and authority, supervisory role over the security units, and that by virtue of his finding of guilt or intent on enslavement, he must have had the same intent in relation to count 12.

I've already made the very important point that when it comes to count 13, enslavement, Gbao's culpability fell under the heading of his role in forced farming. There were no findings at all in relation to forced military training, and therefore it is wrong for the Prosecution to rely on a finding in relation to farming to promote culpability in relation to the intent of conscription of children.

We rely on a wealth of findings in relation to Gbao's lack of command and control and notably the definitive quotation at paragraph 2237, which the Chamber wrote in respect to the supervisory point:

"The Prosecution has failed to establish that Gbao was in a superior/subordinate relationship with the perpetrators of count 12."

That, of course, is of enormous importance and, we say, by itself destroys any suggestion to the contrary.

I hope that deals with count 12. I'll now move on to the third ground of the appeal. This is in relation to the Trial

Chamber's findings with regard to count 18.

I appreciate again this is laborious, but there are four findings which we say are proper, and we wish to adopt them. I will read them out at length, I'm afraid, but it may perhaps, on reflection, be necessary to do that. The first one is this:

"The offence of hostage taking requires a threat to be communicated to a third party with the intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the captives."

That's paragraph 1964.

JUSTICE WINTER: Could you please cite it again.

MR CAMMEGH: Paragraph 1964, I believe.

I refer the Chamber to our response to the third ground of appeal, because I'm afraid to hand I don't have the paragraph numbers for the next three, although my learned co-counsel may be able to assist. I'll continue reading in the meantime.

The second finding that we endorse and rely on is:

"There is no evidence that the RUF stated to the government of Sierra Leone, the United Nations, or any other organisation, individual, or group of individuals, that the safety or release of the peacekeepers was contingent on a particular action or abstention."

That is 1965.

Thirdly:

"The RUF did not abduct the peacekeepers in order to utilise their detention as leverage for Sankoh's release, as the peacekeepers were already being detained at the time of his arrest."

That is 1966. At 1969, finally:

"The Prosecution failed to prove what the Trial Chamber considered to be an essential element of the crime of hostage taking; namely, the use of a threat against the detainees so as to obtain a concession or gain an advantage."

We respectfully adopt those findings, if nothing else on the basis of sound commonsense and chronological plausibility.

The Prosecution appear to put forward four separate lines of appeal. They suggest that the communication of a threat to a third party is not a necessary legal prerequisite. Secondly, they suggest that it's wrong to find that there was no evidence that the detentions were intended to compel the Sierra Leonean government to stop the disarmament process. Thirdly, they suggest that it's wrong to find that the RUF didn't abduct the peacekeepers to utilise the detention of Foday Sankoh, who, it must be pointed out, was arrested five days after the first abductions on 5 May.

The fact that Sankoh was arrested after the first abductions, not at the same time or before them, was, say the Prosecution, irrelevant.

Fourthly, what appears to be an argument in the alternative. They state that Gbao was aware of the intention of the RUF to capture UNAMSIL personnel with the intent to compel a third party to act, and thereby responsibility under 6.1 for aiding and abetting the taking of the hostages is invoked, specifically, in Gbao's case, with reference to Jaganathan and Salahuedin on 5 May, of course.

By way of preliminary comment we say this: That the Prosecution appear to continue to use questionable findings. I don't want to revisit the abuse argument or the contents of it,

but by virtue of paragraph 4.111 the Prosecution say:

"It was further found that Gbao later escorted the peacekeepers arriving in a Land Rover to Makeni. He took three rifles out of the boot of his car. Maroa was bleeding from the mouth, and the three other peacekeepers were limping."

We say that this is an inappropriate argument, given the content of that man's statement, which we discussed earlier in these proceedings, and I'll say no more about it.

Secondly, we would say that Gbao cannot possibly plausibly, logically, rationally, be found responsible for the abduction and hostage taking in relation to count 18 of the peacekeeper Salahuedin. That's for the simple reason that he was not abducted. He was, and was found to have been, assaulted by Mr Kallon or his agents within the camp. It was never suggested during the trial that he was abducted, and he wasn't abducted.

The Prosecution, we suggest, are wrong to suggest that the Trial Chamber erred in law. They say that the question for the Chamber should not be the issue of communication to a third party, but rather the question of the overall intent to hold a UN hostage.

We say that the inclusion of a quotation from the Lambert commentary elsewhere in their appeal pleadings is therefore rather contradictory, because the Prosecution cite the following: "The compulsion must be directed towards a third party."

It would seem that that quotation entirely supports the Trial Chamber's findings that a third party ought to be approached and runs contrary to the Prosecution's earlier averment that the question is not whether a communication to a third party was made; it is the overall intent.

It might not be a definitive point, but we say it's an important one nevertheless in relation to that question of communication to a third party and the issue of how committed the Prosecution is to that issue is questionable, given the inclusion of the quote that I just gave you.

We suggest also, having thereby put that the Prosecution are probably wrong to suggest that the Trial Chamber erred in law - we suggest equally that they are wrong to suggest that the Chamber erred in fact. They are asking the Appeals Chamber, it would seem, to reverse two Trial Chamber findings: First of all, that the detention was not done to compel the Sierra Leonean government to do something or to stop the disarmament proceedings; secondly, it appears that they seek to reverse a finding that the abduction was not done in relation to leverage in relation to Foday Sankoh to encourage his release.

