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

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

THURSDAY, 3 SEPTEMBER 2009
10.20 A.M.
TRIAL

APPEALS CHAMBER

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

Thursday, 3 September 2009

[Open session]

[The accused present]

[Upon resuming at 10.10 a.m.]

THE COURT OFFICER: Your Honour, the case of the Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao. Your Honour, please.

JUSTICE WINTER: Just to check the microphones. Everyone can hear? Yes? Does it work? The accused can hear me?

ACCUSED SESAY: Yes, my Lord.

ACCUSED KALLON: Yes, your Honour.

ACCUSED GBAO: Yes, your Honour.

JUSTICE WINTER: Thank you. Okay, then I hope everyone had a very good rest after the very first very loaded day and we will continue. I will resume now and I give the floor, according to our schedule from today, first of all to the Prosecution for responding to the submissions and then from 1 to 2 we will have lunchtime as you see - as you have seen with the new schedule - for half an hour the Defence for Sesay will have the floor, afterwards the one for Kallon and finally the one for Gbao. That is the plan for today and once again I will ask all the parties to stick to the time schedule.

You will have the floor when it is your time and then you can use for whatever you would like to say in your time.

MR TAKU: Thank you very much, my Lord. That is just the directions I wanted to seek from the Court.

JUSTICE WINTER: I thought so.

MR TAKU: Thank you so much, my Lord.

JUSTICE WINTER: Can I give now the floor to the

Prosecution.

MR STAKER: Before I commence, could I just check that the Appeals Chamber has a bundle of authorities that have been provided by the Prosecution for the purposes of the hearing. Yes, and I didn't have a chance to check with my colleagues for the Defence in advance, but, yes, I am informed they also all have their copies.

May it please the Chamber, the three convicted persons --

JUSTICE KING: Just a minute.

JUSTICE WINTER: Just a minute, please. You have it? Go ahead.

MR STAKER: Yes, thank you, your Honour. The three convicted persons in this case advance a total of some 95 grounds of appeal.

JUSTICE KING: I am sorry, but could you give us just one minute so I open my file so I can listen to you properly.

MR STAKER: Of course, your Honour.

JUSTICE KING: Thank you very much.

MR STAKER: I am obliged, your Honour. The three accused in this case collectively have advanced a total of some 95 grounds of appeal, some of which contain multiple subgrounds of appeal. In our response brief we didn't deal with each of these 95 grounds separately in order, but for convenience we grouped the various grounds of appeal together thematically so that each chapter of our response brief dealt with several grounds of appeal of one or more accused relating to related issues.

Inevitably with three separate appellants and so many grounds of appeal we do appreciate that navigating the hundreds of pages of written pleadings is not straightforward and we do

point out that as a navigational aid Appendix B to the Prosecution response brief contains a table setting out all of the Defence grounds of appeal and where they are dealt with in the Prosecution response brief.

Obviously in the time available for oral argument this morning it would be impossible to address all of those 95 grounds. As our primary submissions we therefore continue to rely fully on our written pleadings in response and in oral argument we confine ourselves to dealing with specific matters that call for further submission, particularly matters arising out of the Defence reply briefs which were filed after our response of course and matters arising out of Defence oral arguments which we only heard yesterday, but I emphasise that where I do not address any particular Defence ground of appeal or where I do so only briefly we do rely fully on our written submissions in relation to that.

And for convenience we will in oral argument today follow the general structure of our response brief. I will be making submissions on matters raised in chapters 1, 2, 3 and 8 of our response brief. I will be followed by Mr Fynn who is dealing with the Defence grounds addressed in chapters 4 and 7 of our response brief and he will be followed by Mr Wagona who will address the matters in chapter 6 and chapter 9 of the Prosecution response brief.

I therefore begin my submissions by referring to chapter 1 of the Prosecution response which in turn incorporates by reference the submissions in chapter 1 of the Prosecution appeal brief dealing with the standards of review on appeal. These standards of review are now firmly entrenched in the case law of

international criminal tribunals and any appeal judgment of the ICTY or ICTR routinely contains an exposition of them.

Paragraphs 31 to 36 of the CDF appeal judgment indicates that this Appeals Chamber has accepted this standing international law on standards of review.

The Appellant mechanism is of course a fundamental fair trial guarantee for the accused, but it is also fundamental that an appeal is not a rerun of the trial. In particular, it is the role of the Trial Chamber and not the Appeals Chamber to consider the evidence and to make findings of fact and the Appeals Chamber will not substitute its views of the evidence for those of the Trial Chamber. The Appeals Chamber will only intervene where a finding of fact by the Trial Chamber was one that was simply not open to any reasonable trier of fact.

Further, as set out in paragraphs 1.12 to 1.15 of our appeal brief, rigorous requirements are imposed on an Appellant. At the trial, of course, the burden of proof is on the Prosecution throughout, but on the other hand in an appeal the burden is on the Appellant to establish an error even where the Appellant is the Defence.

The Appellant cannot simply by making a bare allegation of a defect in the trial judgment put the burden on the Prosecution to establish that there was no defect. The onus is on the Appellant to identify clearly and precisely the alleged error, to identify the applicable standard of review and to establish by reference to the trial record the evidence and legal authority that that standard of review has been met and, in particular, the Defence cannot simply state that there was insufficient evidence to support a particular conclusion and thereby place the burden

on the Prosecution to identify the relevant evidence and to justify its sufficiency. It is the Appellant that should identify all of the relevant evidence and the reasoning of the Trial Chamber and to explain why no reasonable trier of fact could have reached the conclusion that it did on the evidence.

I note that paragraphs 4 to 7 of the Gbao reply brief complains of the Prosecution's alleged nebulous references to the totality of the circumstances as a whole without specific findings of law and fact. We dispute that argument. We submit that in any court of law - in any court of law - it is fundamental that any finding of fact has to take account of all of the evidence in the case as a whole and not merely the evidence relating directly to a specific fact in question.

On that we would refer to the Oric appeal judgment, paragraph 82, which is tab 12 in our bundle. Paragraph 82 sets out a Prosecution argument. I won't take your Lordships to it given the constraints of time. I just point out paragraph 82 contains a Prosecution argument. Paragraph 86 of that judgment, the Appeals Chamber did not accept the argument in the circumstances of that case, but appeared to accept that the Prosecution argument in principle was correct; namely, that the Trial Chamber had to take account of all of the evidence in the case as a whole.

Now, in a case of this magnitude, this is an important point. For instance, if you look myopically only at the evidence to a particular factual finding, take for instance the killing of one particular victim, if one only looked at the evidence directly relevant to the killing of that one victim then it may well be true that that evidence alone may not be sufficient to

establish whether or not the crime was committed as part of a joint criminal enterprise. The Defence was referring yesterday to the fact that a specific crime might have been an opportunistic one committed by people unconnected to the JCE in the general confusion of the conflict.

But the position may be different if the evidence is viewed in the light of the totality of the evidence in the case as a whole. If the Trial Chamber were to conclude that this individual crime, like so many other crimes, form part of a systematic pattern, that this systematic pattern can only have been the result of a common criminal plan and that given the time, the location and the way the crime was committed that it was satisfied beyond a reasonable doubt that this crime was a part of the joint criminal enterprise, then it may have been open to a reasonable trier of fact to draw that conclusion on the evidence as a whole.

Now, in this case the Defence has challenged a very large number of factual findings of the Trial Chamber and within a reasonable scope of an appeal hearing it is not possible for me to go into detail to all of the evidence relevant to all of those factual findings. It is submitted that in various instances the Defence is in effect merely challenging the Trial Chamber's assessment of the evidence and suggesting an alternative assessment of the evidence. That, of course, is not sufficient to make out a ground of appeal. I refer for that to the Krnojelac appeal judgment, tab 10 in our authorities, at paragraphs 20 to 27. In any event, the Appeals Chamber of course will make its own conclusions. The Trial Chamber makes its findings. It refers to the evidence. It will be for the Appeals

Chamber to draw its own conclusion subject to the submission I have made that the inquiry for the Appeals Chamber is not what the Appeals Chamber makes of the evidence; the inquiry is whether on the evidence in the case as a whole and in the background of the findings of the Trial Chamber as a whole whether factual findings were open to any reasonable trier of fact on the evidence.

The Defence has also made much of what they claim are various procedural irregularities in this trial. They refer to various things that happened at the trial and they asked the Appeals Chamber to find that the combination of these various matters rendered the trial as a whole unfair.

Now, as a general response to those submissions, we submit that the Appeals Chamber is not the place to raise this kind of thing at first instance, and I am not suggesting that all of these have been raised before the Appeals Chamber at the first instance, but as a matter of principle these are matters to be raised before the Trial Chamber and this is a very important point: In trials of this magnitude before international criminal tribunals generally, it is normal for problems and procedural issues to arise and the kinds of problems that can arise are infinite and varied. I think all we can say is that like taxes problems in trials are one of the few inevitable facts of life.

And where problems do arise, it is for the Trial Chamber to decide how to deal with them then and there. The focus of the Trial Chamber is to get the proceedings back on track. If something has gone wrong, the Trial Chamber's focus is to find a remedy, to cure any prejudice and allow the case to move on. It is not the case that a large trial needs to be aborted every time

there is some kind of procedural glitch.

Deciding how to remedy procedural problems involves a discretion of the Trial Chamber which must be exercised having regard to all of the peculiar circumstances of the case. The first question, of course, is: Did the Defence raise this problem at the trial? If it didn't, then the complaint may have been waived. If the Defence did raise it, then the Trial Chamber will have ruled on it. If the Trial Chamber ruled on it, the Defence may seek to appeal against that ruling either at the interlocutory stage or on post-judgment appeal and the Appeals Chamber will then rule on that appeal, but the Appeals Chamber's focus will be on the appellate standards of review in relation to the Trial Chamber's decision. It will look at what the situation was. It will look at what the conduct of the parties was. It will look at what the Trial Chamber decided and why. It will apply the standards of review. It will ask whether there were any errors of law in the Trial Chamber's judgment. It will ask whether there was any improper exercise of the Trial Chamber's discretion in the sense that it exercised its discretion in a way that no reasonable Trial Chamber could.

And it is for this reason that these matters shouldn't be raised before the Appeals Chamber at first instance. It should be for the Appeals Chamber to solve problems at the time so that the trial can proceed, not for the Appeals Chamber to look at them ex post facto and start quashing parts or all of a Trial Chamber's verdict.

Now, an illustration of these principles can be given in relation to a matter that was raised by counsel for Gbao yesterday. Counsel for Gbao referred to a witness statement

relating to Gbao's conduct in relation to an incident at Makump DDR camp on 1 May 2000 which Mr Cammegh said totally exonerates Mr Gbao. I won't repeat all of what Mr Cammegh said, which despite his promise to refrain from emotional hyperbole, was indeed very strong language.

This issue was in fact raised at trial. The Gbao Defence filed a motion on 20 October 2006, so we don't dispute that it is a matter that can be raised on appeal, but as I said on appeal this is a matter that really is applying the appellate standards of review to what the Trial Chamber decided.

Mr Cammegh, we submit, painted a picture which is not a complete one and, therefore, not a fair or accurate description of what occurred. Further details of what did in fact happen can be found in the Trial Chamber decision on the Gbao motion dated 22 July 2008. That is document 1201 in the Trial Chamber decisions, pages 27227 to 27273. It was originally filed confidentially, but the confidentiality was subsequently lifted by a decision of 29 July 2008, document number 1205. That latter decision also lifts the confidentiality of the motion's responses and replies relating to the motion, as well as Justice Itoe's separate concurring opinion to the original decision.

The facts set out in the decision are this: A statement was taken from the witness in question on 21 July 2004. The witness in question was Major Maroa, who has been referred to. That is now a matter that has been made public. About a year-and-a-half after the statement was taken on 20 October 2006, the statement was disclosed to the Defence. The Gbao Defence filed a motion complaining of the late disclosure on 9 June 2008 - sorry, I may have said 2006 before - it is 9 June 2008, some 20

months after the statement was disclosed. The relief sought by Gbao in that motion was for a stay of proceedings on counts 15 to 18.

At paragraph 54 of its decision, the Trial Chamber recorded that the Prosecution had acknowledged that the disclosure was late and had given no reasons and the Trial Chamber found a breach of the disclosure obligations. However, the Trial Chamber found that there had been a 20-month delay in the Defence seeking a remedy and that the Defence had not applied at the earliest opportunity as required by Rule 5 of the Rules, but the Trial Chamber went on to find more than that.

At paragraph 57 of it decision, the Trial Chamber noted that Major Maroa's name was on both the Sesay and Kallon witness lists, but that he had not been called by either of them. It noted that he was not on the Gbao witness list and that the Gbao Defence did not apply to add him as a witness after the statement was disclosed, or at any time before the closing of the Gbao Defence case, which was after the Gbao Defence had filed its motion. Nor was any application made by the Gbao Defence to recall Jaganathan or Ngondi.

At paragraph 62 of its decision, the Trial Chamber found effectively that any prejudice to the Defence caused by the Prosecution's late disclosure was reparable. It could have been repaired by calling Maroa and recalling Jaganathan and Ngondi, but that the Gbao Defence had not done that. At paragraph 61 of its decision, the Trial Chamber said that it could not fathom why the Gbao Defence had not done this. So the Trial Chamber found that there had been no material prejudice to the Defence and therefore declined to consider the abuse of process argument. So

we say the picture is not as Mr Cammegh presented it.

Further, my information is that the Prosecution did have information that Major Maroa's government would have been consenting to him being called as a witness and we would say in the circumstances that the Gbao position in that particular situation could be characterised as seeking to profit from a breach of disclosure obligations by the Prosecution. The position was, "Oh, the Prosecution has breached a rule. Therefore we can have some charges dismissed against Mr Gbao." When it was then put in response that in fact any prejudice caused by the late disclosure could be remedied, and that part of that prejudice was due to the Gbao Defence's own delay, then the Gbao Defence wasn't so interested.

So we say that looking at all the circumstances as a whole the Trial Chamber's decision and the reasons for it that no appealable error has been found in that trial interlocutory decision.

And we say this same process needs to be gone through in relation to every other procedural issue that has been raised by the Defence in this appeal. We say the Defence can't just stand back, can't ignore all of the interlocutory decisions given by the Trial Chamber, can't ignore the reasons given by the Trial Chamber for its interlocutory decisions based on all of the circumstances as they presented themselves to the Trial Chamber at the time, can't ignore specific questions of whether any prejudice could have been remedied at that time, to stand back, put all that aside and argue before the Appeals Chamber, effectively at first instance, that all of these matters viewed cumulatively rendered the entire trial unfair.

With that I turn to the first group of Defence grounds of appeal relating to alleged defects in the indictment and lack of notice. At the outset, paragraphs 7 to 16 of the Kallon response brief deal with the issue of the standard of review on appeal for alleged defects in the indictment. The Prosecution has said it is the abuse of discretion standard. We refer to the CDF appeal judgment at paragraph 36. That abuse of discretion standard is not as the Kallon suggests an attempt to incorporate a fourth ground of appeal into the statute.

On the standard of review, we submit that it is self-evident that the question whether an indictment is sufficiently pleaded is not a matter that can be determined with mathematical precision. There is a discretion involved in deciding where to draw the line between what is sufficient and what is not and we therefore submit that the abuse of discretion standard is an appropriate appellate standard for alleged defects in the indictment.

The Kallon Defence says that the Prosecution cites no authority for this. We accept that it is true; we are not aware of any. We have included two authorities that perhaps come nearest to it, the Kupreskic appeal judgment at paragraph 114 in our tab 17 and the Niyitegeka appeal judgment at paragraph 223 at tab 4.

We concede, of course, there are legal principles to be applied in determining whether an indictment has been properly pleaded and any error in the legal principles applied by a Trial Chamber in determining this question of course would be errors of law and would also go as such to the question of whether the discretion of the Trial Chamber was properly exercised.

We also at the outset recall of course that defects in an indictment can be cured and can be waived so that even if defects in an indictment are established that does not necessarily mean the trial as a whole was unfair.

Another preliminary point is that the Prosecution rejects any suggestion which the Defence has made that the Prosecution deliberately attempted to gain an unfair advantage by withholding details that should have been pled in the indictment. The Defence brought motions alleging defects in the indictment, the Trial Chamber ruled on those motions, and the Prosecution complied with what the Trial Chamber required of it in those decisions. The Defence can now raise issues on appeal, but in circumstances where the Prosecution fully complied with what was required of it we submit that allegations of bad faith or of deliberate withholding are not sustainable.

The Sesay Defence complains that the Prosecution gave the Defence inconsistent or fluctuating notice concerning the joint criminal enterprise charged in the indictment. This argument relates primarily to a notice filed by the Prosecution on 3 August 2007 in the course of the trial where it is said that the Prosecution put its case in a different way to what had been pleaded in the indictment.

It is true that the Trial Chamber ultimately agreed with the Sesay argument at paragraph 343 of the trial judgment and the Trial Chamber said that because the Prosecution in that notice put its case in a different way the Trial Chamber would disregard that notice. The Prosecution's position was that the notice was not inconsistent with the way joint criminal enterprise was pleaded in the indictment, but the Trial Chamber having found to

the contrary did what we submit was the straightforward and obvious thing to do.

The indictment is the primary charging instrument. If it is found that the Prosecution subsequently puts its case in a way that is inconsistent with the indictment it is the indictment that stands. The Defence is entitled to object to inconsistent notice. Notice of an inconsistency as I say may be disregarded, but such inconsistent notice does not invalidate the indictment.

We further submit that any inconsistency as was found by the Trial Chamber was not such as to cause confusion preventing the Defence from preparing or presenting its case. The Trial Chamber found at paragraph 372 that the Prosecution had been consistent with the indictment in its pre-trial brief opening statement, Rule 98 argument and final trial brief, that the purpose of the joint criminal enterprise was to take control of the Republic of Sierra Leone and in particular diamond mining activities by any means, including unlawful means as detailed in paragraph 37 of the indictment.

Now, the notice filed by the Prosecution was after the AFRC trial judgment was rendered, but before the AFRC appeal judgment was rendered. The AFRC trial judgment of course found that a similarly worded indictment in the AFRC case had defectively pleaded joint criminal enterprise because the criminal purpose alleged to take over the country was not inherently criminal. That finding of the Trial Chamber was overturned by the Appeals Chamber in the AFRC appeal judgment where the Appeals Chamber held that it is sufficient that the criminal purpose -- that the common purpose even if not inherently a crime it is sufficient that it contemplates the commission of a crime in the pursuit of

its objectives and that the joint criminal enterprise had been validly pleaded in the AFRC case. Given the material similarities with the indictment in the present case, we submit it would follow that the pleading of the joint criminal enterprise was valid in this case as well.

As to the inconsistency in the notice in the indictment, we submit that the difference was really one of semantics rather than any substance. Both in the indictment and in the subsequent notice filed by the Prosecution what was alleged, as indeed is reflected in paragraph 375 of the trial judgment, was a common purpose to take control of Sierra Leone through criminal means including through a campaign of terror and collective punishment. We submit that there is no basis for concluding that the Defence were somehow thrown off balance by the Prosecution notice causing the trial to become procedurally unfair.

There was also a suggestion yesterday that the Prosecution was inconsistent at the Rule 98 stage by relying on the second category of joint criminal enterprise liability. Our submission first is that the indictment as worded does cover all three forms of joint criminal enterprise liability. The Vasiljevic appeal judgment at paragraph 98 and the Krnojelac appeal judgment at paragraph 89 hold that the two variants do not need to be pleaded separately. In fact, the -- as far as I am aware the only way the Prosecution put its case on the second category of joint criminal enterprise was in one paragraph, paragraph 18, of its Rule 98 skeleton argument, where it referred to forced labour as an example of the second category of joint criminal enterprise. Similarly, we submit, that that kind of brief reference cannot invalidate an indictment, or be considered as giving even notice

that is inconsistent with the indictment.

The Gbao Defence argues that the indictment was defectively pleaded because it did not put Gbao on notice that his role in the joint criminal enterprise was put on the basis of his role as ideologist in the RUF. We refer to paragraph 2.15 of the Prosecution appeal brief. First of all, we agree it was not the Prosecution's theory that Gbao's function as RUF ideologist in itself constituted his substantial contribution to the JCE and, therefore, this was not a material fact that the Prosecution had to plead in the indictment.

As I have said, the role of the accused in the joint criminal enterprise was pleaded in this indictment in the same way as in the AFRC case and, although perhaps this aspect of the pleading wasn't expressly considered in the AFRC appeal judgment, the Appeals Chamber, at paragraphs 85 to 87 of the AFRC appeal, after considering various aspects of the pleading in that case, concluded that the joint criminal enterprise was validly pleaded. Again, in the Taylor case the Appeals Chamber has given an interlocutory decision affirming the way joint criminal enterprise was pleaded in that case.

We submit, however, that -- well, joint criminal enterprise having been validly pleaded in the indictment it was then ultimately the Trial Chamber's task to render its judgment on Gbao's joint criminal enterprise liability based on all of the evidence in the case. Gbao had the opportunity to address all of that evidence in the final trial brief and to rebut all Prosecution evidence during the Defence case and we submit the Trial Chamber didn't convict Gbao on any other basis than what had been charged in the indictment, namely, that he shared the

intent of the joint criminal enterprise and made a substantial contribution to it. It is submitted that the Trial Chamber reached its conclusion based on all the evidence in the case and is not rigidly confined to the arguments of the parties or the way that the Prosecution itself put the case.

As we understand it, the Sesay Defence also makes a generalised allegation that the Defence was denied proper notice due to the fact that additional evidence continued to be disclosed to the Defence throughout the trial. In response, we rely on paragraphs 2.18 to 2.38 of the response brief.

We submit that this complaint in fact effectively raises two separate issues. One is whether the indictment was properly pleaded. For the reasons I have given and further reasons I will be giving, we submit that it was not defectively pleaded. The second issue relates to disclosure and the timeliness of disclosure.

As to whether the indictment is properly pleaded, in the AFRC appeal judgment at paragraph 41, this Appeals Chamber affirmed that there is an exception to the specificity requirement for indictments at international criminal tribunals in cases where the widespread nature and sheer scale of the alleged crimes makes it unnecessary and impracticable to require a high degree of specificity. We cite case law for that in our pleadings. The Trial Chamber found that this principle was applicable on the case and we submit that the Trial Chamber made no error in so deciding.

The Trial Chamber also gave careful consideration at the stage of final trial judgment as to how the way the indictment pleaded affected what convictions it could enter. In particular,

it found that personal commission was defectively pleaded and it would only enter convictions on that basis where the defect had been cured. So we say that the issues of the validity of the indictment pleading was carefully considered by the Trial Chamber.

On the second issue of disclosure of evidence, the Sesay Defence appears to be putting the argument on the basis that where evidence of a particular crime base incident is disclosed for the first time during trial, for instance as a result of an ongoing investigation or proofing of witnesses, that this amounted to the addition of new charges to the indictment requiring an amendment of the indictment. We submit that this is clearly not the case. If the indictment for instance alleges murder of an unspecified number of victims on a large scale, the disclosure of evidence of an additional murder victim is not the addition of a new charge. It is evidence of yet another instance of what has already been charged in the indictment. We think it is clear from the fact that if that evidence had been disclosed at the pre-trial stage there would be no question of suggesting that evidence was outside the scope of the indictment requiring an amendment and we submit similarly that if it is disclosed in the course of the trial there is no question of an amendment to the indictment. The only question relates to timeliness of disclosure. We submit that the case law cited by the Sesay Defence on addition to new charges on the indictment is simply not relevant to this situation.

It doesn't appear to be disputed that the Prosecution is entitled to continue to investigate its case during the course of its trial. Of course if the Prosecution discovers a new witness

in the course of ongoing investigations, it would have to apply to add a new witness to its witness list if it wanted to. As I say, that would be a matter of decision for the Trial Chamber and, if there is any complaint on appeal about the Trial Chamber's decision, it is the Trial Chamber's decision that needs to be the focus of the appellate argument. Again, if new information comes out in proofing of a witness, or indeed if a witness just gives evidence of something for the first time in testimony that was previously not anticipated or disclosed, again it is a matter for the Defence to make any application it wishes to the Trial Chamber in respect of any alleged prejudice or breach of the Rules that it may claim. Again, it is for the Trial Chamber to rule. Again if the matter is taken on appeal the focus is what did the Trial Chamber decide? Has any error been established in the Trial Chamber's decision in that respect?

