1331)

SCSL-03-01-A
(2291-2635)

2291

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

**Before**: Justice Shireen Avis Fisher, Presiding Judge
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon M. Kamanda
Justice Philip Nyamu Waki, Alternate Judge

**Registrar**: Ms. Binta Mansaray

**Date**: 8 October 2012

**Case No.**: SCSL-2003-01-A

**THE PROSECUTOR**

**–v–**

**CHARLES GHANKAY TAYLOR**

---

**PUBLIC WITH ANNEXES A AND B**

**CORRIGENDUM TO *APPELLANT'S SUBMISSIONS OF CHARLES GHANKAY TAYLOR***

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**Office of the Prosecutor**:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
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Mr. Christopher Santora
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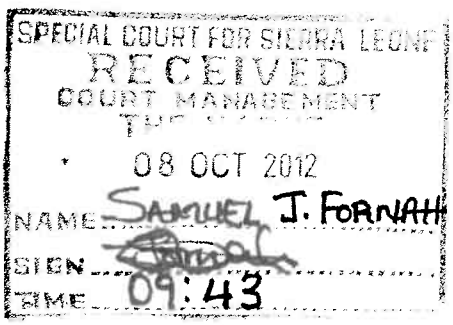

1. On 1 October 2012, the Defence filed the *Appellant's Submissions of Charles Ghankay Taylor*.[1] This corrigendum to the Appellant's Submissions is being filed to rectify the numbering sequence of certain paragraphs, two typographical errors, certain errors in citation, a redundant footnote, certain errors in the Book of Authorities, and the order of appearance of Justice King's name on the cover page.
2. Attached hereto, as Annex A, is the corrected version of what encompasses the cover page through the signature page of the Appellant's Submissions.[2] Attached hereto, as Annex B, is the corrected version of the Book of Authorities of the Appellant's Submissions.[3]

Numbering sequence of certain paragraphs

3. Some paragraph numbers in the Appellant's Submissions were out of sequence. For example, the numbering after paragraph 151 on page 56 (CMS page 1270), reverts back to 104 instead of assuming number 152. Corrections have, consequently, been made to the numbering of all affected paragraphs.

Typographical errors

4. The word "not" has been added to the last sentence of paragraph 33 on page 14 (CMS page 1228) which now reads: "This is not corroboration, and could **not** have been treated as such."
5. The word "corroborated" has been replaced with "uncorroborated" in the last sentence of paragraph 307 on page 101 (CMS page 1315) and the sentence now reads: "In such circumstances, the Chamber's reliance on this second-hand **uncorroborated** hearsay, particularly in light of the complete lack of scrutiny of Mongor's evidence, or the source of the hearsay, is in error."

Citation errors

6. In footnote 159 (CMS page 1249), "Sesay Adjudicated Facts Decision" has been corrected to read "*RUF* Adjudicated Facts Decision."

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[1] *Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012 ("Appellant's Submissions").
[2] CMS pages 1215-1522.
[3] CMS pages 1529-1557.

7. In footnote 1371 (CMS page 1459), "Indictment" has been corrected to read "Original Indictment".
8. In footnote 1441 (CMS page 1472), "*Taylor* Withdrawal Decision" has been corrected to read "Disqualification Decision".
9. In footnote 1603 (CMS page 1505), "16 January 2002," has been replaced with "as amended on 16 September 2009" as the relevant date for the *Amended Agreement between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone*.

Redundant footnote

10. Due to a software error, footnote 1551 appeared twice on CMS page 1496. The errant reference to the Judgement has been deleted, leaving the correct version of the footnote, which reads: "TT, TF1-334, 24 Apr. 2008, p. 8537; 29 Apr. 2008, p. 8896."

Errors in the Book of Authorities

11. Of the seven authorities from the AFRC case[4] listed in the Book of Authorities, the last four had incomplete citations (CMS pages 1529-1530). These have now been corrected in order to reflect their full citations.
12. On CMS page 1532 of the Book of Authorities,, the reference to the "Declaration of Justice Julia Sebutinde, 27 January 2011, appended to..." has been replaced with: "*Prosecutor v. Taylor*, SCSL-03-01-T-1171, Decision on Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor, 27 January 2011."
13. Also on CMS page 1532 of the Book of Authorities, the authority previously cited as "Declaration of Justice Julia Sebutinde, 14 January 2011, appended to the Wikileaks Decision, SCSL-03-01-T-1155" has been replaced with: "*Prosecutor v. Taylor*, SCSL-03-01-T-1155, Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference Pursuant

[4] *Prosecutor v. Brima et al.*, SCSL-04-16.

to Rule *65bis* and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 14 January 2011."

14. In footnote 1546, CMS page 1495, the "Defence Motion to Recall Witnesses" was cited in short-form, but was inadvertently omitted from the Book of Authorities. The full citation has now been added in the Book of Authorities with the corresponding short-form citation of "Defence Motion to Recall Witnesses" and reads as follows: "*Prosecutor v. Taylor*, SCSL-03-01-T-1142, Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 17 December 2010."
15. The full citation for "Disclosure Decision relating to DCT-032" was incorrectly designated as an appeal filing instead of a trial filing (see CMS page 1532). This has been corrected by replacing the "A" in the cited case number with a "T" so that the cited case number now reads: SCSL-03-01-T-1104.
16. The full citation, "*Prosecutor v. Taylor,* SCSL-03-01-I, Indictment, 7 March 2003," incorrectly has the short-form citation "Indictment." This has been corrected so that the short-form citation now reads "Original Indictment."
17. The full citation for the short-form citation "Indictment" was inadvertently omitted from the Book of Authorities. Therefore, the authority "*Prosecutor v. Taylor*, SCSL-03-01-PT-263, Prosecution's Second Amended Indictment, 29 May 2007" has been added with the corresponding short-form citation "Indictment."
18. Under the heading "*News Articles and NGO Websites,*" the short-form citation "*Al Jazera* Article" (see CMS page 1556) has been corrected to read "*Al Jazeera* Article."

Order of Appeals Judges' names on the cover page

19. Justice King's name has been placed after Justice Ayoola's name on the cover page, in order to reflect the proper rotation of the Presidency of the Court.

The remainder of the Appellant's Submissions

20. The remainder of the Appellant's Submissions remains unchanged.

Respectfully submitted,

| | | | |
|---|---|---|---|
| **Morris Anyah**<br>**Lead Counsel for**<br>**Charles G. Taylor** | Eugene O'Sullivan<br>Co-Counsel for<br>Charles G. Taylor | Christopher Gosnell<br>Co-Counsel for<br>Charles G. Taylor | Kate Gibson<br>Co-Counsel for<br>Charles G. Taylor |

Dated this 8th Day of October 2012, The Hague, The Netherlands

## List of Authorities

***Prosecutor v. Taylor***

*Prosecutor v. Taylor*, SCSL-03-01-A-1326, Appellant's Submissions of Charles Ghankay Taylor, 1 October 2012.

# Annex A

## Appellant's Submissions of Charles Ghankay Taylor

**THE SPECIAL COURT FOR SIERRA LEONE**

**THE APPEALS CHAMBER**

| | |
|---|---|
| **Before**: | Justice Shireen Avis Fisher, Presiding Judge<br>Justice Emmanuel Ayoola<br>Justice George Gelaga King<br>Justice Renate Winter<br>Justice Jon M. Kamanda<br>Justice Philip Nyamu Waki, Alternate Judge |
| **Registrar**: | Ms. Binta Mansaray |
| **Date**: | 1 October 2012 |
| **Case No.**: | SCSL-2003-01-A |

**THE PROSECUTOR**

**–v–**

**CHARLES GHANKAY TAYLOR**

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# PUBLIC WITH CONFIDENTIAL ANNEX A AND PUBLIC ANNEXES B AND C

# APPELLANT'S SUBMISSIONS OF CHARLES GHANKAY TAYLOR

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**Office of the Prosecutor**:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
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Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

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## I. INTRODUCTION

1. This is the Appellant's Submissions of Charles Ghankay Taylor, filed pursuant to Rule 111 of the Rules[1] and Article 20 of the Statute[2] ("Appeal Brief" or "Brief").

2. The subject-matter of these submissions are the Judgement and Sentencing Judgement rendered by Trial Chamber II of the Special Court for Sierra Leone ("Trial Chamber" or "Chamber"), respectively on 18 May 2012[3] and 30 May 2012[4] in case number SCSL-03-01-T. These submissions are in support of the *Notice of Appeal of Charles Ghankay Taylor*, filed on 19 July 2012,[5] as well as the Corrigendum thereto of 23 July 2012.[6]

3. Mr. Taylor was charged with an 11 count indictment.[7] Having heard the evidence of 94 Prosecution witnesses,[8] many of whom received substantial payments and benefits as a result of their testimony,[9] the Chamber found that the Prosecution had failed to prove that Mr. Taylor instigated, ordered, or committed (either directly or through a joint criminal enterprise) these 11 counts. The Prosecution also failed to prove that Mr. Taylor commanded members of the RUF, AFRC and/or Liberian fighters, and as such he was acquitted of all counts in the Indictment on the basis of superior responsibility. Rather, he was convicted of having "planned" the crimes committed by members of the RUF/AFRC in the attacks on Kono and Makeni and the invasion of Freetown and subsequent retreat between December 1998 and February 1999,[10] and having "aided and abetted" all crimes committed by the RUF/AFRC between 1997 and 2002.[11]

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[1] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 31 May 2012 ("Rules")
[2] Statute of the Special Court for Sierra Leone ("Statute").
[3] *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012 ("Judgement"); see, also, *Prosecutor v. Taylor,* SCSL-03-01-T-1284, Corrigendum to Judgement Filed on 18 May 2012, 30 May 2012 ("Judgement Corrigendum").
[4] *Prosecutor v. Taylor*, SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement").
[5] *Prosecutor v. Taylor*, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012 ("*Taylor* Defence NoA").
[6] *Prosecutor v. Taylor*, SCSL-03-01-A-1304, Corrigendum to Notice of Appeal of Charles Ghankay Taylor, 23 July 2012.
[7] *Prosecutor v. Taylor*, SCSL-03-01-T-263, Prosecution's Second Amended Indictment, 29 May 2007 ("Indictment").
[8] Judgement, Annex B, para. 26.
[9] See Grounds of Appeal 5 and 40 below.
[10] Judgement, para. 6971.
[11] Judgement, para. 6953.

4. No reasonable trier of fact, applying the standard of proof beyond reasonable doubt, could have reached these conclusions. The colossal Judgement, over 2,500 pages in length, is plagued throughout by internal inconsistencies, misstatements of evidence and conflicting findings.

5. Numerous errors of law and fact infect these findings, invalidating the convictions, or occasioning a miscarriage of justice in respect of findings that could have been reached by no reasonable trial chamber. The planning convictions are built upon an impermissible reversal of a critical adjudicated fact. They are undermined in full by the Chamber's failure to find that Mr. Taylor planned the commission of any crime; the *actus reus* of planning is accordingly missing. The convictions for aiding and abetting are based on an improper legal standard that is not compatible with customary international law. The factual findings are built on a disregard of the usual caution to be exercised in respect of hearsay and uncorroborated evidence, and on errors in the assessment of the evidence that could not have been committed by a reasonable trier of fact.

6. These many errors reflect the weakness of the case against Mr. Taylor, at whose feet the Chamber has laid responsibility for crimes committed by foreign forces over whom he had no effective control, did not command or instigate, with manifest disregard to his physical and legal remoteness from the events in question. These errors are explored in full in the Grounds of Appeal below.

*(i) Interlocutory Filings and Decisions*

7. In compliance with Article 6(b) of the Practice Direction on the Structure of Grounds of Appeal before the Special Court,[12] the Defence hereby provides a list of interlocutory filings and decisions relevant to the appeal in the footnote below.[13]

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[12] Entered into force on 1 July 2011.

[13] **Interlocutory Appeals Chamber filings and decisions:** *Prosecutor v. Taylor*, SCSL-03-01-A-1-1324, Separate Opinion of Justice George Gelaga King on Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012; *Prosecutor v. Taylor*, SCSL-03-01-A-1-1323, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012; *Prosecutor v. Taylor,* SCSL-03-01-T-775, Decision on "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment", 1 May 2009. **Interlocutory Trial Chamber filings and decisions:** *Prosecutor v. Taylor,* SCSL-03-01-1282, Order Authorising Court Photography on 30 May 2012, 30 May 2012; *Prosecutor v. Taylor,* SCSL-03-01-1279, Order Authorising Court Photography on 16 May 2012, 11 May 2012; *Prosecutor v. Taylor,* SCSL-03-01-T-1234, Order re: Defence Motion Seeking Termination of the Disciplinary Hearing for Failure to Properly Constitute the Trial Chamber and/or Leave to Appeal the Remaining Judges' Decision to Adjourn the Disciplinary Hearing, 18 March 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1193, Decision on Defence Motion Seeking Leave to Appeal the Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government

*(ii) Standards of Review on Appeal*

8. Article 20(1) of the Statute and Rule 106 of the Rules provide that the Appeals Chamber shall hear appeals on the following grounds: (a) a procedural error; (b) an error on a question of law invalidating the decision; or (c) an error of fact which has occasioned a miscarriage of justice. The standards of review in respect of these grounds are outlined below and are incorporated by reference, as appropriate, whenever error is alleged in the submissions in this Brief.

9. Errors of law must invalidate the decision of the Chamber.[14] The appellant must provide details of the alleged error and state with precision how the legal error invalidates the decision.[15] In exceptional circumstances, an Appeals Chamber may consider legal issues which may not lead to the invalidation of the Trial Chamber's decision if such issues are of general significance to the Tribunal's jurisprudence.[16]

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Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 7 February 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1174, Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 28 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1171, Decision on Urgent and Public with Annexes A-C Defence Motion to Re-open its Case in Order to Seek Admission of Documents Relating to the Relationship Between the United States Government and the Prosecution of Charles Taylor, 28 January 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1143, Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 10 January 2011; *Prosecutor v. Taylor,* SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 12 November 2010; *Prosecutor v. Taylor,* SCSL-03-01-A-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information relating to DCT-032, 20 October 2010; *Prosecutor v. Taylor*, SCSL-03-01-T-1090, Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 October 2010; *Prosecutor v. Taylor,* SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments made to DCT-097, 23 September 2010; *Prosecutor v. Taylor,* SCSL-03-1-T-765, Decision on Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B), 23 March 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-752, Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE, 27 February 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-751, Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick, 27 February 2009; *Prosecutor v. Taylor*, SCSL-03-1-T-370, *Decision on Judicial Notice*, 23 March 2009; *Prosecutor v. Taylor,* SCSL-03-01-PT-249, Decision on Defence Application for Leave to Appeal the 25 April 2007 'Decision on Defence Motion Requesting Reconsideration of "Joint Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence," Dated 23 January,' 22 May 2007; *Prosecutor v Taylor,* SCSL-03-1-PT-240, Order Designating Alternate Judge, 18 May 2007.

[14] *RUF* AJ, para. 31; *CDF* AJ, para. 32.

[15] *RUF* AJ, para. 31.

[16] *RUF* AJ, para. 31, citing *CDF* AJ, para. 32; *Galić* AJ, para. 6; *Stakić* AJ, para. 7; *Kupreškić* AJ, para. 22 and *Tadić* AJ, para. 247.

10. In order to overturn a trial chamber's finding of fact, the error of fact must have resulted in a miscarriage of justice.[17] A miscarriage of justice is defined as "[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[18] For an error to be one that occasioned a miscarriage of justice it must have been "critical to the verdict reached."[19] The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[20]

11. Only procedural errors that occasion a miscarriage of justice would vitiate the proceedings.[21] Such are procedural errors that would affect the fairness of the trial. Procedural errors that could be waived or ignored (as immaterial or inconsequential) without injustice or prejudice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice.[22]

12. The Chamber's exercise of discretion will be overturned if the challenged decision was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[23] Where the issue on appeal is whether the Chamber correctly exercised its discretion in reaching its decision, the Appeals Chamber will only disturb the decision if an appellant has demonstrated that the Trial Chamber made a discernible error in the exercise of discretion.[24] A Trial Chamber would have made a discernible error if it misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.[25]

13. Each error of law alleged in this Brief invalidates the decision of the Chamber. Likewise, each error of fact alleged herein, individually and cumulatively, gives rise to a miscarriage of justice. In respect of each error of fact, it is maintained that no reasonable trier of fact would have rendered the particular finding of fact beyond

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[17] *RUF* AJ, para. 32, citing *CDF* AJ, para. 33; *Kupreškić* AJ, para. 29.
[18] *RUF* AJ, para. 32, citing *Kupreškić* AJ, para. 29; *Furundžija* AJ, para. 37.
[19] *RUF* AJ, para. 32, citing *Kupreškić* AJ, para. 29.
[20] *RUF* AJ, para. 32, citing *CDF* AJ, para. 33; *Ntakirutimana* AJ, para. 12; *Kupreškić* AJ, para. 30.
[21] *RUF* AJ, para. 34.
[22] *RUF* AJ, para. 34; *CDF* AJ, para. 35.
[23] *RUF* AJ, para. 35; *CDF* AJ, para. 36.
[24] *RUF* AJ, para. 35; *CDF* AJ, para. 36.
[25] *RUF* AJ, para. 35; *CDF* AJ, para. 36.

reasonable doubt. Each procedural error alleged which affects the fairness of the trial occasions a miscarriage of justice.

*(iii) Article 20(3) of the Statute*

14. The Defence has relied extensively on jurisprudence from the ICTY and ICTR in light of Article 20(3) of the Statute, which provides, *inter alia*, that: "[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda."

15. Undergirding the mandatory terms of Article 20(3) is a recognition of the importance of having resort to the jurisprudence of the *ad hoc* tribunals. The importance to apply persuasively decisions taken at the ICTY and ICTR has been a principle long-recognised by the Special Court, as was indicated by Trial Chamber I when it stated:

> Like the Special Court, the ICTY and ICTR are bound to apply customary international law, and their decisions do, as a matter of principle, apply customary international law. It is for this reason that this Court applies persuasively decisions taken at the ICTY and ICTR.[26]

*(iv) Rule 115 of the Rules*

16. The arguments in support of all the grounds of appeal are contained in Section III of this Brief. In respect of some grounds, however, the Defence hereby gives notice of its intent to present additional evidence to the Appeals Chamber as per Rule 115 of the Rules in support of those grounds. These grounds include, but are not

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[26] *Prosecutor v. Brima et al.*, SCSL-04-16-PT-46, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, para. 24. Paras. 22-4 provide, *inter alia*: "[t]here is...a special relationship envisioned between the Special Court and the International Tribunals, as each institution is established to permit prosecutions for *inter alia* "serious violations of international humanitarian law". As such, the International Tribunals, the Special Court and the International Criminal Court belong to a unique, and still emerging, system of international criminal justice.

"This special relationship is reflected not only in Article 20 of the Statute but also through the fact that, under the Statute of the Special Court, the Rules of Procedure and Evidence of the ICTR applied mutatis mutandis to the conduct of legal proceedings before this Court. It can therefore be concluded that the drafters of the Statute of the Special Court not only envisioned that this Court would follow the procedures established by the ICTR – with necessary modifications – but furthermore, that the Rules of Procedure and Evidence of the ICTR can be construed as reflective of the general principles of law applicable to criminal proceedings in which the principles of international criminal law and international humanitarian law are applied.

"Like the Special Court, the ICTY and ICTR are bound to apply customary international law, and their decisions do, as a matter of principle, apply customary international law. It is for this reason that this Court applies persuasively decisions taken at the ICTY and ICTR. While noting that the obligations upon the ICTY and ICTR, as well as the Special Court, in relation to the application of customary international law and respect for the principle of *nullum crimen sine lege* are specifically related to the subject-matter of these institutions, the Trial Chamber finds that the two Tribunals also apply general principles of law on matters related to evidence and procedure."

limited to: Grounds 7-9, 15-16, 23, 32-33 and 36-38. In seeking to introduce additional evidence, the Defence will naturally comply with Articles 21-23 of the Practice Direction on the Structure of Grounds of Appeal before the Special Court[27] and any relevant provisions of the Rules.

*(v) Miscellaneous*

17. Appended to this Brief are three annexes. The first is Confidential Annex A, which contains submissions forming part of Grounds of Appeal 12 and 23. These submissions are being filed confidentally because they implicate and could disclose the identities of protected witnesses. The second is Public Annex B, which is a copy of the video footage of the last 11 minutes and 48 seconds of the Taylor Delivery of Judgement as retained by Court Management Section. The third is Public Annex C, which is Justice El Hadji Malick Sow's statement in court on 26 April 2012.

18. The Defence has also provided a list of abbreviations and short form citations in the Book of Authorities of many of the decisions cited in this Brief.

19. In several instances, the Defence has relied on certain documents that are not in the working language of the Special Court.[28] Where possible, uncertified translations have been provided. The Defence will enegage with the Registry to facilitate the provision of certified translations of the documents not in the working language of the Court.[29]

*(vi) Relief Sought*

20. Unless otherwise specified, the relief sought in relation to each error of law, fact or procedure below, is the reversal of the relevant finding(s) of the Trial Chamber, the quashing of any resulting convictions and, where appropriate, vacatur of the Judgement.

21. On the basis of the grounds of appeal set out below, Mr. Taylor respectfully requests that the Appeals Chamber reverse the convictions of Counts 1-11 entered against him by the Trial Chamber and quash the sentence of 50 years thereby imposed.

## II. STATEMENT OF ISSUES PRESENTED

[27] See, Practice Direction on the Structure of Grounds of Appeal before the Special Court, as amended on 23 May 2012.
[28] Rule 3 of the Rules provides that the working language of the Special Court shall be English.
[29] See, Practice Direction on the Structure of Grounds of Appeal before the Special Court, as amended on 23 May 2012, paras. 17 and 18.

22. The issues presented in this Brief are reflected in the body of each ground of appeal, and concern, in sum:

(i) the errors of fact and/or law which led the Chamber to erroneously convict Mr. Taylor for planning the crimes set out in Counts 1-11 of the Indictment;

(ii) the errors of fact and/or law which led the Chamber to erroneously convict Mr. Taylor for aiding and abetting the crimes set out in Counts 1-11 of the Indictment;

(iii) (iii) the errors of fact and/or law which led the Chamber to erroneously sentence Mr. Taylor to 50 years imprisonment on the basis of the convictions for aiding and abetting and planning the crimes set out in Counts 1-11 of the Indictment.

## III. ARGUMENTS IN SUPPORT OF EACH GROUND OF APPEAL

### A. PART I: SYSTEMIC ERRORS IN THE EVALUATION OF EVIDENCE THAT AMOUNT TO ERRORS OF LAW

#### i. GROUND OF APPEAL 1: The Chamber erred in law by relying on uncorroborated hearsay evidence as the sole basis for specific incriminating findings of fact.

23. The conviction of Charles Taylor rests largely on hearsay evidence, often uncorroborated. The extent of the Chamber's reliance on this type of evidence is unprecedented relative to any other international case, and is often used to make directly incriminating findings.

24. The Chamber failed to recognize not only that it was required by law to approach hearsay with due caution, but that it is legally impermissible to base a particular conviction only on uncorroborated hearsay. The ICTY Appeals Chamber, relying on the European Court of Human Rights, has held:

> A different matter is, of course, what weight a trier of fact is allowed to give to evidence not subjected to the testing of cross-examination. It is in this matter that the jurisprudence of the ECtHR is valuable, as it has authoritatively stated the principle that 'all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence.' Unacceptable infringements of the rights of the defence, in this sense, occur *when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused*

> *has had no opportunity to examine or have examined either during the investigations or at trial.*[30]

25. This discussion concerned "depositions" elicited by a judicial officer or lawyer, under oath, and recorded by stenographers. The rationale for this prohibition is that no matter how accurate the recording, the reliability of the source cannot be adequately tested so as to justify relying on it to determine a directly incriminating fact. The presence of three, five or ten stenographers does not enhance reliability; the issue remains that a defendant must not be deprived of the opportunity to cross-examine the *source* of the evidence, and the Chamber must not place *decisive* reliance on it. *A fortiori*, the prohibition must apply with even greater force in respect of hearsay with much lesser guarantees of accuracy and reliability.

26. Whether a Chamber has relied on particular evidence "in a decisive manner" is necessarily a fact-specific inquiry; however, once an appellate tribunal has made that factual assessment, the trier of fact's reliance on that hearsay evidence to make a directly incriminating finding is an error of law. A trier of fact has no discretion to rely decisively on hearsay evidence to make a directly incriminating finding – i.e. a finding on which a conviction is based.

27. This error was committed repeatedly. A simple example concerns the Chamber's finding that Mr. Taylor instructed Bockarie to release the Freetown Pandemba Road prisoners to Buedu. The basis for this finding was on one witness's uncorroborated fourth-hand hearsay to the effect that Mr. Taylor told Benjamin Yeaten in Monrovia, who told Sam Bockarie via satellite phone in Buedu, who told Mohamed Kabbah, in a conversation which was overheard by the witness, to release the Pademba Road prisoners.[31] This factual finding led directly to a conclusion about Mr. Taylor's responsibility for planning and aiding and abetting crimes in and around Freetown. Reliance on this evidence shows a lack of proper caution to the assessment of evidence, but is also a distinct example of relying on uncross-examinable information to reach highly incriminating findings against Mr. Taylor.

28. A more complex, but no less distinct, example is the Chamber's finding that Mr. Taylor supplied arms to Bockarie in 1998. The Chamber relies on two categories of evidence to make this finding: (1) the hearsay evidence of eight witnesses who

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[30] *Prlić* Decision Relating to Admitting Transcript, para. 53 (italics added).
[31] Judgement, para. 3588.

testified that Mr. Taylor had supplied Bockarie with arms;[32] and (2) circumstantial indications that Mr. Taylor knew of this supply.[33] The Chamber found that the circumstantial evidence "supports the conclusion" that Taylor "had knowledge and sanctioned" Bockarie's acquisition of arms, but did not find, and could not have found, that the circumstantial evidence established that.[34] A close inspection of the evidence shows that of the eight witnesses who gave hearsay evidence, seven and possibly all eight simply recounted what they had been told by Bockarie.[35] The Chamber's finding is therefore based on the same, lone uncross-examined source. The fact that eight witnesses reported the same hearsay does not entitle it to any greater weight than if Sam Bockarie had made this allegation in a room with eight stenographers.

29. The Chamber at the beginning of the Judgement purpoted to instruct itself that it must approach hearsay evidence with "caution," but also declares that "the testimony of a single witness on a material fact does not require corroboration."[36] The latter assertion is wrong in law when the testimony is based on hearsay, and the former principle was not applied. As the previous example illustrates, a cautious approach to the evidence would have required the Chamber to articulate that it was relying on the same hearsay source, and to consider whether it was permissible to rely on that sole source given the directly incriminating nature of the conclusion. Had the Chamber properly instructed itself on the law, given those circumstances, it would have understood that it could not make the finding. Either through lack of due caution of the circumstances, or based on an unawareness of the legal limits of reliance on hearsay, the Chamber entered an improper and impermissible finding.

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[32] Judgement, para. 5021.
[33] Judgement, para. 5022.
[34] Judgement, para. 5022. The Chamber cited three circumstantial factors: (i) that Tamba was involved; (ii) that Bockarie was escorted by members of the SSS upon his return from these trips; and (iii) that Bockarie did not obtain travel documents before his visits to Liberia. These factors, alone or in combination, do not come close to meeting the threshold of circumstantial proof, which requires that the alleged fact be "the only reasonable conclusion that could be drawn from the evidence presented." *Bagosora* AJ, para. 515. None of these facts, alone or in combination, come close to meeting that threshold and the Chamber did not purport to find that they did.
[35] Judgement, para. 5021 (the eight witnesses are Kargbo, Mallah, Kanneh, TF1-371, TF1-585, Fornie, and Perry Kamara and Saidu). Saidu's testimony was that he was told by one of Bockarie's bodyguards that they "went and got" supplies "[f]rom Charles Taylor in Liberia" (Albert Saidu, Transcript 4 June 2008, pp. 11021-2); but the Prosecution adduced no evidence concerning the source of this bodyguard's information, raising the possibility that the source of this information, as with all other witnesses, was Bockarie himself.
[36] Judgement, paras. 166-9.

30. Whether a chamber has committed this error of law by relying "in a decisive manner" on an uncross-examined statement depends to some extent on the notion of "corroboration." The Chamber frequently invokes the notion of "corroboration" without ever explaining its understanding of the concept. The term has been defined by ICTR Appeals Chamber:

> [T]wo testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[37]

31. This definition implies that corroboration involves some correspondance of detail in respect of the same event. A description concerning two different events,[38] or a description that contains no correspondence of detail, does not constitute corroboration.

32. The Chamber frequently applies an erroneous notion of "corroboration". A striking example involves the Chamber's finding that Mr. Taylor instructed koroma to take Kono during his disorderly flight from Freetown towards Buedu in mid-1998.[39] The Chamber bases this finding on one witness's hearsay testimony—Samuel Kargbo.[40] Yet the Chamber purpots to invoke the notion of "corroboration" on the basis that Kargbo's general description of the retreat from Freetown generally corresponds to the testimony of other witnesses.[41] This is not corroboration. Even worse, a review of the evidence relied on by the Chamber shows that Kargbo's assertion that Koroma ordered the second, successful attack on Kono is contradicted by another witness whom the Chamber deemed credible, Bobson Sesay, and was

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[37] *Nahimana* AJ, para. 428. See *Karera* AJ, para. 173.

[38] See, for example, *Bagosora*TJ, para. 1978 ("Witness CE, a soldier, recalled seeing Kabiligi and hearing soldiers cheer his arrival at Camp Kigali in a military jeep "a few days" after the death of the President.2165 Ruggiu, a journalist with the RTLM, recalled seeing Kabiligi arrive between 14 and 17 April by helicopter near the officers mess at Camp Kigali.2166 Although the witnesses provided different dates for Kabiligi's arrival, the Prosecution contends in its Closing Brief that these two witnesses "materially" corroborate one other.2167 There is, however, no convincing way to explain the significant discrepancy between their testimonies about Kabiligi's arrival, and it appears that they are referring to separate incidents at different times").

[39] Judgement, para. 2855.

[40] Judgement, paras. 2832, 2840, 2855.

[41] Judgement, para. 2855 ("The Trial Chamber notes that Kargbo's evidence is substantially corroborated in various aspects.")

undermined by the testimony of five witnesses who testified that the second attack arose spontaneously on the front-line.[42] The Chamber downplayed this contradiction on the basis that the testimony did not "preclude an order having been given by Koroma",[43] even though the evidence certainly suggested that it was less likely. The Chamber's own review of the evidence shows, in fact, that Kargbo's testimony was contradicted to a much greater degree than it was confirmed except in respect of the most general details. Finding on this basis that Kargbo's assertion concerning Mr. Taylor's involvement was "corroborated" in any degree reflects a serious misapplication of the concept, which, in turn, led the Chamber to make a finding that violates the principle of law that uncorroborated hearsay evidence may not be relied upon to make incriminating findings.

33. The Chamber applies this excessively general approach repeatedly. The Chamber wrongly considered that Taylor's involvement in sending "herbalists" to Sierra Leone was corroborated by two completely non-overlapping accounts of the presence of "herbalists" in Sierra Leone.[44] The Chamber similarly found that Mongor and Kargbo's testimony corroborated each other because they both asserted that Taylor was involved in the Magburaka shipment, even though they describe two sets of events that did not correspond in any salient detail, and that required the Chamber to reject both of their accounts almost entirely.[45] This is not corroboration, and could not have been treated as such.[46]

34. Although the application of corroboration to facts is an issue of fact that falls to the Chamber's determination, the definition of corroboration is a matter of law. The failure to define corroboration, combined with the repeated application of a concept bearing no relation to a proper definition of corroboration, was a systematic error of law that is entitled to no deference by the Appeals Chamber. All erroneous applications of the concept, as further specific in the grounds below, should be treated as an error of law and reversed as such. The specific findings that are invalidated as a result of this legal error are addressed in the context of the individual grounds as addressed below.

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[42] Judgement, paras. 2840-2.
[43] Judgement, para. 2842.
[44] See Ground 29.
[45] See Ground 23, Section (ii)(b).
[46] See also Judgement, para. 4470 (describing two completely non-overlapping events supposedly indicating mr. Taylor's direct involvement in facilitating the provision of military personnel).

35. The over-broad conception of corroboration not only led to improper reliance in reaching incriminating findings, but also on the level of "caution" exercised by the Chamber in respect of evidence in general. The Chamber explained that it only needed to approach testimonial evidence with "particular care" where it was uncorroborated, and that corroboration would be a factor favouring reliance on hearsay testimony.[47] The Chamber's over-broad definition of corroboration affected its analysis of both of these categories of evidence.

36. A review of the Judgement as a whole suggests that the Chamber systematically failed to exercise due caution in respect of hearsay evidence. Reliance on hearsay evidence alone is common, not rare.[48] The Chamber even appears to have adopted a mechanical formula by which it would only reject uncorroborated hearsay from witnesses deemed categorically *unreliable*.[49] This contrasts sharply with the rarity of such findings in the judgements of the other *ad hoc* tribunals.[50] The Chamber's mechanical discount of hearsay only for witnesses who were unreliable, combined with an overly broad definition of corroboration, led the Chamber to abandon any proper caution in respect of hearsay evidence.

37. The Chamber's erroneous approach to hearsay evidence, given its systematic and persuasive nature, constitutes an error of law. The Chamber consistently relied on uncross-examined out of court statements for incriminating findings, and otherwise erred as to the definition of corroboration and in adopting a mechanically credulous approach to hearsay. How these errors affected the Chamber's specific findings does call for a case-by-case evaluation, and is addressed as appropriate in Parts II and III below.

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[47] Judgement, paras. 166, 169.

[48] See e.g. Judgement, paras. 3827, 3828, 3830, 3908, 3932-3, 4800, 4842, 5022, 5121-9, 5380, 5390-4, 5588, 5624, 5706, 5921,6135, 6223.

[49] Judgement, para. 268 ("In light of the numerous inconsistencies and implausibilities in Marzah's testimony, the Trial Chamber finds that his evidence ... must be considered with caution and cannot be relied upon without corroboration"); para. 303 ("[i]n light of the foregoing, the Trial Chamber finds that TF1-539's evidence, particularly as it relates to his personal interaction and communication with the Accused, must be considered with caution and cannot be relied upon without corroboration"); para. 325 ("in light of his evasiveness, and the incidents in which TF1-579 was clearly untruthful, the Trial Chamber finds that the testimony of the witness must be considered with caution and cannot be relied upon without corroboration.")

[50] See e.g. *Karera* AJ, para. 204 (finding that "no reasonable trier of fact could have accepted this witness's uncorroborated hearsay testimony that the policemen who killed Ndingutse were the policemen who guarded the Appellant's house. Furthermore, no reasonable trier of fact could have concluded on the basis of that circumstantial evidence that the only reasonable inference was that Ndingutse had been killed pursuant to the Appellant's orders to kill Tutsis"); *Bagosora* TJ, para. 1462 (rejecting "uncorroborated hearsay"); *Bizimungu* TJ, paras. 203, 693, 712, 764, 1018 (rejecting "uncorroborated hearsay"); *Gotovina* TJ Vol. II, para. 2448 (rejecting "uncorroborated hearsay").

### ii. GROUND OF APPEAL 2: The Trial Chamber erred in law by systematically failing to assess the reliability of the sources of hearsay information.

38. The reliability of hearsay evidence, by definition, involves two separate issues: the reliability of the person before the court; and the reliability of the person who conveyed the information to the person before the court. Remarkably, the Chamber almost *never* addressed the latter question, apparently believing that its assessment of reliability of the person before the court was sufficient. The systematic failure to have done so was an error of law.

39. Previous jurisprudence has underlined the importance of knowing the precise content of the hersay source's information, their identity, and the circumstances under which it arose.[51] Chambers have evaluated the source's aptitude to know the fact, their potential biases, and any other available indicia of reliability.[52] Hearsay evidence from an anonymous source can almost never be accorded any independent evidential weight, because its reliability is unknowable.[53] Group membership or identity of the hearsay source can be as important for assessing the weight of hearsay evidence as is the reliability of the witness on the stand. In *Boškoski*, for example, the Trial Chamber discounted the probative value of information provided by a reliable witness because of the circumstantial indications that they had a motive to lie or exaggerate:

> Further, the HRW report on the relevant events in Ljuboten, to which he was the main contributor, and which is a cornerstone of his evidence, is sourced

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[51] *Delalić* TJ, para. 27. See *Hadžihasanović* TJ, para. 272 ("in cases where testimony was based on hearsay, the Chamber noted that to assess its probative value, it wished to know the source of the information, that is, insofar as possible, the identity of the intial source, how he might have learned of the facts, and the number of intermediaries through which the testimony had passed").

[52] *Nahimana* AJ, para. 831 ("In the instant case, the Trial Chamber noted that "Des Forges specifies in detail that her source of information about Nahimana's interaction with the French Government is a diplomat who was himself present in meetings between Nahimana and French Ambassador Yannick Gérard, who had a documentary record of the interaction in the form of a diplomatic telegram", and it considered that this piece of information was reliable. The Appeals Chamber finds that this conclusion was reasonable").

[53] *Ndindabahizi* AJ, para. 115 ("Thus, Witness CGC never explained (nor was he asked how he learned that Mr. Nors was killed at the roadblock about five minutes after he (Witness CGC) had left. Thus, the Trial Chamber did not know how the person – or persons – who told Witness CGC about the killing knew about it; also, the Trial Chamber did not know on which basis the person – or persons – came to the conclusion that the killing happened some minutes after his departure. The finding that Mr. Nors was killed shortly after the Appellant's visit was thus based only on vague and unverifiable hearsay"); *Bagasora* TJ, para. 890 ("Witness ET heard that Father Mahame was on a list as early as 1992. His evidence on this point is hearsay and, furthermore, does not clearly demonstrate the basis and reliability of his source's information"); *Gotovina* TJ Vol. I, para. 241 ("the evidence from Boško Brkić and Kata Čuk insufficiently establishes their source of knowledge in relation to the incident."); *Hardinaj* TJ, para. 317 ("Moreover, it is multiple hearsay and Witness 68 does not specify her source. *For these reasons the Trial Chamber will not rely on Witness 68's hearsay account of the alleged abduction and subsequent events*").

> primarily by unchallenged accounts of ethnic Albanian residents from Ljuboten which have not been tested against the other differing accounts which the Chamber has heard.[54]

40. The Chamber failed to engage in any such analysis in the Judgement, notably in respect of statements made by Sam Bockarie to his underlings about alleged support by or instructions from Mr. Taylor. Bockarie had an obvious motivation to give this impression. He wanted his followers to believe that he had the support of an ostensibly powerful ally, especially in times of low morale or when engaged in power struggles with rivals. The error alleged here is not that the Chamber reached an incorrect determination as to Bockarie's reliability or that it gave insufficient weight to this consideration in weighing probative value; rather that the Chamber made no such analysis whatsoever.

41. The lack of such analysis is striking given that the Chamber was generally aware that people had motives to falsely invoke Mr. Taylor's support. The Chamber heard evidence from a witness whom it deemed generally reliable that "RUF members 'would always *boast* that they get their arms and ammunition from Liberia'".[55] The circumstantial evidence shows that Bockarie also had a motiviation to exaggerate or lie about Mr. Taylor's backing in order to bolster his position. One indication of this attempt to invoke Mr. Taylor's name for his own purposes was his implausible assertion before the start of the Kono and Makeni offensive in late 1998 that Mr. Taylor had allegedly told him that "any commander who disobeyed that instruction was to be executed."[56] Only the most credulous trier of fact could have overlooked the evident personal motive underlying such a claim.

42. The Chamber at one point explains that it would accept hearsay evidence of Mr. Taylor's involvement in providing a particular form of support because "the witnesses who testified were … present in Buedu and/or Kono when the herbalists arrived. They would not conceivably have been present when the Accused would allegedly have made the requisite arrangements. The Trial Chamber considers the lack of direct evidence to be a natural consequence of these circumstances."[57] This

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[54] *Boškoski* TJ, para. 134. See also *Boškoski* TJ, paras. 260, 262-264 (discounting a witness's hearsay evidence based on the ethnicity and probable biases of the sources); *Hadžihasanović* TJ, para. 456 ("While Croatian sources seem to have had information on the structure of the ABiH, at times they seemed unwilling to give a faithful description of the facts.")
[55] Judgement, para. 5583.
[56] Judgement, para. 5420.
[57] Judgement, para. 4085.

reasonsing is the opposite of cautious, implying that a more flexible approach should be adopted in respect of hearsay, based purely on the Prosecution's choice of witnesses. The reasoning reflects a profound lack of regard for the legal framework that is supposed to keep reliance on hearsay evidence within proper limits. Those limits were obviously not respected, as is reflected in the plethora of findings throughout the Judgement based on hearsay. The extent to which this pervasively erroneous approach invalidates the Judgement is discussed below in respect of specific findings addressed in Parts II and III. The factual manifestations of this error do not undermine the fundamentally legal and systematic nature of the legal error committed by the Chamber in respect of hearsay evidence. This error had an extensive impact throughout the Judgement, and invalidates all findings based on that erroneous approach.

### iii. GROUND OF APPEAL 3: The Trial Chamber erred in law in its approach to credibility of witnesses.

43. At the outset of the Judgement, the Chamber selected 22 witnesses deemed to be "significant" and purported to assess their credibility. It found some to be "generally credible", and others not. [58] No explanation was given as to what was meant by "significant", but 20 of the 22 witnesses had been called by the Prosecution. Of these Prosecution witnesses, 16 were categorised as "generally credible".[59]

44. Having made these overall credibility findings, the Chamber undertook to perform "assessments of credibility **in relation to specific events**" throughout the Judgement.[60] Despite this undertaking, this was not consistently done. When the Chamber did assess credibility in relation to specific events, it found some "generally credible" witnesses either untruthful or unreliable for specific events, but then reverted to their original "generally credible" categorisations for other events. [61]...

45. There are three significant problems with the Chamber's approach to witness credibility which, either together or separately, constitute an error of law. First, the Chamber's approach of selecting "significant" witnesses for individual credibility assessments is erroneous. The Chamber was required to evaluate the credibility of all witnesses and the reliability relevant aspects of their testimony, regardless of whether

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[58] Judgement, paras. 212 -380.
[59] Judgement, paras. 219, 226, 236, 243, 253, 262, 274, 284, 289, 295, 307, 317, 329, 333, 338, 358.
[60] Judgement, para. 212.
[61] See, for example, Judgement, paras. 2367, 2559, 2934, 2941, 2367-73, 3091, 3104, 3119, 3383-4, 3412, 4123-5, 4145-4146, 4377, 5090, 5384-5, 5384-5, 5395-6, 5975, 6548-52.

or not the parties raised specific challenges to portions of their testimony, or their credibility as a whole. Adopting a different approach to the credibility assessments of these "significant" witnesses cannot be reconciled with this overarching duty, particularly in light of its seemingly arbitrary selection of these witnesses. This is significant given that, explained further below, once these witnesses were given a "generally credible" rating, the Chamber consistently relied on their evidence in support of findings on the basis of this assessment, and in the absence of further scrutiny. As such, the fact that 20 of the 22 "significant" witnesses were Prosecution witnesses, was prejudicial to the Defence.

46. Second, generalised credibility assessments are insufficient to determine whether individual aspects of witnesses' testimony can be relied upon. The fact that a witness gives evidence honestly is not, in itself, sufficient to establish the reliability of that evidence. As held by the Trial Chamber in the *RUF* case, relying on ICTY pronouncements, the issue is not merely whether the evidence of a witness is honest; it is also whether the evidence is objectively reliable.[62]

47. By contrast, the Chamber in the present case relied on its general credibility assessments as a basis for accepting that **particular evidence** was credible. The general credibility categorisations were, in effect, dispositive. In assessing evidence, the Chamber repeatedly relied on nothing more than the fact that the witness was "generally credible", stating that it "found TF1-516 to be a generally credible witness and accepts his testimony on this point"[63] or "[r]ecalling its finding that Bobson Sesay is generally credible, the Trial Chamber finds his testimony in this regard to be consistent and reliable"[64] or "[r]ecalling its finding that Karmoh Kanneh is a generally credible witness, the Trial Chamber accepts his testimony regarding the provision of $USD 10,000 by Taylor to Bockarie."[65] As such, the overall credibility rating of a witness was used by the Chamber to impute reliability to individual aspects of their evidence, irrespective, in some instances, of other evidence to the contrary. This cannot be reconciled with the requirement that a trier of fact determine whether the evidence (as opposed to the witness) is objectively reliable.[66]

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[62] *RUF* TJ, para. 487, citing *Brđanin* TJ, para. 25; *Delalić* AJ, paras. 491, 506.
[63] Judgement, para. 5921.
[64] Judgement, para. 4370.
[65] Judgement, para. 3951.
[66] *RUF* TJ, para. 487, citing *Brđanin* TJ, para. 25; *Delalić* TJ, paras. 491, 506.