I'm reminding the Court, of course, he wasn't arrested until 6 May.

In relation to the first argument by the Prosecution to encourage the Appeal Chamber to reverse Trial Chamber findings that detention was not done to compel the Sierra Leone government to do anything and was not done to stop disarmament, we say this. First of all, I hope that the pleadings and the argument within our ground 16 sufficiently demonstrates that Gbao cannot have possessed the actus reus to have committed this offence.

Secondly, we suggest also that the Prosecution have failed to sufficiently demonstrate how Gbao could have had the necessary mens rea for count 18. Why is that? In order to show mens rea for the commission of hostage taking, the Prosecution gave a list of factual findings - and our response to those are individually

categorised in paragraph 167 of our response - from which they suggested that the trier of fact either could infer or observe a strong indication or may observe matters that may give rise to an inference.

The Prosecution, we assume, is aware of the very high standard required to reverse factual findings on appeal. It is far higher than a simple request or requirement to find a strong indication; a reasonable inference. If I have time I will deal with the standard of review to close, because I don't think I'm going to get as far as ground 1. I hope the point is made: "Strong indication", "giving rise to an inference", and "could infer" is not the type of language that is conducive to - it's not the kind of process by which an Appeal Chamber can be satisfied in relation to overturning issues of fact.

Furthermore, the Prosecution - we say impermissibly - make reference to exhibit 190, which was the board of inquiry report ironically introduced by counsel for Gbao in cross-examination of Jaganathan back in, I think, 2006. The purpose, as was agreed and tolerated by the Court on that day, was, I quote, "To provide context to Jaganathan's testimony."

The Prosecution, it would appear, now seem to extend the permitted use for that document in order to demonstrate requisite intent for Mr Gbao to compel the government of Sierra Leone to act or not act in a certain way.

In paragraph 513 of the Trial Chamber's judgment it is held as a basic standard and rule of evidence that documentary evidence cannot be used in relation to an accused's acts and conduct. As I discussed on Wednesday, acts and conduct necessarily include evidence or findings of intent.

Thirdly, it is claimed by the Prosecution, in support of the overall allegation that Gbao was party to hostage taking, that he was opposed to the notion of disarmament. In response to that suggestion I refer the Appeal Chamber to findings as to Gbao's actions on 17 April 2000. That is, I hope, adequately covered in our appeal brief in respect of ground 16.

I will paraphrase what happened on 17 April and the findings thereto. According to Colonel Ngondi, a witness to whom credibility could be attached without corroboration, on 17 April at the reception centre in Makeni Augustine Gbao was seen to arrive with other RUF members hotly disputing the right of the military observers, the MILOBS, to institute disarmament. A conversation took place, the detail of which is not relevant, but covered in our ground 16.

Colonel Ngondi was very candid when he testified about this and when I asked him questions - and findings have been made pursuant to this evidence - that Gbao assisted Ngondi to calm a situation down not only at the reception centre, which lay outside the town centre, but to calm down the gathering excitement of RUF sympathisers in Makeni Town itself. Colonel Ngondi - or brigadier now, I think - said in relation to Gbao's conduct on that day that Gbao agreed and accepted disarmament was, and I quote, "for the long term". He ended the description of Gbao's behaviour culminating with, his words, "I commend him for that". Had Gbao been antithetical or aggressively opposed to disarmament on 17 April, no doubt Ngondi would have said something very different.

It's important to stress that Ngondi was - I'll be corrected if I'm wrong - but the Kenyan commander on the ground

at that time in the Makeni area.

Secondly, the Prosecution make reference to TF1-071, a witness who we hotly disputed, who testified that Gbao had threatened execution for those indulging in premature disarmament. He could not be date specific. He claimed it was in the second half of April 2000. But since the witness claimed elsewhere in evidence only to become aware of Gbao in either the second half of 2000 or in 2001, and given that he must have lied when he stated that Gbao was ordering securities to open fire at an UNAMSIL camp in Lunsar on 1 May, when it is not controversial that Gbao was at Makump for a short time that day, and testified to events that actually took place at Makump while attributing them to Lunsar, he was a witness who was lacking in credibility.

We support that notion when casting doubt, as we do on 071's disputed account that Gbao threatened execution for those prematurely disarming, by this illustration: Statements were taken from 071 on 17 November 2002; 12 February 2003; 13 September 2004. All of them were in relation to UNAMSIL events. None of them implicated Gbao in the way I've described.

That deals with our response to the Prosecution request to overturn Trial Chamber findings that detention was not done to compel the government to do anything and was not done to stop disarmament.

The second argument put forward by the Prosecution in this respect is to encourage the Appeal Chamber to overturn the Trial Chamber's finding that the abduction was not done in order to create leverage in respect of freeing Foday Sankoh. In response to that argument there were two points that I should make.

The first one is the Prosecution's argument that the

requisite mens rea for hostage taking was satisfied at the moment that Mr Kallon was found to have abducted Jaganathan on 1 May has to be fatuous, given that Sankoh was not himself arrested until six days later. Put simply, if the purpose of abducting the peacekeepers was to gain leverage for Sankoh's release, it's difficult to work out how such an attempt to gain leverage could have been made five days before Sankoh's arrest actually took place. It would be irrational chronologically, we say, to find otherwise, and the Trial Chamber were therefore absolutely right in holding as they did.