I turn then to claims of alleged defective pleading of Article 6.3 responsibility. The Trial Chamber in its pre-trial decision decided that Article 6.3 had been properly pleaded at the final trial stage. At paragraphs 406 to 410 of the trial judgment, the Trial Chamber saw no reason to revisit that. The Trial Chamber recalled the findings in the AFRC appeal judgment at paragraph 39 concerning the requirements of Article 6.3 pleading and it is to be presumed they took them into account.

Contrary to the Defence suggestion, the Prosecution did not rely on the Blaskic case as such in its response brief. It considered the Blaskic case because that had been raised by the Kallon Defence.

Blaskic says the relationship between the Appellant and the direct perpetrator must be pleaded; that is, that the accused is

a superior who exercised effective control over sufficiently identified subordinates; that direct perpetrators may be identified by reference to their category as a group and that relevant facts of subordinates will usually be stated with less precision because of the details of those acts by whom and against whom they are done are often unknown.

Blaskic also holds that it is not necessary for the Prosecution to plead particular necessary and reasonable measures that were not taken. It is sufficient to plead that there was a failure to take such measures, or that the accused omitted to act altogether. We refer to the Hadzihasanovic case, tab 3 in our authorities, the Prosecution response brief, paragraph 2.56. The Nahimana appeal judgment, tab 5 of our authorities, paragraph 323.

As to the knowledge of the accused, the Stanisic case, tab 11 of our authorities, in that case that fact - the knowledge of the accused was found to have been sufficiently pleaded where the indictment stated that each accused knew or had reason to know that crimes charged in the indictment were about to be or had been committed by subordinates. That is at paragraph 60.

While the Blaskic standard may have become well accepted at the ICTY, it does not set out a rigid formula. In the Halilovic case, tab 14 at paragraph 86, the ICTY Appeals Chamber pointed out that the manner in which effective control was exercised might encompass facts which are not required to be alleged as long as there is a clear indication in the indictment of effective control at the time of the crimes. It was recognised that although each of the material facts must usually be pleaded expressly, it may also suffice if they are expressed by necessary

implication. And that includes the state of the mind of the accused. I refer to Stanisic again, tab 11 at paragraph 16.

It has also been stated that when evaluating the sufficiency of the indictment pleading it is necessary to read it as a whole and not as a series of paragraphs taken in isolation. The Trial Chamber accepted the case law to the effect that it is permissible to plead the material facts underlying both individual and superior responsibility in a manner that is consistent with both. We refer to paragraph 408 of the trial judgment. In any case, an important distinction must always be drawn between the material facts which must be pleaded and the evidence that is intended to prove the material facts.

As to alleged defective pleading of locations in the indictment, paragraph 45 of the Sesay appeal brief, and paragraph 24 of the Sesay reply brief, claim that Sesay could not be convicted of terror in relation to burnings in Koidu because they were not pleaded in the indictment. It is submitted that that is incorrect. Paragraph 80 of the indictment pleaded burnings in various locations in Kono District, including - and it is the word including - three named locations. Admittedly the three named locations didn't include Koidu, it wasn't expressly mentioned, but the use of the word "including" is clearly not exclusive. It indicates that burnings occurred in other locations also.

I rely on paragraphs 2.61 to 2.74 of our response brief dealing with locations not specifically pleaded in the indictment. We submit the decision to consider burnings in Koidu Town as acts of terror clearly falls within the decision of the Trial Chamber that it would consider locations not specifically

pleaded in the indictment.

Contrary to the argument of the Sesay Defence, the Prosecution does not accept that forced labour for diamond mining was only pleaded in relation to Tombodu. Forced labour in a non-exclusive way was pleaded in relation to Kono District and other districts as well and the conviction for forced mining we submit applied to all locations found in paragraph 1240 to 1259 of the trial judgment.

In relation to Count 6 to 9, forced marriage and sexual crimes, the Sesay Defence appears to argue that the indictment was defective for failure to plead what they call specimen charges in relation to the forced marriage count. Paragraph 100 of the Sesay reply brief quotes from the Kupreskic trial judgment. It is actually a quote from paragraph 626 of the Kupreskic trial judgment. It doesn't, we submit, support the Defence argument at all. It is dealing with something entirely different.

What that case says is that it is not possible to plead persecution without specifying what it is that constituted the persecution; persecution being a crime of a general nature. The way that would apply to this case can be seen for instance in the terror count. It would mean that you can't just plead acts of terror without specifying what the acts of terror were and the indictment in this case did specify the acts of terror with the conduct charged in relation to Counts 3 to 14 in the indictment so that is straightforward.

The Sesay Defence tries to apply this principle somehow to forced marriage by saying you have to give specimen counts. We submit that is not what it says. In relation to forced marriage,

paragraphs 55 to 60 of the indictment pleaded locations and time frames, specified that victims were forced into marriages and that they were forced to perform a number of conjugal duties under coercion from their husbands, in inverted commas.

Nowhere in the quoted paragraph of the Kupreskic trial judgment is it suggested that in cases such as forced marriage it is necessary to plead specimen charges where there is a large number of victims.

The Sesay reply brief does refer to the Galic case where specimen charges were pleaded in the indictment in relation to particular allegations. We submit while that may be an example of what can be done, it hardly stands as an authority as to what is required to be done.

We submit that in cases where crimes are committed on a very large scale, it is possible in fact that it may not be possible even to identify the identity of particular victims and if that is the case it would be possible for the Trial Chamber, if satisfied on the evidence beyond a reasonable doubt, that the crime was in fact committed on a large scale against unknown victims, that it would be possible to enter a conviction on that basis.

Furthermore, contrary to what is suggested in paragraph 27 of the Sesay reply brief, we disagree that the Trial Chamber found in paragraph 1476 of the trial judgment that the Prosecution had given notice that acts of enslavement would be limited to domestic labour and use as diamond miners. In that paragraph, in fact, the Trial Chamber repeats the word "including" used in the indictment.

It was only in relation to Kono District that the

indictment specified domestic labour and as diamond miners as types of forced labour and even then it said that the forced labour included these forms. In other paragraphs in relation to other districts it was merely forced labour generally that was alleged, so it wasn't confined to any particular type.

The Trial Chamber noted at paragraph 416 of the trial judgment that additional particulars of forced labour had been provided in equivalent particulars and it is submitted that the charges in the indictment generally never specifically limited forced labour to domestic labour and use as diamond miners.

Paragraph 28 of the Sesay reply brief refers to a wealth of jurisprudence to the contrary, but we submit that none of these authorities deals with the issue of the specificity with which charges of forced labour must be pleaded. The references are merely to case law given in support of Sesay's ground 6 dealing with the general pleading requirements of indictments.

In relation to alleged defects in the indictment, given the passage of time, the Prosecution otherwise relies on its written pleadings.

I move on next to the next group of Defence grounds of appeal dealt with in chapter 3 of the Prosecution appeal brief which is alleged violations of fair trial guarantees.

First of all, I address the Defence submission that the Trial Chamber failed to provide a reasoned opinion in writing as required by Article 18 of the Statute. Paragraphs 9 to 11 of the Sesay reply brief, for instance claim that there was a cursory dismissal of the Defence case in 16 paragraphs of the judgment, in clearest disregard of jurisprudence from other international criminal tribunals.

The Prosecution submits this is a very sweeping general assertion which is in fact quite incorrect. The Trial Chamber is some 800 pages long, including dissenting opinions and annexes. It is possibly the longest trial judgment ever produced by an International Criminal Court, I am happy to stand to be corrected on that, but I would submit certainly one of the longest.

In separate chapters it contains detailed findings in relation to applicable law, the evaluation of the evidence, the RUF as an organisation and the relationship between the AFRC and the RUF. It gave separate consideration to the evidence of different crimes in different locations and to the individual responsibility of the accused for each of those crimes.

It is submitted that the trial judgment is for instance more detailed than the Kvocka trial judgment, which was held in the Kvocka appeal judgment, that is tab 9 as paragraphs 21 to 25, to pass the test of a reasoned opinion in writing.

It was held in the Kvocka appeal judgment at paragraph 23 that there is no need for the trial judgment to refer to all of the evidence and that absent contrary indication it is to be presumed that the Trial Chamber did consider all of the evidence in the case. This was confirmed by this Appeals Chamber in the AFRC appeal judgment at paragraph 268.

We also refer to the Celebici appeal judgment, tab 17 at paragraph 481, in which it was said that a Trial Chamber is not required to articulate in its judgment every step of its reasoning in reaching particular findings. We also refer to the Krajisnik appeal judgment, tab 8 at paragraph 139.

Of course it would always be possible for a Trial Chamber in any trial judgment to provide more detailed reasoning than it

did, and if the Trial Chamber had done so in this case perhaps the trial judgment would have been several thousands pages long. We submit that Article 18 of the Statute does not require this.

Various Sesay grounds are based on arguments that the Trial Chamber did not undertake the requisite analysis of this or that. An example is the Sesay appeal brief paragraph 206, or the Sesay reply brief paragraph 52 but, as I have said, it is not necessary for the Trial Chamber to articulate every step in its reasoning. If the Trial Chamber articulates the correct legal principles, if it indicates or the presumption applies that it considered all of the evidence as a whole, if the Trial Chamber makes findings of fact that are legally sufficient to satisfy the elements of the crimes and the individual responsibility of the accused, and if those findings of fact were open to a reasonable trier of fact on the evidence, then we submit that absent demonstration to the contrary it is presumed that the Trial Chamber undertook all the correct and requisite analysis.

I turn then to the alleged reversal of the burden of proof. Now, the presumption of innocence of course is absolutely fundamental. It was acknowledged at paragraph 475 of the trial judgment. Again in the absence of contrary indication we submit that it is to be taken the Trial Chamber proceeded on that basis.

Paragraph 2 of the Sesay reply brief refers to its argument in paragraph - its argument based on paragraph 2016 of the trial judgment - that resorting to arms to topple a government necessarily implies the resolve and determination to shed blood and commit crimes. The suggestion being made by the Defence is that this somehow suggests that anybody who seeks to topple a government intends to commit crimes within the statute of the

court and that this create as presumption of guilt that anyone with that purpose must intend to commit crimes.

We submit that that is taking the sentence of the trial judgment out of context. We submit that sentence in context is referring to the specific facts of this particular case in the light of all of the evidence as a whole. The sentence in fact reads, "Resorting to arms to secure a total redemption and using them to topple a government which the RUF characterised as corrupt necessarily implies the resolve and determination to shed blood and commit crimes", and those words "total redemption" and "government characterised as corrupt" are references to the findings in the preceding and subsequent paragraphs of the trial judgment which are an analysis of RUF ideology and specifically the connection of that ideology to the crimes, and that based on all of these findings and all of these paragraphs the Trial Chamber were satisfied that on the evidence and findings in this case that the commission of crimes in order to achieve RUF objectives was an integral part of RUF ideology. And if it is open to a reasonable trier of fact to conclude that on the evidence as a whole, such a conclusion does not involve a reversal of the burden of proof or the presumption of innocence.

Complaints have also been made about alleged rejection of Defence evidence, or dismissal of the Defence case. We submit these arguments also can't be sustained. We submit of course there is nothing wrong with rejecting Defence evidence or rejecting a Defence case. In any case where an accused pleads not guilty, then if that person is ultimately convicted it means the Trial Chamber has necessarily rejected the Defence case and presumably rejected the Defence evidence, or parts of it. It is

not a denial of the rights of the accused for the Defence case to be dismissed.

We also submit that the Defence case was not dismissed summarily. As I say, there is a presumption that the Trial Chamber considered all evidence and considered all arguments and all of the findings of the Trial Chamber as a whole go to the reasons that the Trial Chamber had for rejecting the Defence case. And even so part 5 of the trial judgment contains detailed consideration by the Trial Chamber on matters of the evaluation of witness testimony including its findings as to the reliability of particular Defence witnesses and particular categories of Defence witnesses. I refer in particular to paragraphs 527 to 531, 565 to 578.

The Sesay reply brief contends that the Trial Chamber failed to address inconsistency in the testimony of principal Prosecution witnesses. Again, we refer to paragraphs 489 to 491 of the trial judgement. The whole of part 5 gave detailed consideration to witness credibility issues.

At paragraph 546, for instance, the Trial Chamber said expressly that it shared the concerns of the Defence in relation to one particular Defence witness, so clearly the Trial Chamber did consider the credibility of each witness individually. As I say, it was not required to give reasons for every single step along the way.

Similarly, the Sesay Defence complains that the Trial Chamber decided to attach no weight whatsoever to witnesses who said they hadn't heard of the commission of crimes. The Trial Chamber gave two reasons: (1) that some of these witnesses expressly said they still adhered to RUF ideology, which the

Trial Chamber thought undermined their credibility and (2) because the mere fact a witness hasn't heard of a crime doesn't mean a crime has not been committed. We say the weight to be given to evidence is a matter for the Trial Chamber and it was open to a reasonable trier of fact to decide in the circumstances there to attach no weight to that evidence.

Counsel for Kallon yesterday spoke about prejudice caused to Kallon because of adverse testimony given by a co-accused and that complaint related specifically to two items of the evidence, Exhibit 212 introduced by Sesay, and witness DAG-111 called by Gbao. We refer first to paragraph 3.19 of the Prosecution response brief, and we say that a witness presented by one accused as a matter of law can give evidence against a co-accused. There is nothing in the statute or the rules or international criminal law generally that would prevent that. We say that is in fact the point of a joint trial that all of the evidence can be looked at as a whole and that the truth can be got to.

The Kallon reply brief says that there was nonetheless unfairness because the Trial Chamber had made affirmative representations that in this particular case it would not consider evidence of one co-accused against another and we submit that is not in fact what the Trial Chamber said.

We submit that the situation was that the Trial Chamber did not allow one accused to adduce evidence directly to implicate a co-accused. Such evidence would be excluded. But if evidence didn't fall into that category, general evidence adduced by one accused and that was allowed in became general evidence in the case and when the Trial Chamber came to giving its trial judgment

it could base its findings in relation to each accused on all of the evidence in the case.

We also submit it was the case that even if a witness called by one accused couldn't directly give evidence implicating another accused in examination by Defence counsel, the Trial Chamber never said that such evidence couldn't be brought out by the Prosecution in cross-examination and that is what happened to witness DAG-111.

Just to explain very briefly what happened. In the transcript of 17 June 2008 there is an exchange that begins on page 101 as to whether the witness called by the Gbao Defence could answer a certain question or not, and at paragraph 132 of that transcript Judge Thompson then says to counsel for Gbao that based on his undertaking that the question wasn't designed to elicit incriminating evidence against Kallon the question could be put, and the examination and cross-examination of that witness then proceeded.

But then subsequently on 19 June - I refer to page 44 of the transcript - counsel for Kallon moved that testimony elicited by the Prosecution in cross-examination of that witness should be excluded because the Prosecution had brought out evidence inculpating Kallon, according to Kallon Defence counsel contrary to the very express conditions on which evidence was allowed to be led.

On the following page of the transcript, page 45, Judge Boutet said that that direction had been given to Mr Cammegh and not to the Prosecution and he and Judge Itoe agreed that this would be a matter for final trial argument. The matter was addressed in the Kallon final trial brief at

paragraphs 268 to 278 and we submit that the Trial Chamber made its decision based on those arguments.

We say that this whole argument was rendered moot in any event by the fact that at paragraph 278 the trial judgment said that it found DAG-111 unreliable in relation to the events of 1 May 2000 anyway and that it wouldn't rely on that testimony.

Something is then made by the Defence of the fact that there was a reference to DAG-111 in paragraph 609 of the trial judgment, referring to the incident of 1 May. We say nothing hangs on that. It might in fact be a typographical error, because the findings of the Trial Chamber dealing specifically with that 1 May incident do not refer in fact to the evidence of this witness. In any event, we submit that reference makes no difference because the Trial Chamber had made its findings in respect of that incident based on the evidence of Jaganathan and Ngondi and the mere reference to DAG-111 in a paragraph in another part of the trial judgment we submit does not undermine the validity of the trial judgment in that respect.

Again, time is marching on. I would just deal with two further brief points relating to fairness of the trial. One is that an argument was made in relation to evidence of a consistent pattern of conduct. Now, it is suggested that evidence of a consistent pattern of conduct can only be taken into account pursuant to Rule 93 and that the Trial Chamber, in making findings that there was a consistent pattern in the way things happened, contravened that Rule.

We submit that is not the effect of Rule 93. The effect of Rule 93, we say, is that where evidence would otherwise be inadmissible because it is simply irrelevant to the case, it may

be allowed in in the interests of justice if it goes to establishing a consistent pattern of conduct, and where that occurs Rule 93 requires that evidence of that consistent pattern be disclosed to the Defence under Rule 66 if it otherwise wouldn't have been disclosed under Rule 66.

On the other hand, where there is just the general evidence in the case, where it has been disclosed pursuant to Rule 66, the evidence has been led, when the Trial Chamber in its examination of all the evidence in the case as a whole has to reach a verdict, we say there is nothing to prevent the Trial Chamber from looking at that evidence as a whole and saying "We see a consistent pattern here. We are satisfied this was systematic. This was pursuant to a plan. It wasn't just random isolated incidents." As an authority for that, I would refer to the Boskoski and Tarculovski case, tab 6 in our authorities, paragraph 573.

Another issue that came up was that of payments to witnesses. Again, we say -- I revert back to my earlier submissions to the effect that matters have to be raised before the Trial Chamber, the Trial Chamber rules on them. If the matters are raised on appeal we are looking at whether the appellate standard of review has been met in relation to the Trial Chamber's judgment - Trial Chamber's interlocutory decision on that Defence motion.

What happened here? Details of payments to witnesses, which were payments of defraying of expenses of witnesses coming to testify, defraying of transport expenses, defraying of subsistence while witnesses were testifying, in some cases defraying of expenses of relocation, assistance with protection

and so forth, had been disclosed to the Defence over the course of some three years. Finally, on 30 May 2008, the Sesay Defence filed a motion requesting the Trial Chamber to hear evidence concerning Witness Management Unit and the way payments were made to witnesses. Again, the Trial Chamber rejected that motion. It was noted that the Defence had in cross-examination questioned witnesses about such payments, in relation to other witnesses it hadn't raised that, the Defence had not sought to bring evidence of its own, it had not raised the objection at the earliest opportunity. Under Rule 5 the motion was rejected.

In paragraphs 253 to 256 of the Trial Chamber, the Trial Chamber expressly looked at the issue of witness incentives. We submit that nothing has been shown that the Trial Chamber committed any appellate error in giving that decision. We submit further that it hasn't been established simply through the legal submissions that have been made on appeal here before the Appeals Chamber that the trial in any way miscarried as a result of such things.

Witness relocations. I also simply mention that I am only aware of one motion ever having been filed in relation to witness relocations. I am informed that the fact that a witness was being considered for relocation was disclosed to the Defence during trial. Relocations themselves only happened after witnesses testified such that that was not a matter that would have been disclosed in detail before a witness testified.

The one motion that I refer to is one on which the Trial Chamber gave a decision on 2 May 2005, the decision on Sesay motion seeking disclosure of the relationship between governmental agencies of the United States of America and the

OTP. That Defence motion and the decision was really about an alleged breach of Rule 15, a question of whether the Prosecution was acting independently. It was held that seeking the assistance of a government is not inconsistent with the prosecutorial independence under Rule 15 and, as I say, I am not aware of any specific Defence motion relating to relocations other than that.

I will say nothing about cumulative convictions because they haven't come up in oral argument and we will rely on our written submissions in relation to that issue.

I then turn to the next group of alleged Defence errors; those relating to principles of joint criminal enterprise dealt with in chapter 5 of the Prosecution response brief.

I begin, of course, with the proposition that joint criminal enterprise responsibility is a firmly entrenched principle in international criminal law. It was acknowledged in the Tadic appeal judgment which was one of the very first appeal judgments of an International Criminal Court. It has been routinely applied in numerous cases since then and it was recognised by this Appeals Chamber in the AFRC appeal judgment.

The Gbao reply brief makes some general submissions that joint criminal enterprise is not a fundamentally appropriate mode of liability and that its overexpansion can lead to an inequitable result, but as we say it is beyond argument that joint criminal enterprise liability is firmly established in international criminal law. In response I would merely confirm that the Prosecution in this case is not seeking to extend the existing law. We are not seeking to push the envelope. We are not seeking to break the frontiers of that principle. We are

seeking to have this case and this appeal proceed on the basis of the principles as firmly established in the existing case law.

One point is that joint criminal enterprise liability under the established law can apply in very large cases. I refer to the Brdjanin appeal judgment, tab 13 of our authorities, at paragraph 435. There the ICTY Appeals Chamber expressly rejected an argument that JCE liability is confined to cases involving a single district within a country and rejected the argument that it is not appropriate to crimes on a large scale.

I would also note as a preliminary matter that the finding of Gbao's JCE liability was by a two to one majority. We submit that is of no relevance in this appeal. Article 18 of the Statute provides that the judgment of the Trial Chamber is rendered by majority and the majority decision, notwithstanding a dissenting opinion, is the judgment of the Trial Chamber.

The issue on appeal is whether there is any error in the judgment of the Trial Chamber, namely the majority judgment. If a reasonable trier of fact could have reached the factual conclusions that the Trial Chamber, namely the majority, did then there is no occasion to reverse the Trial Chamber's findings. It is irrelevant that the dissenting judge might have been equally reasonable in the Appeals Chamber's view.

Another important point is that in the indictment in this case - and we submit also in the Trial Chamber's findings in the trial judgment - there was a single joint criminal enterprise. It wasn't alleged that there were separate joint criminal enterprises in separate districts in Sierra Leone. That is important because for reasons we presume of convenience in making its findings of fact and in making its findings of individual

responsibility of the accused, the Trial Chamber made separate findings in relation to each separate district, but that doesn't mean there was a separate joint criminal enterprise in each separate district. There was one joint criminal enterprise, we alleged, the Prosecution alleged, and the Trial Chamber found, which was to take control of the whole country by means which included the commission of crimes. One joint criminal enterprise, one plurality of persons, with one common purpose.

It follows as a matter of principle - established principle - that anybody sharing the common purpose who makes a significant contribution to the joint criminal enterprise is individually responsible for all crimes committed in pursuance of that joint criminal enterprise. It means that even if an accused made a significant contribution only in one district, that contribution is a contribution to the one joint criminal enterprise, that accused becomes responsible for all crimes in all districts committed pursuant to that joint criminal enterprise.

Similarly, in assessing whether an accused made a significant contribution to the joint criminal enterprise, it is necessary to assess contributions made in all different districts in which a contribution may have been made and to look at those contributions cumulatively as the one cumulative contribution to the one joint criminal enterprise. The fact that there was no contribution in one particular district or another is immaterial.

The Defence says that this amounts to a very broad application of joint criminal enterprise liability. It would mean that anyone who was a member of the RUF would be responsible for all crimes committed by the RUF.

Well, we clarify. The Trial Chamber found that certain

members of the RUF and certain members of the AFRC together shared this intent and were members of the joint criminal enterprise, that other members of the RUF and the AFRC were not members of this plurality and were mere tools being used by JCE members to commit crimes, and we submit, yes, it is the case. If a person was not a tool being used by members of the joint criminal enterprise to commit crimes, but rather if a person was themselves a member of that joint criminal enterprise sharing that common criminal purpose of that one joint criminal enterprise, and making a significant contribution to it then, yes, as a matter of established principle and established case law that person is responsible for all crimes committed within the joint criminal enterprise.

This leads me on to the arguments that were presented in relation to the findings of the Trial Chamber on the interplay between the first and third categories of joint criminal enterprise in relation to Gbao. We submit there is nothing inherently inconsistent with finding that a person - in this case Gbao - was responsible for some crimes on the basis of the first category and for other crimes on the basis of the third category.

