Case No. SCSL-2003-01-A
THE PROSECUTOR OF THE
SPECIAL COURT
V.
CHARLES GHANKAY TAYLOR

Tuesday, 22 January 2013
10.00 a.m.
ORAL HEARING

APPEALS CHAMBER

Before the Judges:	Justice Shireen Avis Fisher, Presiding Justice Emmanuel Ayoola Justice George Gelaga King Justice Renate Winter Justice Jon Kamanda Justice Philip Nyamu Waki
For Chambers:	Rhoda Kargbo, Kevin Hughes, Gaia Pergolo, Rafael Silva, Laura Murdoch, Melissa Ruggiero, Hannah Tonkin, Kamran Choudhry and Jesenka Residovic
For the Registry:	Binta Mansaray Fidelma Donlon Elaine-Bola Clarkson Zainab Fofanah Rachel Irura
For the Prosecution:	Brenda J Hollis, Nicholas Koumjian, Mohamed A Bangura, Nina Tavakoli, Ruth Mary Hackler, Ula Nathai-Lutchman, James Pace, Cóman Kenny and Christopher Santora
For the accused Charles Ghankay Taylor:	Morris Anyah, Eugene O'Sullivan, Christopher Gosnell, Kate Gibson, James Tamba Kamara, Michael Herz, Szilvia Csevár, Yael Vias Gvirsman, Isaac Ip and Alexandra Popov
For the Principal Defender:	Claire Carlton-Hanciles

The Prosecutor of the Special Court v. Charles Ghankay Taylor

(The hearing starts at 10.00 a.m.)

THE COURT OFFICER: All rise.

Please be seated.

The Special Court for Sierra Leone is sitting in an open session for an oral appearing - an oral appeal hearing - in the case of The Prosecutor versus Charles Ghankay Taylor, Justin Shireen Fisher presiding.

JUSTICE FISHER: Thank you.

Good morning. We are going to delay the proceedings for one minute in order for the representatives of the press to take a few photographs.

(Pause in proceedings)

JUSTICE FISHER: At this time I'd like to introduce the panel, beginning with the Vice-President of the Special Court for Sierra Leone, Emmanuel Ayoola; the Senior Judge for the Special Court for Sierra Leone, Judge George Gelaga King; next to Justice King would be Judge Renate Winter; next to Justice Ayoola is Judge John Kamanda; and to his right is our Alternate Judge, Justice Philip Waki, who is new to our Chamber and we welcome him here today.

At this point I'll take appearances.

MS HOLLIS: Good morning, Madam President, your Honours, opposing counsel. Appearing this morning for the Prosecution: Brenda J Hollis; Nicolas Koumjian; Mohamed A Bangura; Nina Tavakoli; Ruth Mary Hackler; Ula Nathai-Lutchman; James Pace; Cóman Kenny; and Christopher Santora.

JUSTICE FISHER: Thank you.

And for the Defence?

MR ANYAH: Good morning, Madam President. Good morning, your Honours. Good morning, counsel for the Prosecution.

Appearing for the Defence this morning: Myself, Morris Anyah; to my immediate

right is Mr Christopher Gosnell; to my immediate left is Dr Eugene O'Sullivan; and next to Dr O'Sullivan is Ms Kate Gibson, co-counsel. Behind us are our legal assistants, Mr Michael Herz, Ms Yael Vias Gvirsman, Ms Alexandra Popov, Mr Issac Ip and Ms Szilvia Csevár. We are joined also by Mr James Kamara, who is a legal assistant and our team administrator, and last but not least is the Principal Defender of the Special Court, who joins us, Ms Claire Carlton-Hanciles.

Thank you.

JUSTICE FISHER: Thank you.

I note for the record that Mr Taylor is present. Good morning, Mr Taylor.

As we indicated in our notice on the schedule, we will begin this morning by hearing responses to this -- or submissions on the six questions that we provided counsel.

We'll begin with the Prosecution. We will take our break at 11.30 for 15 minutes.

We'll then resume, if the Prosecution needs additional time, until the 1 o'clock lunch-break. The afternoon will be the Defence on their submissions to the six questions which we asked. Tomorrow will be reserved for responses from both the Prosecution and the Defence in the morning, and if there are any replies they will be presented in the afternoon.

And so, Madam Prosecutor, you may begin.

MS HOLLIS: Thank you, Madam President.

May it please the Court, my colleague Mr Koumjian and I will present the Prosecution oral submissions today and tomorrow. We will organise our responses as follows: Mr Koumjian will respond to the following questions set out in your 30 November scheduling order: Question 2, sub (i)(a), whether the Trial Chamber correctly articulated the actus reus elements of aiding and abetting liability under customary international law; sub (ii) relating to any mens rea standard of purpose; sub (iii) and (iv) regarding whether any acts of assistance not specifically directed to the perpetration of a crime, or which are not acts of assistance to the crime as such, can substantially contribute to the commission of the crime, both for aiding and abetting

liability; and finally question (vi) regarding how this Appeals Chamber should apply existing jurisprudence relating to adjudicated facts in the context of a Defence motion to admit such adjudicated facts following the close of the Prosecution case.

I will respond to the following questions in the scheduling order: Question 2(i)(b), the issue of differences and similarities between aiding and abetting, instigation and ordering as forms of liability under Article 6(1) of the Statute; 2(i)(c), whether customary international law recognises that certain forms of liability in Article 6(1) of the Statute are more or less serious than other forms of liability for sentencing and other purposes; and question 2(v), whether the sources of law identified in Rule 72 bis (ii) and (iii) establish that uncorroborated hearsay cannot be relied upon as the sole basis for specific incriminating findings of fact.

And, I will simply say in advance that our remarks are certainly submissions to you, no matter what form they may take, and if we make direct assertions, we are in no way attempting to usurp your Honours' decision-making authority over the law and the facts.

I will ask Mr Koumjian to begin our submissions and now turn over the podium to him.

Thank you.

MR KOUMJIAN: Good morning, your Honours. It's a privilege to address you. Your Honours, during my remarks if at any time I'm not clear, I welcome your interventions, your questions, if I can clarify any issue in your mind. I'm not particularly articulate, and I definitely am nervous about -- because of the importance of the issues that we are addressing today.

I'm going to begin by addressing the six questions that your Honours have asked about aiding and abetting, and that come from the Defence appeal of Mr Taylor's conviction for aiding and abetting each of the 11 counts of the indictment.

Before I begin and get into the details and jurisprudence, answering those six questions, I think it's useful to step back for a moment and look at the common thread

that runs through these issues, these issues of specific direction, purpose, of what the Defence calls the "as such standard."

Because if you carefully study the Defence submission, you'll see a common thread in all of these areas and that is, while the Defence and Prosecution agree - and the Defence acknowledges - that the jurisprudence from your Honours in all three cases at this Court and from all of the ad hoc courts, back to Tadic 15 years ago in 1997, imposes a mens rea standard of knowledge for those who aid and abet atrocity crimes.

The Defence challenges that. They say that is not the standard that should -- that exists in customary international law during the indictment period and they assert it shouldn't be the standard.

What the Defence proposes to you is that the law should be a person is not responsible who knowingly aids and abets a campaign of atrocities where people are being raped, people are being amputated, people are being killed. They're not responsible if they knowingly assisted unless their purpose was those very crimes; unless the objective that they were seeking to achieve, their desire, was the crimes being committed.

So under the Defence proposal if a person knowingly aids and abets atrocities knowing people are going to be killed and raped, but they do it for a political advantage, or they do it for a military alliance, or they do it simply for greed, simply to make money, then they're not responsible because their purpose was not the crimes. Their purpose was military advantage, or their purpose was money.

So to take an example that I think exemplifies this - our case is a great example, but just to use other facts - if a person was selling ammunition and arms to the Hutu militia, the Interahamwe, in 1994 in Rwanda, aware of the killings that they were doing, aware of their campaign to kill all Tutsis in Rwanda, but they were doing it indifferent to the killings simply to make money, or perhaps they were doing it because, "You know, the Hutus are our allies in Congo and so we're providing these

arms for military advantage. The fact that Tutsis are being killed doesn't help me, but it helps me that the Hutus are strong," according to the Defence, as they would want the international criminal law to be, they would not be responsible.

So we see these grounds of appeal in this case, the trial of the first -- the first Head of State being tried for crimes he committed as Head of State ever, of great, great consequence, and we think the fact that you are dealing now with issues of aiding and abetting and how we hold responsible not just those who perpetrate crimes, but those who promote them, we think that's extremely important because in conflicts around the world unfortunately there are groups that engage in campaigns of terror. We can see in the facts of this case, for example, where the RUF under the facts of this case most of the persons were recruited, even according to Defence witnesses, they were taken from NPFL jails and given a choice of joining the RUF or being killed. It was created in terror, and in those circumstances it's not hard, it's not that difficult, to find a Sam Bockarie and Issa Sesay to go and lead these groups in carrying out great atrocities against civilians.

But those behind them we feel are just as important that we hold responsible. Those are the promoters of the war, the lords of war, that sell arms to groups engaged in these conflicts; those who fund groups by buying resources, whether they're buying cocaine from the Shining Path in Peru, or whether they are buying gold or diamonds from a group engaged in raping women as a modus operandi in the Democratic Republic of the Congo.

Those who knowingly provide assistance that they know will facilitate these crimes should be held responsible, and that's the difference between us and the Defence. In their view, as long as their purpose is not the crimes, it's political advantage, it's military advantage, or in the case of Charles Taylor the diamonds of Sierra Leone, then it's okay. They're not responsible for aiding and abetting. They had a different purpose. We think that would be a great step backward in international law.

Your Honours have asked about the actus reus of aiding and abetting and whether the Trial Chamber correctly applied the standard under customary international law. In paragraph 424 of the Judgement, the Trial Chamber articulates a standard that's recognised in international law and that is that the aider and abettor has provided practical assistance, encouragement or moral support that assists the perpetration of a crime, of a specific crime, and, secondly, the Trial Chamber has to find that this assistance had a substantial effect on this crime. So that is the actus reus of aiding and abetting.

Now, the Defence argument at times in their submissions, one of their headings is "The actus reus of aiding and abetting is nothing less than purpose." Now, purpose is clearly, reading the Defence submissions, a mental element. It's part of the mens rea. All of -- everyone understands the difference between actus reus and mens rea, but unless you tell me not to I will address then whether purpose is part of the actus reus of aiding and abetting, or whether there's any mental element for the actus reus of aiding and abetting, which requires me really to talk about the mens rea; what the actual mens rea of aiding and abetting is.

Your Honours, there is no requirement of purpose in the jurisprudence and the law, and one consequence of the Defence proposal I'd like to point out is a fundamental principle of international criminal law. It's called -- it's in the Nuremberg principles, it is principle number 4, and it's part of the Statute of this Court, I believe Article 6, that says words to the effect of, "It is not an offence to crimes of international law to say 'I was just following orders. I was doing what my superior told me.'"

Well, under the Defence proposal for aiding and abetting, that's a perfect defence. "My purpose was not to see the crimes committed. I was obeying an order. My purpose was to satisfy my superior." So the Defence proposal that purpose be part of aiding and abetting would blow a hole in the international criminal law - you could drive a truck through, or many trucks full of ammunition through - in making it for persons -- a defence possible for aiders and abettors to simply say, "I was following

orders. That was my purpose", because what the Defence means by purpose -- and if you read carefully their submission when they talk about specific direction and when they talk about the assistance must be to the crime as such, what they mean is it has to be the ultimate objective, the desire of the person, the aider and abettor, when he provides the assistance, that the crimes happened; that this can't be just something they know is happening, or even a means to achieve what they want to happen.

The Defence relies upon two general arguments -- and, by the way, the Defence submissions are excellent and they're very well researched and they're very clever. They're simply wrong about what customary international law is.

But the Defence makes two basic arguments in two ways. One is with the ICC Statute, arguing that the ICC Statute provides for purpose. I'm not going to repeat the arguments in our submissions. The ICC never has purported to be codifying customary international law, and very frankly, your Honours know, the whole scheme of modes of participation at the ICC right now is a mess and no one knows exactly what it means. And 25(3)(d), the provision that we talked about that clearly provides a knowingly standard for those that knowingly aid and abet a common plan, well, that's not joint criminal enterprise because you don't have to be a member. Mbarushimana, the case that the Defence cites, says that you don't have to be a member. You don't have to intend any crime under 25(3)(d). So it's not joint criminal enterprise. They say it's not aiding and abetting. So then what is it? If the Defence is saying the ICC Statute codifies customary international law, what mode of liability is 25(3)(d)?

What it is is a subset of aiding and abetting for those who are aiding and abetting a joint criminal enterprise, but our point is the ICC Statute never attempts to codify customary international law and it's not helpful in understanding customary international law.

The Defence also asked -- did a survey of domestic jurisdictions and said, "Well, going back to 1996, how many States used different standards?" And their conclusion,

which we do not differ with, is that there's a great variety of ways that the intent for aiding and abetting is articulated in different domestic standards.

The Defence, for example, points out that some jurisdictions have the knowingly standard, and I believe they cite New York, Israel, South Africa and they mention the United Kingdom sometimes applies that.

I don't fault them for that, but of course there are other jurisdictions that also use the knowledge standard. France, for example, specifically in its code uses the knowledge standard. In a moment I hope I can find that. The French criminal code, Article 121(7), provides, "The accomplice to a felony or a misdemeanour is the person who knowingly by aiding and abetting facilitates its preparation or commission."

Very, very similar language is used - and I'm not going to spend a lot of time reading all of those to you, but we have provided your Honours with these codes and citations - in other countries: Rwanda, Article 98; in Latvia; in Malta; in Ireland; in Belgium; in Senegal; in La Cote d'Ivoire; in the DRC; in Madagascar; in Niger.

Now, other countries use words like "intent", as the Defence points out, but the word "intent" has many meanings. In most jurisdictions, even within the jurisdiction it has different meanings.

In a common law country, general intent - we provide your Honours with the Black's Law Dictionary - generally means that someone intends the act whether or not they intend the consequences, or even if they do not intend the consequences, the act is intentional.

In civil law countries, I think they're a little more sophisticated. They divide intent into three normally: Dolus directus, you desire the result; dolus directus of the second degree, that the accused doesn't desire the result but knows that in the ordinary course of events this result will occur; and dolus eventualis is part of almost all civil law systems. And that says more or less, it is articulated slightly differently in different places, it means that there's -- a possible outcome is the crime occurring and that the accused can foresee this as a possible outcome.

So these countries that use the word "intent" that have dolus eventualis and say an aider and abettor must intend to assist, in my view are applying actually a lower standard than this Trial Chamber did. Why? Because this Trial Chamber said you had to prove that the accused did an intentional act, it couldn't be that Charles Taylor thought he was sending school books to the RUF when he was sending ammunition because then it would be unintentional his assistance, and secondly he has to be aware of the substantial likelihood that his acts are going to assist the commission of the crime. So he has to have -- be aware that there's a substantial likelihood these crimes are going to occur and his acts will assist the commission of the crime. That is a higher probability than it's a possible outcome, which is what dolus eventualis provides for. So there's a lot of countries that provide for dolus eventualis for aiding and abetting crimes as a mode of responsibility, including The Ukraine, Mexico, China, Egypt and Germany.

In fact I recall in the Stakic Trial Chamber, the famous Judgement where the Presiding Judge was German, Judge William (sic) Schomburg, and it is where he -- the Trial Chamber advocated for a mode of participation of co-perpetratorship. But Judge -- the Trial Chamber explains dolus eventualis, and one interesting explanation at paragraph 587 they -- the Trial Chamber wrote, "If the killing is committed with manifest indifference to the value of human life, even conduct of minimal risk can qualify as intentional homicide," and that was when he was discussing dolus eventualis. So, you see, dolus eventualis can provide for a possibility much lower than the standard this Trial Chamber imposed, a substantial likelihood.

So what we agree with the Defence on is that in domestic systems there's a whole lot of different ways that aiding and abetting is articulated, and this is exactly the same situation that the Tadic Appeals Chamber faced when they looked at how do different domestic systems deal with crimes by -- in a common plan joint criminal enterprise. And they noted that in some domestic systems people are responsible only those who actually perpetrate the crime, although they are a member of the joint criminal

enterprise are responsible. In others all those who intended that crime, even if they didn't perpetrate it, are responsible. And third, in some systems not only those who perpetrate it and intend that crime, but those who enter into a joint criminal enterprise intending one crime but can foresee this crime as a possible result, joint criminal enterprise 3. So they said there's a wide variety in the domestic systems. And they concluded in paragraph 225 by saying, "In the area under discussion, national legislation in case law cannot be relied upon as a source of principle or rules under the doctrine of the general principle of law recognised by the nations of the world. For this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose," but because there was a variety they said they couldn't do that.

So what did they do? They looked at two things, case law involving international crimes from the Second World War and they looked at international instruments, and that's what -- well, the same thing was done by the Furundzija Trial Judgement and the Tadic Trial Judgement when they determined that customary international law - back in the case of the ICTY is back before 1991 - provided for a knowingly standard for aiding and abetting.

And we've discussed some of those Second World War cases, but I just want to remind you of a couple of them that I think are particularly appropriate and applicable to the facts of this case. One of them was of a man named Flick, and Flick was a businessman and he was charged with promoting, facilitating, aiding and abetting the crimes of the SS, aware of the campaign of crimes that the SS was doing by contributing money. That's what his contribution was.

And in that case the Court found that - they specifically found that - Flick, quote, "... did not approve nor condone the atrocities of the SS." So what's clear is he did not have the purpose, as the Defence would put it, that these crimes be committed, and yet they found him guilty because, quote, "One who knowingly by his influence and money contributes to the support of a violation of the law of nations must under

settled legal proceedings be deemed, if not a principal, certainly an accessory to such crimes." So simply by providing money knowingly, that was aiding an organisation that Flick knew and the whole world knew was committing a gross campaign of atrocities, he was responsible for violations of international criminal law.

Another case that's very noteworthy for many reasons was the Zyklon B case; the trial of Tesch and two others, I believe. That was a case against industrialists who supplied a gas that's normally used to kill rodents to concentration camps in the German occupied territory. This gas is the gas that killed four million people in these concentration camps.

Now, the industrialists were found guilty because, quote, "They knew that the gas was to be used for the killing of human beings." There was no attempt by the Judges - the Trial Chamber - to ask whether they intended these people to be killed because that's simply not necessary, but under the Defence proposal if this gas was being provided simply because they wanted to make money, their purpose was to make money. They would have sold the gas to the Germans if they were using it to kill the rats in the camps to benefit the inmates. Okay, they knew that actually the gas was being used to kill the inmates, but that was the fault of the Germans, the Nazis. They themselves were just selling gas knowing it was being used to kill humans.

In those circumstances, under the Defence proposed standard, he would be -- they would be not responsible. International criminal law would allow these industrialists to go free, because their purpose was simply to make money. They did not want to kill the human beings themselves.

A similar case occurred here in Holland involving crimes that happened in the 1980s, again before our indictment period, and that's the trial of a man named van Anraat who provided a chemical, TDG, that's used in mustard gas and he was providing it to the Iraqi regime.

Now, this chemical could also be used to dye textiles, but the Court in The Hague

found that van Anraat knew that the gas could be and was being used to manufacture mustard gas and he was aware of Saddam Hussein's campaign of using that gas against Iran and against his own civilian population, the Kurdish population, the famous al-Anfal campaign, and the Court in The Hague, the Court of Appeal, held him responsible. They said in Section 16, "He did not give deliberate support to gross violations of law, but acted ...", quote, "... exclusively in support of large gains." So, again, the Defence proposed standard would be van Anraat should not be held responsible. He was providing a neutral object, gas that could be used to -- or a chemical that could be used to dye fabrics, and his purpose was simply to make money and so he shouldn't be held responsible.

We think adopting such a standard is a tremendous -- would be a tremendous step back from the protection of victims around the world, who depend upon international law holding out at least the threat of holding responsible the promoters of wars and atrocities.

Now, I'm going to move on to some of your questions -- your question about the specific direction. To answer that question, it's necessary to go back and understand where does specific direction come from? How is it originally used, these terms? And I should just briefly mention that in ICTR they used the words "specifically aimed" and that's simply, you'll see, a matter of translation. Tadic was translated into French, and I'm not going to try my French pronunciation out on you, and the same term in the first ICTR Judgement came out as "specifically aimed." So it's simply a translation. "Specifically directed" and "aimed" mean the same thing. What Tadic was looking at when they used the term "specific direction" was distinguishing between joint criminal enterprise and aiding and abetting. In paragraph 229, they talk about the difference between the kinds of contribution that a person makes who is guilty of being in the joint criminal enterprise and the contribution that's necessary to prove for aiding and abetting.

Now, in a joint criminal enterprise, if you have a group of people with a common

plan, the accused who makes a contribution to the enterprise will be held responsible for all of the crimes of that enterprise that were intended, or under JCE3 that were foreseeable.

In contrast, the elements of aiding and abetting are more strict. The contribution has to be to the crime, and this is exactly the standard that our Trial Chamber imposed in this case. For aiding and abetting, it is not enough that you contribute to the enterprise. They have to contribute to the crime. Again, this is Tadic Appeal Judgement, paragraph 229.

But if I could use a simple perhaps example? Suppose there's a group of people in a town in Bosnia, Prijedor, that form a common plan to ethnically cleanse the territory and that plan includes forcibly deporting women and children and killing men in camps, Accused X makes a contribution -- is a member of that joint criminal enterprise, he shares that intent and he makes a contribution to the plan by organising the forcible deportation of women and children, but makes no contribution to the killing of the men.

Under joint criminal enterprise, he's responsible for both the deportation and the killings. He made a contribution to the JCE, a significant -- and remember, of course, JCE requires only a significant contribution.

Under aiding and abetting he would be responsible for the deportations, provided it's found he made a substantial, a higher -- a substantial contribution to the deportations, but he could not be held responsible for the killings because his actions did not contribute to the killings.

So that's what clearly -- reading the Tadic in context that's what specific direction means, and that's why, as the Defence agrees, all of the cases at the ICTY, ICTR and this Appeals Chamber that have talked about specific direction -- or the Trial Chambers at this Court that have talked about specific direction, have talked about it as part of the actus reus. It does not have, as the Defence wants to imply, wants you to misinterpret, a mental element.

And that's why in Blagojevic, paragraph 189, Blagojevic Appeal Judgement, the Appeals Chamber went through it and noted that, "In many of our cases at ICTY, Trial Chambers don't mention specific direction." They say, "Well, despite that, if in an aiding and abetting case there's a finding that the accused made a substantial contribution to the crime, a fortiori he has the -- he has satisfied the specific direction standard because specific direction simply means making a contribution to the specific crime."

And the Court -- the Appeals Chamber at ICTY went a little further in Mrksic, citing Blagojevic, saying that really it's not an essential element. The word I would use is it's not a separate essential element. It is implicit in a finding of substantial contribution.

And this was reaffirmed as recently as I believe last month in December in the Lukic Appeal Judgement, which again cited to Mrksic that specific direction is not an essential element.

So in answer to your Honours' question, which I believe was, "Can a contribution that's not specifically directed be a substantial contribution?", of course it cannot because, if it's not specifically directed, it doesn't contribute to the crime at all.