Secondly - and I accept this is by virtue of my last argument venturing into the realms of hypothesis - but even if the mens rea for the abduction were to be held to have been established by the time of Sankoh's arrest on 6 May, it cannot yet be attributed to Mr Gbao for the very simple reason that the Trial Chamber made absolutely no findings in relation to any conduct by Mr Gbao connected to the UNAMSIL incident at the Makump DDR camp on 1 May. Again, therefore, I really refer to chronological impossibility and commonsense in order to support our argument on hostage taking in that regard.

I'm not going to have time to get to ground 1. I'll simply refer the Chamber to our written pleadings in that respect.

Can I just finish with a simple topic, and that is the standard of review demanded by these extraordinary proceedings where the Prosecution have the right to appeal acquittals. And I say extraordinary, of course, because coming, as I do, from a national jurisdiction, it is extraordinary to me. For that reason the standard of review, the bar, is set very high.

We adopt what the Prosecution writes at paragraph 1.10, and

I'll say it out loud:

"The convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt."

The Prosecution must show that when account is taken of the errors of fact committed by the Trial Chamber, of which we say there are none in respect to their appeal, all reasonable doubt of the convicted person's doubt has been eliminated.

We respectfully adopt the words of King J in the CDF appeal judgment and a raft of ICTR and ICTY judgments in relation to the requisite standard of review for Prosecution appeals.

I know this is obvious, but what it comes to is this: That it's only in the most compelling cases where the Trial Chamber has demonstrably or blatantly erred that leave to address ought to be given. To do otherwise, to lower the bar, as I put it, just an inch would be irrational, contrary to the interests of fairness and justice, and I hope the point speaks for itself.

Madam President, I think I'll leave it there. I'll simply refer the Appeals Chamber to our written response to the Prosecution's first ground rather than embark on it for the last five minutes.

JUSTICE WINTER: Thank you. Any questions? I think you can satisfy the Defence that the Appeals Chamber judges do know about the standards of proof on appeal.

MR CAMMEGH: Naturally. I was just trying to fill some time, Madam President.

JUSTICE WINTER: Thank you.

MR CAMMEGH: Thank you.

JUSTICE WINTER: Can I ask the Prosecution for their 30 minutes.

MR STAKER: In reply there are a few points we would wish to address. I think I can say that as a matter of general principle, the arguments have now all been addressed. I know we keep saying it, but we do emphasise that we refer to the written submissions.

I think all Defence counsel are also agreed with the Prosecution that particularly when we stray into areas of error of fact, this is a very large case; there was a very large amount of evidence; there are a lot of findings of the Trial Chamber; and it really isn't possible to go into that level of detail in oral argument, and certainly not in a 30-minute reply. So we do refer the Appeals Chamber to our written pleadings on those issues.

What perhaps need a little more elucidation at this stage is just to clarify the Prosecution position, perhaps, in light of some of the arguments that have been raised in relation to joint criminal enterprise.

The Defence response to our first ground of appeal I think has strayed to a degree into the Defence's own appeals against the JCE convictions. The overlap between our appeal and the Defence appeals on JCE I think is quite apparent, so perhaps that is only to be expected.

The Prosecution position on joint criminal enterprise - I've said it, but just to set it out again - is that there was one single joint criminal enterprise. Our position is that that one single enterprise continued beyond the end of April 1998. We're not saying there was a separate joint criminal enterprise after that; we're saying the same one continued. It did not end when the Trial Chamber said that it did.

The one joint criminal enterprise is important for a number of reasons. There was reference to the divisibility of the joint criminal enterprise, the Trial Chamber saying it would not consider whether there was a separate joint criminal enterprise involving only the RUF after that split that they found happened with the AFRC, and we haven't appealed that. If we don't succeed on our argument that the joint joint criminal enterprise continued, then we are not pursuing as an alternative that there was a separate joint criminal enterprise involving only the RUF.

But because it was a single joint criminal enterprise, we say apart from anything contributions made before April 1998 were a contribution to the joint criminal enterprise, so that it's not necessary to show an additional contribution after the end of April 1998. The contribution by the accused to the joint criminal enterprise was found by the Trial Chamber to have occurred.

Now, we've made the additional submission that in any event there were further contributions, but that is not necessary. Because it was a single joint criminal enterprise, we also acknowledge the high standard of review on appeal. I said at the beginning we're not advocating a different standard of review for the Prosecution, and it is quite right. In fact, case law, while saying the standard is the same for Prosecution appeals and Defence appeals, does point out that there is in fact even a distinction because the Defence have to show that no reasonable trier of fact could have come to the conclusion beyond reasonable doubt, whereas the Prosecution has to show that the only reasonable conclusion is that there was proof beyond reasonable doubt. There is a slight distinction there. Perhaps the task of

the Prosecution is even a little bit higher.

The law on joint criminal enterprise, we submit, is well established. Our submission is that the Prosecution position is consistent with the existing case law. Our submission is that we are not seeking to extend the principles and that the argument in this case is about how the established case law applies on the facts and the findings of the Trial Chamber and the evidence in this case.