I can illustrate with a simple example: Suppose A, B and C are members of a joint enterprise, they all agree they are going to beat three victims. A, B and C all share that common intent to beat three victims. A and B also have a common intent to kill one of those three victims, and that is what happens. The three victims are beaten and then one of them is killed. C, the third accused, shared the intent to engage in the beatings, did not share the intent for the killing, but it was reasonably foreseeable to the third accused that the killing would happen.

In that case it follows as a matter of principle - we submit it is not difficult - A and B are responsible on the first category of joint criminal enterprise liability for the beatings and the killings, C the third accused is responsible on the first category for the beatings and on the third category for the killing.

Of course it is necessary for the third accused to be a member of the joint criminal enterprise and that is what the Trial Chamber found. It found at paragraph 2172 of the trial judgment that Gbao was responsible on the first category of JCE for crimes committed in Kailahun District, so he shared the common intent on the Trial Chamber's finding that crimes would be committed in Kailahun District. In relation to the other districts, Bo, paragraphs 2047 to 2048, Kenema, paragraphs 2059 to 2060 and Kono, paragraphs 2019, findings were made on the basis of the third category of joint criminal enterprise liability.

Now, it is true one might ask the question: If Gbao shared the intent to commit these crimes in Kailahun District and he was part of the plurality that intended to take - intended to gain control of the entire country, could one not conclude that rather than merely foresee that crimes would be committed in districts other than Kailahun, that he also actually intended that? One might draw that conclusion. The Trial Chamber didn't. The Prosecution might have appealed against the finding that in the other districts it was JCE3, rather than JCE1, but the Trial Chamber did not appeal. If there was an error --

JUSTICE KING: The Trial Chamber didn't appeal?

MR STAKER: I am sorry, the Prosecution didn't appeal. And

we would submit even if there was an error of the Trial Chamber in this respect it was an error to the advantage of Gbao in the sense that he was convicted on the third category, rather than the first category.

My general submission --

JUSTICE KING: Before you go to the general submission, what is the test for one to be convicted under the third category?

MR STAKER: The third category is that the accused is a member of a joint criminal enterprise. There is an intent of a plurality to commit a crime. On that test, even if a crime that is committed in execution of the JCE was one not falling within that intent, the accused can nonetheless be committed (sic) if that crime was a natural and foreseeable consequence of the execution of the joint criminal enterprise.

The typical example in national law, it exists even at the national level, a group of people are in a joint criminal enterprise to commit an armed robbery of a bank. That is what is agreed. "We are going to go in with the guns into the bank and hold the place up and steal the money." In the course of the robbery one of the members of the joint criminal enterprise fires a gun when one of the guards tries to apprehend them and kills the guard. The person who fires the shot obviously is guilty of committing murder. The others, although they haven't agreed to commit the murder, they only agreed to commit an armed robbery, nonetheless it was a natural and foreseeable consequence of an armed bank robbery that somebody may get shot in the process. They are all responsible as participants in the joint criminal enterprise for the murder.

JUSTICE KING: Yes, I understand that. The point really I wanted to expatiate on is whether the test of natural foreseeability is objective or subjective.

MR STAKER: I confess I am not aware of any case law on that issue. It would obviously be more favourable to the accused to apply a subjective test. Ultimately in practice it may not make a significant difference, because as in the case of any mens rea finding, it is difficult to get inside the actual mind of an accused and findings of intent are normally based on objective evidence as to what an accused did, what an accused said, and what reasonable inferences can be drawn from that. We don't submit that anything hangs on that difference in this case.

JUSTICE KING: So what you are in fact saying is that what the Trial Chamber found was that in one aspect Gbao, for instance - Gbao, that is the Appellant you are talking about, was not guilty and it was within their powers to hold him guilty on the other aspect of it?

MR STAKER: No. What the Trial Chamber found was that he shared the intent for the crimes to be committed in Kailahun District, so he was a participant in the joint criminal enterprise. Together with others he had the intent to commit crimes. He was a member of the joint criminal enterprise.

JUSTICE KING: In other words, he had the common purpose.

MR STAKER: He had the common purpose.

JUSTICE KING: Yes.

MR STAKER: In relation to crimes in Kailahun District. In relation to crimes in other districts, the Trial Chamber's finding was that it was foreseeable to him that these same crimes -- these same kinds of crimes would be committed in other

districts as well, they were the natural and foreseeable consequence and he was liable for those as well.

JUSTICE KING: That is the third category.

MR STAKER: That is the third category.

JUSTICE KING: The extensive one.

MR STAKER: Yes.

JUSTICE KING: I understand.

MR STAKER: And I have submitted --

JUSTICE KING: Thanks a lot.

MR STAKER: Yes.

JUSTICE FISHER: I am sorry, could I follow up on that please. Are you suggesting that the crimes in the other districts were not part of the common purpose and, if so, how do Sesay and Kallon become liable for those crimes if they weren't part of the JCE1?

MR STAKER: Yes. The Trial Chamber found that the crimes in the other district were part of the common criminal purpose, so in the example I gave before of accused A, B and C, A and B would be the first two accused in this case. In the example I gave they had the intent both for the beating and for the killing. In the case of Gbao, the Trial Chamber's finding was that he had the intent for Kailahun District. For the other districts it was natural and foreseeable consequences.

JUSTICE FISHER: Well, excuse me, but I think the JCE that you are describing in your small example really are two JCEs if in fact we are going to define them as JCEs, are they not? One is a common purpose to commit the robbery and cause injury. Two of those share in that JCE. There is a second JCE which is only to commit the robbery. I don't see how you can have a common

purpose that is different for one member and still have that member be a JCE - a member of the JCE1.

MR STAKER: We would submit that is not in fact the case as a matter of principle. The example I gave of the beating and the killing in my submission would be one joint criminal enterprise, but there would be an aspect of that enterprise where there was a further intent on the part of some members that may have been foreseeable to others but not necessarily known or intended by them.

I am sorry, the joint criminal enterprise as pleaded had the common purpose of taking control of the country by means including the commission of crimes as pleaded in the indictment, and the Trial Chamber found that such a common criminal purpose did exist, that it did include those crimes. Both JCE1 and JCE3 were pleaded. We would submit it is not inconsistent with the way the indictment was pleaded to find that the intent of one of the members of the joint criminal enterprise may have been specific to one district and that in relation to others, while the joint enterprise existed, the intent on the part of that one accused was foreseeability rather than specific intent.

JUSTICE FISHER: You have indicated that you have no desire to expand the concept of JCE. Can you tell the Chamber what, if any, case in international law has ever defined JCE liability in the way that is suggested here?

MR STAKER: I gave what I thought was a simple example. In our submission that is not a shocking submission, or not a surprising one. I would have put it as something that - well --

JUSTICE FISHER: I am looking for a case.

MR STAKER: Yes, I am not in a position to cite any

authority. In our submission, although there may be no authority on that point, in my submission, to so find would not be an expansion of existing case law. It might be a clarification in my submission if there is no existing case on that, but in my submission it does not take the concept or the principle any great distance beyond what it has already been taken.

JUSTICE FISHER: Okay, thank you.

JUSTICE KING: Excuse me, excuse me. I am still on this point. You say there is no case law, but you referred to the original case, Tadic. That is I think in 1990. I think it was in that appeal that that third concept relating to JCE was expounded upon by the judges of the Appeals Chamber.

MR STAKER: Yes.

JUSTICE KING: Isn't that right?

MR STAKER: That is right.

JUSTICE KING: Isn't that an authority for that third aspect of it?

MR STAKER: No, of course, the third category of JCE liability was propounded in the Tadic appeal judgment --

JUSTICE KING: Yes.

MR STAKER: -- and it has been applied in subsequent case law. So we submit there is no dispute, in our submission, that the third category of joint criminal enterprise liability exists. It is true that in the Tadic case Tadic was a low level perpetrator. It wasn't a case where we were looking at a joint criminal enterprise applying across a whole country, and the particular facts in which it applied in that case were that a group of paramilitaries had been involved in an attack on a village and the accused was held liable for the killing of three

civilians in that attack even though it couldn't be shown that the accused personally committed the killings.

JUSTICE KING: Yes, exactly.

MR STAKER: And that was a finding on the basis of joint criminal enterprise liability along the lines of that simple example I gave earlier, rather than along the lines of the facts of this case.

JUSTICE KING: Yes, because you remember that in that case the Trial Chamber had held that there was no evidence that the three of them had agreed to kill those three people that you mentioned, but the Appeals Chamber thought otherwise and said it was reasonably foreseeable.

MR STAKER: Yes. In our submission - well, yes, that was the Trial Chamber's finding. As I say --

JUSTICE KING: They were overruled by the Appeals Chamber and in fact the Appeals Chamber convicted them on that basis. They said that when they went into this place where these three men were they were alive and when they left the men were dead.

MR STAKER: Yes, in the Tadic case.

JUSTICE KING: Yes, in the Tadic case.

MR STAKER: Yes, yes, yes, yes, and that was in my recollection an example of the third category --

JUSTICE KING: Exactly.

MR STAKER: -- where it was held that there may not have been an intent to commit killings.

JUSTICE KING: Precisely, but that was an actual foreseeability.

MR STAKER: But foreseeability that the intent may have been to commit --

JUSTICE KING: So that is the authority, I think.

MR STAKER: Yes, yes, yes.

JUSTICE KING: Thank you.

MR STAKER: In relation to the specific contribution of the accused in this case to the joint criminal enterprise, my colleague, Mr Fynn, will be making more detailed submissions on that. I see time is running very short and I will try to confine myself to a few additional specific points on the general principles and approach that the Trial Chamber took to joint criminal enterprise liability.

Paragraphs 51 and 52 of the Sesay reply brief take issue with the findings of the Trial Chamber concerning the use of non-JCE members by the JCE to further the common purpose. We rely on paragraphs 5.20 to 5.27 of our response brief. Again, the Sesay reply brief says that it wasn't sufficient to find that crimes were committed by non-JCE members, but rather that an analysis was required which focused on a specific crime and a specific JCE member.

This goes back to the Defence argument that I addressed before about the sufficiency of the reasoning in the trial judgment. We submit that where crimes are committed on a very large scale it is not necessary that the Trial Chamber made individualised findings in relation to each crime and find a particular RUF member which then needs to be linked to a specific JCE member, provided that on the evidence before the Trial Chamber as a whole it is capable of being satisfied beyond a reasonable doubt that non-JCE members were being used by JCE members to commit crimes in furtherance of the joint criminal enterprise.

We submit that is what the Trial Chamber did. We refer to paragraph 1992 of the trial judgment where it refers to - well, it says taking account of the entirety of the evidence and the widespread and systematic nature of the crimes committed, that it was capable of being satisfied by this. And in any event, there are more detailed findings in some aspects of the trial judgment that do establish links between specific crimes and specific non-JCE members and the common purpose. An example is given in paragraph 5.23 of our response brief.

Sesay's ground 26 concerns the Defence contention that there was no evidence that members of the joint criminal enterprise other than Bockarie were involved in the planning of crimes of terror in Bo District. Again this comes back to general JCE principles, in our submission. We submit that in order to be responsible for a crime under the doctrine of joint criminal enterprise it is not necessary for an accused to have made a significant contribution to a particular crime. It is not necessary for the accused in fact to have committed any crime at all.

What is necessary is that the accused made a significant contribution to the joint criminal enterprise. If an accused made a contribution to a joint criminal enterprise, the accused will be responsible for all of the crimes committed within that joint criminal enterprise, even crimes that the accused in fact may not have been individually specifically aware of. If the joint criminal enterprise is to, for instance, commit killings throughout the country, and a campaign of killings is conducted, then there would be various incidents of that occurring in particular places and particular times that the accused may not

be specifically aware of, but it is the joint criminal enterprise that the accused is part of and the accused does become responsible for those crimes.

Yesterday it was submitted by counsel for Gbao that the joint criminal enterprise at least in relation to enslavement ended on 19 February 1998. We submit that is not the case. It is true different time frames were pleaded for different districts. In the case of Kailahun District, in paragraph 74 of the indictment, it was at all times material to the indictment. At paragraph 2081 of the trial judgment, the Trial Chamber expressly found that the joint criminal enterprise extended to April 1998.

There is a suggestion in paragraph 203 of the Sesay appeal brief that in assessing the evidence of crimes in one district you can't have regard to crimes committed in another district. Again, our submission is that in assessing the evidence of any crime clearly the evidence has to be assessed against the backdrop of what was happening in the country as a whole before, during and after the incident in question. We say, as I have submitted, this is not impermissible reliance on similar fact evidence. We say it is an inevitable and essential aspect of making findings of fact based on the evidence as a whole. Again, I refer to the Krajisnik appeal judgment at paragraph 144, tab 8, in our authorities.

Paragraph 70 to 71 of the Sesay reply brief says that the Prosecution does not explain what it means by saying the Trial Chamber had to be satisfied that Sesay made a substantial contribution to the JCE and not that he made a substantial contribution to each crime in each location. Again, we submit

the principles of joint criminal enterprise liability are well-established. First of all, the relevant expression is in fact significant contribution, not substantial contribution, and a significant contribution need not be substantial. I refer for that to paragraph 261 of the trial judgment.

As I said, the commission - the contribution to the joint criminal enterprise need not necessarily involve the commission of a crime at all. For that I refer to: Paragraph 261 of the trial judgment; the Kvocka appeal judgment tab 9, paragraphs 99 to 163; Krnojelac appeal judgment tab 10, paragraphs 31 and 81; the Krajisnik appeal judgment tab 8, paragraphs 215 to 18; and the Simba appeal judgment tab 1, paragraph 303.

I would add that even if crimes in certain locations were committed exclusively by members of the RUF, or exclusively by members of the AFRC, this does not mean that the crimes cannot have been committed pursuant to a joint criminal enterprise involving members of both the AFRC and the RUF. As I say, if crimes are committed pursuant to a joint criminal enterprise, all members of the JCE are responsible for crimes committed in the enterprise as a whole even if not all members may have individually participated in each crime that was committed.

As to Gbao's ground 8(b), we submit also that it wasn't in fact the case that the Trial Chamber relied solely on Gbao's role as ideology instructor to establish his significant contribution to the joint criminal enterprise. Reference has been made to paragraph 270 of the sentencing judgment where in fact two major contributions have been identified. One was the role as ideology instructor. The other was planning and direct involvement in the enslavement of civilians in Kailahun District.

We submit that even if the role as ideology instructor were disregarded, one is still left with the finding that the role in the enslavement of civilians was itself a significant contribution to the joint criminal enterprise.

There was reference made to a finding of the Trial Chamber that Gbao trained every recruit in RUF ideology. I don't have a direct reference to a finding of the Trial Chamber to that effect. I am told it exists. I won't take issue with that. We submit, though, that in context this cannot be understood as the actual finding of the Trial Chamber. At paragraph 693, there is a reference to the G5 training civilians in RUF ideology. At paragraph 234 a finding that Gbao had a supervisory role over the G5. Again, we submit the findings of the Trial Chamber on that issue have to be understood in the context of the trial judgment as a whole.

The Trial Chamber acknowledged, at paragraph 213 of the trial judgment, that holding a revolutionary ideology does not in itself constitute a crime. It examined at some length the role of ideology in the RUF before reaching the conclusion that it did on Gbao's contribution in that respect.

JUSTICE WINTER: Just an interruption, please.

JUSTICE KAMANDA: Now, Dr Staker, if you remove the issue of ideology, what are you left with to implicate Gbao as a member of the JCE if you remove the ideological question?

MR STAKER: The Trial Chamber expressly made two findings of significant contribution very clearly in the trial judgment and in the sentencing judgment.

JUSTICE KAMANDA: Significant contribution that can locate him as a member of the JCE, not as a perpetrator of the purpose

of the JCE, which non-members can be? Non-members can be perpetrators of the means intended by the members of the JCE without being members of the JCE. If you look at the judgment, the Trial Chamber extensively dealt with the question of ideology and the position of Gbao in relation to the ideology as the conduct that locates him as a member of the JCE.

MR STAKER: Yes.

JUSTICE KAMANDA: If you remove that, what are you left with?

MR STAKER: One is still left with the finding that the role in enslavement in Kailahun District was a significant contribution to the JCE. That was a finding of the Trial Chamber. The Trial Chamber didn't say those two viewed cumulatively are a significant contribution. The Trial Chamber found each was a significant contribution. If one takes away the role as ideology instructor, one is still left with a finding that there was a significant contribution to the JCE.

JUSTICE KAMANDA: What qualifies you to be a member of the JCE?

MR STAKER: It is the sharing of the common purpose and the making of a significant contribution to the JCE.

JUSTICE KAMANDA: Thank you. With regard --

JUSTICE FISHER: Excuse me - oh, sorry.

JUSTICE KAMANDA: Well, in JCE the significant contribution and the substantial contribution might well pose a problem in a very definitive way to really distinguish between one and the other. If one understands there was a mere agreement between parties, would that constitute a substantial contribution without more?

MR STAKER: The mere agreement without a substantial - without a significant contribution may not be enough.

JUSTICE KAMANDA: So what is significant?

MR STAKER: There is case law expanding on this in greater detail. If I am not wrong, we do refer to it in our written pleadings, case law to the effect as I have said, a significant contribution need not be substantial. It need not be an essential prerequisite for the commission of the crime. It is not necessary to show that the crime would not have been committed but for the contribution of the accused. Significant, I suppose, is one of those words like the word "reasonable" used in the law. It is a matter for assessment by the Bench when faced with a situation to weigh the evidence and to decide whether a contribution was significant.

JUSTICE KAMANDA: So I meant to really ask what is substantial, beyond the mere agreement and without any further major activity?

MR STAKER: I don't want to be exclusive in my response to say it has to be this, or it has to be that, but what it can be is the giving of practical assistance, I suppose similar to aiding and abetting - the giving of practical assistance that enables the joint enterprise to be carried out.

Again, I am trying to think of abstract examples from national law. If we had say a drug importing ring, you have people who collectively agree together they are going to engage in the importation of illegal drugs, the role of one is to finance the operation. Now, lending or providing money is not inherently criminal, they haven't actually committed a crime and they may have had nothing to do with the actual importation of

the drugs, but they were part of the agreement to do it, they shared the intent, they intended that it would happen and by providing money to finance the operation they have rendered practical assistance to putting that plan into effect. That is an example.

If the plan includes the enslavement of or forced labour of civilians, the fact of being involved in the scheme of forced farming and forced labour is an exercise in practical furtherance of the implementation of the joint enterprise.

JUSTICE KAMANDA: I wish to come back to the membership of the JCE. You did submit earlier that not all members of the RUF can be regarded as members of the JCE. Am I correct?

MR STAKER: That was the Trial Chamber's finding.

JUSTICE KAMANDA: Yes, what is - and you agree with the finding apparently?

MR STAKER: Well, we are responding to a Defence appeal, so that was the Trial Chamber's finding, the Defence challenge it, we are responding to the appeal.

JUSTICE KAMANDA: Yes, yes.

MR STAKER: The Prosecution case was not that every member of the RUF and the AFRC was a member of this joint criminal enterprise. The trial --

JUSTICE KAMANDA: Now, if that is so, how - what is the distinguishing feature that qualifies you to be a member of the JCE and that makes you not a member? Although all of you are members of the RUF, how do you determine which one of them is a member of the JCE - RUF member of the JCE?

MR STAKER: That is a matter to be determined by the Trial Chamber on the evidence which approached the matter from this

way: It said given the widespread nature of the crimes and the way they were committed, they were satisfied that this didn't happen randomly. There was a joint enterprise involving senior people, or certain people in the RUF and AFRC, to agree to make this happen. And the question then was who were those people who were involved in this common plan? And the Trial Chamber looked at the evidence and it made findings. Not just the three accused in this case. It named various other individuals which it said it was satisfied on the evidence were part of this joint criminal enterprise. It said there may have been others, it could not exhaustively define who all of them were on the evidence, but it was also satisfied that not every single member of the RUF or AFRC was, but it was satisfied that these three accused were.

JUSTICE KAMANDA: So it is clear that the case was built on circumstantial evidence in that regard?

MR STAKER: The substantial contribution, not necessarily circumstantial evidence. The intent of the accused - I mean, I don't deny aspects of the findings of the Trial Chamber were circumstantial. There was no direct evidence directly of the JCE and the people involved in it and necessarily in a crime of this nature findings will be made from circumstances.

JUSTICE KAMANDA: And with regards to Gbao - sorry, I keep going back to Gbao. In regard to Gbao, the ideology appears to have been the main feature of the circumstantial evidence that the Trial Chamber used to come to the conclusion that he was a member of the JCE?

MR STAKER: The role as ideology instructor we would submit did, in the Trial Chamber's findings, go both to the significant contribution and to evidence of the intent - the intent to be

part of the common purpose - and to that extent we would agree that is circumstantial.

JUSTICE KAMANDA: Sorry, one last question and I won't trouble you on this point any more. In your earlier submission you gave the impression that the question of ideology was not a material fact, whereas when you look at the indictment starting from I think paragraph 30, where you talked about Gbao, you mentioned several of the roles he played, but nothing was said about the ideology. Can you explain that?

MR STAKER: What I said is that the Trial Chamber, when giving its judgment, will base its judgment on all of the evidence in the case as a whole and that the Trial Chamber is not necessarily bound by the way that the Prosecution put its case. So if the Prosecution case wasn't put on the basis that the role as ideology -- that the role as ideologist was a significant contribution, that does not prevent the Trial Chamber from being satisfied on the evidence that it was and basing a Trial Chamber -- basing a trial judgment in whole or in part on that finding. If it wasn't the Prosecution case, of course there was no requirement for the Prosecution to plead that in the indictment.

JUSTICE KAMANDA: Thank you.

JUSTICE FISHER: Given what you have just said about that, is it fair to say then that the Prosecution did not attempt to cure the defect, if that is what it is, in the indictment of not mentioning the material fact of the ideological contribution that was made by Mr Gbao?

MR STAKER: Well, it wasn't the Prosecution case. The Defence have said this and that is true. It was not the Prosecution case so the Prosecution would not have seen that as a

defect in the indictment.

JUSTICE FISHER: And there would have been no effort to try to cure it?

MR STAKER: Well, as I say, if it wasn't the Prosecution case it would have been nothing to cure from a Prosecution perspective.

JUSTICE FISHER: Okay. Just getting back again to the answer that you have given to my colleagues on the JCE issue and Mr Gbao, you indicated I think that what distinguishes a member of a JCE who makes a contribution to the JCE, and a person who is a non-member but used by the JCE as including sharing the common purpose and [microphone not activated] by the characterisation of the Trial Chamber of Mr Gbao's intent and what he shared and what he did not share, what - can you tell us whether the Prosecution's position on what the common purpose was is limited only to the crimes which he shared the intent for, or to all of the 14 crimes which Mr Sesay and Mr Kallon are found to have shared as well?

MR STAKER: Yes. First of all, I don't want to sound unduly technical, I think this is taken as a given, but of course we are not concerned so much with what the Prosecution case is as what the Trial Chamber found --

JUSTICE FISHER: Of course.

MR STAKER: -- and whether that finding contains errors.

JUSTICE FISHER: But I need the Prosecution's position on that.

MR STAKER: Yes, but it is the case the Prosecution's position at trial - I think the Prosecution's position now - and the Trial Chamber's finding was that the common purpose was to

take control of the territory of Sierra Leone by means that included the commission of the crimes charged in the indictment.

JUSTICE FISHER: All of the crimes?

MR STAKER: All of the crimes. It was the campaign of terror and collective punishment involving the commission of the other crimes charged in the indictment and the Prosecution's case is that Gbao was a member of, as I said, that one JCE. That was the Prosecution case and in our submission that was the Trial Chamber's finding.

JUSTICE FISHER: Okay. Thank you.

JUSTICE KING: This question of ideology worries me a bit. Now, in the indictment you did not plead it as a material fact, but then the Trial Chamber went on to make a finding about Gbao's ideology. Do you think they were right in doing that?