48. This formulaic approach allowed the Chamber to skip over the step of determining whether a witness' evidence on specific issues and events in dispute was credible, by simply asserting that the evidence came from a "generally credible" witness.[67]

49. Moreover, if an aspect of a Prosecution witness' testimony had been challenged by the Defence, the Chamber would recall that the witness in question was "generally credible" to explain away inconsistencies and accept the evidence,[68] often with nothing more than "recalling that Kamara is a generally reliable witness, the Trial Chamber found this response credible and accepts Kamara's explanation."[69]

50. This approach was erroneous, particularly given that the Chamber's credibility formula was unsound. Having made its preliminary assessments, the Chamber went on to find on several occasions that some witnesses who had been characterised as "generally credible", were not only unreliable but had not told the truth in respect of certain events.[70] The Chamber then systematically failed to re-evaluate its assessment of credibility in the light of findings that could and should have had a major impact on overall credibility.[71] This constitutes the Chamber's third systematic error.

51. Take, for example, TF1-371, a "generally credible" witness as found by the Chamber.[72] Having relied on his evidence extensively, the Chamber was unable to accept TF1-371's testimony without doubt when he testified that Taylor participated in a meeting in March 1991 to plan the invasion of Sierra Leone.[73] Nor did the Chamber accept his testimony identifying Gullit as being present at a critical meeting in December 1998.[74] Despite these findings, the Chamber then reverted to its original credibility assessment, and went on to rely on the TFI-371 for significant adverse findings against the accused on the basis that he was "generally credible".[75]

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[67] See, for example, Judgement, paras. 2372, 2524, 2557, 2624, 2628, 2703-4, 2747, 2768, 3572, 3951, 4086, 4106, 4365, 4370, 4796, 5089, 5921, 5989, 6043, 6449.
[68] See, for example, Judgement, para 6092. See also paras. 2768, 2943, 3420, 3447, 3962, 4832, 5933, 6037, 6092, 6130, 6341.
[69] Judgement, para. 5933.
[70] See, for example, Judgement, paras. 2367, 2559, 2934, 2941, 2367-73, 3091, 3104, 3119, 3383-4, 3412, 4123-5, 4145-4146, 4377, 5090, 5384-5, 5384-5, 5395-6, 5975, 6548-52.
[71] See, for example, Judgement, paras. 3392, 3798, 3800, 4378, 4473-4474, 5381, 4950-4951, 5085, 5390-5394, 5398-5401, 6186-6187, 6403.
[72] Judgement, paras. 220-6.
[73] Judgement, para. 2373.
[74] Judgement, para. 3091.
[75] See, for example, Judgement, paras. 2754, 2885, 4611, 4796, 5089, 5928.

52. It is uncontroversial that a Chamber may find a witness to be credible and reliable about some aspects of his testimony, and not with respect to others.[76] The Chamber's error was in failing to re-calibrate its original credibility conclusion in light of findings that a witness was untruthful or unreliable on certain specific points. The Chamber would have committed no error had it assessed the credibility of each aspect of TF1-371's testimony regarding the relevant issue in question, instead of falling back on a finding of "generally credibility" and relying on that finding, irrespective of the specific issue under consideration. As such, the Chamber's approach of continuing to rely on evidence on the basis that the witness was "generally credible", having made findings to the contrary, is a wholly unsafe and erroneous approach to the assessment of evidence, and constitutes a failure to give reasons.

53. The errors identified above invalidate the Chamber's findings in respect of the credibility of the affected witnesses. How these errors affect the Chamber's specific findings requires a case-by-case evaluation, and is addressed as appropriate in Parts II and III below.

### iv. GROUND OF APPEAL 4: The Trial Chamber erred in law in pervasively and systematically reversing the burden of proof concerning material facts.

54. The presumption of innocence enshrined in Article 17(3) of the Statute and in customary international law imposes a continuous burden of proof on the Prosecution to prove all "findings required for conviction, such as those which make up the elements of the crime charged."[77] Each fact essential to conviction[78] must be proven "beyond a reasonable doubt," which means that the evidence must exclude any reasonable possibility to the contrary.[79] The latin maxim *in dubio pro reo* is a corollary of this principle.[80]

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[76] *RUF* TJ, para. 488, citing *Kupreškić* TJ, para. 333.
[77] *Limaj* AJ, para. 21. See *Bagosora* AJ, para. 17; *Bikindi* AJ, para. 11; *Blagojević* AJ, para. 8.
[78] *Delalić* TJ para. 599 ("It is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction. As a matter of common sense, therefore, the legal burden or proving all fact essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings").
[79] *CDF* AJ, para. 200 ("It is common place that a criminal tribunal may convict on circumstantial evidence provided that the only reasonable inference to be drawn from such evidence leads only to the guilt of the accused. When such evidence is capable of any other reasonable inference it is not reliable for the purposes of convicting an accused").
[80] *Galić* AJ, para. 77 ("The principle of *in dubio pro reo* dictates that any doubt should be resolved in

55. The precise language used in a judgement is the only way to determine whether, in its deliberations behind closed doors, the judges applied the correct burden of proof. Some inaccuracy of expression can be tolerated but "[i]n considering the manner in which the Trial Chamber applied the burden and standard of proof, the Appeals Chamber must start off by assuming that the words used in the Trial Judgement accurately describe the approach adopted by the Trial Chamber."[81] The boilerplate language used at the beginning of a trial judgement is often a poor indicator of the actual standard applied by the judges to the evidence; appellate review therefore requires a close examination of the language used and reasoning adopted in respect of specific factual findings. As the ICTR Appeals Chamber summarized its own jurisprudence on its way to overturning a conviction based on a misapplication of the burden of proof:

> The Appeals Chamber has recognized that language which suggests, *inter alia,* that an accused must "negate" the Prosecution's evidence, "exonerate" himself, or "refute the possibility" that he participated in a crime indicates that the Trial Chamber misapplied the burden of proof.[82]...

56. The Judgement is replete with such language. The language used sometimes deviates blatantly from the appropriate standard, whereas on other occasions the deviation is more subtle; on some occasions the error relates directly to an incriminating finding, whereas on other occasions the error relates to subsidiary findings that contribute to an incriminating finding. The error is so pervasive and systematic and it is impossible to disentangle proper from improper findings. Some of the following examples, which are in no way exhaustive, are explained with more context in Parts II and III below.

57. The Chamber's conclusion that the RUF had adopted a plan to drive to Freetown is based on several distinct misapplications of the burden of proof. First, the Chamber improperly discounts TF1-567's express evidence that he was told by Bockarie that the alleged Bockarie/Taylor plan involved only an offensive on Kono (rather than Freetown). The Chamber then asserts that "his evidence *does not negate the possibility*" that another plan, also allegedly concocted with Taylor, was discussed at another meeting.[83] The mere possibility that such a plan was discussed at another

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favour of the accused and encompasses doubts as to whether an offence has been proved at the conclusion of a case"); *Halilović* AJ, para. 109; *Delić* TJ, para. 24.

[81] *Musema* AJ, para. 209.

[82] *Zigiranyirazo* AJ, para. 19.

[83] Judgement, para. 3097.

meeting is not enough to discount TF1-567's evidence; the appropriate question is whether, viewed in conjunction with other evidence, it raised a reasonable doubt as to whether another plan actually *was* actually – not possibly – discussed, at that other meeting. The Chamber adopted the same approach in respect of another credible witness on the same issue, discounting Mohamed Kabbah's testimony that the objective of the offensive was Kono on the basis that "Kabbah was told about a plan with regard to his duties, which does not *negate the possibility* of a larger plan."[84] The "negate the possibility" standard – applied to two witnesses whom the Chamber itself deemed credible – sets a far higher threshold than "raise a reasonable doubt". The approach to these two witnesses led directly to the Chamber's finding that the "Bockarie/Taylor plan" included "Freetown as the ultimate destination," on the basis of which the Chamber convicted Taylor of planning all the crimes committed during that operation. This was an "essential fact" for the incriminating finding and the Chamber was not entitled to apply any standard less stringent than "beyond a reasonable doubt."

58. Time and again the Chamber states that evidence contrary to the Prosecution case did not "exclude the possibility",[85] "does not preclude and is not inconsistent with",[86] does not "raise a reasonable doubt as to the possibility",[87] does not "negate[] the possibility",[88] was not "conclusive of the non-occurrence"[89] of an event, was not "dispositive of whether [an event] did or did not occur",[90] was not "dispositive of the Accused's non-involvement or non-awareness",[91] that previous independent arms transactions by an alleged intermediary was not "inconsistent with the premise that after he was elected President, the accused wanted to ensure" the continuing arms

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[84] Judgement, para. 3098.

[85] Judgement, para. 3833 (evidence that Sankoh used forms of communication other than the NPFL radio netword "does not exclude the possibility that he also used the NPFL radio network to pass messages on to Bockarie").

[86] Judgement, para. 4091 (evidence of prior use of "herbalists" by the RUF "does not preclude and is not inconsistent with assistance by the Accused in the provision of this support").

[87] Judgement, para. 4466 (contrary evidence by other witnesses deemed insufficient to "raise[] a reasonable doubt as to the possibility that Taylor sent Keita to Sierra Leone").

[88] Judgement, para. 4467 ("The Trial Chamber does not find that this negates the possibility that the Accused sent Keita to Sierra Leone").

[89] Judgement, para. 4835 ("neither TF1-585's failure to personally see Jungle bring ammunition during 1997 nor the lack of reference in Exhibits D-009 or P-067 to Tamba supplying the RUF is conclusive of the non-occurrence of this event").

[90] Judgement, para. 4835.

[91] Judgement, para. 4956 ("The Trial Chamber does not consider the lack of co-operation amongst the intermediaries engaged in supply to be dispositive of the Accused's non-involvement or non-awareness").

trade,[92] did not "preclude the possibility that the Accused made arrangements" for an arms transaction,[93] or "would not have precluded" an alleged perpetrator from obtaining supplies allegedly provided by Taylor.[94]

59. The Chamber misdirects itself even more obviously on some occasions, adopting a "likely" standard to reach certain critical factual findings. In respect of a crucial finding discussed in more detail in Ground 23, the Chamber found that: "As there is no evidence that the Junta obtained further materiel after the Magburaka shipment in late 1997 or that the RUF/AFRC were able to capture a significant amount of supplies in the retreat from Freetown, *it is likely* that the only supplies that the retreating troops had access to were from the Magburaka shipment." Based on the fact being "likely", the Chamber concluded that it could "safely infer that the Magburaka shipment was used in 'Operation Pay Yourself' and subsequent offensives."[95] An even more direct finding was that it was "likely" that Bockarie's forces provided resupply of materiel to Gullit's forces during the withdrawal from Freetown in early 1999.[96] Ground of Appeal 8 discusses an example of the Chamber the Chamber making a finding that a fact was "likely" in the discussion of the evidence, and the simply adopting the fact as proven in its factual findings.[97]

60. The "likely" standard recurs repeatedly, if less explicitly, in respect of other findings based on circumstantial evidence. One important finding concerned how a particular arms shipment was used by the RUF. The Chamber correctly directed itself that "there is no direct evidence," but then announced without further explanation that it could "nonetheless infer that it was used by the AFRC and RUF forces under Bockarie's command in the course of their activities in the Kenema District, which included the commission of crimes in the area."[98] The Chamber conducted no analysis that this was the *only* reasonable inference, not merely a *possible*, or even a *likely*,

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[92] Judgement, para. 5322.
[93] Judgement, para. 5523 ("The fact that Sankoh met with Diendre in no way precludes the possibility that the Accused made arrangements for this particular arms transaction", referring to the Burkina Faso shipment on which the Chamber placed heavy reliance to convict Mr. Taylor of aiding and abetting).
[94] Judgement, para. 5663 ("While evidence suggests that Mingo did capture materiel from the Fitti-Fatta operation, this would not have precluded him from also taking the materiel given to him by Bockarie for the Fittia-Fatta mission").
[95] Judgement, para. 5551.
[96] Judgement, para. 5710 ("Having found that troops under Bockarie's command and Gullit's force made collaborative efforts to re-attack Freetown, including joint attacks on the outskirts of Freetown, the Trial Chamber considers it likely that the former also supplied the latter with additional ammunition").
[97] Judgement, paras. 3120, 3480, 3486, 3617.
[98] Judgement, para. 5558.

inference. Similarly, the Chamber found that "it is not implausible" that a particular supply of material lasted long enough to be used in the commission of a distinct set of crimes.[99] A third example involves a finding that the Chamber could "reasonably infer that it was used by SLA commanders" in particular operations.[100] An inference must be more than simply "reasonable"; is must the *only* reasonable inference.

61. The Chamber's misapplication of the standard of proof is so fundamental and pervasive, especially when viewed in conjunction with the other serious and systematic errors in the assessment of the evidence, that a dramatic remedy is required to preserve justice. The only appropriate remedy is that aptly described by the ICTR Appeals Chamber in similar circumstances:

> In reversing Zigiranyirazo's convictions for genocide and extermination as a crime against humanity, the Appeals Chamber again underscores the seriousness of the Trial Chamber's errors. The crimes Zigiranyirazo was accused of were very grave, meriting the most careful of analyses. Instead, the Trial Judgement misstated the principles of law governing the distribution of the burden of proof with regards to alibi and seriously erred in its handling of the evidence. Zigiranyirazo's resulting convictions relating to Kesho Hill and the Kiyovu Roadblock violated the most basic and fundamental principles of justice. In these circumstances, the Appeals Chamber had no choice but to reverse Zigiranyirazo's convictions.[101]

### v. GROUND OF APPEAL 5: The Chamber erred in law by disregarding the principle that substantial payments to witnesses, in itself, requires that their testimony be treated with caution.

*(i) Overview*

62. An number of Prosecution witnesses received substantial payments of money and other benefits as a result of their association with the Court. These payments came from the Prosecution's Witness Management Unit (WMU), or the Court's Witnesses and Victims Section (WVS),[102] or both. As acknowledged by the Chamber, some of these payments were made during periods in which there is no record of interviews with the Prosecution.[103] TF1-362 received 4,770 USD from WVS, 3,862 USD from WMU, and lived in a Prosecution safe house for months with her three children and sister, and received a mobile telephone, expenses for child care

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[99] Judgement, para. 5655 ("The Trial Chamber considers that in such circumstances, and accounting for captured materiel from military engagements, it is not implausible that the materiel lasted for several months until September and October 1998").
[100] Judgement, para. 5659.
[101] *Zigiranyirazo* AJ, para. 75.
[102] See Rule 34 of the Rules.
[103] Judgement, paras. 287 and 344.

and school fees.[104] This is just one example of many.[105] The issue of excessive payments and incentives to Prosecution witnesses was a recurring feature of the Defence case before the Trial Chamber.[106]

63. For the purposes of this Ground of Appeal, the propriety of these payments may be set aside for a moment.[107] What is being challenged is the Trial Chamber's assessment of the credibility witnesses that received substantial payments and benefits. Instead of treating the evidence of such witnesses with caution, the Chamber engaged in the speculative and fruitless exercise of trying to determine the extent to which payments and benefits coloured the testimony of the respective witnesses.[108] The impossibility of resolving this subjective question was an error which undermines all findings by the Chamber that rely on the testimony of these witnesses.

*(ii) The provision of payments and benefits requires automatic caution*

64. At the *ad hoc* Tribunals, significant payments or other benefits automatically give rise to caution in the assessment of a witness' credibility and the weight given to their evidence. Rather than burdening themselves with the impossible task of determining to what degree, if any, the evidence in question was influenced by the payments or benefits, Trial Chambers have consistently held that appropriate caution is to be applied when assessing the weight of such evidence. As discussed below, this caution does not automatically mean disregarding the testimony of the witness, particularly if, for example, the witness has been thoroughly cross-examined. However, on many occasions, Trial Chambers at the ICTY and ICTR have found significant doubt as to the credibility of witnesses who have incentives or motives (due to disproportionately high payments or benefits) to implicate an accused, and have declined to rely on their evidence when uncorroborated.

65. Two witnesses in the *Martić* case, MM-03 and MM-079, sought and received assistance from the Prosecution in the form of support for asylum applications. In its

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[104] Judgement, para. 250.
[105] Judgement, paras. 234, 236, 250-1, 260-2, 287, 309, 344, 357-8.
[106] Contempt Decision; Disclosure Decision relating to DCT-032; Disclosure Decision relating to DCT-097; See also, TT, 10 March 2011, pp. 49473 *et seq*; Defence Final Brief at paras. 23-26.
[107] See Ground 40, below.
[108] See, **for example,** Judgement, para. 234: 'The Trial Chamber does not find that these payments undermine his credibility'; para. 287: 'nor did [the payments] appear to influence his testimony'; para. 344: 'The Trial Chamber, while noting the questions about these payments, does not accept that they improperly influenced his testimony'; para. 357: 'The Trial Chamber finds that these payments (...) did not influence his testimony'.

Final Trial Brief, the Prosecution acknowledged that this assistance required the Trial Chamber to treat their evidence 'with care'.[109] The *Martić* Chamber held:

> The Trial Chamber notes that both Witness MM-003 and Witness MM-079 sought assistance from the Prosecution, which also provided such assistance to both witnesses. The Trial Chamber therefore considers that there is significant doubt as to the credibility of both witnesses and has consequently given weight only to the parts of their respective evidence which are corroborated by other evidence.[110]

66. The same caution has been consistently applied at the ICTR. In *Karemera,* the Trial Chamber held that excessive benefits do not *per se* constitute a ground for dismissal or striking the testimony.[111] However, such benefits must be considered when assessing the weight to be accorded to the testimony in question, as the credibility of the witness might have been affected to some degree by the benefits received.[112] In *Karemera*, the Chamber consistently viewed the evidence of the relevant witnesses as 'problematic', never relying on their testimony unless corroborated by other witnesses.[113]

67. In a similar vein, the *Bizimungu* Trial Chamber held that "the possibility that witness D is motivated to provide evidence favourable to the Prosecution in order to ensure continued benefits cannot be ignored."[114] The Chamber noted that the record showed no improper conduct by the Prosecution in relation to the witness in question. Nevertheless, the payments provided for the witness were significant. Therefore, the Trial Chamber placed his evidence under close scrutiny,[115] and none of the Chamber's findings were based solely on the evidence of the witness in question.

68. In *Zigiranyirazo,* the Trial Chamber determined that benefits such as direct payments, payment of relocation costs for the witness' family, and promises related to the venue of the witness' own trial required that the witness' testimony be viewed with caution.[116] The Chamber held that '[u]nder these circumstances [payments received from OTP], the Chamber considers it unsafe to accept Bagaragaza's uncorroborated hearsay testimony'.[117]

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[109] *Martić* TJ, paras. 36-7.
[110] *Martić* TJ, para. 38.
[111] *Karemera* Decision.
[112] *Karemera* Decision, para. 7. *Karemera* TJ, paras. 194-5; 249-50; 341-2; 437-8; 470-1; 495-6; 530-1; 591-2; 623-4; 701-2; 735-6; 878-9; 1281-2; 1331-2; 1352-3.
[113] *Karemera* TJ, para. 110.
[114] *Bizimungu* TJ, paras. 830-1.
[115] *Bizimungu* TJ, paras. 830-1.
[116] *Zigiranyirazo* TJ, para. 139.
[117] *Zigiranyirazo* TJ, para. 140.

69. The approach consistently adopted at the *ad hoc* tribunals strikes a measured and appropriate balance between the often legitimate need to provide assistance to witnesses, and the reality that this assistance may influence their testimony. The question of influence is entirely subjective, and invariablly subtle in the absence of an explicit confession from the witness; it may indeed be as subtle as an underlying (and even unconscious) feeling of loyalty on the part of the witness to his or her benefactor, which colours testimony given before the court. In an acknowledgement of the impossibility of determining whether (or to what extent) benefits have influenced witnesses, the *ad hoc* trial chambers have routinely and automatically viewed the evidence of such witnesses with caution. It is submitted that this is the correct approach, and it reflects the limits of trial chambers' ability to accurately determine the subjective motivation of witnesses.[118]

70. This issue has been considered previously by the SCSL. Responding to Defence concerns, the AFRC Trial Chamber found that 'witness protection' in the form of relocation did not automatically give rise to a 'reason to doubt' a witness' evidence.[119] The Chamber therefore did not give 'undue weight to these alleged 'incentives' when assessing the credibility of the witnesses in question'.[120] It is not being asserted that a trial chamber should give 'undue weight' to incentives, nor that protective measures should automatically require that a witness' testimony be disregarded. Rather, as is the practice in the *ad hoc* tribunals, caution should be applied. A reasonable trier of fact should ensure that factual findings rest on evidence capable of supporting these conclusions beyond a reasonable doubt. Applying caution to the testimony of witnesses who have received excessive and/or duplicative benefits, or declining to rely on such evidence unless corroborated, mitigates the risk of relying on witnesses whose evidence may have been affected by oftentimes life-altering payments or benefits.

71. When determining whether benefits and/or payments influenced the testimony of witnesses, the Chamber made the following conclusions:

- 'The Trial Chamber does not find that these payments undermine his credibility';[121]

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[118] *Martić* TJ, paras. 36-8; *Karemera* TJ, para. 110; *Bizimungu* TJ, paras. 830-1; *Zigiranyirazo* TJ, para. 139-40.
[119] *AFRC* TJ, paras. 128-9.
[120] *AFRC* TJ, para. 130.
[121] Judgement, para. 234.

- '...the Trial Chamber does not find that [allegations of excessive payments] undermine the credibility of [the witness]';[122]
- '...the nature of the information he provided to the Prosecution... does not appear to have been tailored in favour of the Prosecution as a result of those benefits';[123]
- 'While these amounts were significantly more than he had actually spent, the Trial Chamber accepts the testimony of the witness... that he did not testify for monetary gain.';[124]
- The payments did not 'appear to influence his testimony';[125]
- 'The Trial Chamber, while noting the questions about these payments, does not accept that they improperly influenced his testimony';[126]
- 'The Trial Chamber finds that these payments... did not influence his testimony'.[127]

72. These conclusions demonstrate the difficulties with the Trial Chamber's approach. A witness could well decide to give inculpatory testimony in order to ensure continued financial assistance, without any overt indication that this evidence was untruthful. It could be the case that payments did not 'appear' to influence testimony, but this misses the vital point. There is no basis on which the Chamber can safely make such a subjective determination. As such, viewing this testimony with caution is an appropriate middle ground, and one which the Chamber erred in not adopting.

*(iii) The Trial Chamber's error renders factual findings invalid*

73. The Chamber's error infects all findings in the Judgement which rely in whole or in part on the testimony of witnesses who had received the payments and benefits in question; namely TF1-360;[128] TF-362;[129] TF1-337;[130] TF1-532;[131] TF1-334;[132] TF1-579[133] and TF1-274.[134]

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[122] Judgement, paras. 250-1.
[123] Judgement, paras. 260-2.
[124] Judgement, para. 271.
[125] Judgement, para. 287.
[126] Judgement, para. 344.
[127] Judgement, para. 357.
[128] Judgement, para. 234.
[129] Judgement, paras. 250-1.
[130] Judgement, paras. 260-2.
[131] Judgement, paras. 270-1.
[132] Judgement, para. 287.
[133] Judgement, para. 344.

74. These were key witnesses for the Prosecution, and the Chamber relied on their evidence extensively in the Judgement, and many times without corroboration. The Trial Chamber erred in law in failing to treat the evidence of these witnesses with **any** caution despite the benefits and payments received; the errors render findings based on these witnesses unsafe, invalidate the Judgement,[135] and warrant the reversal of all such findings.

75. A similar scenario arose in *Nchamihigo*, albeit with a Prosecution witness who was an accomplice, rather than a recipient of payments. The Trial Chamber recalled that "the testimony of accomplices may be tainted by motives or incentives to falsely implicate an accused to gain some benefit or advantage in regard to their own case or sentence."[136] However, it then concluded that the witness did not have "any motive or incentive to falsely incriminate" Nchamihigo.[137] The Appeals Chamber held this finding to be patently unreasonable and overturned factual findings, in part, on this error.[138]

76. In consequence of the Trial Chamber's wholesale error in failing to treat the evidence of witnesses who received payments and/or benefits with caution, the Appeals Chamber is requested to overturn all factual findings and subsequent convictions that rely, in whole or in part, on the respective testimony of TF1-360; TF-362; TF1-337; TF1-532; TF1-334; TF1-579 and TF1-274.[139] Alternatively, the

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[134] Judgement, para. 357.
[135] Article 20(1)(b), Statute.
[136] *Nchamihigo* TJ, paras. 17, 214.
[137] *Nchamihigo* TJ, para. 214.
[138] *Nchamihigo* AJ, paras. 305, 309, 312-4.
[139] **TF1-360** – Judgement, paras. 2450-2451; 2454; 2457-2459; 2476; 2478; 2481; 2518; 2524; 2526; 2626; 2629; 2831; 2839; 2844; 2856-2857; 2863-2864; 2931; 2937; 2947; 2951; 3124; 3129-3130; 3370-3371; 3374-3375; 3382; 3385; 3387-3389; 3391; 3394-3397; 3399-3401; 3404; 3408-3409; 3413; 3416-3417; 3420; 3423-3424; 3428; 3434-3435; 3437; 3445; 3449-3450; 3452; 3455; 3462; 3473; 3478; 3481-3486; 3587; 3606; 3609; 3657; 3660; 3664; 3665-3666; 3726-3728; 3729-3730; 3783-3785; 3788; 3796; 3804-3805; 3909; 3914; 4062; 4065; 4068; 4086; 4092; 4094; 4148-4150; 4152; 4372; 4374; 4377-4378; 4382; 4388-4390; 4394-4396; 4943; 4946-4947; 4965; 5015; 5021; 5030-5031; 5189; 5191; 5220; 5224; 5395; 5398; 5400; 5403; 5406-5409; 5587-5588; 5591; 5593; 5620; 5629; 5631; 5632; 5652; 5660; 5666-5667; 5669; 5703; 5718; 5719-5721; 5825; 5827; 5832-5834; 5931-5934; 5946; 5947; 5971; 5975; 5977; 6041; 6043; 6057-6058; 6126; 6128; 6130; 6132; 6135; 6136-6137; 6183-6187; 6189; 6191-6192; 6222; 6231; 6285; 6288; 6399; 6403-6404; 6414; 6544-6546; 6659; 6663; 6749-6750; 6757; 6768; 6776; 6783-6784; 6790; 6792; 6878; 6886.
**TF1-362** – Judgement, paras. 2256; 2259; 2321; 2327; 2331; 2337; 4105-4108; 4109; 4167-4169; 4171; 4175-4176; 4555; 4566-4568; 4571-4573; 4579, 4581-4583; 4946-4947; 5717; 6768.
**TF1-337** – Judgement, paras. 2335; 2378-2379; 2384; 2390-2391; 2703; 2718; 4836-4838; 4845; 5815; 5825; 5832-5834; 6725; 6728; 6768.
**TF1-532** – Judgement, paras. 2320-2321; 2323-2329; 2331-2332; 2334; 2337; 2366-2367; 2378; 2390-2391; 2476-2478; 2480; 2481; 2553-2559; 2561; 2703; 2706; 2711; 2718; 2744-2745; 2747; 2753; 2831; 2838-2839; 2841-2842; 2844; 2853; 2857; 2863-2864; 2927; 2929; 2932;

Appeals Chamber is requested to overturn all factual findings and subsequent convictions that are based, in whole or in part, on the evidence of these witnesses, where not corroborated.[140]

## B. PART II: ERRORS WHICH INVALIDATE THE PLANNING CONVICTIONS

### a. INTRODUCTION

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2951; 3090; 3093; 3100-3101; 3107; 3116; 3119-3120; 3125; 3129-3130; 3369; 3371; 3375-3376; 3383; 3388; 3393; 3397; 3399; 3406; 3410-3412; 3417; 3437; 3447; 3464; 3466; 3480; 3481-3486; 3660; 3662; 3664; 3665-3666; 3832; 3834; 3906; 3910; 3914; 4065; 4068; 4147; 4152; 4385; 4394-4396; 4467; 4491; 4493-4495; 4833; 4842; 4844; 4845; 4946-4947; 4960; 4965; 5345; 5384; 5389-5390; 5394-5395; 5397; 5399; 5402; 5404; 5406-5408; 5511; 5513; 5515; 5525; 5527; 5546; 5554; 5559-5560; 5587-5588; 5591; 5593; 5621-5622; 5629-5631; 5632; 5702-5703; 5719-5721; 5820; 5826; 5832-5834; 5868-5869; 5873; 5874; 5923; 5931; 5948; 6188; 6191-6192; 6515; 6518; 6520; 6544; 6546 – 6547; 6656; 6659; 6663; 6761; 6764; 6768; 6772; 6776; 6790; 6792.

**TF1-334** – Judgement, paras. 2335; 2831; 2835-2839; 2841-2842; 2863-2864; 2933; 2944; 2951; 3091; 3106; 3121; 3123-3125; 3129-3130; 3370-3371; 3373-3375; 3382; 3385; 3388; 3394-3396; 3398; 3400-3401; 3403-3404; 3407-3409; 3411; 3413-3414; 3425-3426; 3428; 3435; 3437; 3445; 3450; 3454-3455; 3457; 3462; 3464; 3468; 3472; 3475; 3481-3486; 3659; 3665-3666; 3832; 3834; 3906; 3912-3913; 3914; 3979-3980; 3982; 4090; 4094; 4365; 4368-4373; 4375-4378; 4380; 4382; 4385; 4388-4393; 4394-4396; 4556-4560; 4562-4565; 4579, 4581-4583; 4946; 4957; 4965; 5384; 5389; 5395; 5397-5399; 5403; 5406-5409; 5581-5586; 5591-5592; 5593; 5652-5659; 5666-5667; 5706-5709; 5711; 5713; 5718; 5719-5721; 5742; 5752-5753; 5825; 5832-5834; 6341; 6343-6344; 6345; 6656; 6659; 6663; 6749-6750; 6759; 6761-6762; 6768; 6776; 6792.

**TF1-579** – Judgement, paras. 2386; 2390-2391; 2703-2706; 2711; 2715; 2718; 3915; 3918; 4723-4724; 4734; 4832; 4845; 4943-4946; 4953; 4955; 4960; 4962; 4965; 5192; 5195; 5826; 5832-5834; 5923; 5931; 5934; 5948; 6565-6566; 6745.

**TF1-274** – Judgement, paras. 2367; 2379-2380; 2387; 2390-2391; 2448; 2451; 2457-2458; 2626; 2629; 2765; 2769; 3100; 3110; 3129-3130; 3369; 3384; 3394-3400; 3405; 3410; 3413; 3416-3419; 3437-3438; 3440-3442; 3445-3447; 3449; 3451; 3454; 3456; 3464; 3473; 3478; 3481-3486; 3554-3556; 3562-3563; 3565; 3567-3568; 3571-3572; 3575; 3577-3578; 3587-3589; 3591; 3596; 3600; 3606, 3609; 3660-3661; 3665-3666; 3722; 3724; 3726; 3729-3730; 3783-3785; 3787-3788; 3795-3797; 3801; 3803; 3804-3805; 3832; 3834; 3840; 3842; 3855; 3862; 3856; 3868-3869; 3915; 3918; 3936; 3937; 4239-4240; 4247; 4248 (ix, xi); 4612-4613; 4800; 4802; 4843; 4943; 4946; 4948; 4965; 5008; 5014; 5021-5022; 5028; 5030-5031; 5123; 5126; 5128; 5130; 5316; 5325; 5329-5330; 5511; 5514-5515; 5519; 5527; 5587-5588; 5591; 5593; 5702; 5705; 5714-5716; 5719-5721; 5722(d); 5829; 5835(xi, xxxv); 6222; 6280; 6519; 6520; 6659; 6663; 6768; 6792.

[140] **TF1-360** – Judgement, paras. 2626; 2629; 3394-3397; 3399-3401; 3404; 3408-3409; 3413; 3416-3417; 3445; 3449-3450; 3481-3486; 3664; 3665-3666; 5587-5588; 5591; 5593; 5718; 5719-5721; 6183-6187; 6189; 6191-6192.

**TF1-362** – Judgement, para. 5717.

**TF1-532** – Judgement, paras. 3125; 3129-3130; 3383; 3399; 3447; 3481-3486; 3664; 3665-3666; 5587-5588; 5591; 5593; 6792.

**TF1-334** – Judgement, paras. 3394-3396; 3398; 3400-3401; 3403-3404; 3462; 3481-3486; 4388-4393; 4394-4396; 4556-4560; 4562-4565; 4579, 4581-4583; 5581-5586; 5591-5592; 5593; 5652-5659; 5666-5667; 5711; 5713; 5718; 6343-6344; 6345.

**TF1-274** – Judgement, paras. 2626; 2629; 2765; 2769; 3384; 3394-3400; 3405; 3410; 3413; 3416-3419; 3440-3442; 3445-3447; 3449; 3456; 3481-3486; 3554-3556; 3606, 3609; 3801; 3804-3805; 3936; 3937; 4612-4613; 4800; 4802; 5126; 5128; 5130; 5325; 5329-5330; 5587-5588; 5591; 5593.

77. The Chamber convicted Charles Taylor of "planning" crimes charged in the Indictment, on the basis that he and RUF commander Sam Bockarie allegedly formulated a plan to attack Kono and Kenema, with Freetown as the ultimate destination.[141] The Chamber reasoned that Mr. Taylor was therefore criminally responsible for crimes committed during and after the capture of Freetown, even though it made no finding that Mr. Taylor planned the commission of any concrete crime and was unable even to find that the operation he allegedly planned was carried out in reality.

78. This reasoning reflects two overarching errors. The first error arises from a misunderstanding of the *actus reus* of planning. The *actus reus* is designing the commission of a crime.[142] Convictions have therefore been based on the development of a design whose purpose was "the murder of Tutsis",[143] or the "wanton destruction of houses or other property" or "cruel treatment".[144] The Chamber did not find, and could not have found on the evidence, that Mr. Taylor planned the commission of any crime; it found only that he planned a military operation.[145] The significance of this error is discussed in Ground 11.

79. The second error arises from the fact that the alleged plan was never carried out. The RUF's offensives on Kenema and Freetown failed.[146] Freetown fell instead to AFRC troops commanded by Alex Tamba Brima (Gullit), who had launched their offensive from the north under the command of SAJ Musa, who refused to coordinate at all with the RUF. Gullit's troops entered Freetown; Gullit's troops took over the State House; and Gullit's troops were on the ground while the crimes were being carried out. This was uncontroversial.[147]

80. The Chamber nevertheless attributed Gullit's actions to Mr. Taylor by way of "planning". To do so, it overturned a crucial adjudicated fact (discussed in Ground 6 below),[148] and imputed responsibility to Mr. Taylor for a chain of events that surpasses any recognizable notion of "planning": (a) Sam Bockarie and Charles Taylor formed a military plan with Freetown as the ultimate destination; (b) Mr.

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[141] Judgement, paras. 3129, 3611(vi), 6961, 6971, 6994(b).
[142] *Nahimana* AJ, para. 479; *Limaj* TJ, para. 513. See also *Kordić & Čerkez* AJ, para. 26; *Brđanin* TJ, para. 268; *Krštić* TJ, para. 601; *Galić* TJ, para. 168.
[143] *Gacumbitsi* TJ, paras. 278.
[144] *Boškoski* TJ, para. 577.
[145] Judgement, paras. 3129, 3611(vi), 6961.
[146] Judgement, para. 3480.
[147] Judgement, para. 61, citing Judicial Notice Decision, Annex A, Facts 14, 15.
[148] Judgement, paras. 3377-8.

Taylor and Bockarie contemplated that SAJ Musa would participate in the plan, despite his direct refusal to do so; (c) SAJ Musa's death prompted communication between Gullit and Bockarie; (d) Gullit subsequently abandoned SAJ Musa's plan and adopted the "Bockarie/Taylor plan"; (e) Bockarie assumed effective command and control over Gullit; (f) a small contingent of RUF troops "joined up" with Gullit's troops in Freetown; (g) the "Bockarie/Taylor plan" underwent a "continuing evolution" to encompass Gullit's movements; and (h) Mr. Taylor was aware of the "evolving" plan through regular updates.

81. Grounds 7 to 13 discuss the significant evidentiary flaws affecting each of the links in this complicated factual chain. Given that these findings are interdependent, a reversal of one or more will undermine the Chamber's overall conclusion and warrant a reversal of the planning convictions.

82. Finally, Grounds 14 and 15 discuss the Chamber's error in failing to find that Mr. Taylor had the requisite *mens rea* for each of the 11 crimes for which he was convicted of having planned. Instead, the Chamber relied on a past awareness of crimes to infer intent for future crimes, and vague and uncorroborated evidence of alleged instructions from Mr. Taylor to conclude in a blanket manner that he intended to commit "crimes".[149] This was insufficient and incompatible with principles of individual criminal responsibility.

83. Planning is a straightforward mode of liability: responsibility arises when an accused plans to commit a crime which then occurs, and intends for it to be committed through the carrying out of the plan. Neither of these elements is present in the Chamber's reasoning: it could not find that Mr. Taylor planned any crimes, nor that his alleged plan was carried out. The Chamber's reasoning reflects errors of law that invalidate the Chamber's conviction and, to a lesser extent, errors of fact that could not have been made by a reasonable chamber, and that have occasioned a miscarriage of justice. In the presentation of these Grounds of Appeal, leave is sought from the Appeals Chamber to present Ground 9 before Ground 8 below.

b. **ERRORS RELATING TO PLANNING: GENERAL**

**i. GROUND OF APPEAL 6: The Trial Chamber erred in fact and law in finding that the Prosecution had successfully challenged the truth of**

[149] Judgement, para. 6969.

**Adjudicated Fact 15 from the AFRC trial, thus requiring the Trial Chamber's re-consideration of the matters in question.**

*(i) Introduction*

84. In March 2009, following the close of the Prosecution's case and prior to the start of the Defence case, the Chamber took judicial notice of fifteen adjudicated facts from the AFRC trial.[150] Adjudicated Fact 15 read as follows:[151]

> While the AFRC managed a controlled retreat [from Freetown]... RUF reinforcements arrived in Waterloo. However, the RUF troops were either unwilling or unable to provide the necessary support to the AFRC troops.

85. As such, having heard the Prosecution evidence, a majority of the Chamber took judicial notice of the factual conclusion from the AFRC trial,[152] that the RUF had not been part of the AFRC operation in Freetown of January 1999.[153] Justice Doherty dissented, noting this was a "central issue" in the present case.[154] The scope of the Defence case was determined, in part, in reliance on this adjudicated fact.

86. In the Judgement, however, the Chamber held that the Prosecution had sufficiently challenged the truth of the Adjudicated Fact 15 as to require the Trial Chamber's re-consideration.[155] The Prosecution's challenge was ostensibly presented in paragraph 540 of the Prosecution Final Brief.[156]

87. The Chamber's finding that the Prosecution could challenge an adjudicated fact after the close of the evidence, and without doing so expressly, diverges from established practice; is inconsistent with its original decision; and caused irreparable prejudice to Mr. Taylor by reversing a critical adjudicated fact without any opportunity to respond. These errors are examined below.

*(ii) The Trial Chamber erred in law in its articulation of the legal effects and procedural implications of taking judicial notice of an adjudicated fact pursuant to Rule 94(B)*

88. The Special Court has consistently relied on the approach adopted by the ICTR and ICTY Appeals Chambers in *Karemera*[157] and *Milošević*[158] that Rule 94(B)

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[150] Decision on Judicial Notice of AFRC Adjudicated Facts.
[151] Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 15 ("Adjudicated Fact 15").
[152] *AFRC* TJ, paras. 202, 206, 398.
[153] See, in particular, *RUF* TJ, para. 893.
[154] Decision on AFRC Adjudicated Facts, Separate and Partly Dissenting Opinion of Justice Teresa Doherty, para. 12.
[155] Judgement, paras. 3377-8.
[156] Judgement, para. 3378.
[157] *Karemera* Appeals Chamber Decision on Adjudicated Facts, para. 42, cited in Decision on Judicial Notice of AFRC Adjudicated Facts, para. 27. See also *RUF* Adjudicated Facts Decision, para. 18.

creates a well-founded presumption in favour of the proposed fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at trial.[159] Judicial notice of an adjudicated fact, according to these authorities, suspends evidential inquiry in favour of the fact, and provides an exemption from the necessity of adducing evidence on matters which are "at issue" between the parties.[160]

89. A party may, of course, challenge an adjudicated fact, but must "bring out the evidence in support of its contest *and* request the Chamber to entertain the challenge."[161] The issue may thereby be placed back on the table for the Chamber's consideration. The moving party, until that point entitled to rely on the adjudicated fact, is "provided with an opportunity to respond… and the Chamber will then decide on the matter."[162]

90. The Chamber followed this reasoning in its original *Decision on Judicial Notice of AFRC Adjudicated Facts,* pronouncing that judicial notice was "intended to streamline the Defence case" and expressly declaring that "in the event that the proposed adjudicated facts are judicially noticed, the Prosecution may have the option *to challenge them by cross-examining Defence witnesses or by calling rebuttal evidence.*"[163] The Defence relied on this pronouncement, expecting that if the Prosecution wished to challenge an adjudicated fact it would have to do so by adducing evidence. It did not do so.

91. Despite the absence of such a challenge, the Chamber accepted that an adjudicated fact could be challenged by submissions alone, relying on a decision of an ICTY trial chamber.[164] That Chamber pronounced that judicial notice of an adjudicated fact meant only that the "*fact* is *admitted into evidence,*"[165] rather than creating a rebuttable presumption of its truth.[166]

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[158] *Slobodan Milošević* Appeals Chamber Decision on Adjudicated Facts, p. 2, cited in Sesay Adjudicated Facts Decision, para. 18. Explicit reliance has also been placed on *Krajišnik* Adjudicated Facts Decision.

[159] Judgement, para. 210, citing Decision on Judicial Notice of AFRC Adjudicated Facts, para. 27; See also *RUF* Adjudicated Facts Decision, para. 18.

[160] *Slobodan Milošević* Separate Opinion on Adjudicated Facts, paras. 6-7; See also *Karemera* Appeals Chamber Decision on Adjudicated Facts, para. 42 ("the effect is only to relieve the [proposing party] of its initial burden to produce evidence on the point").

[161] *Krajišnik* Adjudicated Facts Decision, para. 17.

[162] *Krajišnik* Adjudicated Facts Decision, para. 17.

[163] Decision on Judicial Notice of AFRC Adjudicated Facts, para. 32.

[164] *Popović* Adjudicated Facts Decision, para. 21.

[165] *Popović* Adjudicated Facts Decision, para. 21, emphasis added.

[166] *Popović* Adjudicated Facts Decision, para. 21.

92. More recent ICTY jurisprudence has reaffirmed that judicial notice of an adjudicated fact creates a rebuttable presumption in favour of the fact. As the *Mladić* Chamber recently held:[167]

> The core issue is that, in taking judicial notice of an adjudicated fact, a Trial Chamber does not take notice of the evidence underlying this fact on which the previous Chamber established that fact. The presentation of contradicting evidence, if sufficiently relevant and probative to be considered pursuant to the criteria of Rule 89(C), is to be understood as a step to reopen the evidentiary debate on the fact the Chamber took judicial notice of. Therefore, if contradicting evidence is presented, and the proposing party still wishes to meet its burden of persuasion in relation to that fact, the Trial Chamber is invited to strike a balance between a judicially noticed *fact* and *evidence*. As facts in themselves cannot be weighed against contradicting evidence, in order to strike such a balance, the obvious way is to allow the proposing party to submit evidence in relation to the now challenged fact, which can then be weighed against the contradicting evidence. This restores a situation in which the Trial Chamber weighs evidence *pro* and *contra* the judicially noticed fact at issue and makes its own finding.