The corollary of that is that if there's a finding, as there is in this case, that Mr Taylor's actions significantly contributed to each of the 11 counts of the indictment, then it is proven that his actions were specifically directed. It's inherent and implicit in the finding that his contribution - his actions - made a specific contribution to each of these 11 counts that his actions were specifically directed to those crimes.

Now, the Defence -- I may be going backwards a little bit, but the Defence also talked about -- excuse me, let me go forwards because of time.

One other bit of jurisprudence I want to talk about. The Defence cited to two cases from World War II that they feel show that a standard higher than knowledge exists, and one of those I believe is called Resch. Resch was a banker, who made loans to individuals who he knew were using that to fund enterprises that were employing

slave labour.

If you read the Judgement, the only mens rea that's examined by the Trial Chamber is knowledge. That's the only thing they look at. They never discuss whether or not he intended slave labour, but what they found is they said, quote, that -- I'm paraphrasing, "The making of loans we cannot find is itself a violation of international law."

So putting -- what's clear is that was part of the actus reus. They were not discussing his mens rea. And putting it in the terms that we use today for the elements of aiding and abetting, we can see that what the Chamber was finding in Resch was the making of loans to individuals who were funding enterprises that were using slave labour in the view of that Trial Chamber was not a substantial contribution to the crimes. It didn't satisfy the actus reus of aiding and abetting.

The second case the Defence relies upon is Hechingen, which took place in a German court, and in the lower court the Trial Chamber, applying the Allied Control Council law number 10, found that -- applied the knowingly standard and found that certain individuals who had organised the deportation of Jews from two small towns in Germany were guilty as accessories for persecutions of those individuals. And the lower court, if I can find it, they applied the knowingly standard in very clear language.

The Appeals Court decision is frankly problematic and it's been said that they went out of their way often in these cases to acquit individuals, for the police administrator who organised the deportations, S, they found he wasn't guilty because they said the Trial Chamber had discussed a letter written by Jewish community leaders saying, "We should comply with this order," but they hadn't given it enough weight. So they felt that the fact that the Jewish community leaders, I'm sure figuratively if not literally with a gun to their heads, had said, "We better obey this order," was the failure to further discuss that nullified the conviction.

And for the three women involved, the court did not find that the intent for aiding

and abetting is something higher than knowledge. They refused to apply the intent for accessories, which under German law - I'm going take a big chance with my pronunciation - is something like Gehilfe for accessories, Gehilfenvorsatz for the intent for accessories. They refused to apply that, because they said, "Well, this Control Council law makes all forms of responsibility equal, as it is in many common law systems, and we are used to, in German law, accessories being considered separate. So we refuse to apply that." And the reason they acquitted these women is because they said, "Oh, they didn't know that persecution was illegal. They weren't aware of the illegality of persecutions," because that wasn't I guess a law at the time in Germany. So that case again does not support the Defence position that there's a higher mens rea standard than knowledge in international customary law. What's very probative, we feel, is the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind. Why? This is a group of experts that was elected by the United Nations, and in the Furundzija Judgement they specifically talk about this as an authoritative legal instrument. What it provides, as the Defence concedes, is that one who knowingly assists in these atrocity crimes will be held responsible. The Defence concedes the draft code is a knowingly standard. When was this adopted? July of 1996, just months before the start of this indictment period. So what's clear is at the time of this indictment period, throughout this indictment period, customary international law provided for the knowledge standard for aiders and abettors.

Now, I want to move on to your Honours' questions about the "as such standard," as the Defence puts it. Your Honour, we tried hard to come up and discuss the jurisprudence of the "as such standard," but we weren't able to find a single case that uses that language, and my knowledge of the English language, the phrase "assistance to the crimes" and "assistance to the crimes as such" means the same thing. The standard that was applied by this Trial Chamber, which is correct, is the accused has to provide practical assistance, moral support or encouragement that assists the

crimes.

What does the Defence mean then by "as such"? Perhaps they will explain, but I believe if you read their submission carefully it comes down in the end to the same proposition that I began with. The Defence is holding out that only assistance where the objective, the ultimate desire and objective, of the aider and abettor is that the crime be committed should the aider and abettor be held responsible. It comes down to the same purpose. And that any other type of assistance, even if the accused knows people are going to be killed and raped and held in bondage and child soldiers, they're not responsible as long as that was not the objective of their assistance, because we've already talked about cases that the assistance itself can be neutral on its face; the gas that was used to kill vermin in Zyklon B and many other types of cases where the assistance itself is neutral.

Now, why does the Defence argue this? Well, they tried to hold -- frighten you, frankly, with the prospect that, "My God, if we apply the standard ...", that's been part of customary international law they admit since Tadic in 1997, "... then all military assistance is going to be illegal because crimes always happen." And they say, "Well, at the minimum all military assistance, where there are some reports of crimes, are illegal because you're on notice that some crimes have happened," but that, your Honours, does not satisfy the standard that this Trial Chamber imposed; the standard that exists in customary international law. It is not an easy standard to meet. It is met and then some in this case.

That standard is first that crimes against international criminal law within the jurisdiction of the Court are being committed and, secondly, the accused has to do acts that facilitate the crimes. Not all military assistance facilitates crimes. It facilitates crimes when the group has an operational strategy to commit crimes, when you know that when they go out and make operations they're going to be killing, they're going to be using terror, when you know that even when they hold territory crimes are being committed, like the RUF, then that military assistance assists crimes,

but ordinarily it does not necessarily assist crimes.

Professionalising for example a third world army may reduce crimes, and why is that? Because most military leaders recognise that if you want to win a war it depends on winning the hearts and minds, the loyalties, of the civilian population, and committing crimes will only set you back in that goal of that -- your ultimate goal of winning the war.

So I've mentioned two of the requirements. The third requirement for aiding and abetting is that the accused -- well, did I mention two? Yes. The third is that the accused knows his assistance is aiding and abetting the crimes. He is aware at least of the substantial likelihood that his assistance will facilitate the commission of those crimes.

And then there's a fourth requirement, and that is that the assistance itself amounts to not just an incidental contribution, but a substantial -- not just a significant contribution as in joint criminal enterprise, but a higher standard. It has to be a substantial contribution to that crime.

That's what the Trial Chamber found in this case. How did they do it? Well, there's over 500 pages of findings about crimes by the RUF and its allies in this case. I'm not going to be able to talk about all of them, but what is clear from that is that from the beginning of the conflict the Chamber found the RUF was abducting civilians, using children as child soldiers, and what they found is that when they took territory, children were taken and being used and kept as child soldiers employed in their forces, women were taken and turned into sex slaves. When a town was taken the best looking girls went to the top commander, so women and girls were being held in sexual slavery and civilians were being used in forced labour to farm for the RUF, to mine diamonds and other materials for the RUF, to carry the loads of the RUF.

So even in situations where hostilities were not active, everywhere where the RUF held territory, crimes were happening, and that is not just the finding -- that's not just a theory. This is what happened in Sierra Leone. This was proven by the

witnesses - the 50 or so witnesses - that testified.

The Defence said at the beginning they were not challenging the crime base. Why did we call all these victims? And now they are saying, "Oh, the crimes were sporadic." Now they argue to your Honours that these were uncontrollable soldiers and sporadic crimes. Well, we have 500 pages of people talking about how the RUF operated. They operated with terror and it came from the top. The Trial Chamber found that Operation Stop Election was ordered by Foday Sankoh. There's numerous findings about Sam Bockarie, and the Defence's own witnesses talk about what a cruel, wicked and ruthless man he was. The Trial Chamber found he himself personally organised and shot people in the Kailahun Town massacre. 60 to 65 people shot in the middle of the road, and the Defence's star witness, Issa Sesay, says, "Sam Bockarie ordered that the bodies not be buried." Why? To terrorise the civilian population. "Let them rot in the open."

And Issa Sesay -- Defence Witness DCT-292 said Sam Bockarie was ruthless and killed innocent civilians, but Issa Sesay, he said, was even more ruthless.

So these crimes of the RUF were not sporadic, and the Defence made a very late attempt to say, "Oh, these were uncontrollable soldiers. This was not the policy." It's just not true. The Trial Chamber had more than enough evidence to justify its finding that the RUF was a force engaged using a modus operandi of terror. They were engaged in an operational strategy of terror. As Charles Taylor said the first day of his testimony, "There's no one on this planet who's not aware of the atrocities in Sierra Leone." He knew it and he continued to support them.

So when we come to your Honours' question about whether the evidence meets the standard of purpose, I've talked about various standards. Let me talk briefly about purpose. There's a couple of cases in Canada, Hibbert and Briscoe. Canada, as the Defence points out, has the purpose standard, but in these two cases they talk about what it means and it's clear from these cases that it does not mean that the objective of the accused's actions was the commission of the crime. Both quote -- both cases take

a quote from a casebook by Hewitt and Manning, both Briscoe and Hibbert, and that casebook quotation is this, "If a man is approached by a friend who tells him he's going to rob a bank and he would like to use his car for the get-away and he will pay him $100, when that person is charged as an aider and abettor can he say, 'My purpose was not to aid the robbery. My purpose was just to make $100?'"

The commentator says that that makes no sense. Both the Canadian Supreme Court in both Briscoe and Hibbert calls that result -- states that result would be absurd. If you know what the results of your actions are going to be, the fact that you're doing it for $100, or in the case of Charles Taylor for the diamonds of Sierra Leone, does not make you not responsible for your actions.

But even, your Honours, if you adopt the standard, "Did Charles Taylor intend these crimes, the terror campaign of the RUF?", looking at the findings of the Trial Chamber, the evidence in this case, one would have to say he did, because how do you interpret a human being's intent? In cases - domestic cases - all around the world, you look at their actions. And the philosopher John Locke said, "The best interpreter of a man's thoughts are his actions."

Well, Charles Taylor told us - and there's many findings of the Trial Chamber's Judgement - he knew about these atrocities. He even had the nerve in the midst of providing assistance in 1998 in July to issue a statement with President Kabbah condemning the atrocities of the rebel forces.

At the same time that he was condemning them, at the same time he knew about them, he was continuing to send them more arms and ammunition. He made that statement in July and he shortly after organised the November shipment from Burkina Faso. The Chamber found he kept some for himself and he sent this -- the largest arms shipment of the war to the RUF, and they found that shipment was used on the attacks on Kono and Makeni.

Issa Sesay said, "Without that armament from Liberia that came in November, we couldn't have attacked Kono." And the Trial Chamber said, "If not for the attacks on

Kono and Makeni these were critical to the attack on Freetown, because the RUF took out ECOMOG in Kono, took out ECOMOG in Makeni, was fighting all the way to Waterloo in support of the AFRC and even was able to get a small group with ammunition into the town."

So what was Charles Taylor's reaction to all these reports of atrocities during the Freetown invasion? To send them more. That came through Dauda Fornie. And what was his reaction afterwards? Organise another shipment in March 1999.

So those are his actions and you don't need words, but you have words in this case because the Trial Chamber found Charles Taylor told the RUF when they made that operation, "Make it fearful," and it was clear from the witnesses in this case what that meant, especially when you're saying it to the RUF. You are not saying it to a boy scout troop. What it meant was amputations, people being burned alive in their homes, people being killed and heads put on sticks. That's what "Make it fearful" meant.

There was a witness who testified on 30 October 2008, and Mustapha Mansaray was a double amputee. The last question to him on direct was, "Why did you come to testify? Thank you. Why did you come?' He said, "Why did I come? Because a long time ago a man named Charles Taylor said on the radio that we in Sierra Leone would taste the bitterness of war. We all heard that." And what he said as he held up his hands, "This is the bitterness that I've tasted." He held up the stumps of his arms, showing that he had no hands. "This is the bitterness that I've tasted. What he said is what came to pass."

And, your Honours, the Trial Chamber found specifically, despite Mr Taylor's denials, he did threaten Sierra Leone with the bitterness of war. The Defence's own witnesses corroborated that. What he said was what came to pass. He promised the bitterness of war. He promised a fearful campaign. Those crimes happened because he intended them to happen.

So does the -- do the findings of the Trial Chamber satisfy even the standard of

purpose? Yes, they do.

So, your Honour, I want to move on to the one last point which is the adjudicated facts question in this case, unless there are some questions about aiding and abetting now?

Your Honours have asked on adjudicated facts whether or not -- how the Chamber should apply the case law on adjudicated facts when an adjudicated fact is found at the close of the Prosecution case. This was the case with adjudicated fact 15 in this case.

Our answer is you should apply the case law as it is, because what the case law makes clear is that a Trial Chamber at all times has an obligation to consider all evidence. An adjudicated fact is rebuttable. At no time does a Trial Chamber, when it makes an adjudicated fact, make a final determination.

In this case, the adjudicated fact motion was brought after the close of the Prosecution case, after there were 24,000 pages of transcripts and hundreds of exhibits. It would be obviously a violation of the fair trial rights of parties if the Chamber then made determinations of fact without hearing final arguments - oral arguments - from the parties on those facts, and no such arguments on the truth of specific facts occurred in this case.

In the Tolimir Trial Judgement -- excuse me, the decision on adjudicated facts in Tolimir, 17 December 2009, the Trial Chamber said, "Like all rebuttable evidence, judicially noticed facts remain subject to challenge by the non-moving party during the course of the trial. The Trial Chamber retains the obligation to assess the facts' weight, taking into consideration the evidence in the case in its entirety."

And that was clearly the understanding of the Defence, because when they made the motion, when they wrote the reply, they said, "Oh, the Prosecution shouldn't be upset, because of course they do have evidence on the record and that can be considered by the Trial Chamber."

And, in fact, in the RUF they then brought a motion three months later in the RUF for

adjudicated facts in the RUF case. Justice Sebutinde dissented in that. In paragraph 9 of her dissent she says, "In my view, the Prosecution has ample opportunity to challenge or rebut the facts proposed by the Defence in a number of ways; namely, (1) by using Prosecution evidence already on the record."

So Justice Sebutinde clearly in March, long before the start of the Defence case had also told the Defence, as they had previously submitted, that of course the Prosecution has the right to bring -- has a right to ask you to consider the evidence which is part of the trial record in this case.

Now, on the particular fact at issue in this case, we've pointed out in our brief that the Defence in their appeal made a gross distortion about what that adjudicated fact is. The Defence said that the fact showed in paragraph 85 of their appeal, "Having heard the Prosecution evidence, the majority of the Chamber took judicial notice of the factual conclusion from the AFRC trial that the RUF was not part of the operation in Freetown," but that of course is not anything like any of the adjudicated facts in this case. In effect, what the Defence is asking for in the appeal is for the Appeals Chamber to make a finding of adjudicated facts that was never brought before the Trial Chamber.

On the specific fact that is at issue, fact 15, as Justice Doherty indicated in her dissent, this was taken from the AFRC discussion of the context of crimes. And what does it say exactly? I'm not going to read the whole thing, but in the end it says -- it talks about the AFRC retreating from Freetown and it says, "RUF reinforcements arrived in Waterloo."

Well, the big issue of course that's in dispute is whether the RUF and the AFRC were co-operating in the attack on Freetown, and the Prosecution in this case frankly proved it far beyond any reasonable doubt in all kinds of ways, and especially with the help of some of the Defence witnesses such as Issa Sesay and Charles Ngebeh that this was a co-ordinated operation. So this adjudicated fact that talks about "RUF reinforcements arrived in Waterloo," well, what are reinforcements for? They are for

AFRC. That's clear. It shows co-ordination.

Then it goes on to say, "However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops." Well, what does "the necessary support" mean? I mean, it is slightly vague. I don't know how the Defence is interpreting it. I would interpret "necessary support" that what the Trial Chamber meant is to expel ECOMOG from Freetown, to capture and permanently hold Freetown, and of course that's not in dispute.

What the evidence shows is the RUF was working with the AFRC. Bockarie was giving them the orders, Gullit was complying with the orders, and right at the back of ECOMOG, the RUF forces were attacking at Waterloo, right on the Freetown peninsula, trying to get into the city. Thank God they weren't able to get into the city.

They even tried, according to Issa Sesay, when the AFRC first went in to take the airport. They attacked Port Loko, aiming to take the airport. If they had taken Lungi Airport, ECOMOG would not have been able to reinforce. If they had Port Loko to cut off the road to Guinea, to Conakry, the attack on Freetown may have had a very, very different result. The key is the RUF and AFRC were working together.

Now, the Defence relies upon one case for the proposition that they say, "Well, the Prosecution shouldn't have been able to argue about the evidence showing that Rambo Red Goat group went into Freetown without asking permission from the Trial Chamber." They rely on a single case that talks about that and that is Krajisnik from 2003, the adjudicated fact decision.

There is a big difference between Krajisnik and this. First, it was pre-trial. It was before the start of the trial. There's another decision in 2005 in Krajisnik where they don't make any such order.

Let me just go back, I'm sorry. In the 2003 decision they say, "The way the party will challenge a fact is by presenting evidence and requesting the Trial Chamber to consider it." They never say in 2003, "The request has to be before." Obviously,

when you are arguing the significance of the fact, you are requesting the Trial Chamber to consider it.

Also in Krajisnik, the only thing they talk about in that 2003 decision is judicial economy, and Judge Orie runs a very tight ship in trying to get that case done.

What that decision also said is that the Trial Chamber in that case was only taking notice of facts not in reasonable dispute, which is a different standard than was used in the adjudicated fact - AFRC adjudicated fact - decision in our case, where the Trial Chamber specifically said, "The fact that these issues are in dispute is not a reason that we are not going to take judicial notice of them."

So the Trial Chamber in Orie -- no, excuse me, in Krajisnik, there were cases where there was an issue of cases issues not in dispute, where before the time was wasted in a court by calling a witness perhaps Judge Orie wanted to say, "Well, I want to hear the relevance of that witness since this is a fact not in reasonable dispute."

But in 2005, Krajisnik went on to say -- in paragraph 10 they found more adjudicated facts. I hope I've written it down. Well, I'll paraphrase it because I don't have it.

In paragraph 10, they talk about -- I believe it's paragraph 10. They talk about it, and they say again that the Trial Chamber retains the obligation to consider all of the evidence, including the adjudicated fact, but in considering all of the evidence and deciding on what weight, if any, to give to an adjudicated fact and how to place that into context.

So our answer to your question about adjudicated facts is the jurisprudence that should be applied is that that exists. A Trial Chamber always retains the obligation to consider all of the evidence in deciding what weight and what context to give to an adjudicated fact and whether or not it's true or not true, because the primary obligation frankly of any Trial Chamber, or an Appeals Chamber, is to get to the truth of what happened.

And there's no question on this particular fact that Rambo Red Goat group did go into Freetown with a group of RUF. And the Defence's own witness, Issa Sesay, testified

in his direct examination that Rambo Red Goat was leading a group of RUF. That was in the Defence case.

And further in the Defence submissions, in their final brief, the Defence acknowledged this, saying in paragraph 1131 of the Defence final brief, "There is evidence that Rambo Red Goat, when he and his group joined the AFRC under Gullit during the retreat, brought with him ammunition." And then the Defence in this case actually got to do two final briefs. In their response to the Prosecution brief, paragraph 150, they said, "The Defence notes that the Prosecution so soon forgets that, according to its witness, the groups that stayed behind in Freetown to carry out Sam Bockarie's orders to burn and destroy were the Rambo Red Goat group and Striker."

So the Defence is now saying, "We were prejudiced by a finding that Rambo Red Goat group and a group of RUF went into Freetown." Well, why didn't they object to that when the Prosecution brought it up in its final brief? They didn't object to it. In fact, they themselves argued that Rambo Red Goat group went into Freetown.

In all of their submissions on this adjudicated fact, when they have claimed prejudice, what is the prejudice? What is the evidence that they claim that they have that they didn't bring? They don't mention any of it. All they mention is that there were witnesses that said that the AFRC and RUF did not co-operate, but there's no specifics before you of evidence about Rambo Red Goat group.

Issa Sesay himself admits that there is evidence that Rambo Red Goat group went into Freetown. Issa Sesay's lies that the Trial Chamber found, three different versions of how he knew the name Idriss Kamara for Rambo Red Goat, show that in fact what the Prosecution witnesses said was true. Idriss Kamara, Rambo Red Goat, was sent by Issa Sesay with a group of RUF. That was just one more way that the RUF contributed to the attack on Freetown.

What the Trial Chamber found in this case is -- was proven far beyond a reasonable doubt. The two groups were co-operating. In fact, a piece of evidence that wasn't

available in earlier trials was played in this case, P-279, a radio broadcast, and in that broadcast -- it's from Freetown, 6 January. There's a call to Robin White, Focus on Africa, "It's an amazing day in Freetown and we have on our phone a Colonel Sesay, Colonel FAT Sesay, from the AFRC." And they say, "We have just taken the State House." And Robin White asks, "Well, who took it?" He said, "We, the combined forces, the RUF and the AFRC."

So, your Honours, there is an interest in harmonising Judgements, but the primary interest is the truth. And what's clear and proven in this case is the RUF and the AFRC were doing a joint operation. Gullit and the AFRC commanders were carrying out Sam Bockarie's orders to commit terror, to burn Freetown, and all of it was part of the Charles Taylor/Sam Bockarie plan to take Freetown. That's the truth and that's what the Appeals Chamber should uphold, in our submission.

So thank you, your Honour. I've reached the end of my submissions.

Excuse me, the Krajisnik paragraph was 17, where they talk about the obligation of the court. In the March 2005 adjudicated fact decision, they say, "At that time ..." -- this is interesting, because unlike 2003 now they're in the middle of trial. In the 2005 decision, the Trial Chamber in paragraph 17 reminds that, "The Trial Chamber always remains under the obligation to consider the adjudicated fact in light of all of the evidence in the case."

JUSTICE FISHER: Thank you.

MR KOUMJIAN: So I'm available for questions from your Honours, if there any?

(Appeals Chamber confers)

JUSTICE FISHER: I believe we have no questions.

Madam Prosecutor, if you'd like to continue.

MS HOLLIS: Thank you, Madam President, your Honours.

As I said, I'll begin with the question you posed at 2 sub (i) part (b), the differences and similarities between aiding and abetting, instigation and ordering as forms of liability under Article 6(1) of the Special Court Statute, and if I could first look at some

differences in the actus reus of these three forms of liability.

If we look at aiding and abetting, we must prove that an accused provided practical assistance, encouragement or moral support to the physical perpetration of a crime or underlying offence, and in that regard at paragraph 482 of the Taylor Trial Judgement, citing earlier cases of this Court, they indicated that aiding and abetting actually constitutes two discrete activities: Aiding consists of giving practical assistance to the physical perpetrator, or intermediary perpetrator, whereas abetting consists of facilitating the commission of an act by being sympathetic to it; that is to say giving encouragement or moral support to the physical perpetrator or intermediary perpetrator.

When we look at actus reus of instigation, what we must prove there is that the accused prompted another to act in a particular way, and in that regard you need only prompt another to act in a particular way and not necessarily to commit a crime or underlying offence per se if the mens rea of instigation is satisfied.