MR STAKER: It would have been open perhaps to the Trial Chamber to reopen proceedings and to invite the parties to make submissions on that, given that it had not been argued. The question is whether the entire trial judgment, or whether that entire part of the trial judgment, is rendered invalid or the proceedings as a whole rendered unfair, because the Trial Chamber didn't do that. As I said, the Trial Chamber's finding was based on all of the evidence in the case as a whole, and the Defence had the opportunity to challenge any of that evidence and to make any submissions on it. Our submission is the Trial Chamber is not bound by the way the Prosecution puts its case, or indeed by the way the Defence puts its case.

JUSTICE KING: No, I think you misunderstand me. I am not saying that the way the Prosecution puts its case. I am referring specifically and directly to the material facts pleaded

in the indictment. And as you yourself have admirably admitted, there is nothing pleaded there about ideology of Gbao, and yet the Trial Chamber went to the extent of pronouncing on this on the guilt or otherwise of Gbao. As a Prosecutor, and having regard to Article 17, the rights of the accused, were they entitled to do that? That is the question I want you to answer positively or otherwise.

MR STAKER: Yes. We submit that it was not necessary to plead it. We submit that the contribution of Gbao to the joint criminal enterprise was pleaded with the same level of specificity as the other two accused in this case and as other accused in other cases before this Special Court.

As I said, the indictment in this case is materially identical to that in the AFRC case. We have had another indictment in the Taylor case. There are general principles about the level of specificity required in indictments, particularly when the exception of sheer scale applies which was held to apply by the Trial Chamber in this case and which has been held by this Appeals Chamber to be an exception to normal specificity requirements. We submit the specificity in the case of Gbao was no different to any other accused, so --

JUSTICE KING: With respect, I don't see - I don't think you have seen the point I am trying to stress. I am dealing specifically with the question of ideology.

MR STAKER: Yes. Well the answer is, no, it wasn't necessary to plead that.

JUSTICE KING: Exactly. That is what I wanted to say.

MR STAKER: Yes.

JUSTICE KING: Thank you.

JUSTICE WINTER: Do you have a question.

MR STAKER: Yes, I am sorry. At this juncture, given the passage of time, I will hand over to Mr Fynn. I am sorry that it has been the Prosecution to say this now because the Defence have been rigorous in adhering to their allocated time, but in view of the number of questions if we did seek leave at the appropriate time to extend our time I would be very grateful if the Bench were not too harsh on whichever of my colleagues turns out to be the one to ask for it.

JUSTICE FISHER: Before you leave and having in mind your request, I have some questions. I didn't want to interrupt you before, but they go back to some of the points you made earlier and I would ask Madam President is this a good time, or should we wait until the submission is completed?

PRESIDING JUDGE: If you have questions for Dr Staker, then you should ask them now.

JUSTICE FISHER: Thank you. I would like to just hit some of the points that you hit and the questions that arose in my mind as you were talking about them.

We talked about one a little and that is the curing of the alleged defect in the indictment regarding reference to the ideology. I would also ask in the same regard the Defence has raised issues regarding what they allege to be 20 unnamed locations upon which convictions were ultimately found, and the second is the acts of forced labour which underlined the convictions for enslavement.

Both of those were raised as defects in the indictment because they had not been specifically pled and I wonder if you have any information as to an argument as to why they maybe

either cured, or waived, as those were the two conditions that you mentioned earlier.

MR STAKER: If we might be permitted to take that one on notice? I am told I think we have dealt with it in our written pleadings. I don't want to spontaneously say anything that may not be correct.

JUSTICE FISHER: That would be fine. My next question - and this has to do and perhaps you are not the person to ask, but it falls within JCE. This has to do with a point that was raised in the Sesay appeal that I could not find answered in your submissions and, if you could either direct me to where I should be looking for this answer or provide an answer, I would be grateful.

That has to do with Sesay's conviction for planning the use of child soldiers and the role regarding the contribution to the common purpose of that activity. The issue that I believe was raised by the Sesay argument had to do with specific requirements for planning that don't apply to other types of commission of crimes and I believe Mr Sesay's Defence submitted a couple of case references for that.

My question is do you address that in your response and, if not, could you address that argument?

MR STAKER: Again, given the stage of time, could I request that perhaps we address those immediately after the lunch break, the replies of the Defence, and we can confirm over the lunch hour?

JUSTICE FISHER: Okay. Now the other area that I wanted to look at was the fair trial area and you indicated answers to several of the points that were raised yesterday, but there are

two issues that I am a little concerned about and would like more on your views.

One has to do with the submission that was made by the Defence regarding failure to disclose sums of money that were paid to witnesses. I understand your argument about the issues when they weren't raised, but I am focusing now on the one that was raised. You have also referenced the trial court judgment, paragraphs 253 to 256, as responding to the concerns there.

I have a couple of questions about that. First of all, 253 to 256 seem to be addressing only the payments that were made to witnesses from the Registry and I believe that the core of the objection goes to payments that were made from the funds of the Prosecution. So my first question is are there other findings that you can point to that actually address that point?

My second question in that same regard is does the Prosecution consider that relocation benefits paid by the Prosecution as opposed to the Registry and any other money given by the Prosecution to witnesses falls within Rule 68 material and, if so, why or why not?

MR STAKER: The Prosecution's position is that it is disclosable under Rule 68 and that it was disclosed; payments from the Prosecution.

JUSTICE FISHER: Okay. And it was disclosed in what way? Simply that payments were made, or in some detail?

MR STAKER: In detail.

JUSTICE FISHER: Okay.

MR STAKER: The payments made were known, and I go back to the submission that if the Defence had issues they were matters to be raised with the Trial Chamber and then before this Appeals

Chamber the focus would be on whether there was any error in the way the Trial Chamber dealt with the matter.

JUSTICE FISHER: Okay, perhaps we are looking at different motions, but my understanding was that the motion for further specificity - the motion for disclosure was denied on the grounds that the material had to be identified with greater precision.

MR STAKER: To our knowledge, there was only the one motion. Perhaps that motion speaks for itself. My understanding is that it goes to the whole panoply of payments to witnesses issues, but disclosure was made consistently and the opportunity was always there to raise it at any time. As disclosure is made, the opportunity is there to the Defence to raise any issues and a reason of the Trial Chamber was the delay in raising the issue.

JUSTICE FISHER: Okay, I think I understand your answer. And just one final question on the fairness issue and that is the Kenyan major. You invited the Chamber to look at the decision of the Trial Court regarding the motion that was filed by Mr Gbao in connection with the late disclosure and we have taken you up on that invitation.

In paragraph 53 of that decision, the Chamber acknowledges that the statement - the pre-trial statement - made by the Kenyan major was in fact Rule 68 material. It then is unclear to me and I guess I would like your position on this. It seems to me that the Chamber never actually said that the effect of the late disclosure was not prejudicial, but rather it said that the failure of the Defence to do anything to mitigate the prejudice rendered their submission at this point - I don't think it says unprejudicial and perhaps that is the reading that you have given it, but nonetheless it doesn't ever say that the points they have

made are not prejudicial, only that they could have done things in that 19 to 20 month period to relieve or mitigate the prejudice. Is that the Prosecution's reading as well?

MR STAKER: I think I would agree that there is no clear and expressed statement that at the point of disclosure there had been no prejudice to that point, but certainly the Trial Chamber does in the final paragraphs come to the conclusion that there has been no prejudice. I can't put my finger on the paragraph now.

JUSTICE FISHER: Well, I think they found that there was no abuse of process because the prejudice aspect was missing somehow.

MR STAKER: My recollection is they didn't address the abuse of process point because they found there had been no prejudice.

JUSTICE FISHER: That is right. They never got to the analysis of the abuse of process.

MR STAKER: Yes, sorry, paragraph 62.

JUSTICE FISHER: Yes.

MR STAKER: "In our considered opinion if there was any prejudice expressed in the hypothetical, remedies were available to cure that prejudice ", and the final sentence, "We have, however, found specifically that there was no resulting material prejudice." So that was the finding.

JUSTICE FISHER: So I guess my question to you is first of all you argued that material prejudice was - had to be proven in order for there to be a remedy at that point and that is still your position, is that right?

MR STAKER: I wouldn't go that far. My position is that

for this to be raised now before the Appeals Chamber, the inquiry must be was there an appealable error in that Trial Chamber decision? It is not for the Appeals Chamber to decide de novo whether this late disclosure caused unfairness to the accused, but rather whether the way the Trial Chamber handled it was legally erroneous.

JUSTICE FISHER: And isn't the error of law that is being alleged that the Trial Chamber required there to be a showing of material prejudice and required that the burden of showing that be on the Defence? Isn't that the crux of the legal error, or is there something else that you would suggest is the legal error that is in contest here?

MR STAKER: I would say that ultimately the basis of the Trial Chamber's decision was that whatever material prejudice there may have been the Defence were in a position to cure that and that they didn't, presumably they didn't want to, so that it was not an issue, or --

JUSTICE FISHER: I understand, yes.

MR STAKER: And that ultimately - that ultimately - was the basis of the Trial Chamber's decision and our submission is there is no appealable error in the way the Trial Chamber dealt with that. There is nothing to challenge on appeal in the way that that situation was handled.

JUSTICE FISHER: Okay, but characterising it as you have as the Trial Chamber finding that there was no material prejudice, is not - the fact of whether or not the Trial Chamber needed material prejudice to rule on the motion, is not that the issue in contest?

MR STAKER: No, I don't think so, because the first

sentence in that paragraph I referred to said that even if there was material prejudice it could have been cured and so --

JUSTICE FISHER: And the failure to cure is what the motion was dismissed on, yes?

MR STAKER: Yes, I mean as a matter of principle if an accused says there has been a breach of the rules, take specifically a breach of the rules in relation to disclosure obligations, it can raise that before the Trial Chamber and it is within the discretion of the Trial Chamber to say, "Yes, we find that there has been a breach of the rules, but we are providing no remedy because there has been no prejudice, or no material prejudice."

JUSTICE FISHER: And I am asking you is that the standard that the Prosecution believes is the correct standard?

MR STAKER: No, not necessarily. I think that even if there was no material prejudice the Trial Chamber might for other reasons in its discretion consider that some kind of remedy was appropriate, but it is certainly appropriate for a Trial Chamber to say, "We grant no remedy because we find there was no material prejudice."

JUSTICE FISHER: That is your position?

MR STAKER: That is our position.

JUSTICE FISHER: Thank you.

JUSTICE WINTER: Before we now continue, I think given the time we have been sitting here there would be need for a break for ten minutes. We will resume after ten minutes and we will take that of course into consideration concerning the time for the continuation of the Prosecution's submissions.

MR STAKER: I am obliged, your Honour.

[Break taken at 12.20 p.m.]

[Upon resuming at 12.30 p.m.]

JUSTICE WINTER: My usual check. Can everyone hear? Everything is okay? Okay, I give the floor now to Mr Fynn and he has three quarters of an hour now until 1.15.

MR FYNN: Thank you very much.

PRESIDING JUDGE: I will continue after when we come from the lunch and we will give another 15 minutes to the Prosecution.

MR FYNN: Thank you very much, Madam President. I will be using between 30 and 40 minutes and I would then defer to my learned friend, Vincent Wagona, who will use the rest of the time.

Madam President, my Lords, I would be addressing parts 4 and 7 of the Prosecution's response brief and matters dealt therein, but I must say that the Prosecution continues to rely on all that has been submitted in its written brief and I will be focusing on matters which have been raised by the Appellants in their oral submissions and in their reply.

Part of the issues raised include evidence evaluation matters, some of which my learned friend Dr Staker has already averred to. I would draw your attention to Sesay's grounds 14 and 15 which specifically touch the question of accomplices. The Prosecution submits that as a general rule there is no legal requirement that the evidence of accomplices ought to be corroborated and so any claims or complaints by the Defence that such corroboration or lack of corroboration of accomplice witnesses makes the judgment defective must be disregarded, my Lords.

My Lords, the Trial Chamber of its own volition felt the

need to seek corroboration of the evidence of certain insider witnesses, or accomplices, and we would submit that that does not amount necessarily to that being a legal requirement.

Having set that standard, it was up to the Trial Chamber itself to find corroboration where it may and, my Lords, I say this bearing in mind that such corroboration can come from other witnesses and these need not be witnesses who have been characterised in any particular way and such corroboration can also come from the total circumstances and context of the case which is before the Trial Chamber.

Indeed, if I would refer your Lordships with your leave to paragraph 540 of the trial judgment, the Chamber at that paragraph averts its mind to the possible defect or the possible credibility issues which insider witnesses would have, but then it retains for itself, my Lords, the power to accept or reject the testimony of those witnesses.

My Lords, I would suggest that the standard is the same for all witnesses, accomplices not being different. The same discretion which a Trial Chamber has to accept or reject testimony of any witness is the same that they have regarding the testimony of accomplices.

I would move on to Mr Gbao, who in his grounds 6 and 7 alleges that there has been a failure to address and reconcile inconsistencies. That ground, my Lords, is very similar to that raised also by Mr Sesay in grounds 1, 2, 3 and indeed 14, which I have mentioned, and to my mind - and it is my submission - that they also deal with corroboration issues, because in those several grounds the Appellants suggest - the Appellants suggest - that having found inconsistencies in a particular witness's

testimony the Trial Chamber ought to have excluded such testimony. The Trial Chamber need not have relied on the testimony of such witnesses whose statements have been found to be inconsistent.

It is my submission, my Lords, that inconsistencies in a witness's testimony does not by itself provide a ground for the whole of that witness's testimony to be discarded. On the contrary, it is up to the Trial Chamber taking the whole of that witness's testimony into the context of the evidence as a whole to evaluate and see whether it could accept some of it, reject some of it, or indeed reject the whole.

My Lords, this is true also with respect to witnesses who Gbao suggests admitted to lying under oath. Where a witness has been found to have told an untruth, the question arises does that mean the whole of that testimony is untrue? Cannot the Trial Chamber - having regard to all the testimony before it and all the reliable witnesses before the Chamber, cannot the Trial Chamber accept some of the testimony of such a witness who has been found to be telling an untruth? My Lords, we would submit that the Trial Chamber was open to find - testimony of witnesses who had proved to be telling untruths in some aspects, the Chamber was still entitled to find their testimony useful and acceptable in other respects.

My Lords, the Sesay Defence - the Appellant Sesay in his ground 21 and 22 raises further issues regarding the way the Chamber evaluated the evidence and in those grounds they were specific to victims and child combatant witnesses.

The Appellant Sesay suggests - he submits - that the Chamber had created what Sesay calls an inviolable category of

witnesses. It is our submission that no such inviolable class was created. The Chamber was aware that these witnesses were victims and children, but did not attach any particular significance regarding credibility to their testimony simply because of their being victims and child combatant witnesses.

My Lords, we would at the risk of repeating ourselves say this is an evaluation issue. The Chamber uses the same principles by which it will evaluate evidence. It doesn't matter whether these are child combatants, or whether these are victims. The Chamber is still entitled to accept their evidence, or reject it.

Well, the Chamber did in this particular circumstance limit its use of such evidence and it is said - and I quote - that, "The evidence of victims was generally accepted for the purpose of establishing that crimes took place." This is paragraph 535 of the trial judgment. But I would suggest that - I would submit, my Lords, that even that it was left to the Trial Chamber to come to that conclusion, the Trial Chamber was free and had a discretion to use the evidence of these witnesses for even further purposes if the Trial Chamber had chosen to do so.

Sesay at grounds 17 and 18 singles out TF1-108's evidence and also TF1-366 for particular censure and claims that these witnesses did not have their testimony corroborated. In particular Sesay says that TF1-108's evidence on forced farming is uncorroborated.

However I would refer your Lordships to the trial judgment at paragraphs 1417 to 1425 where, my Lords, we would find that not only TF1-366, another witness complained of by Sesay, not only TF1-366, but also TF1-133 and TF1-330 they also corroborate

Sesay's - sorry, TF1-108's evidence on forced farming. Further to that, at those paragraphs the Trial Chamber found further corroboration in the evidence of DAG-048 who spoke of government farming and said there were RUF controlled farms.

So, my Lords, the contention by my learned friends for Sesay that TF1-108's evidence was not corroborated, though we have already submitted that it is open to the Chamber to use uncorroborated evidence, though it is open to the Chamber to do that, we would submit that in fact the evidence of TF1-108 was in fact corroborated not only by other Prosecution witnesses, but in some respects by Defence witnesses as well.

With respect to TF1-366, who also is complained of in those grounds, we have already discussed the motion which was put before the Court at some stage by the Defence to exclude these witnesses - this witness's testimony. The Trial Chamber was in a position to look at that motion and did so and on the merits of the motion dismissed it.

The Trial Chamber, my Lords, found that TF1-366's testimony was "somewhat problematic" to use their words, but again based on the principles of evaluation we have already mentioned notwithstanding that problematic nature it was still open to the Trial Chamber to do with that witness's testimony as it deemed just within the context of the whole evidence which was before the Trial Chamber.

My Lords, I would move on to Gbao's ground 2 where he appeals the use of expert reports in the determination of ultimate issues. As a preliminary point, the Prosecution submits that the preliminary issue in every criminal case is the question of whether the accused persons are guilty or not and that that

ultimate question is a question which can only be answered by the Court itself and to suggest that those issues were answered by experts is to misconstrue the whole purpose and use to which experts' testimonies were used by the Trial Chamber.

I feel it is accepted by all parties that the use of expert testimony in criminal trials is quite established and has been a practice for quite a long time and I need not make submissions on that, but now zero in on TF1-369 - TF1-369 - of whom Gbao's complaint is directed. Gbao's complaint is directly about TF1-369, who is the expert who testified for the Prosecution regarding sexual violence, forced marriage and such like issues.

The Trial Chamber was very clear as to the use it put this expert's testimony to and we would submit that it was the testimony of this expert that helped the Trial Chamber understand the full gravity, scope and effect of the crimes of sexual violence and forced marriage which were committed during the indictment period and the Trial Chamber makes findings to this regard at paragraph 1474 of the trial judgment.

In view of that, we do not think - we submit that Mr Gbao's contention that the Trial Chamber relied on expert reports in determining ultimate issues should be ignored. In fact I must mention the whole of the report of this particular expert says nothing about Mr Gbao as a person, or any accused as a person. It merely helped - it merely helped - the Chamber to understand the effect of the crimes alleged on the women and the people of Sierra Leone.

My Lords, Mr Sesay at his grounds 23 and 29 and Mr Kallon on ground 16 and Gbao on ground 12 raise issues regarding forced marriage, sexual slavery and sexual violence as being acts of

terror, and the Prosecution submits that the Court has a unique opportunity to lay any confusions regarding these to rest.

Mr Sesay has spoken about certain sexual crimes being opportunistic in their nature. There has been a suggestion by the Appellants that the fact that women were used to satisfy sexual needs and conjugal duties at random by other persons does not necessarily mean that these were acts of terror.

Well the Chamber found, and particularly so at 1466 - at paragraph 1466, my Lords, the Chamber found that there appeared and it was satisfied that there was the pattern - a concerted pattern - to use sexual violence and forced marriage as a weapon of terror.

My Lords, it must be submitted that the fact that there may be some sub-motive, some other purpose, behind the commission of a crime does not mean that where the principal element of the crime has been established, that principal element becomes negated or is detracted from. I would submit that when the Trial Chamber found a pattern - a concerted pattern - to use sexual violence as a weapon of terror, that formed sufficient basis for the conviction of the accused for crimes of forced marriages and sexual slavery and sexual violence. The fact that some people may have used the opportunity to commit crimes does not detract from the pattern which was found.

The Appellants also refer to a finding in the AFRC trial regarding acts of terror. We would submit, my Lords, that the finding in the AFRC trial was not that sexual violence and forced marriage could not be used as a weapon of war, an act of terror, rather the AFRC(sic) found that in their particular case and circumstances there was insufficient evidence to prove the crimes

as charged.

My Lords, the Appellant Sesay in his ground 30 complains about his conviction for collective punishment. My Lords, we would submit - and in his submissions, my Lord, he did put forward a thesis that the Chamber ought to have assessed each incident case by case before coming to conclusions.

My Lords, we would suggest - and already this has been said - that the duty of the Chamber to assess crimes or incidents case by case does not mean - does not translate, my Lords - to a duty to enumerate the consideration of each piece of evidence within its judgment.

My Lords, only those findings which support the conclusion of the Chamber need be put in the judgment, and we would submit, my Lords, that the evidence of happenings in Kenema which are detailed by the Trial Chamber in paragraphs 1098 to 1101, those happenings, my Lords, including Bockarie and Akim attacking a house at Mambu Street and killing two people, the killing of suspected Kamajors at the NIC building, the killings of alleged Kamajor bosses, the arrest - [indiscernible] arrest - and torture of suspected Kamajors and the beating and killing of BS Massaquoi and others, those findings, my Lord, underscore and provide the basis for a conviction in collective punishment, because these individuals met their fate or had the treatment meted to them which was for one reason and one reason alone because they were either believed to be Kamajors, or Kamajor collaborators, my Lords. My Lords, we submit that Sesay's appeal against his conviction on the collective punishment must be disregarded.

In ground 30 of Sesay's appeal, 17 of Kallon's and 9 of Gbao's, the Appellants complain about the convictions relating to

unlawful killings. Sesay, in particular, contends that there were no killings in the Cyborg Pit at Tongo Field.

My Lords, I would draw your attention to the trial judgment at paragraphs 1106 to 1109 where the Trial Chamber makes specific findings, my Lords. My Lords, if I would with your leave read 1106:

"The Chamber finds that on three separate occasions SBUs under the command of AFRC/RUF fighters killed over 20 civilians, 25 civilians and 15 civilians at the Cyborg Pit. On another occasion, three civilians and two fighters were killed by AFRC fighters. The Chamber is satisfied that the killings of these civilians at Cyborg Pit constitute murder as charged."

My Lords, clearly Mr Sesay's contentions that there was no - there were no killings in the Cyborg Pit but for occasions when the sand collapsed, clearly, my Lords, this is not supported by the findings of the Chamber. My Lords, we would also submit that TF1-045 and TF1-035 are witnesses who have testified about the deaths and unlawful killings which occurred at the Cyborg Pit.

My Lords, Sesay on his ground 39 and Gbao in his ground 10 make further reference to sexual violence, challenging the credibility of witness TF1-314 and TF1-093. My Lords, we would submit that those contentions raise again issues of the evaluation of witness testimony and the earlier submissions in that regard are relied upon, my Lord.

My Lords, the Sesay Defence in their ground 43 and Kallon at ground 20 make complaints regarding the finding of the planning the use of child soldiers in active combat. My Lords, I would submit that at paragraph 1735, which I would refer your Lordships to, the Chamber makes findings about Mr Sesay

specifically regarding the use of child soldiers. My Lords, if I may, 1735 reads:

"The Chamber therefore finds that the security guards between the ages of 12 and 15 who accompanied Sesay during the December 1998 attack on Koidu were Sesay's bodyguards and they were therefore actively participating in hostilities. The Chamber is satisfied that at least some of these bodyguards were under the age of 15."

My Lords, Sesay may wish to say that doesn't support a finding for planning but, my Lords, we would draw your attention to the fact that the Chamber also found that the use of child soldiers was an integral part of the plan of the RUF. Since the very beginning, even in pre-indictment period, the RUF had used child soldiers in combat and, my Lords, I would submit that Sesay, considering his rank and role, being a part and parcel of that movement and having been found to be using child soldiers himself personally, it was not unreasonable, my Lord, for the Trial Chamber to have found him guilty of the use of child soldiers, my Lords - planning the use of child soldiers, my Lords.

My Lords, a similar argument is advanced for Mr Kallon, who himself was found to be using child soldiers as bodyguards. My Lords, I would refer your Lordships to paragraph 1744 to 1748 as general findings on the use and planning the use of child soldiers.

My Lords, if I may I wish to pick up from where my learned friend, Dr Staker, left off regarding the individual participation of the accused to the JCE. I wish, my Lords, to quickly draw your attention to certain findings of the Chamber

which I submit support our position that each accused played a significant role in the JCE.