There have been suggestions that the Prosecution is pushing the boundaries back enormously; that we are advocating the most sweeping theories of criminal liability. I know that in the Defence submissions there's a number of different angles of attack that are all wrapped up in this broad conclusion, such as the sufficiency with which the indictment was pleaded, various procedural issues, and such. But when we're talking specifically about the theory of joint criminal enterprise liability, we submit that the theory we are putting forward is not a particularly different one, not a particularly shocking one, and not a particularly far reaching one.

I know that we've had a lot of hypothetical examples advanced. I don't want this hearing to become a kind of first year university tutorial, but sometimes you do have to descend to simple examples to illustrate what, in our submission, are basic points.

One way of perhaps explaining the way joint criminal enterprise works in the Prosecution theory is to point out that in international criminal law, unlike criminal law principles in common-law legal systems - and it may be different in civil law systems. In common-law legal systems there is a mode of

liability of conspiracy. In international criminal law that exists in the convention for genocide and that's been picked up in the statutes of the ICTY and ICTR in their articles dealing with genocide, the conspiracy as a general mode of liability has not been picked up in international criminal law. But to anyone who is from a common-law background, the concept of conspiracy and the way it works in practice is something well established, not particularly shocking, but then it does have implications for the kind of activity for which a person may become criminally responsible. It shows some parallels to the instant case.

For instance, suppose we had a conspiracy and the conspiracy, of course, requires the agreement of the parties, a joint criminal enterprise, as it were, with some differences that I'll come to, but you need to have an agreement between the parties. Suppose one accused who is charged with conspiracy - suppose the theory of the conspiracy is this, the facts: A group of people agree that they were going to conduct a large-scale fraud and they were going to do it by means of these e-mails that I'm sure all of us have received from time to time, for instance, saying, "This is an e-mail from your bank. We are rejigging our security procedures. Please logon, enter your account number and password and everything will be fine." Of course it's fraudulent. It doesn't come from the bank; it comes from the conspirators, and once they get your account details and passwords, they are going to take money out of your account.

Now, suppose the particular accused in that kind of case has the role that at the beginning they are one of a group of people who say, "Yes, we're going to do this. We're going to set up a scheme in which we do this." They are all agreed, and the

accused's role - having agreed that this is going to happen, his role is to provide the technology as to how it's going to be done. The accused is the computer expert who knows how to construct these e-mails and web pages that look convincing and knows how to send out many e-mails all over the world, but thereafter has no role in the actual execution of it. That accused would be a conspirator.

Now, it may be that a particular victim is defrauded of a large amount of money in execution of this joint criminal enterprise - in execution of this conspiracy. The particular accused we're talking about knows that large numbers of people are going to fall victim to this, but doesn't know exactly who they are going to be, doesn't actually know where they are going to be, because this scheme is going to be carried out all over the world, doesn't know exactly which banks the perpetrators are going to pretend to be from, doesn't know exactly how much money they are going to get from each one. If you said in a Prosecution for something like that: Well, this accused never agreed to defraud Fred Smith in such-and-such city in such-and-such country of such amount of money; this person had never heard of the victim; never knew where the victim was, of course it's true. What the accused has agreed to is a large-scale enterprise involving unknown numbers of victims in unknown locations for an unspecified period of time in the future. But we submit that doesn't mean that we have a mode of liability that is unconscionable, that is so far reaching it's inconsistent with modern notions of justice, or that it's a theory of liability that is shocking to sensibilities. It is very well established. We submit that there is nothing unusual

about that.

Now, having said that, international criminal law is actually somewhat stricter than the common-law system allowing this mode of liability of conspiracy, because for a conspiracy you don't actually need a crime to have been committed. The mere fact that a group of people agree to do this amounts to the conspiracy. And if the crime is never carried into execution, there is still criminal liability for the mere fact of a group of people having agreed to do it.

In international criminal law, before there is liability it's not enough that there's just an agreement: There also has to be a crime committed. So the joint criminal enterprise has to be carried into effect, at least to the extent of one of the contemplated crimes being committed. That has to happen, and secondly, the individual accused - it's not enough that the accused just agreed with the others that this enterprise would happen and that a crime was committed. It's necessary that the accused personally made some contribution to the joint criminal enterprise.

Now, we've gone through the case law. It doesn't have to be a crime that the accused committed. But for conspiracy, the accused doesn't have to do anything. In international criminal law, for joint criminal enterprise the accused has to do something. But that something doesn't have to be the commission of a crime; it has to be a significant contribution to the joint criminal enterprise.

In the conspiracy example I gave, if that scheme was carried into effect, showing people how to set up computer technology is not a crime. Passing on information technology

know-how is not a crime. If the accused was someone who financed the operation, investing money, giving money to people is not a crime. But nevertheless, that could be a significant contribution to the joint criminal enterprise and you don't necessarily have to say: Well, how did that particular assistance affect that one individual victim or that one individual victim? The accused in that situation is responsible for being a participant in the joint criminal enterprise and is responsible for all crimes committed within the joint criminal enterprise, which may not be the full scope of everything that was agreed. The agreement may have been to carry ten crimes into effect, but in fact only one was committed.

We would even submit that the agreement - I said it may involve unspecified numbers of victims in unspecified locations. There may be other aspects that are not identified. It may be that the fraud isn't necessarily confined to getting money out of people's bank accounts, but the use of other devices to extract money - or perhaps not even money - to extract other valuables from victims, and it may be that the individual accused isn't even fully aware of all the different kinds of activity he might be engaged in in exercise of this operation. What is necessary is that what does happen is something that can be proved beyond reasonable doubt to have been within the contemplation of the joint criminal enterprise.