93. The procedural implications, according to the *Mladić* Chamber, are two-fold. First, taking judicial notice of a fact "relieves the proposing party of its initial burden to produce evidence on that fact".[168] The challenging party may then challenge the fact.[169] Second, "even if the challenging party notifies the proposing party of its intention to challenge certain judicially noticed facts, the proposing party may still rely on the legal effect of being relieved of its initial burden to produce evidence on the point, until the moment the challenging party puts the adjudicated fact into question by *introducing* evidence to the contrary."[170] The proposing party must then have an opportunity to present further evidence: "the legal effect of judicial notice would not serve its purpose if, when the challenging party presents contradicting evidence, such a presentation results in the eradication of the proposing party's possibility to then present its evidence in support of this fact."[171]

94. The approach adopted by the Chamber in the Judgement (i) deviated from its own decision taking judicial notice of adjudicated facts; (ii) deviated from established SCSL jurisprudence on judicial notice; and (iii) deviated from the predominant approach to adjudicated facts at the ICTR and ICTY. This legal error alone invalidates

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[167] *Mladić* Decision on Adjudicated Facts, para. 15.
[168] *Mladić* Decision on Adjudicated Facts, para. 13.
[169] *Mladić* Decision on Adjudicated Facts, paras. 16, 19.
[170] *Mladić* Decision on Adjudicated Facts, para. 17.
[171] *Mladić* Decision on Adjudicated Facts, para. 17.

the Chamber's findings concerning Mr. Taylor's alleged planning of the Freetown invasion and subsequent retreat, in addition to the further errors addressed below.

*(iii) The Trial Chamber erred in finding that the Prosecution could challenge an Adjudicated Fact in its Final Trial Brief*

95. The Chamber held, citing the Prosecution Final Trial Brief, that the Prosecution had sufficiently challenged the truth of Adjudicated Fact 15, requiring its reconsideration.[172] This was erroneous. Submissions are not "evidence", and the Prosecution was required to challenge the judicially-noticed adjudicated fact by adducing evidence to the contrary.[173]

96. A salutary aspect of the requirement that adjudicated facts be challenged by way of evidence alone is that this gives the party supporting the adjudicated fact an opportunity to rebut the evidence to the contrary.[174] As explained by the *Mladić* Trial Chamber, "the legal effect of judicial notice would not serve its purpose if, when the challenging party presents contradicting evidence, such a presentation results in the eradication of the proposing party's possibility to then present its evidence in support of this fact."[175] The methodology pursued by the Prosecution, and permitted by the Chamber, is worse than trial by ambush; it is the equivalent of an ambush after the battle is over.

97. Even assuming that the Chamber was entitled to find that a party could, as matter of law, challenge an adjudicated fact in this manner, no reasonable trial chamber could have found that the Prosecution did so.[176] Paragraph 540 of the Prosecution's Final Trial Brief reads:

> When the AFRC/RUF was unable to defeat ECOMOG forces defending the approaches to Freetown at Jui and Kossoh town, Issa Sesay gave an order for a small detachment of men to enter the city using a bypass to the south. He chose Idrissa Kamara, known as Rambo Red Goat, to lead the group because Kamara was an SLA soldier known to commanders inside the city, but the group itself included many RUF fighters. Issa Sesay confirmed in his testimony that the "Red Goat Batallion" was made up of RUF fighters.

98. The Chamber interpreted this paragraph as asserting that "RUF reinforcements sent by Bockarie arrived in Waterloo before Gullit retreated from Freetown and that

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[172] Judgement, para. 3378, fn. 7541.
[173] Decision on Judicial Notice of AFRC Adjudicated Facts, para. 32.
[174] *Krajišnik* Adjudicated Facts Decision, para. 17; *Mladić* Decision on Adjudicated Facts, para. 17.
[175] *Mladić* Decision on Adjudicated Facts, para. 17.
[176] Judgement, para. 3377.

they attempted and partially succeeded in connecting with the troops in the city".[177] The Chamber's interpretation is unwarranted. There is no mention in this paragraph of Bockarie, or any connection with Gullit's troops. The Chamber's reasoning is therefore unfounded, and compounds the errors identified above.

99. Even if it is assumed that this crucial paragraph of the Judgement has been carelessly drafted (a difficult assumption in light of the issuance of a corrigendum), and the Chamber in fact meant to refer to paragraphs 540 to 546 of the Prosecution Final Brief, the evidence cited therein comes from the Prosecution's own case. Insofar as that section makes reference to the testimony of Defence witness Issa Sesay, it examines his testimony predominantly for the purpose of discrediting it and thereby minimising its potential to detract from the Prosecution's evidence in chief.[178] This Prosecution evidence, therefore, had already been heard when the Chamber issued its decision taking judicial notice of the adjudicated fact in question.[179] Justice Doherty's dissent incontrovertibly demonstrates that a majority of the Chamber had already contemplated and rejected the evidence to the contrary.[180] The Prosecution's submission could in no way be interpreted as "*introducing* reliable and credible evidence to the contrary"[181] either through cross-examination of Defence witnesses, or through calling a case in rebuttal.[182] The Chamber was not entitled on this basis to overturn an adjudicated fact that it had itself recognized after the close of the Prosecution case.

*(iv) The Chamber's error caused irreparable prejudice to the Defence*

100. These errors caused irreparable prejudice to the Defence in two ways. Firstly, upon Adjudicated Fact 15 being judicially noticed, the Defence was entitled to rely (and did rely) on the legal effect of being relieved of its burden to produce evidence on this point. Judicial notice is a device that "provide[s] for an exemption from the

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[177] Judgement, para. 3378.
[178] Prosecution Final Brief, para. 544.
[179] *Slobodan Milošević* Final Decision on Adjudicated Facts, paras. 10-11. It found, as the facts in question pertained to areas of evidence already strongly challenged by the other party (in that case, the Accused) and upon which the other party had consistently cross-examined, judicially noticing them would not serve the interests of judicial economy: "attempts by an accused to rebut these facts may absorb considerable time and resources during the course of the proceedings, thereby not promoting judicial economy or expeditiousness"; See also *Mladić* Adjudicated Facts Decision, para. 18 ("[h]aving this specific information [of the precise nature of the challenge] enables the Chamber to determine whether, in this case, taking judicial notice would indeed serve judicial economy.")
[180] Decision on AFRC Adjudicated Facts, Separate and Partly Dissenting Opinion of Justice Teresa Doherty.
[181] *Karemera* Appeals Chamber Decision on Adjudicated Facts, para. 42.
[182] Decision on Judicial Notice of AFRC Adjudicated Facts, para. 32.

necessity to adduce evidence on matter which are "at issue between the parties"[183] and that an adjudicated fact is "put... into question by introducing reliable and credible evidence to the contrary."[184] Until such time as an adjudicated fact is challenged, "even if the challenging party notifies the proposing party of its intention to challenge certain judicially noticed facts, the proposing party may still rely on the legal effect of being relieved of its initial burden to produce evidence on the point, until the moment the challenging party puts the adjudicated fact into question by *introducing* evidence to the contrary."[185] As such, the Defence relied on the adjudicated fact to streamline its case.

101. Secondly, the Defence was deprived of any notice that Adjudicated Fact 15 was in contest. Had the Chamber applied the correct legal standard, the Defence would have been on such notice and have had the opportunity adduce additional evidence to confirm the adjudicated fact. To this end, it is worth noting the abundance of witnesses and evidence upon which SCSL Chambers have relied in order to consistently find that the RUF did not enter Freetown during the relevant period, which would presumably have also been available to Mr. Taylor to bring as evidence in the present case.[186] Crucially, in the absence of this Defence evidence, this error cannot be redressed on appeal.

102. This was not a harmless error. Having found that it could determine whether the RUF entered Freetown,[187] the Chamber then made an adverse finding against the accused. It found that a small contingent of RUF troops in fact reached Freetown, [188] and relied on this finding to conclude that the alleged "Bockarie/Taylor plan" "substantially contributed to the RUF/AFRC military attacks leading to and involving the Freetown Invasion, during which these groups committed the crimes charged in Counts 1 to 11 of the Indictment."[189] The Chamber's errors identified above invalidate this conclusion and warrant a reversal of the convictions on Counts 1 to 11 on the basis of planning the crimes committed during the invasion of and the retreat from Freetown between December 1998 and February 1999.[190]

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[183] *Slobodan Milošević* Separate Opinion on Adjudicated Facts, para. 7.
[184] *Karemera* Appeals Chamber Decision on Adjudicated Facts, para. 42.
[185] *Mladić* Decision on Adjudicated Facts, para. 17.
[186] *AFRC* TJ, paras. 202, 206, 398; *RUF* TJ, paras. 882, 884, 892, 893.
[187] Judgement, para. 3378.
[188] Judgement, paras. 3435, 3483, 3611(x), 6962.
[189] Judgement, paras. 6961-2, 6968.
[190] Judgement, paras. 6971, 6994(b).

*(v) The Chamber erred in fact in finding that the RUF was involved in the Freetown invasion*

103. Even assuming that these errors had not gravely prejudiced the Defence, the Chamber's conclusion that the RUF was involved in the Freetown invasion, (contrary to its own judicially noticed adjudicated fact), is one that no reasonable trier of fact could have reached on the available evidence.

104. The Chamber purported to rely on Bobson Sesay, Perry Karama, TF1-567,[191] TF1-375, and Exhibit P-149.[192] TF1-567, a "generally credible" RUF soldier,[193] testified that "we were unable to link up with the group in Freetown."[194] Exhibit P-149 is a memo from an Overall Intelligence Officer Commander to Issa Sesay, dated 21 January 1999, which reports that on 15 January 1999 "it was agreed that the men in Freetown and the men at our point were to do [*sic*] joint operation on Jui and Kosso town" but that "the Freetown men never turned up."[195]

105. TF1-375, Kamara and Bobson Sesay gave contradictory and divergent accounts of Rambo Red Goat's alleged entry into Freetown. Kamara testified that Rambo Red Goat came with 15 men, and that, rather than "joining up" with Gullit's troops, the two groups passed on Kissi Old Road when Gullit's troops were on their way out of Freetown. Rambo Red Goat stated that he had "not come to return" and decided (unlike the majority of Gullit's troops) to stay in Freetown.[196] Bobson Sesay, by contrast, testified that Rambo Red Goat came with "more than 50" men,[197] and that Gullit appointed the witness and others to receive this contingent in Allen Town and bring them to Ferry Junction, which he then did.[198] Their morale was high and everybody was happy, and together they joined the team at Eastern Police and advanced back to the State House, which was then recaptured.[199] The diametric opposition of the key elements of these two accounts deprives them of any corroborative character.

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[191] The Judgement cited an incorrect transcript date at fn. 7719.
[192] Judgement, para. 3434.
[193] Judgement, para. 3423.
[194] TT, TF1-567, 4 Jul. 2008, p. 12940.
[195] Exhibit P-149, p. 2.
[196] TT, Perry Kamara, 6 Feb. 2008, p. 3238.
[197] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8327.
[198] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8326.
[199] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8327.

106. Witness TF1-375, whose evidence the Chamber found must be considered with caution,[200] put the number of troops in Rambo Red Goat's group at 60 to 65, not 15, and testified that this group entered Freetown by way of a back road.[201] The witness offered no source for his hearsay information. The Chamber finds this testimony corroborative of that of TF1-371, who testified that Rambo Red Goat was successful in linking up with the AFRC troops.[202] TF1-371, who was not present in Freetown at the time, claims (without giving any source) that Rambo Red Goat's group "were able to resist for some time, and they came along with some of the prisoner and detainees at the Pademba Road Prison"[203] and then describes the combined group attacking at Waterloo and then retreating to Lunsar. TF1-371's account therefore contradicts both Kamara and Bobson Sesay as regards the movements of this contingent of anywhere between 15 and 65 men.

107. This was the only evidence in support of the Chamber's conclusion (different from that reached in both the ARFC and RUF trials)[204] that the small contingent led by Rambo Red Goat connected with Gullit's troops in Freetown. Given that these four witnesses gave vastly inconsistent accounts of this event, this conclusion was not one which a reasonable trial chamber could have reached.

108. More importantly, the Chamber heard virtually no evidence to support its finding that "these forces committed crimes charged in the Indictment."[205] Alimamy Bobson Sesay is the sole source for this claim,[206] but his evidence that Rambo Red Goat arrived with over 50 men consisting of a mix of SLA and RUF[207] is inconsistent with the evidence of Perry Kamara who testified that Rambo Red Goat was "the only man who could garner up to 15 manpower and they bypassed ECOMOG and came to Freetown and joined us."[208] The Chamber failed to address this. Moreover, once in Freetown, Bobson Sesay testified that Rambo Red Goat joined in with the Red Lion Battalion,[209] and the Chamber found that there was "no direct evidence" that members

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[200] Judgement, paras. 308-12.
[201] TT, TF1-375, 24 Jun. 2008, pp. 12608-12.
[202] Judgement, para. 3428.
[203] TT, TF1-371, 28 Jan. 2008, pp. 2427-8.
[204] *AFRC* TJ, paras. 202, 206, 398; *RUF* TJ, paras. 882, 884, 892, 893.
[205] Judgement, para. 6962.
[206] Only Alimamy Bobson Sesay testified about crimes that could be attributable to the forces led by Rambo Red Goat. See Judgement, paras. 806-7, 830, 2109, 2122, 2155, 2162.
[207] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8327.
[208] TT, Perry Kamara, 6 Feb. 2008, p. 3237.
[209] TT, Alimamy Bobson Sesay, 23 Apr. 2008, p. 8342; Perry Kamara, 6 Feb. 2008, p. 3238-9.

of this "Red Lion Batallion" committed crimes in Freetown.[210] No reasonable trier of fact, given the lack of corroboration, the diversity of descriptions, and the incriminating implications of the finding, could have drawn this conclusion. As such, the Chamber's finding that "these forces" committed "crimes charged in the Indictment"[211] is without a sufficient basis, warranting its reversal.[212]

109. In any event, the Chamber relied solely on Prosecution evidence to support its conclusion that a small contingent of RUF troops led by Rambo Red Goat, was able to join Gullit's troops in Freetown.[213] This is unsurprising, given the evidence of Defence witnesses that they did not.[214] This Prosecution evidence was before the Chamber when the majority judicially noted the fact that "the RUF reinforcements arrived in Waterloo, [but] were either unwilling or unable to provide the necessary support to the AFRC troops."[215] As such, the Chamber reviewed this evidence and concluded that the Prosecution had not brought forth sufficient evidence to make the question of whether RUF entered Freetown a point of serious contention, let alone that it had been proven beyond a reasonable doubt. These two conclusions are irreconcilable. The Chamber either erred in its *Decision on Judicial Notice of AFRC Adjudicated Facts*, or erred in the Judgement. A review of the evidence demonstrates that it was the latter.

110. The Chamber relied on this joining up of the undefined "small contingent" with Gullit's troops to conclude that the "Bockarie/Taylor plan substantially contributed to the RUF/AFRC military attacks leading to and involving the Freetown invasion", and thus held Mr. Taylor liable for planning the crimes charged in Counts 1 to 11 of the Indictment. [216] The Chamber's errors identified above invalidate this conclusion and warrant a reversal of the convictions on Counts 1 to 11 on the basis of planning the crimes committed during the invasion of and the retreat from Freetown between December 1998 and February 1999.[217]

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[210] Judgement, para. 4393.
[211] Judgement, para. 6962.
[212] An indication of the Chamber's lack of caution and care in relation to its factual findings is its failure to recognize that Bobson Sesay testified only that the crimes in Counts 1 through 3 were committed by these forces. The Chamber had no evidence at all that this force committed the crimes enumareted in Counts 4 through 11, and yet it entered a conviction against Taylor on all counts. Judgement, paras. 806-7, 830, 2122, 2155, 2162.
[213] Judgement, para. 3435, 3483, 3611(x), 6962
[214] Judgement, para. 3422.
[215] Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 15.
[216] Judgement, paras. 6961-2, 6968.
[217] Judgement, paras. 6971, 6994(b).

### c. ERRORS RELATING TO PLANNING: ACTUS REUS

### i. GROUND OF APPEAL 7: The Trial Chamber erred in fact and law in finding that Charles Taylor and Sam Bockarie jointly designed an attack on Kono, Makeni and Freetown.

*(i) Overview*

111. The Chamber found that in November or December 1998, Charles Taylor and Sam Bockarie planned a two-pronged military offensive on Kono and Kenema, with Freetown as the ultimate destination.[218] This plan, referred to throughout the Judgement as the "Bockarie/Taylor plan",[219] is the basis of Mr. Taylor's liability for "planning" in respect of the eleven crimes enumerated in the Indictment.

112. The Chamber heard no direct evidence about the making of this alleged plan. Bockarie died on 6 May 2003,[220] and Mr. Taylor denied that this plan was either made or that he knew of its existence.[221] All evidence concerning Mr. Taylor's alleged participation in formulating the plan came from the hearsay testimony of TF1-371, Issac Mongor, and Karmoh Kanneh as to what they were told by Bockarie. The probative value of the evidence therefore depends entirely on Bockarie's veracity and accuracy. The Chamber conducted no inquiry as to Bockarie's potential motivation for lying or exaggerating, despite such motivations being obvious. TF1-371's own testimony gives an abundant indication of Bockarie's motivation to lie, noting that he had improbably claimed to his commanders that "he [Bockarie] had been instructed by Taylor that no commander should contest his authority, otherwise they would be executed, conveying again that Taylor had given him authority."[222] The probative value of these three hearsay witnesses is diminished further by their numerous inconsistencies and contradictions.

113. On the basis of this extremely weak and unsatisfactory evidence, the Chamber made a directly incriminating finding: that Mr. Taylor had assisted Bockarie to plan an attack, on the basis of which Mr. Taylor was convicted of a wide range of crimes.[223] No reasonable trial chamber could have found that the evidence satisfied the burden of proof beyond a reasonable doubt, and no trial chamber as a matter of

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[218] Judgement, para. 3129.
[219] Judgement, paras. 3480, 3486, 3611(xiii), 3617.
[220] Exhibit D-46, p. 2.
[221] TT, Charles Taylor, 5 Aug. 2009, pp. 26050-1.
[222] Judgement, para. 2963.
[223] Judgement, paras. 3099, 3109, 3112, 3117, 3120, 3126-7 and 3129-30.

law could have convicted Mr. Taylor exclusively on the basis of an uncross-examined out-of-court statement, especially when that source had such an obvious motive to lie.

*(ii) The Chamber erred in relying on TF1-371, Karmoh Kanneh and Isaac Mongor's evidence on the events leading up to the December 1998 offensive.*

*(a) Introduction*

114. No reasonable trier of fact could have relied on the testimonies of TF1-371, Karmoh Kanneh and Isaac Mongor when their evidence is inconsistent and contradictory with respect to the events leading up to the December 1998 offensive, prior to the Freetown invasion. Some inconsistencies were addressed but deemed insignificant, and many inconsistencies were not addressed at all.

*(b) The Chamber failed to take appropriate caution in the assessment of the evidence of TF1-371, Karmoh Kanneh and Isaac Mongor*

115. The Trial Chamber held that TF1-371, Karmoh Kanneh and Isaac Mongor were all "generally credible" witnesses.[224] However, they are all accomplice witnesses, having been senior members of the RUF during the Indictment period.[225] As acknowledged by the Chamber, it was required to assess whether the accomplice has an ulterior motive to testify, and noted that it would generally look for corroboration or otherwise view the evidence with sufficient caution. [226] The Chamber erred in failing to do so.

116. The Chamber specifically criticised the evidence of Karmoh Kanneh with regard to his recollection of the events of 1998 concerning Operation Fitti-Fatta, stating "there are several elements of Kanneh's evidence which suggest that his recollection of the meeting [at Waterworks in spring 1998] may have been confused with other events occurring in 1998."[227] The Chamber then erred by unconditionally accepting Kanneh's evidence of later meetings in 1998 without reference to this confusion.

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[224] Judgement, paras. 226, 2704 and 274, respectively.

[225] There is no requirement that, in order to qualify as an accomplice, a witness must have been charged with a specific offence (Judgement, para. 182). The Trial Chamber noted that TF1-371 and Isaac Mongor are accomplice witnesses (Judgement, paras. 220 and 270, respectively). Furthermore, by their own admissions, Mongor, Kanneh and TF1-371 were accomplices in the December 1998 offensive: Mongor had the role of attacking Joru and advancing on to Zimmi (TT, Isaac Mongor, 11 Mar. 2008, pp. 5795-6); Kanneh had the role of attacking Segbwema and Daru (TT, Karmoh Kanneh, 9 May 2008, pp. 9426-7); TF1-371 was a member of the RUF, participating with Bockarie in the preparation of the offensive (TT, TF1-371, 28 Jan. 2008, pp. 2402-16).

[226] Judgement, para. 183. See also *Nchamihigo* AJ, paras. 305, 309, 312-4 (regarding the need for caution when assessing an accomplice's evidence).

[227] Judgement, para. 2941.

117. Further, despite the Chamber's finding that these witnesses were "generally credible", there are numerous and notable examples of when the Chamber declined to rely on their evidence elsewhere in the Judgement.[228] During the course of the evidence itself, Mongor and Kanneh had either previously lied[229] or were unclear[230] in their prior statements to the Prosecution of Mr. Taylor's role in the Freetown Invasion. Despite these factors which would reasonably give rise to scrutiny or caution being applied to their evidence, when it came to Mr. Taylor's involvement in the alleged plan, the Chamber accepted the testimony of all three witnesses without any reservation.

*(c) The Chamber erroneously relied on inconsistent accounts of the meetings held before Sam Bockarie left Buedu*

118. TFI-371, Karmoh Kanneh and Isaac Mongor provided inconsistent accounts of the meetings held prior to Bockarie's departure for Liberia and Burkina Faso. This evidence led to the findings that Mr. Taylor planned the offensive of December 1998.[231] The Chamber's failure to address the inconsistencies in the evidence relied upon therefore directly affects this finding.

119. Kanneh and Mongor both testified about a large Waterworks meeting before Bockarie left Buedu. Kanneh testified that the meeting occurred before Sani Abacha died,[232] around spring 1998,[233] and said that Bockarie left for Liberia and Burkina Faso that same month.[234] Kanneh then testified that the next Waterworks meeting was the senior officers' meeting at Bockarie's house on Bockarie's return.[235] Mongor, who attended the spring Waterworks meeting according to Kanneh,[236] testified that it

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[228] For example, the Chamber was "unable to accept TF1-371's testimony without doubt" when he testified that Taylor participated in a meeting in March 1991 to plan the invasion of Sierra Leone. TF1-371's assertion that Gullit was present at the Waterworks meeting in November/early December 1998 was also ignored. Mongor was not believed in respect of his evidence that JP Koroma contacted SAJ Musa to ask him run the operation to capture Freetown. The Chamber determined that, "in light of the evidence concerning related events", Mongor's evidence was "inaccurate". Further examples include: TF1-371: Judgement, paras. 2367-73, 3091, 4123-5, 5384-5, 6548-52; Karmoh Kanneh: paras. 2941, 3104, 5090, 5975; Isaac Mongor: Judgement, paras. 2367, 2559, 3119, 3383-4, 3412, 5384-5, 5395-6.
[229] See Judgement, para. 3101.
[230] See Judgement, para. 3110.
[231] Judgement, paras. 3090, 3099, 3112, 3129.
[232] TT, Karmoh Kanneh, 8 May 2008, p. 9393. Contradictingly, Kanneh stated in cross-examination that it happened after Sani Abacha's death (TT, Karmoh Kanneh, 13 May 2008, pp. 9678, 9687-8, 9689). However, the Chamber consistently summated that it was before Abacha's death (Judgement, paras. 2881, 2971).
[233] Judgement, para. 6526.
[234] TT, Karmoh Kanneh, 8 May 2008, pp. 9396-7.
[235] TT, Karmoh Kanneh, 9 May 2008, pp. 9416-9.
[236] TT, Karmoh Kanneh, 13 May 2008, p. 9689.

was in November, not spring, 1998.[237] He made no mention of a Waterworks meeting earlier in the year.

120. Kanneh and Mongor also point to different motivations and circumstances leading up to Bockarie's trip. Mongor explained how they sent a letter to Mr. Taylor asking for ammunition[238] and it was only when Bockarie had travelled to Monrovia around November 1998 that he informed his RUF colleagues that Taylor had made them "another connection": the President of Burkina Faso.[239] This is roughly consistent with TF1-371's account.[240] However, this cannot be reconciled with Kanneh's account that Bockarie informed the 600-strong group at the spring Waterworks meeting that the link with Blaise Compaoré to purchase arms was already in existence;[241] approximately six months before TF1-371 and Mongor knew about it. The Chamber brushed over some of these inconsistencies on the basis that neither TF1-371 nor Kanneh were asked how Mr. Taylor was initially contacted.[242] This specific question would not have been able to reconcile the fundamental differences in their recollections as outlined above. Moreover, the Chamber is not entitled in the exercise of its discretion to fill gaps in the Prosecution evidence by assuming that the witness' hypothetical answers would have done so.

121. The planning convictions were premised on the contextual evidence that Bockarie had arranged a trip to Burkina Faso to procure arms and ammunition, passing by Monrovia on the way there and back. The evidence of the meetings before Bockarie left is critical in establishing these events. Due to the inconsistencies in this evidence and the failure of the Chamber to address them, properly or at all, the Chamber reached a conclusion which was not open to a reasonable trier of fact.

*(d) The Chamber erred in failing to address contradictory evidence concerning Isaac Mongor's meeting with Sam Bockarie*

122. Mongor testified that he had a private meeting with Bockarie at his house in Buedu after Bockarie had returned from his Liberia/Burkina Faso trip on the evening before the Waterworks forum.[243] Bockarie explained to Mongor how he and Mr.

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[237] TT, Isaac Mongor, 11 Mar. 2008, pp. 5780-2.
[238] TT, TF1-532, 11 Mar. 2008, pp. 5781-2.
[239] TT, Isaac Mongor, 11 Mar. 2008, p. 5793.
[240] TT, TF1-371, 30 Jan. 2008, p. 2643.
[241] TT, Karmoh Kanneh, 8 May 2008, pp. 9396-7.
[242] Judgement, para. 5511 (the Trial Chamber considered this aspect of the evidence in the Burkina Faso Shipment section in Arms and Ammunition, as per para. 3090 of the Judgement).
[243] TT, Isaac Mongor, 11 Mar. 2008, pp. 5789-90.

Taylor planned the operation to capture Kono, Makeni, Freetown, Joru and Kenema together.[244] The plan entailed that Mongor attacked Joru and Zimmi, at which point he was to receive support from NPFL troops.[245]

123. Mongor claimed that no-one else was present at this private meeting. Therefore, there is no corroborative evidence as to its occurrence or contents. However, when comparing Mongor's account with other relevant evidence, numerous inconsistencies arise which the Chamber failed to consider. Firstly, as argued in Ground 9 below, Mongor's account of the plan, as told to him at this private meeting, encompassed three separate phases[246] as opposed to the two described by other witnesses at the meetings the day after, which the Chamber accepted.[247] Secondly, Mongor gave an account that involved the RUF receiving support from NPLF forces at Zimmi,[248] contradicting Kanneh's evidence that Bockarie explicitly rejected the idea of obtaining manpower support from Liberia at the "inner core" meeting the day after.[249] Thirdly, Bockarie apparently told Mongor that the weapons he had returned with were given to him by Mr. Taylor;[250] which cannot be reconciled with the Chamber's finding that the arms and ammunition came from Burkina Faso.[251]

124. Therefore, the Chamber erred in failing to consider relevant evidence and failed to address the inconsistencies identified above. A reasonable trier of fact, having regard to these significant inconsistencies, would not have been able to rely on the evidence of Mongor as to the content of this meeting or what Bockarie allegedly told him.

*(e) The Chamber erred in relying on contradictor evidence regarding the Waterworks and "inner core" meetings after Sam Bockarie returned*

125. The Chamber heard evidence about a number of meetings which were held upon Sam Bockarie's return. According to the deliberations of the Chamber,[252] these meetings occurred in the following sequence: (i) the meeting with Isaac Mongor the

[244] TT, Isaac Mongor, 11 Mar. 2008, p. 5795.
[245] TT, Isaac Mongor, 11 Mar. 2008, pp. 5795-6.
[246] TT, Isaac Mongor, 11 Mar. 2008, p. 5795.
[247] Judgement, para. 3129.
[248] TT, TF1-532, 11 Mar. 2008, pp. 5795-6.
[249] TT, Karmoh Kanneh, 13 May 2008, pp. 9726-7.
[250] TT, Isaac Mongor, 11 Mar. 2008, pp. 5794-5: "The ammunition which [Bockarie] brought, he told he had brought them from Liberia and that it was Mr Taylor who gave them to him."
[251] Judgement, para. 5527.
[252] Judgement, paras. 3089-128.

day prior to the Waterworks meeting,[253] (ii) the forum of commanders at Waterworks[254] and (iii) the "inner core" meeting at Bockarie's house.[255] Notably, the Chamber summated that the "inner core" meeting was convened **immediately after** the Waterworks forum[256] and, elsewhere in Judgement, **halfway**, through the briefing during the Waterworks forum.[257]

126. TF1-371 testified about both the Waterworks forum and the "inner core" meeting.[258] Karmoh Kanneh failed to mention the larger Waterworks forum,[259] testifying only about the "inner core" meeting[260] whereas Isaac Mongor completely skipped the "inner core" meeting and testified only about the Waterworks forum.[261]

127. Kanneh's and Mongor's failure to mention both meetings, particularly when one immediately followed the other (or was even overlapping) is such a crucial error that it undermines the reliability of their evidence. In failing to acknowledge either this inconsistency or its impact on both Kanneh and Mongor's evidence, the Chamber was in error. It also erred in concluding there were two successive (or overlapping) meetings despite relying on the evidence of two witnesses who only testified as to one.

*(f) The Chamber erred by finding that TF1-371 and Karmoh Kanneh were testifying about the same "inner core" meeting*

128. Regardless, the Trial Chamber determined that both TF1-371 and Kanneh testified about the same "inner core" meeting at Bockarie's house.[262] No reasonable trier of fact could find that TF1-371 and Kanneh were testifying about the same meeting, given their wholly different descriptions of events. The significance of this is vital; this is the meeting at which Bockarie allegedly told Kanneh that Mr. Taylor had

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[253] Judgement, para. 3093.
[254] Judgement, para. 3091.
[255] Judgement, paras. 3100-2. See also, Judgement, paras. 2963 and 5419.
[256] Judgement, para. 5419.
[257] Judgement, para. 2963.
[258] TT, TF1-371, 28 Jan. 2008, pp. 2405-16.
[259] Karmoh Kanneh actually explicitly stated that Bockarie **did not** convene a general meeting to tell them what he went to Burkina Faso for (TT, Karmoh Kanneh, 9 May 2008, pp. 9416-7).
[260] TT, Karmoh Kanneh, 9 May 2008, pp. 9418-9: "Q. Now, you said this second meeting that you held was after Sam Bockarie returned from Burkina Faso… Where was this meeting – this second meeting – held? A. At Sam Bockarie's house."
[261] TT, Isaac Mongor, 11 Mar. 2008, pp. 5789-802.
[262] Judgement, paras. 3102-4.

designed the plan[263] and allegedly told TF1-371 that Mr. Taylor instructed them to go to Freetown.[264]

129. Kanneh testified that the meeting was held at night specifically so that JP Koroma would not know about it.[265] Despite some uncertainty from Kanneh as to whether the meeting was held between 11 p.m. and 2 a.m., or between 9 p.m. and midnight,[266] the time of day was in no doubt. It was held at night. Indeed, according to him, after the meeting concluded, all the participants went to sleep.[267] The meeting TF1-371 testified about occurred around the afternoon; the "inner core" of participants were having lunch in Bockarie's bedroom.[268] After the "inner core" meeting, Bockarie had time to address the commanders who were outside of the house about his conversation with Mr. Taylor on the satellite phone, and the discussions held in the bedroom.[269] Instead of the participants all going to sleep, at the conclusion of the meeting the commanders began preparing for their various assignments and Bockarie gave instructions for the S4 to distribute materials.[270] On this alone, it is evident that they were not talking about the same meeting. Consequently, no reasonable trier of fact could have considered the discrepancy as to the time of day of the meeting to be insignificant.[271]

130. Kanneh and TF1-371 also differed dramatically as to who attended the "inner core" meeting. TF1-371 testified that Isaac Mongor was present,[272] while Kanneh testified he was not.[273] TF1-371 made no mention of Kanneh's presence at any of these meetings, and Mongor himself made no mention of any "inner core" meeting nor of Kanneh's presence at any meeting he attended.

131. Furthermore, TF1-371 and Karmoh Kanneh also have a fundamentally different perception of the format of the meeting. While Kanneh did not distinguish between different parts of the meeting,[274] TF1-371 split the meeting into at least two parts: (i) the meeting outside of Bockarie's house where Bockarie briefed the larger

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[263] TT, Karmoh Kanneh, 9 May 2008, p. 9424.
[264] TT, TF1-371, 30 Jan. 2008, pp. 2640-2.
[265] TT, Karmoh Kanneh, 9 May 2008, p. 9429.
[266] TT, Karmoh Kanneh, 9 May 2008, p. 9429, 9433; 13 May 2008, pp. 9694-5.
[267] TT, Karmoh Kanneh, 9 May 2008, p. 9437.
[268] TT, TF1-371, 28 Jan. 2008, pp. 2412-4.
[269] TT, TF1-371, 28 Jan. 2008, p. 2414.
[270] TT, TF1-371, 28 Jan. 2008, p. 2414.
[271] Judgement, para. 3104.
[272] TT, TF1-371, 28 Jan. 2008, p. 2410.
[273] TT, Karmoh Kanneh, 13 May 2008, pp. 9707-8.
[274] TT, Karmoh Kanneh, 9 May 2008, p. 9424-30.

group of commanders about the offensive[275] and (ii) the lunch meeting inside of Bockarie's bedroom attended by TF1-371 and five or six others.[276]

132. Kanneh made no mention of whether he was a part of the outside meeting or the bedroom lunch meeting. On the basis that the Trial Chamber accepted Kanneh's testimony of Bockarie calling Mr. Taylor during the meeting, it is implied that Kanneh was present for the bedroom lunch meeting (despite it being late at night, according to him), during which it was said by TF1-371 that this call occurred. However, TF1-371 did not mention Kanneh to be a part of either the outside meeting or the smaller bedroom lunch meeting, despite identifying virtually all the attendees by name.

133. Perhaps as a result of the confusion in the record, the Chamber itself gives an inconsistent account of the timing of the satellite phone call, at one point placing it at the end of the Waterworks meeting, [277] rather than at the inner core meeting.[278]

134. Despite previously having given an inconsistent account to the Prosecution as to how many were at the meeting, Kanneh testified that approximately twelve people were present.[279] Before being confronted with his prior inconsistent account, he stated that all twelve people at the meeting were on the veranda when Bockarie made the call to Mr. Taylor.[280] Not only does this differ from TF1-371's account that there were only about half the number of people at the meeting at which Bockarie placed the call to Mr. Taylor (nearly all identified by TF1-371),[281] it is also TF1-371's recollection that they remained in the bedroom when Bockarie went to the veranda to make the call to Mr. Taylor.[282]

135. The inconsistencies do not end there. Kanneh, who claimed to have been present during the telephone call, said that Bockarie and Jungle told Mr. Taylor about the plan being made and accepted by the senior RUF officers at the meeting.[283] Whereas TF1-371 testified that Bockarie returned to the bedroom and said that Mr. Taylor instructed them to go to Freetown so as to force the government to negotiation

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[275] TT, TF1-371, 28 Jan. 2008, p. 2411.
[276] TT, TF1-371, 28 Jan. 2008, pp. 2412-3.
[277] Judgement, para. 6958.
[278] See Judgement, para. 3102.
[279] TT, Karmoh Kanneh, 13 May 2008, pp. 9700-8.
[280] TT, Karmoh Kanneh, 9 May 2008, p. 9435.
[281] TT, TF1-371, 28 Jan. 2008, pp. 2412-3, 2415 (Jungle was also present).
[282] TT, TF1-371, 28 Jan. 2008, pp. 2412-3.
[283] TT, Karmoh Kanneh, 9 May 2008, p. 9435-6.

and supposedly gave Bockarie the authority to execute commanders who contested his command over the operation.[284]

136. Furthermore, the Chamber failed to address the evidence of "generally credible" witness Mohamed Kabbah,[285] which undermines TF1-371 and Kanneh's evidence that Bockarie spoke to Mr. Taylor via satellite phone on the veranda. Kabbah's evidence, relied upon elsewhere in the Judgement,[286] was that when in Buedu, Bockarie had to drive to "the hill" where there was satellite coverage, in order to use the satellite phone (which itself necessitated forewarning Mr. Taylor via radio that Bockarie was about to use the satellite phone).[287] Kabbah's testimony renders it implausible that Bockarie could have both conducted his call to Mr. Taylor within 15 minutes[288] and conducted it on the veranda of his house.[289] In any event, the fact remains that the number (and significance) of the inconsistencies as between Kanneh and TF1-371's testimony makes it impossible to accept that they were describing the same meeting.

137. The Chamber noted "some inconsistencies in the testimony of TF1-371 and Karmoh Kanneh with respect to this meeting".[290] It then referred to three.[291] The Chamber then concluded that it "does not consider these inconsistencies to be significant."[292] The Chamber did not refer to inconsistencies as between (a) the identity of the attendees, (b) whether the meeting was split between Bockarie's bedroom and outside, (c) the number of people present, (d) the content of Bockarie's satellite telephone call to Mr. Taylor, (e) what the participants did after the meeting and (f) TF1-371's failure to account for Kanneh at any of the meetings, including the small bedroom meeting.

138. The Chamber was free to disregard the testimony of Kanneh and accept the testimony of TF1-371, or vice versa. However, the Chamber does not have unfettered discretion in this assessment; there has to be consistency in the way in which it approaches Prosecution and Defence evidence. For instance, Martin George was contradicted by other witnesses on his testimony that Issa Sesay did not attend the

[284] TT, TF1-371, 28 Jan. 2008, pp. 2412-3.
[285] Judgement, para. 338.
[286] Judgement, para. 3555.
[287] TT, Mohamed Kabbah, 15 Sept. 2008, pp. 16176-7.
[288] TT, TF1-371, 28 Jan. 2008, p. 2412; TT, Karmoh Kanneh, 9 May 2008, p. 9437.
[289] TT, Karmoh Kanneh, 9 May 2008, p. 9435; TT, TF1-371, 28 Jan. 2008, p. 2412.
[290] Judgement, para. 3104.
[291] Judgement, para. 3104.
[292] Judgement, para. 3104.

meeting at Waterworks. As a result, the Chamber did not find his evidence to be credible.[293] However, when TF1-371 stated that Gullit was at the same Waterworks meeting, which is also contradicted by other witnesses, this did not affect his credibility.[294]

139. The Chamber's approach of either ignoring or minimizing the flagrant and numerous inconsistencies of Prosecution evidence and finding the testimonies of TF1-371 and Kanneh to be corroborative was not one which a reasonable trier of fact could have reached. In light of the multitude of inconsistencies in the evidence of TF1-371 and Karmoh Kanneh about vital and memorable details, the Chamber's finding that Bockarie returned to Buedu with a plan that he had drawn up with Mr. Taylor,[295] based on TF1-371's and Kanneh's evidence of what Bockarie told them in smaller meetings at Bockarie's house,[296] and that Mr. Taylor was briefed on the meeting from Buedu by satellite phone,[297] was manifestly erroneous.

*(iii) The Chamber erred in accepting accounts of the plan that are inconsistent and contradictory*

140. The Trial Chamber found that "the plan presented at the Waterworks meeting was for a two-pronged attack on Kono and Kenema, with Freetown as the ultimate destination."[298] The Trial Chamber failed to address the inconsistencies of the witnesses on which it relies.

141. Prosecution witnesses differed as to which commanders were responsible for the two operational flanks. No fewer than five different commanders were associated with the command of the southern prong of the offensive. Kanneh claimed that he was given the role of taking Segbwema and Daru on the southern flank,[299] Mongor said that he was tasked with the role of taking Joru and Zimmi on the southern flank.[300] TF1-371 said that Bockarie had assigned Akim Turray and Momoh Rogers to take the Kenema, Bo and Masiaka on the southern flank. None of the witnesses corroborated

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[293] Judgement, para. 3094.
[294] Judgement, para. 3091.
[295] Judgement, para. 3109.
[296] Judgement, para. 3100.
[297] Judgement, para. 3112.
[298] Judgement, para. 3099.
[299] TT, Karmoh Kanneh, 9 May 2008, pp. 9426-7.
[300] TT, Isaac Mongor, 11 Mar. 2008, pp. 5795-6. Superman was also considered but was too far away in Koinadugu District at the time.

each other's claims and Augustine Mallah contradicted TF1-371 by stating that Akim was instructed by Bockarie to attack Kono and Tongo on the northern flank.[301]

142. As noted above, Kanneh and Mongor provided conflicting accounts on whether the RUF were to receive manpower support from the NPFL,[302] There are further serious contradictions between the evidence of Kanneh and Mongor concerning the plan. Kanneh testified that Bockarie called SAJ Musa after the meeting at Bockarie's house and asked him to attack Freetown, but SAJ Musa unequivocally refused and a heated argument ensued.[303] Mongor testified that, following a discussion at the meeting of his involvement, SAJ Musa was contacted, accepted the request, and agreed to run the operation.[304]

143. Faced with these two conflicting versions, the Chamber found Mongor's account as being "inaccurate" on the basis that his account stemmed from an un-named radio operator.[305] However, the Chamber failed to explain the inconsistency between Mongor's first-hand evidence that it was agreed that it would be JP Koroma who would contact SAJ Musa[306] and Kanneh's first-hand evidence that Bockarie contacted SAJ Musa,[307] specifically to avoid JP Koroma's involvement.[308] It also ignored the evidence of TF1-371 who made no reference to a discussion among the participants to approach SAJ Musa, or to SAJ Musa's refusal (or agreement) to be involved.[309]

144. Perhaps one of the most memorable aspects of an operation is its name, usually symbolizing an overarching objective or target. Yet, none of the witnesses could agree as to the name of the December 1998 offensive. Kanneh called it Operation Free the Leader.[310] TF1-371 said that Operation Free Sankoh was the name of the in-house plan of the RUF to free Sankoh after his death sentence was announced,[311] but also said that Operation Spare No Soul was the name of the operation to free Sankoh.[312] However, Mongor said that Operation Spare No Soul was

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[301] TT, Augustine Mallah, 13 Nov. 2008, p. 20223.
[302] Compare TT, Karmoh Kanneh, 13 May 2008, pp. 9726-7 with TF1-532, 11 Mar. 2008, pp. 5795-6.
[303] Judgement, para. 3118.
[304] Judgement, para. 3119.
[305] Judgement, para. 274.
[306] TT, Isaac Mongor, 11 Mar. 2008, pp. 5799-800.
[307] TT, Karmoh Kanneh, 9 May 2008, pp. 9425-6.
[308] TT, Karmoh Kanneh, 9 May 2008, p. 9429.
[309] Judgement, paras. 2958-70.
[310] TT, Karmoh Kanneh, 8 May 2008, p. 9398; 13 May 2008, p. 9734.
[311] TT, TF1-371, 30 Jan. 2008, p. 2649.
[312] TT, TF1-371, 28 Jan. 2008, p. 2401.

an operation led by Morris Kallon to take the town of Njaima Nimikoro in the Kono District.[313] TF1-371 also referred to the names Operation No Bush Shake, which no other witness has mentioned and Operation Spare No Living Thing,[314] which was a name coined by Bockarie – not Mr. Taylor.[315] With no agreement on such an elementary aspect of the plan, serious doubts arise as to the credibility and/or reliability of the other evidence of these witnesses concerning the alleged plan.