I would submit, my Lord, that for Sesay firstly one has to consider his rank and his role within the RUF and the influence this brings to him, but more so his close collaboration with Bockarie in 1998 and pre-1998. My Lords, we would suggest - and I would refer you to paragraph 826 which is the finding that relates directly to this. My Lords, with your leave I will read. It says:

"Between March and May 1998, Sesay was a colonel and had the important assignment of BFC. He was based in Buedu. Bockarie was the only commander in Buedu with a radio set at his house. Sesay lived across the street from Bockarie and the two men worked closely together, sharing the radio set. Sesay and Bockarie maintained constant contact with the front lines and transmitted orders and received messages via the radio. Sesay took command in Buedu in Bockarie's absence."

My Lords, this is Sesay. He had a very important role; a role which over the passage of time grew and it became great in stature since the time frame referred to in this reference, my Lord, in the reference stated. He grew in stature, he became the interim leader and leader of the RUF and even before that at the time referred to in the paragraph he enjoyed - he still enjoyed significant position, but also enjoyed the ear of the feared and dreaded Bockarie, my Lord. They could be seen clearly, my Lord, working together.

My Lord, we would submit that Sesay played a significant role in ensuring that the JCE had sufficient men and fighters to pursue the common purpose. He ensured that there was a steady

supply of footmen, my Lord, and for that I would refer your Lordships to paragraph 2000 of the trial judgment. It says, "Sesay also participated in organising the availability of sufficient fighters for the RUF to allow them to maintain control over the civilian population and captured territory."

My Lords, this is Sesay. His role included ensuring that there was a supply of manpower.

To that end we would see that in paragraph 1437 the Chamber found that it was Sesay in collaboration with Sam Bockarie who gave orders for the capture of civilians and taking them to Bunumbu for training, my Lords, and when Bunumbu was closed and moved to Yengema - as the Trial Chamber found in paragraph 2088, when Bunumbu was closed and moved to Yengema it was again Sesay and Bockarie collaborating with one another issuing the command, "Close Bunumbu. Let's move to Yengema." These, my Lords, we would submit are significant contributions to the JCE.

My Lords, he did not only send men to the training camps. There is evidence and the Court found that Sesay visited the camps himself. He visited the training camps. TF1-141 at paragraph - in the trial judgment paragraph 1441, my Lords, TF1-141 at paragraph 1441 of the trial judgment, the Court refers to the evidence of this witness who saw Sesay visit and Sesay told them that even his own boys, that is Sesay's own boys, he would bring to the camp and he threatened that if anybody were to escape from the camp or disobey orders that person would be killed. My Lords, this is Sesay making significant contributions to the JCE.

My Lords, it is also found at paragraph 199 that Sesay used the levers of state to squash any support for the Kamajor and in

that process lots and lots of civilians were terrorised and were physically abused, my Lords.

My Lords, Kallon on his part also served - he served on the Supreme Council, as Sesay himself did. Kallon served on the Supreme Council of the AFRC and was involved in that group which made significant decisions regarding the furtherance of the JCE. Denis Koker testified that Kallon brought people to be trained at Bunumbu and Denis Koker's testimony is that 45 per cent of those trained there were below 15 years. There is evidence of this at the Trial Chamber's findings 1438. There is evidence that Kallon's bodyguards forced civilians to mine diamonds at Tongo Field. Paragraph 2005 has findings that support Kallon having his bodyguards forcing civilians to mine and TF1-045, TF1-041 and TF1-366 all testify to Kallon doing just that. My Lords, we also have evidence at paragraph 2006 of the judgment that on two occasions Kallon was present when SBUs opened fire at civilians mining in a mining pit.

My Lords, I would move on to Mr Gbao. Mr Gbao's contribution to the JCE I believe has been pursued by Dr Staker earlier, but in brief I would draw your attention to paragraph 1990 of the trial judgment which sets Gbao's rank and his role in Kailahun, my Lords.

My Lords, I would draw your attention to paragraph 2023 which talks about the capture and forced conscription of civilians being part of the organisation and Gbao being present and participating in the groups - the organisations - within the RUF which oversaw the supervision and screening of captured civilians, deciding what civilians were more appropriate for; whether they were more appropriate to become people working in

the mines forcibly, farming or trained as soldiers. My Lords, we would bring your attention to the fact that Gbao was a vanguard and was the overall security commander of the RUF.

My Lords, these are findings which support our submission that Gbao, Kallon and Sesay made significant contributions to the JCE. By no means am I suggesting that the list I just went through is exhaustive of the contributions found by the trial judgment. These are merely indicative of the significant contribution that they did make to the joint criminal enterprise.

This is all I intended to say, my Lords, and I would if there are no questions defer to my learned friend, Mr Wagona. Thank you, Madam President.

JUSTICE WINTER: I do think it would not be appropriate for you to have just three minutes left and then to be interrupted and to restart again, so I would rather say we are going to break now for three quarters of an hour - unfortunately only three quarters of an hour - and we will then resume with 15 minutes for you and 15 minutes for the answers directed to Dr Staker.

Can you manage with three quarters of an hour, Dr Staker? Thanks a lot for your understanding and assistance. We will rise.

[Lunch break taken at 13.12 p.m.]

[Upon resuming at 2.10 p.m.]

[14:11:10 audio missing]

MR STAKER: Your Honour, I hope we can deal with the questions that were asked briefly. I have to confess, though, and this is entirely a fault on our part, that we're not entirely certain we understood the question exactly as it was put. If I understand, the first question related to the elements of

planning.

JUSTICE FISHER: The arguments that were raised by Sesay and the cases cited by him, did you address those in your submission?

MR STAKER: I believe we do.

JUSTICE FISHER: So we'd be getting a reference to that case.

MR STAKER: Paragraphs 29 to 30. No. It's section 2(f) of our response brief.

JUSTICE FISHER: Okay. Thank you.

MR STAKER: The second question, if I understand it, related to forced marriage and an inconsistency in the way the Prosecution have put the case over the course of the trial.

JUSTICE FISHER: I don't think so.

MR STAKER: Then we genuinely have misunderstood.

JUSTICE FISHER: What is your understanding of the question?

MR STAKER: In our conferral, our understanding was it related to the Sesay contention that the Prosecution case on forced marriage evolved over the course of the trial as originally a sexual crime, and by the end of it something not necessarily involving sexual conduct.

JUSTICE FISHER: No, that was not -- I did ask you about acts of forced labour that formed the basis for the conviction of enslavement.

MR STAKER: Yes.

JUSTICE FISHER: And whether or not if we found that they were not properly pled in the indictment, whether there had been any cure proposed.

MR STAKER: Yes. That would depend on the nature of the defect. What I can confirm is that if this relates to individual victims, that names of individual victims were not given in the pre-trial brief or in a bill of particulars, so we rely on our submission that the indictment was not defectively pleaded.

JUSTICE FISHER: Okay.

MR STAKER: Through disclosure, the Defence knew what witnesses were going to say. If they had issues about sufficient notice, they were in a position to raise those before the Trial Chamber, but names of individual victims were not given prior to that, is my information.

JUSTICE FISHER: And the second question was of the same character and that was as to the unnamed location. Allegedly, there were 20 unnamed locations from which convictions were found. If, in fact, we find that that was a defect, is there some instance of cure that you'd like to share with us?

MR STAKER: I do apologise. If it's just a case of giving a reference to our pleadings, I'll give that after Mr Wagona.

JUSTICE FISHER: No, I understand your pleadings, but your pleadings don't address cure, and that's what I'm looking for.

MR STAKER: Right.

JUSTICE FISHER: If you have some response to that.

MR STAKER: I'll give a very quick response after Mr Wagona.

JUSTICE FISHER: Okay.

MR WAGONA: My Lords, I will start by responding to the submissions made in respect of Mr Kallon concerning his ground 13, which were repeated in oral argument yesterday. The Kallon Defence submits that the crime of forced marriage was not pleaded

in indictment and that he had no notice of the allegation of forced marriage. My Lords, this is addressed in the Prosecution response brief at paragraphs 2.51 to 2.53, and what I want to respond to specifically is the submission that the elements of Kallon's Article 6.3 responsibility for the crime of forced marriage were not established. Those submissions are at paragraphs 138 to 142 of the Kallon appeal brief, and they were repeated in oral argument yesterday.

The Kallon Defence submits that there's nothing to show that the Appellant was in effective command and control of RUF troops at Kissi Town, as he was found by the Trial Chamber to have been based at a different location, Guinea highway, at the time, and that Kallon was also found not to have had discrete combat units or forces assigned to his command. It was further submitted that it was not established that Kallon either knew or had reason to know of the commission of the crime.

My Lords, in response it is submitted that all the elements of Article 6.3 responsibility were established. First, it is submitted that the effective control test which refers to the material ability to prevent or to punish criminal conduct was satisfied. In this regard I refer to the Trial Chamber findings in the Trial judgment of paragraphs 833 to 838, and 2135 to 2136.

At paragraphs 2135 to 2136, in assessing Kallon's superior subordinate relationship with troops in Kono, the Trial Chamber recalled its earlier findings at paragraph 833 to 838, which I will not repeat, but notably - notably - the Trial Chamber further found at paragraph 2137 that Kallon had a supervisory role over the civilian camps in Kono District and that he had effective control over Rocky, the commander of the camps.

My Lords, the significance of this is that Kissi Town, where the crime of forced marriage was found to have been committed, was one of the civilian camps. In this regard the indictment at paragraph 55 listed Kissi Town or Kissi Town camp as one of the locations in Kono District where the crimes in Counts 6 to 9 were alleged to have been committed, and elsewhere in the trial judgment, for example, paragraphs 1283 and 1188, reference is made to Kissi Town as a civilian camp. So there was therefore no error in the Trial Chamber's finding that Kallon had effective control over the RUF fighters who forcibly married TF1-016 and her daughter in Kissi Town between May and June 1998, as the Trial Chamber held at paragraph 2146. The effective control test, we submit, was therefore satisfied.

Next, my Lords, it is submitted that Kallon had reason to know that his subordinates had committed the crimes of forced marriage in Kissi Town. I rely, my Lords, on the trial judgment finding at paragraph 2148, where it was held as follows:

"The Chamber has found that Kallon occupied a supervisory role with respect to the civilian camps and we are therefore satisfied that Kallon had actual knowledge of the enslavement of civilians there. The Chamber is further of the view that the commission of the crime of forced marriage was widespread in Kono District and indeed throughout Sierra Leone, and we find that in these circumstances Kallon had reason to know of the fighters who committed this crime at Kissi Town."

My Lords, as I've already indicated, the finding that Kallon occupied a supervisory role with respect to civilian camps is relevant to the crime of forced marriage at Kissi Town, given that in Kono District civilian camps were some of the places

where crimes of forced marriage were found by the Trial Chamber to have been committed. I refer, for example, also to the trial judgment, paragraph 1179, relating to forced marriage in another camp, which was Wendedu camp. Kissi Town camp, as I've already said, was itself another civilian camp where crimes of forced marriage were found to have been committed. This is at the trial judgment, paragraph 1211.

The Trial Chamber found in that paragraph that at Kissi Town, the RUF distributed female captives among themselves and that both TF1-016 and her daughter were given to rebels as wives in this fashion. In these circumstances, my Lords, it is submitted the Trial Chamber committed no error in finding, at paragraph 2148 of the trial judgment, that Kallon had reason to know of the fighters who committed the crime of forced marriage in Kissi Town and also in finding, at paragraph 2151, that Kallon was responsible under Article 6.3 for the forced marriage of TF1-016 and her daughter in Kissi Town.

My Lords, I now beg to move to the grounds relating to sentence, and my first submission is that none of the Appellants has demonstrated that in exercising its discretion in sentencing the Trial Chamber went outside the law. It is indeed our submission, my Lords, that the sentence imposed on each of the Appellants was within the provisions of the law, namely, Article 19.2 of the Statute which states that, "In imposing sentence, the Trial Chamber should take into account such factors as gravity of the offence and the individual circumstances of the convicted person."

I also refer to Rule 101 of the Rules, which additionally requires the Trial Chamber to take into account aggravating and

mitigating circumstances. None of the Appellants has shown that the Trial Chamber failed to follow this applicable law. Indeed, these are the factors that the Trial Chamber did consider for each of the Appellants, and in this regard I refer to the trial judgment -- to the sentencing judgment, paragraphs 220 to 232 in respect of Sesay, paragraphs 250 to 262 in respect of Kallon and paragraphs 277 to 279 in respect of Gbao.

At this point, my Lords, the Prosecution wishes to emphasise the high standard of review that is applicable before the Appeals Chamber would interfere with sentence imposed by a trial chamber. The Prosecution refers to its response brief, paragraphs 1.16 to 1.20, and emphasises the following points:

"The sentencing discretion conferred upon Trial Chambers is very broad, due to the obligation to individualise sentence to fit the individual circumstances of the accused and the gravity of the individual accused's criminal conduct."

The weighing and assessing of aggravating and mitigating factors is a matter primarily within the discretion of the Trial Chamber. It is up to the Trial Chamber to determine what weight to attach to aggravating and mitigating factors. As a result, the Appeals Chamber will not interfere with the exercise of this discretion unless it finds that there has been a discernible error or that the Trial Chamber has failed to follow the applicable law. It is for the Appellant to establish the existence of a discernible error in the exercise of the Trial Chamber's discretion, and in doing this it's not sufficient, for example, to simply show that a different sentence was imposed in another case in which the circumstances were similar. The Appellant must show that the sentence imposed was so unreasonable

or plainly unjust in that it underestimated, or like in this case, that it overestimated the gravity of the convicted person's criminal conduct, that the Appeals Chamber is able to infer that the Trial Chamber failed to exercise its discretion properly.

None of the Appellants, we say, has established the existence of a discernible error. Instead, the Appellants merely repeat their submissions made at sentencing, which were all already considered. And in this regard it's not correct to say that some mitigating factors were simply ignored.

My Lord, I refer to paragraph 33 of the sentencing judgment, where the Trial Chamber indicated that in issuing its sentencing judgment, the Trial Chamber had taken into consideration both the written and oral submission of the parties and further, and more importantly, at paragraph 100 of the sentencing judgment, the Trial Chamber commenced its sentencing deliberations by noting that it had fully considered the submissions of the parties in relation to sentencing.

The factors that the Defence claim were ignored were all referred to in sentencing submission, which the Trial Chamber fully considered, including the individual circumstances of each of the Appellants. So it's not correct to say that factors were ignored. What is correct is that some mitigating factors were given little weight, while others were given no weight, which we say was all perfectly in the Trial Chamber's discretion to determine what amounted to a mitigating factor and also to determine what weight, if any, to give to each factor.

My Lords, it was not mandatory for the Trial Chamber to attach any particular weight to any particular factor such as, for example, Sesay's peace efforts as a mitigating factor. The

gravity of Sesay's criminal conduct in the crimes against UNAMSIL peacekeepers, Counts 15 and 17, which conduct it is submitted was at the same time contrary to peace, given the mandate -- given that the mandate of UNAMSIL -- given the mandate of UNAMSIL, clearly outweighed any mitigation arising from Sesay's peace efforts.

As the Trial Chamber found in the sentencing judgment at paragraph 190, UNAMSIL peacekeepers were acting in fulfillment of their mandate to assist with the process of disarming, demobilising and reintegrating combatants, as well as monitoring a ceasefire and facilitating humanitarian assistance. Peacekeepers were therefore acting for the peace process.

Sesay's form and degree of participation in his Article 6.3, criminal responsibility for Counts 15 and 17, as found by the Trial Chamber in the sentencing judgment at paragraphs 217 to 218, directly contradicted his peace effort claims. It is recalled that the Trial Chamber found that the gravity of the crimes -- it's recalled that the Trial Chamber found the gravity of these crimes to be exceptionally high. I refer to the sentencing judgment, paragraph 191 to 204.

In the circumstances, my Lords, it is submitted the Trial Chamber committed no error in finding that Sesay's failure to prevent or punish perpetrators of the attacks against UNAMSIL personnel was a direct affront to the international community's own attempt to facilitate peace in Sierra Leone. I refer to sentencing judgment paragraph 228. And so the Trial Chamber made no error in opting to give no weight to Sesay's role in peace as a mitigating factor.

With regard to serving sentence in a foreign country,

although the Trial Chamber did not consider -- did not give any weight to this factor, as found in the sentencing judgment paragraph 205 to 206, this concern is adequately addressed by the recently issued practice direction for designation of state for enforcement of sentence, especially Rule 5 thereof.

My Lords, with regard to harsh or excessive sentence as compared to other cases, I refer to the sentencing judgment, paragraph 18, where the Trial Chamber stated that the sentence should be individualised and also proportionate to the conduct of the accused, reflecting the inherent gravity of the totality of the criminal conduct of the convicted person, taking into consideration the particular circumstances of the case and the form and degree of participation of the accused.

This is what the Trial Chamber did, because different factors relating to gravity, aggravation and mitigation found in different cases dictates different results in sentencing. And in this particular regard, the Prosecution recalls the gravity of the crimes for which the Appellants were convicted and their forms and degrees of participation in JCE and other responsibilities.

With regard to the gravity of the crimes, my Lords, the details are in the sentencing judgment, paragraphs 104 to 105, and 107 to 204. What I want to emphasise, however, is this: that after considering all the relevant factors, the Trial Chamber did find in respect of Counts 3 to 13, and Counts 15 to 17, that the inherent gravity of the criminal acts was exceptionally high. In the case of pillage, Count 14, that the inherent gravity of the criminal acts was high. I refer to sentencing judgment paragraph 107 to 204.

It is submitted further, my Lords, that the form and degree of participation of each Appellant in JCE, and in the crimes as found by the Trial Chamber, was equally grave, so grave as to justify the sentences imposed on each of the Appellants. I refer to the Trial Chamber's findings in the sentencing judgment at paragraphs 211 to 212 and in 214 to 215, 209 and 217 to 218 in respect of Sesay, and paragraphs 235 to 237 and 239 to 240, and then 245 to 245 -- to 246 in respect of Kallon, and paragraphs 264, 267 and 272 in respect of Gbao.

In summary, my Lords, I would emphasise the following points: In respect of Sesay, his level of participation in the JCE was found to be key to the furtherance of the objectives of the JCE, and his culpability was found to reach the highest level. The gravity of his criminal conduct in relation to his Article 6.3 responsibility for the crimes in Count 15 and 17 - these are attacks on UNAMSIL peacekeepers - was found to reach the highest level. The gravity of his criminal conduct in relation to his Article 6.1 responsibility for the crimes in Count 12, use of child soldiers, was found to reach the highest level. It was suggested yesterday that Sesay was sentenced not -- that Sesay was sentenced not for his own role in the use of child soldiers but for the role of the entire RUF. Contrary to that suggestion, Sesay was not sentenced for RUF's use of child soldiers. He was convicted and sentenced for his own role.

JUSTICE WINTER: If you could come to the end, please.

MR WAGONA: Thank you, my Lords. My Lords, I present the same summary in respect of Kallon, that the gravity of his contribution to the JCE was substantial and his culpability reached the highest level. It was the same conclusion for his

Article 6.1 responsibility on Counts 15 and 17, same conclusion for his Article 6.3 responsibility for crimes in Counts 15 to 17, and his involvement in the matter of a Nigerian woman was found to be direct and serious.

Gbao's role, coming to Gbao, his role should not be underestimated or be downplayed, based especially on the sentencing judgment finding at paragraph 267 regarding his role in the large-scale management of the crime of forced farming which continued from 1996 to 2001 and also his involvement in the design and securing of forced labour. The brutality of that crime was also found to be high. My Lords, I would want to emphasise Gbao's submission concerning his role in the assault of the two peacekeepers. His commission of this offence was not a small role and the abuse of his leadership position was considered aggravating.

In conclusion, my Lords, it's contended that none of the Appellants has been able to justify any interference in their sentences by the Appeals Chamber, and we pray that the grounds in this respect be rejected.

That will be all, my Lords.

JUSTICE WINTER: Thank you.

MR WAGONA: Thanks for the time.

JUSTICE WINTER: Any questions from the Bench? Okay. Then thank you very much.

Dr. Staker.

MR STAKER: If I could just provide a response to your Honour Judge Fisher's second question. We would refer the Appeals Chamber to the Prosecution's final trial brief, paragraphs 112 to 121, where the issue's addressed.

JUSTICE FISHER: I'm inviting the Prosecution to expand on that. But you have no desire to do so?

MR STAKER: The reason I didn't intend to expand on it was because of the time limitations. It's about four or five pages long. We're not suggesting that there was any particular disclosure made at a point in time, but a number of ways are canvassed in which notice was given. Rather than read it out, if I could just refer the Appeals Chamber to it.

JUSTICE FISHER: No, I don't want you to read it out. I just wondered if there was anything in addition you wanted to add.

MR STAKER: Nothing I would want to add now to what's there.

JUSTICE FISHER: Okay. Thank you.

MR STAKER: Thank you.

JUSTICE WINTER: Thank you very much.

MR JORDASH: Sorry. First of all, could I apologise for my late arrival. I simply lost sight of the time, and I do apologise, and no disrespect was intended.

JUSTICE WINTER: Thank you.

MR JORDASH: And the second thing is, could I just ask the Prosecution to repeat the paragraph numbers again? I missed that.

JUSTICE WINTER: 112.

MR STAKER: 112 to 121.

MR JORDASH: Thank you.

JUSTICE WINTER: Mr Jordash, it's you. Thirty minutes.

MR JORDASH: May I just gather a lectern and put my files into order, please. And, hopefully, that won't count against me

in time.

Sorry to keep you waiting. And could I just make the point that I will not be able to hand out the documents perhaps I would have liked to because there's no time between the submissions, but I can, I hope, clarify the Appellant's position and meet some of the Prosecution's points.

The Prosecution opened their submissions with an urge to the Appeal Chamber, when dealing with the problems which we've highlighted in this appeal, to not ignore that the Trial Chamber was the place to raise them and not to ignore that specific remedies were available at trial. In our submission, in relation to the principal problems we've outlined in our appeal brief, that was not the case.

If I may deal first of all with the issue of defects of the indictment. My learned friend sums the position up well in the sense that there is two issues: One is was the indictment specific enough; was the evidence, as a second point, disclosed in sufficient time, and the two obviously are closed related. Your Honours will recall perhaps from yesterday the reference we made to a test employed by the Trial Chamber in dealing with new evidence. What the Appellant was facing was an indictment, and I'll hand up an indictment shortly when copies arrive for your Honours to look at, in your Honours' time, the case of Mico Stanisic, and an indictment which was very recent, the 29th of September 2008, and we say this indictment from the ICTY is what this indictment should have looked like, containing a fixed list of locations, a fixed list of crimes which made up the means which went to prove -- went, as the Prosecution would say, "were committed," as the Prosecution say in that case, in furtherance

of a common purpose, a fixed list of crimes and a common purpose which is clearly defined. And I'll hand up that indictment towards the end. You will not see in that indictment and you will not see in the indictments of the ICTY the all-encompassing words of "including," locations named but caveated by including these crimes. The crimes are listed, they're fixed and they're defined. The right of the Appellant and the right of an accused at trial is prompt notice of the charges, detailed prompt notice of the charges, not, "Here's a selection. We might lead some more evidence later detailing the rest."

Annex 1 of our appeal brief is the result of, firstly, the indictment not having that fixed list; secondly, a result of a series of -- series of decisions by the Trial Chamber, urged by the Prosecution. The Prosecution say, "We never sought an advantage." The Prosecution met our applications to exclude evidence outside of the indictment with the following submission, and you'll see reference to these decisions in our Appellant's brief. There's a series of them. We were fighting every step of the way. Every time the Prosecution brought a new witness, new challenges were led.

Charges. Counts are the broad description we found in our indictment. Charges at the ICTY and ICTR are the distinct basis for convictions which fall within the counts. The Prosecution's submissions attempt to confuse the issue. What they have done is plead an indictment with the counts but without the charges, and the charges were led continuously through evidence. When we complained, the Trial Chamber said, in response to an allegation that these charges were new evidence, they said, "They're not new evidence. They're episodic events, as it were, building blocks,

of the substratum of the charges of the indictment; therefore, not new."