The Trial Chamber in the AFRC Trial Judgement distinguished aiding and abetting from instigating by noting that instigating requires more than merely facilitating the commission of the principal offence, which would be sufficient for aiding and abetting. Rather, instigating requires some kind of influencing the principal perpetrator by way of inciting, soliciting or otherwise inducing him or her to commit the offence. So this is one of the nuanced differences between this particular element of actus reus for instigation and aiding and abetting.

When we turn to ordering, on the other hand, it must be proven that the accused, a person in some position of authority, instructed another to carry out an act or engage in an omission, and, again, you need only instruct another to carry out an act or engage in an omission and not necessarily instruct them to commit a crime or underlying offence per se, if the required mens rea is satisfied. And in a moment I will speak to why that is the law and why that makes perfect sense when we are assessing liability.

I can give an example of this issue of instructing another to perform an act or omission which is not of itself criminal, but may bring criminal liability when you look at the mens rea element. So, for example, after the Junta had been forced from Freetown by ECOMOG forces, Charles Taylor gave a series of orders to capture Kono and to maintain control of Kono, and the Trial Chamber found this at paragraphs 2863, 2864, 3611(ii), 3613 and 6543.

Now, of itself, an order to hold an area, to maintain control, to capture an area, is not criminal. However, in this instance, Charles Taylor gave those orders on more than one occasion to a group whose war strategy was one based on a campaign of terror against the civilian population; a group that deliberately used terror against the Sierra Leonean population as a primary modus operandi of their political and military strategy.

It is in that context that Mr Taylor gave these orders to capture Kono and to maintain control of Kono, and at the time Mr Taylor gave these directions he was aware of crimes that these groups were committing through a variety of sources, as the Trial Chamber found, through his own daily briefings as President of Liberia, through media reports and sources, and also of course Mr Taylor himself admitting that by April of 1998 he was aware that the RUF was a group engaged in a campaign of atrocities against the civilian population of Sierra Leone. It was in this context that Mr Taylor gave these orders to hold and maintain control of Kono and, in carrying out these instructions, crimes indeed were committed.

Now, if we look at other differences in the actus reus for these crimes, we would note that for ordering, as I have said, it must be proven that the one issuing the instruction had some position of authority. Some position of authority, it doesn't have to be formal, it doesn't have to be long-term, it doesn't have to be in a formal chain of command, but some position of authority that would imply an element of compulsion to comply with that order.

Instigation requires no position of authority. However, when you're looking at the

mode of liability of instigation, a person's position viewed in context may be relevant in assessing their ability to instigate, that is to prompt the crimes, and of course for aiding and abetting there is no requirement of a proof of a position of authority of the aider and abettor.

Now, again going back to ordering and this position of authority, this may be a position of authority based on moral authority. Again, it may be short-term. It may be informal. Evidence that those who received the instruction, carried out it out, or attempted to carry it out, is some indication of the position of authority that the person giving the order had.

Now, in this case the Trial Chamber found that, in fact, Charles Taylor did hold a position of authority amongst the RUF and the AFRC/RUF alliance, and they found that at paragraph 6973. They also found, at paragraph 6774, that in March of 1997, Foday Sankoh gave an instruction to Sam Bockarie that he take orders from Charles Taylor.

Again, the significance is that this adds to Mr Taylor's position of authority; a position of authority he already held because of the centrality of his role in the ability of the RUF and later the AFRC/RUF to continue its campaign of atrocities in Sierra Leone, the many, many ways that he was central to that.

The Trial Chamber found two of the modes that he was central to that: Aiding and abetting in a variety of ways, and also planning the bloodiest operation of this bloody, bloody war; the operation that resulted in the attack on Freetown in January of 1999.

Now, other differences in the mens rea, or excuse me the actus reus, is that ordering requires a positive act. It cannot be accomplished through omission. You have to positively act in order to provide an instruction.

Similarities in the actus reus among these three modes of liability would include the following, and that is there must be a substantial effect as a result of the actions of the accused. When we look at aiding and abetting, the conduct must have had a substantial effect on the commission of the crime, or the underlying offence. The

prompting must have been a factor substantially contributing to the conduct of others in committing the offence. The order must have been a factor substantially contributing to the physical perpetration of the crime, or the underlying offence. And, indeed, your Honours have found that in the CDF Appeals Judgement at paragraph 84, and also looking at paragraph 52 of that Judgement, that both aiding and abetting require the actus reus to have a substantial effect on the perpetration of the crime. And your Honours found that a finding that an accused's conduct had a substantial effect for aiding and abetting will therefore normally also satisfy the substantial effect test for instigation.

Now, if we also look at other similarities, if we look at ordering, there's no requirement of a formal superior/subordinate relationship. What is required is proof of some position of authority, however that comes about, that would imply an element of compulsion. Certainly for instigation no superior/subordinate relationship is necessary, nor is it necessary for aiding and abetting. Similarly, as to all three, there's no requirement that you prove the existence of a plan or agreement.

If we turn to the mens rea, let's look first at the similarities for the mens rea of these three forms of liability. For aiding and abetting, the mens rea would be satisfied if it can be proven that the accused acted, provided the practical assistance or encouragement or moral support, with an awareness of the substantial likelihood that these actions would assist the commission of the underlying offence.

In regard to instigation, the similar awareness will be sufficient if the accused has the awareness of the substantial likelihood that a crime would be committed as a result of the prompting, that is to say as a result of influencing the principal perpetrator by means of inciting, soliciting or otherwise inducing him or her to commit the crime. And for ordering, a similar awareness would suffice where the awareness is of the substantial likelihood that a crime would be committed in the execution of the instruction.

Now, why would it be that this would be sufficient mens rea to find someone liable

for their conduct either as an aider and abettor, an instigator or for ordering certain actions? And the reason for this was actually set forward in the Blaskic Appeals Chamber Judgement at paragraph 42.

They were speaking specifically of ordering, but we suggest it applies to all three of these modes of liability. And the Appeals Chamber said, "A person who orders an act or omission with awareness of the substantial likelihood that a crime will be committed in the execution of that order must be regarded as having accepted the crime."

If I act, being aware -- if I issue an order, being aware of the substantial likelihood a crime is going to result when they implement my order, I have accepted that crime. And we suggest that that is correct, it is a perfectly correct standard to use. And we also suggest that it would be a standard to use for all three of these forms of liability for the same reason: that by acting with that awareness, I have accepted the crime. And why should I not be liable where I have accepted the crime?

Now, there are differences in the other form of mens rea for these three forms of liability. If we look at aiding and abetting, the mens rea could be satisfied if it was proven that the accused knew - knew - that his acts provided practical assistance, encouragement or moral support to the perpetration of the crime. So it's a knowledge element. It's a knowledge standard.

Whereas for instigation, the mens rea could be satisfied if it could be proven the accused intended that a crime would be committed as a result of his act, of his prompting, and so here we have an intention standard.

And the same is true for ordering. The mens rea would also be satisfied if it is proven that the accused intended that a crime or underlying offence be committed as a result of his act, of his instruction.

So we would suggest these are the principal similarities and differences when we look at these three forms of liability. And in that regard we suggest that these forms of liability are not mutually exclusive, that they can and have been in many cases, in the

ad hoc tribunals they have been found in their cases, aiding and abetting has been found, as well as instigation, as well as ordering.

And why would that be important? That would be important on a matter that I'm going to address next, and that would be important to describe the full criminal culpability of the accused's conduct, to have a full picture of the criminality of the accused's conduct.

JUSTICE FISHER: Would this be a good place to stop for our break?

MS HOLLIS: Yes, it would.

JUSTICE FISHER: Okay. I notice we're a little ahead, so the break will be 15 minutes and we will reconvene at 20-minutes-to-12.

THE COURT OFFICER: All rise.

(Recess taken at 11.25 a.m.)

(Upon resuming at 11.40 a.m.)

THE COURT OFFICER: All rise.

Please be seated.

JUSTICE FISHER: Ms Hollis, you may continue.

MS HOLLIS: Thank you, Madam President.

Unless your Honours have questions about similarities and differences of the three modes of liability, I will now move on to your next question? Thank you.

Your next question, under paragraph 2(i), was whether customary international law recognises that certain forms of liability set forth in Article 6(1) are more or less serious than other forms of liability for sentencing or other purposes. And the Prosecution's response to that question is, no, that there is no such hierarchy of seriousness, or, if you will, blameworthiness, for these modes of liability set out in Article 6(1).

And we suggest that, in looking at this question, it's helpful to look at the Statute, Agreement and Rules of this Court, and when we look at the Statute, Article 6(1), we see there is no hierarchy established in the plain language of that part of the Statute.

We also think it's helpful when thinking about this question to consider the situation of the Yugoslav Tribunal. And the Secretary-General of the United Nations, pursuant to United Nations Security Council Resolution 808, made a report about the creation of that tribunal. And in that report, at paragraph 34, the Secretary-General said that, "The Yugoslav Court would be mandated to apply what without doubt was accepted as part of international customary law."

Now, in paragraph 36 of that report, the Secretary-General went on to make remarks we suggest are very important in considering this question. And in paragraph 36 the Secretary-General said, "While International Humanitarian Law, as outlined above, provides a sufficient basis for subject matter jurisdiction ..." -- and we would suggest that is the substantive law of the crimes and the forms of liability. "While IHL, as outlined above, provides a sufficient basis for this subject matter jurisdiction, there is one related issue which would require reference to domestic practice; namely penalties."

And then the Secretary-General makes reference to paragraph 111 of his report, and in paragraph 111 it is indicated that, "In determining the term of imprisonment, the Trial Chamber should have recourse to the general practice of prison sentences applicable in the courts of the Former Yugoslavia."

We suggest that the Secretary-General took this approach, because when we're speaking of a hierarchy of forms of 6(1), in particular for purposes of sentencing, there is no international customary law that speaks to this. There is no uniformity of practice regarding the existence of such a hierarchy, or the sentencing consequences of such a hierarchy.

Without consistency of practice, we suggest there is no customary law regarding sentencing, and in this regard we note your Honours' decision in the Norman case, the Decision on Preliminary Motion based on Lack of Jurisdiction, where at paragraph 17 you state that, "The formation of custom requires both State practice and a sense of pre-existing obligation." And, as you noted in your Appeal

Judgement in the CDF case, at paragraph 405, "In determining customary international law with reference to State practice, State practice should be both extensive and virtually uniform in the sense of the provision invoked and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." We suggest to you there is no such uniformity of practice in relation to a hierarchy of seriousness, or, if you will, blameworthiness, of the forms of liability set forth in Article 6(1).

As we look even in the international arena at Nuremberg, aiders and abettors were sentenced to death in the Zyklon B case. Others were not.

If we look at judicial systems at the national level, there's a great disparity as to how you would treat various forms of liability. In some jurisdictions you would charge and sentence them all the same. In others, you would differentiate between principals and accessories.

Now, specifically relating to sentencing, our Statute very clearly mandates at Article 19(1) that, "In determining terms of imprisonment, the Trial Chamber, as appropriate, shall have recourse to the sentencing practice of the national courts of Sierra Leone," and there are similar provisions in the Statutes of the Yugoslav court and the Rwanda court.

Now, as the Taylor Trial Chamber in its Sentencing Judgement correctly noted, the law of the one State specifically referred to in our Statute, the law of Sierra Leone, provides for sentencing an accessory to a crime on the same basis as a principal, and the same is true of the law of England and Wales. The same is true of the law of the United States. The same is true of the law in many other jurisdictions. However, in some there would be a difference in sentencing based purely on legal characterisation. But absent uniformity in this practice, we suggest you cannot say that customary law creates a hierarchy of these forms of liability.

Now, in referencing Sierra Leone law, we are mindful of paragraph 475 of your Honours' Judgement in the CDF case where you were discussing the Trial Chamber's

decision not to have recourse to Sierra Leone's sentencing practices, and you noted that, "At the time the Special Court Statute took effect, Sierra Leone had not criminalised war crimes and crimes against humanity as such," but we suggest the issue here is different and renders the sentencing practice of Sierra Leone particularly significant.

The issue here is not sentencing practices regarding international crimes, but rather the issue is whether as a matter of customary law there is a hierarchy of seriousness of the modes of liability under Article 6(1). And we believe Sierra Leone law indicates that there is not, because it takes one approach. Other States take a very different approach.

Nor does the fact that the elements of proof would differ to a greater or lesser degree for the various forms of liability impose a hierarchy, no more than the difference in the elements of proof imposes a hierarchy of seriousness between crimes against humanity and war crimes. Different elements, but no hierarchy of seriousness.

And we suggest the same is true when we're looking at the Article 6(1) modes of liability.

We suggest that in order to find any principle that may be said to be a principle of customary law relating to sentencing for these international crimes, we must look to much broader principles, and we would suggest that to the extent you can say these are customary, these principles might apply. That is the accepted principle, that sentences must be based on the gravity of the offences and the totality of the criminal conduct of the accused. And, in order to determine that, you must look at the facts and circumstances of each case to determine an appropriate sentence.

So to this extent we would say that if there is international custom it is this broad principle, and the principle is this: That, in order to determine a just and appropriate sentence, you must look at the crimes, the conduct of the accused and the consequences of the crimes and conduct, not to category or legal characterisation of the crimes.

This approach is consistent with the Statute of this Court at Article 19(2), which mandates that for sentencing you must take into account factors such as the gravity of the offence and the individual circumstances of the convicted person, and again this is a similar mandate to that found in the Statutes of the ICTY and the ICTR.

This approach is also consistent with this Chamber's Judgement in the CDF case at paragraph 466, where your Honours spoke of the obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.

It is consistent with Professor Cassese's statement that your Honours cite in the Norman decision, paragraph 48, to the effect that in regard to international crimes at the international level, tariffs relating to sentences for each crime do not exist, and indeed States have not yet agreed upon a scale of penalties due to widely differing views about the gravity of the crimes, the seriousness of guilt for each criminal offence and the consequent harshness of punishment.

And when we're looking at this general principle, we agree with the Trial Chamber in the Celebici Judgement at paragraph 1225, that their Article 24(2) and their Rule 101(b), which are the equivalent of our Article 19(2) and Rule 101(b), that those two sources by themselves contain the indicia necessary for the determination of an appropriate sentence, and that by far the most important consideration - the litmus test - is the gravity of the offence.

As your Honours stated at paragraph 546 in the CDF Appeals Judgement, "The final sentence must reflect the totality of the culpable conduct of the accused. It should reflect the gravity of the offences and the overall culpability of the offender," and you noted that this totality principle is firmly supported in the case law of the international criminal tribunals, and you noted further that, "The totality principle requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of participation of the accused."

So what we suggest to you is that if the form or category, the legal characterisation of

the conduct, is anything at all, it is but one factor and a minor factor to be considered in sentencing. It is not a hierarchical imperative, because to put such a hierarchical imperative in place would be contrary to what we suggest is the fundamental principle that sentences be individualised to the circumstances of the case, to the gravity of the crimes in that case, to the totality of the criminal conduct of the accused in that case.

And most certainly we suggest to you that in the crimes that you have to deal with here, international crimes, crimes against humanity, war crimes, to rely on a supposed hierarchy of forms of liability based on category not crimes, not conduct, not consequence, would be contrary to what we suggest is this fundamental principle, and would lead to sentences that are not reflective of the totality of the conduct of the accused, sentences that are not individualised to the facts and circumstances of the case, sentences that are not just.

Indeed, when we look at the cases that you have to judge, we see that very often the conduct of a direct perpetrator in terms of totality of conduct, in terms of liability for crimes, in terms of consequence, the liability for sentencing for a direct perpetrator would be much less than for one who is found guilty of other forms of liability such as planning and aiding and abetting.

We suggest that that is true in this case. If we were to look at a hierarchy, many people would say, "Well, direct commission has to be at the top," but how can we say that direct commission of the killing of 100 people is automatically more serious than planning which results in the killing, the mutilation, the enslavement of thousands or tens of thousands of people? Or the aiding and abetting that results in these crimes on a scale much broader than an individual perpetrator?

Now, perhaps if we were dealing with what is often the case in domestic courts, a singularity if you will, we have one direct perpetrator, we have one aider and abettor, we have one crime, perhaps there you might argue some relative scale of seriousness. We suggest not, but perhaps there it would be more appropriate, but here, where an

aider and abettor can be responsible for a magnitude, for a qualitatively larger number of crimes over a longer period of time, over a broader geographic area, than any individual direct perpetrator, we suggest that the hierarchy simply doesn't exist, properly should not exist, and cannot be the basis for sentencing.

And what we suggest, your Honours, is there is no customary law in relation to this, but rather you must look to the individual facts and circumstances of each case, the circumstances of each accused and in particular in relation to sentencing. This is the only way that you can apply the principle that a sentence must be appropriate, proportionate to the seriousness of the crimes, to the totality of the criminal conduct of the accused, however you characterise it. There is no hierarchy. There is just look at the individual facts and circumstances of the case.

Do your Honours have any question on my submissions on that particular issue?

JUSTICE FISHER: Apparently not. You may proceed.

MS HOLLIS: Then, Madam President, your Honours, I will turn to the last question that I would address and that is your question at 2(v) of the scheduling order. The question is whether the sources of law identified in Rule 72 bis (ii) and (iii) establish that uncorroborated hearsay cannot be relied upon as a sole basis for incriminating findings of fact.

Of course Subrule 72 bis (ii) indicates that, "Where appropriate, as one of the sources of law you may rely upon, other applicable treaties and principles and rules of international customary law may be applied in this Court," and Subrule 72 bis (iii) indicates, "You may also apply general principles of law derived from national laws of legal systems of the world."

Let me summarise the Prosecution's answer to this question, and it is in two basic parts. First, no, sources of law identified in Rule 72 bis (ii) and (iii) do not establish that uncorroborated hearsay cannot be relied upon as a sole basis for incriminating findings of fact. Rather, we suggest to you the issue is really whether, viewing the proceedings as a whole, the trial was fair.

Further, we suggest to you in this regard Mr Taylor's reliance on the European Court of Human Rights cases, which were in turn relied upon by the Yugoslav Appeals Chamber in its Prlic decision at paragraph 53, that this line of cases is no longer the law of the European Court of Human Rights.

Secondly, and very importantly, even if there were such an absolute rule prohibiting such reliance, which we suggest there is not, this would not be a justiciable issue in this case because the Defence has made no showing that a conviction - a conviction - in this case has been based solely or in a decisive manner on uncorroborated hearsay.

So let's turn to our first position, that customary law does not establish such a prohibition on the use of uncorroborated hearsay. We suggest that, even in an instance where there was such reliance, there would be no error as long as the proceedings have been conducted fairly. And that reliance on such evidence solely or in a decisive manner for a conviction is not an error of law, and the Trial Chamber has the discretion to rely on it in its assessment of evidence.

Now, we suggest to you that it can fairly be said that the different approaches to the use and reliance on hearsay very often are reflective of the difference between common law judicial systems and civil law judicial systems, although today many common law systems have broadened their laws in relation to the use and reliance on hearsay.

And, again, when we look at custom, we reflect back on your Honours' language in the CDF Appeal Judgement and that is, "In determining customary international law with reference to State practice, the State practice should be extensive and virtually uniform", and we do not have that today.

If we look at our own rules of evidence, and if we look at the jurisprudence of this Court and the ad hoc tribunals, our rules of evidence do not prohibit the admission of hearsay evidence, and the jurisprudence allows reliance on hearsay evidence to prove elements and to support convictions. And if we look at various systems throughout

the world, again we see this divide over whether you can use hearsay, to what extent and how can you rely on it? Some jurisdictions allow it, others don't, so there is no uniform practice here to establish customary law at this degree of detail.

So what of Mr Taylor's arguments, then, that it is error to use allegedly uncorroborated hearsay as a basis for, in their words, a directly incriminating fact, basing their arguments on the Prlic decision, paragraph 53, which in turn relies on a line of cases from the European Court of Human Rights?

Mr Taylor's reliance fails, we would suggest, for many reasons. First and foremost because this is no longer the law of the European Court of Human Rights, but even if it were the law today, Mr Taylor's reliance would fail.

If we look at the Prlic decision, the Prlic Appeals Chamber rightly found that European Court of Human Rights' jurisprudence has no binding effect on the tribunal. But it did find that this line of jurisprudence was helpful to it - it was valuable to it - in determining this issue of reliance on evidence that had not been subject to cross-examination. But when we look at that line of cases on which the Prlic Appeals Chamber relied and upon which Mr Taylor relies, we see something that is very important. And that is that line of cases says no conviction - conviction - can be based solely or in a decisive manner on uncorroborated or uncross-examined evidence.

It does not speak of directly incriminating facts. It does not speak of specific incriminating facts, but conviction. And we suggest that's the standard that you would have to apply in assessing whether it would be error to rely on uncorroborated hearsay. Even under that line of cases, only where the conviction relied solely or in a decisive manner on such evidence would there be, under those line of cases, an unacceptable infringement on the accused's rights.

And we also have to note that this limitation on reliance on this evidence that has not been cross-examined that, in looking at solely or decisive, the European Court of Human Rights has made it very clear that those terms have to be defined very

restrictively.

And if we look at the Al-Khawaja case, at paragraph 131, then we see how the European Court of Human Rights says you have to define it. You have to define it restrictively, and here is what they say it means. "If we say 'solely,' what that means it is the only evidence against the accused for that conviction," the only evidence. That's what "solely" means.

The more problematic issue seemed to have been how do you interpret "decisive" in a decisive manner? And the European Court of Human Rights tells us that, "'Decisive' means more than probative. It means that without the evidence the chances of conviction would lessen and the chances of acquittal would increase. It means more than that. Rather, 'decisive' should be understood as indicating evidence of such significance or importance that it was likely to be determinative of the outcome of the case." So we're talking about conviction, and we're talking about very restrictive and precise definitions of "solely" or "in a decisive manner."

Now, as I said, we suggest to you that there has been no showing of any such reliance for a conviction in this case and I will discuss that in more detail momentarily. But most importantly, let's go back to this line of cases cited in Prlic that simply no longer reflects the law of the European Court of Human Rights in respect of this issue. Rather, subsequent decisions of this Court, most notably the December 2011 decision of the Grand Chamber of the European Court of Human Rights in the case of Al-Khawaja and Tahery versus The United Kingdom, have made it clear there is no absolute rule barring a conviction based solely or in a decisive manner on evidence not subject to cross-examination. And they also made it clear that it would not be correct for the European Court of Human Rights to ignore the specificities of the particular legal system concerned, and its particular rules of evidence in particular. And we would suggest, again, that they quite rightly noted that Article 6 of the European Convention on Human Rights does not lay down any rules of admissibility. Nor, we suggest, does Article 1 of the International Covenant of Civil and Political

Rights.
In that regard, we note that our rules of evidence expressly allow the admission of any relevant evidence, and the only provision addressing exclusion of evidence is Rule 95 which requires exclusion of the evidence only where its admission would bring the administration of justice into serious disrepute.
So the question is not whether a Trial Chamber relied or based a conviction solely or in a decisive manner on uncorroborated hearsay. Rather, as the European Court of Human Rights Grand Chamber has made clear, the question is whether the proceedings as a whole were fair. They also made clear that, in making that determination, they will look at the proceedings as a whole, and they will look at the proceedings as a whole not only in respect of the rights of the accused, but also in respect of the interest of the public and the victims that crime be properly prosecuted. And we suggest that this current European Court of Human Rights law is consistent with the jurisprudence of this court and of the ICTY and the ICTR.
Now, in regard to the principle that all evidence against an accused must normally be produced in his presence, the Grand Chamber found two general requirements arising from this general principle. They noted that at paragraph 119 of the Al-Khawaja case. They said the first principle is there must be a good reason for the non-attendance of the witness, and in relation to the second principle they said, again, it's not an absolute rule that there can be no conviction based on these -- such evidence, but where there is such a conviction then you have to look to determine if there were sufficient counterbalancing factors to ensure it was a fair trial. So those were the two principles that they derived from that general principle about confrontation.
Now, the counterbalancing factors that they considered in that case were the counterbalancing factors in the laws and procedures of the United Kingdom and they included the following: That the trial must allow evidence relevant to the credibility or consistency of the maker of this out-of-court statement to be introduced. You

have to allow them to bring in that evidence to attack the maker of that out-of-court statement, and of course that was done in this case, in the Taylor case, both in cross-examination and, we suggest, in the Defence's case in-chief. Also, a judge has to have the discretion to refuse to admit evidence if satisfied that its exclusion substantially outweighs the case for admission.