145. The military plan found by the Chamber was signifant, encompassing multiple targets and the invasion of a capital city. The utter improbability that such a plan would exist only in oral form also further undermines the credibility of the evidence from these three witnesses. A military plan is not verbally created and then memorised, it would entail the creation of a paper trail; of maps, documents concerning the chain of command, logistics, intelligence, and operational orders. The Chamber did not hear any evidence that such a written account of the plan existed, nor did the Prosecution produce any documentary evidence of this kind. This further calls its existence into question.

*(iv) The Chamber erred in systematically failing to assess the reliability of the source of hearsay*

146. The Trial Chamber also erred in failing to assess the reliability of the source of hearsay evidence, ignoring Defence arguments in its Final Trial Brief emphasising the importance of establishing the reliability of hearsay evidence.[316] The jurisprudence and arguments regarding the importance for the Chamber to assess the reliability of the source of hearsay have been detailed in Ground 2 and are incorporated here as if set out in full. The specific error in relation to planning in this instance is the Chamber's failure to assess the reliability of Sam Bockarie, who is the source of the hearsay for TF1-371, Kanneh and Mongor.

147. Bockarie might not have been truthful to the witnesses as to Mr. Taylor's involvement in the plan for many reasons. He might have told the witnesses different things, which might explain some of the inconsistencies between their evidence. For example, it is not disputed that Mr. Taylor, as president of Liberia, was viewed as an authoritative figure in West Africa, as a successful leader of a revolution in Liberia that resulted in his legitimate appointment to power. By contrast, this was a

[313] TT, Isaac Mongor, 11 Mar. 2008, pp. 5752-3.
[314] TF1-371, 28 Jan. 2008, pp. 2412-3; 30 Jan. 2008, p. 2643.
[315] TF1-371, 30 Jan. 2008, pp. 2649-50.
[316] Defence Final Brief, paras. 81 and 1391.

particularly critical period for the AFRC/RUF; the junta had failed to stay in power and there had been serious fractures amongst their ranks, with different groups operating independently. Yet, the success of their mission to free Sankoh and capture Freetown relied on Bockarie exercising effective and unchallenged command over all the troops, especially those who had split away such as SAJ Musa's group. By claiming that a plan was designed with Mr. Taylor, Bockarie lent a great deal of credence to his plan allowing him to compel SAJ Musa to submit to his command[317] and pronounce, for instance, that he had the authority to execute anyone who contested his command. [318]

148. This is just one of many possible motivations for Bockarie to falsely draw Mr. Taylor into the story he presented to the RUF/AFRC troops assembled in Waterworks. The failure of the Trial Chamber to consider any possibility other than Bockarie telling the absolute and whole truth renders its finding unsafe. Moreover, these three witnesses claim to have been told about Mr. Taylor's alleged involvement from the same source; Sam Bockarie. As such, even had their evidence been consistent and corroborative, it would only have been corroborative of Bockarie's hearsay statement of Mr. Taylor's involvement, and not of Mr. Taylor's involvement itself.

*(v) Conclusion*

149. TF1-371, Karmoh Kanneh and Isaac Mongor were relied on to link Mr. Taylor to Bockarie, through an alleged military plan. Their evidence, as laid out above, is inconsistent and contradictory. The Trial Chamber erroneously dismissed many of these inconsistencies as insignificant,[319] which is a finding that no reasonable trier of fact could have reached. In many cases, it failed to address or acknowledge the inconsistencies at all, which is an error.

150. The evidence detailing the plan suffers from the same flaw; without a clear picture of what the plan entailed, it was impossible for the Chamber to safely conclude what plan could have been designed by Mr. Taylor in Monrovia. The Chamber also erred by failing to consider the reliability of the source of the hearsay; namely, Sam Bockarie, who is the single source of all the evidence directly implicating Mr. Taylor with regard to the plan.

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[317] TT, Karmoh Kanneh, 9 May 2008, pp. 9425-6.
[318] TT, TF1-371, 28 Jan. 2008, pp. 2412-3.
[319] Judgement, para. 3104.

151. The errors identified above both invalidate and warrant the quashing of the finding that in November 1998, Mr. Taylor and Sam Bockarie jointly designed a two-pronged attack on Kono and Kenema with Freetown as the ultimate destination.[320] Consequently, the Appeals Chamber should reverse the convictions on Counts 1 to 11 for planning the attacks on Kono and Makeni and the invasion of and retreat from Freetown between December 1998 and February 1999.[321]

**ii. GROUND OF APPEAL 9: The Trial Chamber erred in fact and law in finding that the "Bockarie/ Taylor plan" had Freetown as the "ultimate destination".**

*(i) Overview*

152. The Chamber accepted evidence that the alleged "Bockarie/Taylor plan" included an advance on Freetown. It also accepted evidence that it did not. As such, the Chamber's conclusion cannot be reconciled with its own factual findings, particularly in the absence of any reasons for preferring inculpatory evidence over evidence more favourable to Mr. Taylor.

*(ii) The Chamber erred in relying on contradictory evidence as to the locations encompassed by the alleged plan*

153. The Chamber relies on the testimony of TF1-371, Isaac Mongor, Karmoh Kanneh and TF1-585 as to the locations encompassed by the alleged plan, and concluded that "the plan presented at the Waterworks meeting was for a two-pronged attack on Kono and Kenema, with Freetown as the ultimate destination."[322]

154. The testimonies relied upon are insufficiently corroborative to underpin this finding. The itinerary of the alleged operation is a critical (and undoubtedly memorable) material fact. Each of the four witnesses gives a different version. With the devil being in the detail, the Chamber's summaries in the Judgement brush over the following significant discrepancies.

155. Rather than a two-pronged attack, Isaac Mongor identifies three separate phases: "[Bockarie] came with a plan for us to launch an operation whereby we'll capture Kono, Makeni and advance to Freetown. And we were **also** to attack Joru. So those were the areas we were to capture. We were also to launch **another attack** on

[320] Judgement, para. 3129.
[321] Judgement, paras. 6971, 6994(b).
[322] Judgement, para. 3099. See also Judgement paras. 3127, 3129, 3615.

Kenema. We were to attack Kenema as well."[323] TF1-585 talks of one prong of attack, namely "a uniform mission… after they and SAJ would have cleared up Kono they should go to Kabala, and from Kabala they should proceed to Freetown".[324] While Karmoh Kanneh and TF1-371 identify two phases, their locations do not match up. Kanneh testified that "the first target should be Kono, to Makeni, up to Freetown, and the next target should be Segbwema and Daru, that is heading towards Kenema and to go to the southern province."[325] TF1-371 testified "Issa Sesay and Kallon were given the mission to attack Koidu and move to Makeni and from Makeni they were supposed to head for Lunsar, Masiaka as a meeting point for the other flank that would have moved from Kenema, Bo and subsequently to Masiaka and onwards to Waterloo and then to Freetown."[326]

156. The Trial Chamber formulated the alleged plan in general terms, perhaps in an attempt to encompass these divergent versions and sidestep the inconsistencies between the different witness accounts. Key differences in the testimonies of the four witnesses, however, deprive them of any corroborative character. The Chamber accordingly erred in reaching a conclusion not supported by the evidence, and/or in failing to give sufficient reasons as to why this evidence is corroborative.

*(iii) The Chamber erred in concluding that the plan included an advance on Freetown having accepted evidence that it did not*

157. The Chamber's conclusion that the alleged "Bockarie/Taylor" plan had Freetown as the ultimate destination suffers from a second flaw. Three witnesses testified that the discussion at the Waterworks meeting did not include an advance on Freetown.[327] The Chamber explicitly rejected this evidence. [328] A fourth witness said that Bockarie returned from Monrovia with a plan to attack Kono and other mining areas,[329] while a fifth had been told that the Waterworks meeting participants discussed an attack on Kono and Makeni. [330] Their evidence is also discounted as not negating the possibility that the plan for Freetown was also discussed. [331] However,

[323] TT, Isaac Mongor, 11 Mar. 2008, p. 5795 (emphasis added).
[324] TT, TFI-585, 8 Sept. 2008, p. 15700.
[325] TT, Karmoh Kanneh, 9 May 2009, p. 9424.
[326] TT, TF1-371, 28 Jan. 2008, p. 2411.
[327] Judgement, paras. 3094-6.
[328] Judgement, paras. 3094-6.
[329] Judgement, para. 3097.
[330] Judgement, para. 3098.
[331] Judgement, para. 3098.

the Chamber accepted the testimony of three other witnesses, none of whom testified that Freetown was the ultimate goal.

158. Augustine Mallah, who the Chamber found had attended the meeting at Waterworks, testified the plan had been for the 1st brigade to attack towns up to and including Kenema, while another group would attack Kono and advance towards Makeni.[332] His recollection of the plan did not include Freetown. Abu Keita, who had also been at the meeting, testified that Bockarie told the attendees to attack Kono and proceed to Makeni, while the witness himself was assigned to fight on an axis leading to Kenema.[333] His recollection of the plan did not include Freetown. Albert Saidu, though not at the Waterworks meeting himself, was told that at the meeting the plan discussed was for the 1st and 2nd brigades to attack Kenema and Kono respectively.[334] His recollection of the plan did not include Freetown.

159. The Chamber concluded its summary of this testimony by "recall[ing] its findings that… Augustine Mallah, Abu Keita and Albert Saidu are all generally credible witnesses."[335] The Chamber neither discounted this testimony, nor provided any reasoning as to its preference for those witnesses who incorporated Freetown into their recitation of the alleged plan over those who did not. The Chamber could well have declined to rely on this testimony or reconciled it with the testimony of the four witnesses upon whom it relied. It did not. The Trial Chamber was required to be satisfied of Freetown's inclusion in the alleged plan beyond a reasonable doubt. Such a finding is precluded by its acceptance of evidence from "generally credible" witnesses, none of whom included Freetown in the alleged "Bockarie/Taylor plan".

160. Compounding the Chamber's error was its dismissal as "implausible" Freetown not being mentioned as a target, given that the goal of the operation was Sankoh's release and Sankoh was being held in Freetown.[336] This reasoning is illogical, given it would have been easy for ECOMOG forces to transfer Sankoh elsewhere in advance of the RUF forces. Nor can this be reconciled with the Chamber's finding elsewhere that the operation was designed to pressure the

[332] TT, Augustine Mallah, 13 Nov. 2008, pp. 20222-4.
[333] TT, Abu Keita, 23 Jan. 2008, pp. 2005-8.
[334] TT, Albert Saidu, 5 Jun. 2008, pp. 11082-6.
[335] Judgement, para. 3092.
[336] Judgement, para. 3095.

Government into negotiations for his release, rather than physically removing him from prison.[337]

161. As a result of this error, the Chamber's finding beyond a reasonable doubt that "the Accused, in concert with Bockarie, intentionally designed a plan for the RUF/AFRC Freetown Invasion"[338] was not open to a reasonable trial chamber. The inclusion of Freetown in the "Bockarie/Taylor plan" was the basis for the Chamber's subsequent finding that the plan substantially contributed to the military attacks involving the Freetown invasion.[339] As such, the Chamber's error invalidates Mr. Taylor's planning convictions for crimes committed during the Freetown invasion and subsequent retreat,[340] and occasions a miscarriage of justice.

**iii. GROUND OF APPEAL 8: The Trial Chamber erred in fact and law in finding that the incorporation of Gullit's movements into the "Bockarie/Taylor plan" was contemplated by Sam Bockarie and Charles Taylor.**

*(i) Overview*

162. The "Bockarie/Taylor plan" failed.[341] The Chamber acknowledged that the RUF's attempts to take over and capture Kenema and Freetown were unsuccessful.[342]Freetown was instead invaded by SAJ Musa's AFRC troops, operating under the command of his successor Alex Tamba Brima (Gullit).[343] As such, there was no legal or factual link back to Mr. Taylor. The Chamber creatively inferred that SAJ Musa or Gullit's movements were somehow foreseen by Mr. Taylor and Bockarie and were, accordingly, incorporated into their plan.[344]

163. The reasoning is unsound. The Chamber's original conclusion that SAJ Musa's involvement was contemplated at the time the "Bockarie/Taylor plan" was formulated is based on circumstantial, uncorroborated hearsay and was not the only reasonable conclusion available on the evidence. In any event, there is no evidence that Mr. Taylor contemplated Gullit's movements (who was then SAJ Musa's

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[337] Judgement, para. 3117.
[338] Judgement, para. 6961.
[339] Judgement, para. 6968.
[340] Judgement, paras. 6971, 6994(b).
[341] Judgement, para. 3480.
[342] Judgement, para. 3480.
[343] Judgement, para. 61, Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Facts 14, 15.
[344] Judgement, paras. 3118-24; 3480; 3486; 3611 (xiii); 3616-7; 6958-71.

deputy)[345] being incorporated into the "Bockarie/Taylor plan" at the time it was allegedly made.

*(a) The Trial Chamber's inconsistent findings*

164. Structuring a 2,500-page judgement undoubtedly poses challenges. One of the consequences of the Judgement's structure is that findings are repeated in the conclusions of different sections and sub-sections. The finding concerning Bockarie and Mr. Taylor's "contemplation" of Gullit's movements appears on four occasions.[346] This is not of itself problematic, except that the finding changes with each repetition.

165. After an analysis of the evidence, the Chamber makes its original finding:

> ...the Trial Chamber finds that **the possibility** that **SAJ Musa** would participate in the execution of the plan was contemplated by **Bockarie and the Accused at the time they designed the plan**.[347]

166. As it re-appears throughout the Judgement, this finding morphs as follows, starting with the first non-sequitur:

- ...recalling that even at Waterworks Bockarie envisaged **SAJ Musa's direct involvement** in the implementation of this plan... the Trial Chamber finds that SAJ Musa's original plan was abandoned and **Gullit's movements** were incorporated into the Bockarie/Taylor plan as had been envisioned **by Bockarie at Waterworks**.[348]

- From that point on... **Gullit's movements** were incorporated into the Bockarie/Taylor plan, as had been contemplated by Bockarie **and the Accused**[349]

- From that point onwards... **Gullit followed** the Bockarie/Taylor plan, as had been contemplated by Bockarie **and the Accused**.[350]

167. Through a process reminiscent of Chinese-whispers, the finding goes from both Bockarie and Mr. Taylor having contemplated the possibility that SAJ Musa would participate at the time they designed the plan; to Bockarie having envisioned that Gullit's movements would be incorporated; to both Bockarie and Mr. Taylor having contemplated that Gullit would follow the plan.

168. No argument can be made that each of these statements is a distinct factual finding. In each case, the Chamber is recalling or summarising its previous findings,

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[345] Judgement, para. 55.
[346] Judgement, para. 3120; repeated at paras. 3480, 3486, 3611(xiii), 3617.
[347] Judgement, para. 3120 (emphases added).
[348] Judgement, para. 3480 (emphases added).
[349] Judgement, para. 3486 (emphases added). See also para. 3611(xii).
[350] Judgement, para. 3617 (emphases added).

and no references are given. As a result, there is no basis for the Chamber's eventual "finding" that Mr. Taylor contemplated that Gullit would follow the Bockarie/Taylor plan, warranting its reversal.

*(ii) There is insufficient evidence that Bockarie and Mr. Taylor contemplated the possibility of SAJ Musa's participation*

169. Even the original finding that Bockarie and Mr. Taylor contemplated the possibility of SAJ Musa's participation in their plan is unreasonable.

170. Firstly, the Chamber erroneously downplays the acrimonious and violent recent history between SAJ Musa and the RUF. Elsewhere in the Judgement, the Chamber acknowledges that following "Operation Fitti-Fatta" in mid-1998, RUF commander Denis Mingo assumed the leadership of a group of RUF fighters travelling to Koinadugu to join SAJ Musa's group. In October 1998, there was a violent dispute between Denis Mingo's group and SAJ Musa's group,[351] following which SAJ Musa severed ties with the RUF command and created an unaffiliated SLA group of approximately 1,000 fighters, with Brima as his deputy.[352]

171. No reconciliation occurred in the intervening month. Prosecution witness Kanneh testified (and the Chamber accepted) that SAJ Musa was already "disgruntled" before Bockarie's overtures, which is corroborated by other evidence.[353] By the Prosecution's own admission, "it is indisputable that by October 1998 SAJ Musa was going not to cooperate with Bockarie and the RUF".[354] Moreover, the Chamber accepted that while in Monrovia, Bockarie complained to Mr. Taylor about SAJ Musa's recent disloyalty.[355] This makes any contemplation of SAJ Musa's possible involvement in the plan highly unlikely, and certainly not the only reasonable conclusion available on the evidence.

172. Secondly, the Chamber recognised that it heard two conflicting accounts of the attempt to involve SAJ Musa in the "Bockarie/Taylor plan". Karmoh Kanneh testified that Bockarie called SAJ Musa after the meeting at Bockarie's house and asked him to attack Freetown, but SAJ Musa unequivocally refused and a heated argument ensued.[356] In direct contrast, Isaac Mongor testified that following a discussion at the

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[351] Judgement, para. 55.
[352] Judgement, para. 55.
[353] See, for example, Judgement, paras. 3118-9, 3122, 3125.
[354] Prosecution Final Brief, para. 476.
[355] Judgement, para. 3120.
[356] Judgement, para. 3118.

meeting of his involvement, SAJ Musa was contacted, accepted the request, and agreed to run the operation.[357]

173. Faced with these two conflicting versions, the Chamber found Isaac Mongor's account to be "inaccurate", and accepted Kanneh's version.[358] This was despite the fact that Isaac Mongor was considered to be a "generally credible" witness.[359] However, the Chamber failed to explain the inconsistency between Mongor's evidence that it would be JP Koroma who would contact SAJ Musa[360] and Kanneh's evidence that Bockarie contacted SAJ Musa,[361] specifically to avoid JP Koroma's involvement.[362] It also ignored the evidence of TF1-371 who makes no reference to a discussion among the participants to approach SAJ Musa, or to SAJ Musa's refusal (or agreement) to be involved.[363]

174. In any event, having found Isaac Mongor's account to be "inaccurate", and accepting Kanneh's version,[364] the Chamber then erroneously relies on Mongor's version in the very next paragraph, concluding as follows:

> Based on the evidence of **Karmoh Kanneh** that Bockarie said that he had complained to the Accused about SAJ Musa's disloyalty and refusal to take orders from him, and on the evidence of **Isaac Mongor** that Bockarie and the Accused took into consideration the locations in which both the RUF and the SLAs were stationed at the time of their discussion of the plan, and that following the Waterworks meeting Bockarie contacted SAJ Musa and requested or ordered him to cooperate, the Trial Chamber finds that the possibility that SAJ Musa would participate in the execution of the plan was contemplated by Bockarie and the Accused **at the time they designed the plan**.[365]

175. From this paragraph, it is clear that the Chamber inferred Bockarie and Mr. Taylor's "contemplation" of SAJ Musa's involvement from three circumstantial elements: (a) uncorroborated hearsay evidence from Kanneh that Bockarie told Mr. Taylor about SAJ Musa's disloyalty; (b) uncorroborated hearsay evidence from Mongor that Bockarie and Mr. Taylor considered RUF and SLA positions; and (c) uncorroborated hearsay evidence from Mongor that, following the Waterworks meeting, SAJ Musa was contacted to cooperate.

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[357] Judgement, para. 3119.
[358] Judgement, para. 3119.
[359] Judgement, para. 274. See also Ground of Appeal 3 above.
[360] TT, Isaac Mongor, 11 Mar. 2008, pp. 5799-800.
[361] TT, Karmoh Kanneh, 9 May 2008, pp. 9425-6.
[362] TT, Karmoh Kanneh, 9 May 2008, p. 9429.
[363] Judgement, paras. 2958-70.
[364] Judgement, para. 3119.
[365] Judgement, para. 3120 (emphases added).

176. Even considered cumulatively, this evidence does not lead to Bockarie and Mr. Taylor's contemplation of SAJ Musa's involvement as the only reasonable conclusion available.

177. Firstly, a discussion between Mr. Taylor and Bockarie about SAJ Musa's disloyalty does not lead to the only reasonable conclusion that his involvement would be contemplated. Logically, it suggests the opposite. Secondly, a discussion of RUF and SLA troop positions is also insufficient to conclude that Mr. Taylor and Bockarie anticipated that SAJ Musa's troops would be part of their plan. The making of any operational plan would presumably involve a discussion of the location of other troops in the relevant area, without automatically giving rise to contemplation that the other troops would form part of the operational plan. Moreover, in the immediately preceding paragraph the Chamber found that Mongor (from whom this hearsay testimony stems) gave "inaccurate" testimony under oath about SAJ Musa's involvement.[366] The Chamber's selective reliance on isolated aspects of this part of Mongor's testimony is erroneous.

178. Lastly, the Chamber relied on Mongor's evidence concerning contact with SAJ MUSA which it had rejected as "inaccurate" in the immediately-preceding paragraph. In relying on evidence which it had rejected, the Chamber committed an error which undermines its finding that SAJ Musa's involvement was "contemplated". In addition, Mongor testified that the idea of contacting SAJ Musa was discussed by the participants of the Waterworks meeting, who "all agreed" that Bockarie should contact SAJ Musa.[367] Had Bockarie and Mr. Taylor really contemplated SAJ Musa's involvement "at the time they designed the plan"[368] in Monrovia, this discussion among the participants at the meeting to decide whether or not to contact SAJ Musa would not have been necessary.

179. Finally, the circumstantial evidence of Kanneh and Mongor is uncorroborated hearsay, warranting caution and rendering it even less capable of supporting a finding beyond a reasonable doubt. The Chamber relied on this evidence in the absence of any scrutiny or caution, or any consideration of its reliability or circumstantial guarantees of truthfulness, or the context and circumstances in which their statement

[366] Judgement, para. 3119.
[367] TT, Isaac Mongor, 11 Mar. 2008, pp. 5799-800.
[368] Judgement, para. 3120

were made. [369] This is despite the Chamber's obligation to "provide a fully reasoned opinion" and "be especially rigorous" in its assessment of such evidence.[370] In these circumstances, the weakness of the evidence relied upon renders the Trial Chamber's conclusion unsafe.

*(iii) Contemplation of the possibility of SAJ Musa's involvement, does not automatically extend to Gullit*

180. The Chamber found that Bockarie and Mr. Taylor contemplated SAJ Musa's possible participation "at the time they designed the plan".[371] Whether this was the case or not becomes irrelevant once SAJ Musa, in reality, refused to cooperate. From the moment Bockarie got off the phone from SAJ Musa, following his unequivocal refusal and the subsequent heated argument,[372] any contemplation of his further involvement must have ceased. There was no longer any reasonable, or even slight prospect or expectation that SAJ Musa would be involved in the "Bockarie/Taylor" plan, let alone any possible contemplation that his then-deputy, Gullit, would ultimately follow it.

181. The evidence leaves no room for any finding that the AFRC faction in the north, whether under SAJ Musa or Gullit, was within the contemplation of the "Bockarie/Taylor plan", or that the extreme violence[373] ultimately committed by Gullit's troops[374] was remotely within the contemplation of that plan. Convicting Mr. Taylor for planning the crimes committed by Gullit's troops in the Freetown invasion and subsequent retreat is accordingly a miscarriage of justice, warranting the quashing of these convictions.[375]

**iv. GROUND OF APPEAL 10: The Trial Chamber erred in fact and law in finding that SAJ Musa's plan to attack Freetown was abandoned.**

*(i) Overview*

182. Following its erroneous finding that Mr. Taylor contemplated Gullit's movements being incorporated into the plan, the Chamber then went on to find that Gullit abandoned SAJ Musa's plan to attack Freetown, and adopted the

[369] *RUF* TJ, para. 495-6.
[370] *Kordić & Čerkez* AJ, para. 274.
[371] Judgement, para. 3120.
[372] Judgement, para. 3118.
[373] Judgement, para. 6967.
[374] Judgement, para. 6966.
[375] Judgement, paras. 6971, 6994(b).

"Bockarie/Taylor plan" to attack Freetown, while in the midst of attacking Freetown.[376]

183. This "abandonment theory" of the Freetown events originates with the Chamber. Not a single witness testified that Gullit abandoned SAJ Musa's plan for the "Bockarie/Taylor plan" and effectively changed course mid-stream. Nor does this theory come from the Prosecution. According to the Prosecution, the Freetown invasion was a "joint operation", for which the RUF provided "support".[377] The Chamber developed this theory on its own.

184. The abandonment theory is a critical cog in Mr. Taylor's planning convictions. If the troops who invaded Freetown were following SAJ Musa's plan under the command of his successor Gullit, then there was no link back to Mr. Taylor. The "Bockarie/Taylor plan" could not have substantially contributed to the commission of crimes by Gullit's troops in Freetown if it was not put into action. It was the abandonment theory that allowed the Chamber to sidestep SAJ Musa's stubborn independence from the RUF, and link the events in Freetown back to Charles Taylor. The problem with this theory is that there is simply no evidence to support it.

*(a) The Chamber's abandonment theory is not supported by the evidence*

185. The fact that there were two plans to invade Freetown is uncontroversial.[378] The Chamber accepted that "there were two plans to attack Freetown, one made by the RUF and one made by the AFRC group led by SAJ Musa."[379]

186. It is also incontrovertible that SAJ Musa's advance to Freetown started well before the "Bockarie/Taylor plan" even came into being."[380] The Chamber appears to accept the evidence of Alimamy Bobson Sesay that SAJ Musa's planned advance on Freetown began as early as June or July 1998, long before the Waterworks meeting in December 1998.[381] In any event, it was an adjudicated fact that at a meeting in Koinadugu District, SAJ Musa met with various AFRC commanders who agreed that troops who had arrived from Kono District should act as an advance party, which would establish a base in the north-western area of Sierra Leone in preparation for an attack on Freetown,[382] and that SAJ Musa left to join the advance team and prepare

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[376] Judgement, paras. 3480, 3486; para. 3611(xiii).
[377] Judgement, paras. 3132-4.
[378] Judgement, para. 3121. See also Judgement paras. 3122-5, 3128, 3478, 3480, 3486, 3611(xiii).
[379] Judgement, para. 3121.
[380] Judgement, para. 3125.
[381] Judgement, para. 3121.
[382] Judgement, para. 3122, Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 8.

for the attack on Freetown **in October 1998**.[383] Arriving in Colonel Eddie town in November 1998, SAJ Musa stressed that it was vital that his troops arrive in Freetown before the RUF. [384] As such, there were two plans; the first having been in train for weeks (if not months) before the other allegedly came into existence.

187. In support of its finding beyond a reasonable doubt that Gullit disengaged his approximately 1,000 troops[385] from Plan A and re-engaged them in Plan B, the Chamber points to nothing. There is no evidence to show that Gullit moved from the "AFRC plan" to the "RUF plan". There is no evidence that Bockarie told Gullit "you should now follow the RUF plan", nor any evidence of Gullit acquiescing or agreeing to do so. There is no evidence of Gullit's troops either being informed that the plan had changed, or doing anything differently. By contrast, Perry Karama testified that some of Gullit's troops were opposed to even contacting Bockarie after SAJ Musa's death,[386] and when Bockarie told Gullit to wait for reinforcements to advance to Freetown, a majority of Gullit's troops voted to ignore this instruction.[387] In light of this evidence (from a witness whose evidence the Chamber found to be "highly probative"[388] and "of significant weight"),[389] it is difficult to accept that Gullit (or his troops) who had been preparing for and following SAJ Musa's plan for weeks or months would abruptly start following the plan of an RUF commander, a group from which they had recently split after a violent dispute.[390]

188. The Chamber heard no evidence of the difference between the two plans in terms of strategy, timing, troop movements, intelligence, locations, operational plans, or manoeuvres. This kind of evidence would have provided a basis for the Chamber's finding that from a particular date the 1,000 troops started following the "Bockarie/Taylor plan" rather than the plan they had followed up to that point. Of course, a counter-argument can be made that given the chaos, killing, disorder, anarchy and absence of a conventional armed force or conventional conflict, clear-cut operational plans or defined strategic schema did not exist. If this is the case, however, it mitigates against any trier of fact being able to establish beyond

[383] Judgement, para. 3122, Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 10.
[384] Judgement, para. 3122, Decision on Judicial Notice of AFRC Adjudicated Facts, Annex A, Fact 11.
[385] Judgement, paras. 55, 3150, 3335, 4302.
[386] Judgement, para. 3176.
[387] Judgement, paras. 3179, 3408.
[388] Judgement, para. 3391.
[389] Judgement, para. 3408.
[390] Judgement, para. 55.

reasonable doubt that the troops in question were following one plan as opposed to another.

189. At one point, the Chamber appears to draw a distinction between two plans on the basis of their respective goals, stating: "the evidence indicates that Musa's goal in attacking Freetown was to reinstate the army while Bockarie's goal in attacking Freetown was to release Foday Sankoh from prison."[391] Later, however, the Chamber corrects itself and notes that: "[t]he evidence indicates that it was the intention of the forces lead by Gullit and SAJ Musa **to free some prisoners**, not a new idea from Bockarie."[392]

190. In any event, the evidence does not support a clear distinction between the two plans on the basis of their ultimate goal. While "generally credible" witness Alimamy Bobson Sesay[393] referred to SAJ Musa's goal to reinstate the army,[394] he ultimately rejected the proposition that SAJ Musa's goals were different from those of Bockarie,[395] and cited the execution of the 24 SLA soldiers, the desire to reinstate the army, and the desire to release the RUF and ARFC political detainees at Pademba Road Prison as all being factors leading to the decision to invade Freetown by SAJ Musa's troops.[396] He also cited the release of people "like Foday Sankoh",[397] demonstrating a clear overlap between SAJ Musa's goals, and those of the RUF and Bockarie. As such, Gullit's advancing on Freetown and releasing prisoners cannot be safely attributed to Gullit following the "Bockarie/Taylor plan".

191. Moreover, there was evidence before the Chamber that 3,500 prisoners were released, namely SLA and RUF members and their supporters.[398] The Chamber later put the figure in the "hundreds".[399] Had the sole motivation of SAJ Musa been to "reinstate the army", a large injection of manpower would have gone a fair way to assisting him in this goal. There is no evidence which would allow the two plans to safely be distinguished in terms of their respective goals, or on the basis that Gullit released prisoners once in Freetown.

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[391] Judgement, para. 3123.
[392] Judgement, para. 3375.
[393] Judgement, para. 289.
[394] Judgement, para. 3123.
[395] Judgement, para. 3123
[396] Judgement, para. 3167.
[397] TT, Alimamy Bobson Sesay, 29 Apr. 2008, p. 8837.
[398] TT, Alimamy Bobson Sesay, 22 Apr. 2008, pp. 8280-1.
[399] Judgement, para. 3371.

192. The Chamber also attempts to differentiate between the two plans on the basis that SAJ Musa ordered his forces to proceed towards Freetown without killing looting or burning, while Bockarie had a campaign of terror in mind.[400] Even had SAJ Musa given such an order, there is abundant evidence that it was disobeyed by certain commanders like Santigie Borbor Kanu and Kabila, and the fighters killed, looted and murdered during their advance towards and into Freetown.[401] Equally, the Chamber made no findings that any crimes were committed in Kono and Makeni by the troops carrying out the only successful portions of the "Bockarie/Taylor plan".[402]

193. In reality, the Chamber's finding that one plan was abandoned for another is artificial. It is an impossible task for a trier of fact to find beyond reasonable doubt that at one point troops engaging in a chaotic and fast moving attack on a capital city were following Plan A, and then suddenly and uniformly switched to Plan B, particularly given the lack of evidence as to what the respective plans entailed.

*(b) The weight of evidence undermines the Chambers abandonment theory*

194. There was some contact between Bockarie and Gullit prior to the entry of Gullit's troops into Freetown itself.[403] However, the wealth of evidence does not demonstrate that that Gullit's troops were carrying out the "Bockarie/Taylor plan" as distinct from SAJ Musa's plan.

195. Even assuming momentarily that SAJ Musa's plan had been abandoned, it appears that the very first task that Gullit was given in pursuit of the new plan was simply to wait. Bockarie told Gullit **not** to advance to Freetown and to wait for reinforcements.[404] Having been told by the architect of his new plan **not** to advance to Freetown, Gullit promptly advanced to Freetown.[405] The Chamber insists that this was not disobedience, nor a rejection of Bockarie's authority, but rather a strategic decision.[406] Regardless of Gullit's motive, this evidence does not support the Chamber's theory that the "Bockarie/Taylor plan" was now the plan in operation.

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[400] Judgement, para. 3142.
[401] See, for example, TT, TF1-143 5 May 2008, p. 9015-8; Alimamy Bobson Sesay, 22 Apr. 2008, p. 8226-72. See also Judgement paras. 863-4, 848-50, 1565.
[402] The only finding of crimes in Kono during the relevant period is the shooting of five civilians at Yengema Training Base between December 1998 and 2000, which is not connected to the offensives on Kono and Makeni. See Judgement, para. 721. There are no findings of crimes committed in Makeni.
[403] Defence Final Brief, para. 615.
[404] Judgement, paras. 3402-18.
[405] Judgement, paras. 3402-18.
[406] Judgement, para. 3413-4.

196. The wealth of evidence heard by the Chamber suggests the opposite. Mr. Taylor testified that having heard about the Freetown invasion on the morning it occurred, a subsequent conversation between his national security advisor and Bockarie revealed that "Bockarie did not know what was going on in Freetown".[407] Issa Sesay testified as to the independence of this attack, and told the Chamber that he found out through the media.[408] Sam Kolleh, a RUF Vanguard[409] also found out through the press.[410]

197. Even putting this Defence evidence to one side, the Prosecution evidence suggests the same level of detachment and division and between Bockarie and the invading troops. Perry Karama, who gave "highly probative" evidence" of "significant weight", [411] confirmed that only after Gullit's troops had invaded Freetown, taken the State House, taken National Stadium, taken Pademba Road Prison, released prisoners,[412] and the commanders were "based and settled" at the State House, was Bockarie even informed.[413] TF-371 confirmed that Gullit called Bockarie once already in the State House.[414] Mohamed Kabbah agreed the RUF radio operators and RUF members in Buedu only heard that Gullit was in Freetown from the BBC.[415] Notably, Kabbah testified that this was not a complete surprise because Gullit's troops had never had accepted Bockarie's orders because "that was their own mission",[416] and that the mission was unplanned as far as Bockarie was concerned.[417]

198. The evidence of Bockarie's reaction to this news that Gullit had advanced to Freetown is particularly telling. RUF radio operator Dauda Aruna Fornie testified that Bockarie was "grumbling" that "maybe Gullit and the others would want to turn themselves into presidents in Freetown",[418] and that "Bockarie was concerned that Gullit would take power in Freetown on his own."[419] It is difficult to accept that the "Bockarie/Taylor plan" envisaged Gullit anointing himself the President of Sierra Leone following a successful invasion. Had Gullit really been following the

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[407] Judgement, para. 3306.
[408] Judgement, para. 3319-21.
[409] Judgement, para. 2428.
[410] Judgement, para. 3336.
[411] Judgement, paras. 3391, 3408.
[412] TT, Perry Kamara, 6 Feb. 2008, p. 3229.
[413] TT, Perry Kamara, 6 Feb. 2008, p. 3229.
[414] TT, TF1-371, 30 Jan. 2008, p. 2648.
[415] TT, Mohamed Kabbah, 17 Sept. 2007, p. 16447.
[416] TT, Mohamed Kabbah, 17 Sept. 2007, p. 16447.
[417] TT, Mohamed Kabbah, 17 Sept. 2007, p. 16448.
[418] Judgement, para. 3251.
[419] Judgement, para. 3251.

Bockarie/Taylor plan, then Bockarie would not have had to grumble about such a possibility, nor be concerned that it would occur. Prosecution witness Abu Keita, who said he was with Bockarie in Buedu during the invasion, testified that when Bockarie heard on the BBC on 6 January 1999 a commander speaking from Freetown saying that he was in control of the State House, Bockarie became angry.[420] This is not the reaction of a man whose plan was being followed.

199. The Chamber also heard that SAJ Musa stressed that it was vital that his troops arrived in Freetown before the RUF ever got there.[421] Dauda Aruna Fornie agreed that even though SAJ Musa was killed in Benguema, his objective and that of his troops was that "they would be the ones who took Freetown, and not the RUF as a body."[422] This evidence is extremely difficult to reconcile with these same 1,000 troops abruptly changing course and following the plan of an RUF commander.

200. Contemporaneous documentary evidence provides further corroboration that Gullit was unrestrained by the "Bockarie/Taylor plan". Exhibit P-067 is a 1999 report to Foday Sankoh from a Black Guard commander, in which he recounts the operation to capture Kono and Makeni. He writes:

> Furthermore, Col Rambo also tried his level best to link up with the other brothers that entered Freetown, but the Freetown operation was not coordinated as the said **Commander Black Jah [Gullit] was not going by the instruction from the High Command**. When they retreated from Freetown, the BFC met them and told them to present a comprehensive report pertaining [*sic*] the whole Freetown operation, but they deliberately fail to do so.[423]

201. This evidence does not support a finding that Gullit's troops were carrying out the "Bockarie/Taylor plan". In fact, it suggests the opposite; that Gullit was continuing to lead SAJ Musa's troops in their ongoing mission into Freetown which had long before been set in motion.

202. Nor does any evidence of "coordination" between Bockarie and Gullit provide support for the theory that SAJ Musa's plan had been abandoned.[424] In fact, the term "coordination" implies an effort to ensure the harmonious operation of two separate plans. Another reasonable conclusion was that the RUF and AFRC were essentially

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[420] TT, Abu Keita, 23 Jan. 2008, pp. 2019-20.
[421] TT, Dauda Aruna Fornie, 4 Dec. 2009, p. 21722.
[422] TT, Dauda Aruna Fornie, 4 Dec. 2009, p. 21724.
[423] Exh. P-067, page 8 (emphasis added), summarized in Judgement at para. 3360.
[424] Judgement, paras. 3480, 3486, 3611(xiii).

two groups working against a common enemy, the Sierra Leone Government,[425] who would necessarily be in contact during a significant military operation that was in both their interests.

203. No reasonable trier of fact, having heard this evidence, could have found that the only reasonable conclusion was that SAJ Musa's plan had been abandoned, and Gullit's movements were incorporated into the "Bockarie/Taylor" plan.

*(ii) Outcome of the Chamber's error*

204. If Gullit's troops had been following SAJ Musa's plan during the Freetown invasion, the dormant "Bockarie/Taylor" plan did not substantially contribute to their crimes. The "abandonment" theory was the Chamber's key to severing the connection between Gullit's troops and SAJ Musa's plan. Only once this link was broken was the Chamber free to create a link between the troops involved in the Freetown invasion and Charles Taylor, through the abrupt and mid-course adoption of the "Bockarie/Taylor plan".

205. The finding that Gullit "abandoned" SAJ Musa's plan is artificial, unsupported by evidence, and undermined by a wealth of evidence showing that Gullit was continuing with what SAJ Musa had started; a determination on the part of his troops to enter Freetown without waiting for the RUF. The Chamber's "abandonment theory" was certainly not the only reasonable conclusion available on the evidence.

206. No reasonable trier of fact could have devised the abandonment theory based on the evidence. The finding is pure speculation, and bears no demonstrable relation to matters that were initially within Mr. Taylor's initial or subsequent contemplation. Holding Mr. Taylor criminally responsible for "planning" the crimes of Gullit's forces in Freetown on this basis[426] is a miscarriage of justice, and warrants the quashing of the planning convictions based on the crimes committed during the Freetown invasion and subsequent retreat.[427]

**v. GROUND OF APPEAL 11: The Trial Chamber erred in fact and in law in convicting Charles Taylor for crimes committed during the implementation of a different plan from the one it erroneously attributed to him.**

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[425] TT, Alimamy Bobson Sesay, 29 Apr. 2008, pp. 8860-1.
[426] Judgement, para. 6965.
[427] Judgement, paras. 6971, 6994(b).

*(i) The Trial Chamber erred in convicting Mr. Taylor absent of a finding that he designed a plan to commit crimes*

207. The Prosecution alleged that the "Bockarie/Taylor plan" included a "ruthless terror campaign"[428] - i.e. was a plan to commit crimes.

208. The Chamber did not make this finding. It accepted that Bockarie and Mr. Taylor planned a military operation: that they "intentionally designed a plan for the RUF/AFRC Freetown invasion".[429] It did not find that this was a plan to commit acts of terrorism, or to commit sexual slavery, or to commit outrages on personal dignity, or to commit any of the concrete crimes in Counts 1 to 11 of the Indictment. It found (erroneously as discussed in Ground 15, below), that the Accused told Bockarie that the operation carried out should be "fearful"[430] and later told Bockarie via satellite phone that he should "by all means" take Freetown.[431] For the Chamber, these two comments were relevant to Mr. Taylor's *mens rea*. The Chamber held that through his instructions to take Freetown "by all means" and to make the operation "fearful", Mr. Taylor "demonstrated his awareness of the substantial likelihood that crimes would be committed during the execution of the plan".[432] The Chamber never held that the plan itself was a plan to commit crimes.

209. The *actus reus* of planning is "one or more persons formulate a method of design or action, procedure or arrangement of the accomplishment of a particular crime."[433] Liability for planning arises when one or several persons design the commission of a statutory crime".[434] One commentator describes planning in international criminal law as "devising... the commission of a crime. Think, for instance, of planning an air attack on civilians or the use of such prohibited arms as chemical or bacteriological weapons, or the indiscriminate killing of civilians as part of widespread or systematic attack."[435]

210. When there is evidence of an accused having formulated a plan that does not constitute a plan to commit concrete crimes, this does not give rise to liability through the mode of liability of "planning". In *Brđanin*, the Chamber found the existence of a

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[428] Prosecution Final Brief, paras. 161, 168.
[429] Judgement, para. 6961. See also Judgement, paras. 3127, 3611(vi), 6958.
[430] Judgement, paras. 3116-7, 3611 (vii), 6959, 6969.
[431] Judgement, paras. 3117, 3130, 3611(vii), 6969.
[432] Judgement, para. 6969.
[433] *Semanza* TJ, para. 380.
[434] See *Limaj* TJ, para. 513. See also *Kordić & Čerkez* AJ, para. 26; *Brđanin* TJ, para. 268; *Krštić* TJ, para. 601; *Galić* TJ, para. 168; *Boškoski* TJ, para. 398; *Nahimana* AJ, para. 479.
[435] Cassese, Antonio, *International Criminal Law*, Oxford University Press (Oxford 2003), p. 192.

"Strategic Plan" to create a separate Bosnian Serb state which could only be implemented through force and fear."[436] As to *Brđanin's* liability for planning, the Chamber held that while the accused espoused the Strategic Plan, which may have set the wider framework within which crimes were committed, the evidence was insufficient to conclude that he "was involved in the immediate perpetration of concrete crimes. This requirement of specificity distinguishes "planning" from other modes of liability."[437] In the absence of evidence that the accused was involved in the preparation of *concrete crimes*, the Chamber could not sustain a conviction for planning, despite his espousal of the overall "Strategic Plan".

211. The Chamber's error in holding Mr. Taylor liable on the basis of a military plan, in the absence of a finding that he planned the commission of concrete crimes, means that a material element of planning is missing. This legal error invalidates the Judgement, and vitiates the planning convictions entered under Counts 1 to 11 of the Indictment.

*(ii) The Trial Chamber erred in convicting Charles Taylor for crimes committed during the implementation of a different plan*

212. Having failed to identify a design to commit particular crimes, the Chamber then went on to erroneously convict Mr. Taylor for a different plan from the one it found he had made.[438]

213. The Chamber accepted that the "Bockarie/Taylor plan" to capture Freetown were unsuccessful.[439] Before the RUF troops could reach the capital, the AFRC troops led by Gullit invaded.[440] The Chamber held that the invasion by Gullit's troops was marked by "extreme violence" and the commission of crimes in the Indictment.[441]

214. Liability for planning arises when an accused (i) designs criminal conduct constituting statutory crimes, and (ii) these crimes are later perpetrated.[442] As discussed above, the Chamber failed to find that Bockarie and Mr. Taylor devised a

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[436] *Brđanin* TJ, para. 65.
[437] *Brđanin* TJ, para. 357-8 (emphasis in original).
[438] Judgement, paras. 3118-24, 3486, 3611(xiii), 3616-7, 6958-71.
[439] Judgement, para. 3480 (emphasis added).
[440] Judgement, paras 3370-1.
[441] Judgement, para. 6967.
[442] Judgement, para 470; *Nahimana* AJ, para. 479; *Kordić & Čerkez* AJ, para. 26; See also ILC Draft Code of Crimes, Article 2(3)(e); *Dragomir Milošević* AJ, para. 268; Judgement, para. 470: "...the plan must have been a factor 'substantially contributing to [...] criminal conduct constituting one or more statutory crimes that are later perpetrated.'" See also *Blaškić* AJ, para. 278: "a person other than the person who planned (...) must have acted in furtherance of a plan or order".

plan to commit particular crimes. Nor were any planned crimes perpetrated as the troops simply did not reach Freetown.[443]

215. The Chamber nevertheless extended the original "Bockarie/Taylor plan" to encompass the actions of all 1,000 of Gullit's troops who entered Freetown. It did so by finding that the plan underwent a "continuing evolution";[444] that Bockarie and Mr. Taylor contemplated that Gullit's movements and action, whatever they might be, would be incorporated into the original plan;[445] and that SAJ Musa's plan had been abandoned.[446] This reasoning is wrong in law and in fact.