So that is my initial submission on the scope of the liability that the Prosecution is advocating. As I say, our submission is that it's consistent with established case law. It is not a shocking theory.

Another issue that has come up is the way that joint

criminal enterprise was pleaded in relation to joint criminal enterprise one and joint criminal enterprise three and whether there is one joint criminal enterprise or two. Or, as one counsel for the Defence put it, possibly three in the example that we gave of A, B and C and the bank robbery.

In our submission, there is one joint criminal enterprise in that example. Take, for instance, the situation where A, B and C together have only agreed that they will rob the bank. None of them have agreed that they are going to kill anyone, but then one of them individually on their own does that when they have gone to the bank armed. Now, in our submission it would be artificial in that situation to speak of two joint criminal enterprises. There is one joint criminal enterprise to rob a bank. In the course of that one joint criminal enterprise, one of the accused killed a victim. That one accused is therefore additionally liable for the separate crime of committing a murder. But B and C are responsible, on a joint criminal enterprise theory, for the murder on the ground that it was foreseeable that that would happen in the execution of the joint criminal enterprise.

There is one joint criminal enterprise, and the liability of B and C within that joint criminal enterprise extends to the murder because of its foreseeability in the execution of the joint criminal enterprise.

Now, we submit if that's the case, it makes no difference that instead of one of the three individually and on their own committing a murder which wasn't agreed between the three, if instead of that it's actually A and B have agreed between themselves that there will be a killing and it's only C to whom

it was foreseeable, we would say in that situation again A is responsible for committing the murder; B is responsible on the theory of JCE 1, because he agreed that the murder would happen, but he agreed that the murder would happen in the execution of the joint criminal enterprise involving A, B and C to rob a bank; and C, as in the previous example, is responsible under a theory of JCE 3 in relation to the same joint criminal enterprise.

That brings me also to an issue of the way this is pleaded then in the indictment.

It's also well established in international criminal law that criminal liability can be pleaded in the alternative. So it's possible to plead that B and C, for instance, are liable under the theory of JCE 1 because the Prosecution case is that all three agreed that the murder would happen, but that in the alternative, if that's not proven on the evidence that B and C are responsible - B and/or C are responsible on the theory of JCE 3 because if it can't be proved that they agreed that the murder would happen, it is alleged by the Prosecution that it was a natural and foreseeable consequence to them that the murder would happen. The indictment can plead that.

We would say that when the wording of the indictment in this case is looked at, that is what the indictment pleaded: That the three accused in this case were responsible, on a theory of JCE 1, for all of the crimes charged in the indictment, but in the alternative, that any one of the accused in relation to one or more of those crimes might in fact be proved to be responsible on a theory of JCE 3.

That is what the Trial Chamber found in relation to Gbao in relation to certain of the crimes in certain of the districts.

We submit that there is nothing illogical or legally impossible about that finding. As I say, it may not have been the Prosecution case. It might even be that the Prosecution might have appealed against that finding but the Prosecution didn't. But that was the finding of the Trial Chamber.

There were arguments put about what the overarching criminal purpose was. The Sesay Defence had the theory that because the alleged overarching purpose, taking control of the country, is not a crime, that can't be the common purpose; therefore, all that is left is the common purpose of committing each of the crimes; therefore, you have to prove each of the accused intended each of the crimes.

Our submission is that the way the joint criminal enterprise was pleaded was clear. I think certainly from the AFRC appeal judgment it's apparent from a materially identically worded indictment in the AFRC case that there's no doubt that it validly pleaded a common purpose of intent to take control of the country by means, including the commission of crimes. That's the common purpose.

JUSTICE AYOOLA: Can you say that again?

MR STAKER: I don't want this to be written in stone, because I'm not quoting from the indictment. In fact, I could say by reference it's what the Appeals Chamber in the AFRC appeals judgment said. But paraphrasing or putting it very simply --

JUSTICE AYOOLA: [Inaudible].

MR STAKER: Yes. Yes, repeat what I said. The common purpose was to take control of the country by means which included the commission of crimes. That's the common purpose.

Now, we know that the AFRC Trial Chamber said that the purpose is to take control of the country, which is not criminal; therefore, it's not a validly pleaded JCE. And we know the Appeals Chamber reversed that, because in our submission, what we say - and in our submission - and it's not for me to put words in the Appeal Chamber's mouth - but in our submission, the purport of the AFRC appeal judgments is that in practice there's no difference between a purpose of - there's no difference between an aim to take control of the country by means of the commission of crimes, or the aim of committing crimes for the purpose of taking control of the country. It's a bit artificial to say which is the aim and which is the means.

Basically, the common purpose is to take control of the country by means, including the commission of crimes. That's the common purpose.

JUSTICE KING: There is one question I would like to ask you. While you have the constitutionally elected government or the elected government of a country that had been in existence and a group of peasants, a body, be they one or two, come together for the purpose, as they put it, of taking control of the country, do you agree with the Trial Chamber that that by itself is not criminal?