Now, that is not our Rule 89, your Honours did not put that balancing test in there, but the inherent ability to admit evidence is with the judges and so we suggest that this was met as well.

And the judges may stop the proceedings if satisfied at the close of the Prosecution case that the statements on which the Prosecution case was based wholly or partly, or that the statements on which the Prosecution case were wholly or partly on hearsay, if - if - they are convinced that the statement is so unconvincing that considering its importance to the case conviction would be unsafe. And certainly the judges in this Special Court have the ability to do that with the "no case to answer." They have the ability to do that on their own.

And finally they looked at the general discretion to exclude evidence if it would have such an adverse impact on the fairness of the trial that it ought not to be admitted. And, again, the judges in this Court certainly have the ability to do that.

And we suggest that these counterbalancing factors are consistent with the approach that the Trial Chamber took in this case. If we look at the Trial Chamber Judgement, at paragraphs 156 to 206, we have an extensive discussion of the law and the Trial Chamber's approach to the evaluation of evidence. The Trial Chamber in particular looks at hearsay evidence at paragraphs 168 and 169, how it should treat it, the factors it should consider, and then at paragraphs 212 to 397 the Trial Chamber goes on to make credibility assessments of certain specific witnesses and also assessments of the authenticity of certain documents.

But what we suggest to you is that, as to counterbalancing factors in this Court, as in the court -- the Yugoslav Tribunal and the Rwandan Tribunal, the most important

counterbalancing factor that you have is that it is the judges whom the Court in the Horncastle case referred to as "the gate-keepers." It is the gate-keeper judges who decide not only the admissibility of evidence, what will be allowed and what will not be allowed, but it is these gate-keepers - these professional judges - who assess each bit of evidence and determine what weight, if any, should be given to it.

So it is no longer the law of the European Court of Human Rights that you cannot rely on uncorroborated hearsay as a sole or decisive basis for a conviction. Rather, in such circumstances you have to look at factors that would ensure a fair trial, and we suggest when you conduct that review here you will find that there were sufficient factors to ensure a fair trial.

Now, let's move to our second point in response to your question and that is, even if the European Court of Human Rights were still following the jurisprudence cited in Prlic, this would not be a justiciable issue in this case because there has been no showing that the Trial Chamber relied solely or in a decisive manner on any uncorroborated hearsay as a basis for any conviction - conviction - in this case. And you can't expand the findings of those courts to include directly incriminating facts, or specific incriminating facts. Conviction, that's what it is, and that's what you would have to look to in this test.

What we suggest is that, when you look at the Defence allegations of uncorroborated hearsay, what you really find is the Defence simply disagreeing with the assessment of the evidence by the Trial Chamber. And in that regard it's helpful to remember that the primary responsibility for assessing and weighing the evidence is for the Trial Chamber and that that will only be disturbed on appeal if no reasonable fact-finder could have reached those conclusions, or if the findings were wholly erroneous, and we suggest that is not the case here.

Now, if we look at just a couple of examples in ground 1 where the Defence alleges this reliance on uncorroborated hearsay, it may be helpful. And in paragraph 27 of ground 1, Mr Taylor asserts, "The Trial Chamber finding that Charles Taylor

instructed Sam Bockarie to release freed Pademba Road prisoners to Buedu was based on one witness's uncorroborated hearsay," and here they were referring to the evidence of Dauda Fornie.

But when you look at that assertion on its face it's false, first of all because the Trial Chamber found that Dauda Fornie's evidence was corroborated by the evidence of TF1-516, and that's at paragraph 3588 of the Judgement.

Now, Mr Taylor makes a second assertion in paragraph 27, but it is also unsubstantiated when you look closely at the record. And at paragraph 27 Mr Taylor asserts that this finding about Taylor ordering that the freed prisoners be moved to Buedu, that this finding led directly to a conclusion about Mr Taylor's responsibility for planning and aiding and abetting crimes in and around Freetown. This is a misstatement, or a misinterpretation, of the Trial Chamber Judgement.

As to the aiding and abetting allegation, when we look at the Trial Chamber's findings regarding legal responsibility for aiding and abetting - and this is at paragraph 6907 to 6953 - there's no direct reference to this finding.

Under sub-part (a) of those findings relating to the physical elements of aiding and abetting operational support, this is paragraph 6925 to 6937, there is no specific reference to this finding.

Well, is there any reference at all then? Indirectly there is, and that is at paragraph 6928 where the Trial Chamber finds that Charles Taylor provided satellite phones. This is a finding that he provided satellite phones to Sam Bockarie and that providing such phones enhanced the capacity to plan, facilitate or order RUF military operations during which crimes were committed. And the Trial Chamber in that same paragraph found that Charles Taylor and Sam Bockarie communicated by satellite phone in furtherance of the Freetown invasion and other RUF/AFRC military activities during which crimes were committed. Now, that was the finding about satellite phones and the importance of satellite phones.

At footnote 15552 of this paragraph, the Trial Chamber cites back to its discussion,

deliberation and findings under "Operational Support: Communications, Satellite Phones," at paragraphs 3667 to 3731, and if you look at that section of the Judgement, the Trial Chamber is examining the Prosecution's allegation that Taylor provided RUF leaders, including Sam Bockarie, with satellite phones that enabled Charles Taylor to plan, facilitate and order RUF activities during which crimes were committed. During its assessment of evidence on this issue at paragraph 3672, the Trial Chamber discusses Dauda Fornie's evidence, but broader evidence, evidence in the most significant part about communications between Sam Bockarie and Benjamin Yeaten after the 6 January invasion, and notes Fornie's evidence about frequent contacts, sometimes two or three times a day, via satellite phone, during which Sam Bockarie would ask Benjamin Yeaten for advice and provide him with sitreps; with reports about the situation on the ground.

In that paragraph, almost as an aside, the Trial Chamber notes the Fornie evidence about the instruction from Benjamin Yeaten to bring freed prisons to Buedu, Benjamin Yeaten saying this instruction was Charles Taylor's.

Now, Mr Taylor ignores that in this section under "Operational Support: Communications, Satellite Phones," in addition to Fornie, the Trial Chamber notes the evidence of many other people: Varmuyan Sherif; Jabaty Jaward; Mohamed Kabbah; TF1-585, Karmoh Kanneh, Abu Keta and many others. And Mr Taylor also ignores that in its deliberations on "Operational Support: Communications, Satellite Phones," which is found at paragraphs 3722 to 3728, the Trial Chamber refers to the evidence of multiple witnesses. So Mr Taylor's assertion that this finding about this instruction led directly to a conclusion about Mr Taylor's responsibility for aiding and abetting is simply not founded in the Judgement.

If we turn to planning, the same can be said to be true of that assertion, that this order to move these freed prisoners led directly to a conclusion about Charles Taylor's responsibility for planning crimes in and around Freetown. This is also, when we look closer, without merit.

Again, looking at the Trial Chamber's findings on legal responsibility for planning at paragraphs 6954, 6971, there is no direct mention of this order. That's sub-part (a), "Findings on the physical elements of planning." This is paragraph 6958 to 6968. If we do look at paragraph 6960, we have the Trial Chamber recalling that in December '98 and January '99, Sam Bockarie was in frequent contact via radio or satellite phone with the accused, either directly or through Benjamin Yeaten, to update him on the execution of plans and the progress of a Kono and Freetown operation. So that's their finding there. It has nothing to do with an order to bring freed prisoners to Buedu.

But at footnote 15593, the Trial Chamber cites as support for this finding the section of its Judgement entitled, "Military operations: The Freetown Invasion, Allegation that the Accused Directed the Freetown Invasion," and this is a very extensive part of the Judgement. It covers paragraphs 3487 to 3618.

Now, Mr Taylor ignores this very extensive review, deliberation and findings that take place in this section, and he ignores that this Trial Chamber's review of this evidence covers a review of the evidence of multiple witnesses.

He also ignores the Trial Chamber's detailed deliberations covering paragraphs 3553 to 3605. And he ignores that in its deliberations, the Trial Chamber first addressed our allegation that from the commencement of the December 1998 offensives to the withdrawal from Freetown, Charles Taylor, either directly or through Benjamin Yeaten, was in communication with Sam Bockarie regarding the progress of the Freetown attack.

And then secondly it examines our allegation that Charles Taylor gave specific directions concerning the operation. And it is in this second subsection about specific directions that the Trial Chamber talks about this order to bring the freed prisoners from Freetown to Buedu.

So it has nothing to do with the planning, and, in fact, if you look at its findings, it finds there was only one order of the ones that we allege that it could find proven

beyond reasonable doubt, that was this one, and they said, "You know what, that's insufficient to show that he gave these orders and controlled the Freetown operation." That was the significance of that finding. It had nothing to do with the finding about his planning of this operation.

So Taylor ignores that in its deliberations in the first subsection about these alleged communications, the Trial Chamber reviews the evidence of multiple witnesses, and he also ignores that in its findings under this section, the Trial Chamber entered separate findings and summary of findings regarding the order to move freed prisoners and the evidence and findings regarding the contact between Sam Bockarie and Charles Taylor or his subordinates, including Taylor giving advice and getting progress reports. It makes separate findings about those. They also ignore that, in paragraph 3618, the Trial Chamber's only mention of the order to move the freed prisoners is in relation to a finding there was insufficient evidence to prove Charles Taylor had control over the Kono to Freetown operation.

And Mr Taylor also ignores the detailed discussion of the Trial Chamber in its findings in relation to the unique relationship between Charles Taylor and Benjamin Yeaten, his most ruthless and most loyal subordinate in Liberia, and that discussion and those findings are found at paragraphs 2570 to 2629.

So when you look closer at these allegations in paragraph 27, they're simply not supported by the Judgement. They are basically allegations in search of facts. The facts do not support it.

The second example is at paragraph 28, and if I could quickly point to that one. At paragraph 28 of ground 1, Mr Taylor alleges that the finding that Charles Taylor supplied arms to Sam Bockarie in 1998 is based on the evidence of eight witnesses whose evidence basically comes from one source, Sam Bockarie.

Now, remember when we're talking about Sam Bockarie as the source of these out-of-court statements, the first requirement of the principle that the European Court of Human Rights talk about is there has to be a good reason why that witness isn't

there.

Well, for Sam Bockarie there's a very good reason. He's dead. He's dead and he was killed by Charles Taylor's forces in Liberia, so we have to keep that in mind when we are thinking about these statements of Sam Bockarie.

But, again, Mr Taylor's assertion in paragraph 28 ignores the detailed discussion, assessment and findings the Trial Chamber engaged in in determining whether, as we alleged, Charles Taylor was a source of matériel during Sam Bockarie's leadership from February 1998 to December 1999, and they engage in this analysis at paragraphs 4855 to 5031 of the Judgement.

They ignore that the Trial Chamber's assessments were set out in two subsections, the first one being alleged deliveries of matériel from Charles Taylor to Sierra Leone, paragraphs 4855 to 4965, and the second subsection of alleged trips by Sam Bockarie to Liberia in 1998, paragraphs 4966 to 5031. And it is in the second section that you will find the paragraphs that the Defence refers to, paragraphs 5021 and 5022.

And Mr Taylor ignores that their findings about Charles Taylor being a source of this matériel is based on their assessments and findings as to both subsections, and that in subsection (1) regarding alleged deliveries, they evaluate the evidence of multiple witnesses who have different bases for their evidence, for their information, and this is thoroughly tested at court and it is discussed in these findings.

They also ignore the evidence in this regard of AB Sesay, at paragraphs 4920 and 4957, and what does he say? He says that, at a meeting between Taylor and the AFRC leaders in August of 1999, Mr Taylor himself confirmed to AB Sesay and others at the meeting that he had supplied arms and ammunition, as well as food, to the rebels to overthrow President Kabbah. They ignore that completely in saying that this finding about Charles Taylor being a source is based on only eight witnesses and they really are only relying on Sam Bockarie.

They also ignore the Trial Chamber's deliberations at paragraphs 4943 to 4964. And in those findings the Trial Chamber says that 20 witnesses testified supplies/matériel

were brought by intermediaries of Charles Taylor and that their accounts were complementary in most respects.

They also found at paragraph 4944 that four Prosecution witnesses testified to being directly involved in the transport of military equipment from Liberia to the RUF/AFRC, and they named them, Joseph Marzah, TF1-579, Varmuyan Sherif and Abu Keita, and that Joseph Marzah and Varmuyan Sherif said they got their orders directly from Charles Taylor to take those supplies. And they ignore the finding at paragraph 4946 that 13 witnesses corroborated the account of TF1-579 and Marzah that Charles Taylor was the source of that matériel.

They ignore the finding also at paragraph 4947 that two of the witnesses seem to rely on a general belief that Charles Taylor was the source, but that they were corroborated by others who gave concrete foundations for their beliefs. Seven said they had been told it was Charles Taylor, either by Sam Bockarie or by the intermediaries sent by Charles Taylor, and others indicated that indeed these intermediaries were the subordinates of Charles Taylor.

They also ignore paragraph 4949 where the Trial Chamber looks at two documents which it says bolsters the witnesses' testimony, and that is a letter, Prosecution Exhibit 066, wherein Sam Bockarie thanks Charles Taylor for providing assistance and asks for more, and a Black Guard report, Black Guard being an intelligence unit of the RUF, talking about what invaluable assistance Charles Taylor had provided.

Even in the second section, Mr Taylor's analysis ignores all but two of the paragraphs. He ignores the reliance on multiple witnesses.

So the Trial Chamber relied on multiple sources of evidence, not all of it hearsay, and not all of the hearsay based on Sam Bockarie.

So, your Honours, what we suggest to you in answer to your question 2(v) is that, no, there is no customary law that prohibits the use of this evidence, that there was no error in this case number (1) because there's been no showing that a conviction was based solely or in a decisive manner on uncorroborated hearsay and, number (2),

even if there were such a showing, the procedural guarantees, the counterbalancing factors, in this case show very clearly that Mr Taylor received a fair trial, that the Trial Chamber properly assessed the evidence, that these gate-keepers, these professional judges, properly evaluated each item of evidence in determining the weight that it would be given.

We suggest that viewing this trial as a whole, it was a fair trial, sufficient factors were present to ensure fairness even if uncorroborated hearsay were a sole or decisive factor for conviction, which we say it was not.

If your Honours have no questions, I have completed my responses to your questions.

(Appeals Chamber confers)

JUSTICE FISHER: Justice King would like to ask a question.

JUSTICE KING: This question is really directed to your predecessor, Mr Koumjian.

MS HOLLIS: I will ask him then to rise and respond to it.

JUSTICE KING: I think it is correct to say that the accused was found not guilty of the offence of joint criminal enterprise. How would such a finding -- in the circumstances of this case, what bearing if any would such a finding have in proof of the legal elements in the offence of aiding and abetting?

MR KOUMJIAN: Your Honour, it would have no effect, because the reason that the Trial Chamber acquitted Charles Taylor under joint criminal enterprise is that they found it not proven beyond a reasonable doubt that Charles Taylor had a common plan with the RUF and the AFRC to commit the crimes.

The element of joint criminal enterprise that they found lacking was not his contribution. It was whether or not there was a common plan. In dealing with that specifically in the pre-indictment period, the beginning of the indictment, pre-indictment, what the Trial Chamber noted - and the Defence has cited this many times in their submissions - is that Charles Taylor had a trading relationship, arms for diamonds, with the RUF and that sometimes he was their military ally. That actually was ULIMO before the indictment and there was no enemy in Liberia until

LURD came in 2000. There were two minor attacks in '99.
Anyway, the Trial Chamber talked about his trading relationship with the RUF and his military alliance at some times with the RUF as being the motivation for the assistance he gave them, for sending them the arms and ammunition that allowed them to commit the crimes.
So the fact that they found that there wasn't an agreement between Charles Taylor and the RUF to commit terror is not an element of aiding and abetting. Aiding and abetting requires simply providing assistance knowingly, aware of the substantial likelihood the crimes would be committed, and in fact the Trial Chamber found specifically that Charles Taylor made a substantial contribution to the crime; even higher than what's required for joint criminal enterprise which is significant contribution to the enterprise.
So my submission is the acquittal on joint criminal enterprise because the Trial Chamber did not find that Taylor was part of a common plan with the RUF and AFRC to commit terror, as charged in the indictment, that that has no bearing on whether he aided and abetted the crimes in the 11 counts of the indictment knowing that his assistance would facilitate those crimes.
JUSTICE KING: Just a subsidiary question. You are aware that in quite a few instances States have supported rebels in various other countries; in fact, overthrowing or toppling lawful governments. How is this case different from those cases?
MR KOUMJIAN: Well, your Honour, first overthrowing a lawful government may be a violation of international law by the State, but this case is dealing with individual criminal responsibility.
Not all assistance to a rebel movement is illegal, because there are certain requirements for aiding and abetting to be met. Not all rebel movements, or movements that seek the overthrow of a government, target civilians as part of their military strategy, which the RUF and the AFRC in fact did and this Trial Chamber

found.

So giving assistance to a rebel movement, to an insurgency in another country, is not a violation of international criminal law, it's not aiding and abetting, unless that assistance first facilitates crimes against civilians. I'm not talking about whether it facilitates the rebellion. That's not a subject of international criminal law.

Does it facilitate crimes against civilians, rapes, child soldiers, amputations, killings? If it does, when the person gave the assistance, did they know that their assistance was going not just to help them win the war, but assist in the commission of these crimes? And, finally, does the Trial Chamber determine that this is a substantial contribution?

As I mentioned earlier, not all military assistance assists crimes, because it's normally against the interests of even an insurgency to target civilians. You lose their support. It's an unusual circumstance, thank goodness. I certainly don't think it's the only time in the world, but it's unusual that a movement exists like the RUF where their very strategy was, as the Trial Chamber found, inextricably linked to the commission of the crimes. They needed terror. They used terror. That's how they recruited their soldiers, the children. They used women in every location that they were to rape as slaves. So that's an unusual factor. When you know that and you give assistance to that kind of rebel movement, or even if you give assistance to a government that's doing that, then you should be held criminally responsible.

And let me make one thing clear. The Defence raised the issue, "Well, maybe some big States give assistance to such crimes." It doesn't matter how powerful the State is. Our position is clear that the law should be applied equally. If any State is providing assistance, knowing that this crime is going to result in more civilians being murdered, more women being raped, people burned alive and heads put on sticks, and they do that knowingly, it's not an excuse to say, "Well, I had another motive. My motive was to fight terrorism," or anything like that. Killing civilians is not allowed under international criminal law and it is aiding and abetting if you knowingly provide

assistance to a group that's doing that.
Thank you.
JUSTICE FISHER: Justice Waki?
JUSTICE WAKI: Thank you.
Ms Hollis, maybe a comment on whether uncorroborated -- or whether accomplice evidence can be corroborated by other accomplice evidence. You've addressed us on hearsay evidence and how in the international criminal law arena this is acceptable, but what about accomplice evidence and corroboration on that?
MS HOLLIS: Thank you, your Honour.
We suggest that, yes, it may, and it will depend upon the evaluation of the evidence itself and the indicia of liability that are looked at to determine is this evidence believable?
Because when we look at corroboration, what are we really looking at? We are looking at is there something else in the record that makes this evidence more likely to be true, that gives us a greater sense of trust and reliability for that evidence, so that it would be an individual assessment as to each piece of evidence before you.
Now, we suggest that here we have evidence not only of who would certainly be accomplices, talking about the involvement of Charles Taylor, but we also have physical evidence of them travelling to Liberia, getting evidence -- getting ammunition and arms from White Flower, from the warehouse next to White Flower, and being told by Charles Taylor to take this evidence (sic).
So we suggest you have to look at each particular piece of evidence and judge it by its reliability, by its consistency with the other evidence before you, and again we look at the counterbalancing factors is what we would suggest that you have to do.
JUSTICE FISHER: Thank you.
There appear to be no further questions. We will be in lunch recess until 2 o'clock.
THE COURT OFFICER: All rise.
(Luncheon recess taken at 12.47 p.m.)

(Upon resuming at 2.05 p.m.)

THE COURT OFFICER: All rise.

Please be seated.

JUSTICE FISHER: Mr Anyah, you may proceed.

MR ANYAH: Thank you, Madam President.

If I may begin by indicating the order of presentation of the Defence's appeal in respect of the questions posed under Roman numerals (i) through (vi) of number 2 of your order of 30 November.

Mr Chris Gosnell, to my immediate right, will address Roman numeral questions (i) through (iv), except for the third question subsumed within Roman numeral (i). This is the question about a possible hierarchy among the various modes of liability under Article 6(1). The fifth question will be addressed by me, this is the question dealing with uncorroborated hearsay, and the sixth question will be addressed by Ms Kate Gibson. The third question subsumed under Roman numeral (i) will be addressed by Dr Eugene Sullivan, seated to my immediate left.

With leave of your Honours we propose to modify somewhat the order in which we answer the questions, and that relates to questions 5 and 6. Instead of question 5 being addressed first by me, we propose that Ms Gibson, with leave of your Honours, address question 6 first and then I finish last vis-à-vis question 5.

Thank you.

JUSTICE FISHER: The order is acceptable and you may begin.

MR ANYAH: I will hand the floor to Mr Gosnell.

MR GOSNELL: Good afternoon, your Honours. Some time around March or April 1998, according to the Trial Chamber, unidentified soldiers killed eight civilians in the area of Payema, just north of Koidu Town in eastern Sierra Leone. The Trial Chamber was not able to ascertain or determine precisely who the soldiers were, but did infer that they must have been members of the AFRC or the RUF. One of the victims was according to the Trial Chamber at paragraph 723, and I quote, "... shot

dead while making bricks for his house because he refused to give the soldier money or diamonds." The Chamber found that these killings were not only unlawful, but that their primary purpose was to terrorise the civilian population.

Now, this is just one of the crimes for which Charles Taylor is deemed to be criminally responsible by way of aiding and abetting, according to the Trial Chamber. Not only was he found guilty of this crime, but indeed of every other crime charged in the indictment.