216. No trier of fact could have found that Mr. Taylor contemplated the incorporation of Gullit's movements in the plan, as previously discussed.[447] The Chamber confuses hindsight with what could possibly have been foreseen – let alone what actually was foreseen by the alleged protagonists. Even assuming that such a finding could have been supported by the evidence, the Chamber cites no legal principle, either from domestic or international criminal law, to support its theory that an accused can be held liable for crimes that occur in the implementation of a plan different from the one he was found to have made. The notion of an "expanded" or "evolved" plan has no discernible legal basis.[448] Planning is not JCE, and certainly not JCE III, and no such doctrines as to an "evolving" JCE have ever been applied to planning. The Chamber's notion of an "evolved" plan involves a confusion of planning and JCE III which is improper in law.

*(iii) The Chamber erred in convicting Mr. Taylor for crimes committed during the attacks on Kono and Makeni in the absence of findings that these crimes occurred*

217. The Chamber convicted Mr. Taylor for "planning the crimes charged in Counts 1 to 11 of the Indictment, committed by members of the RUF/AFRC and Liberian fighters **in the attacks on Kono and Makeni**, in the invasion of Freetown, and during the retreat from Freetown."[449]

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[443] Judgement, para. 3480.
[444] Judgement, para. 6966: "Taylor… was aware of its continuing evolution".
[445] Judgement, para. 3116(xiii), 3617.
[446] Judgement, paras. 3480, 3486, 3611(xiii).
[447] See Ground of Appeal 8.
[448] Judgement, para. 3486.
[449] Judgement, para. 6971.

218. The Chamber did find that some crimes were committed in Kono District in 1998, but they were not carried out during this operation.[450] The only other finding of crimes in Kono is the shooting of five civilians at Yengema Training Base between December 1998 and 2000, which is not connected to the offensives on Kono and Makeni.[451] As discussed below in Ground 23, section (iii)(e)(2), the isolated reference in paragraph 5719 to crimes having been committed during this operation in these locations is contradicted elsewhere in the Judgement. There were no findings as to crimes in Makeni during this period. Consequently, the planning convictions based on crimes alleged to have been committed in Kono and Makeni must also be quashed.

*(iv) The Chamber's error requires a reversal of the planning convictions*

219. In its apparent determination to fashion a link between the Freetown invasion and Mr. Taylor, the Trial Chamber firstly failed to find a material element of "planning" as a mode of liability, namely a plan to commit crimes. It then relied on a different "expanded" plan for his conviction for the crimes committed during the Freetown invasion and subsequent retreat, through an unprecedented and impermissible expansion of planning liability. Lastly, it failed to find that any crimes pursuant to the alleged plan were committed in Kono and Makeni. The various legal and factual errors identified above invalidate the Chamber's decision, and occasion a miscarriage of justice warranting the reversal of Mr. Taylor's planning convictions.

**vi. GROUND OF APPEAL 12: The Trial Chamber erred in fact and law in finding that Charles Taylor received daily updates as to the implementation of the "evolving" plan and in finding him liable on the basis of these updates.**

*(i) Introduction*

220. A remarkable aspect of this part of the Prosecution case is the lack of direct evidence concerning Charles Taylor's actual acts and conduct during the Freetown invasion. Despite the Prosecution's relentless assertions that Mr. Taylor planned, and was even controlling the invasion of 6 January 1999,[452] the Chamber heard no direct evidence from the Prosecution about what Mr. Taylor did, said, or was aware of during this period. In the accounts of Prosecution witnesses, Mr. Taylor is a distant

[450] Judgement, para. 1231. See (i) Amputations in Tombodu, March to June 1998 (Judgement, para. 1217); (ii) Mutilations in Kayima, May 1998 and Mid-1998 (Judgement, paras. 1221-2); Carvings and "knocking out teeth" in Wondedu, sometime between April and November 1998 (Judgement paras. 1228-9).
[451] Judgement, para. 721.
[452] Judgement, para. 3611(xviii).

figure, apparently speaking at the other end of satellite telephones, but never actually seen or heard.

221. Mr. Taylor was available to the Chamber to recount in detail his level of knowledge about the Freetown events. His evidence is disregarded, on the basis of an erroneous assessment of selective extracts, discussed below.

222. In the end, the Chamber relies on the evidence of two witnesses to support its finding of direct contact between Bockarie and Mr. Taylor during the Freetown invasion;[453] TF1-516 and Mohamed Kabbah. Neither had been in Monrovia during the Freetown invasion. Their evidence is uncorroborated second-hand hearsay. Neither TF1-516 nor Mohamed Kabbah spoke with Mr. Taylor directly, or heard his voice, or had any direct knowledge of what he allegedly told Bockarie during these conversations. Their evidence is manifestly insufficient to support the Chamber's finding of direct contact between Bockarie and Mr. Taylor during this period, let alone its content.

223. Perhaps as a result, the Chamber then hedged its bets by finding that, even if there was little or no direct contact between Bockarie and Mr. Taylor during the Freetown invasion, there was direct contact between Bockarie and Benjamin Yeaten,[454] Director of the Liberian Special Security Service.[455] Even if this had been established beyond a reasonable doubt, the Chamber heard no evidence that Yeaten regularly (or ever) relayed the content of his conversations with Bockarie back to Mr. Taylor. As such, this alternative finding does not assist the Chamber.

224. The importance of this evidence is clear: if Mr. Taylor was not in contact with Bockarie (either directly or through Yeaten) during the invasion, he had no basis to be "aware" that his plan was evolving, thus severing the link made by the Chamber between the "Bockarie/Taylor plan" and the actions of Gullit's troops in Freetown.[456] As shown below, the evidence simply does not support that this level of contact existed.

*(ii) The Chamber erred in disregarding the testimony of Mr. Taylor as to his contact with Bockarie during the Freetown invasion*

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[453] The Trial Chamber concluded that this contact was "daily" through a morphing of its original finding of "frequent" contact: see Judgement, paras. 3654, 3606, 3611(xiv), 6966.
[454] Judgement, para. 2571.
[455] Judgement, paras. 3654, 3606, 3611(xiv), 6966.
[456] Judgement, para. 6966.

225. The Chamber did not make a general finding as to Mr. Taylor's credibility. His evidence is assessed on a case-by-case basis throughout the Judgement. Some aspects are relied upon. Some are not.

226. Mr. Taylor testified that he was not in direct contact with Bockarie via satellite phone during the Freetown invasion,[457] that he had no prior knowledge nor encouraged anyone to invade Freetown, and did not receive information about the Freetown invasion through Yeaten.[458] The Chamber disregarded his denial that he was communicating with Bockarie directly or through Yeaten.[459] Two reasons are given.

227. Firstly, the Chamber found "inconsistencies" in Mr. Taylor's evidence as to the contact between Bockarie and the Liberian Government.[460] However, the Chamber misconstrued the three extracts which it cited as "inconsistent". The three impugned responses from Mr. Taylor, while not identical, each relate to a different period.

- In response to a suggestion that Bockarie spoke to Yeaten and Tuha **during the Freetown fighting**, Mr. Taylor testified that "**they** would have had no reason to be in touch with Sam Bockarie **during the Freetown invasion**. None whatsoever."[461]

- When questioned whether there was any communication between the **Government of Liberia** and Bockarie **in the aftermath of the Freetown invasion**, Mr. Taylor testified "Yes, in January 1999 there was communication I would say **immediately after the Freetown invasion** and into the negotiation for the ceasefire which occurred, I would say, around the middle of January. Yes, there were communications."[462]

- When asked "are you aware of communications, radio communications between the RUF and Benjamin Yeaten through is radio operator **at or about the time that Koidu and some Nigerian soldiers were captured**?", Mr. Taylor responded "No. But to be factual about it, I would not dispute that - well, the first thing is that Benjamin Yeaten, I mean, he as director would have a radio operator. I don't know his code. The second thing factually is that I would not dispute the fact that the operator of Benjamin - because of Benjamin coordinating the security, it would not be out of reason for his operator to call Sam Bockarie, okay? So I don't - but I don't know the name of the operator. So I wouldn"t have the details, and so I don't have a quarrel with the fact that maybe there's communication. I don't."[463]

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[457] TT, Charles Taylor, 22 Sept. 2009, 29395-6.
[458] TT, Charles Taylor, 16 Sept. 2009, 29104-5; 17 Sept. 2009, pp. 29266, 29273-7.
[459] Judgement, para. 3564.
[460] Judgement, para. 3564.
[461] TT, Charles Taylor, 22 Sept. 2009, pp. 29395-6.
[462] TT, Charles Taylor, 16 Sept. 2009, pp. 29095-6
[463] TT, Charles Taylor, 14 Sept. 2009, p. 28738.

228. These statements are not inconsistent. Mr. Taylor is giving different answers based on the context and timing of the different propositions put to him. The Chamber's finding otherwise is erroneous.

229. Just as erroneous is the Chamber's finding that "in light of these inconsistencies and against the weight of the Prosecution evidence", Mr. Taylor's evidence was not credible.[464] This almost-textbook burden shift by the Chamber further undermines its conclusion to disregard Mr. Taylor's direct evidence. A Chamber is required to determine whether Prosecution allegations have been proven beyond a reasonable doubt. Contradictory Defence evidence (such as from Mr. Taylor) is relevant to that assessment. The credibility of Defence evidence does not depend on whether it is inconsistent with any or all of the Prosecution evidence.

230. The Chamber therefore erroneously excluded Mr. Taylor's direct testimony from its assessment of the second-hand hearsay of Prosecution witnesses as to his alleged contact with Bockarie.[465] Had Mr. Taylor's evidence been considered, no reasonable chamber could have concluded beyond a reasonable doubt that direct contact was taking place.

*(iii) The Chamber erred in relying on TF1-516 and Mohamed Kabbah to find beyond a reasonable doubt that Mr. Taylor was in direct contact with Bockarie*

*(a) TFI-516*

231. TF1-516 was a RUF radio operator based in Buedu.[466] The Chamber relies on his evidence, together with that of Kabbah, to conclude there was direct contact between Mr. Taylor and Bockarie during the Freetown invasion.

232. His evidence suffers from the following flaw: the premise of his testimony is that "020" was the call sign of the radio located in "Executive Mansion" in Liberia,[467] and that the operator of the radio with the call sign "020" reported to President Charles Taylor.[468] On this basis, he testified as to Bockarie being in "persistent communication" with "020" and "Base 1" (Yeaten's call sign).[469]

233. However, the question of whether anyone else could (or did) use the radio with the call sign "020" is never addressed. The basis for the witness" knowledge that

[464] Judgement, para. 3564.
[465] Judgement, para. 3564.
[466] TT, TF1-516, 8 Apr. 2008, p. 6857.
[467] TT, TF1-516, 8 Apr. 2008, pp. 6861, 6890-1.
[468] TT, TF1-516, 8 Apr. 2008, pp. 6891.
[469] TT, TF1-516, 8 Apr. 2008, pp. 6937.

this call sign was linked to the "Executive Mansion" is not established. The Chamber heard no other evidence that "020" was the call sign of the radio at the "Executive Mansion". TF1-516 never heard Mr. Taylor's voice during any alleged conversations with Bockarie. [470] He did not testify as to what Mr. Taylor told Bockarie, or the content of their discussion.

234. TF1-516 also demonstrated an inability to accurately place events as having happened during the Freetown invasion. He testified that Bockarie flew to Monrovia to see Mr. Taylor and returned 72 hours later during the Freetown invasion.[471] He later said he was mistaken, and that this had occurred when "the operation in Freetown had long been undertaken."[472]

235. Moreover, TF1-516's evidence is uncorroborated hearsay. As discussed in Ground 1, while there is no absolute prohibition on reliance on uncorroborated hearsay, the judgements of international tribunals are replete with such statements being deemed insufficient to support findings beyond a reasonable doubt.[473] This practice reflects the fact that hearsay evidence is untested, not given under oath, potentially affected by compound errors or perception and memory, and (particularly when uncorroborated) its content cannot be confirmed or verified.[474]

236. The Chamber's error is not that it relied on TFI-516's hearsay evidence,[475] but its reliance on this evidence in the absence of any scrutiny or caution, or any consideration of its reliability or circumstantial guarantees of truthfulness, or the context and circumstances in which the statement was made. [476] This is despite the Chamber's obligation to "provide a fully reasoned opinion" and "be especially rigorous" in its assessment of such evidence.[477] The Chamber's error was compounded by its complete failure to assess the reliability of the source of the hearsay: Sam Bockarie, and consider any motivation he may have had for exaggerating or fabricating his level of contact with the President of Liberia.[478]

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[470] TT, TF1-516, 8 Apr. 2008, pp. 6923-4.
[471] TT, TFI-516, 8 Apr. 2008, pp. 6945-5, 6962-5.
[472] TT, TF1-516, 16 Apr. 2008, p. 7821.
[473] See, Ground of Appeal 1. See, for example, *Bizimungu* TJ, para. 693; *Gacumbitsi* TJ, para. 196; *Nzabonimana* TJ, paras. 1454, 1688. See also, *Kanyarukiga* TJ, para. 193.
[474] *RUF* TJ, para. 495.
[475] *Kordić & Čerkez* AJ, para. 274: "[a]ny appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question."
[476] *RUF* TJ, para. 495-6.
[477] *Kordić & Čerkez* AJ, para. 274.
[478] See Ground 2, above. See also Ground 7 on Sam Bockarie's motivations for associating with Taylor.

237. This lack of scrutiny came on the heels of the Chamber's recognition that TF1-516 was evasive and "tried to avoid answering questions" on more than one occasion.[479] Having recounted this behaviour, the Chamber simply concluded that the witness was "generally credible", thereby failing to address or resolve the evasiveness it had identified. In such circumstances, the lack of scrutiny applied to this second-hand uncorroborated hearsay is an error.

*(b) Mohamed Kabbah*

238. The only other witness relied upon by the Chamber is Mohamed Kabbah, another radio operator in Buedu.[480] He testified about one conversation between Bockarie and Mr. Taylor during which he was present, which occurred at the MP station, on a hill.[481] Like TF1-516 he did not hear Mr. Taylor speaking on the other end of the satellite phone.[482] He is very clear that this was the "only communication" that he monitored.[483] He made no mention of what Mr. Taylor told Bockarie, or the content of their discussion.

239. This evidence of Mr. Taylor's conversation is, again, uncorroborated hearsay. As such, the same errors arise out of the Chamber's reliance without any scrutiny or caution. Kabbah told the court that he had lied to Prosecution investigators about the Freetown attack.[484] His motivation was his security, although this is not fully explained or comprehensible. The Chamber unreservedly "accepts Kabbah's explanation."[485] A demonstrable willingness to lie about the events when it serves his interest, warrant even further caution in assessing his uncorroborated evidence. The Chamber's unreserved and unquestioning reliance on this testimony is an error.

240. [See Confidential Annex A, para. 2]

241. The Chamber also ignores that other Prosecution witnesses who were with Bockarie during the Freetown invasion knew nothing about direct contact between Bockarie and Mr. Taylor. Dauda Aruna Fornie, a "generally credible" witness,[486] and RUF radio operator[487] was in a position to testify that there was constant contact

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[479] Judgement, para. 283 (footnotes omitted).
[480] Judgement, para. 3505.
[481] TT, Mohamed Kabbah, 15 Sept. 2008, p. 16177.
[482] TT, Mohamed Kabbah, 15 Sept. 2008, p. 16178.
[483] TT, Mohamed Kabbah, 15 Sept. 2008, p. 16179.
[484] The Chamber erroneously cited to "Transcript, 12 September 2008, pp. 16244 – 16247", when in fact these pages and this discussion occurred on 15 September 2008.
[485] Judgement, para. 338.
[486] Judgement, para. 358
[487] TT, Dauda Aruna Fornie, 1 Dec. 2008, p. 21395.

between Bockarie and Yeaten during the invasion, at least two to three times per day.[488] He said nothing about contact between Bockarie and Mr. Taylor. Abu Keita, a "generally credible" witness[489] was also with Bockarie in Buedu in January 1999, also testified about Bockarie's contact with Yeaten.[490] He said nothing about direct contact between Bockarie and Mr. Taylor. The failure of these two witnesses to implicate Mr. Taylor, given their "credibility" and direct proximity to Bockarie during the events, casts doubt over the two witnesses who testified otherwise. In failing to consider this evidence, the Chamber was in error.

242. Even had the evidence of TF1-516 and Mohamed Kabbah been sufficiently corroborated and reliable (which it was not), there was no evidence of the content of any discussions between Bockarie and Mr. Taylor. The Chamber must have presumed (without so saying) that these alleged communications were to inform Mr. Taylor as to the "continuing evolution" of his alleged plan. In the absence of evidence to support this, or any reasoning to support the Chamber's assumption, and given the Chamber's errors in assessing the problematic and uncorroborated hearsay of TF1-516 and Kabbah, its finding as to direct contact with between Bockarie and Mr. Taylor is manifestly unsafe.

*(iv) The Chamber erred insofar as it relied on the Pademba Road order as supporting its finding of direct or daily contact between Mr. Taylor and Bockarie*

243. The Chamber concluded, citing to nothing, that Mr. Taylor "gave advice to Bockarie" and received updates as to the progress in Freetown.[491] The sole evidence accepted by the Chamber about the content of Mr. Taylor's alleged communications during the Freetown invasion concerns an alleged order which emanated from Mr. Taylor, through Yeaten, to Bockarie, to release the Pademba Road prisoners.[492]

244. Only one witness links the release of the Pademba Road prisoners back to Mr. Taylor; Dauda Aruna Fornie. He gives uncorroborated fourth-hand hearsay on Mr. Taylor's involvement as follows: Mr. Taylor told Yeaten in Monrovia, who told Bockarie via satellite phone in Buedu, who told Mohamed Kabbah, which was

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[488] TT, Dauda Aruna Fornie, 3 Dec. 2008, pp. 21609-10.
[489] Judgement, para. 219.
[490] TT, Abu Keita, 23 Jan. 2008, pp. 2020-2.
[491] Judgement, paras. 3606, 3611(xiv).
[492] Judgement, para. 3591.

overheard by the witness, to release the Pademba Road prisoners.[493] Bockarie then instructed Kabbah to send a message to Gullit to release the prisoners.[494]

245. This evidence is so far removed from the source that it is impossible that a reasonable trial chamber would be satisfied by its reliability. In this case, the Chamber unblinkingly accepts this testimony, with no apparent caution despite its fourth-hand nature, with no enquiry into the credibility of the multiple sources of the hearsay, and from a witness who received significant payments from the Prosecution and WVS over two years,[495] and who admitted to a "lack of candour" in his dealings with the Prosecution until receipt of a letter promising immunity.[496]

246. Notably, Fornie's extended-hearsay-chain includes Mohamed Kabbah, one of the two witness upon whom the Chamber relies to find that Mr. Taylor was in regular contact with Bockarie. Kabbah says nothing about this incident. The Chamber acknowledged this. His omission is justified on the fact that "having testified prior to Fornie, Kabbah was not questioned further on his testimony concerning the release of Pademba Road prisoners."[497] This reasoning is erroneous. Firstly, it invites parties to mask uncorroborated testimony through strategic scheduling of witnesses. Secondly, the Prosecution's questioning of Kabbah on communications concerning Mr. Taylor was exhaustive. In response to a direct question, he was clear that he only monitored one alleged conversation involving Bockarie and Mr. Taylor:[498]

> Q. Now, where there any other communications during this time that you have information about involving Sam Bockarie and the satellite phone?
> A. That is the communication that I monitored between him, that is Sam Bockarie, and Charles Taylor. That was the only conversation I monitored.

247. Kabbah's failure to recount that Bockarie told him about instructions from Mr. Taylor to release the Pademba Road prisoners undermines Fornie's already extremely shaky account of this event.

248. In any event, even had there been sufficient and credible evidence of Mr. Taylor telling Yeaten to tell Bockarie to tell Gullit to release the Pademba Road

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[493] Judgement, para. 3588.
[494] TT, Dauda Aruna Fornie, 3 Dec. 2008, 21586-8.
[495] Judgement, para. 357.
[496] Judgement, para. 352.
[497] Judgement, para. 3589.
[498] TT, Mohamed Kabbah, 15 Sept. 2008, p. 16178-9.

prisoners, this does not assist with establishing "direct" or "daily" contact between Mr. Taylor and Bockarie, or his general awareness of the events in Freetown.[499]

*(v) The Chamber's attempt to hedge its bets through Yeaten fails because of a lack of evidence*

249. Fornie's fourth-hand uncorroborated hearsay is in fact the sole evidence of any alleged exchange between Mr. Taylor and Yeaten during the Freetown invasion. Kabbah testified that "it was said" within the RUF that Yeaten was Mr. Taylor's right-hand man and so "whatever he said he must have discussed it with the Pa."[500] But even he agreed there was no evidence to support this, it was just what people in the RUF assumed.[501]

250. The Chamber examined at length the relationship between Yeaten and Bockarie, but made no findings as to the regularity of contact between them.[502] Relevantly, it concluded that Yeaten was emboldened "take action without prior direction from the Accused."[503]

251. There is accordingly no basis to conclude that in the absence of direct contact between Mr. Taylor and Bockarie, Mr. Taylor would be aware of the continuing evolution of the plan because of contact between Yeaten and Bockarie. This finding required evidence that Yeaten was regularly reporting the content of these discussions back to Mr. Taylor. No such evidence was heard.

*(vi) The impact of the error*

252. As outlined in Ground 11 above, the Chamber was unable to find that the crimes committed by Gullit's troops in Freetown were part of the original "Bockarie/Taylor plan". As such, they found that this plan "evolved", and held Mr. Taylor liable through this expanded plan, and on the basis that his alleged "awareness" of this evolution through daily contact with Bockarie. The evidence examined above demonstrates that no reasonable chamber would have accepted that this daily or regular contact had been established beyond a reasonable doubt. As such, the Chamber's basis for Mr. Taylor's liability for the crimes encompassed in the "evolved plan" disappears, invalidating the Judgement and warranting a reversal of

[499] Judgement, paras. 3654, 3606, 3611(xiv), 6966.
[500] TT, Mohamed Kabbah, 16 Sept. 2008, p. 16381.
[501] TT, Mohamed Kabbah, 16 Sept. 2008, p. 16381.
[502] Judgement, paras. 2621-9.
[503] Judgement, para. 2623.

the planning convictions based on the crimes that were committed during the Freetown invasion and subsequent retreat after the evolution of the plan occurred.[504]

**vii. GROUND OF APPEAL 13: The Trial Chamber erred in fact and law in finding that Sam Bockarie exercised effective command and control over Gullit whether before, during or after the capture of State House and Pademba Road Prison in Freetown.**

*(i) Overview*

253. The Chamber did not accept that Mr. Taylor directed or had control over the Freetown invasion.[505] It found, however, a relationship of "effective command and control" between Mr. Taylor's "co-planner" Sam Bockarie and AFRC commander Alex Tamba Brima (Gullit).[506] It then relied on this relationship of command to extend liability for the Freetown invasion to Mr. Taylor, as follows:

> The Trial Chamber recalls its finding that **Bockarie then assumed effective control over Gullit's actions** and SAJ Musa's plan was abandoned for the plan that had been made by Bockarie and the Accused in November 1998. The troops commanded by Gullit in Freetown were subordinated to and used by Bockarie in furtherance of this plan, and further execution of the plan was carried out with close coordination between Bockarie and Gullit, with Gullit in frequent communication with Bockarie and with Gullit taking orders from Bockarie. **In these circumstances the Trial Chamber finds that the plan made by Bockarie and the Accused substantially contributed to the commission of crimes committed by Gullit's forces while Gullit was operating under Bockarie's command.**[507]

Hence, for the Chamber, Bockarie's command of Gullit forms the link between Mr. Taylor in Monrovia and the fighters in Freetown. The Chamber was explicit that "what is relevant to the responsibility of the Accused is whether Bockarie was effectively in command of a concerted and coordinated effort to take Freetown, with Gullit as his subordinate."[508]

254. No reasonable trier of fact could have concluded on the available evidence that Bockarie exercised effective control over Gullit. Moreover, the Chamber failed to make the findings necessary for a finding of effective control; namely that Bockarie

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[504] Judgement, para. 6966.
[505] Judgement, paras. 3605, 3611(xviii), 3618.
[506] See Judgement, paras. 3464, 3479, 3485, 3611(xii), 3617, 6965.
[507] Judgement, para. 6965 (emphases added). See also Judgement, para. 3485: "Bockarie exercised effective command and control over Gullit during the capture of the State House and Pademba Road Prison." See also Judgement, paras. 3463, 3479, 3611(xii), 3617.
[508] Judgement, para. 3479.

had the material ability to prevent or punish crimes. [509] Either of these two errors, alone or in combination, invalidate Mr. Taylor's planning convictions because of the direct link explicitly made by the Chamber between Bockarie's command of Gullit and Mr. Taylor's involvement in the Freetown invasion.

255. The gaping holes in the Chamber's command findings are unsurprising, given that the facts do not lend themselves to a finding of effective control in a superior-subordinate relationship. Factually, the Chamber found that Bockarie was giving orders to commit crimes, rather than failing to prevent or punish crimes. The doctrine of command responsibility centres on the culpable omission of a superior to adopt necessary and reasonable measures to prevent and punish crimes, [510] rather than liability for having given criminal orders in the first place. The Chamber appears to have conflated the doctrine of command responsibility with "ordering" as a mode of liability. However, the Chamber's insistent use of the terms of art "effective command and control",[511] and Gullit as Bockarie's "subordinate",[512] and its conclusion that "Gullit was operating under Bockarie's command"[513] leave no doubt about the Chamber's reliance on this doctrine, and its concomitant obligation to be restrained by its confines and to make the necessary findings.[514]

*(ii) Bockarie did not exercise effective control over Gullit*

*(a) Bockarie was not the de jure superior of Gullit*

256. The Chamber firstly asserts that "in February 1998, Bockarie took command over both the RUF and AFRC, pursuant to which he had a formal superior-subordinate relationship with Gullit."[515] It is assumed that by "formal superior-subordinate relationship" the Chamber was referring to *de jure* command, where

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[509] *AFRC* AJ, para. 257; citing *Delalić* AJ, para. 256. See also *Bagilishema* AJ, para. 50; *Hadžihasanovic* TJ, para. 164. See also *Halilović* AJ, para. 59.

[510] *CDF* TJ, para. 234: "It is thus the failure to act when under a duty to do so which is the essence of this form of responsibility. It is responsibility for an omission..."; *Halilović* TJ, para. 54: "The Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates"; *AFRC* AJ, para 783: "[A] superior is responsible not for the principle crimes, but rather for what has been described as a 'dereliction' or 'neglect of duty' to prevent or punish the perpetrators of serious crimes."

[511] Judgement, paras. 3646, 3485, 3611(xii), 3617.

[512] Judgement, para. 3479.

[513] Judgement, para. 6965.

[514] See, for example, *Orić* AJ, paras. 47-9, where the Appeals Chamber quashed Orić's convictions under Article 7(3) because of the Chamber's to make sufficient findings as to the criminal liability of his subordinate, making only a small number of general findings "without any indication of whether and how they relate to any form of criminal liability under the International Tribunal's Statute".

[515] Judgement, para. 3464.

power is derived from official or formal appointment to a position of authority.[516] The Chamber points to no evidence of the formalisation of Bockarie's appointment over the AFRC forces, noting only that he "assumed" command after an incident where JP Koroma was arrested on suspicion of attempting to leave the country with a large quantity of diamonds; an incident which is placed between late-February and mid-1998.[517]

257. Even had Bockarie assumed a "formal superior-subordinate relationship with Gullit" sometime before mid-1998 (which is not accepted), the Chamber acknowledged that in October 1998 "SAJ Musa severed ties with the RUF command and created an unaffiliated SLA group... with Brima [Gullit] as his deputy."[518] As such, any such formal relationship was certainly dissolved prior to the relevant period.

258. In any event, a relationship of *de jure* command does not necessarily give rise to effective control.[519] *De jure* authority may exist without the superior being in a position to exercise effective control over subordinates.[520] As was affirmed by the ICTY Appeals Chamber in *Orić*, "*de jure* authority is not synonymous with effective control."[521] Whereas the possession of *de jure* powers may suggest a material ability to prevent or punish criminal acts of subordinates, it may be neither necessary nor sufficient to prove this ability.

259. Whether Bockarie had effective control over Gullit depends on his material ability to prevent and punish Gullit's crimes, rather any official title or appointment.[522]

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[516] *Bagilishema* AJ, para. 50; *Kordić & Čerkez* TJ, para. 406; *Delalić* AJ, para. 193.

[517] Judgement, para. 53. The Chamber also cited in the Judgement, para. 3463, fn. 7851 to a paragraph of the Prosecution Final Brief which does not support its assertion, and a paragraph of the Defence Final Brief which states only that "It was at this point in which the command structure became unified. Each group led by a RUF commander was to have an AFRC deputy, and each group commanded by an AFRC commander was to have a RUF deputy; though in practice there was no RUF commander as deputy to an AFRC commander. The RUF took over the command role, with any AFRC commander as deputy."

[518] Judgement, para. 55.

[519] *Nahimana* AJ, para. 787.

[520] *Halilović* AJ, paras. 211 and 214.

[521] *Orić* AJ, para. 91. See also *Hadžihasanović* AJ, para. 21: "Even when a superior is found to have *de jure* authority over his subordinates, the Prosecution still has to prove beyond reasonable doubt that this superior exercised effective control over his subordinates." See also *Halilović* AJ, 16 October 2007, para. 85.

[522] *AFRC* AJ, para. 257: "[t]he power or authority may arise from a *de jure* or a *de facto* command relationship. Whether it is *de jure* or *de facto,* the superior-subordinate relationship must be one of effective control, however short or temporary in nature." Citing *Bagilishema* AJ, para. 50; *Delalić* AJ, para. 256.

*(b) There was insufficient evidence to support a finding that Bockarie "ordered" Gullit*

260. The evidentiary burden required to establish effective control is high.[523] This is unsurprising given that the doctrine of superior responsibility potentially gives rise to broad liability for the actions of others. On this basis, "[g]reat care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote."[524] A chamber is required to satisfy itself that each act upon which the Prosecution seeks to rely to establish effective control is an "unequivocal exercise of superior authority."[525] Effective control must be established beyond a reasonable doubt. If another competing and reasonable conclusion is open on the evidence, this precludes such a finding.

261. As the Appeals Chamber has recognised, effective control is the ability to prevent or punish the actions of subordinates.[526] The ICTY Appeals Chamber was clear that indicators of effective control "are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate."[527]

262. The Chamber was aware of this test. When setting out the "elements of superior responsibility", it defined effective control as "the material ability to prevent or punish the commission of the offence."[528] In acquitting Mr. Taylor under Article 6(3) of the Statute, the Chamber held *inter alia* that "the Accused was not in a position to take the necessary and reasonable measures to prevent or punish Bockarie for the commission of crimes", and "the evidence does not establish... that the Accused had effective control over the AFRC/RUF Junta, i.e. that the Accused was in a position to take the necessary and reasonable measures to prevent or punish Koroma for the commission of crimes."[529] This requirement went out the window when it came to the Chamber's analysis of Bockarie's effective control over Gullit, which was

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[523] *AFRC* TJ, para. 1660.
[524] *Delalić* TJ, para. 377; See also *Kordić & Čerkez* TJ, para. 414.
[525] *Delalić* TJ, para. 669.
[526] *AFRC* AJ, para. 257; citing *Delalić* AJ, para. 256. See also *Bagilishema* AJ, para. 50; *Hadžihasanović* 98*bis* Decision, para. 164. See also *Halilović* AJ, para. 59.
[527] *Blaškić* AJ, para. 69.
[528] Judgement, para. 493.
[529] Judgement, paras. 6979-86.

substantially restricted to examining whether Bockarie gave orders to Gullit, which were then obeyed.

263. The Chamber found four instances of such orders from Bockarie to Gullit, namely: (a) to withdraw from Freetown and make it "fearful"[530] (b) to send the Pademba Road prisoners to Buedu;[531] (c) to execute Martin Moinama;[532] and (d) to execute captured ECOMOG soldiers.[533]

264. The evidence relied upon by the Chamber is insufficient to support findings beyond a reasonable doubt. The Chamber's finding that Bockarie ordered Gullit to execute captured ECOMOG soldiers, for example, was based on the hearsay evidence of one uncorroborated witness, whose testimony was misrepresented. The Chamber incorrectly asserted that: [534]

> Kamara testified that Bockarie told Gullit that as there was no prison for ECOMOG, any captured ECOMOG soldiers should be killed.

265. In fact, Kamara testified that: [535]

> Sam Bockarie would tell [Gullit] that he had no prison for ECOMOG. No politicians. As a result, those ECOMOG soldiers were killed under the cotton tree.

266. Kamara did not testify that Bockarie gave an order to execute the ECOMOG soldiers, rather he stated that Bockarie said that there was no prison for these soldiers, which, without more, cannot be equated to an order for their execution. There is accordingly no evidence that Bockarie gave an order to kill the captured ECOMOG soldiers, undermining one of the four orders relied upon by the Chamber for its finding of "effective control".

267. Concerning the execution of Martin Moinama, the Chamber relied on the hearsay evidence of two witnesses.[536] Alice Pyne only heard after the fact that Moinama had been killed on Bockarie's orders,[537] and under cross-examination confirmed a prior statement that Moinama's wife informed her that Moinama had been killed before the Freetown intervention.[538] Foday Lansana claims to have monitored a radio communication in which Bockarie gave an order to Gullit to

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[530] Judgement, paras. 3445-52.
[531] Judgement, paras. 3453-7.
[532] Judgement, paras. 3458-63.
[533] Judgement, paras. 3458-63.
[534] Judgement, para. 3462.
[535] TT, Perry Kamara, 6 Feb. 2008, pp. 3230-1.
[536] Judgement, paras. 3458-62.
[537] Judgement, para. 3459.
[538] TT, Alice Pyne, TFl-584, 20 June 2008, pp. 12342-4.

execute Moinama. He had no direct evidence concerning whether this order had been carried out.[539] Moreover, Lansana had told the Prosecution in 2003, that he did not know Moinama's whereabouts.[540] The Chamber acknowledged these (and other) difficulties with this evidence, but relied on it regardless.

268. Even if the Chamber was correct in relying on this evidence despite the flaws outlined above (which is not accepted), it erred in failing to address additional weaknesses. Lansana and Pyne were husband and wife.[541] They were radio operators, both stationed with Superman in Lunsar throughout the Freetown attack, operating from the same location.[542] Lansana claims to have monitored Bockarie ordering Gullit to execute Moinama.[543] Pyne's testimony, by contrast, corroborated her prior statement that she never heard a radio message about Moinama's release or death from anyone.[544] Pyne's evidence therefore necessarily casts doubt on the reliability of Lansana's testimony. The Chamber's failure to acknowledge or address this is an error. In addition, the Chamber acknowledged that Lansana told the Prosecution in 2003 that he did not know Moinama's whereabouts, but accepted Lansana's explanation that "he did not initially tell the Prosecution about Moinama's death because he did not yet feel safe as a witness."[545] The Chamber did not address the fact that Lansana first testified that he had in fact told the Prosecution in 2003 that Moinama had been executed.[546] Lansana is not only inconsistent as between his prior statement and his testimony, but is also inconsistent in the excuses he gave for this inconsistency.

269. In these circumstances, the Trial Chamber's reliance on such vague and inconsistent hearsay (coupled with its failure to address at least two significant evidentiary weaknesses), in order to conclude beyond a reasonable doubt that Bockarie gave an order to Gullit to execute Martin Moinama is an error. The resultant finding is one that no reasonable trier of fact could have reached.

*(c) Gullit's disobedience*

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[539] Judgement, para. 3459. See also TT, TFI-275, 26 Feb. 2008, p. 4749.
[540] TT, Foday Lansana, TFI-275, 26 Feb 08, pp. 4749-54.
[541] TT, Alice Pyne, 18 June 2008, pp. 12135-6.
[542] Judgement, para. 3459; TT, Foday Lansana, 22 Feb. 2008, pp. 4453, 4569 ; Alice Pyne, 19 June 2008, p. 12273.
[543] Judgement, para. 3459.
[544] TT, Alice Pyne, 20 June 2008, pp. 12342-4.
[545] Judgement, para. 3461.
[546] TT, Foday Lansana, TFI-275, 26 Feb 08, p. 4750.

270. Even had sufficient evidence been heard about Bockarie's four orders, the Chamber's finding then runs into its next obstacle to a finding of effective control: Gullit's persistent insubordination. As the Chamber acknowledged, Gullit did not always follow Bockarie's orders. Evidence of prior instances of indiscipline and of non-compliance with orders is relevant to an assessment of effective control.[547]

271. To take the most striking example, five Prosecution witnesses testified that Bockarie gave Gullit an order (characterized by the Chamber as an "instruction") **not** to advance towards Freetown until reinforcements arrived. [548] An instruction not to advance on the capital during a civil war is of undeniable significance. Gullit went anyway. [549] The Chamber concluded that "by advancing to Freetown from Waterloo and Benguema without Bockarie's reinforcements, Gullit was not rejecting either Bockarie's authority or his offer of assistance".[550] Perhaps not, but he was certainly not following Bockarie's instruction. However the facts are dressed up, Bockarie gave an instruction which Gullit did not follow.

272. The Chamber seems to have been aware of the significance of this particular example of non-compliance by Gullit. At one stage it limits its temporal finding of effective control "from the point at which Gullit reported to Bockarie after the capture of the State House",[551] (namely after Gullit had broken ranks and advanced to Freetown). Elsewhere, however, it finds that "Bockarie exercised effective command and control over Gullit during the capture of the State House and the Pademba Road Prison."[552] Obviously, these two findings cannot be reconciled. Either way, the Chamber found effective control at a time when Gullit was advancing on Freetown despite Bockarie's instruction, or it found effective control at the time when Gullit reported to Bockarie that he had done so. Neither scenario provides support for a finding of effective control.

273. Nor is the Chamber assisted by the testimony of two radio operators who testified as to tensions between Bockarie and Gullit during this period. Dauda Aruna Fornie testified that upon hearing one of the fighters who had entered Freetown speaking on the BBC, Bockarie became concerned that Gullit would take power in

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[547] *Strugar* AJ, para. 257.
[548] Judgement, paras. 3402-6.
[549] Judgement, paras. 3402-18.
[550] Judgement, para. 3413.
[551] Judgement, para. 3464.
[552] Judgement, para. 3611(xii).

Freetown on his own.[553] Perry Kamara testified that Bockarie told Gullit to delay entering Freetown "for the command structure". The Chamber conceded that this "indicates Bockarie was concerned about maintaining his authority over the troops led by Gullit."[554] Prosecution witness Abu Keita, who said he was with Bockarie in Buedu during the invasion, testified that when Bockarie heard on the BBC on 6 January 1999 a commander speaking from Freetown saying that he was in control of the State House, Bockarie became angry.[555] Their evidence also casts doubt on the Chamber's conclusion that Bockarie was in command.

274. In any event, Gullit's independent advance to Freetown was not the only example of his "disobedience" towards Bockarie, which also finds support in contemporaneous documentary evidence. Exhibit P-067 is a 1999 report to Foday Sankoh from a Black Guard commander, in which he recounts the operation to capture Kono and Makeni as follows:[556]

> Furthermore, Col Rambo also tried his level best to link up with the other brothers that entered Freetown, but the Freetown operation was not coordinated as the said **Commander Black Jah [Gullit] was not going by the instruction from the High Command**. When they retreated from Freetown, the BFC met them and told them to present a comprehensive report pertaining [*sic*] the whole Freetown operation, but they deliberately fail to do so.

275. The Chamber also acknowledged the existence of "certain decisions made by Gullit which had the appearance of insubordination or a rejection of Bockarie's involvement."[557] These decisions are explained away, however, as being justified by Gullit on the basis of "military necessity."[558]

276. The Chamber's finding that Gullit followed those orders which suited him, and rejected those which were inconvenient (whether militarily or otherwise), mitigates against a finding of effective control. It points to a likelihood that Gullit did not consider himself bound to obey Bockarie's orders, but sometimes acted in a manner consistent with them because he agreed with them or considered that it was in

[553] Judgement, para. 3416.
[554] Judgement, para. 3416.
[555] TT, Abu Keita, 23 Jan. 2008, pp. 2019-20.
[556] Judgement, para. 3360.
[557] Judgement, para. 3442.
[558] Judgement, para. 3442.

his interests to do so.[559] This other reasonable conclusion was open to the Chamber, and was not considered or discounted.

277. In any event, even if the Chamber's evidentiary analysis had been flawless, and sufficient evidence established beyond a reasonable doubt that Bockarie gave orders to Gullit which he uniformly followed, this would not automatically give rise to a finding of effective control. Again, what matters is the material ability to prevent or punish the actions of subordinates. In *Kordić*, although Dario Kordić possessed sufficient authority over the Bosian-Croat forces to order them to commit certain acts and could therefore be liable for ordering those acts under Article 7(1) of the ICTY Statute, the Trial Chamber held that he lacked the effective control necessary for a finding of effective control relevant to Article 7(3).[560] In *Blaškić*, the ICTY Appeals Chamber held "the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over the troops that received the orders."[561] The issue is not whether orders were given (or followed) but whether the superior had the material ability to prevent or punish the alleged subordinates. This finding was never made. The Chamber's conclusion as to Bockarie's effective control over Gullit is therefore in error.

*(d) Other insufficient indicia of "effective control"*

278. As such, the four orders relied upon by the Chamber are insufficient to establish Bockarie's effective control over Gullit, either legally or evidentially. Perhaps in an attempt to bolster its conclusion, the Chamber coupled these orders with two other factors: (a) "that Gullit reported to Bockarie as the overall commander"; and (b) Gullit's use of deferential language when communicating with Bockarie.[562]

279. In support of its statement that "Gullit reported to Bockarie as the overall commander", the Chamber relies on two witnesses. The first, Alimamy Bobson Sesay, did not characterise Bockarie as the "overall commander". He testified:

> [w]hen we captured the State House all the reports he made to Mosquito. Whatever happened he briefed Mosquito.[563]

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[559] See, for example, *Orić* TJ, para. 706, where the changeable willingness of local leaders and fighters to subordinate themselves to the command and control of the accused mitigated against a finding of effective control.
[560] *Kordić & Čerkez* TJ, paras. 834, 839-41.
[561] *Blaškić* AJ, para. 485.
[562] Judgement, para. 3464.
[563] TT, Alimamy Bobson Sesay, 22 Apr. 2008, p. 8289.

At its highest, this testimony is only demonstrative of Gullit reporting to Bockarie. While reporting can be one indicia of command, it is certainly not dispositive.

280. Nor did Mohamed Kabbah testify that "Gullit reported to Bockarie as the overall commander", stating only that:

> [i]t was Gullit who was in charge of the men in Freetown, the fighting force that went there, but Sam Bockarie was in charge of the entire movement.[564]

An individual can be in charge of a movement without having command over particular troops. In *Halilović*, the ICTY Appeal Chamber upheld the Trial Chamber's refusal to find effective control, noting that "responsibility does not attach to a military official merely on the basis of his over-all command" in the absence of the prevention or punishment of crimes.[565] The testimony of these two witnesses does not stand for the proposition relied upon by the Chamber.