MR STAKER: We certainly agree that the aim of taking control of the country without more is not a crime within the Statute of this Court. It might be a crime under national law, depending on the circumstances. If the aim is to take control of the country by contesting an election, then I'm sure it's not illegal at all.

JUSTICE KING: Exactly.

MR STAKER: If the aim is to take control of the country by conducting a military coup, then that may be the crime of treason under national law, but it wouldn't be a crime within the Statute of this Court. But if the aim is to take control of the country by means including the commission of crimes such as murder of civilians, forced labour, recruitment of child soldiers, and so forth, then that is a purpose which contemplates the commission of crimes within the Statute of this Court and it makes it a joint criminal enterprise, and that's what this Appeals Chamber held in the AFRC appeal judgment.

Now, we therefore submit that in examining the evidence, when examining the findings of the Trial Chamber, I think, as Mr Jordash put it, what is the benchmark that you use against which to measure the significant contribution? He says because taking control of a country is not a crime, you can only take as a benchmark the contribution to specific crimes.

We say that's not correct. We say the common purpose is to - I'm sorry if I keep repeating this, but the benchmark is to what extent did - not even "to what extent". Did the accused make a significant contribution to the common purpose of taking control of the country by means, including the commission of crimes? That means it's necessary to establish that the accused had the intent that control would be taken of the country by means including the commission of crimes. That must be established. And it must be established that the accused made a significant contribution to the common purpose of taking control of the country by means including the commission of crimes. The contribution need not itself have been the commission of a crime, but it must have been something that was a significant

contribution to that common purpose.

Now, we say that the contribution towards taking control of the country - it's true, taking control of the country in isolation not being a crime, therefore making a significant contribution to taking control of the country is not of itself a crime, but - but - that contribution is nonetheless relevant - clearly relevant - in an assessment of whether the accused made a contribution to the criminal purpose as charged in the indictment.

If you're asking did someone make a contribution towards taking control of the country by means including the commission of crimes, one thing to take into account in assessing that is did they make a contribution towards taking control of the country? That doesn't get you to the answer, but it's certainly a relevant consideration in considering the question and getting to the answer.

Now, in our submission - and this is all in the written pleadings. We can't go through it detail by detail here - we say crimes were committed. It was open to a reasonable trier of fact in all the circumstances to find that these crimes were committed in pursuance of a joint criminal enterprise. It wasn't random acts of violence happening all over this country during a period; there was a joint criminal enterprise. And the question then: Did the accused contribute to that joint criminal enterprise?

Well, in addition to the contribution that was made to taking control of the country, the contribution included, on the findings of the Trial Chamber, findings that the accused did in fact incur individual criminal responsibility for certain of those crimes.

Now, we say apart from anything else, criminal responsibility for those individual crimes, being crimes within the joint criminal enterprise, that itself is a significant contribution to the joint criminal enterprise.

I think the point was made that it would be unfair to engage in double counting to say that someone is liable for the same crime, both for commission as joint criminal enterprise and for something else like planning or 6.3 responsibility for child soldiers. That's not what we're advocating. Our brief does deal expressly with that.

For instance, we say on some of the child soldiers counts where convictions have already been entered under Article 6.3, we're not seeking to have that changed or added to with a JCE finding. But the fact that it's established that the accused were participants in the joint criminal enterprise, the fact that findings were made that the accused made a substantial contribution to the joint criminal enterprise, in our submission that suffices to establish joint criminal enterprise liability. If I can --

MR CAMMEGH: I'm so sorry. My Lady, Mr Gbao is desperate to leave for the bathroom, please. I'm so sorry to interrupt. I've been trying to find a convenient moment.

MR STAKER: My colleague has pointed out that on at least one occasion I've used the expression "substantial contribution". I did make a submission earlier that in the findings of the Trial Chamber and in the case law, the relevant expression is "significant contribution" and the case law does expressly say that a significant contribution need not be substantial.

JUSTICE WINTER: You would please continue then.

MR STAKER: Yes. I see that I have used, I think, almost the entirety of my time on the joint criminal enterprise point.

I did have a few minor comments in relation to the other grounds, although I think in all the circumstances the points have probably been adequately addressed already. Perhaps if at this stage I just inquire as to whether I can assist the Bench any further?

JUSTICE WINTER: Thank you very much. Any other questions from the Bench? Then thank you very much. We will now have the last break, 20 minutes' break, and we will be back at 4 o'clock.

I would also note that at the end of the submissions today we will allow each of the appellants to have a last word if they desire to do so.

MR JORDASH: Madam President, I'm sorry to interrupt. Yesterday I mentioned handing your Honours an indictment - the Mico Stanisic indictment, which I was asking your Honours to look at in relation to our submissions about defects. I have given a copy to your legal officers, and I would ask you to look at it in your own deliberations. Thank you.

JUSTICE WINTER: Thank you very much. The Chamber will now rise.

[Break taken at 3.40 p.m.]

[Upon resuming at 4.03 p.m.]

MR JORDASH: Mr Sesay would like to say something with your Honours' leave.

JUSTICE WINTER: Instead of you?

MR JORDASH: I think we had all understood it as the appellants to speak. That was certainly the way we had taken the --

JUSTICE WINTER: Sorry, I said at the end of the submissions. If you don't have any submissions any more it's okay, but you have - according to the scheduling order, you have ten minutes if you need them. This is why I said after the submissions. If this is not necessary, it is okay.