Now, what is the connection between this crime and Charles Taylor's actions as found by the Trial Chamber? What is the substantial contribution that Charles Taylor made to the unlawful killing of these eight civilians and the crime of terrorisation? The only basis for the Chamber's finding is that, more than seven months prior to this killing in Payema, Charles Taylor allegedly permitted one of his associates to act as an intermediary between the junta government and an unidentified third party for the sale of arms in September 1997.

That, your Honours, is the connection. That, your Honours, is the substantial contribution as found by the Trial Chamber. Despite the absence of any finding by the Trial Chamber that these soldiers had ever received weapons from that shipment which the Chamber found could have occurred any time between September and December 1997, as early as September 1997, more than seven months before this crime, no finding that any of these soldiers received ammunition or guns from that shipment. No finding about anything that occurs during those intervening seven months, no finding beyond a reasonable doubt that those soldiers had not obtained ammunition from some other source, despite the inherent implausibility, your Honours, that those soldiers, whoever they were, still had ammunition from that shipment seven months earlier, despite the absence of any discussion that between September 1997 and April 1998 there had been a substantial ECOMOG intervention which had forced the rebels into flight, despite the absence of any discussion that the operation in which these crimes are committed had not even been conceived in September 1997.

Despite all that, your Honours, the Trial Chamber still convicted Charles Taylor of aiding and abetting the deaths of these eight individuals.

This, your Honour, is at the heart of the reasoning of the Trial Chamber. This is the reasoning that the Trial Chamber applies time and again in respect of all of the crimes with which he was convicted of aiding and abetting.

Indeed, your Honours, the Trial Chamber goes even further, unlike in this particular case where the Trial Chamber at least attempted -- although I suggest it failed to make adequate findings connecting the supply of arms in which Charles Taylor allegedly participated and the crime -- on some occasions they dispense with that requirement quite expressly and blatantly. And thus, your Honours, we see at paragraphs 5716 and 5721 of the Judgement, in respect of the crimes in Freetown, the Trial Chamber, instead of bothering to make specific findings or deeming that it had to make specific findings connecting crimes, specific crimes, to specific supply by Charles Taylor, instead they rely on this concept of "an amalgamate of fungible resources." In other words, if you put into that amalgamate of fungible resources and from that pool of fungible resources a crime can be said to have been committed you've established a substantial contribution.

Indeed, the Trial Chamber then, as if to reach the ultimate logic of this reasoning, says at one point, "Any assistance towards these military operations of the RUF and RUF/AFRC constitutes direct assistance to the commission of crimes by these groups."

Now, your Honours, this reflects -- this reasoning reflects a deep and fundamental, we say, misunderstanding of the notion of aiding and abetting.

The actus reus of aiding and abetting, as the Appeals Chamber of the ICTY and ICTR have repeatedly underlined, and not only underlined in theory but applied in practice, is that the assistance must be connected by -- to a specific crime and there must be a substantial contribution to that crime. Aiding and abetting is not merely JCE with a lower mens rea, and yet this is precisely the reasoning that was adopted by the Trial Chamber.

Indeed, your Honours, the concept is so broad that it would in fact encompass actions that are today carried out by a great many States in relation to their assistance to rebel groups or to governments that are well known to be engaging in crimes of varying degrees of frequency, and I regret to say that the Prosecutor is wrong to say that is unusual for crimes to be committed in bloody civil wars. Unfortunately, it is all too common. It is going on and it has been documented as going on now by both sides in Syria. It is going on in Pakistan. It is going on in Sudan. It is going on in many other countries that are supported in some cases by the very sponsors of this Court. Is it the case? Is it the law that these governments are guilty of aiding and abetting crimes that are reported by Human Rights Watch, Amnesty International and by the United Nations itself?

Your Honours, I propose, with that introduction, now to address specifically the questions that you have posed and I'm very grateful for the questions that you've posed because I think they do put the finger on many of the vital questions that you are going to have to adjudicate, and given the breadth of the subject matter, the complexity, and perhaps my lack of eloquence relative to the Prosecution, I am going to rely on a PowerPoint presentation, which I hope will be available to your Honours shortly, and I will be addressing you on questions 1, 2, 3 and 4, in roughly that order.

The first question that your Honours asked of the parties was whether the Trial Chamber correctly articulated the actus reus elements of aiding and abetting liability under customary international law and the differences and similarities between aiding and abetting, instigation, and ordering as forms of liability under Article 6(1) of the Statute.

Now, I think it's a very -- at the risk of ingratiating myself, your Honours, it's a very good question because it appears to suggest that what your Honours are seeking is some insight into what might be the essential characteristics of access -- or accessorial liability in general. In other words, what might we be able to infer about the very difficult questions arising from aiding and abetting from two other forms of

accessorial liability prescribed by Article 6(1), namely, ordering and instigation. I propose, your Honours, not to repeat what has been already said in our submissions to you in writing, where we elaborately cover the various elements of these three forms of liability. Instead, I propose to just present to you certain highly salient characteristics in respect of aiding and abetting as they relate to the other two forms of liability.

Now, ordering and instigating are unlike aiding and abetting in the sense that they both involve acts that in themselves reflect a criminal objective. As John Locke would say, the actions themselves speak about the intention of the perpetrator. Thus, ordering involves the accused giving an instruction to another person under the accused's authority to commit a crime.

Now, contrary to the Prosecution's contentions, according to the prevailing jurisprudence of the ICTY, ordering does indeed require that the order encompasses or actually be for the commission of a crime. Thus -- and this is illustrated very clearly in the Dragomir Milosevic case which was decided, I believe, in 2009, which was after the Blaskic decision, and there the Trial Chamber convicted Dragomir Milosevic in ordering in respect of the use of air-modified bombs, which the Trial Chamber found to be intrinsically involving indiscriminate attack against civilians. On the contrary, he was not found guilty of ordering in respect of his orders to continue a campaign of sniping against the city of Sarajevo. Why? Because some of the sniping was lawful, even though it was well known by that stage, according to the Appeals Chamber, to the accused that, on the other hand, some events of unlawful targeting were taking place. Nevertheless, the Appeals Chamber acquitted Dragomir Milosevic in respect of the sniping and convicted him in respect of the use of the fuel air explosives.

Ordering also requires, in addition to that, that the order substantially contribute to the crime, although I must say, your Honours, it's hard to imagine how an order which is given to somebody who, by its very definition, must be under the authority

of the orderer, how strong of a role substantial contribution will often play in respect of ordering.

The traditional view as well, your Honours, is that the mens rea for ordering is direct intent and nothing less than direct intent. There is not very much scope, if you think about the requirements of the actus reus, for dolus eventualis.

Now, we have discussed the other elements of ordering in our Defence response brief at paragraph 16 to 46, and we rely on those submissions.

Now, instigation, like ordering, also involves a communicative act and the communicative act is prompting the perpetrator to commit a crime. The difference with ordering, however, as the Prosecution has correctly stated, is that the addressee of this communicative act is not under the authority of the accused. Thus, as articulated in the Media case from the ICTR, the instigation must be a factor substantially contributing to the conduct of another person committing the crime.

Again, this element is the same in respect of ordering, but unlike ordering, the substantial contribution requirement is often essential to determining liability, and famously in that case, your Honours, the Appeals Chamber quashed convictions by the Trial Chamber in respect of alleged acts of instigation that were in the form of radio broadcasts and newspaper articles issued before the beginning of the genocide on 6 April 1994, even though some of those broadcasts specifically named individuals to be targeted.

Nevertheless, the Appeals Chamber said that's not substantial contribution if it's prior to 6 April. The Chamber reached the alternative conclusion in respect of radio broadcasts after 6 April, thus illustrating the importance of the substantial contribution element in respect of those -- in that case.

And, your Honours, we have more fully set out the elements of instigation at paragraphs 56 to 71 of the Defence response submissions.

Now, the unique aspect of aiding and abetting that distinguishes it so fundamentally from instigation and ordering is that the actus reus can actually be quite easily

fulfilled quite unconsciously by the alleged aider and abettor. Consider, for example, the case of a chocolatier who sells a tasty treat to a paedophile, who then uses that paedophile to trap a child, to abduct a child. As it turns out, that potentially, in fact, there's no reason why in a particular case it might not fulfil the actus reus of aiding and abetting. But this isn't the only type of circumstance or the only type of activity that potentially could be assistance to a crime. Preparing a tax return, giving someone a ride in a taxi, providing someone with a hammer, giving them an axe, giving them even a weapon, your Honours, all of these forms of assistance or products that could be given either can be used perfectly lawfully, or at least non-criminally, or even the most apparently innocent products and services can be used for assisting a crime.

The question under these circumstances is, how do we define the limits where there is nothing whatsoever intrinsic in the nature of assistance which tells us what is aiding and abetting and what is not?

I would suggest to your Honours that when we put the question of aiding and abetting in the broader context of the two other forms of accessorial liability that you've asked about, I would suggest that it's exactly this contrast between ordering, instigation and aiding and abetting that helps us understand why the Appeals Chamber in the late 1990s in the ICTY sought to include specific direction as a form or as an element of the actus reus of aiding and abetting.

Now, over time that element has fallen into disfavour, and recently in the Mrksic case it was abandoned, but nevertheless, your Honours, what we see is an attempt to find an analog, a characteristic of the service or the product that somehow would help us understand how is it similar to the case of instigation or ordering in terms of conveying to the Court, as the Prosecution says, John Locke's illusive intent.

John Locke can infer intent quite easily in the case of an order or instigation. Can John Locke infer the intent so easily in the case of providing a service or providing a product? No, your Honours, it depends dramatically and fundamentally on the

context and it depends dramatically and fundamentally on the purpose, the intent with which the service or product is provided.

Now, your Honours know from having read ground 16 of our appeal that the Defence has a very clear answer as to the mens rea that ought to apply in respect of aiding and abetting, and we say that there are many legal systems that apply that purpose standard, including, as you know, the ICC, and we have fully explored in our briefs the relationship between 25(3)(c) and Article 25(3)(d), and I won't bore you with that discussion. You have not asked about it and I don't propose to go over it again.

Suffice it to say, however, that where knowledge is the standard requirement in many countries, the standard of knowledge that is usually applied is the requirement that the person providing the service know that, in the ordinary course of events, to a virtual certainty, the assistance provided will be used in the commission of a specific crime, and that is the crime for which a person can be held responsible as an aider and abettor.

Now, I won't discuss this further now, but I'll be happy to address mens rea further in some later stage in the context perhaps of the question that you have asked about purpose, but your Honours, for the moment, in a nutshell, the purpose of this overview of ordering, instigating, and aiding and abetting is to show that there is that illusive factor in aiding and abetting that is not present in the other two forms of accessorial liability and it requires greater caution in defining how we assess the limits, the appropriate limits, of this form of liability.

Now, your Honours asked whether the Trial Chamber correctly articulated the actus reus elements of aiding and abetting under customary international law, and to state our answer succinctly at the outset, the standard articulated was not erroneous but the standard applied was erroneous. And we have set out rather extensively the basis for this submission, in particular at grounds 21 and 34 of our appeal, where we have characterised the error as one of law and fact, or as a misdirection of law and

fact.

We have also argued in respect of each ground of the -- in relation to the material elements of aiding and abetting where this error had a significant significance in respect of factual findings.

Now, many of our submissions -- of my submissions to follow will rely on the case law of the ICTY and ICTR and that is so because we believe that that case law indeed is indicative of customary international law in this area.

Now, the definition of the material elements of aiding and abetting were given by the Trial Chamber at paragraph 482, and there you see it on the screen in front of you. The definition, as your Honours will note, does not contain a requirement of specific direction.

The Defence's position is that customary international law does not compel, and for this I appreciate the position of my learned friend opposite, does not compel the inclusion of what he would describe as a separate or distinct element of specific direction in the actus reus.

It continues, however, in the view of the Defence, and apparently also in the view of the Prosecution, to be a factor that is very near decisive or determinative in respect of assessing substantial contribution.

We also, or perhaps in the alternative, depending on your Honours' view of the overall structure of aiding and abetting, maintain in respect of ground 16 of our brief that purpose is in fact indeed a requirement that flows from customary international law. And our view is that specific direction has performed a role at the ICTY and ICTR that is analogous, even if not directly reflecting that requirement.

Now, the Trial Chamber's assertion that the assistance in question must have had a substantial effect upon the commission of the underlining offence here at paragraph 482 is correct. However, when it came to applying this test of the facts, it applied a very different notion of that concept, at least as it has been applied at the ICTY. And the difference is foreshadowed in a slight difference of expression between that

adopted by the Trial Chamber and that adopted at the ICTY, and I very deliberately have chosen for your Honours' consideration the definition of the actus reus adopted in the Mrksic case, which is widely regarded as, in a sense, the broadest formulation of aiding and abetting that has been pronounced so far at the ICTY, and what you will see or note in respect of this definition relative to that provided by the Trial Chamber is the emphasis that the perpetration -- that the support or the aiding, whatever it may be, must be to the perpetration of a specific crime and which has a substantial effect upon the perpetration of the crime.

And just to dispense with one issue immediately, we agree with the Prosecution that there are other formulations or variations on this standard. Sometimes the Appeals Chamber at the ICTY uses the formulation "substantially contribute," and just in respect of "specifically aimed" or "specifically directed," we would suggest that there's no fundamental difference between the requirement that there be a substantial effect and that there be a contribution which is substantial, except to say that perhaps phrasing it as a requirement that there be a contribution which is substantial, eliminates any possible ambiguity that one is just talking about effects one way or the other. What is required is a positive causal influence by the assistance on the perpetrated act.

Now, where does that language about assistance to a specific crime come from? Is it just something that they made up in Mrksic? Is it just something that has to do just purely with aiding and abetting? No, your Honours, it doesn't. It actually comes from a very specific source. There's a very specific lineage to this language, and this language in fact derives from the Tadic Appeal Judgement from 1999, which rather than addressing aiding and abetting was addressing joint criminal enterprise, but it was the very first application of joint criminal enterprise at the ICTY, and in doing so the Appeals Chamber evidently was very concerned to differentiate these two concepts, and this is where you see for the very first time this emphasis laid on the requirement of the assistance being to the perpetration of a certain specific crime. In

other words, JCE is being described as "The form of liability that deals with assistance to an organisation, and aiding and abetting deals with the form of liability concerning direct assistance or abetting, encouragement towards a specific crime."

Here we see the two formulations side by side, just to highlight how it is that the Trail Chamber defined the actus reus of aiding and abetting relative to that set forth by Mrksic.

What we see in the Trial Chamber's Judgement is that there be moral support to the perpetration of a crime or underlying offence that has a substantial effect upon the commission of the underlying offence, as compared to the Mrksic definition which again refers to a specific crime.

Now, your Honours, this does not rise to the level of a legal error. We have not suggested that it does. There's no requirement that a Trial Chamber explain every last implied element in a particular concept, but what we say is that this at least gives you an indication of where the Trial Chamber may have started to go wrong in terms of how it applied the concept in question.

Now, the other sort of error that perhaps falls below being a legal error which requires that the Judgement be quashed is the Chamber's failure anywhere to explain, despite applying this concept to convict Charles Taylor of every crime alleged in the indictment, its failure anywhere to explain precisely what it considered the substantial contribution to a specific crime to mean. It never explained precisely what standard it was purporting to adopt, and it's not enough, your Honours, to just say, "Well, there's a standard. We've articulated the standard properly on page 500. 1,500 pages later, we're now applying that standard without any further elaboration or discussion." It's quite possible to define a legal element correctly and then say the determination of a legal element is then to be applied on a case-by-case basis, but at the same time to take into account jurisprudence that helps to understand and explain what that very general or broad concept might mean, and this the Trial Chamber did not do, and had the Trial Chamber explored the question, it would have found that in

fact there are -- there is jurisprudence on this very question.

Now, the first significant discussion of the content of substantial contribution to be found in the ICTY jurisprudence concerns the conviction of Jokic for his contributions to killings following the fall of Srebrenica, and the Appeals Chamber in that case explained some of the features of Jokic's participation that it considered significant for determining that he indeed had substantially contributed to those crimes.

And amongst the criteria that we see set out in that Judgement are, first of all, the general pronouncement that specific direction, while not any longer necessarily a separate or distinct element of aiding and abetting, nevertheless continues to form an implicit part of the actus reus of aiding and abetting, but the Chamber then included that element amongst other elements that it considered salient, and amongst the other elements were its finding that Jokic's acts of assistance concerned co-ordinating, sending and monitoring resources to actually go and commit the crime, and that was for the Chamber a salient consideration in deciding whether the actus reus had been met.

It also found that he had -- well, in the end, it ultimately reached the conclusion that indeed his assistance was substantial.

In Ndindabahizi, by contrast, the ICTR Appeals Chamber quashed a conviction where the accused had advocated the killing -- had openly and directly advocated the killing of Tutsi at a roadblock six days before that crime took place. So the accused, who is a minister in the government, walks up to a roadblock where there are a group of Interahamwe and says, "Kill Tutsi." At trial, the accused was convicted of aiding and abetting that crime six days later.

On appeal, the Appeals Chamber said, "Well, there's no particular error of law here, but your application of the actus reus standard to the facts is so wrong that no reasonable trial chamber could have reached that outcome," and they quashed the conviction.

The reasoning that seemed particularly relevant to the Trial Chamber is two-fold:

First, the Appeals Chamber's assessment that other people had been killed at the roadblock prior to the intervention of the minister.

Now, it's often stated in the jurisprudence that there is no cause -- and the Trial Chamber said it as well, there's no cause and effect requirement in respect of the actus reus of aiding and abetting, and that's true, your Honours. There's no simplistic cause-and-effect requirement. The effect need not be solely caused by the aid provided by the aider and abettor, but it would be equally untrue and false to suggest that causation is irrelevant to the question of aiding and abetting and to the actus reus of aiding and abetting. That's not true.

The very words "substantial contribution" indeed imply that there is a causation analysis at work, and what we see here in the ICTR Appeals Chamber Judgement is a very explicit expression of that notion, is it really true that the minister who shows up and who gives this pronouncement, saying "Kill Tutsi," what is the causal significance of that in relation to a killing that occurs six days later? And the Appeals Chamber says, "No, that is not enough. That is not substantial contribution."

One of the reasons is that killings were already ongoing. The second reason is that there was no specific evidence that the perpetrators who heard the accused speaking were the same ones as who killed the victim. And the Trial Chamber did not in that case say, "Well, the minister's words, being a man of great reputation in the community, would have been heard by others. They would have been passed on to others." The Appeals Chamber did not rely on that reasoning. They decided that, in the absence of specific evidence connecting the words specifically to the crime against the victim, that there was no aiding and abetting.

The third case I've already alluded to in respect of the actus reus of aiding and abetting, and this is the Media case, and it's really important to remember how odious the pronouncements in the broadcasts and the newspapers were. This was hate speech, and not only was it hate speech in general, there were specific injunctions to target specific individuals prior to 6 April 1994. And the accused, by the way, were

not only convicted of instigation at trial. They had also been convicted of abetting, so there's no distinction arising here as between instigation and aiding and abetting. In any event, in both cases the substantial contribution requirement arises, but nonetheless there can't be any distinction arising from that. The Appeals Chamber reversed the convictions for all speech that occurred before 6 April, not because it was protected, not because it wasn't hateful, not because it didn't call for outrageous things, not because the accused didn't have the intent to see these heinous acts carried out. No. The aiding and abetting conviction was reversed on the grounds that there was no demonstrable connection, causal connection, between those -- between that speech and the crimes, and this despite the fact that the Trial Chamber understood that that speech did, in a sort of general sense, contribute to an atmosphere of violence; it contributed to an atmosphere of menace.

And notwithstanding that finding, here we have the Trial Chamber saying that in respect of those killings, the connection, the evidence of a link, is tenuous. Why? In part because the period of time between the act, the alleged aiding act, and the crime, as the Trial Chamber here says, is relatively long. And why is that lapse of time so significant? Because in the absence of an ability to show that there were no other causal influences during that lapse of time, there is indeed a danger of imbuing artificially a causal influence to a dramatic event, even many months before, in respect of the later crime, and here we have the Appeals Chamber saying that's a factor for which trial chambers should be very careful and alert.

And that, your Honours, was a finding that was made, as I have mentioned, even where the Appeals Chamber accepted that there was probably a link - probably a link - between the appellant's acts and the genocide, owing to the climate of violence to which the publication contributed and the incendiary discourse it contained.

It is a temptation, when one looks at this case to say, "Well, the accused clearly is a bad person. The accused called for this violence. The accused in some sense contributed to this violence." Well, there's sort of a liability crucible, so to speak, in

the form of the climate of violence to which the accused is contributing, and we know in some sort of historical sense that that climate of violence, yes, indeed, it did have a causal influence on the deaths that followed 6 April to the genocide, and here we have the Appeals Chamber saying that may be true. Historically, there may be a judgment on these individuals, but they're not guilty of aiding and abetting.

So what can we infer from this very brief overview of the case law? Well, at least preliminarily we can see that there are some criteria that help us in understanding what does substantial contribution mean - substantial contribution to the specific crime - and those criteria include the directness of the aider's involvement in the crime itself. That was, in particular, the case in Blagojevic. The strength of the demonstrable causal connection between the act and the crime, again illustrated in all the cases we've looked at, and finally the importance of the temporal connection to the crime or, in the alternative, the lapse of time.

Now, your Honours, this is, I would suggest, one of the thorniest questions that you could possibly have thought of. It is a difficult question. It's a difficult question for several reasons. One reason is that specific direction, as I'm sure you know, has now been effectively, at least by the majority view, abandoned at the ICTY as a separate and distinct element of the actus reus, and that's significant because now the Appeals Chamber, and for that matter all of the Trial Chambers at the ICTY and ICTR, having seen that this element is reduced from a legal element down to an adjectival description, it relieves the requirement of providing a very clear definition of what specific direction actually might mean. And I would suggest to your Honours, when you look at all the submissions that have been presented both by the Prosecution and the Defence in our briefs, you'll see that there are some competing concepts as to what that concept might mean, what actually is specific direction.

On the one hand, you have the Defence arguing that specific direction is a fairly broad notion and that, to some extent, you cannot examine whether an action is specifically directed unless you consider the mental state, the intention of the accused.

The Prosecution appears to adopt the view that that is categorically impermissible, that somehow specific direction is imminent -- immanent in the act itself and that there's no need, in fact, it's impermissible to attempt to look at the intentions that somehow lie behind the actions.

So the question that you've posed is extremely difficult, given -- and to be quite honest with your Honours, there's never really been a clear discussion or explanation by any Trial Chamber or Appeals Chamber at the ICTY or ICTR clearly explaining what they consider the concept to mean. So your question is very -- extremely difficult for that reason.

I would propose the following start to an answer. One thing that we can say if we look at ordering and instigation is that, without the actus reus of ordering and instigation, you don't even reach the substantial contribution question. The substantial contribution question would be cut off. There couldn't be a finding that an order or an instigation had a substantial contribution if there was no order or instigation. You'd first have to make that finding of an order or instigation.