281. Lastly, the Trial Chamber added "the level of deference exhibited by Gullit towards Bockarie in their communications" into the mix of indicia of effective control. Two witnesses testified that Gullit called Bockarie "sir", or "master". [566] Without evidence that the use of the terms "master" or "sir" was more than a reflection of politeness, or Gullit's acknowledgement of Bockarie's age or position, [567]or even a way to avoid identifying Bockarie over sensitive radio communications during a civil war, [568] these terms are of negligible evidential weight, and certainly insufficient to tip the balance in terms of effective control.

*(e) Failure to Make Necessary Findings*

282. Even had the Chamber not made the multitude of errors identified above, the conclusion as to Bockarie's effective control was made in the absence of any discussion or findings of Bockarie's material ability to prevent or punish Gullit's actions. Without this, there is no basis for the Trial Chamber's finding of effective control. Any finding of effective control in the absence of a material ability to prevent or punish would be contrary to the law as established by the SCSL,[569] and the doctrine of command responsibility more generally.[570]

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[564] TT, Mohamed Kanneh, 15 Sept. 2008, pp. 16172-3.
[565] *Halilović* AJ, para. 214.
[566] TT, Dauda Aruna Fornie, 3 Dec. 2008, p. 21603; Isaac Mongor, 11 Mar. 2008, pp. 5825-6.
[567] See, for example, TT, Isaac Mongor, 11 Mar. 2008, p. 5826.
[568] See, for example, TT, Dauda Aruna Fornie, 3 Dec. 2008, p. 21603.
[569] Judgement, para. 493, citing *AFRC* TJ, para. 782. See also *RUF* TJ, para. 287, citing *AFRC* AJ, paras. 257, 298.
[570] *Delalić* AJ, para. 256. See also *Bagilishema* AJ, para. 50; *Hadžihasanović* 98*bis* Decision, para. 164. See also *Halilović* AJ, para. 59.

*(iii) Consequences of the Trial Chamber's error*

283. The Chamber characterised the relationship between Bockarie and Gullit as one of "effective command and control". The Chamber was explicit that "what is relevant to the responsibility of the Accused is whether Bockarie was effectively in command of a concerted and coordinated effort to take Freetown, with Gullit as his subordinate."[571] It concluded that "the plan made by Bockarie and the Accused substantially contributed to the commission of crimes committed by Gullit's forces while Gullit was operating under Bockarie's command."[572] Without command, this link disappears. The errors in the Chamber's finding that Bockarie "commanded" Gullit therefore invalidate the planning convictions for crimes attributable to Gullit and his troops during the Freetown invasion and subsequent retreat, and have occasioned a miscarriage of justice.[573]

*(iv) Conclusion: The Chamber erred in finding that the "Bockarie/Taylor plan" substantially contributed to the crimes committed by RUF/AFRC fighters*

284. In order to find that the "Bockarie/Taylor plan" substantially contributed to the crimes committed, the Chamber relied on two elements:[574] (i) the "joining up" of a small contingent of RUF troops lead by Rambo Red Goat with Gullit's troops, who then committed crimes;[575] and (ii) the Chamber's "evolved" planning theory together with Bockarie's command over Gullit. The numerous errors which invalidate these findings and have occasioned a miscarriage of justice have been explored in Grounds 6 to 13 above.

285. Even if these findings had been established beyond a reasonable doubt, no reasonable trial chamber would have concluded that the "Bockarie/Taylor plan" substantially contributed to the crimes committed during the Freetown invasion and subsequent retreat. While the Prosecution is not required to establish that the crimes would not have been perpetrated but for the alleged plan,[576] it is required to prove beyond a reasonable doubt that the plan was a factor "substantially contributing to [...] criminal conduct constituting one or more statutory crimes that are later perpetrated."[577] The Chamber accepted that SAJ Musa's troops invaded Freetown

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[571] Judgement, para. 3479.
[572] Judgement, para. 6965.
[573] Judgement, paras. 6971, 6994(b).
[574] Judgement, paras. 6962-8.
[575] Judgement, para. 6962.
[576] Judgement, para. 470, citing *Kordić & Čerkez* AJ, para. 26.
[577] Judgement, para. 470, citing *Kordić & Čerkez* AJ, para. 26.

independently,[578] and accepted abundant evidence that these fighters killed, looted and murdered during their advance towards and into Freetown,[579] both before they were joined by the "small contingent" of RUF troops,[580] and before Bockarie allegedly assumed command.[581]

286. As such, no reasonable trier of fact would have found that that the "Bockarie/Taylor plan" substantially contributed to the crimes committed,[582] such a finding being precluded by the previous conduct of these particular troops.

287. Apart from the Freetown invasion and retreat, the Chamber also convicted Mr. Taylor for planning crimes committed "in the attacks on Kono and Makeni".[583] Given the absence of findings that any crimes were committed during the implementation of the alleged plan in Kono and Makeni, the planning convictions based on these areas must also be reversed.

**d. ERRORS RELATING TO PLANNING: MENS REA**

**i. GROUND OF APPEAL 14: The Trial Chamber erred in fact and law in inferring that Charles Taylor possessed the requisite mental state for planning based on alleged awareness of crimes being committed by the RUF and/or AFRC.**

288. To be liable for planning, the accused must have either intended that the planned crime be committed or, at a minimum, been aware of the substantial likelihood that the crime would be committed when the plan was carried out.[584]

289. Immediately, the Chamber hits its first obstacle. As discussed in Ground 11 above, the Chamber failed to find that Mr. Taylor made a plan to commit particular statutory crimes or underlying offences. It found that Mr. Taylor and Bockarie "intentionally designed a plan for the RUF/AFRC Freetown Invasion",[585] but failed to identify any concrete crimes that were part of this plan.

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[578] Judgement, paras. 57, 61, 3121.
[579] See, for example, TT, TF1-143, 5 May 2008, p. 9015-8; Alimamy Bobson Sesay, 22 Apr. 2008, p. 8226-72. See also Judgement paras. 863-4, 848-50, 1565.
[580] Judgement, para. 6962.
[581] Judgement, para. 3464: "Bockarie exercised effective command and control over Gullit from the point at which Gullit reported to Bockarie after the capture of the State House and Pademba Road Prison."
[582] Judgement, para. 6968.
[583] Judgement, para. 6971.
[584] Judgement, para. 499(ii); *Nahimana* AJ, para. 479. See also Judgement, para. 470; *Kordić & Čerkez* AJ, para. 31.
[585] Judgement, para. 6961.

290. Planning convictions in other cases have identified plans to "murder Tutsi"[586] or "kill military aged men, expel civilians, and destroy houses"[587] Accordingly, at the *mens rea* stage, the Chamber in only required to determine whether the accused intended that these crimes occur (or was aware of a substantial likelihood that they would). In this case, the Chamber's failure to find a plan to commit certain crimes means that there was no object crime to the *mens rea* finding.

291. Instead, the Chamber found in a blanket manner that Mr. Taylor was aware that "crimes" would occur.[588] The Chamber relied on: (i) Mr. Taylor's awareness that the AFRC/RUF's "war strategy was explicitly based on a widespread or systematic campaign of crimes against civilians" and (ii) his instruction to make the operation "fearful" and use "all means".[589] No basis was given for Mr. Taylor's *mens rea* for each of these 11 separate and distinct crimes. This was an error.

292. The Appeals Chamber Judgement in *Kordić and Čerkez* is instructive. Kordić had been present at a meeting where an order had been approved to kill all Muslim men of military age, expel civilians and burn down their houses.[590] He was therefore held to have participated in the planning of the attack against Ahmići (and other Lašva Valley villages) aimed at "cleansing" these areas of Muslims.[591] Kordić was held liable for planning crimes he directly intended, namely "to kill military aged men, expel civilians, and destroy houses."[592] He was also liable for crimes which were substantially likely to occur as a result of the plan: "Kordić approved the general plan… with the awareness of the substantial likelihood that other crimes such as killing of civilians, unlawful detention of civilians, and plunder would be committed in the execution of this general plan."[593]

293. Where the Chamber went wrong in the present case was failing to make a finding as to which crime(s) Mr. Taylor either intended or was aware might likely occur. Unlike in *Kordić*, no basis was given for Mr. Taylor's awareness of the substantial likelihood that 11 different underlying offences, (i) acts of terrorism; (ii) murder; (iii) violence to life, health and physical and mental well-being of persons in

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[586] *Gacumbitsi* TJ, paras. 271-8
[587] *Kordić & Čerkez* TJ, para. 976.
[588] Judgement, para. 6969.
[589] Judgement, para. 6969.
[590] *Kordić & Čerkez* TJ, para. 631.
[591] *Kordić & Čerkez* AJ, para. 975.
[592] *Kordić & Čerkez* AJ, para. 976.
[593] *Kordić & Čerkez* AJ, paras. 976, 1092.

particular murder; (iv) rape; (v) sexual slavery; (vi) outrages upon personal dignity; (vii) violence to life, health and physical and mental well-being of persons in particular cruel treatment; (viii) other inhumane acts; (ix) conscripting or enlisting children under the age of 15 into armed forces or groups or to participate actively in hostilities; (x) enslavement; and (xi) pillage would occur.

294. Holding an accused liable for all offenses in an Indictment without finding intent for the particular crimes[594] is inconsistent with principles of individual criminal responsibility.[595] To be convicted of a war crime, for example, the principle of individual guilt requires "that fundamental characteristics of a war crime be mirrored in the perpetrators mind... it is illogical to say that there is such a nexus unless it is proved that the accused has been aware of the factual circumstances concerning the nature of the hostilities." [596] To be liable for murder as a crime against humanity, an accused must have known of the fundamental characteristics of this category of crimes.[597]

295. As a result of its failure to make a finding as regards Mr. Taylor's *mens rea* for each of crimes for which he was convicted, the Chamber jumped over these fundamental steps. The Chamber made no findings that Mr. Taylor had knowledge of the fundamental characteristics of war crimes or crimes against humanity. A failure to make a *mens rea* finding in relation to crimes has previously necessitated the quashing of convictions.[598] The same should occur in the present case.

296. Further, the two elements relied upon, namely Mr. Taylor's awareness of past crimes by the AFRC/RUF, and his "fearful" and "by all means" instructions (discussed in Ground 15), were insufficient to satisfy the *mens rea* for planning.

297. The Chamber cites to no precedent of awareness of past crimes being sufficient to establish the requisite *mens rea* for planning. Even when awareness of past crimes is a legitimate consideration in determining whether a superior "had reason to know" that his subordinates have or will commit crimes,[599] caution has been

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[594] Judgement, para. 469.
[595] See *Naletilić* AJ, para. 114.
[596] *Naletilić* AJ, para. 114.
[597] *Tadić* AJ, para. 271: To convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related (emphasis in original). See also *Naletilić* AJ, para. 114.
[598] *Krajišnik* AJ, paras. 175-8, 203; *Vasiljević* AJ, paras. 131-2. See also *Orić* AJ, paras. 47, 53, 56, 60.
[599] Judgement, para. 490.

regularly exercised in drawing inferences to establish such constructive knowledge,[600] and only in very limited circumstances can future crimes be inferred from past conduct. It is not sufficient to establish awareness of the risk that crimes might or could be committed by subordinates, rather there must be a substantial or strong risk, or a real and obvious prospect that this will occur.[601]

298. On this point, the arguments set out in Ground 17 below are repeated and relied upon. In short, the Chamber's own findings demonstrate that RUF/AFRC soldiers, rather than implementing a policy of crimes against civilians, tended to commit crimes opportunistically when on the brink of defeat. And while Mr. Taylor acknowledged the past commission of gross atrocities,[602] the Chamber also accepted that the RUF issued a public apology to the citizens of Sierra Leone in May 1997,[603] and the findings in the Judgement of violent crimes committed by the RUF/AFRC forces during the Junta period are notably sparse.[604] Moreover, Mr. Taylor's acknowledgement of criminal activity on the part of the RUF must be read in light of his testimony that the situation in Sierra Leone was changeable.[605] In such circumstances, there is an insufficient basis to conclude (nor was one reached) that Mr. Taylor was aware of a substantial likelihood at the time he formulated the "Bockarie/Taylor plan" that the RUF/AFRC would commit any or all of the particular crimes for which he was convicted.

299. Moreover, a Chamber is required to make findings that particular crimes, and not any criminal offence, had been or was about to be committed. In *Hadžihasanović*, the ICTY Appeals Chamber found that Kubura's knowledge of wanton destruction could not automatically be inferred from his awareness of acts of plunder committed in the same area.[606] In *Krnojelac*, the ICTY Appeals Chamber found it was not sufficient for the accused to have known that his subordinates were beating people to convict him of "torture" if it had not been established that he knew of the prohibited

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[600] See, for example, *Bagilishema* TJ, para. 988.
[601] *Blaškič* AJ, paras. 41-2; *Strugar* TJ, para. 370, 417-8; *Kvočka* AJ, paras. 155 and 179.
[602] Judgement, para. 6969.
[603] Judgement, paras. 526, 6880
[604] See Ground 17 below.
[605] TT, Charles Taylor, 25 Nov. 2009, p. 32390 ("It depends on when. You've been switching me between '99 and '98"). See *Perišić* Dissenting Opinion, para. 49: "It is important to recognize that situations during a war can change dramatically over time. What Perišić knew or thought he knew about the activities and propensities of the VRS during the initial break-up of the SFRY cannot be equated with his understanding of circumstances during later stages of the war."
[606] *Hadžihasanović* AJ, para. 295.

purpose behind the beatings which forms part of the definition of torture.[607] The Chamber's vague reference to past "crimes against civilians" and past "atrocities"[608] fails to demonstrate that Mr. Taylor had constructive knowledge that particular crimes would or were likely to be committed. As such, this error invalidates the Chamber's finding that Mr. Taylor had the requisite *mens rea* for planning, warranting the reversal of the planning convictions.

**ii. GROUND OF APPEAL 15: The Trial Chamber erred in fact and law in finding that Charles Taylor instructed that the Freetown operation be made "fearful" and that the RUF should capture Freetown "by all means", and in relying on these findings to infer that Charles Taylor possessed the requisite mental elements for planning.**

*(i) The Chamber erred in finding that Mr. Taylor told Bockarie that invasion of Freetown should be "fearful"*

300. The second element erroneously relied upon by the Chamber to make its insufficient blanket finding that Mr. Taylor intended or was aware that "crimes" would be committed was his instruction to Bockarie that the operation should be "fearful", and that he should take Freetown "by all means".[609]

301. That Charles Taylor told Sam Bockarie to make the operation "fearful"[610] is uncorroborated second-hand hearsay from Isaac Mongor.[611] No witness heard Mr. Taylor give this instruction to Bockarie. Only Mongor heard Bockarie say that Mr. Taylor had given it.

302. The Chamber's reliance on an uncross-examined out-of-court statement to infer a directly incriminating fact was legally improper, as discussed in Ground 1. The Chamber's reasoning also reflects none of the caution that the jurisprudence of the international tribunals has repeatedly emphasized in respect of hearsay, even in respect of less important findings.[612] The Chamber makes a highly prejudicial and incriminating finding on the basis of information that, in effect, is untestable.[613]

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[607] *Krnojelac* AJ, para. 155.
[608] Judgement, para. 6969.
[609] Judgement, para. 6969.
[610] Judgement, paras. 3116-7, 3611 (vii), 6959, 6969.
[611] Judgement, paras. 3116-7.
[612] See, Ground of Appeal 1. See, for example, *Bizimungu* TJ, para. 693: "Finally, the Chamber does not consider that Witness LEL's uncorroborated hearsay evidence provides a sufficient basis for it to conclude beyond reasonable doubt that Mugenzi sent security personnel, whether they be soldiers or gendarmes, to rescue Vestine Ugiranyina and her husband's niece"; para. 764: "Notwithstanding the frailties in the Defence evidence, Witness GHY's uncorroborated hearsay evidence fails to provide a

303. The Chamber also failed to give reasons that would be remotely adequate in relation to the nature of the finding. No reasons are given concerning the reliability of the original statement or circumstantial guarantees of truthfulness, or the context and circumstances in which the statement was made. [614] This is despite the Chamber's obligation to "provide a fully reasoned opinion" and "be especially rigorous" in its assessment of such evidence.[615] The Chamber's error was compounded by its complete failure to assess Sam Bockarie's veracity or motivations for being untruthful about Mr. Taylor's alleged "fearful" instruction.[616]

304. Isaac Mongor's reliability is also significantly undermined by his admission that he was untruthful when first discussing Mr. Taylor's role in the Freetown operation with the Prosecution.[617] He is an accomplice witness[618] whose evidence (according to the Chamber) must be viewed with caution when uncorroborated,[619] who benefited financially from his testimony,[620] and upon whom the Chamber declined to rely elsewhere in the Judgement.[621] In such circumstances, the Chamber's unqualified acceptance of his uncorroborated second-hand hearsay evidence in the absence of any scrutiny or caution is an error.[622] This was manifestly insufficient in the circumstances.

305. A further inconsistency in Mongor's testimony arises from his claim that he was first told about the "fearful" instruction in a private conversation,[623] and that the next morning during a commander's meeting Bockarie "explained the same thing that

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sufficient basis for the Chamber to make findings beyond reasonable doubt." *Gacumbitsi* TJ, para. 196: "However, the hearsay evidence of Witness TAS is insufficient, failing corroboration, to establish that the Accused ordered the murder of Marie and Béatrice"; para. 327: "On her part, Prosecution Witness TAS also testified that she heard those who raped her say that the Accused had ordered them to rape Tutsi women and girls, but her uncorroborated hearsay evidence is not such as to prove the involvement of the Accused." *Nzabonimana* TJ, para. 1454: "Nevertheless, the Chamber observes that the Prosecution relied on the uncorroborated hearsay evidence of a single witness to support this allegation. The Chamber recalls that it may find an allegation proven beyond a reasonable doubt on the basis of a single witness's testimony. However, in this instance, given the hearsay nature of the witness's evidence and the lack of corroborating evidence, the Chamber does not find this evidence sufficient to support this allegation." See also para. 1688. See also, *Kanyarukiga* TJ, para. 193.

[613] *RUF* TJ, para. 495.

[614] *RUF* TJ, paras. 495-6.

[615] *Kordić & Čerkez* AJ, para. 274.

[616] See Ground 2, above. See also Ground 7 on Sam Bockarie's motivations for associating with Taylor.

[617] TT, Isaac Mongor, 7 Apr. 2008, pp. 6735-42.

[618] Judgement, para. 270.

[619] Judgement, para. 183.

[620] Judgement, para. 271.

[621] Judgement, paras. 2367, 2559, 3119, 3383-4, 3412, 5384-5, 5395-6.

[622] Judgement, paras. 3116-7.

[623] TT, Isaac Mongor, 11 Mar. 2008, pp. 5796-7.

he had briefed me on."[624] Despite this, there is no evidence that Bockarie relayed the same "fearful" instruction to the other commanders. The Chamber heard from other witnesses who allegedly attended this meeting, and didn't say that Bockarie's recitation included the instruction that it be "fearful". TF1-371 was at that meeting and makes no reference to any instruction that the operation should be "fearful" or to otherwise terrorize the civilian population.[625] Its absence from the conversation casts significant doubt on Mongor's assertion that Bockarie had told him the previous day.

306. A further indication that no such "fearful" instruction was ever given is that the Chamber made no findings that any crimes were committed in the only successful portion of the "Bockarie/Taylor plan" – the offensives on Kono and Makeni.[626] The Chamber did find that some crimes were committed in Kono District in 1998, but not during this operation.[627] The only other finding of crimes in Kono is the shooting of five civilians at Yengema Training Base between December 1998 and 2000, which is not connected to the offensives on Kono and Makeni.[628] As discussed below in Ground 23, section (iii)(e)(2), the isolated reference in paragraph 5719 to crimes having been committed during this operation in these locations is contradicted elsewhere in the Judgement. There were no findings as to crimes in Makeni during this period.

307. The Chamber appears to rely on evidence that Bockarie later instructed commanders to make the operation "fearful" during the course of the Freetown invasion.[629] Even if this occurred, this does not implicate Mr. Taylor. There is no evidence of Bockarie telling anyone, except Isaac Mongor in their private meeting, that this instruction originated with Mr. Taylor. In such circumstances, the Chamber's reliance on this second-hand uncorroborated hearsay, particularly in light of the complete lack of scrutiny of Mongor's evidence, or the source of the hearsay, is in error.

*(ii) The Chamber erred in its assessment of and reliance on TFI-371's evidence that "we should use all means to capture Freetown"*

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[624] TT, Isaac Mongor, 11 Mar. 2008, p. 5697.
[625] TT, TF1-371, 30 Jan. 2008, pp. 2652-5.
[626] Judgement, para. 3840.
[627] Judgement, para. 1231. See (i) Amputations in Tombodu, March to June 1998 (Judgement, para. 1217); (ii) Mutilations in Kayima, May 1998 and Mid-1998 (Judgement, paras. 1221-2); Carvings and "knocking out teeth" in Wondedu, sometime between April and November 1998 (Judgement paras. 1228-9).
[628] Judgement, para. 721.
[629] Judgement, para. 6969.

308. Again, the evidence that Charles Taylor told Sam Bockarie to use "all means" to capture Freetown is uncorroborated second-hand hearsay from TF1-371,[630] giving rise to the same concerns as to the Chamber's lack of scrutiny, reasoning or caution, or any consideration of the credibility of the source of the hearsay: Sam Bockarie. The problems and inconsistencies about TF1-371's evidence of the alleged satellite phone conversation between Bockarie and Mr. Taylor have been discussed in Ground 7 above, in particular the inconsistencies between his evidence and that of Karmoh Kanneh and Isaac Mongor. These same arguments are incorporated and relied upon here.

309. TF1-371 is also an accomplice witness,[631] who explained prior inconsistent statements on the basis of their being "improperly recorded",[632] and upon whom the Chamber declined to rely in other parts of the Judgement.[633] The Chamber just recalled his evidence and then relied upon it.[634] This was manifestly insufficient, and an error.

310. Moreover, the Chamber repeats throughout the Judgement that Bockarie said that Mr. Taylor said to "use all means" to get to Freetown.[635] This was a mischaracteriation on the part of the Chamber. In fact, TF1-371 said that Bockarie said that Mr. Taylor said "we should by all means capture Freetown".[636] A small difference, but potentially significant in meaning.

311. It was not the only reasonable conclusion that the phrase "by all means" demonstrated Mr. Taylor intended or had an awareness of the substantial likelihood that crimes would be committed.[637] There is no evidence (nor any discussion) of what "by all means" meant to TF1-371, or was intended by Mr. Taylor to mean, or what it meant in this context. On the same day of testimony, TF1-371 had used the same phrase in an innocuous manner, testifying that "the mission was to meet Mr. Taylor by all means",[638] with no suggestion that this mission would employ violence to achieve its end. "We should by all means capture Freetown" could reasonably be understood as meaning "by all available military means" or "employ all available

[630] TT, TF1-371, 28 Jan 2008, p. 2413.
[631] Judgement, para. 220.
[632] Judgement, para. 221.
[633] Judgement, paras. 2367-73, 3091, 4123-5, 5384-5, 6548-52.
[634] Judgement, paras. 3114, 3117.
[635] Judgement, paras. 3117, 3130, 3611(vii), 6969.
[636] TT, TF1-371, 28 Jan 2008, p. 2413.
[637] Judgement, para. 6969.
[638] TT, TF1-371, 28 Jan 2008, p. 2374.

troops and materiel". These and other innocuous and reasonable interpretations were neither considered nor rejected by the Chamber, rendering unsafe the Chamber's inference that the phrase had an underlying criminal meaning.

312. In failing to make a *mens rea* finding for each of the 11 distinct crimes for which he was convicted, and in erroneously relying on vague references to past crimes and uncorroborated second-hand hearsay "instructions", the Chamber erred in concluding that Mr. Taylor either intended or was aware of the substantial likelihood that the crimes charged in Counts 1 to 11 of the Indictment would be committed.[639] The Chamber's failure to make *mens rea* findings invalidates the Judgement, and warrants a reversal of the convictions for planning the crimes committed during the attacks on Kono, Makeni and during the Freetown invasion and subsequent retreat. [640]

## C. PART III: ERRORS WHICH INVALIDATE THE AIDING AND ABETTING CONVICTIONS

### a. INTRODUCTION

313. The Chamber convicted Mr. Taylor for aiding and abetting all crimes committed by the RUF/AFRC between 1997 and 2002 on the basis that he provided military support to those organizations knowing that they had committed such crimes in the past, and would therefore probably do so again in the future. This conviction is based on (i) eliminating any requirement that the assistance be given for the purpose of assistance those crimes, rather than for some other purpose; (ii) deeming assistance to the continued existence of the organization as assistance to crimes committed by its members; and (iii) deeming knowledge of crimes to be satisfied by public reports thereof, including in the reports of human rights organizations.

314. The Chamber's reasoning criminalizes conduct that is widely regarded by States as not unlawful. The United States Government provided substantial military support to Yemen in 2009 and 2010 to eliminate safe havens for terrorist organizations at a time when its own Department of State and Human Rights Watch reported that its air force, army and police had probably engaged in indiscriminate targeting of civilians, unlawful killings, torture and arbitrary detention. Any American official with knowledge and decision-making authority over such assistance, based on the legal and evidential approach adopted by the Chamber, is guilty of aiding and abetting those crimes. The same situation would arise in many other States or armed

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[639] Judgement, para. 6970.
[640] Judgement, paras. 6971, 6944(b).

groups in respect of which there are credible indications of recurring crimes – whether it be unlawful detention, torture, or indiscriminate targeting in armed conflict. Support to the rebels in Syria or Libya, or to the governments of Rwanda, Afghanistan, and Pakistan would, *prima facie*, be categorized as not just wrongful, but criminal.

315. This cannot be so. States do have the right to pursue national security interests by supplying materiel to the armed forces of a State or a party to an internal conflict, even if there is evidence of a recurring pattern of crimes committed by those armed forces. Behaviour of this sort is not prohibited as a matter of general public international law, and yet the Chamber seeks not only to make it wrongful, but to render any such action *criminal* under international criminal law. National courts would then have jurisdiction – indeed, an obligation – to prosecute such assistance as aiding and abetting.

316. Pronouncements of international courts are not directly binding on States, but do have substantial persuasive value in interpreting international customary law. The consequences of the Chamber's reasoning extend far beyond this specific case, or even the specific jurisdiction of the Court. This Special Court does have the authority, and the solemn responsibility, to articulate customary international law as it binds all States, and all individuals. Conversely, this Court has no authority to apply any law other than what has been properly established as a matter of customary international law.

317. The reasoning of the Chamber reflects a dangerous over-extension of international criminal law. That over-extension, which is based on no State practice and, indeed, is contradicted by widespread State practice, risks destroying international criminal law as a body of law that demands, and is based on, universal acceptance. International criminal law will simply be rejected by States with the power to control its jurisdiction, and imposed on those that do not. The legitimacy of international criminal law will be eroded, thus weakening its normative force in ongoing or future conflicts.

318. These are the larger issues underlying the specific errors identified in Part III. Ground 16 demonstrates that customary international law does not support a definition of aiding and abetting based purely on "awareness" or "knowledge" of the probability that, in the aggregate, the recipient of assistance will use some of the assistance in the commission of crimes. Grounds 17 through 20 show that the Chamber, even assuming that it was entitled to apply a "knowledge standard",

misapplied this standard to the evidence, or that it drew inferences that no reasonable trier of fact could have drawn from the evidence.[641] Grounds 21 through 34[642] identify the Chamber's errors in respect of the assistance allegedly provided by Mr. Taylor. Much of the assistance imputed to Mr. Taylor was based on findings that could not possibly have been reached by a reasonable trier of fact properly directing itself as to the evidence. Even assuming that those errors were not unreasonable, the assistance imputed to Mr. Taylor was too remote from the crimes to fulfil the *actus reus* of aiding and abetting – which requires that the assistance contribute substantially to the commission of the crime. The Chamber itself vacillated between attempting to establish that the assistance provided was used in crimes, and dispensing with the need for such findings. No reasonable trier of fact, properly applying the law, could have found that any of the alleged assistance provided had a substantial effect on the commission of any crime.

**b. ERRORS RELATING TO THE MENTAL ELEMENT**

**i. GROUND OF APPEAL 16: The Trial Chamber erred in law in defining the *mens rea* of aiding and abetting as requiring no more than that an action is performed with an awareness of a substantial likelihood that the action would provide some "practical assistance" to a crime.**

*(i) Overview*

319. The Chamber articulated and applied an erroneous *mens rea* standard of aiding and abetting. The Chamber held that the *actus reus* need be performed only with an "awareness" of the perpetrator's criminal intent. International practice and the domestic law of many states do not support such a standard. Although "knowledge" of the perpetrator's criminal intent is a necessary condition of aiding and abetting, it is not alone sufficient. Article 25(3)(c) of the Rome Statute, which was actively debated by State representatives, requires that the *actus reus* be performed "[f]or the purpose of facilitating" the principal's crime. The ICC standard, and the negotiations leading thereto, shows that the *opinio juris* of States does not favour mere knowledge of the perpetrator's intent as the *mens rea* of aiding. The Chamber erred not only as to the

[641] No separate arguments are presented in respect of Ground of Appeal 18, as those arguments are sufficiently expressed in the other Grounds concerning *mens rea*. The ground of appeal is nevertheless maintained on the basis of those arguments.

[642] Ground 35 is hereby withdrawn. No separate arguments are presented in respect of Ground of Appeal 34, as those arguments are sufficiently expressed in the other Grounds concerning *actus rea*. The ground of appeal is nevertheless maintained on the basis of those arguments.

standard applied: it erred by failing to even attempt to ascertain the *opinio juris* of States.

320. The Chamber committed a separate and independent error by applying a misconceived and erroneous version of "knowledge". The Chamber held that the aider and abettor need not have actual knowledge of the principal's intent in performing the *actus reus*, but could be found guilty based merely on knowledge of a "probability" of that intent. This approach derives from a misinterpretation of ICTY and ICTR jurisprudence, and is not reflected in the *opinio juris* of States.

321. Third, the Chamber erred on a more technical level by not defining the *mens rea* in relation to the *actus reus*. The *actus reus* as defined by the Chamber requires assistance that has a "substantial effect" on the commission of the crime, whereas the *mens rea* is defined in relation to assistance in any degree. If knowledge is the required *mens rea*, then the accused must know that his assistance will have a "substantial effect" on the commission of the crime, not merely that it would assist the crime to a lesser degree.

322. These errors, whether separately or together, invalidate the Chamber's conviction of Mr Taylor for aiding and abetting. Although the Appeals Chamber does have a discretion after correcting a legal error to assess whether the proper standard is met on the facts, no such assessment is possible in the present case. The Chamber made no factual findings showing that it would have convicted Mr. Taylor had it applied the correct standard; indeed, the Chamber's findings fall distinctly below that threshold. The only just remedy, given the gravity of the Chamber's error, is to quash all convictions based on aiding and abetting.

*(ii) Standard Applied By the Trial Chamber*

323. The Trial Chamber defined the *mens rea* of aiding and abetting as follows:

> i. The Accused performed an act with the knowledge that such act would assist the commission of a crime or underlying offence, or that he was aware of the substantial likelihood that his acts would assist the commission of underlying offence; and
> ii. The Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.[643]

324. This formulation therefore addresses knowledge in respect of two different states: (i) the assisting character of one's own acts (at least "aware[ness] of the

[643] Judgement, para. 486.

substantial likelihood"); and (ii) the principal's acts and intentions ("aware[ness]"). Logically speaking, of course, the former could not arise without the latter.

325. The Chamber found that Mr. Taylor "knew that his support to the RUF/AFRC would provide practical assistance, encouragement or moral support to them in the commission of crimes in the course of their military operations in Sierra Leone"[644] and that he "was aware of the 'essential elements' of the crimes he was contributing to, including the state of mind of the perpetrators."[645] The Chamber deemed this knowledge and awareness was continuous in respect of any and all of Mr. Taylor's acts from August 1997 onwards, as the Trial Chamber found:

> The sole reasonable inference to be drawn from this evidence is that as early as August 1997, the Accused as President of Liberia and a member of the ECOWAS Committee of Five, was informed in detail of the crimes committed by the AFRC/RUF members during the Junta period, including murder, abduction of civilians including children, rape, amputation and looting. He would therefore have been aware of the likelihood that the AFRC/RUF would commit similar crimes in the future.[646]

326. It is said to have been "public knowledge" "after 1997" that AFRC/RUF forces were committing crimes,[647] and that Mr. Taylor by his own admission knew, by April or July 1998, that the AFRC/RUF had an "operational strategy and intent to commit crimes."[648]

*(iii) The Trial Chamber Erred In Applying Mere "Awareness", Or Knowledge, As a Sufficient Mental State For Accessorial Liability*

*(a) The Law To Be Applied By the Special Court, Including Modes of Liability, Is Jurisdictionally Limited By Customary International Law*

327. This Court is jurisdictionally limited to applying modes of liability established as a matter of customary international law.[649] As explained by the ICTY Appeals Chamber in respect of its own Statute:

> The scope of the Tribunal's jurisdiction *rationae materiae* may therefore be said to be determined both by the Statute, insofar as it sets the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.... [T]he principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the

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[644] Judgement, para. 6949.
[645] Judgement, para. 6950.
[646] Judgement, para. 6882.
[647] Judgement, para. 6883.
[648] Judgement, para. 6885.
[649] *AFRC* Indictment Decision and Order, para. 24.

> time of the acts charged. And just as is the case in respect of the Tribunal's jurisdiction *rationae materiae*, that body of law must be reflected in customary international law.[650]

328. The Secretary-General, in his Report preceding the adoption of the ICTY Statute, declared that "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are *beyond any doubt part of customary law* so that the problem of adherence of some but not all States to specific conventions does not arise."[651] The Secretary-General's report on the creation of this Court reflects the same principle, noting for example that a particular version of conscription or enlistment of children had been excluded from the Statute because of its "doubtful customary nature."[652] These declarations reflect the intent of the Security Council that this Court be jurisdictionally limited to applying only such law as meets the threshold for recognition in customary international law.

329. This is no formality. The jurisprudence of this Court, as well as the other United Nations or hybrid tribunals, is of "persuasive value" in defining customary international law.[653] States and their leaders are not directly bound by pronouncements of this Court, but this Court's pronouncement are a persuasive indication of the content of the law by which they are bound. Every such pronouncement is important given that this a "unique, and still emerging" body of law, with potentially grave consequences for those who would violate it.[654] It follows that States, as subjects of that law and as the sponsors of this institution, have the right to insist that this Court adhere strictly to the law as it is, and to follow the established principles for the elaboration of this law.

330. International criminal law, as is well-established, is determined according to customary international law. A legal principle or standard, according to the ICTY Appeals Chamber, may be recognized only if a court is "satisfied that State practice recognized the principle on the basis of supporting *opinio juris*" of States.[655] This

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[650] *Milutinović* JCE Decision, paras. 9-10.
[651] U.N. Secretary General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, para. 34 (italics added).
[652] U.N. Secretary General, Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, paras. 12 and 18.
[653] *AFRC* Indictment Decision and Order, para. 25.
[654] *AFRC* Indictment Decision and Order, para. 22.
[655] *Hadžihasanović* Command Responsibility, para. 12. See *Tadić* Jurisdiction Decision, para. 133 (referring to *opinio juris* on the issue of whether criminal responsibility arises for violations of

must be "always ascertain[ed]."[656] Courts are, of course, entitled to rely on their own previous jurisprudence insofar as they have already properly ascertained the state of customary international law, or to determine whether to apply a recognized principle to a novel situation;[657] but any *modification* of a previously-ascertained standard must, in principle, be verified on the basis of customary international law. As explained in the ICC Statute: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[658]

331. Customary international law is established with reference to the practice and "*opinio juris*" of States. *Opinio juris*, as explained in the ICJ in the *North Sea Continental Shelf Case*, is determined by examining the practice of States, and States' understanding of that practice: "[n]ot only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[659] One ICTY Appeals Chamber Judge has stated in relation to criminal law that "state practice has to be virtually uniform, extensive and representative."[660] This high standard reflects the unique character of international law, whose binding character derives from the consent of its subjects. This is as much true for international criminal law as any other branch of international law.

332. The requirement that a legal standard be recognized in customary international law is not just a question of jurisdiction or institutional integrity. Article 15(1) of the International Covenant on Civil and Political Rights enunciates that "[n]o one shall be held guilty of any criminal offence on account of an act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." International criminal law incorporates this right.[661] Fundamental fairness requires not only that the prohibition have existed at the time of the alleged

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international humanitarian law in respect of internal armed conflicts); *Tadić* AJ, para. 223 (referring to *opinio juris* to determine the existence of "joint criminal enterprise" liability).

[656] *Galić* AJ, para. 85 ("while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal's jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom.")

[657] *Hadžihasanović* Command Responsibility Decision, para. 12.

[658] Rome Statute, Art. 22(2).

[659] *North Sea* Judgement, para. 77.

[660] *Dragomir Milošević* Dissenting Opinion, para. 6 (partly dissenting opinion, but not on this point).

[661] *Galić* AJ, para. 71.

crime, but also that it was "sufficiently accessible and foreseeable" to an accused.[662] These concepts collectively constitute the principle of *nullum crimen sine lege*.

333. *Nullum crimen sine lege* and customary international law require clarity and consensus. The absence of consensus does not mean that a Chamber may simply override significant State opinion to the contrary – that would run directly contrary to the foregoing definition of *opinio juris*. This raises a theoretical difficulty in the realm of criminal law. Assume that all States recognize a mode of liability, but differ significantly as to its constituent elements. The doctrine of *opinio juris* does not compel the absurd result that no mode of liability may be recognized; the principle requires instead that no standard may be adopted that does not lead unanimously to the same result notwithstanding the difference of standards.

334. Curial discussions of customary international law, reflecting the importance of this threshold, are often extensive and refer to the practice of many States.[663] The seminal *Tadić* Appeal Judgement, to take but one example, ascertained the doctrine of joint criminal enterprise based on three indicators of State practice: post-World War II caselaw of quasi-international courts; a multi-lateral treaty; and the ICC Statute.[664] National law was also referred to in that Judgement to explain and elucidate these three indicators of customary international law.[665]

335. International criminal law therefore requires international judges to depart from the method familiar to common law judges in at least two ways. First, a doctrine of liability or criminal norm can be recognized for the first time, only if its existence is reflected in the practice and *opinio juris* of States. Every doctrine of liability or criminal norm must be confirmed as existing in customary international law.[666] Second, although an international court is not obliged to mechanically re-establish the customary foundation of the principle every time it is applied,[667] such independent

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[662] *ECCC* JCE Decision, para. 45; *Milutinović* JCE Decision, paras. 39-43. *Vaslijević* TJ, para. 193 ("[f]rom the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was insufficiently accessible at the relevant time.")

[663] See e.g. *Galić* AJ, paras. 86-98; *Bagosora* AJ, para. 729.

[664] *Tadić* AJ, paras. 194-223.

[665] *Tadić* AJ, para. 225.

[666] *Hadžihasanović* Command Responsibility Decision, para. 44.

[667] The *Krajišnik* Appeals Chamber, for example, declined to re-evaluate whether JCE principles complied with customary international law because "JCE counsel fail to address the jurisprudence holding that the notion of JCE as established in Tadić does not violate the *nullum crimen sine lege* principle." *Krajišnik* AJ, paras. 669-70.

verification is necessary whenever (i) a party brings new evidence that a previously ascertained standard does not comply with customary international law,[668] or (ii) when a standard or concept is being significantly modified or extended. Many examples of this independent verification are to be found in the jurisprudence of the ICTY when existing principles were sought to be modified or extended, including: (i) whether customary international law permits a superior to be responsible for failing to punish crimes committed before he or she assumed effective control of a perpetrator ("no");[669] (ii) whether a crime committed pursuant to a JCE may be committed by someone who is used by, but not a part of, the JCE ("yes");[670] (iii) the application of JCE liability for crimes that are a foreseeable result, but not specifically contemplated by, the common purpose of a JCE ("yes" at the ICTY and ICTR, "no" at the ECCC);[671] (iv) whether the previously-decided pain threshold for torture was correct in light of the practice to the contrary by only one State ("yes");[672] and (v) whether unlawful targeting of civilians arises even in the absence of a showing of death, serious injury, or other negative effects ("no").[673] Though the answer in every one of these cases, applying a purely common law approach, could have been "yes", customary international law, in some cases, dictated a different outcome. The Appeals Chamber of the ICTY, in light of this possibility, has been particularly alert to the need to re-evaluate any new indications of customary international law when raised by the parties.[674]

336. Customary international law sets the parameters not only for the definition of crimes but also the definition of modes of criminal responsibility. The seminal *Tadić* decision concerned modes of responsibility. The ICTY, ICTR and ECCC have developed their conceptions of "commission" and "superior responsibility" only subject to verification with customary international law.[675]

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[668] This was notably the case in *Hadžihasanović* Command Responsibility Decision, where the Chamber noted that the ICC Statute "necessarily excludes criminal liability" on the question before it, and embarked on a full-scale consideration of the matter according to customary international law, para. 46.
[669] *Hadžihasanović* Command Responsibility Decision, paras. 44-6.
[670] *Brđanin* AJ, paras. 393-410.
[671] *ECCC* Decision on Applicability of JCE, para. 38.
[672] *Brđanin* AJ, paras. 244-252.
[673] *Kordić & Čerkez* AJ, paras. 47-68 (finding customary international law to be "unsettled").
[674] *Delalić* AJ, paras. 151-73 (extensively reconsidering, based on the the Defence's arguments, whether Common Article 3 gave rise to individual criminal liability in customary international law).
[675] *Tadić* AJ, para. 194 ("However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (actus reus and mens rea) of this category of collective criminality. To identify these elements one must turn to customary international law.

*(b) Customary International Law Reflects No Aiding and Abetting Liability Based on an Actus Reus Performed With Anything Less Than Purpose*

337. The Appeals Chamber of the Special Court has never conducted its own analysis of the proper elements of aiding and abetting, let alone conducted any analysis of customary international law. The pronouncement in the *Brima* case cites to just two ICTY Appeal Judgements, neither of which could be properly described as the leading cases on the subject.[676] The *Fofana* and *Sesay* Judgements merely advert briefly to the pronouncement in *Brima* with no further analysis.[677] This Chamber, notwithstanding the provisions of Article 20(3) of the Statute, has an overriding jurisdictional obligation to assure itself that the law it applies meets the threshold of customary international law.[678] The issue now raised is therefore a matter of first impression for this Court.

338. No practice or *opinio juris* of States has crystallized around the *mens rea* standard applied by the Chamber, namely that the aider and abettor perform the *actus reus* with no more than *awareness* that it assists – or even just *may* assist – the perpetrator. The clearest indication of an absence of practice and *opinio juris* is the ICC Statute's provision on aiding and abetting, Article 25(3)(c):

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: ...
> (c) *For the purpose of facilitating the commission of such a crime*, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

As made clear by the first ICC decision to interpret this provision, "article 25(3)(c) of the Statute requires that the person act with the purpose to facilitate the crime; *knowledge is not enough for responsibility under this article.*"[679]

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Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation")(JCE I); *Milutinović* JCE Decision, paras. 9-44 (JCE I); *Brđanin* AJ, paras. 393-410 (JCE I); *ECCC* Decision on Applicability of JCE (JCE III); *Hadžihasanović* Command Responsibility Decision, paras. 10-51 (superior responsibility); *Delalić* AJ, paras. 220-241 (defining the minimum *mens rea* of superior responsibility).

[676] *AFRC* AJ, para. 243; citing *Blaškić* AJ, para. 50 and *Simić* AJ, para. 86.

[677] *CDF* AJ, paras. 366-7; *RUF* AJ, para. 546.

[678] *AFRC* Indictment Decision and Order, paras. 24-25 ("Like the Special Court, the ICTYand the ICTR are bound to apply customary international law .... It is for this reason that this court applies persuasively decisions taken at the ICTY and ICTR .... The Chamber will, however, where it finds it necessary or particularly instructive, conduct its own independent analysis of the state of customary international law or a general principle of law.")

[679] *Mbarushimana* Confirmation Decision, para. 274 (italics added).

339. The salient issue, it must be recalled, is not whether Article 25(3)(c) declares customary international law; the issue, rather, is whether there is any evidence to justify the Chamber's pronouncement that the knowledge standard reflected customary international law as of the date of the alleged criminal activity. Article 25(3)(c) decisively indicates that the knowledge standard does not, and did not from 1996 through 2002, have the required support in State practice and *opinio juris* to be recognized as customary international law.