Secondly, what they decided, and this is critical to your Honours' consideration, is that they also decided they did not increase the incriminatory nature of the evidence. In other words, the Prosecution were permitted continuously to lead such things as Sesay involving himself in mining in Kono in new locations, Sesay committing crimes which had never before been mentioned, but according to the Trial Chamber, it wasn't new, it was an episodic event, a building block of the substratum of the charges of the indictment. There is no such definition. There is no such definition of substratum of the charge. A charge is a distinct basis for conviction. We know it, the Prosecution knew it, and the Prosecution took advantage of that decision to continuously disclose the charges. So when they say they did not seek an advantage, it is an advantage to ignore established jurisprudence.

And that point is important, we say, for this reason: That it might be suggested during deliberations that why didn't the Defence apply for recall of witnesses? Well, the reason we didn't apply for recall of witnesses was because the Trial Chamber was saying to us there's no need. "You've had notice, there's no prejudice here whatsoever, nothing is new," despite the fact killings, rape, sexual violence, use of child soldiers was coming day by day in new charges. According to the Trial Chamber and according to the Prosecution, this wasn't new, "You've had sufficient notice of it. No prejudice arises." So why would we apply for recall?

In relation to the payments issue and the relocation issue,

the Prosecution agree that payments and relocation are Rule 68. We had that concession today, for the first time, perhaps. Certainly in relation to relocation, for the first time. The Prosecution said relocations only happened after testimony, and that of course is logical. Some relocations can occur during trial if the security position is particularly dangerous, but relocations often happen after the testimony's been given. That is not a reason, clearly, for not disclosing that information. The whole point is that a witness obtains an assurance that his security will be secured by relocation before giving his testimony, and that relocation is then operable on the witness's mind, possibly to encourage, we say, unreliable evidence. It's no point the Prosecution's simply delaying relocations until the end of the trial and then saying, "Well, it's not Rule 68." Clearly, it is.

JUSTICE WINTER: Sorry to interrupt at this point. What kind of assurance would you propose to give to a witness in danger, other than relocate, if necessary?

MR JORDASH: What other assurance would the Prosecution give?

JUSTICE WINTER: Yes.

MR JORDASH: Well, in this is case, we don't know because if the Prosecution's taken the position that relocations were not disclosable, we don't know what else the assurances were given which equally were not, in their minds, disclosable. If I may refer you to John Tanu, a witness who gave evidence in public, relocated -- not just relocated. His family relocated, money given, but not just that. Also, his immigration status sorted out in a very prosperous western country, a massive inducement to

the right witness. And John Tanu was the right-hand man also, he said, of Charles Taylor. According to the Prosecution then, right in the thick of crime.

JUSTICE WINTER: Is there any possibility for a location that would not cost money and would not need to imply -- to use the immigration services?

MR JORDASH: Well, a relocation within Sierra Leone, perhaps. But a relocation out of the country, then that assistance would -- well, even within Sierra Leone. These were insiders who were desperately poor. None of them have employment, or if they do, they have the lowest-paid employment. To relocate to a part of this country or out of the country requires funding.

JUSTICE WINTER: Thank you. That is what I wanted to know.

MR JORDASH: In relation to the payment issue, I'll deal with it very briefly. Yes, it's right the Prosecution did disclose some payment to Prosecution witnesses. The first point I raise there is: Why was the Prosecution paying witnesses in the first place, when we have an active WVS?

Secondly, the point I raise is this: That the most compelling evidence of something going wrong in the Prosecution investigation came out in the Taylor case. You'll see from the motion we filed on this subject that the evidence that was most compelling came out of the Taylor case in February/March of 2008, and the motion was filed in 2008. Witnesses who were saying not just that -- the disclosures from the Prosecution raised a certain suspicion.

JUSTICE WINTER: Sorry, would you leave the Taylor trial to the Taylor trial.

MR JORDASH: Well, the point is that these were RUF witnesses, RUF witnesses who then went to testify in the Taylor trial, and what happened was that in our trial no such disclosures emerged. When they got to the Taylor case, 362, for example, said "I was given money in an envelope." When asked when it was, she said April 2005. She gave evidence in the RUF case April 2005.

JUSTICE WINTER: Again, kindly leave the Taylor issues to the Taylor trial.

MR JORDASH: Well, this is an RUF issue, in that witnesses who are here were -- testified here, said they'd been paid whilst here, whilst -- during their time testifying here. So I'm talking about here, Madam President. So, witnesses who have confessed on oath to being paid while during their testimony here, the Prosecution never disclosed that. As I said yesterday, it may not be true but it required, we say, some investigation. It was a coincidence that four witnesses all said the same thing: Money for no obvious reason. And the Prosecution's suggestion that the motion was brought late simply takes advantage of the fact that we didn't discover those facts until after the -- well, until close to the end of the RUF case.

My learned friend raised another point about accomplices, and I think the point that was being made was the Trial Chamber did not have the same -- the Trial Chamber did have the same discretion with these witnesses in terms of evaluating their evidence. We submit that's fundamentally wrong. It is clear that accomplices fall into a special category in international criminal law, and logically that must be right. These are, by their own omissions, often, the worst perpetrators of crimes, the

biggest criminals in the conflict.

As a result of that, the Prosecution -- sorry, the Trial Chamber has to do two things, which is, one, approach their evidence generally with caution and two, when assessing their evidence and providing a reasoned judgment, they have to explain how, if doubt arises from that accomplice status, or from motives which arise from that accomplice status, they must explain how that doubt was resolved. What they've done in this judgment, with due respect to Trial Chamber I, is to simply say, "We've approached it with caution," but have not demonstrated that that is so. And that, in our submission, is the real gravamen about a reasoned judgment. They had to go into the charges when a witness said a particular -- an accomplice said a particular allegation which supported a particular charge but was drawn into doubt because of obvious motives or accomplice status they had to say how that doubt had been resolved. They didn't do that in relation to any single charge.

In relation to notice, again. I beg your pardon to return to this. I missed it out. I wanted to say something more about mining in Kono and the conviction, Mr Sesay, for enslavement of civilians in the area of Kono, between December of 1998 until January 2000. The notice we were first given in the indictment I detailed yesterday simply dealt with Tombodu, the pre-trial brief dealt with Tombodu, and more importantly in relation to this, or as importantly, the pre-trial brief detailed, in effect, that Sesay between 14 February to January 2000 was present in Kono on a regular basis attending AFRC camps and was present at a meeting in which he ordered mining to take place, and gave instruction that whether there was a loss in -- wherever there was a loss in

manpower at the mines, more workers were to be forcibly brought in. The notice in relation to the mining was that Sesay was in Kono, and that changed. That changed and it became Sesay was in Kono -- when the evidence came out and it was obvious that no witness was implicating Sesay being in Kono from February 1998 until December 1998, when he returned to carry out an operation in Koidu, the Prosecution's case demonstrably changed. And this is key, we say.

At one stage the Prosecution say he's supervising Kono in 1998. Then the mining case changes, and I dealt with that yesterday. And now the Trial Chamber finds that one of Sesay's contributions to the joint criminal enterprise is his presence in Buedu working hand-in-hand with Sam Bockarie. So what we had was a very specific case pleaded through the -- well, I won't say a specific case. A case pleaded which placed Sesay in Kono. When that didn't work, we had Sesay in Buedu. When the evidence came out that Sesay was in Buedu from February '98 until the end of the joint criminal enterprise in April 1998, but the evidence didn't establish what he was doing except being on the radio, receiving reports from the frontlines, but nothing more, the Prosecution failed to establish what he was doing, we find the section in the judgment referred to by Mr Fynn this morning which basically is this global, general paragraph that he worked hand-in-hand with Bockarie. That's why we say the pleading, defective pleading in this case is critical, because once you follow the way in which the changes -- the case changed and the Prosecution adopted a new stance and then the Trial Chamber adopted perhaps even a new stance on that, one can see the massive transformation from beginning to end. It was never

alleged that Sesay was in Buedu from February to the end of April 1998 dealing with frontline operations until evidence was led which the Prosecution grabbed hold of and used it to convict the accused, the Appellant.

Finally, the -- well, two last things I would like to deal with briefly. There's joint criminal enterprise and the sentence. If I can just try to simplify things, because the Prosecution's approach is to try to complicate things because the joint criminal enterprise they're inviting the Trial Chamber to uphold, in fact, doesn't work when one looks at the judgment and sees what the Trial Chamber did, and that's why they're trying to fudge it, we would submit.

Paragraph 257 of the Trial Chamber judgment to 261 deals with the assessment that must be made: First, a plurality of persons is required. It needs to be shown that this plurality is acting in concert. The common objective in itself is not enough. Second, the existence of a common plan, design or purpose which amounts to or involves the commission of a crime in the Statute. Thirdly, the participation of the accused in the common purpose is required, and that contribution must be significant. This is the assessment the Trial Chamber must make: identify the plurality, identify the actions in concert, identify the concrete crime, the common purpose. And it cannot be overstated enough, in our submission, the importance of establishing a definable common purpose because that is the key to joint criminal enterprise one. Contributions to that purpose are key to an assessment of an accused's responsibility. Contributions to that common purpose are key to inferring criminal intent, and finally, key to passing an appropriate sentence.

The Prosecution here, we submit, attempt to -- sorry, I've just lost my notebook -- attempt to fudge the issue. You will not have heard during the Prosecution's submissions reference to a significant contribution to the criminal purpose. What you will have heard is significant contribution to the JCE. That, if one looks at the transcript, and it's there throughout their submissions on joint criminal enterprise, it's a significant, for them, significant contribution to a JCE.

That is not the test. It's a significant contribution to a common purpose, a common purpose being a crime within the statute. The reason that they're avoiding the issue, because the Trial Chamber's error becomes obvious when one takes the correct approach. It's not a contribution to a liability. That's what effectively the Prosecution are saying: significant contribution to a liability. It's a significant contribution to a concrete crime, a common purpose.

With the Prosecution's joint criminal enterprise and the Trial Chamber's joint criminal enterprise, they say it's a common purpose to take over the country by committing the crimes. So what is the common purpose? What is the concrete crime? Is it the taking over the country? Well, that's not a crime. That's a non-criminal purpose. So it's not that. We say, in our Appellant's brief, that that's what the approach the Trial Chamber appeared to have made because what it does continuously in the judgment is repeat that Sesay's contribution was to secure revenue, men, and to further the war, effectively. That's why the Prosecution this morning talked about his contribution to the joint criminal enterprise being collaboration with Sam Bockarie. Well, collaboration with Sam Bockarie could be two things: It

could be to further a legitimate -- legitimate in terms of international criminal law, a legitimate war, or it could be to further crime. It's not enough for the Trial Chamber or the Prosecution to simply say, "You were working in a military capacity to further the war." That's the non-criminal purpose. The criminal purpose, as they put it, is common -- take over the country using the crimes within the indictment.

So how do you assess significant contribution in relation to that? Well, you can't use the non-criminal purpose alone. What you can use, perhaps, is all the crimes taken together: the unlawful killings, the sexual violence, the child soldier use in pursuit of taking over the country. What do you then assess the significant contribution to? Well, it must be, if the Prosecution are right, and they don't want to say this because, as I said, it exposes the Trial Chamber's error, then they must establish significant contribution to each crime. The reason for that is this: If it's just a significant contribution to one crime, for example, the killings, that doesn't allow you to infer a criminal intent, which is the final stage to commit sexual violence. Killings are one thing, sexual violence is another.

If it was that, then effectively what the Prosecution have done and the Trial Chamber has done is conflate JC1 and JC3 by saying, "All we require is a significant contribution to one set of crimes. We're going to infer from that guilt or criminal intent for the remainder." That's foreseeability. They're saying significant contribution to the killings, it was foreseeable that the rest of the crimes would be committed. That is not JC1, and that's why my learned friends cannot offer a single authority from the ICTY or ICTR; it doesn't exist.

So, we are left with this: If the Prosecution and Trial Chamber are right, we're left with a joint criminal enterprise where the Prosecution have to prove Mr Sesay had a significant contribution to each set of crimes. We're not suggesting each actual crime, we're suggesting each type of crime: Unlawful killings, sexual violence, and so on. And that, as we I hope demonstrated yesterday, just doesn't exist. These are global findings, for example, using -- abusing the levers of power, three arrests in Kenema. That doesn't allow you to infer the other crimes. That physical violence doesn't allow you to infer killings, rape, enslavement, his involvement in enslavement. It doesn't, in and of itself, a significant contribution to killing, allow you to infer the rest. And that's the problem with the judgment. You will not find the findings which allow an inference -- which support an inference that he, Mr Sesay, intended all the crimes because the Trial Chamber erred by itself, with the greatest respect to them, fudging it as well.

Those are my submissions for the moment on joint criminal enterprise and we will, I'm sure, return to it tomorrow with the Prosecution appeal.

Finally, I want to say something briefly about sentence, and I only want to address really two points, which is the UNAMSIL sentence, sentence for Mr Sesay's 6.3 responsibility for the UNAMSIL attacks, Counts 15 and 17. I want to make the following points, if I may.

First of all, the judgment findings indicate that at the earliest Mr Sesay became involved or knew about the attacks was on 3 May. The judgment doesn't allow any other reading, in our submission. By 3 May, nine of the 14 attacks had occurred. In

relation to the attacks found after 3 May, they were never -- in particular, those at judgment 1859 and 1860, helicopter attack on -- sorry, an attack on a helicopter by the RUF, and secondly an attack on Indian contingent, they were disclosed to us during evidence first on 13 February 2005 and second on 28 to 30 March 2006. We never had notice of them. But putting that point aside, what the Trial Chamber had to do was therefore sentence Mr Sesay for command responsibility, not 6.1, for not preventing attacks, nine attacks, which he had no notice of, and then not punishing the whole sequence of attacks. Fifty-one years, 51 years for UNAMSIL, 6.3.

If I can just very briefly take you to just one case I think demonstrates the point. Laurent Semanza was convicted at the ICTR of genocide, complicity in genocide, assisting extermination, murder, torture, and rapes as crimes against humanity as well as rape as a war crime, found to have de facto control over and organised the Interahamwe, who were the attackers there, to attack and kill Tutsi refugees in a church, attacked and killed other refugees, tortured and murdered other -- another man, directed men to rape and then kill a specific group of Tutsi women and to have directed the Interahamwe to kill a specific Tutsi tribe -- Tutsi family. For these crimes he was sentenced to 35 years.

That -- could I make just two more sentences, if I may, Madam President?

JUSTICE WINTER: Depends on the length of the sentences.

MR JORDASH: I make this point about why Mr Sesay should be given credit for his cooperation with the international community. If he's not, it basically removes the right of any

accused to that kind of mitigation. Every accused who is entitled to that mitigation, and it was found on the balance of probabilities here, evinces a series of crimes which stop and then the cooperation starts. That's what happened here. The crimes were committed, according to the Trial Chamber, the 6.3 failure to prevent and punish occurred, at some point Sesay turned his back on crime and cooperated with the international community. That's the same with any accused who starts to cooperate with the international community and gives up crime. There's no difference here because they were UN peacekeepers. Egregious as that is, it is not a reason to then say, "The next two years of your life, Mr Sesay, bringing the RUF to the rebels -- the rebels to the peace table, stopping -- playing your part in stopping the war is not worth a dime." In our submission, it clearly must be. Thank you.

JUSTICE WINTER: Thank you very much.

Any more questions? No? Thank you.

MR JORDASH: Thank you.

JUSTICE WINTER: Can I ask now please the Defence of Kallon.

MR TAKU: Yes, my Lord, I think I will take about seven minutes, and I will leave the rest of the time to my friend. And I will just make certain points at random to correct the record of some of the things the Prosecution said.

Now, my Lords, paragraph 399 of the judgment, they found that the personal commission of Kallon for the crimes, his personal commission was never pleaded, and the Prosecution provided no reason why they could not have given better particulars. At paragraph -- thereafter, my Lord, the Trial

Chamber undertook to cure, they themselves undertook to cure the defects. As you will find, my Lord, that they found the cure only in two instances. UNAMSIL, they found a cure only on the attack on Salahuddin, not based on his own witness statement, because he never testified, but on the witness statement of another witness. The rest of the UNAMSIL adoptions, Maroa, Jaganathan, Mendy, Gjellestad, they didn't find any cure and yet they proceeded to convict.

I would submit, my Lord, that this goes to the gravamen of the submissions my learned colleague made yesterday with regard to Maroa. That was purely a conviction that proxy of these witnesses, Maroa, Gjellestad and Salahuddin, that was a conviction of proxy because they never testified the person knew the whereabout, he gave no explanation why he could not bring them to testify. At any case, they didn't find a cure for that personal commission.

The next point, my Lord, is this: The Trial Chamber stated clearly at paragraph 2311 that they would not -- it would be inappropriate to convict under both Article 6.1 and 6.3 for the same crimes. You will find that in the disposition to the judgment, Count 15, they convicted Kallon for these crimes under both 6.3 and 6.1 despite their finding, giving judgment to the contrary at paragraph 2311.

The next point, my Lord, is this: The pursuance of about the curing of the indictment with regard to paragraph -- I mean to Count 17 in paragraph 2.57 of the Prosecution response, footnote 90, page 26, they refer -- the notice is referred to. It's to Count 16 and paragraph 82 of the indictment. Count 16, Mr Kallon was acquitted, so for Count 17 there is no notice.

With regard to -- one minute, my Lord. With regard to the curing of the indictment, the pleading standard that the Prosecution has talked about, in paragraph 329, the Trial Chamber referred to the standard that you laid down in the AFRC trial. That is the sheer scale of the crimes. But in the next sentence, the Trial Chamber departed from the standard laid by you and laid down a new standard. That is the standard of the scale of the conflict, and that is what -- that, the standard they will apply. We submit the conflict started in 1991 and it has absolutely nothing, so that was a wrong standard they applied.

And with regard to the Witness DH-111, we have annexed here, my Lord, at number 1 to the folder that we supplied to Your Lordships, the summary of his testimony that he said about Mr Kallon and the Trial Chamber, there he stated that, "The crimes for which my colleague submitted yesterday, that was to lead evidence to show, were committed by Kailondo with the third accused and many others, and he did that twice. He gave that notice consistently. And therefore there was no indication where you will come to trial and say it was Mr Kallon when the notice we had, which we annex here, progressively said that it was Kailondo, his client, and a number of people listed therein.

That said, my Lord, and also, my Lord, about the common purpose, they said that the common purpose was to overthrow the Government of Sierra Leone. So far, the Prosecution has not told us which government of Sierra Leone because, in paragraph 21 and 22 of the judgment, they indicated that by the time the RUF left the forest and joined the AFRC, the Government of Sierra Leone had been overthrown. So they have so far not made a determination which government of Sierra Leone in respect of

paragraph 21 and 22 of the judgment.

And finally, my Lord, with regard to the standard of a appellate review we annex here the Lockerbie judgment, the Lockerbie judgment. That set the appropriate standard that Your Lordships would follow, and I would refer Your Lordship to paragraphs 25 to 26. That gives you the power, your Honours. You will read it. It is a bit long; I can't read it now. But I'll attach these other. I'll put it in the folder that goes to your lordship.

Thank you. And my friend Kennedy can take over.

JUSTICE WINTER: Thank you. Any questions from the Bench?

MR OGETTO: Good morning, your Honour, my Lords, colleagues.

I will start by responding to the submissions made by my learned friend Mr Fynn in relation to the significant contribution by the Appellant Kallon to the joint criminal enterprise. My learned friend listed I think about three points which he submitted constitute significant contribution by Mr Kallon to the joint criminal enterprise.

The first issue that Mr Fynn dealt with relates to the fact that Mr Kallon is alleged to have brought people to be trained at Bunumbu, and my Lords, we have dealt with this issue at ground 20 of our appeal brief and specifically at paragraph 211 of our appeal brief. And my Lords, what is important for my submission this afternoon is the finding of the Chamber at paragraph 2221. And my Lord, because this paragraph is important, with your permission I'll read the entirety of it.

"Although there is evidence that Sesay used child soldiers as bodyguards and in combat and that Kallon may have personally

conscripted children by bringing them for training at Bunumbu, the Prosecution failed to plead these material particulars in the Indictment. Although the Prosecution disclosed the Defence documents containing allegations that the Accused were seen with SBUs or used SBUs as bodyguards at various times throughout the Indictment period, we hold that this does not constitute clear, timely and consistent notice of the material facts pertaining to alleged personal commission of those crimes by the Accused. We are of the view that this failure to provide adequate and sufficient notice occasioned material prejudice to the Sesay and Kallon Defence in the preparation of their respective cases."

Then the next paragraph:

"We therefore find that none of the Accused are liable under Article 6(1) for the personal commission of the use of persons under the age of 15 to actively participate in hostilities."

So, my Lord, that particular piece of evidence was disregarded and excluded by the Trial Chamber, and it cannot constitute significant contribution to JCE by the Appellant Kallon.

My Lord, the second issue that my learned friend raised relates to forced -- to the fact that Kallon forced civilians to mine at Tongo, and he referred to paragraphs 2005 to 2006 of the judgment. Our submission is that we have sufficiently addressed this issue at ground 10 of our brief, and specifically paragraph 111, but for purposes of my submission this afternoon, I wish to state that although Mr Fynn referred to the testimonies of 045, 366 and 035 as supporting the allegation that Mr Kallon forced civilians to mine in Tongo, those witnesses actually did not

implicate Kallon, and we have adequately dealt with that issue in our brief.

But I want to mention something about Witness TO35 -- T1-035, and I made submissions on this witness yesterday. But let me point out that this witness is the only witness who placed Kallon in Tongo Field, but this very witness was not able to identify Mr Kallon as the person that he was talking about. We raised this issue during cross-examination. We raised the issue in our final submissions after the trial, and the Trial Chamber did not resolve it. So it is subject of our appeal at paragraph 111, ground 10, and our submission is that it was not reasonable for the Trial Chamber to have relied on the testimony of TF1-035 when that particular witness did not positively identify the Appellant as the person who was present in Tongo when these crimes were committed.

My Lord, the next issue raised by my learned friend Mr Fynn relates to the Supreme Council. Mr Fynn contends that because Kallon was a member of the Supreme Council, that constituted significant contribution to the joint criminal enterprise. Some preliminary points, my Lords: We dispute that Mr Kallon was a member of the Supreme Council, and we have addressed that adequately in ground 8 of our appeal brief. We contend that Mr Kallon was a member of the AFRC council, and we submit further that there's a distinction between the AFRC council and the Supreme Council. But even assuming Mr Kallon was a member of the Supreme Council and assuming the Appeals Chamber upholds the Trial Chamber's conclusion about Kallon's membership in the Supreme Council, our submission is that that alone cannot constitute significant contribution in the joint criminal

enterprise.

And my Lords, I would refer you to an authority by the ICTY. It's in the bundle that we distributed yesterday to Your Lordships. It's at number 10 in that bundle, paragraph 26 of that decision. It's a decision of 21 May 2003, Milan Milutinovic and others, paragraph 26. It's to the effect that criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes, but rather a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter.

So, my Lords, mere membership of the Supreme Council cannot, by any stretch of the imagination, constitute significant contribution. We have argued in our appeals brief that Mr Kallon was not shown to have participated in any meeting of the Supreme Council that may have decided on the commission of any crimes. In fact, the Trial Chamber found that Mr Kallon participated in only few meetings because at the time of his membership in the Supreme Council, he was holed up in Bo because of Kamajor attacks. And that finding will be found at paragraph 774 of the judgment.

The other critical point about the Supreme Council is that the Chamber itself found that decisions on critical and key issues were made by a clique of a few individuals: JPK, SAJ Musa and a few others, all affiliated to the AFRC. And Kallon was not one of those personalities. So there's no demonstration whatsoever in the evidence or in the judgment to demonstrate that Kallon made any significant contribution to any illegal, wrongful activities by the Supreme Council. So his membership therefore

cannot constitute significant contribution to the joint criminal enterprise.

My learned friend, Dr Staker very, very generously stated that -- I think in answer to a question by the Honourable Justice Kamanda, that significant contribution takes the form of giving practical assistance to the joint criminal enterprise, and I cannot agree more with him. So that the question for the Appeals Chamber, my Lords, to decide is which practical assistance did Mr Kallon give in the commission of the various crimes that he has been convicted for? Take Bo, for instance. Which significant contribution did he make? Which practical assistance did he give to the commission of these crimes? Look at the entire judgment. Such practical assistance is nowhere.