MR JORDASH: May I just explain a moment? I think we'd all on the Defence side interpreted the schedule to at this stage be a personal address by the convicted persons, and so the convicted person Mr Sesay had prepared something to say to the Court, as opposed to myself wrapping up the submissions. We recognise that it was a rather what we considered to be unusual --

JUSTICE WINTER: I apologise if I have expressed myself in such a doubtful way. If you would like to say something, please go on. If you do not wish to - "Personal address by Mr Issa Sesay". Okay, let Mr Sesay speak, yes.

MR JORDASH: Thank you very much.

APPELLANT SESAY: Yes, my Lord. I would first like to extend my sympathy to all the civilians who suffered during the war. I thought the war brought terrible hardship to the people of Sierra Leone. The war brought untold tragedy to the country. As someone who was eventually interim leader of the RUF I want to apologise to the civilians who lived through the war.

MR JORDASH: I'm extremely sorry to interrupt, but Mr Sesay is speaking in English and doesn't need a translator. Thank you very much.

APPELLANT SESAY: I want to apologise to the civilians who lived through the war, and especially those who lost their loved ones and who still bear the scars of the conflict as the result of the actions of the RUF.

Before my trial began I heard the SRHG Adeniji advise the Special Court during a radio interview in 2003 on Radio UNAMSIL to give me a fair trial because my cooperation allowed UNAMSIL to accomplish their peace mission in Sierra Leone. I decided earlier on to fully - to take part fully in my trial, as I believed a fair trial would give me a chance to explain my role during the conflict - during the conflict and contribute to a national healing in the years following the disarmament.

Before my trial the Prosecutor offered me a deal to cooperate with them in order to serve only 12 years in jail. The deal was that I should accept that I ordered RUF fighters to amputate civilians; I should accept that I was involved with raping; I should accept that I agreed with orders to kill civilians in Sierra Leone; I should agree that I was involved in burning.

I acknowledge that atrocities were committed during the war in Sierra Leone. I mean, I acknowledge that the atrocities were committed during the war and the RUF committed crimes, but I refused the deal with the Prosecutor because I know that civilians in the RUF areas knew that I did not allow fighters to commit crimes and I did not encourage fighters to commitment crimes against civilians.

I knew civilians will come forward to defend me. This is why civilians came from Kailahun, Kono, Bombali, Kenema and Tonkolili Districts to defend me. I denied this deal because I knew very well that I never ordered any RUF to amputate, rape or kill civilians.

I am a native from the north, Temne by tribe, but by Defence case proved to the Trial Chamber that civilians in the

eastern parts of Sierra Leone supported my Defence case.

A Temne native of Kailahun, Mende by tribe, testified on my Defence before the Trial Chamber. I also heard Konos, Krios, Limbas, Temnes and Mandingos testify for me.

UNAMSIL commanders came from [indiscernible] and Bangladesh, flew back to Sierra Leone to support my Defence case. ECOWAS leaders including His Excellency Alpha Konare, former president of Mali, and the SRHG Adeniji make statements in support of my Defence case. In total I had over 300 witnesses who were ready to testify in my Defence.

TF1-334 testified that JPK declared Koidu a no go area for civilians and that civilians should be killed because they did not support the AFRC/RUF. TF1-334 told the Trial Chamber that I endorsed orders given by JPK that I told the RUF/AFRC at the meeting that they should carry out orders given by JPK. TF1-334 was in jail in Pademba Road Prison, but the Prosecution and the previous government released him from prison to be a witness for the Prosecution. 334 was not the only Prosecution witness that was released from Pademba Road Prison with the help of the Prosecution. 334 was also given good amounts of money by the Prosecution, and 334 never gave this important piece of evidence about my endorsing JPK's orders in his first statement during his interview with the Prosecution.

The Prosecution also called TF1-371, who told the Trial Chamber that he was present at the meeting chaired by JPK in Koidu Town in late February 1998. TF1-371 told the Trial Chamber that JPK never gave such orders. 371 never supported a piece of evidence from 334 about JPK giving such orders.

TF1-360 confirmed that JPK never gave such orders.

My Lords, my Defence case proved that wherever I was living there was law and order. Even the Prosecution witnesses said this. I lived in Pendembu in Kailahun District from April to November 1998, and the Prosecutor did not bring any evidence of any wrongdoing to civilians in Pendembu and the area around it. From Kono to Makeni in 1998 to 1999 I tried to protect civilians even from the Kamajors that surrendered to me in Bombali in late 1998. DIS-103 and DIS-009 came to Freetown to testify on my Defence on behalf of how I well treated them and the civilians they lived with.

When Superman and Gibril Massaquoi attacked me in Makeni, I escaped. When I returned to Makeni in October 1999 hundreds of civilians danced on the streets of Makeni, saying that their defender had returned back to Makeni. This evidence is before the Trial Chamber from Prosecution witnesses and Defence witnesses that supported wherever I was I installed law and order.

There is no evidence before the Trial Chamber about amputating civilians from December '98 to 2001 in Kono, Tonkolili, Bombali. I always maintained respect for civilians in any area where I lived during the war. This is clearly shown in the record. This is the reason why I got the support of the civilians from Kailahun, Kono, Kenema, Tonkolili and Bombali Districts.