340. First, there is no indication that Article 25(3)(c), unlike some other provisions,[680] deviated from a well-established customary international law norm. The general significance of the ICC Statute has been aptly described by the ICTY Appeals Chamber, specifically in the context of modes of liability:

> As for the Rome Statute, it is still [in 1998] a non-binding international treaty (it has not yet entered into force.) It was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998. In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States.... Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallize them, whereas in some areas is creates new law or modified existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.[681]
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> ...
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> [T]he [Rome] Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee.... This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio juris* of those States. This is consistent with the view that the mode of accomplice liability under discussion [JCE] is well-established in international law and is distinct from aiding and abetting.[682]
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> ...
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> In fact, there are indications that militate against the existence of a customary rule [imposing superior responsibility for failure to punish crimes committed prior to the assumption of effective control over the subordinate]. For example, Article 28 of the Rome Statute of the International Criminal Court provides that.... Under the Rome Statute, therefore, command responsibility can only exist if a commander knew or should have known that his subordinates were committing crimes, or were about to do so. This language necessarily excludes criminal liability on the basis of crimes

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[680] Cassese, Antonio, *International Criminal Law*, Oxford University Press (Oxford, 2nd ed., 2008), p. 279 (arguing that the inclusion of a defence of mistake of law arising from superior orders as a defence to war crimes deviates from well-established customary international law).
[681] *Furundžija* TJ, para. 227.
[682] *Tadić* AJ, para. 223.

> committed by a subordinate prior to an individual's assumption of command over the subordinate.[683]

341. Even if there could be some doubt as to whether Article 25(3)(c) is declarative of customary international law, the provision strongly negates that there is State practice or *opinio juris* in favour of a *mens rea* standard based purely on knowledge. States were fully aware during the negotiation of Article 25(3)(c) that the knowledge standard was one of the options available. Working drafts contained the alternative words "[intent]" and "[knowledge]" until late in the negotiations.[684] The final wording of Article 25(3)(c), as participants have confirmed, reflected a compromise between these two positions. Even a fierce advocate of the knowledge standard admits that this is precisely what occurred:

> It was a very contentious provision, with some delegations seeking explicit reference to intention, notwithstanding the important complication that the word "intention" has different meanings in different legal systems.... Other delegations were wedded to the term "knowledge," believing that it better reflected the standard that was employed in their national practice and that had been endorsed in the [international] jurisprudence.... Negotiators struggled to find compromise wording and ultimately settled on using neither "intent" nor "knowledge" but "purpose."[685]

342. The origin of the compromise wording is well-known. As another participant in the negotiations has written: "[t]he expression 'for the purpose of facilitating' is borrowed from the Model Penal Code" of the United States.[686] That provision, in order to understand the origin of the language adopted in the ICC Statute, provides:

> 2.06(3) A person is an accomplice of another person in the commission of an offense if:
> (a) with the purpose of promoting or facilitating the commission of the offence, he ...
> (ii) aids or agrees or attempts to aid such other person in planning or committing it.[687]

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[683] *Hadžihasanović* Command Responsibility Decision, para. 46

[684] Bassiouni, M. C., *The Legislative History of the International Criminal Court*, v. II, Transnational Publishers (Ardsley,,2005), p. 194.

[685] Brief of David J. Scheffer, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 131 S. Ct. 79 (2010), No. 09-1262, On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, 19 May 2010, ("Scheffer Brief") p. 12. One author claims that the provision ultimately adopted was "borrowed" from the Model Penal Code: K Ambos 'Article 25' in O. Triffterer, ed., *Commentary on the Rome Statute*, Beck (Munich 2nd edn, 2008) ("Ambos Article 25 – Triffterer"), p. 757.

[686] Ambos Article 25 – Triffterer, p. 757. *Mbarushimana* Transcript, p. 5 ("I was a part of the German delegation in Rome and I was participating in the working group of general principals which negotiated, among others, this provision.") See M. E. Badar, The Mental Element in the Rome Statute Of the International Criminal Court: A Commentary From a Comparative Criminal Law Perspective, 19 (3-4) Criminal Law Forum 473, 507.

[687] United States Model Penal Code, § 2.06(3)(a)(ii).

The Model Penal Code defines "purpose" in the following manner: "A person acts purposely with respect to a material element of an offence when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist."[688] Though the aider and abettor need not intend the crime itself, the accused must at least undertake his actions with the "conscious object" of "promoting or facilitating" the offence by the perpetrator.

343. One eminent English commentary assists in understanding the policy implications underlying the "purpose" requirement:

> the "knowledge" standard "would also lead to the conviction of a shopkeeper who knows that his customer plans to use a certain item for a crime and who nevertheless sells the item, and it is dissatisfaction with this outcome which led the framers of the American Model Penal Code to impose the more stringent requirement that the accomplice should have acted with the purpose of promoting or facilitating the offence. The effects of that narrower doctrine is to ensure that citizens are not treated as their fellow citizens' keepers, a sturdy individualist approach.[689]

344. Article 25(3)(c) of the ICC Statute must also be viewed in conjunction with Article 30(1), which provides that "unless otherwise provided" a person is criminally responsible "only if the material elements are committed with intent and knowledge." The unanimous view of commentators and the one judicial pronouncement on the issue confirms that the default standard of Article 30 is elevated by the purpose standard of Article 25(3)(c).[690]

345. No other State practice or *opinio juris* demonstrates that the international community has accepted that mere knowledge suffices for the *mens rea* of aiding and

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[688] United States Model Penal Code, § 2.02(2)(a).

[689] Ashworth, A., *Principles of Criminal Law,* Oxford University Press (Oxford 2009), p. 417.

[690] *Mbarushimana* Confirmation Decision, para. 274 ("knowledge is not enough for responsibility under this article"); A. Eser, "Individual Criminal Responsibility" in A. Cassese, P. Gaeta, J. Jones, *The International Criminal Court: A Commentary*, Oxford University Press (Oxford, 2009), p. 801 (the purpose requirement "means more than the mere knowledge that the accomplice aids the commission of the offence"); Ambos Article 25 – Triffterer, p. 757; B. Goy, "Individual Criminal Responsibility Before The International Criminal Court: A Comparison With the *Ad Hoc* Tribunals," 12 International Criminal Law Review (2012), 1, 63 (Article 25(3)(c) "introduces a subjective threshold which goes beyond the subjective elements required by Article 30 ICC Statute"); M. E. Badar, The Mental Element in the Rome Statute Of the International Criminal Court: A Commentary From a Comparative Criminal Law Perspective, 19 (3-4) Criminal Law Forum 473, 507; S. Finnin, "Mental Elements Under Article 30 of the Romes Statute of the International Criminal Court, 61(2) International Criminal Law Quarterly p. 325, 357; K. Heller, "The Rome Statute of the International Criminal Court," in Heller, K. and Dubber, M., *The Handbook of Comparative Criminal Law*, Stanford University Press (Stanford, 2011), p. 608.

abetting. Article 16 of the ILC's Draft Articles on Responsibility for Internationally Wrongful Acts provides that a State may be responsible for the acts of another State when it "aids or assists another State in the commission of international wrongful act with knowledge of the circumstances of the internationally wrongful act." The Commentary expressly states, however, that the assistance, in addition to being given with knowledge, must be given "with a view to facilitating commission of that act":

> First, the relevant State organ or agency providing aid or assistance must have been aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act....[691]

346. Even though this provision is directed at State responsibility, it is analogous for purposes of individual responsibility to aiding and abetting. States would not likely have intended a lower *mens rea* standard for the imposition of criminal liability on, for example, a head of State, than the standard for holding the State itself responsible to pay, for example, compensation.

347. The ILC's 1996 Draft Code of Crimes does propose a "knowingly" standard for the *mens rea* of aiding and abetting, but this Code was never adopted or even negotiated directly by States. Indeed, at the very moment the Draft was adopted, States were directly negotiating the ICC Statute. Those negotiations, the signatures on the treaty, and its subsequent ratification by more than 120 States is a far stronger indication of State practice, and constitutes a direct repudiation of the proposal in the 1996 Draft Code.

348. The Chamber relied on ICTY caselaw in applying a knowledge standard for the *mens rea* of aiding and abetting. The Defence respectfully submits that this caselaw is manifestly incorrect and requests that this Appeals Chamber exercise its authority to independently evaluate the content of the customary international law in respect of aiding and abetting.

349. The first ICTY judgement to address aiding and abetting in any depth – the *Furundžija* Trial Judgement – was decided six months after the signing of the ICC Statute.[692] Yet that Judgement makes no reference to Article 25(3)(c) of the ICC

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[691] ILC Draft Articles on State Responsibility, p. 66. See also, Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

[692] The *Furundžija* Trial Judgement discussion has frequently been relied upon in ICTY and ICTR appeals jurisprudence in lieu of any independent inquiry into the state of customary international law. See e.g. *Aleksovski* AJ, para. 162; *Krnojelac* AJ, para. 51; *Krstić* AJ, para. 140; *Mrkšić* AJ, para. 159. The *Krstić* Judgement does offer a brief discussion of the state of customary law, but only in the context of determining whether a person accused of aiding and abetting genocide must share the

Statute to determine the proper *mens rea* of aiding and abetting. Such a glaring oversight in a Judgement that has been repeatedly cited as the basis of subsequent ICTY caselaw, in itself, should provoke close scrutiny of the correctness of that decision.

350. The *Furundžija* Trial Judgement relies on three sources to reach its determination about the *mens rea* of aiding and abetting: (i) the ILC's 1996 Draft Code of Crimes; (ii) Article 30 of the ICC Statute and (iii) four post-World War II cases. None of these sources, taken alone or cumulatively, supports a knowledge standard for the *mens rea* of aiding and abetting.

351. The first two sources relied on by the Chamber have already been discussed. The Draft Code is of little weight given its direct repudiation by Article 25(3)(c) of the ICC Statute. Article 30 is only a default rule and yet, astonishingly, the Trial Chamber relies on that provision without regard to the elevated *mens rea* expressly set out in Article 25(3)(c). Even though the *Furundžija* Chamber did not at that time have the benefit of the *Mbarushimana* Confirmation Decision or the academic commentary, it is hard to understand how it could have ignored, to the point of not even mentioning, the requirement in Article 25(3)(c) that aiding and abetting be performed "for the purpose of facilitating the commission of such a crime...." The Chamber thus proceeded to find that the applicable *mens rea* for aiding and abetting was "knowledge that these acts assist the commission of the offence."[693]

352. The *Furundžija* Chamber purports to find this standard in Word War II cases, but its discussion is manifestly incorrect, incomplete and insufficient to establish State practice and *opinio juris*. In fact, none of the four cases relied on by the Chamber were before an international bench. The conviction relied upon in the *Einsatzgruppen* case, heard by a U.S. court, referred not only to the accused's knowledge of the principal's criminal intent, but also explains that "[h]e was an active leader and commander."[694] The *Zyklon B* case, before a British tribunal, did turn primarily on the issue of knowledge, but this was because the accused had pleaded that he had no relevant knowledge, thus rendering all other issues superfluous. The court's decision was two lines long, neither of which addresses the standard of aiding and abetting

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genocidal intent. The discussion, oriented to that specific question, does not address Article 25(3)(c) of the Rome Statute or other indications in customary international law that "purpose" is the requisite standard.

[693] *Furundžija* TJ, para. 249.

[694] *Ohlendorf* Judgement, p. 569.

applied.[695] The *Schonfeld* case, also before a British court, does confirm that actual knowledge of the principal's criminal intent is a necessary condition of liability, but says nothing about whether it is sufficient.[696] The final case, *Hechingen*, before a German court, actually rejects the knowledge standard. On appeal the court held that an accessory must share the perpetrator's *mens rea*.[697] These four cases are not, on any proper construction, indicative of any State practice or *opinio juris* remotely approaching the threshold necessary for recognition of customary international law. Half of the cases cited – *Einstzgruppen* and *Hechingen* – are ambiguous, and one quarter are actually contrary to the proposition in question. The larger methodological deficiency, however, is that three verdicts by national military courts cannot on any proper view be accepted as a basis for determining international criminal law.

353. The *Furundžija* Chamber's discussion of that jurisprudence was, in any event, incomplete. A United States military court in the *Ministries Case*, in a declaration of striking relevance to the present case, acquitted a banker, Karl Rasche, of aiding and abetting enslavement and other crimes notwithstanding that he had loaned money to the SS in full knowledge that the money would be used for business operations applying those practices:

> Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did. The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law? .... Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.[698]

354. The ICTY Appeals Chamber, possibly recognizing the incompleteness of the standard adopted in *Furundžija*, soon thereafter added an element to the requirements

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[695] *Tesch* Judgement, pp. 93, 100-101, 102.

[696] *Schonfeld* Judgement, p. 64. In any event, the "Notes" accompanying the case suggest, at page 72, that the court made no real effort to apply international law, but instead relied upon English law.

[697] A. Cassese, G. Acquaviva, M. Fan, A. Whiting, eds., *International Criminal Law: Cases and Commentary*, Oxford University Press (Oxford 2011), pp. 382-386; A. Cassese, "Modes of Participation in Crimes Against Humanity," *Journal of International Criminal Justice*, Vol. 7, pages 131-154 (2009).

[698] A. Cassese, G. Acquaviva, M. Fan, A. Whiting, eds., *International Criminal Law: Cases and Commentary*, Oxford University Press (Oxford 2011), pp. 382-386; A. Cassese, "Modes of Participation in Crimes Against Humanity," *Journal of International Criminal Justice*, Vol. 7, page 389 (2009). *Weizsaecker* Judgement, p. 622.

for aiding and abetting: the assistance must be "*specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime."[699] The Appeals Chamber did not at first say whether this requirement should be part of the *mens rea* or *actus reus*, though it was later categorized as falling under the rubric of *actus reus*.[700]

355. The similarity of "specifically directed" or "specifically aimed" and "purpose" is evident. One could not, for example, assess whether selling a gun to someone was "specifically aimed" at the commission of an offence without considering the mental state of the seller. Regardless of whether the concept is formally categorized as part of *actus reus* rather than *mens rea*, there is no gainsaying its resemblance to "for the purpose of facilitating". Perhaps not coincidentally, although the *Furundžija* Trial Judgement had made no reference to Article 25(3)(c) of the ICC Statute in its discussion of *mens rea*, there was such a reference in relation to *actus reus*.[701] The similarity of "specifically aimed" and "purpose" is illustrated in the *Blagojević* Appeal Judgement, where the evidence was found to foreclose the possibility that the accused's "acts were directed towards another goal."[702] For as long as the "specifically aimed" requirement remained part of the ICTY's standard of *actus reus* for aiding and abetting, it provided a rough equivalent to the "purpose" requirement in Article 25(3)(c) in the ICC Statute.

356. That situation arguably changed in 2009 when the ICTY Appeals Chamber, in the context of aiding and abetting by omission, departed from its previous jurisprudence and announced that "'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting."[703] The *Mrkšić* bench, with one dissent, held

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[699] *Tadić* AJ, para. 229 (italics added).

[700] See e.g. *Ntagerura* AJ, para. 370 ("to establish the material element (or actus reus) of aiding and abetting under Article 6(1) of the Statute it must be proven that the aider and abettor committed acts *specifically aimed* at assisting...") (italics added); *Nahimana* AJ, para. 482 ("The *actus reus* of aiding and abetting is constituted by acts or omissions *aimed specifically* at assisting ....") (italics added); *Seromba* AJ, para. 44 ("to establish the *actus reus* of aiding and abetting under Article 6(1) of the Statute, it must be proven that the alleged aider and abettor committed acts *specifically aimed* at assisting....") (italics added); *Muvunyi* AJ, para. 79 ("an aider and abettor carries out acts *specifically directed* to assist....") (italics added);

[701] *Furundžija* TJ, para. 231. Although the "specific direction" requirement was not adopted in that Judgement, two of the judges sitting in that case later sat on the appeals bench in the Tadić case that did adopt the "specific direction" requirement.

[702] *Blagojević* AJ, para. 223.

[703] *Mrkšić* AJ, para. 159. The Appeals Chamber claimed that it was merely relying on a pronouncement in Blagojević, although this claim, at the least, debatable and had no impact on the outcome of that case. Mrškić constitutes the first deviation from the "specific direction" requirement. See e.g. *Perišić* Dissenting Opinion, para. 9.

that the *actus reus* would be satisfied whenever acts "assist, encourage or lend moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of a crime."[704]

357. The ICTY Appeals Chamber, in purporting to abandon the "specifically directed" and "specifically aimed" language, failed to analyze whether this complied with customary international law. Curiously, this innovation has not yet been adopted by the ICTR Appeals Chamber, which has continued, notwithstanding *Mrkšić* to reaffirm the "specifically directed" and "specifically aimed" language.[705] Even the *Perišić* Trial Judgement returned to the formulation, albeit removing the "specifically" from the requirement that acts be "directed at" assisting the crime.[706]

358. The overall position, notwithstanding the isolated deviation reflected in *Mrkšić*, is that a concept analogous to "purpose" has usually been recognized in the jurisprudence of the ICTY and ICTR, albeit by way of a "specific direction" element. Special Court jurisprudence has also consistently adopted and applied the "specific direction" requirement.[707]

359. The Chamber's finding that the "*actus reus* of aiding and abetting does not require 'specific direction'"[708] is therefore wrong for two reasons. First, as a matter of jurisprudence and Article 20(3) of the Statute, it failed to be guided by the law that continues to prevail at the ICTR Appeals Chamber. Second, adopting a pure knowledge standard has no justification in customary international law. Indeed, no attempt has ever been made to properly justify it as a matter of customary international law. The Chamber was bound to do so.

360. The domestic practice of States is not directly indicative of State practice, but it can assist in understanding State practice. The *Tadić* Appeals Judgement, for example, reinforced its findings on JCE on the basis "that the notion of common

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[704] *Mrkšić* AJ, para. 81. Judge Vaz did not specifically dissent on this point, but since she disassociated herself from all findings on *mens rea* and *actus reus*, it cannot be stated whether she supported the abandonment of the specific direction requirement.

[705] *Ntawukulilyayo* AJ, para. 214 ("Chamber recalls that the *actus reus* of aiding and abetting is constituted by acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime") (December 2011); *Kalimanzira* AJ, para. 86 ("The Appeals Chamber has explained that an 'aider and abettor commits acts *specifically aimed* at assisting....") (italics added); *Rukundo* AJ, para. 52 ("an 'aider and abettor commits acts specifically aimed at assisting ...") (italics added).

[706] *Perišić* TJ, para. 126. The ICTY Appeals Chamber has also used the expression "directed" in *Orić* and *Simić* , but the prevailing formulation is with the adjective "specifically": *Simić* AJ, para. 85; *Orić* AJ, para. 43.

[707] *RUF* TJ, para. 277; *CDF* TJ, para. 229.

[708] Judgement, para. 484.

purpose upheld in international criminal law has an underpinning in many national systems."[709]

361. The domestic practice of States provides similar assistance in respect of the purpose standard of aiding and abetting adopted in the ICC Statute. German doctrine applies a higher standard than mere awareness or knowledge. The elevated *mens rea* standard emerges with particular clarity in respect of "*neutral*" vocational conduct ("*berufstypisches Verhalten*") that the recipient/perpetrator can use either lawfully or unlawfully. The accused will only be liable as an aider and abettor if he has a supplementary, heightened intent amounting to "solidarity with the principal offender". The doctrine is illustrated by the case of two former East German deputy border commanders charged with aiding and abetting crimes for their alleged contribution to the placement of mines along the border. The German Federal Court of Justice (BGH) dismissed the charges:

> [T]he BGH has established the following principles in cases of vocation-specific ("*berufstypisch*") 'neutral' acts: If the acts of the principal offender are solely aimed at a criminal act, and the person assisting him knows this, then the assistance should be regarded as aiding and abetting. Under these circumstances, his acts lose the ordinary, everyday character and should instead be viewed as solidarity with the principal offender. Otherwise, the assistance is not unlawful. The annual orders [by the border commander] did not solely concern criminally relevant conduct in relation to the border crossing, but also legitimate matters of national security of the former DDR, as well as external border protection. The contribution of the two accused to the issuance of order no. 40 was limited to their military tasks which had been delegated to them, and which were not connected to the laying of mines along the border. The contribution was therefore vocation-specific and, in relation to the crimes, 'neutral'. Although the accused knew that the annual orders also included directions about the laying, maintenance and operation of mines, their own contributions had an independent meaning. They remained relevant without the unlawful acts of the principal offenders and can be legally evaluated independently from those acts. In light of these facts, the conduct of the accused in relation to the giving of the annual orders did not unlawfully contribute to the crimes.[710]

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[709] *Tadić* AJ, para. 225.

[710] German Federal Court of Justice (BGH), Case No. 4 StR 453/00, Judgement of 8 March 2001, p. 10. See also I. Strafsenat Urteil vom 14. November 1904 g. B. u. Gen. Rep. 1178/04, pp. 323-324 (acquitting a lawyer who had given incorrect advice to the wife and son of a prison inmate on furlough that they were legally permitted to assist his escape: "To establish knowledge (*Wissentlichkeit*) equivalent to intention (*Vorsätzlichkeit*) it is not sufficient that the aider is aware that the perpetrator intends to commit the relevant offence. For the subjective element of the offence it is necessary that the perpetrator gives his help and advice in the knowledge that through his acts the commission of the offence intended by the principal offender is furthered, and that thereby also the intention (*Wille*) of the person giving advice is directed towards this commission (*Erfolg*).... If the lawyer ... intends nothing more than to give his professional and advice in accordance with his duty, and he is aware that his expert opinion leads to the commission of an offence, but his intention (*Wille*) has nothing to do with the consequence of his legal advice, then knowing/deliberate (*wissentlichen*) aiding is out of the question. But if his conscious and deliberate/intentional acts (*Geistes und Willenstätigkeit*) are not only

362. German doctrine is influential amongst other modernized civil law jurisdictions, and may have had some impact on the position in French and Italian courts requiring that an accessory have acted "together and in concert" with the perpetrator.[711] Italy notably requires for accessorial liability "that each of them has acted for a purpose with a unitary awareness of the role played by others and their will to act in common."[712] Opinions appear to diverge in Poland, but at least one leading commentary on the new criminal code argues that purpose is required.[713]

363. Standards vary dramatically amongst, and sometimes within, common law jurisdictions. In the United States, a majority of states as well as some federal circuits apply *at least* the standard set out in § 2.06(3) of the Model Penal Code,[714] with some applying the even higher standard of shared criminal intent set out in Penal Code § 2.06(4).[715] The Canadian Criminal Code, like Article 25(3)(c) of the ICC Statute, also

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directed to practicing his profession in giving advice, but also to promote the commission of a crime by means of his professional advice, then, and only then, does aiding exist within the meaning of the criminal code.")

[711] Stefani, G. *et al.*, *Droit pénal génénal*, Dalloz (Paris, 2000), p. 290 ("En tous cas, il faut, selon la formule des arrêts , que le complice et l'auteur principal aient agi 'ensemble et de concert', en vue d'obtenir le resultat delictueux"); Cass. pen., sez. VI 12-06-2003 (21-03-2003), n. 25705 - Pres. Acquarone R - Rel. Colla G - Salamone ed altri - P.M. (Conf.) Viglietta G *(massima 2)* ("For the purposes of establishing the existence of an accessorial responsibility, either it is needed the proof of a prior agreement between the accomplices, or it is necessary to demonstrate that each of them has acted for a purpose with unitary awareness of the role played by others and their will to act in common.")

[712] Cass. pen., sez. VI 12-06-2003 (21-03-2003), n. 25705 - Pres. Acquarone R - Rel. Colla G - Salamone ed altri - P.M. (Conf.) Viglietta G *(massima 2)*.

[713] Rejman Genowefa (ed.) *Kodeks karny część ogólna – Komentarz*, Wydawnictwo C.H. Beck (Warszawa 1999) ("1. New criminal code introduces the new formula of assistance, which differs from the concept established by Article 18§2 of the repealed code of 1969. The list of major changes includes: a) Mens rea of the assistance has been determined only by the word "intent" / dolus [polish: zamiar], whereas the repealed code had explicitly stated that the assistance might be given also with dolus eventualis. Nowadays, under the new code, the issue will be disputable. The legislator did not unequivocally include dolus eventualis into assistance's mens rea. It should be noted nevertheless, that the definition of incitement precisely requires dolus directus [zamiar bezpoœredni], therefore when in the next paragraph the legislator uses only the word intent / dolus [without any adjectives], it implies that both types of intent / dolus(es) are included. Such linguistic interpretation is possible, but not definitive. Although Codification Committee commentary to the Code mentions also dolus eventualis, what matters in the end is the text of the bill, not its commentary.")

[714] Courteau, C., "The Mental Element Required for Accomplice Liability: A Topic Note," 59 Louisiana Law Review 325, 333 ("Courteau") ("A majority of states, in line with the Model Penal Code, require that the accomplice have the 'intent to promote or facilitate the offense.'") A small number of states, such as New York, appear to have adopted "criminal facilitation" statutes that permit imposition of liability on a knowledge or "believing it probable" standard, but these states remain in the small minority: Robinson, P. and Dubber, M., "The American Model Penal Code: A Brief Overview," 10 *New Criminial Law Review* 319, 337 (2007); Courteau, p. 340-1.

[715] United States Model Penal Code, § 2.06(4). See e.g. *United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir 1938). See US Model Penal Code, s. 206(4)("When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of the offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense); *State v. Moreno*, 104 P.3d 628, 631 (Or. Ct. App. 2005) (acquitting a

relies on "purpose" as the *mens rea* threshold,[716] although it appears that in practice the standard is lower than that generally applied in the United States. The "purpose" threshold sometimes emerges distinctly, as when there is some indication that the assistance was rendered with some other lawful purpose in mind, so that any assistance to the crime is "incidental."[717] The English Court of Appeal, which is not bound by any codified standard and whose decisions are therefore varied, has also on occasion applied a purpose standard to acquit an accused person where he had a lawful purpose for his action, despite an awareness of a probability that a crime might thereby be assisted.[718] Hong Kong courts tend to more consistently apply a purpose standard than in Canada or England, typically requiring that the assistance be given "with the intention of assisting or encouraging the principal."[719] Indian courts also apparently apply a form of intent in relation to the ultimate crime, in that "the defendant must have intended that the person abetted carry out the conduct abetted."[720]

364. This domestic backdrop assists in understanding the reason for the particular language adopted in Article 25(3)(c) of the Rome Statute. In the face of a variety of

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person selling large number of over-the-counter drugs to purchasers whom he knew were likely to concentrate the products into illegal drugs, on the basis that "the mental state required for criminal liability on and aid and abet theory is essentially the same as for the principal's liability in this circumstance.").

[716] Criminal Code, R.S.C. 1985, c. C-46, s. 21(b).

[717] *F.W. Woolworth Co. Ltd. (1974)*, 18 C.C.C. *(2d)* 23, 32 (Ont. CA.) (after a full discussion of the knowledge requirement, the Court of Appeal then found "another reason why ... the convictions cannot stand. Section 21 requires that an alleged party must do or omit to do something for the purpose of aiding the principal to commit the offence. That purpose must be the purpose of the one sought to be made a party to the offence but if what is done *incidentally* and accidentally assists in the commission of an offence that is not enough to involve the alleged party.")

[718] *Gillick v. West Norfolk and Wisbech A.H.A.*, [1986] AC 112.

[719] Jackson, M., "Criminal Law", in Gaylord, M. *et al.*, *Introduction to Crime, Law and Justice in Hong Kong*, Hong Kong University Press (Hong Kong 2009), p. 28; *Halsbury's Laws of Hong Kong*, s. 130.055 ("there must be a common purpose between the principal and the aider and abettor and an intention to aid or encourage the persons who commit the offence or, a readiness to aid and encourage them if required."); *R. v. Lam Kit*, [1988] 1 HKC 679, 680 ("it is not only necessary to prove that he was present while the offence is committed, that he knew an offence was being committed and that his presence, in fact, gave encouragement to the perpetrators but it must be proved that he intended to give that encouragement, that he *wilfully* encouraged"); *R. v. Leung Tak-yin* [1987] 2 HKC 250 ("But the fact that a person was voluntarily and *purposely* present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted") (italics added) (citing to *R. v. Clarkson* 1971 55 Cr. App. R. 445).

[720] Yeo, S., "India", in Heller, K. and Dubber, M., eds. *The Handbook of Comparative Criminal Law*, Stanford University Press (Stanford:, 2011), p. 296, citing *Mohd Jamal v. Emperor*, A.I.R. 1953 All 668. ("The offence of abetment, however ... cannot be made out. Appellant 2 certainly aided appellant 1 in driving the car but it cannot be said that he intended that it should be driven rashly and negligently").

diverse practices, compromise was required to find consensus. Consensus was reached only after a vigorous process of negotiation, and the consensus option "ha[d] an underpinning in many national legal systems."[721]

*(c) Conclusion and Remedy Requested*

365. The foregoing discussion shows that Article 25(3)(c) was vigorously and actively negotiated; that the language adopted has a strong foundation in the domestic law of States, and that there was no intention amongst States other than to express the best, consensus view possible as to the international standard of accessorial liability that would bind them. The *opinio juris* of States has coalesced around the purpose standard set out in Article 25(3)(c). Even assuming there is still some doubt about that, one point is beyond doubt: the *opinio juris* of States has not coalesced around a knowledge standard of *mens rea* for aiding and abetting.

366. This Appeals Chamber, as previously mentioned, has never had to squarely address the issue now posed, nor has the outcome of any previous case in this Court turned on the appropriate standard.[722] A departure would nevertheless arguably be required from the current jurisprudence of other international courts. This Chamber has both the power and the responsibility to do so, notwithstanding Article 20(3) of the Statute. The overriding obligation of all international courts is to not exceed the bounds of customary international law. Aside from the fact that this Chamber is not bound by any doctrine of *stare decisis* in respect of the appellate tribunals of other international courts, any court has the authority to alter its jurisprudence on the basis of "cogent reasons in the interests of justice," which can arise "'usually because the judge or judges were ill-informed about the applicable law.'"[723] The Supreme Court of the ECCC in similar circumstances departed from the ICTY and ICTR's established jurisprudence concerning JCE III.

367. This Appeals Chamber is therefore called upon to recognize that the *opinio juris* of States does not support a standard of mere knowledge, much less knowledge of a probability, for the *mens rea* of an accessory in customary international law. The minimal acceptable standard is expressed in Article 25(3)(c) of the ICC Statute: "*For the purpose of facilitating the commission of such a crime*, aids, abets or otherwise

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[721] *Tadić* AJ, para. 225.
[722] *AFRC* AJ, para. 243; *CDF* AJ, paras. 366-7; *RUF* AJ, para. 546.
[723] *Aleksovski* AJ, para. 109.

assists in its commission or its attempted commission, including providing the means for its commission."

*(iv) The Chamber's Elaboration of Knowledge As Being Equivalent to An "Awareness of a Substantial Likelihood" Was Erroneous*

*(a) Awareness of a Substantial Likelihood Is Not the Knowledge Standard Accepted in International Criminal Law*

368. The Trial Chamber asserted that an aider and abettor need be "aware of the substantial likelihood" that his acts would provide assistance to that crime.[724]

369. The "substantial likelihood" standard is not the correct standard of knowledge in international criminal law. ICTY jurisprudence prescribes – and has repeatedly affirmed despite requests to the contrary by the Prosecution – that the accused must have *actual* knowledge both of the criminal intentions of the perpetrator and of the nature of the one's own acts as assistance. The ICTY and ICTR Appeals Chambers have repeatedly affirmed the following standard, which makes no mention of "probability":

> The Appeals Chamber considers it firmly established that, to satisfy the *mens rea* requirement for aiding and abetting, "[i]t must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal" (for example, murder, extermination, rape, torture) and that the aider and abettor was "aware of the essential elements of the crime which was ultimately committed by the principal." Where the *mens rea* of the principal perpetrator is an element of the principal crime, the aider and abettor need not share the intent of the principal perpetrator, but he or she must be aware of the intent of the principal perpetrator.[725]

370. The Prosecution in *Blagojević* and *Haradinaj* urged the Appeals Chamber to adopt an "awareness of a probability" interpretation of "knowledge", arguing that this would harmonize the *mens rea* of aiding and abetting with other modes of liability, such as planning, instigating, and ordering.[726] The Appeals Chamber in both cases expressly rejected these efforts and reaffirmed the existing standard quoted above. In *Blagojević*, the the Appeals Chamber made the following pronouncement of particular relevance to Mr. Taylor's alleged situation:

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[724] Judgement, paras. 486, 6904.

[725] *Haradinaj* AJ, para. 58. See *Vasljević* AJ, para. 102 ("the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal"); *Rukundo* AJ, para. 53; *Kalimanzira* AJ, para. 86; *Karera* AJ, para. 321; *Muvunyi* AJ, para. 79; *Seromba* AJ, para. 56 ("the requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator").

[726] *Haradinaj* AJ, para. 54; *Blagojević* AJ, para. 220.

> Thus, the Trial Chamber did not decline to find that Blagojević knew about the mass killing operation because he lacked certainty, but because it could not rule out the equally reasonable inference that he thought *that his acts were directed towards another goal*. Accordingly, the Trial Chamber did not err in its formulation of the *mens rea* requirement for aiding and abetting and the Appeals Chamber dismisses this sub-ground of appeal.[727]

The Appeals Chamber gave similar reasons in the *Haradinaj* case, noting that the evidence

> at best, shows that Idriz Balaj put vulnerable women in contact with KLA soldiers who had a reputation for violence. The Prosecution does not point to any evidence as to what happened to the women between the time that they were last seen alive and the time that they were killed, in particular which KLA soldiers killed them or under what circumstances they were killed. As the Trial Chamber correctly noted, none of the evidence shows that Idriz Balaj was aware that a crime would be committed against the women at the relevant time.[728]

371. These cases distinctly show that the ICTY has never accepted – and has in fact expressly rejected – the claim that "knowledge" can include mere "awareness of a probability." Imposing a foresight requirement to intentional modes of liability is very different from imposing it in respect of accessorial liability. None of the ICTY cases referred to by the Chamber at footnote 1146 adopt a probability standard in respect of knowledge.[729] On the contrary, the *Blaskić* Appeals Chamber overturned the Trial Chamber's insertion of a "possible and foreseeable consequence" standard.[730]

372. The only authority relied upon by the Chamber was the Appeal Judgement in *Sesay* which, in turn, quotes from the *Brima* Appeal Judgement which, in turn, is based only on the ICTY Appeals Chamber judgements in *Blaskić* and *Simić*.[731] As previously discussed, the pronouncement of this standard was *obiter*, and apparently

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[727] *Blagojević* AJ, para. 223 (italics added).
[728] *Haradinaj* AJ, para. 60.
[729] *Vasiljević* AJ, para. 102 ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose"); *Perišić* TJ, para. 129 ("The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.")
[730] *Blaškić* AJ, para. 49 ("In relation to the *mens rea* of an aider and abettor, the Trial Chamber held that 'in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.' However, as previously stated in the *Vasiljević* AJ, knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the mens rea requirement of this mode of participation. In this respect, the Trial Chamber erred.")
[731] *AFRC* AJ, paras. 242-3. Cf. *Simić* AJ, para. 86: "The requisite *mens rea* for aiding and abetting is knowledge that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal perpetrator."

had no impact on the outcome of those cases, nor is it apparent whether the issue was raised by the appellants and respondents. This is, accordingly, the first case before this Appeals Chamber where the issue is squarely raised, and the definition of knowledge defined by the ICTY Appeals Chamber's clear and consistent jurisprudence should be accurately and faithfully transposed as part of the law of this Court, in accordance with Article 20(3) of the Statute.

373. Incidentally, some States applying a knowledge standard for aiding and abetting liability in their domestic law, such as South Africa and Israel, do permit imposition of liability on a mere "awareness of a probability" standard. This expansive domestic approach, even if it could somehow illuminate customary international law, is in the clear minority.[732] There is, therefore, no support in the practice of international criminal law for a "knowledge of a probability" standard, much less any practice coming close to a consensus that would demonstrate that it has been accepted as a matter of international criminal law; and no indirect support that there is any consensus amongst States amounting to a general principle of law or any expression of *opinio juris* that that standard should be accepted as a matter of international criminal law.

374. What happens, however, when the principal commits a crime different from the one anticipated by the accessory (i.e. "knew", but ultimately was wrong about in the event), and for which assistance was provided? As the ICTY Appeals Chamber explained in *Blaskić*:

> The Trial Chamber agrees with the statement in the *Furundžija* Trial Judgment that "it is not necessary that the aider and abettor [...] know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the

[732] *R. v. Roach* (Ontario Court of Appeal) Docket C38012, 3 June 2004, para. 44 ("knowledge will include actual knowledge or willful blindness but will not include recklessness"); *Giorgianni v. The Queen*, High Court of Australia (1985) 156 CLR 473, 507-509; Cass. pen., sez. I 03-03-1987 (09-02-1987), n. 2656 - Pres. CARNEVALE C - Rel. DINACCI U - GRAZIANI - P.M. (CONF) GUASCO (massima 2) ("The *mens rea* standard required for the accessorial liability is the knowledge of cooperate with others in realizing a crime: i.e. the full awareness of the others conducts, in the past or in the future. The identity of the individuals will it is therefore essential and their participation has to be directed to commi t the offense, i.e. they have to share and have the precise knowledge of the crime they intend to commit."); G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal génénal* (Paris: Dalloz, 2000), p. 290 ("l'auteur d'une faute d'imprudence ne peut pas être pousuivi comme complice, même si cette imprudence ou cette negligence constitue une faute au point de vue civile") (English Translation: "A person who is liable of recklessness cannot be cannot be held criminally responsible as an accomplice, even though this recklessness or negligeance would engage his civil liability.")

> commission of that crime, and is guilty as an aider and abettor." The Appeals Chamber concurs with this conclusion.[733]

375. The conclusion is unexceptionable: an aider and abettor can be held responsible as long has he or she has actual knowledge that at least one crime is going to be, or is being, committed. The Prosecution attempted to extrapolate a different meaning from the word "probably," arguing in subsequent cases that this language had modified the pre-existing jurisprudence that the accessory must "know" and be "aware" of the crime and his or her assistance thereto. The Appeals Chamber firmly rejected this interpretation in *Blagojević*, explaining that:

> The Appeals Chamber, however, recalls its position from the *Blaskić* Appeal Judgement that there are no reasons to depart from the definition of *mens rea* of aiding and abetting found in the *Vasiljević* Appeal Judgement. The *Blaskić* Appeal Judgement did not extend the definition of aiding and abetting.[734]

376. The law is therefore clear. The language concerning the case where a crime different than the one anticipated was not intended to disturb or alter the existing and well-established standard: actual knowledge. The Chamber erred in adopting a different standard.

*(b) The Trial Chamber Failed to Define, Or Erred As To, the Mens Rea in Respect of Assistance of Future Crimes*

377. The Chamber asserted that an aider and abettor also needs to be aware that the principal "committed" a crime.[735]

378. The Chamber's definition is temporally incoherent. The *mens rea* in respect of the principal's criminal intentions is expressed in the past tense ("committed"), whereas the knowledge of the assisting effect of the accessory's acts is formulated in the future tense ("would assist").[736] The Chamber's formulation presupposes that the criminal act occurs before the *actus reus* of assistance, since the awareness is described in relation to a past event. The Chamber offers no further clarification.

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[733] *Blaškić* AJ, para. 50.
[734] *Blagojević* AJ, para. 222. See *Haradinaj* AJ, paras. 54-7 (rejecting the probability standard); *Rukundo* AJ, para. 53 (omitting the "probability" passage from *Blaškić* in its definition of the applicable *mens rea* for aiding and abetting); *Muvunyi* AJ, para 79 (omitting the "probability" passage from *Blaškić* in its definition of the applicable *mens rea* for aiding and abetting); *Seromba* AJ, para. 56 (omitting the "probability" passage from *Blaškić* in its definition of the applicable *mens rea* for aiding and abetting).
[735] Judgement, paras. 486, 6904.
[736] Judgement, paras. 496, 6904.

379. While it is possible to aid and abet a past crime (provided that the crime was committed on the basis of an agreement that the *post facto* assistance would be provided), this was not the basis of the Chamber's aiding and abetting conviction of Mr. Taylor.[737] The Chamber, therefore, entered a conviction without ever articulating the accessory's mental state at the moment of the *actus reus*. This simultaneity, as with the *actus reus* and *mens rea* of any crime or mode of responsibility, is a requirement of accessorial liability.[738]

380. The Chamber went on in its "Legal Findings on Responsibility" to declare that Taylor "was aware of the 'essential elements' of the crimes he was contributing to, including the state of mind of the perpetrators."[739] This language presupposes, unlike the Chamber's initial statement of *mens rea*, that the assistance and the crimes are contemporaneous. This was not the basis on which the Chamber imposed aiding and abetting liability on Taylor, who was convicted of provided assistance used in crimes committed significantly in the future.[740] The legal standard is therefore again not apposite to the facts as found by the Chamber. It makes no difference that some assistance and some crimes were, in the Chamber's view, ongoing in parallel: the relevant question is the accused's mental state in giving the assistance that was used in the crime allegedly assisted.

381. The Chamber's failure is unsurprising because neither the ICTY nor the ICTR have ever, until the *Perišić* case, had to articulate such a standard. The reason is that the crime has always occurred before, simultaneous with, or immediately after the alleged assistance – so immediate that knowledge by the accessory of the perpetrator's present intentions could suffice. Anto Furundžija, for example, was convicted of remaining present during a rape and lending express or implied support to the continuation of the crime;[741] Mitar Vasiljević was convicted for guarding and escorting a group of men to a location believing that that is where the perpetrators intended to kill them, and where they were, in fact killed;[742] Francois Karera

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[737] Judgement, paras. 6950-1.
[738] See e.g. *Blagojević* AJ, para. 295. Bouloc, B., *Droit pénal génénal*, Dalloz (Paris, 2009), p. 234 ("Il faut que l'élément moral se joigne a l'élément material (qu'il apparaisse avant ou au même moment) pour que l'infraction soit constitué") (English Translation: "A mental element must accompany the material element (whether it exists before or during the commission of the crime) in order for the crime [of complicity] to exist.")
[739] Judgement, para. 6950.
[740] Judgement, paras. 6907-53.
[741] *Furundžija* TJ, paras. 273-5.
[742] *Vasiljević* AJ, paras. 134-5.

possessed the relevant knowledge that a crime would result by telling *Interahamwe* that a particular person was an *Inyenzi*, which led to his murder.[743] No uncertainty arose in any of these cases because of any temporal lapse between the assistance and the crime. The issue is usually precluded because a substantial temporal lapse usually precludes a finding of "substantial assistance" under the *actus reus*. In *Nahimana*, for example, the ICTR Appeals Chamber quashed all convictions for instigation based on statements made prior to the commencement of the genocide in Rwanda on the basis, *inter alia*, that:

> [w]hile there is probably a link between the Appellant's acts, because of his role in Kangura, and the genocide, owing to the climate of violence to which the publication contributed and the incendiary discourse it contained, the Appeals Chamber considers that there was not enough evidence for a reasonable trier of fact to find beyond reasonable doubt that the Kangura publications in the first months of 1994 substantially contributed to the commission of acts of genocide between April and July 1994.[744]

The Appeals Chamber expressly noted the effect of the lapse of time on the "substantial contribution" requirement of aiding and abetting, noting that "the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it."[745] The Appeals Chamber in *Kupreškić* quashed a finding of aiding and abetting based on an alleged delivery of weapons six months before an attack.[746] In *Ndindabahizi*, the ICTR Appeals Chamber quashed a conviction for an *actus reus* of instigation committed six days before the crime by the principals, noting that victims had "been killed at the roadblock even before the Appellant's visit" and that it was unclear whether the words of instigation actually had an impact on those who did the killing six days later.[747] The ICJ has itself implied that the crime in question cannot be too far in the future, but must be, at the most, "about to take place."[748]

382. The *Perišić* Majority, unlike the Chamber, at least assays a standard by which to infer "knowledge" in the unprecedented context of events occurring in the significant future, variably describing the accused's state of knowledge at the time of

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[743] *Karera* AJ, para. 322.
[744] *Nahimana* AJ, para. 519.
[745] *Nahimana* AJ, para. 513.
[746] *Kupreškić* AJ, para. 277.
[747] *Ndindabahizi* AJ, para. 116.
[748] *Bosnia v. Serbia* Judgement, para. 422.

the *actus reus* as being that "other similar crimes *would probably* occur";[749] a "*high likelihood*" that they would occur;[750] "*very probable*" that they would occur;[751] or just that their occurrence was "*foreseeable*" to Perišić.[752]

383. The Chamber, though not setting out its view of the applicable standard in respect of its findings, in one isolated passage suggests that it may have adopted an even lower standard than adopted in *Perišić*: Taylor is determined at one point to "have been aware of the likelihood that the AFRC/RUF would commit similar crimes in the future."[753] The "likelihood" standard would facially appear to be even lower than most of the terms used in *Perišić*.