Similarly, if we analyse the question by analogy, if we say that there is no intrinsic definition to aiding the actus reus of aiding and abetting other than the context, namely, that it provides assistance, and if we say that the specific direction element is designed to in some way identify those acts which can have an impact on a crime sufficient to lead to the actus reus, then similarly I would argue that indeed with the Prosecution, if that's the concept of specific direction that is applied, indeed, you could not have substantial contribution without specific direction. If that's the concept of specific direction, then indeed you couldn't.

The problem, however, your Honours, is that different systems in the world use different analyses - global analyses - of mens rea and actus reus to reach the final result, and if you had a very narrow concept of specific direction, and the Prosecution seems to have a narrow concept, if you say you cannot look at intent in order to determine whether or not assistance is specifically directed or not, then I would say

on the contrary that it is possible to find that a particular assistance is not specifically directed, but does indeed have a substantial effect on a crime.

One example would be the case of a Head of State who welcomes Omar Al Bashir to their territory and who does not execute the arrest warrant at the ICC, knowing full well that crimes are ongoing in Sudan, and who, by virtue of omitting to serve that arrest warrant and execute it, Mr Bashir is permitted to return, on the assumption that indeed he continues to commit crimes, at least from a linguistic sense, there is an arguable case that perhaps he has -- the leader has engaged in a -- there is a substantial effect between non-executing the warrant and subsequent crimes. It would be very perverse to then say that the leader is guilty based on a knowledge standard, based on a foreseeability that Mr Bashir might return and continue those crimes.

So if there is a weak specific directions concept in actus reus, that nevertheless permits a finding in the absence of specific direction based on substantial contribution, then we say, and this is our argument in ground 16, that there must be a compensating notion in the mens rea that can prevent liability in those circumstances.

So the short answer to your question that you've posed is no, if we have a broad concept of specific direction and yes if we have a narrow concept.

Now, your Honours, I propose to deal with questions 3(b) and question 4 together, if I may, and the questions that you have asked are whether the Trial Chamber's findings meet the specific direction standard, and for the purposes of answering this question, I'm going to assume what I've previously described as the broad notion of specific direction and whether acts of assistance not to the crime as such can substantially contribute to the commission of the crime for aiding and abetting liability, and finally, whether the Trial Chamber's findings meet the "as such" standard.

Your Honours, in our view, the case law is not unclear. There's no absence of authority. There's no vacuum in respect of this issue. On the contrary, it is clear, both in respect of actus reus as well as mens rea, that the assistance must be provided

to a specific crime and which has a substantial effect upon the perpetration of that specific crime.

Now, this formulation doesn't say anything about the specific instrumentalities. It's possible that there could be some indirectness in the form of the effect, but at the end of the day the requirement is that there must be a substantial effect on the specific crime in question, and each of the cases mentioned previously, Nahimana, Jokic and Ndindibahizi, reflected such a detailed discussion.

The Trial Chamber's findings in no way reflect that it enquired into that issue, that it applied its findings in respect of specific crimes that are committed. In fact, it did the opposite.

Now, this is, in fact, the Trial Chamber's factual finding in respect of the crimes, and you'll notice that this is at paragraph 729 of the Trial Judgement, and this is in the middle of about a thousand pages of factual findings about the commission of particular crimes, and we see here the Trial Chamber making the finding that indeed rebel soldiers from the AFRC and RUF killed eight individuals who were not taking an active part in hostilities.

I'll just give you a very brief opportunity to read this particular passage, which is from 5551.

Now, what we see here, your Honours, is the Trial Chamber's attempt to characterise its understanding of the evidence that showed that supplies -- let's be very precise about this -- ammunition allegedly supplied by Charles Taylor was connected to this event in Payema. And notice here how the Chamber reverses the burden of proof. It says, "As there is no evidence that the junta obtained further matériel after the Magburaka shipment in late 1997, or that the RUF/AFRC were able to capture a significant amount of supplies in the retreat from Freetown." So, first of all, what you see right there in the beginning of that sentence is a reversal of the burden of proof, unequivocal, absolutely clear.

The Charles Taylor Defence is saying there's no evidence to support the contrary, ergo,

we assume the contrary or we take the position that the contrary existed. And notice the standard of proof that they apply. It is likely that the only supplies that the retreating troops had access to were from the Magburaka shipment.

Only likely, your Honours? Is that proof beyond reasonable doubt? Is the Chamber here making a finding that indeed those soldiers, whoever they may have been, were using ammunition supplied by Charles Taylor? Well, the Chamber considered that it -- notwithstanding the fact that it reversed the burden of proof and made a finding based only on a standard of likelihood, it said, "The Chamber can safely infer that the Magburaka shipment was relied on in both Operation Pay Yourself and subsequent offensives and was used to commit crimes during those operations until the RUF/AFRC was able to capture or otherwise obtain alternative supplies of matériel."

Now, what's interesting - and this is going to come up in two slides down the road - is here we have the Trial Chamber, I think quite correctly, being alert to the possibility of other sources of supply. Here the Trial Chamber is saying, "We have considered whether there are other sources of supply. We find that no such sources of supply have been established by the Defence, ergo, those supplies can be attributed to the Magburaka shipment," but just as a question of the mode of reasoning, at least the Trial Chamber here is indeed looking at the sources of supply in order to see whether or not it can determine that these soldiers had supplies from the Magburaka shipment.

Again, the specific action of Charles Taylor in respect of the crime is that he allowed someone to broker an agreement. Even that, I suggest to your Honours, in and of itself, may not reach the standard of a substantial contribution. Allowing a third party, even an associate, to engage in an arms transaction with some third party, with no further findings as to the involvement of Charles Taylor, that's not sufficient. Even assuming that all of those weapons were indeed used in crimes, in our respectful submission, even that is not sufficient to show substantial contribution.

Now -- and I would suggest that in fact Charles Taylor's involvement in this transaction is very remote and minor.

Now, what precisely is Charles Taylor's knowledge at this time in September 1997? And, indeed, it's important to remember, when the Prosecution claims that the Defence imposes artificial time-frames on the events analysed by the Trial Chamber, the Trial Chamber must make a finding that the actus reus, whatever it may be of aiding and abetting, is performed with the relevant mens rea, whatever that mens rea may be, but it's the case that the mens rea must be assessed at the time of the actus reus. There surely can't be any dispute about that.

So when the Trial Chamber finds that in September 1997 the actus reus was performed by Charles Taylor, then there's a need for a finding as to what the mens rea was in September 1997, and if you look at the Judgement carefully, what you'll see is great difficulty in ascertaining what kind of statement the Chamber is making about Charles Taylor's mens rea when, and you'll see that the Prosecution and Defence even have contrary interpretations, about four or five paragraphs of the Judgement, as to whether or not there's an increasing knowledge by Charles Taylor in respect of the crimes or whether it's supposedly static throughout the entire period. We say that clearly there is an increasing finding of knowledge by the Trial Chamber, but the ambiguity in and of itself shows you the kind of findings that the Trial Chamber made.

Now, what could Charles Taylor have known, according to the Chamber? What did the Chamber unequivocally say it could find about Charles Taylor's knowledge, intent, at the time of the Magburaka shipment?

Well, it said that as at August 1997, according to the Chamber, it was recognised that any military support could facilitate the commission of the crimes described above. Taylor, as part of the ECOWAS Committee of Five, would therefore have been aware of the likelihood that the AFRC/RUF would commit similar crimes in the future, and as early as August 1997, the accused knew of the atrocities being committed against

civilians in Sierra Leone by the RUF and the RUF/AFRC forces and of their propensity to commit crimes. Propensity is an inclination or a tendency.

Now, at this early period in August 1997, I would suggest to you these findings that I've just presented to you show that the Chamber isn't able to say anything more than that there is something between a mere possibility and a probability that crimes -- some crimes at some time would be committed in the future, but what we see in the evidence is not -- is an evaluation not of any specific information - and this is really the more fundamental error - we don't see an analysis of any specific information about knowledge of specific crimes that may be substantially assisted by the ammunition. The Chamber is instead, as the Prosecution has repeatedly done throughout its presentation, viewed knowledge in the aggregate as a general possibility or a general likelihood or even a general certainty that, in the aggregate, somewhere along the way a bullet is going to be used in a crime.

Now, your Honours, this reasoning is not sufficient. It does not reflect the requirements of aiding and abetting. It does not reflect the requirement of substantial contribution that's been applied in previous cases at the ICTY. There's no finding as to the identity of the perpetrators. That's the first question mark. There's no finding as to the instrumentalities used. There's no finding that those instrumentalities came from Charles Taylor. There's no finding that those instrumentalities had any impact, much less a substantial impact, on the decision of these three unidentified perpetrators to commit the crime.

There's no discussion of the impact of this assistance on the specific crime of terrorisation as opposed to the killings. There's no discussion of any intervening events. There's no discussion of the lack temporal proximity. There's no finding that Charles Taylor provided the assistance with the purpose of facilitating this crime. There's certainly no finding that the assistance was definitely going to be used for that crime, and there's no finding that Charles Taylor provided the assistance knowing that the junta government would be deposed, that an operation called Operation Pay

Yourself would come into being and that this crime would be committed as part of that operation. None of that had occurred at the time that Charles Taylor allegedly engaged in the actus reus.

Now, we say, your Honours, that there are none of the indicia of substantial contribution that you see in previous cases. There is a remoteness between Charles Taylor's alleged involvement and the crime, remote in time. There is a weak causal connection. It's no more, even by the Chamber's own account, than likely that the supplies were used in the crime, and there's absolutely no temporal proximity. And just to step back again, your Honours, the point here is that we're seeking to define the outer limits of a form of accessorial liability where there's no inherent -- there's nothing inherent in the assistance itself that predisposes it towards the commission of a crime. Bullets can be used either criminally or lawfully, and in the context of a bloody civil war, there is no finding in this Judgement at all about what percentage of those bullets were used in crimes versus what percentage were used lawfully, and there isn't one finding that one bullet provided by Charles Taylor was used in any crime.

Now, your Honours, the event that I just described concerned an attack in Kono in the first quarter of 1998, and the question is whether or not similar or the same reasoning applies in respect of other findings in the Trial Judgement that Charles Taylor aided and abetted crimes, and of course at the heart of this indictment and the Judgement against Charles Taylor is the attack on Freetown, and the question is: How is it, according to the Trial Chamber, how is it that Charles Taylor aided and abetted crimes in Freetown?

Now, the Chamber's reasoning, and this is a pared down explanation, schematic, as to how the Chamber reaches this conclusion, is first of all that Charles Taylor allegedly facilitates the Burkina Faso shipment. Now, your Honours, I apologise for again inserting the word "allegedly," but I must simply state that our position continues to be that there was not sufficient evidence to find that Charles Taylor was involved in

all or any of these transactions, and we have briefed you fully on that in our submissions and I won't go into it any further, but I simply draw it to your attention. Now, the Chamber's reasoning was that Charles Taylor facilitates the Burkina Faso shipment in November 1998. Ammunition from this shipment is then used by RUF forces to take Kono and Makeni. Now, the Trial Chamber - and this has been a point of contention between the Defence and the Prosecution in its submissions - the Trial Chamber made no express finding that any crimes were committed during that offensive in Kono and Makeni. Now, what the Prosecution attempts to do in the absence of such specific findings -- and I remind you that there are hundreds of pages of specific findings of crimes. What the Prosecution does is says, well, maybe there were no express findings, but nevertheless there's some evidence that maybe some crimes were committed, and perhaps the Trial Chamber occasionally makes reference to those crimes. Well, that may be, your Honour, but there never was a proper finding of any crime committed during that offensive on Kono and Makeni, and in a Judgement of this length and this exhaustiveness, I suggest that that should be deemed - considered - determinative.

It's a small point, but I nevertheless want to draw your attention to the fact that what we have is a major offensive. Notwithstanding the Trial Chamber's assertion that we have a continuous constant campaign to commit crimes, here you have one the central offensives of the entire war and the Trial Chamber makes no findings of crimes having been committed during this offensive.

The third element in the Chamber's reasoning is that AFRC forces then are simultaneously during this attack on Kono and Makeni moving from the north, south towards Freetown. I'm sure your Honours are very familiar with all of this scenario from previous cases, but I apologise if I'm taxing your patience in going through it. The Trial Chamber found that these forces - the AFRC forces - were not in any way assisted by Charles Taylor. They did not have ammunition, they did not have weapons, they did not take instructions from him in respect of the attack. Under SAJ

Musa, they commenced that attack and pursued that attack independently.

Now, Musa was subsequently assassinated, and then there was some discussion about the extent to which Charles Taylor then has some control over the forces, but the point is that the forces proceed all the way into Freetown without Charles Taylor's assistance at all. That's the Chamber's finding. So the finding that Charles Taylor could be responsible for crimes in Freetown has nothing to do, according to the Trial Chamber, with the AFRC offensive.

Now, RUF forces don't arrive in Freetown until the third week of January, so all kinds of crimes are allegedly going on in Freetown during this time. Charles Taylor is convicted of those crimes and the basis, presumably, of that conviction is the arrival of Rambo Red Goat at some unspecified time before the third week of January with, I believe, about 60 fighters. No findings that those fighters engage in crimes, no findings that those fighters give their ammunition to the AFRC forces who were found to be committing crimes by the Trial Chamber, no connection, no specific connection, at least as far as the Trial Chamber's findings are concerned, in respect of specific crimes committed in Freetown, and yet Charles Taylor was convicted of those crimes.

The Trial Chamber then goes on to say, "… and Charles Taylor is also responsible for the crimes committed during the retreat from Freetown." And why is that? Well, even though most or a great deal of the ammunition that was possessed by the RUF forces when they arrived on the doorstep of Freetown in the third week of January, even though some, or at least a substantial amount of that matériel, had been captured from ECOMOG during the non-criminal offensives in Kono and Makeni. Nevertheless, we should treat that matériel as if it had been supplied by Charles Taylor. And why should we treat the matériel captured from ECOMOG as if it had been supplied by Charles Taylor? We should treat it as having been supplied by Charles Taylor because, without his assistance, there never would have been an advance on Kono and Makeni and therefore he's responsible for that ammunition as

well. And that finding is based even on the fact that the offensive against Kono and Makeni was not conducted criminally.

Your Honours, I suggest to you it is an astounding assertion for the Trial Chamber to have made, and this is where they come up and where they use the amalgamate of fungible resources theory, which I suggest to you is the absolute opposite; it is the antithesis of making a finding that there has been a substantial contribution to a specific crime.

What the Trial Chamber is saying, in effect, in suggesting that all you need is proof that there is an amalgamate of fungible resources to which the accused contributed, what the Trial Chamber is in effect telling you is it doesn't need to make specific findings. It doesn't need to do that. You have an organisation here that has a body of resources that have been provided to it. It doesn't matter that there's no specific proof linking specific resources to specific crimes. No need of that, your Honours. We have the amalgamate of fungible resources theory, and the ultimate expression of that is this next quotation from the Trial Chamber, where it says, "Throughout the indictment period the operational strategy of the RUF and AFRC was characterised by a campaign of crimes against the Sierra Leonean civilian population, including murders, rapes, and other crimes. The Trial Chamber therefore considers that any assistance towards these military operations of the RUF/AFRC constitutes direct assistance to the commission of crimes by these groups."

Now, the question that you asked and that I'm still in the process of answering was whether or not the Trial Chamber's reasons reflect an analysis of whether Charles Taylor made a substantial contribution to the crimes as such or whether they addressed the standard that the assistance be specifically directed to the crimes, and I suggest to you that this paragraph that you have in front of you is the fullest expression of the antithesis of that approach, because according to the Trial Chamber, if you further -- if you do anything to perpetuate the existence of an organisation that you know in part, aside from many other activities, you know in part engages in

criminal actions, then that alone is sufficient to find you guilty of assisting any and all crimes committed by that organisation. This is the liability crucible applied by the Chamber, and the liability crucible is fine in respect of joint criminal enterprise. That's precisely what joint criminal enterprise is addressed towards. But here what you have is the Trial Chamber not applying an intent of -- a direct intent standard, merely a knowledge standard, and once you have this finding on the screen in front of you, there's no further inquiry necessary. It doesn't matter that the assistance you provide may perfectly well be used for legitimate or non-criminal purposes as well, or in the alternative. It doesn't matter whether there is proof that the specific assistance was used in any crime in particular. It doesn't matter that the form of liability just described is in fact JCE liability. It doesn't matter that the role of the accused may be extremely remote and minor, as in the case of the Magburaka shipment.

This raises the question, if this is the Chamber's ultimate position on aiding and abetting, why bother with findings, the findings that I alerted you to earlier in respect of Payema, where the Chamber says, "Well, actually, we've considered the possibility that ammunition came from other sources and rejected that possibility, albeit by reversing the burden of proof and adopting an impermissible standard of proof"? But at least they were being looking for it, your Honours. At least, in that part of the Chamber's reasoning, they said to themselves, "We need to determine whether or not the ammunition used in this crime, we need to determine beyond a reasonable doubt that it came from Charles Taylor."

Here you have the Chamber saying, "Well, actually, we didn't mean that. We don't need to determine that at all. You have fungible resources theory and you have this organisational liability theory, and once you have that, that's enough. Aiding and abetting is satisfied." I suggest, your Honours, that aiding and abetting was never designed for that purpose.

Now, one of the questions that your Honours asked, and I very much appreciated the question because it is one that neither party exhaustively addressed, is whether or not

the Trial Chamber's findings meet the mens rea standard of purpose.

Now, what exactly might "purpose" mean? And the Prosecution threw down the gauntlet and said, "What exactly does the Defence mean by 'purpose'?"

Well, we didn't make this up, your Honours. It's not my devising. It's not because I'm particularly smart or clever and came up with a novel concept unknown to international criminal law. The purpose standard is in the ICC Statute, Article 25(3)(c), which in its terms covers aiding and abetting, and if the Prosecution is correct in saying, "Well, you know, there's the knowledge standard in various countries and Canada applies it in a particular way and there's the draft code of crimes." If that's all true and the issue was settled in 1996, then why on earth is the purpose standard in the ICC Statute? Why was there such controversy at the Rome conference regarding whether or not the standard should be mere knowledge or purpose? Why were those two words bracketed out in the drafts of the ICC Statute and negotiated, according to those who were present at the conference, quite vigorously?

If the Prosecution is correct, none of that would have happened. If the Prosecution is correct, Article 25(3)(c) should have been easily adopted as simply a replication of the standard that was set out in the draft code of crimes, and no matter how eminent the 26 or 20-odd experts may have been, and for all I know one of your Honours might have been on that commission - I don't know - without any disrespect to the eminence of those officials, none of them were acting as representatives of States, and yet the representatives at the Rome conference clearly were and those representatives of States clearly had very, very serious reservations and concerns about the knowledge standard.

So what is purpose, at least as it is applied in some systems? Well, purpose in some systems is defined as an intent to assist a crime. The intention to assist a crime, that's not the same as direct intent in respect of the crime of the perpetrator. It is dolus directus in respect of the assistance, not in respect of the ultimate crime.

Now, whether or not those two might be very hard to distinguish in any particular

case is not for me to say. There may be cases indeed where they are different, but in terms of topology, it's very clear what "purpose" means. "Purpose" means intent to assist. And to consider why that standard is sensible, why it has been adopted in various national systems, it's because -- precisely because knowledge is in and of itself ambiguous, and the Prosecution has been applying a standard of knowledge which is quite different than the standard of knowledge applied in many national systems where, as I've previously said, knowledge requires that you know to a virtual certainty, not -- there's also imponderables, but in the ordinary course of events, you know that the assistance you provide is going to be used in a specific crime. That is the knowledge standard applied in some countries. Not necessarily the same concept applied in all countries, but that is the standard, and I would suggest that the purpose formulation makes it very clear that that actually is the minimum requirement. There can't be some other use for the assistance you provide that is non-criminal because then you've reduced the likelihood down to a possibility or a probability, neither of which are sufficient for that standard.

Now, the Prosecution referred in particular to one case, which I'll just briefly mention now because I think it's salient and that was the, I believe it's the Flick case, in which poison gas is supplied to Auschwitz.

Your Honours, that decision is fundamentally predicated on the notion that there was absolutely no other lawful use for that gas, given the circumstances. The individuals supplying the gas knew that there was only one potential, possible use for that gas, and it was criminal. And the same cannot be said about supplying weapons or ammunition to a party to a civil war.

Even if you know that there is a possibility or even a likelihood that some of those bullets are going to be used in crimes, because the truth is that if you give a bullet to the Syrian opposition today, knowing what we know, knowing what the UN High Commissioner for Human Rights has already publicly pronounced, then you can say that there is a possibility, if not a likelihood, that if you are continuously supplying

bullets to the Syrian opposition, one or more of those bullets is going to be used in a crime, and are the suppliers -- is the Prosecution saying that the suppliers of those bullets are guilty of aiding and abetting those crimes?

Your Honours, there is nothing in the Trial Chamber's findings in this case either implicitly or expressly that would have allowed it to make the finding that Charles Taylor knew that specific weapons or ammunition that he may have had some role in providing would be used in a crime, as opposed to being used for a lawful purpose. It was inherently geared towards combat. This is not the case of shipping a million machetes to Rwanda. This is ammunition being used to support a military campaign, and there is nothing illegal or there's nothing at least criminal in supplying such ammunition to an armed force, even when there's a Security Council Resolution prohibiting it, even when you know that there is a bloody civil war going on. That doesn't meet the standard of aiding and abetting in international criminal law.

Now, what did the Trial Chamber find about Charles Taylor's criminal purpose?

I see your Honour looking at the clock. I'm not sure when we're breaking.

JUSTICE FISHER: We're breaking at 3.30.

MR GOSNELL: Thank you, your Honour.

And what you'll see, your Honours, is the Trial Chamber made two distinct but nevertheless related findings about Charles Taylor's purpose and in his associations with the AFRC and the RUF. And a question was asked from the Bench of the Prosecution, "Well, does the Chamber's findings concerning JCE really have anything whatsoever to do about aiding and abetting?" And the answer that was given said, "Well, no, because that was only about the existence of a plan." Well, the existence of a plan was one part of it, but another part of it was intent, because when you're dealing with a criminal plan, you're also talking about criminal intent.

The Trial Chamber's finding in front of you does concern the pre-1996 period and it says that the accused in the AFRC and RUF had common enemies, namely ULIMO, and that therefore there was an interest to be in an alliance with the RUF. The point

here is not, as the Prosecution has tried to frame it, that if there is some purpose in addition to a criminal purpose, that does not alleviate the criminal liability. Of course it doesn't. That's not the issue.

The issue is, if you supply ammunition for a non-criminal purpose, if that purpose is the reason why you supply it, then that does not -- that displaces the finding, the ability to find, that the purpose was to further crimes. And here what you see, at least in the pre-1996 period, is an indication that the weapons were supplied by the accused, not as some ulterior motive to find ULIMO, but as the primary, as the -- to use John Locke's expression, it is the reason that is imminent in the act itself, and that's what this finding relates to.

The reason that the pre-1996 finding of the Chamber is relevant is because the post-1996 reasoning is expressed in similar terms, in the sense that it does make mention of the fact that the accused and the RUF were military allies and trading partners, and for that reason is an insufficient basis to find beyond reasonable doubt that the accused was part of any JCE. Now, yes, that does go to the issue of plan. What it also indicates is that the Trial Chamber is saying "We cannot find that Charles Taylor's intent in providing this assistance was to commit crimes," and that's highly salient to the issue of purpose. It's directly relevant.