Hundreds of civilians, including members of Parliament, religious leaders, paramount chiefs, section chiefs, chiefdom speakers, women chiefs, officers of the peace, youth leaders, farmers, teachers, doctors, nurses, traders, miners and drivers, I have also had former Kamajors come to testify in my Defence.

The ECOWAS leaders, former Heads of State also gave statements to my Defence team. Including the SRHG and UNAMSIL senior commanders.

It is not fair for the Court to punish me on the crimes that Sam Bockarie, Superman, Isaac Mongor, Mike Lamin and others committed against the civilians. The Trial Chamber convicted me on the evidence of these insider witnesses who blamed me for disarming the RUF while Sankoh was in prison. Many blame me for Sankoh's death and the difficult lives they live in peacetime.

TF1-362 said I had betrayed the revolution, while TF1-045 said he hated me as the commander who pushed the RUF to the peace table. I made many enemies --

JUSTICE WINTER: Sorry, can you come to an end now.

APPELLANT SESAY: Well, my Lord, I only remain with three paragraphs.

My Lords, even if you uphold the conviction against me, I know that my children will be able to read the trial records in the future and know civilians came from all over Sierra Leone to speak up for me and my protection for them during the war. The records will show that their father did not commit the crimes he's been punished for.

I have heard that I would be likely to serve my sentence in Rwanda. The sentence imposed against me is a heavy sentence at my age. If I were to serve that full sentence, I will likely never see Sierra Leone again. Sierra Leone is, and always will be, my home. It is where I was born and I want to pass.

My Lord, just remains one paragraph. Please, ma'am.

It is important for me to state that prior to my appointment as interim leader I dedicated myself to the peace

process and ending the war in Sierra Leone. At the Lungi war done done disarmament ceremony I had looked forward to a peaceful future in Sierra Leone. I consider all Sierra Leoneans my brothers and sisters. If I will never be able to share the peace for which I struggled in having the RUF lay down their arms, I would at least like to remain in Sierra Leone. When I die, I want to die in Sierra Leone. If I am released one day, I would like to spend the rest of my life in Sierra Leone.

Thank you, my Lords.

JUSTICE WINTER: Thank you. Kallon.

APPELLANT KALLON: Thank you, my Lords. My Lords, let me take this opportunity to sincerely thank you for granting me and my Defence team by putting forward my appeal. I appreciate your patience and understanding in hearing my appeal without fear or favour. I do hope that you will, in the same spirit, return the verdict that will stand the test of the time. I am asking this statement without prejudice to the appeal I have put forward.

My Lords, as a follow-up to the statement I made to the Trial Chamber, in which I expressed sincere and [indiscernible] remorse about my conduct in the Sierra Leone conflict, I continue to ask that you forgive me for any action or inaction on my part that caused untold suffering to the country and people of Sierra Leone.

My Lords, I recognise the role of the Special Court in bringing peace and justice to the Sierra Leone people. I have profound respect for the rule of law and the independence of the judges, and I do hope that justice will be done in my case in view of my appeal.

My Lords, if you do not, however, uphold my appeal, then I

pray for a lenient sentence in the hope that I will be given the opportunity to reconcile with my fellow Sierra Leoneans and continue to contribute to the peace process.

The six years I have spent in detention, I have gained the opportunity to deeply reflect on my role in the conflict. As is shown in the statement in good conduct issued on my behalf by the Special Court detention, I consider myself as a reformed person.

My Lords, I thank all the officers of the Special Court for contributing to the justice process, especially the officers at the detention facility.

My Lords, again I thank you all. In the spirit of the holy month of Ramadan, may Allah bless Sierra Leone and give the entire peace. Amen.

Thank you very much, my Lord.

JUSTICE WINTER: Thank you. Gbao.

APPELLANT GBAO: Good afternoon, Madam President. Thank you for the opportunity to address the Court today. Since I did not testify in my trial, this is the first time I have had the chance to address the Court, while at the same time I am the last person who will address it.

Of course, the last six years have been a time of great adversity to me and to my family. But during that time I have had plenty of time to reflect on so many issues with a sober mind, including the suffering of so many victims of RUF excesses in the war. This reflection truly brings me great sorrow, and above all I have been humbled by the kindness and perseverance of so many I have been fortunate to come to know during my incarceration.

In this regard I extend my heartfelt thanks and affection

to the detention staff, who have taken such care of us. I want to especially thank my legal team, who have shown much dedication to my Defence and well being. I will not forget the special bonds that have been formed between us.

Above all I wish to thank my wife Hawa and my children, whose love has sustained me even at times when I have lost all hopes.

As a final plea, I humbly ask the Court not to send us out of our country to serve our sentences. For myself, I am especially afraid whether I will ever see my family and beloved country again.

Finally, Madam President, I express my thanks to you and your fellow judges for your consideration of my appeal. Thank you very much.

JUSTICE WINTER: Thank you. This brings us now to the conclusion of this appeal hearing. Before closing I would like to express our gratitude to the parties and their counsel for the submissions and the constructive approach, notwithstanding our really heavy schedule.

I would also like to thank all those who gave the assistance in the holding of the appeals hearing and a special thanks to the interpreters who, as usual, contributed efficiently to facilitate in the consideration of the appeal and to facilitate our discussions. The appeals will now rise. The hearing is adjourned.

[Whereupon the hearing adjourned at 4.23 p.m.]