Talk about the 200 who were killed in Bo. Kallon is not even mentioned. It's not indicated that he even knew about the killing of these 200 people. It's not even indicated that he had any link, any practical link, to the perpetrators of this crime in Bo. It's interesting that one of the crimes for which Mr Kallon is convicted in respect of Bo relates to the looting of some money by Sam Bockarie, 800,000 leones. How can Mr Kallon possibly be responsible for the looting of money for the personal use of Sam Bockarie under the joint criminal enterprise?

Kailahun, there's absolutely nothing in the judgment to link Mr Kallon to the crimes that were committed there, no practical assistance given by Mr Kallon whatsoever. Take for instance the killing of the 60 suspected Kamajors, 60 or 63; I'm not very sure. Which practical assistance did Mr Kallon give? None. It's not indicated that Mr Kallon even knew about the perpetration of this crime. And this is -- this applies to many,

many of the crimes that have been the basis of conviction of Mr Kallon.

Now, finally, my Lords, I will deal with Mr Wagona's submission in relation to forced marriage in Kissi. Mr Wagona relies on the fact that Mr Kallon held a supervisory role over civilian camps in Kono. Yesterday I made submissions on this issue, but I want to make a few clarifications in view of the submissions by my learned friend Mr Wagona. And to help me make my submission, I would refer Your Lordships to paragraph 2149, 2149 of the judgment. It's a very important paragraph in relation to this issue, and I would like to read it, with the permission of your Honours.

"However, the Prosecution has failed to establish that Kallon knew or had reason to know of the mutilation inflicted on the civilian men at Tomandu. We recall that Kallon, although a senior RUF Commander, did not occupy a formal position within the operational command structure of the RUF and it is therefore unclear to what extent he received reports on the actions of troops throughout Kono District. In particular, the Prosecution has not proven that Kallon was ever in Tomandu or had reason to know of events there. We therefore find that the Prosecution has not proved beyond reasonable doubt an essential element of superior responsibility and we find Kallon not liable under Article 6(3) for this act of mutilation."

Now, there's a special relationship between Tomandu and Kissi, and this is the gist of my submission. Kissi Town. In relation to Tomandu, the Trial Chamber says Mr Kallon cannot be liable for crimes committed there under 6.3 for a number of reasons: One, there was no clear evidence of the extent to which

he received reports from Tomandu, notwithstanding the fact that the Chamber has already said that he had a supervisory role over civilian camps.

Second, no evidence that Kallon was ever in Tomandu, notwithstanding the fact that the Chamber has already said that he had a supervisory role over camps. And, finally, no evidence that he had reason to know of events in Tomandu, again notwithstanding the fact that he had a supervisory role over civilian camps in Tomandu.

What is important about this submission, my Lords, is that Witness TF1-016, on whom the Trial Chamber relied to convict Kallon, in her testimony of 21 October 2004, at pages 7 to 8 and then page 13, he stated that Tomandu and Kissi -- or, rather, stated that Kissi was a walking distance from Tomandu. Let me read what the witness said. Transcript of 21 October 2004, page 7, line 25. That is the witness TF1-016.

"We were all captured there on the farm.

PRESIDING JUDGE: Was the town Tomandu?

MR STEVENS: Yes, Your Honour, she said Tomandu.

Tomandu is in what chiefdom?

Lei Chiefdom."

My Lords, let's now go to page 13, at paragraph 21.

"How did you travel to Kissi town? What mode of transportation was used to travel from Tomandu to Kissi town?

We walked.

Could you tell this Court where Kissi town is located, which chiefdom, in which district?

Lei chiefdom, the same, Kono."

So, my Lords, we are here talking about a town by the name Kissi which is walking distance from Tomandu, and Tomandu is the area where Mr Kallon has been acquitted because he has no command authority over fighters in that area, and the reason for that is that it is not clear the extent to which he received reports in relation to crimes committed in Tomandu, and also the other reason is that there's no evidence to suggest that he knew of crimes committed in Tomandu.

So that on what basis then does the Chamber conclude that Kallon knew about crimes committed in Kissi Town, which is a walking distance from Tomandu? This evidence, in my humble submission, is lacking and no reasonable trier of fact would have concluded on the basis of the finding at 2149 that Mr Kallon would have knowledge of crimes committed in Kissi Town, only on the basis that he had a supervisory role over civilian camps in Kono.

More importantly, my Lords, I wish to refer to a decision of the ICTY, and I'm sorry I keep repeating -- referring to ICTY jurisprudence. And the gist of this jurisprudence is that it is not the mere knowledge of crimes generally that determines liability under 6.3. Rather, it is the knowledge of crimes committed by subordinates. So that these are two different issues. You can have knowledge of crimes generally, but that is not the same thing as having knowledge of crimes committed by subordinates.

So that, even assuming Mr Kallon had command authority over Kissi, which we deny, there is no demonstration, either on the trial record or in the judgment, that he actually knew about the commission of this specific crime. And the authority I wish to

refer to --

JUSTICE WINTER: Would you kindly come to an end?

MR. OGETTO: Yes. That is my last point I am making, your Honour. It's number three, my Lords, number three on the list. It's a decision -- it's actually a judgment of 3 July 2008, Prosecutor v Oric, and paragraph 56. Of course, I would ask the Chamber to look at paragraph 55 to 61. But with your permission and because of time let me read out paragraph 56:

"On such a crucial element of the accused's criminal responsibility under 7(3) of the Statute as his knowledge or reason to know of his subordinate's criminal conduct, the Appeals Chamber emphasises that neither the parties nor the Appeals Chamber can be required to engage in this sort of speculative exercise to discern findings from vague statements by the Trial Chamber."

57:

"The difficulty in detecting the necessary Trial Chamber findings on this issue appears to arise from the approach taken in the Trial Judgement. Rather than examining Oric's knowledge or reason to know of his subordinate's alleged criminal conduct, the Trial Chamber concentrated its entire analysis on Oric's knowledge of the crimes themselves, which were not physically committed by Atif Krzic, his only identified culpable subordinate."

Paragraph 60:

"In conclusion, the Appeals Chamber finds that in order to establish Oric's responsibility under 7(3) of the Statute, the Trial Chamber was under the obligation to make a finding on whether he knew or had reason to know that Atif, the only

identified culpable subordinate, was about to or had engaged in criminal activity. The Trial Chamber's failure to do so constitutes an error of law."

So, my Lords, it's our submission that Kallon's liability and criminal responsibility under 6.3 has not been established in respect of this crime in Kissi Town. Thank you.

JUSTICE WINTER: Thank you very much. A question from the Bench? Thank you.

Can I now ask the Defence for Gbao?

MR OGETTO: My Lord, I'm sorry, I just forgot one small point. My Lord, we would have wished to make submissions on Count 12, but because of time I just wish to state that we rely on the authorities submitted by my learned friend Mr Jordash for the first appellant in relation to planning, and our submission is that there is no demonstration of significant contribution to the planning of the use of child soldiers by the appellant Kallon.

JUSTICE WINTER: Thank you. I think you are not short of authorities in any case.

We could start, please.

MR CAMMEGH: My Lady, my Lords, I will endeavour to be as brief as I can, hopefully within the 30-minute limit, to deal with various of the points that were raised by the Prosecution earlier on today. And can I begin by responding to Mr Staker's comments in relation to the finding of Augustine Gbao's significant contribution as an ideologist?

We note, or we noted, that today the Prosecution accepted that they did not plead, nor did they offer any evidence that Gbao contributed to the joint criminal enterprise in a guise of

ideologist. The Prosecution appeared to submit this morning that, nevertheless, the Trial Chamber had a discretion to make various findings or, rather, different findings upon the evidence than that was presented by the Prosecution. They referred this morning to the Trial Chamber's discretion to consider all the evidence in the case. There was a further comment by Mr Staker that it was -- I'm not quoting him but I think the words that he said were to the effect that it was up to the Gbao Defence to deal with any evidence from which inferences in relation to Gbao's role could reasonably have been drawn.

Whilst taking on board Mr Staker's comments, it is unequivocally the case that in any event not a single witness stated Gbao acted as an ideologist or taught ideology. And we repeat, it was never pleaded, from the indictment until the end of trial proceedings. And in fact, the very first time the notion of ideologist was ever raised was in the trial judgement.

In our respectful submission, the basis of my appeal or our appeal on ground 8(a) yesterday has not been covered by the Prosecution in any way, shape, or form today. And, indeed, it is an irony, we submit, that whilst on the one hand, having accepted today that they never averred or pleaded ideology -- I'm sorry, that Gbao was an ideologist, it is deeply ironic, we say, that in their appeal the Prosecution nevertheless appear, by virtue of paragraph 2.168, to still be seeking to extend the joint criminal enterprise yet further in its temporal form to April of 1999 and thereby attempt yet further convictions, to secure yet further convictions on account of Gbao's alleged contribution to the JCE as an ideologist, whilst seeking that at the same time as accepting that it was never their case that he acted in that role

is, we say, an impermissible attempt by the Prosecution to expand the convictions in this case.

I want to move on now to the Prosecution's response to our grounds 8(j) and (k), and this is where I drew the distinction yesterday between a Form 1 JCE conviction, that is, where the perpetrator or, rather, the member was found to have Form 1 intent by way of a Form 3 mens rea.

I'll remind the Chamber that it was ruled by the Trial Chamber that so far as Gbao was concerned, the offences that took place in Bo, Kemena and Kono, whilst having been found explicitly to have been Form 1 crimes, that is, crimes that were committed by Sesay and Kallon on intent, were committed by Gbao pursuant to Form 3, no intent, simply that the crimes were, in his mind, reasonably foreseeable.

And I hope to have explained to the Chamber yesterday why we say that that is impermissible, because it would mean that the person who does not intend the crimes necessarily cannot be said to any longer be acting in concert with the others in furtherance of the common plan. I hope I made that argument clear yesterday.

I was surprised to hear Mr Staker's comment this morning that indeed it was to Gbao's advantage that he was convicted under Form 3 rather than Form 1. I'm not quite sure what he meant by that. Perhaps he feels it's mitigating in some sense. In fact, we say it's very much to Mr Gbao's disadvantage because being convicted of something that he shouldn't be convicted of is not really to his benefit at all.

As stated yesterday, the moment a member of the plurality lacks the intent of the others acting in furtherance of a common plan, he can no longer be said to be acting in concert. The

Prosecution appear today to have failed to pay heed to the Trial Chamber's comment in their judgment at paragraph 265, and this is the crucial point which, in our submission, once and for all -- I made the point yesterday but I repeat it today because the Prosecution didn't deal with it -- it once and for all destroys the possibility that Form 3 can act as mens rea for a Form 1 crime, and I quote at 265:

"The intent to commit the crimes must be shared by all participants in the joint criminal enterprise."

It is unequivocal. It is a well-established standard in other international criminal tribunals and has been since, I believe, the case of Tadic. And we agree, with respect, with Justice Fisher that there are no cases that point otherwise.

It is again ironic that the Prosecution appear to have stated that Form 1 and 3 can co-exist whilst in their appeal -- I'm sorry, in their response brief on appeal -- in relation to Sesay and Kallon, they make these two comments.

At paragraph 9.4 of the response brief from the Prosecution, they say, they state that Sesay's contribution to the joint criminal enterprise is thus:

He should be found guilty if, and I quote -- or sorry, guilt may be found provided, and I quote, "that the accused shares the mens rea or intent to pursue a common purpose."

And in paragraph 9.6, in determining the way by which Mr Kallon could have been convicted, his mens rea should have been the same. I quote: "The accused shares the mens rea or intent." So quite how the Prosecution now can -- I'm sorry. Quite how the Prosecution now may appear to ride two horses at once is unclear to us.

Mr Staker claimed this morning that employing Form 3 mens rea to establish a Form 1 crime doesn't impermissably extend the JCE. Indeed, I think he said it doesn't actually extend the nature of joint criminal enterprise at all. We say that this is, with respect, to gravely misunderstand what the function and the ingredients of joint criminal enterprise are.

It clearly does extend the ambit of joint criminal enterprise and to a very worrying degree, because what Mr Staker's theory implies is an effective modification of the theory of joint criminal enterprise to accommodate even those who are not acting in concert in the commission of the particular crimes committed. So it is a desperately dangerous precedent that the Trial Chamber inadvertently perhaps set, and that is why I made the comment yesterday that this is a worthy opportunity for the Appeals Chamber in this case to set the law straight once and for all in order that such misuse of this complicated mode of liability cannot be allowed to continue beyond this case.

In relation to the Prosecution's response to our ground 8(d), that was the ground of appeal in which we claim that there'd been insufficient linkage to attribute non-members of the JCE to crimes, I think I dealt with that comprehensively yesterday.

Today, just as a passing comment - I don't want to dwell on this - but the Prosecution referred to the evidence as a whole and suggested that such linkage from crimes of non-members of JCE to members of JCE may be attributed by reference to the generic term "the evidence as a whole". We suggest that this is not permissible. The case of Krajisnik has been supplied to the Chamber this afternoon. I'm not going to go into the citation,

simply to repeat as I said yesterday that that authority states that the linkage, the connection, to perpetrators on the ground to members or alleged members of the JCE has to be done on a subjective evidential case-by-case basis. I simply provide the authority for the Chamber's perusal.

In a similar vein, as a general point, I would like to say this: This doesn't pertain to a particular ground of our appeal but it probably applies across the board to the various complaints made by the appellate counsel in this trial.

The Prosecution this morning, in response to those general arguments that insufficient factual findings were made across the board in the Trial Chamber's judgment, maintain today that large cases, or the Prosecution and proceedings of large cases, and they don't come much larger than this, make it necessarily difficult to detail and specify factual findings within a judgment. As Mr Staker pointed out this morning, otherwise, the judgment would be far too long. Well, that, frankly, is not the Defence's problem. We are here to safeguard the rights of the accused and, moreover, to safeguard and uphold a fair trial.

Additionally, the Prosecution said it's very difficult to detail crimes that occurred on a very, very large scale. Well, it's one thing to say that. It's yet -- it's quite another to say that that is a fair process. Because what the Prosecution - if one looks at the logical extension of their comments - what the Prosecution are really suggesting is that, in practicality, what we're really looking at there, it must amount to a reversal of the burden of proof. How can defendants possibly be expected to defend themselves in situations where matters are alleged too generally?

How can the - this is the most important point - how can a judgment be said to be fair where there are insufficient factual findings, almost on an arbitrary and generic nature, the excuse being well, we can't give individual, precise findings because we haven't got the time, or because the judgment would be too long? Well, it is an unfortunate state of affairs if that's the best the Prosecution can do. The fact is that in order for proper scrutiny to be rendered to trial judgments, proper factual findings have to be made.

I want now to spend the last few minutes on the abuse point that we raised yesterday. I'm sorry if it appeared that I broke my pledge and ventured into hyperbole or emotive language, but with the greatest of respect, it is difficult not to be affected by the consequences of a 25-year sentence pursuant to the finding of a crime which appeared to be denied or utterly contradicted by the contents of a statement which we sadly were not shown until 28 months after it was written.

Just to correct Mr Staker, I think he - I think I'm right - he said it was served a year-and-a-half too late. That's not right. The statement was served on the Defence in October 2006, having been written just before the case was opened in June 2004.

I am prepared to be candid and accept and admit that it was not professional by the Gbao team to fail to notice that statement for some 20 months, but I do take issue with Mr Staker when he suggests that we chose not to attempt to cure the prejudice.

On the contrary, proceedings, written proceedings, flowed as soon as the existence of that statement was discovered. It's not for me to venture excuses or reasons as to why it wasn't

dealt with for some 20 months, because I'm not prepared to go into private issues and I'm certainly not in a position, rightly, to give evidence to explain why that took place. But to go into these arguments as the Prosecution do, to suggest that we failed to cure the prejudice or that we sat on it for too long, is sadly to entirely miss the point.

The point is much more fundamental than that. It's much more grave than that. The point is that never having any reason to doubt the credibility or the accuracy of the Kenyan major's statement, the Prosecution failed, one, to disclose it; secondly, we say failed to withdraw the charge.

It is very crucial that one considers the import of this point. The Prosecution will have had no reason to doubt that statement's accuracy or truthfulness. The Prosecution have never -- and today was as good an opportunity for them to give an explanation as ever they have had. Still, they have never attempted to explain to us or to this Court why they did not disclose that statement.

The statement was from a high-ranking Kenyan officer, a major, who had a high -- clearly, a very important assignment in Makeni and particularly around the Makump DDR camp. As I said yesterday, he would have been an extremely important witness to the Prosecution, a prized witness. The Prosecution would have been anxious to secure his testimony. If that is the case, why is it that they never showed his statement to anybody? The bigger question, of course, is why is it that they chose, notwithstanding possession of that statement, to continue to prosecute a man whilst running the risk that he should be convicted for something of which they unequivocally, in writing,

had evidence did not commit?

It is disappointing to see how the Prosecution attempt to extract themselves from this predicament. It is disappointing to see the Prosecution rely on, we say, pedantic arguments concerning Defence failure to locate the statement and bring it to the Court's attention for 20 months. I'm perfectly candid, it was not professional of us to do that. We failed our duty. Why can't the Prosecution observe and display the same candor? Why is it that to this day the only response that we've ever had from them as to the question of why it was never disclosed is, "It should have been disclosed earlier." Why is it that they continued to run the case?

I don't know how relevant it would be to discuss other jurisdictions but, in England, the duties of disclosure are probably no more stringent than anywhere else, but to contemplate a prosecution not only -- well, one would expect that the Prosecution would not only disclose such a statement, they would necessarily withdraw the case.

For what possible credible reason could a prosecution continue when one of their alleged victims says, "The man didn't do it. He was trying to stop somebody else doing it, but he didn't do it"? And indeed, I repeat what I said yesterday. If one reads the statement, the statement's actually beneficial to Mr Kallon because it points out that Kallon and Gbao agreed to discuss something. And I ask the Appeal Chamber today to require the Prosecution once and for all to unredact that statement so we know what it fully contains. Until we know what it fully contains, how can we be sure that justice is being observed here?

I simply say this: That to rely on concepts such as

prejudice to the - I forget the phrase now - prejudice to the accused, to continue to rely on narrow issues like that is to miss the point. Material prejudice. The question to be addressed, as I suggested yesterday, is whether the Prosecution's conduct of the proceedings have contravened this Court's sense of justice, following some pre-trial impropriety or misconduct. Has it violated the rights of the accused? The answer, surely, is yes. For what kind of prosecution continues to run the risk of someone getting a 25-year sentence when they have a statement from someone as high-ranking as this major to say what it says -- saying what it says?

This is a court that was supposed to have acted to banish impunity. We say, with the greatest of respect, and we take no pleasure in saying this, that the Prosecution so far have got away with this with impunity. The Prosecution are supposed to come here with clean hands and we would be grateful if they were required to uphold that basic standard.

I want to finish on this issue by reference to what Mr Antonio Cassese said in the case of Kupreskic. And this, in our submission, is perhaps as good a definition of the role of the prosecutor but, moreover, as good a definition of how justice should be seen to be done as one will ever find.

He wrote, "It should be noted that the Prosecutor at the Tribunal is not, or not only, a party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution which includes not only inculpatory but also exculpatory evidence in order to assist the Chamber to discover the truth in a judicial

setting."

Those words, more than any other, put the Prosecution's misconduct into a true perspective. I emphasise, it gives us no pleasure to make complaints of such gravity, but we do so and accordingly invite the Appeals Chamber to stay the proceedings on Count 15 against Mr Gbao. And I want to just clear this point up in case there's any confusion.

As I made clear yesterday, Mr Gbao was convicted of just two assaults and the abduction of two individuals, on one single occasion at Makump DDR camp on 1 May. He was not convicted of any other offence stretching over the days that followed. And if one reads the major's statement, it comprises the events pursuant to which Mr Gbao was, we say, wrongly convicted.

It is a complete absolution, we say. And the President was right, it was not evidence in the case, but it is something subject to previous proceedings, and we do invite the Chamber to take that statement fully into account when considering whether an abuse argument lies. It's the bigger picture that counts, not the narrow definition of material prejudice.

My Lady, my Lords, I don't think I can improve the argument, and I'll leave it there. Thank you very much.

JUSTICE WINTER: Any questions from the Bench?

Please go ahead.

JUSTICE AYOOLA: Could I just clear a point in your submission. Are you suggesting that the mens rea, the participant must have to be a member of a JCE, that a participant in a JCE, an alleged participant in a JCE, must have mens rea in regard to the JCE as well as mens rea as to the cognate offence?

MR CAMMEGH: Of the what?

JUSTICE AYOOLA: Of the offence, of the crime. Must he have mens rea, intention to be part of the JCE, as well as mens rea in regards to intention in respect of the crime?

MR CAMMEGH: If one talks about a Form 1 JCE, the intent, we say, may be properly inferred from an alleged member's role -- the significant contribution made by an alleged member, or what may be deemed to be a... Perhaps it would be better if I set out what my understanding of the role of intent within JCE is.

In a Form 1 joint criminal enterprise, what we're suggesting is that an accused has in mind a common goal, a common purpose, and in furtherance of that common goal intends that crimes should be committed. Now, within that definition -- or setting that definition aside for a moment, for an accused to be convicted of specific crimes alleged, so let's just suggest the murders in Kailahun or mining in Tongo, it has to be shown that he intended those particular crimes to take place.

Now, if I can refer back to the Trial Chamber's findings in relation to Bo, Kenema and Kono, it was found to the opposite, that the Trial Chamber found that Gbao did not intend those crimes to take place, they were Form 3. I don't know if that answered the question.

JUSTICE AYOOLA: Partially. What is the position of -- well, when he did not intend those crimes to take place, but nevertheless went along with the enterprise, appeared to have gone -- went along with the enterprise, as found by the Trial Chamber?

MR CAMMEGH: If he didn't intend the crimes, then --

JUSTICE AYOOLA: Let us assume he did not intend the crimes but nevertheless he gave the appearance of going along with the

rest of the members of the JCE in furtherance of the enterprise.

MR CAMMEGH: If, for example, it could not be shown that he intended the crimes - just a random example - in Tongo, then he automatically falls outside those who are acting in concert and that ingredient, acting in concert in furtherance of the common goal, is not made out.

If he didn't intend certain crimes to be committed, then it can't be said that he was acting in concert with those who did intend those crimes to be committed. So if A and B intend the mining or the killing in Tongo to take place, and C, who may be acting in pursuance of a common goal didn't intend, however, the crimes in Tongo to happen, then it cannot be said that he is guilty of those crimes within the joint criminal enterprise because the intent's not there and therefore he's not acting in concert with those who did intend it.

It's also right to say that even if he reasonably foresaw those crimes to be taking place in Tongo but carried on regardless in furtherance of a common goal, he again cannot be said to be guilty of the events in Tongo because he didn't intend them. He's not acting in concert with those who did and so he's not within the joint criminal enterprise to commit crimes in Tongo.

JUSTICE AYOOLA: Thank you. Thank you.

JUSTICE KING: I think you started, Mr Cammegh, by your response by stating that the Trial Chamber had held in paragraph 265 that the intent to commit the crime must be shared by all the participants --

MR CAMMEGH: Yes.

JUSTICE KING: -- to the joint criminal enterprise. Now,

that is with regard to Category 1 of joint criminal enterprise. What I think that you consider in joint criminal enterprise you must also consider the third category, so I would like to know your views as to what was said by the Trial Chamber in paragraph 266, the immediately following paragraph, because I think that dealt with the third category.

MR CAMMEGH: I don't have that in front of me, my Lord.

JUSTICE KING: If somebody has that they can give it to you. Because that's very crucial because all the submissions that you've made about the duty that we have, we'll need your help to --

MR CAMMEGH: Yes.

JUSTICE KING: -- as far as that 266 is concerned. Because it seems to me that that's a quite separate category and it's more extensive than Category 1. You can read it out aloud.

MR CAMMEGH: Yes, I'll do so.