Is it the same question? No, your Honours, it's not the same question. Is it relevant? It certainly is. And I'm mindful of the recent pronouncement in the Lukic case, in which the Appeals Chamber said that it is extremely hazardous on appeal to look at findings in relation to one form of liability and then convert them to another. And I would say that that is a matter on which your Honours certainly need to be cautious. At the same time, you have a voluminous Judgement, and at the end of that voluminous Judgement with all the findings that the Chamber came to, you nevertheless had the ultimate conclusion of the Trial Chamber being that Charles Taylor had no criminal intent in respect of any of the actions that the Trial Chamber found he had taken.

We contest that many of those actions taken. We challenge those findings, but nevertheless, even in respect of those findings, the Trial Chamber found that Charles Taylor had no criminal intent in respect of those actions.

Has the Prosecution appealed that finding? The Prosecution has not appealed that finding. The Trial Chamber's conclusions on joint criminal enterprise go uncontested by the Prosecution. Now, what did the Chamber positively say about Charles Taylor's alleged mens rea, and is what it said in any way close to the purpose standard? I would suggest to your Honours that it's not close to the purpose standard. We have this finding from the Trial Chamber at paragraph 6949, which again is about 6,000 paragraphs after the finding concerning Payema, and here we have the Trial Chamber saying that it could find beyond a reasonable doubt that the accused knew that his support would provide practical assistance in the commission of crimes during the course of their military operations in Sierra Leone.

Now, notably, the Chamber here again is laying emphasis on the support being provided for military operations out of which -- or in relation to which, or perhaps simply as a consequence of which, crimes were committed.

It's notable that the Chamber actually doesn't in terms say that the support was provided to the crime specifically. They are still relying on this intermediation between the action of Charles Taylor and the crime. I've pointed out what I believe are some of the specific improper steps along the way, the liability crucibles that were deployed by the Trial Chamber, but here we have even the Trial Chamber itself telling you "This is what we consider the substantial assistance to have been to."

This is not a gloss provided by Defence counsel, this is from the Chamber itself.

Does this meet the purpose standard? Not only does it not meet the purpose standard in terms, as I've tried to point out, the Trial Chamber did not even explain to your Honours or to the public or to Mr Taylor what precisely in particular he is said to have knowledge of. What is the reference point? What does he have knowledge is going to occur specifically? Does he know that the crime in Payema is going to

occur? Or is it simply that he should know that there's a substantial possibility that some of the assistance he provides could be used in a crime? And we say that that's a definition of knowledge that doesn't even meet the standard of knowledge that would be applied in many countries, and it certainly doesn't meet the standard of purpose.

JUSTICE FISHER: Excuse me, are you coming to a good place to stop? We have about three minutes.

MR GOSNELL: I'm at your disposal, Madam President.

JUSTICE FISHER: Okay. Why don't we take our break now then.

MR GOSNELL: Thank you, Madam President.

JUSTICE FISHER: We'll resume at quarter-to-4.

THE COURT OFFICER: All rise.

(Recess taken at 3.45 p.m.)

(Upon resuming at 4.00 p.m.)

THE COURT OFFICER: All rise.

Please be seated.

JUSTICE FISHER: You may proceed.

MR GOSNELL: Thank you, Madam President. I only have a few further brief remarks.

A further indication of the lack of findings that satisfy the purpose standard is -- and at -- it's helpfully illustrated by the quotation here still on the screen in front of you, that there must be the mens rea in respect of the specific crime of the principal perpetrator, and notwithstanding what the Prosecution has said, even the Chamber in its narrative of events in Sierra Leone would have to concede, even if it didn't make any such finding or attempt to make such findings, that there was an ebb and flow in the violence. There were periods that were much more violent than others. There were periods when the AFRC in particular was negotiating. There were periods when the RUF was negotiating. There were periods when there were more efforts at

reconciliation than others.

I don't urge any particular conclusion on your Honours in respect of that. What I do suggest, however, is that in the absence of an attempt to, in a very specific way, explain what Charles Taylor's mental state may have been at different times, should suggest to you that the Chamber didn't do that at all. They may or may not have attempted to do so, but even the Prosecution disputes that in its submissions, saying that no, there was only one mental state, only one state of knowledge throughout the entire period from 1996 through 2002, and that Charles Taylor would have had precisely the same mental state throughout that entire period, and I would suggest that the complexity of the circumstances and the evidence belie that particular methodology.

Now, your Honours have -- the Prosecution has emphasised, both in its submissions and even here today, the finding of the Chamber that the Trial Chamber further recalls that at the time there were news reports of a horrific campaign being waged against the civilian population of Sierra Leone. And the Trial Chamber relies on a supposed admission by Charles Taylor to that effect, and you'll even see that there are quotation marks there that purport to reflect what he says.

The first difficulty with this is that, first of all, Charles Taylor never said this. Charles Taylor was posed a question formulated by the Prosecution which included this phrase, to which he responded, "May of 1998, yes, there were news reports of that, yes." And the context of that answer and the context of the question was in respect of a specific operation, Operation No Living Thing, and there were several Operation No Living Things, unfortunately, but this one was one that apparently started in May -- April or May 1998. And the answer and the question were both in relation to that particular operation.

The Chamber not only does not exercise care, and I suggest to your Honours and you should know this I'm sure from your own practices as Trial Judges, that admissions, particularly of an accused, particularly those that are contrary to accused's interests

that are deemed to be incriminating, must be treated with the ultimate most care. And here you have the Trial Chamber not only failing to mention that this was not Charles Taylor's testimony out of his mouth, it was a response to a proposition put by the Prosecution, and a qualified one at that. Not only that, but there is no contextualisation of the response in respect to a time period or the operation, and I suggest that that alone reflects an error in reasoning and an error in relation to whether or not an absence of a finding that Charles Taylor possessed purpose in respect of the assistance he was providing, either then or at other times.

Your Honours, I've done my best to answer your questions. I don't propose now to go any further with substantive submissions or to respond further to what the Prosecution has said. I understand that you'll provide an opportunity to do that tomorrow. I thank you kindly for your keen attention, and I stand ready to answer any questions you may have.

JUSTICE FISHER: Thank you. There are no questions at this time, so you may proceed.

MR GOSNELL: Thank you. Mr O'Sullivan will be speaking next.

JUSTICE FISHER: Thank you.

MR GOSNELL: Thank you.

MR O'SULLIVAN: May it please the Court, thank you, Madam President. Good afternoon, your Honours. Good afternoon, counsel from the Office of the Prosecutor.

Your Honours, I'll be addressing the third question that you ask in paragraph 2(i) to your scheduling order of 30 November. The question is whether customary international law recognises that certain forms of liability set forth in Article 6(1) of the Statute are more or less serious than other forms of liability for sentencing or for other purposes.

Your Honours, I'll endeavour to be succinct and to the point. In my submissions, I'll be drawing a distinction between a rule of customary international law and a general

principle of law. In our submission, the short answer to your question is no, there is no rule of customary international law that pertains to the question you pose. However, there is a general principle of law which applies to the sentencing of persons convicted of aiding and abetting.

The Trial Chamber adopted this general principle at paragraph 21 of the Sentencing Judgement, when the Trial Chamber wrote that it "adopted the jurisprudence of the ICTY and the ICTR that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation."

Now, to assist the Chamber and hopefully to make the point, in answering your question, last Friday we provided you with a bundle of additional authorities, 13 Judgements from the ICTY and the ICTR. Very quickly, those are the Krnojelac Decision Judgement, the Kajelijeli Judgement, Vasiljevic, Krstic, Kvocka, Muhimana, Semanza, Bisengimana, Oric, Simic, Nchamihigo and Sljivancanin.

The question, in our submission, are what are the general principles that apply to sentencing a person convicted of aiding and abetting? We say the key factors are the gravity of the offence, the conduct of the accused, and that generally -- this is the point -- that generally an aider and abettor warrants a lesser sentence.

I would direct your attention to the Krstic decision which is at tab 5 of the bundle I've just referred to. In our submission, this general principle applies to a person in a leadership role as well. Krstic was a military commander who commanded a military brigade of the Army of Republika Sprska at Srebrenica, and the Appeals Chamber found that his conviction for aiding and abetting merited a considerable reduction of his sentence.

Now, your Honours, we are not saying that there's an absolute requirement that a person convicted of aiding and abetting must receive a lesser sentence. We are saying, however, that there's a general principle that, generally, an aider and abettor warrants a lesser sentence than that to be imposed for more direct forms of participation.

As we set out in our written submissions and as we argue there, we say that this general principle should have been applied by the Trial Chamber. We argue that the Trial Chamber did not apply it and the Trial Chamber gave no valid reason for departing from this general principle, and for this reason we say the Trial Chamber committed a discernible error in the exercise of its sentencing discretion, which resulted in a manifestly excessive sentence.

Your Honour, I said I'd be succinct and to the point. Those are my submissions in answer to that question.

JUSTICE FISHER: Let me see if there are any questions.

Okay, proceed.

MS GIBSON: Good afternoon, Madam President, your Honours, and good afternoon to colleagues around the courtroom. I'll be addressing question 6 from your scheduling order, namely, how the Appeals Chamber should apply existing jurisprudence on adjudicated facts in the context of a Defence motion filed after the close of the Prosecution case.

I'm aware of the time, your Honours, and it's already been a long day and so my submissions will also be quite brief, and happily, like the Prosecution, we have a short answer to this question.

In our submission, the mechanism of judicial notice still operates effectively and fairly, even in the context of a decision for judicial notice taken after the close of the Prosecution case and at the request of the Defence. But first very, very briefly, why are we talking about adjudicated facts now in this appeal? Because in March 2009 - so this is after the close of the Prosecution case but before the start of the Defence case - the Trial Chamber in Taylor took judicial notice of a number of adjudicated facts from the AFRC case, including the now contentious adjudicated fact 15 which concerned the Freetown invasion, and the AFRC Trial Chamber found that the RUF reinforcements who are on the outskirts of Freetown didn't manage to provide support to the AFRC troops who were involved in the fighting in Freetown.

Now, once the Trial Chamber had judicially noticed adjudicated fact 15, Mr Taylor was able to streamline his case accordingly and not bring evidence on this point. In the Taylor Judgement, however, the Trial Chamber found the opposite. It found that the RUF troops had managed indeed to connect with the AFRC troops who were fighting in Freetown, and it did this on the basis that the Prosecution had allegedly reopened the debate into adjudicated fact 15 through a submission in its final trial brief.

Now, this finding that the troops had indeed connected in Freetown was integral to the planning conviction that the Chamber ultimately handed down against Mr Taylor. Now, our submissions today won't focus on the question of whether or not the Trial Chamber was correct or incorrect in doing so. That's all set out in ground 6 of our appeal brief. Rather, your Honours have asked us to focus on the question of the fact that adjudicated fact 15 was judicially noted after the Prosecution had finished presenting its proof and at the request of Defence, and how the existing jurisprudence applies to this situation.

Individual trials before the international criminal courts obviously aren't conducted in vacuums. The subject matter of a trial will generally overlap with the trials that went before it in terms of the underlying conflict, in terms of the events that are considered, the temporal jurisdiction, the individuals involved, and so Rule 94(b) of the Special Court Rules, which incidentally is the same at the ICTY and the ICTR, allows facts that have been decided in one case to be incorporated into another case and this rule relieves the party who seeks judicial notice of the burden of having to re-prove something that's already been decided in another case. So this process is about efficiency, it's about judicial economy. It makes the trials quicker.

It means parties can cut their witness list, they can bring less evidence and they can shorten the presentation of their cases. It also helps in making sure that the Judgements across a particular court are consistent and not contradictory, and it's also been credited with relieving victims and witnesses from the burden of having to

testify about often traumatic events on multiple occasions.

Now, it was Prosecution teams who first began to harness this mechanism to their advantage and so the jurisprudence which built up around Rule 94(b) was always in the context of a Prosecution request, generally filed at the beginning of a case, and the Defence being the party who could come back and rebut the presumption of truth that attached to an adjudicated fact, and we understand this as being the existing jurisprudence to which your Honours refer in your question. But you've asked how this existing jurisprudence applies to what happened in the present case, namely, adjudicated fact being judicially noted once the Prosecution case had finished.

So why does it matter when judicial notice is taken and at whose request? It matters because when a Trial Chamber takes judicial notice of a fact, it's not the end of a story. Although there's a presumption of truth that attaches to that fact, the presumption can still be rebutted. As explained by His Honour Judge Shahabuddeen of the ICTY Appeals Chamber in a 2003 opinion in Milosevic, which is item 246 of our Defence appeal bundle, "It creates a presumption that the adjudicated fact is accurate unless rebutted. It is not intended to dispense with the right of the opposing party to make that rebuttal." So the non-moving party must be given an opportunity to come back and lead credible and reliable evidence to challenge the adjudicated fact, and if they do this, this re-opens the debate into the fact and the original party, the moving party, can come back and submit evidence in support of that fact.

Now, plainly, the later in a case a decision for judicial notice is taken, less opportunity there is for this challenge and response procedure to be carried out. But this can still happen and does happen, even when judicial notice begins in the second half of the case.

The question then becomes, how does the Prosecution do this? How does the Prosecution challenge an adjudicated fact if it's already finished presenting its witnesses? And Trial Chambers have held that this can be done in two ways: The Prosecution can do this through its cross-examination of Defence witnesses or it can

do this through seeking to call a case in rebuttal, which then leads to the next obvious question, but wouldn't that make the case longer if the Prosecution has to extend its cross-examinations or call additional witnesses?

Well, this is precisely what a Trial Chamber weighs when it decides whether or not to take judicial notice after the close of the Prosecution case. A Trial Chamber has the discretion to consider how significant is the issue to the case; to what extent will the Defence be able to shorten its case; will the Defence be able to drop one witness or five witnesses or 30 witnesses; does the Prosecution dispute judicial notice being taken; does the late stage of the case mean that, in all likelihood, the Prosecution would have to call rebuttal witnesses, thereby lengthening the case rather than shortening it? All these questions ensure that judicial notice is only taken when it doesn't lead to unfairness.

And this where the Prosecution and the Defence diverge in the present appeal. The Prosecution says that, in addition to these two ways, through crossing Defence witnesses or potentially leading rebuttal evidence, the Prosecution can also challenge a adjudicated fact through evidence it's already led in its case in-chief, and we say that's incorrect in law and inconsistent with the jurisprudence and would in fact render the rule a dead letter.

To explain this in concrete terms, just say the Prosecution has led evidence in the case that, in 1998, there were killings in Kono, and then the Trial Chamber during the Defence case judicially notes an adjudicated fact from an earlier case that in 1998 there were no killings in Kono. If the Prosecution is allowed to challenge that adjudicated fact through evidence it's already led in its case in-chief, taking judicial notice would mean nothing. It would have no effect.

The Defence would have no choice but to lead evidence to support the adjudicated fact during the Defence case. It couldn't rely in any way on the Chamber having taken judicial notice of the fact because, according to the Prosecution, the challenge has already been made. So there's no shortening of the case, there's no cutting of

witness lists, there's no streamlining of the Defence case. There'd be no judicial economy. The whole purpose of Rule 94(b) would fall away. The adjudicated fact in fact wouldn't be adjudicated. It would be a live issue.

The Prosecution's issue on appeal isn't supported by the jurisprudence, and to take the 2003 Krajisnik decision as an example, only because it's the example that the Prosecution gave this morning, and it can be found in the Prosecution's appeal bundle at item 17, in paragraph 16 of that decision, Trial Chamber I of the ICTY held that "Once a fact is judicially noted, it doesn't have to be proven again at trial unless the other party brings out new evidence and successfully challenges the fact. So, new evidence, not evidence that it may or may not have already led in its case in-chief.

The jurisprudence on this point has remained consistent, and we point your Honours to the most recent comprehensive adjudicated facts decision, which is on 2 May last year, 2012, in the Mladic case, which is at item 25 of our appeal bundle, at paragraph 17. And this makes sense. Judicial notice wouldn't serve any purpose if the Defence couldn't rely on it to shorten its case. No Defence team could ever advise an accused to drop witnesses or streamline his or her case if the Prosecution was allowed to pop up at the end of the case and say, "Oh, by the way, those adjudicated facts, we actually brought some evidence at the beginning of the case to challenge them, so although you thought you could rely on the fact that the Chamber had judicially noted them, too bad, you can't, and you should have brought evidence on them," and that's exactly what the Prosecution is doing in this case.

When Trial Chambers take judicial notice, it's for the express purpose of allowing Defence teams to streamline their cases and not lead evidence on the fact, and if the Prosecution's position was accepted, no Defence team could ever safely rely on a decision or benefit from a judicial notice mechanism. And any concerns on the part of the Prosecution should be allayed because the safeguards that are put in place by the existing jurisprudence ensure that the Prosecution will always have a chance to rebut an adjudicated fact of which judicial notice is taken in the Defence case through

either crossing Defence witnesses, or if it deems necessary, calling a rebuttal case. The Trial Chamber won't take judicial notice of an adjudicated fact if it's too late for the Prosecution to have a chance to rebut it, and a good practical example of this is the two decisions on judicial notice that were taken in the Taylor case. So, in March 2009 the Defence asked for judicial notice of facts from the AFRC case, so including this adjudicated fact 15. Now, the Prosecution opposed the Defence motion and they said, if you take judicial notice now, that will cause unfairness to us. It will put us at a disadvantage because we've presented all of our evidence without any notice that we had a burden to rebut these facts. And the Trial Chamber considered that argument and they said, no, you do have an opportunity. You have an opportunity in two ways: Either through crossing the Defence witnesses or calling a rebuttal case, and this approach was consistent with the jurisprudence and significantly was not appealed by the Prosecution. They didn't seek to appeal this decision or seek reconsideration on any point.

But eight months later, the Defence tried again. The Defence said: This time we would like judicial notice of facts from the RUF case, and again the Trial Chamber looked at all the relevant factors and said, okay, now, not only has the Prosecution case closed and the Defence case opened, but the Prosecution has already cross-examined a number of your witnesses, including Mr Taylor. So the Trial Chamber reasoned at this stage, in all likelihood, if the Prosecution wanted to rebut the adjudicated facts, it would have to call a rebuttal case, and this would lengthen rather than shorten the case, and so the Defence request was denied.

So the same safeguards apply regardless of when judicial notice is taken and when the motions are filed and it's up to each Chamber to assess whether, in the particular circumstances of a case, taking judicial notice will promote efficiency or not. The Prosecution in this case failed to challenge adjudicated fact 15 through the introduction of new credible and reliable evidence, despite it being on notice that it was required to do so, and the Chamber could only find that they brought this

challenge in their final trial brief, and for the reasons set out in ground 6, we say this was an error.

And, your Honour, unless there are any questions, I'll pass to Mr Anyah to complete our presentation.

JUSTICE FISHER: Fine. Let me see.

There are no questions. Mr Anyah.

MR ANYAH: Good afternoon again, Madam President, your Honours, counsel opposite. May it please the Court.

Madam President, the question presented about hearsay, we answer in the affirmative, yes. The question presented is whether the sources identified in Rule 72 bis (ii) and (iii) establish that uncorroborated hearsay cannot be relied upon as the sole basis for specific incriminating findings of fact. We answer it "yes" because there is a substantial body of law which establishes what we say is a consistent, a widespread practice of disallowing the use of uncorroborated hearsay as the sole basis to sustain specific findings of incriminating facts.

The bodies of law to which I refer are consistent with those delineated in Rule 72 bis (ii) and (iii), applicable treaties, international customary law, the laws of nations - the national laws, if you will - of legal systems. And it's important here to elaborate briefly on this customary international law notion. We know it derives from the North Sea Continental Shelf case from 1969. It is also reflected in the ICJ Statute, Article 38, and it consists of two critical ingredients, the notion of state practice at a consistent level, and more importantly, the subjective element of opinio juris, that the States believe to be bound by the rule of law in question.

The examples that I will give derive from the European Court of Human Rights and its interpretation of Article 6(1) in conjunction with 6(3)(d) of the European Court of Human Rights, I will look at the law of national jurisdictions: The United States, the UK, Hong Kong, New Zealand, Canada, South Africa, Australia and Ireland and Scotland, and also Sierra Leone. Sierra Leone is mentioned in Rule 72 bis (iii).

We say that there is an established practice. Tomorrow we'll have the opportunity to respond to the Prosecution's submissions from today. This established practice, regardless of how different legal systems arrive at their conclusion, is there nevertheless. Whether you call the rule a rule of a sole or decisive basis standard, as articulated by the European Court of Human Rights, or whether you follow United States' jurisprudence and the rule of Crawford v. Washington, as well as the federal rules of procedure, or whether you follow the Criminal Procedure Act of 1965 of Sierra Leone, the result element is usually the same.

Generally, there is the overall prohibition of hearsay, and then you have exceptions and you have circumstances under which hearsay may be admitted.

Uncorroborated hearsay is merely one permutation of the various kinds of hearsay, and what we find vis-à-vis this established practice are three key principles. The first one is the notion of necessity: Why is it necessary to allow hearsay evidence to be admitted and subsequently relied upon? And these usually involve cases where there's an effort to preserve the record. So you have a situation where somebody is deceased, or the person might be alive but mentally infirm or hesitant to give evidence, and then the issue becomes how do you preserve the record. Those circumstances usually involve a deposition, a statement in which a court reporter is present or otherwise a record is made of the statement of the declarant.

The second important and relevant principle is reliability: How reliable is this hearsay evidence? The various jurisdictions in one way or another consider this factor. They look at, for example, is the identity of the declarant known? They look at the issue of corroboration, which is the subject of your question. They look at the issue of whether, if the declarant had come to court to testify, the evidence would be admissible. Issues such as the nature of the statement are looked at. Was the statement made under circumstances that give it an additional reliability, if you will, like a dying declaration, a statement against pecuniary interest, for example? Courts look at whether it is double hearsay that is at issue in assessing its reliability.

The Prosecution was right in saying fairness matters. Indeed, the fairness of the trial undergirds all these issues that the courts examine, but in addition to looking at issues of necessity and reliability, the courts also, adopting provisions from decisional law as well as statutory law, look and apply procedural safeguards.

Most legal systems have statutes that delineate safeguards that should be considered when hearsay is involved. Those safeguards, in many instances, provide for a directed acquittal by a judge, in circumstances where the Prosecution's case has ended, the hearsay is an integral part of the case and yet it is extremely unconvincing.

These jurisdictions provide for jury instructions in cases of jury trial, what we call limiting instructions about the dangers about hearsay, and in some instances these jurisdictions provide a trial judge with the ability to do a balancing act, if you will, and consider whether the benefit of admitting the hearsay substantially outweighs other dangers such as the danger of undue delay and prejudice to the accused.

These are the regime under which hearsay is considered in most of these jurisdictions. The decisional law does not distinguish necessarily between hearsay, on the one hand, generally speaking, and the specific permutation of uncorroborated hearsay, but the analysis of whether or not there is corroboration is integral to the reliability element when assessing whether to admit hearsay or not.