JUSTICE KING: Read the whole thing aloud, so we can all follow.

MR CAMMEGH: Yes, I will do that.

JUSTICE KING: Read the whole thing aloud, it's not long.

MR CAMMEGH: Can I just follow up one point with my Lord Justice Ayoola?

JUSTICE KING: Oh, you've gone back to that now.

MR CAMMEGH: Can I just finish this very quickly?

JUSTICE KING: All right.

MR CAMMEGH: Because, of course, what we're saying is that as Gbao was never an ideologist, the ingredient requiring him to make a significant contribution has not been made out, so I just want to make that quite clear. You have to satisfy the finding

that he made a significant contribution before you analyse what the intent was, Form 1 or Form 3. I just want to make that clear. I don't want to make it sound as if I'm conceding anything in the answer that I gave.

The paragraph 266 reads:

"The mens rea for the third category of joint criminal enterprise is two-fold. In the first place, the accused must have had the intention to take part in and contribute to the common purpose. In the second place, responsibility under the third category of joint criminal enterprise for a crime that was committed beyond the common purpose of the joint criminal enterprise but which was a natural and foreseeable consequence thereof arises only if the Prosecution proves that the accused had sufficient knowledge that the additional crime was a natural and foreseeable consequence to him in particular. The accused must also know that the crime which was not part of a common purpose but which was nevertheless a natural and foreseeable consequence of it might be perpetrated by a member of the group or by a person used by the accused or another member of the group. The accused must willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise. The Chamber can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence."

That, my Lord, I would suggest is a full, comprehensive definition of Form 3 joint criminal enterprise.

JUSTICE KING: Can you support that?

MR CAMMEGH: Well, we don't demur from -- excuse me. We don't demur from that at all, but I want to emphasise something

here: The Trial Chamber were absolutely clear that Counts 1 to 14 - and I made this point yesterday - were all said to be crimes of basic intent; that is to say, they were all intended by the members of the joint criminal enterprise. So the question of Form 3 joint criminal enterprise shouldn't really apply, and I drew the Chamber's attention yesterday to the contradiction in relation to Bo, Kenema and Kono where, on the one hand, having ruled that crimes in those districts were Form 1, in other words, they were committed pursuant to the direct intent of the accused, on the other hand, when it came to Gbao, they made an explicit finding - and I have the paragraph, I think I related to - referred to it yesterday, they made the explicit finding that Gbao did not intend them. They made explicit findings on the basis that both Sesay and Kallon intended those crimes and convicted them as Form 1 participants.

With Gbao, they mixed things up. They found, on the one hand, these were basic Form 1 crimes, but the mens rea that Gbao had was pursuant to Form 3. I have no trouble with the definition of Form 3 here. In my submission, Form 3 is something of a red herring because one cannot, on the one hand, say Counts 1 to 14 are all basic Form 1 crimes, and then simply because on closer inspection it's impossible to make findings that show Gbao intended them, then move over to a substitute which is, well, we shall say that he reasonably foresaw them instead.

First of all, there is no basis, we say, in the Trial Chamber's findings to show that Gbao could have reasonably foreseen them. But that's not the point. The point is, will be, and always has been, that you cannot have a Form 3 mens rea to substantiate what the Chamber has found to be a Form 1 crime.

JUSTICE KING: All right. I don't want to interrupt you, but just to be absolutely clear about it, can you point out the record where the Trial Chamber held that Counts 1 to 14 were Form 1 of the JCE.

MR CAMMEGH: Yes, certainly, my Lord, if you'll just give me a moment, I will. It was at 1985.

JUSTICE KING: Yes.

MR CAMMEGH: Where.

JUSTICE KING: Yes, could you read it out, please.

MR CAMMEGH: I'm sorry, I'm going to have it ask Mr Ogetto for his judgment again because we only have an electronic copy here. If someone else can assist. Thank you very much.

I stand corrected, it's 1982. I'll read it out loud.

JUSTICE KING: Yes, please.

MR CAMMEGH: Perhaps that's put right a confusion that I might have inadvertently created yesterday because I think I told the Court yesterday 1995.

JUSTICE KING: 1992, you said?

MR CAMMEGH: 1982.

JUSTICE KING: 82.

MR CAMMEGH: "The means... "

JUSTICE KING: Just a minute, please.

MR CAMMEGH: Yes.

JUSTICE KING: Yes, go on.

MR CAMMEGH: Does my Lord want me to quote from it?

JUSTICE KING: Could you please read it.

MR CAMMEGH: Certainly.

"The means to terrorise the civilian population included unlawful killings, Count 3 to 5, sexual violence, Counts 6 to 9,

and physical violence, Counts 10 to 11. Additional criminal means to achieve the common purpose included the enlistment, conscription and use of child soldiers, Count 12, as a means to enforce the military components of the AFRC/RUF forces in order to assist in specific military operations, forced labour of civilians, Count 13, to perform farming, logistical chores or diamond mining which was necessary for the furtherance of the common purpose. In addition the practice of pillage, Count 14, was endorsed and ordered or tolerated by senior RUF commanders in order to serve as compensation to satisfy their fighters and thereby further the common purpose, as it ensured the willingness of the troops to fight. The punishment of the civilian population for their alleged support of opposing forces was also a means to further the joint criminal enterprise."

And then this:

"The Chamber therefore finds that the crimes charged under Counts 1 to 14 were within the joint criminal enterprise and intended by the participants to further the common purpose to take the power and control..."

JUSTICE KING: That's the whole point. Nowhere do they say it belonged to the first category of JCE.

MR CAMMEGH: Well --

JUSTICE KING: What you've read there doesn't say that at all. That is the problem.

MR CAMMEGH: No, but, well, my Lord --

JUSTICE KING: That's why I asked for your assistance because it seems to me that whatever you consider joint criminal enterprise, the concept, you cannot just stop at paragraph 265; you have to read paragraph 265 in conjunction with paragraph 266.

And the passage you've just read, nowhere does it say that they were restricting what they found to the first category. It's nowhere there, as you yourself have seen. That's why I asked you to read it.

MR CAMMEGH: It doesn't use that phraseology, no, but I would suggest that as a matter of common sense, the word in 1982 "intended" or the phrase "intended by the participants" has to be taken at its ordinary, literal meaning. If there were to be any -- if the Trial Chamber meant anything else other than the literal, basic definition of intending or intention, they would have cited the alternative, surely, would have intended, been intended by the participants or would have been a reasonable... "

JUSTICE KING: I have to stop you, Mr. Cammegh, because we know probably common sense is not a common commodity but you see, if you look at the recorded, your submission was quite clear that as regards Counts 1 to 14, the Trial Chamber held that they were Category 1 -- they came under Category 1 of the joint criminal enterprise and nowhere have they said that there. And I wondered how they could have said that, when immediately thereafter, 266, it states, "the full concept of joint criminal enterprise." That's why I've asked you this question.

MR CAMMEGH: Well --

JUSTICE KING: So it's not a question really of just common sense. The question of what was actually said by the Trial Chamber with regards to Counts 1 to 14. You yourself have read it. It says quite clearly, "The Chamber therefore finds that the crimes charged under Counts 1 to 14 were within the joint criminal enterprise and intended by the participants to further the common purpose to take power and control over Sierra Leone."

Nowhere does it say it comes under Category 1 to the exclusion of the third category.

MR CAMMEGH: No, no, it doesn't.

JUSTICE KING: Well, that's the point I'm making.

MR CAMMEGH: Well, in my submission, my Lord, it's more clear than that. It states unequivocally the counts to 14 were within the joint criminal enterprise.

JUSTICE KING: Yes.

MR CAMMEGH: Well, that, in our submission, can only mean "were intended," but if there's any doubt over the meaning of the word "within" and "intended by the participants." Now, by virtue of the words "intended by the participants," we take that at face value. If the Trial Chamber meant anything other than "intention" by use of the words "intended by the participants," then we're not at liberty to guess what was in their minds. We have to take that at face value.

JUSTICE KING: You see, what I'm trying to tell you, Mr Cammegh, because you've been helpful most of the time, your submission would have been unquestionable if, in fact, you had interpreted that in the way you have without saying that the Trial Chamber said so. Because nowhere there have they said so.

MR CAMMEGH: I accept --

JUSTICE KING: You are interpreting that to mean that it's limited to Category 1.

MR CAMMEGH: Well, I am.

JUSTICE KING: That's what you should have said.

MR CAMMEGH: Well, my Lord, if that's -- I take my Lord's point. But in reply, can I once again refer back to paragraph 265 --

JUSTICE KING: Yes.

MR CAMMEGH: -- where there is no reference there to Form 3 reasonable foreseeability. The words are plain, "shared intent."

JUSTICE AYOOLA: Could I please interrupt you? Before you go further on that, can you look at paragraph 37 of the indictment and let us know your own interpretation and scope of the indictment. Paragraph 37 of the indictment.

MR CAMMEGH: If my Lords would just give me one moment, please.

"The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimise resistance to their geographic control and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this indictment," and then it lists them, "were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise." One --

JUSTICE AYOOLA: What do you understand that to mean?

MR CAMMEGH: Well, quite simply, my Lord, one would understand the final phrasing in this section were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence thereof to assist me in the answer I just gave to my Lord Mr Justice King because here, it is quite clear that the distinction is drawn between actions within the joint criminal enterprise and actions that were a reasonably foreseeable consequence.

My reading of this, and I'm sure my learned friends on this side of the room would agree, is that here we see in alternative

language the averment of both forms of joint criminal enterprise within the indictment. "Actions within the joint criminal enterprise," inferentially one would assume is Form 1, distinct from "or were a reasonably foreseeable consequence of," one would assume here, quite sensibly, is Form 3.

JUSTICE KING: But that's the whole point, isn't it, here, Mr Cammegh? That's the whole point I'm trying to make, that in every instance you have to consider the various categories.

MR CAMMEGH: Yes.

JUSTICE KING: You cannot limit it to Category 1. And what my Brother has pointed out, quite clearly, the Judges had that in mind in that last sentence there. You find both Category 1 and Category 2. That reasonably foreseeability there refers to Category 3. The other part of it is dealing with Category 1.

MR CAMMEGH: It does. But, my Lord, the issue is that those crimes outside Kailahun were found to be Form 1, which we say were actions within the joint criminal enterprise, as opposed to those that were reasonably foreseeable.

I repeat, the Trial Chamber held that the crimes were basic form. Mr Kallon and Mr Sesay were convicted of those crimes following a finding of basic form mens rea; in other words, they were found to have intended. Mr Gbao distinctly was separated. The findings were that he reasonably foresaw. That invokes Form 3.

What the indictment does here is nothing more than, number one, advertise the two types of mens rea that may apply to joint criminal enterprise in this case; in other words, the Prosecution are putting in this paragraph of the indictment their case.

We say that Gbao was guilty either of Form 1 JCE within the

JCE, or Form 3, reasonably foreseeable. There's nothing wrong with that. But what is wrong is that having assessed all of the evidence in relation to the crimes outside Kailahun, the Trial Chamber came to a definitive conclusion: Yes, there were crimes committed. Yes, they were intended by the members of the joint criminal enterprise. But in relation to Gbao, there was no such intention. They were simply reasonably foreseeable.

JUSTICE KING: That's it.

MR CAMMEGH: And my point is, I've said many times, is that takes him outside the joint criminal enterprise to commit crimes in those districts because he doesn't share the intent. Therefore, he is not acting in concert with those who did have the intent, in this case, Mr Kallon and Mr Sesay, to pursue the common goal or to commit those crimes.

JUSTICE KING: You see, my difficulty is, you know, as far as the two other appellants are concerned, it is quite clear that the Trial Chamber found that they came under Category 1.

MR CAMMEGH: Yes.

JUSTICE KING: With regard to your client, Category 3 will have to be looked into.

MR CAMMEGH: Well, in my --

JUSTICE KING: That he did not necessarily have a common intent but reasonable foreseeability that those crimes would or could be committed. That is the point I'm stressing, and that is the important thing because, you see, you ask us to make a definitive ruling on what was said by the Trial Chamber and we must have these positions cleared up so there can be no doubt, no confusion, on the issue.

MR CAMMEGH: My Lord, if Mr Gbao is, unlike the others,

taken to be a member of a plurality acting together in furtherance of a common purpose, agreeing to commit crimes in pursuit of that common purpose but is the only one who doesn't intend crimes to be committed --

JUSTICE KING: Yes.

MR CAMMEGH: -- is the only one who is said to be reasonably foreseeing that the crimes were committed, then how can the final ingredient of JCE be satisfied, that he is acting in concert? He's not acting in concert; he's outside.

JUSTICE KING: You see, I would have appreciated your submissions if they were to the effect that there's no basis for the Trial Chamber coming to the conclusion that your client could be said to have naturally foreseen that those crimes would have been committed; in other words, Category 3. I would appreciate that. And that's the distinction I'm trying to make all the time.

But if you talk about intent, intent, intent, as you started, you started by quoting 265, we dealt with the intent to commit a crime by those who are participating in joint criminal enterprise. But you cannot read that, you know, separate from the next paragraph, 266. In between, of course, you have the systemic or systematic category which doesn't apply here anyway, the issue before us, you see, and the widest one is Category 3, where you don't have the intent but it's sort of presumed either objectively or subjectively, the natural foreseeability that certain crimes would be committed.

MR CAMMEGH: But my Lord, my rhetorical question is this: Given that to be convicted one must be acting in concert with the other members, how can it be said that if someone doesn't -- let

me refer, to go back to the example I gave yesterday. You have ten people sitting around a table. They want to take over -- well, they want to commit a crime. I'll start again. They want to take over the country. Nine of them say, "Right, we want to take over Sierra Leone. Let's bomb Freetown." Nine of them agree with that, and it's set in motion and Freetown is bombed. The tenth person says, "No, no, I don't like that idea. In fact, I don't agree with that idea at all." Now, he might still want to take over the country, so he's still acting generally in pursuit of the common goal, but is he acting in concert with the nine who intend the bombing of Freetown? No.

JUSTICE AYOOLA: Are you assuming that he did not withdraw?

MR CAMMEGH: Well --

JUSTICE AYOOLA: Are you assuming he did not withdraw?

MR CAMMEGH: Well, the -- that's --

JUSTICE AYOOLA: If he didn't want to be part of the enterprise but he played along, he did not withdraw, what is the common sense conclusion that one can draw from that? He remains part of the enterprise.

MR CAMMEGH: Well --

JUSTICE AYOOLA: That is a possible conclusion, isn't it, that he remained part of the enterprise when he has an opportunity of withdrawing but did not withdraw.

MR CAMMEGH: Well, my Lord, with respect, it's speculation to enter into those sort of arguments. The key question here is, did he share the intent of the others. Whether he withdrew or not, if he doesn't share the intent, he can't fall within a Form 1 conviction.

JUSTICE KING: Well, that's why I would never agree with

you because if he doesn't share the intent, then you have to go further: Was it a reasonably foreseeable thing that those crimes would be committed? He might not share the intent, but could it be said that he ought reasonably to have foreseen that the crimes in question would have been committed? That is the point.

MR CAMMEGH: In this case, and I'm anxious to talk, to restrict our arguments to this particular finding, one must not forget that the Trial Chamber found that all of those crimes were committed via Form 1 intent. They were all intended.

JUSTICE KING: Oh, God, we're just going round and round in circles. I'll leave it there.

JUSTICE FISHER: If I may, just two points on this, if I can. Perhaps some of the disagreement is arising over the focus on intent, instead of the focus on the shared intent to pursue the common purpose, because it seems to me that it is the common purpose that establishes the number of crimes that form the core JCE.

Without the core JCE1, you can't have a JCE3. So perhaps if you would address the example that was given by the Prosecutor this morning. Let's forget about your ten people sitting around the table and instead worry about the bank robbery. If you recall that, I'm not - if you were here this morning - I believe the example was three people agree to rob a bank. Two of those people have a side agreement that the third one doesn't know about that they're going to cause harm to the people in the bank in the course of robbing the bank, and then the question became who has what kind of liability, if you put it in terms of JCE1 and 3. Perhaps if you use that example, you might be able to clarify some of these issues.

MR CAMMEGH: In that case, if somebody agrees to rob a bank, there is the common purpose to rob the bank.

JUSTICE FISHER: And that common purpose is what?

MR CAMMEGH: To rob the bank. But if within that there is a private agreement between others that someone should be injured in the course of robbing that bank, then the other individual cannot possibly be found under any liability to be guilty of that. He didn't intend it and it can't be said that he reasonably foresaw it. He's entirely absolved of that crime pursuant to the theory of JCE.

JUSTICE FISHER: Okay. So do we have two different JCEs?

MR CAMMEGH: In that case it could be argued that you -- that you do because -- well, the common goal is the same for both, for both groups of people, for the single person and the group. But one has to look at the ingredients one by one to establish liability, and I've been through them already: plurality, the acting in concert, et cetera, et cetera, et cetera. Now, to become liable for a joint criminal enterprise, one has to be found to have played a significant contribution.

JUSTICE FISHER: Can we just focus on common purpose --

MR CAMMEGH: Yes.

JUSTICE FISHER: -- in this analogy, or any analogy you choose.

MR CAMMEGH: In this case they don't share the common purpose because if one is entirely outside -- if there is a totally separate common purpose, then it could be argued that there's two JCEs there.

JUSTICE FISHER: Okay. Now, using that same approach, can you explain for us why you believe that Gbao cannot be found

guilty of a JCE3 under the findings as they appear in 1982?

MR CAMMEGH: There are two main reasons: The first one is that there was an entire lack of findings to demonstrate that Gbao could have reasonably foreseen what was going on. If one is going to suggest Form 3 at all, there has to be findings that he reasonably foresaw it. That's one point that I think has to be made that might have been neglected so far. There were no findings to show that Gbao could have reasonably foreseen what was going on.

I return to the point. I have to -- we deal with the Trial Chamber's findings. It's not our job at this stage to make an overview of the evidence. We're dealing with the findings for the purposes of this appeal, and I repeat, in relation to Counts 1 to 14, the Trial Chamber found that those were crimes of Form 1 basic intent -- basic intent.

JUSTICE FISHER: Can we talk instead about common purpose? Let's not talk about Form 1 basic intent. Can you describe this in terms of the common purpose which they shared the intent to pursue.

MR CAMMEGH: Well, the common purpose as alleged was to take over the country, but --

JUSTICE FISHER: And the means?

MR CAMMEGH: Well, the means was to commit crimes. That's what was alleged, that the -- what was alleged here was the common purpose taking over the country through commission of crimes. But what has to be proved is a series of ingredients, and one of those ingredients is that when one looks at the individual crimes committed, an individual has to be acting in concert with other members of the JCE in order to be found a

member of the JCE pursuant to that particular crime.

JUSTICE FISHER: And your reading of 1282 -- or 1982, is that the JCE1 in order -- that the JCE1 as described in that paragraph had the -- all of its participants acting in concert toward the common purpose of taking over the country by commission of those 14 crimes? Is that your position?

MR CAMMEGH: Yes.

JUSTICE FISHER: Okay.

MR CAMMEGH: Yes, that's how we put it, by the commission of those crimes, and that Gbao was not in concert in order to commit those crimes.

JUSTICE FISHER: Okay. Thank you.

MR CAMMEGH: Or pursuant to those crimes, rather.

JUSTICE FISHER: One other -- I don't know if anyone -- any more questions on this?

JUSTICE AYOOLA: Does it make any difference that in paragraph 37 there was mention of actions, not crimes? Does it make any difference?

MR CAMMEGH: Is it 37, my Lord?

JUSTICE AYOOLA: Yes, of the indictment. Talked of actions, not crimes.

MR CAMMEGH: Well, "either actions within the JCE or a reasonably foreseeable consequence." Well, my Lord, the lines above refer to a list of crimes and I think generically they're referred to by the word "actions" in this context. It's quite clear that where the word "actions" is used there, it refers to the crimes committed as alleged in the lines above.

I'll read it out: "Unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers,

looting, burning of civilian structures were either actions within the JCE or a reasonably foreseeable consequence thereof."

I think one can -- it's not in dispute that those are crimes. In fact, if one goes to the beginning of the sentence, it suggests that "the crimes alleged in this indictment," and then it goes on to list them, were actions.

JUSTICE FISHER: Just one -- oh, I'm sorry.

JUSTICE KING: No, no, you go ahead.

JUSTICE FISHER: This is on a different subject. Is that okay?

JUSTICE KING: Finish.

JUSTICE FISHER: Okay, just one more. I did not write down exactly what you said regarding the role of the Defence in the failure to bring up the issue of the Kenyan major's statement, so I don't want to misquote you because I didn't write it down, but you clearly attributed some responsibility to the Defence team, very candidly. I don't want to use the word "negligence" if you did not use it, but some responsibility. My question to you is that are you suggesting that Mr Gbao has some additional fair trial remedy based on the actions not only of the Prosecution but also the inaction of the Defence team?

MR CAMMEGH: No, I don't, and I want to make two points there. First of all, I am not at liberty to discuss the dynamics pertaining to the Gbao team at that time, but it's on record that changes were made in, I think, June 2006 or 2007. I can't remember. That's not something that should form part of this discussion. I'm quite content to leave it on the basis that the Gbao team should have been aware of the contents of that document.

But let me just take the logical extension of what my Lady has just said. Even if we had that document -- sorry, even if we had been aware of the existence of that document when it was served in October of 2006, the Rule 98 bis proceedings had already closed. The witnesses Ngondi and Jaganathan had already been and gone some long time previously. So, of course, we hadn't -- whether -- even if we'd acted immediately on receipt of that statement in October of 2006, the opportunity to cross-examine those two witnesses on the ground had already been and gone, and the opportunity to address the Trial Chamber at the half-time proceedings at Rule 98 had been and gone as well.

I mean, this would be our response to any suggestion that we weren't materially prejudiced. Of course, we were, because had that statement been put in cross-examination to both Jaganathan and Ngondi, one could have little doubt that the Trial Chamber would have had a different -- would have put an entirely different complexion on the state of the case. So that's the material prejudice, if you want to discuss that.

Of course, our point is this really isn't about material prejudice, it's a much more fundamental point. But -- so what I'm saying is that even if we had become aware of the existence of that statement and its contents in October 2006 there is nothing we could have done anyway. The Prosecution case was already over.

JUSTICE FISHER: Okay. I understand your position. Thank you.

MR CAMMEGH: And I want to assure the Court that the moment that the contents were discovered, we did act. It wasn't as Mr Staker suggested earlier a choice by the Defence team for Gbao

not to do anything. And again I'm not prepared to disclose process -- what we did.

MR TAKU: My Lord, may it please the Court. This statement is not on record so all the statements made about Mr Kallon, the submissions made about Mr Kallon about the statement is not part of the record yet. It's not yet part of the record. It's not even part of the record. It should be disregarded, my Lord. We have lost to test the credibility of this major. We thought the Prosecutor would bring him, he did not. We approached him. We recorded a statement from which contradicted materially what he said. And in any case, to request that you admit the statement at this point, when my colleague made copious, lengthy submissions about Mr Kallon in this regard would be highly prejudicial without the ability to test the credibility of this major.

In fact, Your Honours will know that to that extent the Trial Chamber made many rulings about the possibility of adverse evidence from co-accused. And this matter is on appeal; we made our position clear. So to the extent that that statement is not in evidence, all the references made to a statement that is not part of the trial record, especially prejudicial to Mr Kallon, should be disregarded. We invite the Court not to make any adverse -- any adverse considerations about Mr Kallon because of that. And we say Mr Gbao was never convicted because of the document of the major. Mr Kallon was. Whereas by proxy, because that witness never testified and we have lost to test his credibility. That's all I can say now.

JUSTICE WINTER: Thank you very much, but I remember that yesterday I already stated that this statement was not admitted

in evidence.

MR TAKU: Thank you, my Lord.

JUSTICE WINTER: Thank you. So that brings us, I suppose, when there are no questions any more, to the end of this very long day number two. We will resume our day number three tomorrow at ten o'clock. I thank you.

[Whereupon the hearing was adjourned at 5.00 p.m. to be reconvened on Friday, 4 September 2009 at 10.00 a.m.]