Now, another key and vital principle that comes into play is the notion of the right that an accused has to confront his or her -- the witnesses against him or her. This is reflected in Article 17 of our Statute, 17(3)(e). It is reflected in Article 6(3)(d) of the European Convention of Human Rights.

This is a vital consideration. Does the accused exercise his right, either in the form of having had the opportunity on a previous occasion to examine the witness or to have the witness brought before the court to be examined by counsel for the accused or by the accused? When this factor is not complied with, it becomes more difficult to have uncorroborated hearsay admitted.

Now, the European Court of Human Rights jurisprudence. We go back to 1986.

There's an Austrian case, Unterpertinger v. Austria, and in this case the court found a violation in the sense that the accused was unable to cross-examine two declarants of statements that were admitted, and in doing so the court for the first time made reference to this sole or decisive degree rule, the rule that says it is impermissible to base a conviction solely and decisively on uncorroborated hearsay. This is where the genesis of that rule begins.

A few years later, indeed, ten years later, in Doorson v. The Netherlands, the court did not find a violation of Article 6(3)(d). Why? Because there was corroboration and the identity of the hearsay declarant was known. The Doorson case is at tab 38 of the bundle of documents we provided.

Almost a decade later, 2005 and 2006, the Al-Khawaja case begins. This is a consolidated case, Al-Khawaja and Tahery, from the United Kingdom. It goes to the European Court of Human Rights. In 2009, January, the court rules that there was a violation of Article 6(3)(d), and the court in that instance pronounces a rule that appears to be an absolute rule, indeed, the finding makes it absolute that a conviction that rests solely or decisively on uncorroborated hearsay cannot stand because it violates Article 6(3)(d).

A few months after that the UK Court of Appeals considered the case of Horncastle and others; two different cases, two accused in each case, consolidated into one.

And the Court of Appeals ruled contrary to the rule pronounced in Al-Khawaja and said there cannot be an absolute bar to uncorroborated hearsay when it forms the sole or decisive basis of a conviction.

The UK government appeals the Al-Khawaja ruling to the Grand Chamber. The Grand Chamber of the European Court delays its decision to allow the Horncastle case move through the UK system, and then Horncastle is appealed from the Court of Appeals in the UK to the Supreme Court of the UK, and the Supreme Court of the UK issues a decision on 9 December 2009 and its decision affirmed the Court of Appeals, saying that the sole or decisive factor rule cannot be absolute, there are exceptions to

the rule.

However, the court said that if the procedural safeguards built into the UK's Criminal Justice Act of 2003 are followed, it would have the same effect as applying the sole or decisive factor rule. So the court is saying, yes, exceptions to the rule exist and should be acknowledged, but the danger to an accused of receiving an unfair trial is extremely diminished and not likely if the provisions of their own safeguards, the 2003 Criminal Justice Act, are applied.

There is no distinction -- there is no difference, in our view, in the result element, whether you apply the European Court of Human Rights or you apply the standards of the 2003 Criminal Justice Act in the UK. The result element is the same: It's to view hearsay with caution, it is to evaluate its reliability vis-à-vis whether there's corroboration or not, it is to examine the overall fairness of the process, considering in particular whether or not the right to cross-examine witnesses was upheld, in particular, the out-of-court declarant.

In tab 41 of our bundle is the Horncastle decision, and in annex 4 of that document, which is at page 5, the UK court lists several cases from the European Court of Human Rights where violations of Article 6(3)(d) have been found, and the UK court considers whether or not, had its Criminal Justice Act of 2003 been applied, it would still have found a violation, it would also have found a violation like the European court. And in almost every case, the outcome is the same. What was inadmissible before the European court would have been inadmissible before a British court. So we don't see any conflict in the practice de facto between these different legal systems.

Now, national law, the United Kingdom, I've spoken of the Criminal Justice Act of 2003. Its cornerstones are reliability in Section 116, and in Sections 124 and 126 we have the issue of fairness and the different standards that have to be looked at.

Section 124 deals with evidence that might be admitted to impeach the credibility of the out-of-court declarant.

Section 125, the judge may stop the case after the Prosecution's case in-chief, as I said

before, when it's convincing and the hearsay place an important role.
The United States, Crawford v. Washington, reliability is not sufficient alone. The Sixth amendment to the Constitution of the United States requires confrontation. The accused must confront or have the ability to confront the witnesses against him or her. And then you have the federal rules of evidence which are instructive of a general principle in the US, and we have the blanket prohibition of hearsay in Rule 802, and in Rule 803 we have exceptions, and in Rule 804 we have exceptions on the basis of an unavailable witness.
I've mentioned some other jurisdictions. I will go through them quickly. Scotland is interesting because, in Scotland, whether it's hearsay or not, if it's not corroborated, the testimony of a single witness cannot sustain a conviction. It doesn't matter if it's hearsay or not. So Scotland has a higher threshold, if you will.
Now, there are conditions in Scotland when hearsay will be admitted, for example, when the declarant is deceased, and in Scotland it's covered by the Criminal Procedure Act of 1995.
In Ireland, the protections for an accused derive from the Irish constitution, Article 43(1), and that provides a right to fair procedures. This is something declared by the Irish Supreme Court. And imbued or implicit in that right to fair procedures is the right of confrontation, to confront witnesses against an accused. There are exceptions but those exceptions are dealt with on an ad hoc basis.
Canada, in tab 46, we have provided a case from the Supreme Court of Canada, an important case, the Khelawon case, and Canada assesses the admissibility issue using a necessity standard, is it sufficiently necessary to admit the hearsay, and then the reliability standard, whether the evidence could be sufficiently verified by the judge before it is placed in front of the jury.
Now, interestingly in this Canadian case, the court introduced a more stricter reliability standard, adding also that there must be a showing that there was no real concern about whether the statement was true or not because of the circumstances in

which it came into being and that there was no real concern because the truth and veracity of the statement could nonetheless be sufficiently tested by means other than cross-examination.

Australia, the Evidence Act of 1995 governs this. This is at tab 47 of our bundle. There are exceptions, but again reliability is looked at, whether in the circumstances make the statement unlikely to be a fabrication, whether when the statement -- whether the statement was made shortly or after the asserted fact occurred, and whether the circumstances make the statement highly probable to make it reliable.

New Zealand, the Evidence Act of 2006, it looks at unavailability, reliability, and considers the issue whether circumstances, including the nature of the statement, the contents of the statement, the circumstances that relate to the making of the statement, and other issues that touch upon the credibility, make it more probative to have it admitted.

New Zealand and Canada were drawn upon by Hong Kong, which adopted the necessity standard: Is there a necessity for the hearsay evidence and is it reliable? So Hong Kong adopts New Zealand and Canada.

South Africa, we've provided a case at tab 50, State v. Ramavhale, and in South Africa, the Law of Evidence Act of 1988 governs this issue, and the Supreme Court of South Africa in Ramavhale said that, "Despite this Law of Evidence Act, there remained an intuitive reluctance to permit untested evidence to be used against an accused in a criminal case." It said that, "Previous authority of the Court confirmed that a Court should hesitate long in admitting and relying on hearsay which plays a decisive or even significant part in convicting an accused, unless there are compelling reasons to do so." That's South Africa, tab 50.

Sierra Leone, we have the Criminal Procedural Act of 1965 in tab 1, and what's interesting, in Sierra Leone it speaks of depositions as well. We're not just talking of an out-of-court statement with no court reporter, unrecorded, otherwise by perhaps

an investigator of the Prosecution. We're talking about a deposition that invariably involves the judicial process.

Tab 51, page 21, it deals with the preservation of evidence, speaks of a deposition, and the statement has to be made on oath or affirmation, notice has to be given to the accused to be present; and paragraph 64 on that page, that "Such statement so taken may afterwards be used in evidence on the trial of the accused if the person who made the statement is deceased [dead], or the court is satisfied that for sufficient cause his attendance cannot be procured, and if reasonable notice of the intention to take such a statement was served on the accused and he had, or might have had, the ability to cross-examine the person." So did the accused have a right or ability to cross-examine the person and is the court satisfied that the person's attendance could not be procured or the person is otherwise unavailable?

If you go to the next page, page 20, subsection B at the top of the page, "It must be proved at the trial, either by certificate purporting to be signed by the magistrate before whom the deposition purports to have been taken, that the deposition was taken in the presence of the accused and that the accused or his advocate had full opportunity to cross-examine the witness."

These are safeguards provided by the legal systems of the world vis-à-vis uncorroborated hearsay and indeed hearsay generally.

What is interesting when you look at our Judgement in this case, it is that it is replete with the use and reliance on uncorroborated hearsay. Our rules provide in Rule 92 quater identical language to the ICC language in the 92 quater and the anomaly here is that if it were a circumstance falling under Rule 92 quater for an unavailable witness, you could not admit their statement, though taken on record by a court reporter, unless there was corroboration. The jurisprudence from the ICTY is extensive in this regard, and your Honours are well familiar with Article 20(3) of our Statute and the need to rely on this jurisprudence, where appropriate.

But yet in our case, and we've raised this issue in ground number 2 in our appellant's

brief, in instance after instance, you have the Court relying on Sam Bockarie's statements made out of court to others. Sam Bockarie is not available, but if it were a Rule 92 quater situation and Sam Bockarie had made those statements to a court reporter, you would require corroboration, and yet in our case no corroboration in many instances was sought or relied upon by the Trial Chamber.

I will turn quickly to the facts of our case just to give your Honours some examples. This will be at tab 35, and I would ask that these examples be displayed for your Honours. I have already provided the information to the courtroom representative from the CMS. I will start at page number 4.

JUSTICE FISHER: It's indicating no signal.

MR ANYAH: Yes, it appears they're having difficulties. We did give to your legal officers the same document.

JUSTICE FISHER: Copies for the Bench?

MR ANYAH: Yes, Madam President.

JUSTICE FISHER: Enough for all of us?

MR ANYAH: Yes.

JUSTICE FISHER: Let's pass them out then instead. Okay?

Rhoda, do you have those? Okay, let's pass out in the meantime the documents themselves. You don't have those?

Mr Anyah, I think there's a disconnect here.

MR ANYAH: I understand the difficulties. Well, I understand the AV booth is trying to resolve the situation. I will just read and I will read slowly.

JUSTICE FISHER: We would appreciate it. Okay.

MR ANYAH: What we've done in this chart is to isolate an adverse finding of fact made by the Trial Chamber, in one column. In the next column we've identified the uncorroborated hearsay relied upon, and the next column, we've shown the manner in which the hearsay was relied upon, and this is an example that appears on page 4 of this document, in the middle row of that page, and at paragraph 31(13) of the

Judgement, it is there said that the Trial Chamber finds that the accused, Charles Taylor, told Bockarie to make the operation fearful in order to force the government into negotiation and free Foday Sankoh from prison. So this is the finding, Taylor told Bockarie, "Make the operation fearful."

Where did this come from? We say the uncorroborated testimony of Isaac Mongor at paragraph 3116 of the Judgement, and Mongor said he testified that Sam Bockarie told him, Mongor, that Taylor said that in order to ensure the freeing of Foday Sankoh and others, they should ensure that the ammunition would not be wasted and that the operation should be "fearful" in order to capture Freetown and hold on to power.

Now, at paragraph 3117 the Trial Chamber finds -- based on this evidence, the Trial Chamber finds that the accused told Bockarie that the operation should be made fearful. The statement by Sam Bockarie is a statement allegedly made by the accused to Sam Bockarie, so the original declarant here is Mr Taylor, on the basis of this testimony. Sam Bockarie is a subsequent declarant who tells the information to Isaac Mongor. We are not --

JUSTICE FISHER: Excuse me, hold that thought for a moment. It looks like we're getting something here. It's not on the back screen, but it is on our small screens, but small is the operative problem.

I would appreciate it if you would continue to explain what the provisions show because we are having a little difficulty actually being able to read the type.

MR ANYAH: Okay, Madam President. It is the middle row.

JUSTICE FISHER: Okay, thank you.

MR ANYAH: It's the information on the middle row --

JUSTICE FISHER: Yes.

MR ANYAH: -- of that page.

JUSTICE FISHER: Yes.

MR ANYAH: And on the far right-hand column is the reliance on Isaac Mongor's

hearsay, where the Trial Chamber finds, based on this evidence, the Trial Chamber finds that the accused told Bockarie that the operation should be made fearful.

Now, I'm saying this is double hearsay. The original declarant is Charles Taylor and not even Sam Bockarie. Sam Bockarie is deceased. He is not available to be cross-examined by Mr Taylor. All we have is the evidence of Isaac Mongor. It is uncorroborated.

If this were to appear before the European Court of Human Rights, if it were to go before the Supreme Court of Canada, it could never sustain this sort of finding. Uncorroborated hearsay, double hearsay from Isaac Mongor, from a declarant who is deceased, when the original declarant is the accused. This sort of finding would not be sustained in these jurisdictions.

The row immediately below is another example. The adverse finding appears on the left-hand column. The Trial Chamber finds that after the Waterworks meeting, the accused told Bockarie to use, "All means to get to Freetown in a satellite phone conversation." And the basis for this is uncorroborated hearsay, we say, and that's to be found in the middle column. TF1-317 testified that when Bockarie returned from his conversation with the accused over the satellite phone, Bockarie said that Taylor gave him an instruction for Operation No Living Thing and that they should capture Freetown, "by all means in order to push the government into negotiations."

And based on this -- you have the reliance on the far right-hand column, where the Chamber wrote, "Based on this evidence, the Trial Chamber finds that the accused told Bockarie that the RUF should use all means in order to pressure the government into negotiations for the release of Foday Sankoh." Again, double hearsay. The accused is the original declarant. Sam Bockarie is unavailable. There is no right of confrontation respected vis-à-vis cross-examining Sam Bockarie. It is a satellite telephone conversation. Whether or not TF1-317 was close to the conversation when it occurred, I'm talking about proximity-wise, whether he could hear Sam Bockerie's side of the conversation, would not change the circumstances of this hearsay.

If we could go to page 6. Thank you. Now, this is the section of the Judgement dealing with operational support, communications. It deals with aiding and abetting through the provision of Liberian communication networks to the RUF for Foday Sankoh when Foday Sankoh was in custody in Nigeria. Foday Sankoh was taken into custody in Nigeria, I believe, around March of 1997.

It says, "While detained in Nigeria, Sankoh used the MPLF communications network to communicate with the RUF and send messages to Bockarie through Mr Taylor." Two witnesses -- Foday Lansana, stated that Bockarie told him that RUF members, Moinama, which is Martin Moinama, and Massaquoi were passing messages from Sankoh through Taylor for Yeaten. And then you have TF1-388 that Daniel Tamba called on the radio and had been instructed by Taylor to give a message to Bockarie which was passed on by Sankoh. If we take Foday Lansana's evidence as an example, we are talking of quadruple hearsay. Foday Sankoh is the original declarant here and Foday Sankoh is said to send a message through Martin Moinama and Massaquoi. None of them appeared at the trial. And this message was sent either through Taylor or Yeaten, Benjamin Yeaten. Yeaten, of course, was not a witness at trial. And Bockarie told Foday Lansana all of this.

What are the indicia of reliability here? How can this type of evidence be credible under the circumstances? The right of confrontation not respected, Sam Bockarie not available, much less Martin Moinama or Massaquoi.

The same applies to TF1-388 statements: Sankoh is not available, the original declarant. Sankoh told Taylor to give a message to Bockarie and this was relayed through Daniel Tamba, who was not also available. And what are the findings of fact that are important in this? The column on the right, the Trial Chamber's finding. The Trial Chamber recalls that it had no general reservations regarding the credibility of TF1-388, Mallah or Lansana. Though these witness accounts differ in detail and in some instances are hearsay, they corroborate each other in that Sankoh used either the accused or Tamba to pass messages on to Bockarie.

Let's pause there. The Chamber is acknowledging that there are different details in this evidence. In some instances the Chamber says they're hearsay. Nonetheless, the Chamber says they corroborate each other. And then it goes on to say, "Though Lansana contends that the communication between Sankoh in detention and the accused in Liberia occurred through two intermediaries, Moinama and Massaquoi, this may have been an extra detail that was not passed on to the other witnesses through Tamba or Bockarie." The Chamber is now coming up with excuses for why the evidence is unreliable.

If you read that statement again, the Chamber is coming up with the justification. You know there is the maxim in dubio pro reo, "give the accused the benefit of the doubt." When you read this type of statement and you think of that maxim, it leaves one very, very disconcerted about this type of legal analysis.

The Chamber says, in addition, though Sesay does not mention the involvement of the accused, the Trial Chamber notes its finding that at various times Tamba was an agent of the accused." The Sesay before referred to here, if I'm correct, is testimony by Defence witness Issa Sesay.

A member of the RUF testifies that the accused was not involved and yet the Chamber says it notes its prior findings that Daniel Tamba was an agent of the accused. Under all of the legal systems I went through quickly, this type of evidence would not pass muster. It would not even be admitted, much less relied upon.

The row immediately below is another example. On the left-hand column at paragraphs 3914 and 4248, Roman numeral (xv), the accused was aware that 448 messages were sent to the RUF when ECOMOG jets left Monrovia. So you have ECOMOG in Monrovia going into Sierra Leone to bomb locations where the RUF are. The issue is were messages sent from Liberia at the request of the accused or through the accused to warn the RUF that these jets were coming? What is the source of the evidence that's relied upon? Superman told Alimamy Bobson Sesay that Sam Bockarie had told him that the 448 jets had left and that the information came from

Mr Taylor through Mosquito. Superman was not a witness in this case. Sam Bockarie was not a witness in this case. The witness who testified did not even hear this from Sam Bockarie himself, he heard it from Superman, who was relaying what Sam Bockarie told Superman. Now, this is triple hearsay.

And then on the far right-hand column we see what the Chamber wrote about this evidence: "This is the only evidence that specifically mentions the accused as having sent a warning to Sierra Leone that an ECOMOG jet was en route. It is uncorroborated and it is hearsay. The accused denied sending a warning, saying that it would have been impossible for him as president to have sent a warning on the radio or by telephone. The sense of the evidence given by Alimamy Bobson Sesay" -- if I may have a minute -- "in the view of the Trial Chamber, was not that the accused necessarily transmitted a message personally but that he had caused a message to be sent to Bockarie. So the Chamber is now analysing Sesay's testimony just by the fact Sesay is saying Superman told him what Bockarie told Superman. The Chamber is saying the thrust of that information was not that the accused actually sent it himself but that the accused caused the message through someone else to be sent to Bockarie.

The Chamber goes on to say, "Nevertheless it cannot find on the basis of the evidence that the accused personally sent a message to Bockarie warning him that an ECOMOG jet was en route."

But now you go to the paragraphs below: The Trial Chamber considers that Alimamy Bobson Sesay's evidence linking Taylor to the 448 messages corroborates the overwhelming evidence that these 448 messages were regularly and consistently transmitted by his subordinates, which leads the Trial Chamber to find that the accused must have been aware of the transmission of these messages.

What has the Chamber done? It has found utility for an otherwise admissible piece of uncorroborated triple hearsay. It has said: Although we can't use it on its own, we are going to use it as corroboration for another finding of knowledge on the part

of Mr Taylor, an awareness that messages were being transmitted from Liberia to Sierra Leone about 448 messages. This is impermissible. It's either admissible or not. If it's not admissible, you can't use it to corroborate other evidence that you say is overwhelming.

I will make one more quick example. If we go to page 12, please.

JUSTICE FISHER: I don't mean to interrupt you but we only have six more minutes.

MR ANYAH: I will be quick because I heard in the arguments today the mention of Rambo Red Goat. So the last page, the last row, these deal with the December 1998 offensive and the Freetown invasion. On the left, arms and ammunition from Burkina Faso were distributed to RUF and AFRC commanders in Buedu and used in attacks in Kono and Kenama in December 1998, where further arms and ammunition were captured and in the commission of the crimes in Kono and Makeni districts. This was provided by Alimamy Bobson Sesay, who said Rambo Red Goat reinforced the troops in Freetown with arms and ammunition he received from Bockarie, that Rambo Red Goat explained the source of the ammunition when he arrived. So we have Rambo Red Goat arriving to reinforce and he comes with arms and ammunition, and he explained the source of the ammunition when he arrived.

Rambo Red Goat is not called. The person from whom he received it, Sam Bockarie, is not called as a witness; so no cross-examination of either of them, uncorroborated. It's just Alimamy Bobson Sesay's evidence.

And on the right-hand column we see what the Court found: Witnesses do not specifically corroborate Bobson Sesay's account that Idrissa Kamara brought matériel. The Trial Chamber nonetheless or nevertheless considers it a reasonable interference that Idrissa Kamara brought -- I think that should be "inference," that Idrissa Kamara brought matériel with him. The Trial Chamber considers credible Bobson Sesay's evidence that Rambo Red Goat told him it came from Bockarie, and Bockarie's distribution prior to advancing towards Kono and Makeni, although Rambo Red Goat did not disclose whether the ammunition he brought came from Liberia.

So we have the Chamber again finding that Sesay's evidence is credible where Rambo Red Goat is not called. Sam Bockarie is unavailable. The source of this information is not brought before the Chamber.

Your Honours, these examples viewed in conjunction with the jurisprudential principles we've argued in our briefs in grounds 2 and 3 -- sorry, grounds 1 and 2 regarding hearsay, confirm that the key issues you look at when assessing unsourced or uncorroborated hearsay were not respected in this case, whether the accused had the right to confront the original declarant. The totality of the circumstances, whether it was reliable. Was it anonymous? Was the person identified? When you compare this with Rule 94 quater and you juxtapose the two provisions, it raises more questions than it answers.

I will end with one quick point which is, the hearsay issue is important because as an issue on appeal, you don't need to give the Trial Chamber deference. The issue of how a Trial Chamber relies on a particular fact, yes, is deferential, but when it comes to whether or not it should have sought corroboration and whether or not the hearsay evidence relied upon was reliable, that's a question of law. So no deference attaches to it. And if you find that hearsay evidence has been uncorroborated and relied extensively on in this Judgement, you retain the discretion to reverse all those findings by the Trial Chamber. Thank you, your Honours.

JUSTICE FISHER: Thank you, Mr Anyah. You hit one minute to five. Let me see if there are any questions.

Justice Kamanda has a question.

JUSTICE KAMANDA: Yes. Does the totality of evidence adduced have any curing effect on uncorroborated hearsay evidence, especially where the Trial Chamber has cautioned itself against admitting such evidence?

MR ANYAH: Well, the totality of the evidence adduced in this case includes the uncorroborated hearsay. This is the problem. It is part and parcel. You can't divorce the two. It is part and parcel of the evidence used to convict the accused.

In most instances it was hearsay of what an out-of-court declarant who never came before the court said. So if it were another instance where there was all this direct evidence on record and hearsay played a tangential role in the convictions entered against the accused, that would be one case, but the exact opposite is what happened in this case. So it is difficult, your Honours, with respect, to divorce one from the other.

JUSTICE FISHER: Okay, there appear to be no further questions. We will stand in recess then until ten o'clock tomorrow morning, when we'll resume with the responses. Thank you, all.

(The hearing ends at 5.05 p.m.)