384. A reasoned opinion is an elemental component of the right to the fairness of proceedings, including the appellate stage.[754] An accused can make a "useful exercise" of his right of appeal only if properly informed of the basis of his or her conviction at first instance.[755] The failure to state such reasons also impairs the statutory function of the Appeals Chamber.[756] The Appeals Chamber should not normally adjudicate factual issues *de novo* – a practice which, if resulting in a conviction, deprives the accused of any opportunity to comment on their correctness, much less to seek review thereof before an appellate body.[757] The prejudice in such a scenario is clear. However, and even if it were assumed that the Chamber applied a "likelihood" or a "substantial likelihood" standard in respect of knowledge of the perpetrators' criminal intent, the Defence submits that such a standard is legally untenable.

385. Regardless of whether knowledge is considered a sufficient condition of liability, or whether it is a necessary component of purpose, the only appropriate standard of knowledge in international criminal law, as discussed in the previous section, is actual knowledge. The predictability of future events warrants no exception to this standard. The "substantial likelihood", much less mere "likelihood" that a crime will be committed in the significant future using the assistance provided does

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[749] *Perišić* TJ, para. 1632.
[750] *Perišić* TJ, para. 1635.
[751] *Perišić* TJ, para. 1637
[752] *Perišić* TJ, para. 1646.
[753] Judgement, para. 6882.
[754] *Kvočka* AJ, para. 23.
[755] *Hadžihasanović* AJ, para. 13. *Naletilić* AJ, para. 603 (a reasoned opinion "makes it possible for an individual to exercise their right of appeal").
[756] *Karera* AJ, para. 20; *Limaj* AJ, para. 81.
[757] See e.g. *Rutaganda* AJ, Separate Opinion of Judges Meron and Jorda, p. 1; *Mrkšić* AJ, Partially Dissenting Opinion of Judge Pocar, para. 12.

not satisfy this standard. Unless the assister can be said to have actual knowledge of the criminal intention of the principal, then the assistance is too remote to satisfy the *mens rea* requirement. Indeed, in the specific context of future events, the ICJ has interpreted complicity as requiring that an accused be "clearly aware" that the crime "was about to take place or was under way".[758]

386. A standard that further clarifies the circumstances in which an accused would be "clearly aware" of the predictability of future events, that complies with international criminal law as discussed in the previous section, is offered by the United States Model Penal Code:

> A person acts knowingly with respect to a material element of an offense when: .... If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.[759]

387. This standard is commendable as complying with the ICTY and ICTR jurisprudence discussed in the previous section rejecting a probability standard of awareness. It also fits with the broader hierarchy of modes of liability recognized in international criminal law. Liability for JCE III arises where: (i) the crime was foreseeable; and (ii) the accused willingly took the risk that they would occur – "that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise."[760] Accessorial liability cannot justly be imposed on roughly the same knowledge standard as that imposed for JCE III liability. The latter case involves a perpetrator who possessed direct criminal intent, even if the crime turned out differently than expected. The accessory, who has no direct criminal intent whatsoever, cannot justly be subject to criminal liability on the same standard of awareness. As the form of liability with the lowest level of culpable intent, whether that standard be purpose or knowledge, the limits of accessorial liability should be carefully drawn to maintain the highest level of cognitive certainty about the character of one's own acts.

*(v) The Imposition of a Knowledge Standard, Including By Awareness of a Probability, Risks Interfering With Traditional And Well-Established Prerogatives of States*

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[758] *Bosnia v. Serbia* Judgement, para. 422.
[759] US Model Penal Code, § 2.02(2)(b).
[760] *Vasiljević* AJ, para. 101.

388. The standard of aiding and abetting liability adopted by the Chamber would, in practice, overturn the limits of state responsibility set out in the *Nicaragua Case*. At paragraphs 115 and 116, the International Court of Justice held:

> All the forms of United States participation mentioned above, and even the general control by the respondent State [the United States] over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant state [Nicaragua]. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operation in the course of which the alleged violations were committed. [116] The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State.[761]

389. The ICJ recently refused to lower this threshold of responsibility even in the context of the crime of genocide, finding that it was "settled jurisprudence" and reflective of customary international law.[762] The acts of VRS forces, despite their dependence on Serbia, were found not to be imputable to the Government of Serbia.[763]

390. An awareness of a probability standard of accessorial liability would extend international criminal law dramatically beyond the contours of state responsibility. State officials who provide assistance to rebel forces in other states could incur criminal liability if they were aware of the commission of crimes by those forces, even if those forces were not under the command of the state providing assistance. Thus, President Reagan, or any other official with knowledge of the provision of support to the contras, would have been open to liability as a war criminal for aiding and abetting any war crimes committed by the *contras* in Nicaragua even though, according to the settled law of state responsibility, the United States would not be responsible. It is noteworthy in this regard that the Chamber acquitted Mr. Taylor of responsibility as a superior under Article 6(3) of the Statute, finding that he did not exercise effective control over the RUF and the AFRC.[764]

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[761] *Nicaragua* Judgement, paras. 115-6.
[762] *Bosnia v. Serbia* Judgement, paras. 406-7.
[763] *Bosnia v. Serbia* Judgement, paras. 413-5.
[764] Judgement, paras. 6979, 6986.

391. Other recent examples that presumably would attract the same divergent outcomes include those members of NATO who offered assistance to Libyan insurgents who were widely reported to be committing war crimes;[765] states that are currently supporting insurgents – or for that matter, the government – in Syria if there are any reports of the commission of war crimes by those forces;[766] and states that may be supporting insurgents now involved in conflicts in the Democratic Republic of Congo.[767]

392. Defining a mode of liability to encompass such actions would have far-reaching consequences. States would then have universal jurisdiction over such acts and, depending on the crime, even an obligation under international criminal law to prosecute them.[768] The consequences seem anomalous: the law of State responsibility would insist that the State cannot be held responsible, whereas States would have a mandatory obligation under international criminal law to prosecute State officials responsible for providing the assistance, even when motivated by traditionally legitimate purposes in the realm of state action such as self-defence. Whereas such a bifurcation seems justifiable and appropriate where the individual state official intends a criminal act, the "knowledge of a probability" standard requires neither intention nor control over the perpetrators. Accessorial liability would therefore stand alone as the only form of international criminal liability that would involve neither: (i) the intentional (and therefore highly volitional) commission of an act that is prohibited by customary international law; nor (ii) a level of control over the perpetrator that does not correspond to the established ICJ's standards for imputing state responsibility.

393. The doctrine propounded by the Chamber either risks unduly interfering with the customary prerogatives of States or the total destruction of the universalist aspirations of international criminal law. The enduring significance of these principles for the international community as a whole was eloquently expressed in *The Ministries Case*:

> [W]e are here to define a standard of conduct of responsibility, not only for Germans as the vanquished in war, not only with regard to past and present events, but those which in the future can be reasonably and properly applied to men and officials of every state and nation, those of the victors as well as

[765] Libya Article.
[766] Syria Report.
[767] Chair of the Secuirty Council Committee Letter, paras. 1-13.
[768] *Belgium v. Senegal* Judgement, para. 102.

> those of the vanquished. Any other approach would make a mockery of international law and would result in wrongs quite as serious and fatal as those which were sought to be remedied.[769]

*(vi) The Required Mens Rea, Assuming That The Chamber Correctly Adopted a "Knowledge" Standard, Requires Knowledge that the Assistance Provided Would Have a "Substantial Effect on the Commission of the Crime", Not Merely That It Would "Assist The Commission of a Crime"*

394. The Chamber erroneously failed to align the required *mens rea* with its own definition of the *actus reus*. The actus reus as defined by the Chamber requires (i) "practical assistance ... to the perpetration of a crime"; and (ii) the assistance must have had "a substantial effect upon the commission of the crime."[770]

395. In defining the mens rea, however, the Chamber required that the accused only be aware of the first prong of the *actus reus*, but not the second. This is an error: the mens rea, in addition to any special intent that may be required in respect of a crime, always requires as a minimum that the accused know the character of the *actus reus*.

396. This elemental principle of criminal law is expressly articulated in Article 30 of the ICC Statute which requires at a minimum in respect of any crime that a person shall be criminally responsible for a crime only if "the material elements are committed with intent and knowledge."[771] The material element of a crime committed through aiding and abetting is that the assistance has a *substantial* effect, not merely that it has *some* effect. It follows that, at a minimum, the Chamber erred by adopting a standard requiring knowledge that the act would only "assist", rather than "substantially assist," the commission of a crime.

*(vii) These Errors, Given Their Severity and the Complexity of the Factual Record, Require That the Judgement Be Set Aside*

397. The erroneous standard of aiding and abetting invalidates the conviction on that basis. The departure from the proper standard is substantial, must have pervasively, if not always expressly, affected the Chamber's reasoning, and cannot now be effectively remedied based on a review of the complex record based on the proper standard. The only proper remedy is to set aside all convictions entered on the basis of aiding and abetting liability.

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[769] *Weizsaecker* Judgement, p. 527.
[770] Judgement, para. 482.
[771] S. 20 of the California Penal Code, to take one illustration from national law, requires that there "exist a union, or joint operation of act and intent, or criminal negligence."

## ii. GROUND OF APPEAL 17: The Trial Chamber erred in fact and in law in finding that the RUF and AFRC, throughout the indictment period, had a continuous "operational strategy" to commit crimes, from which it inferred Charles Taylor's continuous mental state for aiding and abetting.

*(i) Overview*

398. The Chamber found that Mr. Taylor supplied or facilitated the supply of materiel to Sam Bockarie on several occasions throughout the Indictment period. Notably, the Chamber found that he supplied or facilitated the supply of three large shipments ("Magburaka", between September and December 1997; "Burkina Faso", November or December 1998; and to Bockarie directly, March 1999), and a series of small shipments. Mr. Taylor's primary position, set out in Ground 23, is that no reasonable trial chamber, evaluating the evidence properly, could have found that Mr. Taylor participated in any or all of these shipments. The *actus reus* is therefore not proven. But even assuming such a finding was possible, no reasonable trier of fact, as is addressed here, could have inferred that Mr. Taylor knew that the materiel supplied would be used in, or have a substantial effect on, the commission of crimes.

399. The Chamber's findings exclude that Mr. Taylor provided support "for the purpose" of facilitating crimes.[772] However, even applying the erroneous "knowledge" *mens rea* standard, no reasonable trier of fact could have found, for the reasons that follow, that this standard was satisfied on the evidence beyond a reasonable doubt.

400. The essence of the Chamber's reasoning is that Mr. Taylor gave assistance and advice to the RUF/AFRC at a time when "the operational strategy of the RUF and AFRC was characterized by a campaign of crimes against the Sierra Leonean population."[773] The Chamber found that "the RUF and later the AFRC/RUF" pursued this strategy starting with "Operation Stop Election" in 1996.[774] The Chamber, on this basis, equates any assistance to these forces from then onwards as assistance to crimes: "any assistance towards these military operations of the RUF and RUF/AFRC

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[772] Judgement, para. 6896 ("it was in the interest of the Accused and the RUF to join forces against their common enemies"); para. 6897 ("Cooperation between the NPFL and RUF was limited in its purpose and it was military, not criminal, in its nature"); para. 6898 ("the evidence relating to the support provided indicates that there was a *quid pro quo* in the relations between the RUF and the Accused").
[773] Judgement, para. 6905.
[774] Judgement, para. 6790.

constitutes direct assistance to the commission of crimes by these groups."[775] Despite this "direct assistance" formulation, the Chamber proceeded to link specific shipments to six specific crime groupings – implying that that was a necessary feature of proving "substantial assistance" to crimes.[776]

401. The Chamber did not find that Mr. Taylor knew about this "operational strategy" of terrorization from the beginning of the RUF's activities, defining instead a two-step evolution of his knowledge over time. During the first stage, which commences "as early as August 1997, the Accused knew of the atrocities being committed against civilians in Sierra Leone by the RUF and RUF/AFRC forces and their propensity to commit crimes."[777] Propensity is different from "operational strategy", which only emerges, according to the Chamber, "by April 1998" when the "Accused knew of the AFRC/RUF's operational strategy and intent to commit crimes."[778] The Chamber's finding, therefore, is that (i) from August 1997 to April 1998, Taylor was aware of a "propensity" of some RUF or AFRC soldiers to commit crimes, whereas (ii) from April 1998 onwards he was aware of an "operational strategy" to commit crimes. The Chamber found that both mental states satisfied the *mens rea* of aiding and abetting.

402. This finding encompasses three errors, the first legal, and the second and third factual. First, the knowledge as found by the Chamber during the first period (August 1997 to April 1998) does not satisfy the knowledge *mens rea* of aiding and abetting. Second, no reasonable trier of fact could have found that the RUF and AFRC had a continuous operational strategy in 1998, known to Taylor, to commit crimes. Third, no reasonable trier of fact could have found that the RUF and AFRC had a continuous operational strategy from 1999 onwards, known to Mr. Taylor, to commit crimes. Any of these errors, alone or in combination invalidate, in whole or in part, the findings that Mr. Taylor aided and abetted the crimes as found in the Judgement.

403. The Chamber's own findings show that RUF/AFRC soldiers, rather than implementing a continuous policy to commit crimes, tended to commit such crimes opportunistically and when pushed to the brink of defeat. Sporadic crimes occurred at other times as well, but the RUF and AFRC leadership tried to impose discipline and

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[775] Judgement, para. 6905. The statement is contrary to the *actus reus* of aiding and abetting, which requires assistance that is directed to the crime, not to some lawful activity that may form the context for the crime. That error is discussed below, in Ground 21.
[776] See Ground 23.
[777] Judgement, para. 6947.
[778] Judgement, paras. 6884-5.

punish soldiers who committed crimes. Indeed, the leadership publicly apologized for those crimes and promised to take corrective measures against them in the future. These apologies were widely publicized. Imposing discipline was hampered by infighting and, as the Chamber itself acknowledged, the formation of splinter groups.[779]

*(ii) The Chamber's Findings Show That Mr. Taylor Did Not Have Criminal Mens Rea In Respect of the Two Arms Shipments During the Junta Period, 1997-early 1998*

404. The Chamber recognized that, at its inception, the RUF was a legitimate force with laudable goals[780] but that in "Stop Election" in 1996 it adopted "terror against the Sierra Leonean population as a primary *modus operandi* of their political and military strategy."[781] The Defence disputes this finding as an over-generalization, but the issue is only of peripheral significance for two reasons. First, the Chamber made no finding that Taylor provided any support, material or otherwise, to the RUF during this period.[782] Second, whatever may have previously been the strategy of the RUF altered significantly in May 1997 when it joined the AFRC-dominated junta government and was formally subordinated to the "Supreme Council".[783] The RUF thereafter made a public declaration apologizing for any crimes that its forces may have committed *before* the Junta government:

> For the past six years or so, we have been living in an environment of hatred and divisiveness. We looked at our brothers and killed them in cold blood, we removed our sisters from their hiding places to undo their femininity, we slaughtered our mothers and butchered our fathers. It was really a gruesome experience which has left a terrible landmark in our history.[784]

As one Prosecution witness characterized it, this was the RUF's effort to "make their peace with the civilian population".[785]

405. The evidence does not show the AFRC or RUF during the Junta period – i.e. between May 1997 and 14 February 1998 – pursued a "policy" or *modus operandi* of violence against the civilian population. Indeed, the Chamber stopped short of making that finding, though it did find that there were "ongoing crimes" being "committed by

[779] Judgement, paras. 65 and 5742.
[780] Judgement, para. 6789.
[781] Judgement, para. 6790.
[782] Judgement, paras. 6901-53.
[783] Exh. D-9; TT, TF1-334, 17 Apr. 08, p. 7875-6; Adjudicated Fact 4; Exh. D-85.
[784] Judgement, para. 526. See Judgement, para. 6880.
[785] TT, TF1-371, 1 Feb. 2008, p. 2838 (closed session).

the Junta government."[786] The critical issue, of course, is what the Accused knew. The Chamber held that "as early as August 1997, the Accused knew of the atrocities being committed against civilians in Sierra Leone by the RUF and RUF/AFRC forces and of their *propensity* to commit crimes."[787] The Chamber further found that Taylor "was informed in detail of crimes committed by the AFRC/RUF members during the Junta period, including murder, abduction of civilians including children, rape, amputation and looting."[788]

406. RUF and AFRC soldiers did commit some crimes during this period. No war, and particularly not a bloody civil war, is waged without some crimes being committed by armed forces, to say nothing of crimes committed by civilians who take advantage of a chaotic situation. However, even the ECOWAS reports from August 1997, which are highly critical of the AFRC/RUF's takeover of power, do not accuse them of terrorizing the civilian population.[789] The reports refer instead to "massive looting of property, murder and rape" and to "national assets" being "vandalized and looted", but do not accuse AFRC/RUF forces of being the perpetrators.[790] Precious few findings are to be found in the Judgement itself of violent crimes committed by RUF/AFRC soldiers during the Junta period. The total number of victims of unlawful killings, as found by the Judgement, is fourteen in Kenema and three in Tongo Fields.[791] Most of these killings were characterized as "revenge killings" of alleged "collaborators", or extreme and summary punishment of criminals who were masquerading as RUF soldiers.[792] While none of these explanations render the killings lawful, they demonstrate no indiscriminate policy or "*modus operandi*" to terrorize the civilian population.

407. The Chamber's inference as to Mr. Taylor's state of mind reflects the sporadic and relatively isolated nature of the crimes committed during the Junta period. The Chamber found that it could only infer that Mr. Taylor must have known of a

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[786] Judgement, para. 6879.
[787] Judgement, para. 6947 (italics added).
[788] Judgement, para. 6882.
[789] Exh. D-135; Exh. D-136.
[790] Exh. D-135, p. 2.
[791] Judgement, paras. 588-624 (Kenema); paras. 628-642. The Judgement also notes that an additional 18 were killed during this period by RUF/AFRC forces, but that these findings could not be taken into account to establish guilt, paras. 631, 635.
[792] Judgement, para. 595 (the main witness describing at least one of the victims as a "'notorious criminal'" and another as a thief "who was impersonating the rebels"); 632 ("AFRC/RUF forces carried out revenge killings after suffering heavy casualties").

"propensity"[793] of AFRC/RUF forces to commit crimes, and that "military support *could* facilitate the commission of crimes."[794] The choice of the word "could" – instead of *would* – is significant: the Chamber could only infer Mr. Taylor's knowledge of a *possibility* that assistance might be used in *possible* crimes.

408. This does not satisfy any known standard of aiding and abetting *mens rea*, including the erroneously-low standard adopted by the Chamber which requires that an accused must at least be aware of the substantial likelihood that his acts *would* – not *could* – assist the underlying offence.[795] This standard is not met, according to the Chamber's own findings. Accordingly, the Chamber erred in finding that Mr. Taylor possessed the requisite *mens rea* during this first period, prior to February 1998. This therefore excludes liability for any and all assistance provided through at least February 1998, including the Magburaka shipment and that allegedly provided through Tamba.[796]

409. This same reasoning applies to the materiel allegedly used to assist the Kono crimes, allegedly supplied in "early 1998".[797] The Chamber concluded that the operations against Kono relied on supplies facilitated by Taylor, but makes no finding as to the specific date when those supplies were provided.[798] The absence of such a finding, in case of doubt, must inure to the benefit of the accused in accordance with the principle of reasonable doubt. There is a reasonable possibility, indeed likelihood based on the evidence, that the supplies allegedly used in those crimes were provided at a time when, according to the Chamber, there was still only a possibility – not a probability – that any resources would be used for the commission of crimes.[799] Indeed, it is only after the very crimes that Taylor is alleged to have aided and abetted that this awareness would, in the Chamber's view, have become inevitable.[800] The

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[793] Judgement, para. 6947.
[794] Judgement, para. 6881.
[795] Judgement, para. 486.
[796] See Judgement, paras. 5559-60 (finding that weapons provided in the Magburaka shipment and by Tamba were used for crimes committed both before and after the fall of the Junta).
[797] See e.g. Judgement, paras. 5587 (describing the supply as arriving "shortly after the Intervention"); 5591 (characterizing the timing of the supply as being "in early 1998").
[798] Judgement, paras. 5593, 5835 (xxix) ("materiel supplied by the Accused was used in operations in the Kono District in early 1998, before Operation Fitti-Fatta and the commission of crimes in those operations").
[799] Judgement, paras. 6881, 6883.
[800] Judgement, para. 6883. The official reports listed in footnotes 15475 through 15482, which are supposedly the basis for saying that Taylor must have known of the notorious and widespread crimes and which are, in turn, the basis for inferring a modus operandi of terrorizing the civilian population, confirm that this information would not have been available until late-March 1998: Exh. D-155 (Fourth Report of the Secretary-General on the Situation in Sierra Leone, 18 March 1998); Exh. P-130 (Fifth

Chamber's own findings do not sustain its conclusion that the alleged assistance provided to the crimes in Kono was provided with the requisite *mens rea*.

*(iii) No Reasonable Trial Chamber Could Have Inferred The Existence Of, Let Alone Taylor's Knowledge Of, A Constant and Continuous RUF/AFRC Operational Policy That Encompassed the Indictment Crimes Committed Up To the Freetown Attack (1998)*

*(a) Overview*

410. The Chamber found that Taylor supplied a large quantity of materiel to Bockarie in November or December 1998 and small quantities of materiel during that year through intermediaries including Daniel Tamba. Mr. Taylor's involvement in any such shipments is challenged below in Ground 23; the issue here is, assuming that such shipments were made with the approbation or knowledge of Taylor, the evidence showed that he provided the assistance knowing that it would be used in crimes.

411. The Chamber found that Mr. Taylor had knowledge of an operational strategy to terrorize the civilian population by the RUF/AFRC as of April 1998.[801] In substance, the Chamber infers that because of the notoriety and seriousness of the crimes committed by some forces within the RUF/AFRC alliance, in particular during their retreat from Freetown in February and March 1998, anyone facilitating the supply of arms thereafter, notably in the form of the Burkina Faso shipment in November or December 1998, would have had to know that those arms would be used in the commission of crimes.[802]

412. This knowledge is relevant to three *actus reus* events between the fall of the Junta Government and the Freetown Invasion at the beginning of 1999: (i) supplying small amounts of military materiel "in 1998 and 1999" to the RUF in its strongholds in the east of Sierra Leone through Daniel Tamba and others;[803] (ii) giving Bockarie "sizeable amounts of materiel ... although not comparable in quantity" to the three

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Report of the Secretary-General on the Situation in Sierra Leone, 9 June 1998). Even an Amnesty International report, dated 24 July 1998, referred to in footnotes 15475, 15476 and 15477 (Exh. P-078), which Taylor did not read (Taylor, 25 November 2009, p. 32393), describes a "deliberate and systematic campaign" as having "emerged since April 1998", not before).

[801] Judgement, para. 6905.

[802] Judgement, paras. 6791-3; 6883-6.

[803] Judgement, para. 4965 ("[t]he Prosecution has proved beyond reasonable doubt that supplies of arms and ammunition were sent to the RUF/AFRC in Buedu between February 1998 and December 1999 by the Accused, through, inter alia, Daniel Tamba (a.k.a. Jungle), Sampson Weah and Joseph (a.k.a. Zigzag) Marzah. However, there is insufficient evidence to establish beyond reasonable doubt that, except for the Burkina Faso shipment of November/December 1998, the amounts of materiel provided by the Accused in 1998 and 1999 ... were large"; para. 5561.

large shipments, to take to his base in Buedu;[804] (iii) "around November/December 1998", facilitating "a large quantity of arms and ammunition for the RUF from Burkino Faso."[805] The Chamber found that these supplies were (i) "used in operations in the Kono District in early 1998 ... and the commission of crimes during those operations";[806] (ii) during the Fitti-Fatta operation around June 1998;[807] and by the AFRC group headed by SAJ Musa in Mongor Benguda and Kabala "which included the commission of crimes", and by the AFRC group headed by Gullit in Koinadugu and Bombali Districts from June to October, "which included the commission of crimes";[808] and (iii) in the offensives leading to the capture of Freetown, including "in attacks in Kono and Kenema in December 1998 ... and in the commission of crimes in the Kono and Makeni Districts" as well as "in the commission of crimes in Freetown and the Western Area."[809]

413. No reasonable trier of fact could have found, as addressed in Ground 23, that Taylor provided or procured these supplies for the RUF. But even assuming he did, no reasonable trial chamber could have inferred that at the time Taylor supplied this materiel, he did so for the purpose of, and with knowledge that, it would contribute substantially to the crimes committed.

*(b) Mr. Taylor's Own Acknowledgements, Contrary to the Chamber's Interpretation, Do Not Constitute An Admission of Mens Rea For Aiding and Abetting*

414. The Chamber places heavy reliance on Mr. Taylor's acknowledgements that in April 1998 he was aware that serious crimes were being committed in Sierra Leone. Thus, Mr. Taylor was asked whether anyone providing support to "the RUF/AFRC as of April 1998 ... would be supporting a group engaged in a campaign of atrocities against the civilian population of Sierra Leone". Mr. Taylor responded "[w]ell, to an extent you could say yes, anybody that would supply would be doing it against the civilians, yes."[810] Mr. Taylor also agreed that in May 1998 "there were news reports"

[804] Judgement, paras. 5030-1, 5561.
[805] Judgement, paras. 5527, 5561.
[806] Judgement, para. 5593.
[807] Judgement, para. 5632.
[808] Judgement, paras. 5666-7.
[809] Judgement, paras. 5719-20.
[810] TT, Charles Taylor, 25 Nov. 2009, p. 32395; Judgement, para. 6884.

of a "horrific campaign being waged against the civilian population in Sierra Leone."[811]

415. Horrendous atrocities were, as Mr. Taylor acknowledged, indeed committed during this period by elements of the AFRC and RUF. These crimes occurred in the aftermath of the defeat of RUF/AFRC forces in Freetown and the disorderly retreat that followed, and appears often to have been inflicted as retaliation against civilians perceived to have collaborated with the enemy, and in situations where they operated without proper command and control. Acknowledgement of those crimes does not mean: (i) that they had been approved by the RUF central leadership, including Sam Bockarie, at any time; or (ii) that this was a tactic that they would pursue in any future operations. Indeed, as discussed below, the UN reports of the time draw no such conclusions. The recognition that serious crimes had been committed by some members of these forces does not constitute a recognition that these forces had adopted a tactic or a *modus operandi* of attacking civilians.

416. Taylor in his testimony repeatedly emphasized that his knowledge of events in Sierra Leone, along with the events themselves, changed over time, and that it was not possible to speak of an unchanging state of affairs, or an unchanging state of knowledge.[812] The specific question asked above related to the context of the post-Intervention retreat from Freetown,[813] and Taylor elsewhere underlined in respect of this time period that "we are talking about at this particular time."[814] His acknowledgements cannot, therefore, be taken as an admission – as the Chamber apparently did – that he knew that he was providing assistance to an organization adopting such a *modus operandi*. This was not the case.

417. As expressed by Judge Moloto in the *Perišić* case:

> [I]t is important to recognize that situations during a war can change dramatically over time. What Perišić knew or thought he knew about the activities and propensities of the VRS during the initial break-up of the SFRY cannot be equated with his understanding of circumstances during later stages of the war.[815]

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[811] TT, Charles Taylor, 8 Sept. 2009, p. 28274.
[812] TT, Charles Taylor, 25 Nov. 2009, p. 32390 ("It depends on when. You've been switching me between '99 and '98.")
[813] TT, Charles Taylor, 25 Nov. 2009, p. 32394: ("Q. You understand strategically the junta, the RUF and its AFRC allies, were retreating and weakened, correct? A. Definitely. We received reports on that, yes.")
[814] TT, Charles Taylor, 25 Nov. 2009, p. 32416.
[815] *Perišić* Dissenting Opinion, para. 49.

*(c) The Circumstantial Evidence Does Not Show That Mr. Taylor Knew The RUF Had Adopted a Modus Operandi to Terrorize the Civilian Population From April 1998 Onwards*

418. The Chamber also relied on circumstantial evidence of Mr. Taylor's alleged *mens rea* at the relevant times. Proof by circumstantial evidence requires that the challenged finding is the *only*, not merely one possible, reasonable inference available on the evidence:

> It is common place that a criminal tribunal may convict on circumstantial evidence provided that the only reasonable inference to be drawn from such evidence leads only to the guilt of the accused. When such evidence is capable of any other reasonable inference it is not reliable for the purposes of convicting an accused.[816]

The Chamber held that Taylor had the requisite *mens rea* – i.e. that he knew that crimes would probably be committed with the assistance provided – based on the finding that the RUF/AFRC had a continuous *modus operandi* to terrorize the civilian population, and that Taylor knew that this *modus operandi* was in effect on each occasion that he provided the alleged assistance to the RUF/AFRC. The Chamber, in the absence of any direct evidence of Mr. Taylor's mental state, inferred it based on circumstantial evidence.

419. The finding that Taylor must have had that mental state is not the only reasonable inference available, for several reasons. First, the violence perpetrated by the RUF/AFRC was concentrated, as the Chamber itself acknowledged, in the wake two events: "after the ECOMOG Intervention and the end of the Junta Government"[817] and during the retreat from Freetown.[818] This is not to say that crimes did not occur on other occasions, but that they were far less notorious, severe and widespread. The fact that violent crimes against civilians were concentrated around these two events suggests that rather than being a reflection of organizational policy, they were acts of indiscipline, desperation and revenge for perceived collaboration. This in no way excuses the crimes or the lack of adequate measures to control them; but the circumstances suggest that the crimes may not have been a function of a general policy. A further indication of the absence of such a policy is that the

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[816] *CDF* AJ, para. 200; *Delalić* AJ, para. 458 ("It is not sufficient that [the finding of guilt] is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.")

[817] Judgement, paras. 6883-4.

[818] See e.g. Judgement, paras. 785-8; 805-8; 830-1; 839-41.

Chamber could not find that any crimes were committed in the course of the RUF's two major offensives of 1998: Fitti Fatta in June; and the capture of Kono and Makeni in December.[819] Crimes would have been widespread and notorious during these operations if it had been the RUF's operational policy to commit crimes.

420. Second, this doubt would be reinforced by the substantial evidence from Prosecution witnesses that the RUF did attempt, particularly after the excesses of the Freetown retreat in 1998, to discipline criminal acts by its soldiers. Prosecution witnesses Conteh, TF1-274, TF1-101, TF1-314, and TF1-367 all testified that the RUF did attempt, during 1998 and 1999, to instil discipline and punish those who committed crimes against civilians.[820] The Chamber disregarded, and apparently did not consider, this evidence.

421. Third, the Chamber's own findings contradict the claim that there was a continuous *modus operandi* to commit crimes. The Chamber found that the AFRC had committed crimes following the ECOMOG Intervention,[821] but also found that SAJ Musa ordered the main AFRC faction "to proceed to Freetown without killing, looting or burning, indicating that he did not have a campaign of terror in mind, as Bockarie did."[822] This finding reveals that the Chamber itself accepted that the commission of crimes, even atrocities, by elements of the AFRC did not mean that

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[819] Judgement, paras. 2950-1 (failing to find that any crimes were committed during the Fitti-Fatta attack); para. 5632 (finding that materiel supplied by Mr. Taylor was used in Fitti-Fatta, but omitting to find that any crimes were committed there). See Ground 23(iii)(e)(2) discussing the absence of such findings in respect of Kono and Makeni.

[820] TT, TF1-227, 27 Oct. 2008, p. 19303 ("Q. And did [Brigadier Five-Five] not go on to say, 'There is not going to be any kind of ruthless behaviour on the civilians'? A. He said that. Q. In fact, he went further, did he not, and said that – he told the abducted civilians and rebels twice during the muster parade that you should observe certain rules such as no fighting amongst yourselves, no stealing, no raping or killing, is that right? A. Yes."), p. 19306 ("Q. But the point is you never saw anyone ordering anyone to carry out those crimes in terms of senior commanders? A. No."); TT, TF1-274, 11 Dec. 2008, p. 22155 ("Q. … '5. Do not harass any civilians or take anything from them as it is against our code of conduct.' Pausing there. Foday Sankoh had always been very anxious that the RUF did not harass and harm civilians, hadn't he? A. Yes. Q. And he punished people who were caught harassing and harming civilians, didn't he? A. Well, that that he saw, those that he heard about"); TT, TF1-314, 20 Oct. 2008, p. 18785 ("Q. But in Makeni, during the period you were there and Issa was in charge, the MP's imposed discipline, didn't they? A. Yes. Q. So that, for example, if a soldier raped he would be executed, wouldn't he? A. Yes.... I saw Issa kill one person because he set an example, he said because they said that persona had raped, that was in my presence. I saw that with my own eyes where he shot him. … 'Q. So he ordered no raping, no killing, am I right? A. Yes. Q. No looting, am I right? A. Yes. Q. No burning people's properties, am I right? A. Yes. Q. No harm of any kind no harassment of civilians; am I right? A. Uh-huh. Q. If he discovered any of those things had been done execution was a real possibility? A. Yes, more for rape, because as regards looting, if you are caught looting you would take the things and return them from – to the civilians from where you took them. You would be flogged and you would be locked in the guardroom. After two or three days you would be freed"); TT, TF1-101, 14 Feb. 2008, p. 3928-9.

[821] Judgement, paras. 5664, 5666.

[822] Judgement, para. 3124.

SAJ Musa had adopted that approach as a policy, let alone a policy that he would apply in his actions at the end of 1998.

422. Fourth, the RUF/AFRC was a fractious hodge-podge of elements that often defied orders or simply splintered into separate factions. At least three and possibly four factions emerged within what had been the "RUF/AFRC" alliance in the course of 1998 alone.[823] Not only were orders flagrantly disobeyed on occasion[824] and rival leaders arrested,[825] but there was outright combat between different groups[826] and alleged assassinations.[827] Commanders in individual areas sometimes treated the areas under their control as fiefdoms, defying central command where they could get away with it. Crimes committed by undisciplined groups were therefore highly likely, and no reasonable observer, absent more information, could have necessarily inferred that these crimes were adopted or approved by the central leadership of the RUF. Indeed, to speak of a single organizational policy under these circumstances, or to draw inferences about the intentions of the whole based on the actions of some faction, would not have been a reasonable assumption during 1998.

423. Fifth, Taylor would not have been able to infer anything about the *modus operandi* of military operations based on the fearsome labels given to them by the RUF/AFRC. The names "Operation Pay Yourself", or "Operation No Living Thing", or even "Operation Spare No Soul" would no more indicate a policy to commit crimes than "Operation Dracula" would suggest that British forces had adopted a tactic of sucking the blood of their enemies at night time during their offensive to retake

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[823] Judgement, para. 6755.

[824] Judgement, para. 6754 ("Koroma ... was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. His diamonds were taken from him and his wife was sexually assaulted"); para. 6758 ("SAJ Musa ordered his troops to stop all communications with Bockarie"); p. 2389, para. 6755 (("Prior to Koroma's arrival in Buedu, SAJ Musa was furious when he learned about Koroma's decision – that the AFRC should be subordinate to the RUF command, as he would not accept the notion that untrained RUF fighters could be in charge of former soldier... As a result, SAJ Musa, and a significant number of AFRC troops loyal to him, opted not to participate in or support the operation.").

[825] Judgement, para. 6754 ("Koroma ... was arrested by Sam Bockarie, Issa Sesay and other RUF fighters. His diamonds were taken from him and his wife was sexually assaulted.").

[826] Judgement, para. 6755 ("a dispute erupted over command and control issues resulting in hostilities between the two factions [the AFRC faction led by SAJ Musa and the RUF] and the deaths of several fighters."); para. 6756 ("In October 1998, Superman and SAJ Musa fought over the killing of a recruit which resulted in an armed clash between Superman and SAJ Musa, causing Musa to leave Koinadugu for Rosos"); para. 6760 (Superman and Gibril Massaquoi engaged in infighting with Boackarie and Issa Sesay, which resulted in the death of Boston Flomo (a.k.a. RUF Rambo) and Superman's forces taking over Makeni, in around late March/early April 1999); para. 6763 ("in around October 1999, fighting again broke out in Makeni, involving Issa Sesay, Superman and Brigadier Mani from the AFRC. This resulted in Sesay taking over command of Makeni. During this infighting, RUF fighter Senegalese was killed.").

[827] Judgement, para. 6758 ("Some witnesses suggested in their testimony that Boackarie and Gullit conspired to kill SAJ Musa.").

Rangoon in World War II.[828] The purpose of such names, which is in no way illegitimate or unlawful, is to instil fear in the enemy. The Yemeni military, in a year when it received $70 million in military support from the United States, launched an operation against militants called "Scorched Earth."[829] No reasonable trier of fact moderately acquainted with military practice could have properly inferred that these names reflected a policy to commit crimes or, more importantly, that any outside observer would have inferred such a policy on that basis.[830]

424. Sixth, though there can be no doubt that the United Nations had reported that serious crimes had been committed by RUF/AFRC soldiers in the aftermath of their ouster from Freetown, even these reports refrained from describing an organizational "*modus operandi*" or tactic. The UN Secretary-General's Fifth Report, dated 9 June 1998, describes "armed former junta elements" or "groups of rebels" engaging in attacks civilians.[831] The description, which Taylor admitted that he read,[832] notably refrains from suggesting that the RUF had adopted such tactics as an organizational policy. Amnesty International did make that claim in late July 1998, but there is no evidence that Taylor read this report, nor that it would have been entitled to credence.[833]

425. Seventh, an accused must know – have actual knowledge – that his assistance will substantially contribute to the future crime. Taylor had no reason to know whether the assistance would have any impact at all on the incidence of future crimes. The most severe crimes, according to the reports, were apparently retaliation in defeat against civilians for perceived collaboration.[834] Allowing the RUF to avoid cataclysmic defeat might well have been understood as a way to avoid a repetition of

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[828] Other notably fearsome names of military operations include "Atilla" (Turkey); "Urgent Fury" (United States); "Carthage" (Royal Air Force), referring to the devastating Roman sack of Carthage on which Tacitus remarked: "They made a desert and called it peace"); "Rathunt" (Canadian Navy).

[829] *The Guardian* Article; *Al Jazeera* Article ("The army launched operation "Scorched Earth" on August 11 in an attempt to finally crush an uprising in which thousands of people have been killed since it first broke out in 2004").

[830] Judgement, para. 6905 ("This strategy entailing a campaign of terror against the civilian population is explicitly demonstrated by the overt names of their military campaigns, such as 'Operation Pay Yourself', 'Operation No Living Thing', and 'Operation Spare No Soul.'").

[831] Exh. P-130, paras. 15 ("former junta elements"), 26 ("several groups of rebels"), 27 ("former junta elements").

[832] TT, Charles Taylor, 25 Nov. 2009, p. 32393 ("I only read the Secretary-General's reports.").

[833] Cf. TT, Charles Taylor, 11 Nov. 2009, p. 32393 ("Q. Did you read reports or get summaries of reports of the international human rights community, people like Amnesty, Human Rights Watch, and their reports that of the atrocities that were being carried out by the RUF and its allies in Sierra Leone? A. No, no, I did not. I only read the Secretary-General's reports.").

[834] See e.g. Judgement, para. 6830 (noting that "AFRC casualties are known to be high and many civilians have been killed and injured").

those attendant crimes. Indeed, the Chamber accepted that Taylor did not intend the perpetration of the crimes that occurred, but that his interests were military, strategic and commercial.[835] As Taylor candidly testified, he did not view the defeat of the RUF and AFRC as in the best interests of the people of Sierra Leone, and that the best solution was a negotiated "return to peace and the recognition of the Kabbah government."[836] This view finds support in an ECOWAS report from 1997, reporting that the "Chiefs of Staff" of ECOMOG that "extreme poverty and other socio-economic factors would inevitably lead to the appearance of numerous factions, putting Sierra Leone at risk of disintegration."[837] These are reasonably possible views as to why Taylor would have provided assistance to the RUF leadership. This state of mind would have been reinforced given Taylor's testimony that Bockarie, during their first meeting "showed interest in what I had to say … what we were interested in was making sure that we had peace and a return to the 1996 agreement that had been signed in la Côte d'Ivoire".[838]

426. The circumstantial evidence did not establish that the *only reasonable possibility* was that Taylor knew in the course of 1998 that a *modus operandi* had been adopted by the RUF to attack civilians, and that that *modus operandi* would be adopted in respect of any future operations. Another reasonable possibility was that even though he knew some RUF fighters had committed despicable crimes in the retreat from Freetown, he nevertheless believed that this was not the policy of the RUF leadership. This view may have been wrong, even recklessly wrong. But neither of these mental states suffices for the *mens rea* for aiding and abetting. That *mens rea* standard, as discussed in Ground 16, excludes negligence, gross negligence, or even recklessness. As long as the evidence does not exclude as unreasonable the possibility that Mr. Taylor could genuinely have held this view, the conviction for aiding and abetting must be quashed.

427. The circumstantial evidence does not establish, in providing the alleged assistance, that he had that knowledge. A plausible view of the evidence is that Taylor provided the materiel to assist the RUF to hold its positions; to avoid cataclysmic defeat that would have led to its further disintegration with potential negative consequences for peace; and to consolidate its position without a repetition of the

[835] Judgement, pp. 2444-5, paras. 6896-9.
[836] TT, Charles Taylor, 25 Nov. 2009, p. 32396.
[837] Exh. D-136 (Sixteenth Meeting of ECOWAS Chiefs of Staff, 26-27 August 1997), p. 19.
[838] TT, Charles Taylor, 25 Nov. 2009, p. 32431.

crimes committed against civilians during its flight from ECOMOG forces. Indeed, this view is in line with the Chamber's own description of Taylor's purpose in providing the assistance.[839]

*(iv) No Reasonable Trial Chamber Could Have Inferred The Existence Of, Let Alone Taylor's Knowledge Of, A Constant and Continuous RUF/AFRC Operational Policy That Encompassed the Indictment Crimes Committed After the Freetown Invasion (1999-2002)*

428. The Chamber found that Taylor supplied a large quantity of materiel to Bockarie in March 1999; and unspecified or small quantities of materiel in January and September or October 1999; and in small quantities in 2000 and 2001. The existence of these shipments is challenged below in Ground 23; the issue here is whether, assuming that such shipments were made with the approbation or knowledge of Taylor, the evidence showed that he provided the assistance knowing that it would be used in crimes.

429. The Accused's state of knowledge would not have substantially changed following the crimes committed in Freetown and during the retreat following the ECOMOG counter-offensive. Most forces present in Freetown, and those most likely to have committed crimes there, were the AFRC forces that had spearheaded the attack from the north. Even though the Chamber found that Gullit obeyed some of Bockarie's command, and even though the Chamber found that Bockarie ordered the commission of some crimes in Freetown, there is no evidence that Taylor was informed of either of these facts at the time. The Chamber's findings regarding the extent to which he received "updates" concerning the evolution of the attack on Freetown have been challenged above in Ground 12. But even assuming that there was some contact, the evidence was insufficient to establish – and the Judgement's findings reflect this in the rejection of three of the four instructions allegedly relayed from Taylor to Bockarie[840] – demonstrate that the information provided by Bockarie was not necessarily reliable or accurate.

430. Regardless of the chaotic and disorderly events during and after the Freetown invasion, the evidence shows that by early 1999, the RUF had committed itself to the peace process. On 18 May 1999, the RUF/AFRC signed a ceasefire with the

[839] Judgement, paras. 6896-9.
[840] Judgement, paras. 3567, 3581-610.

Government of Sierra Leone and signed the Lomé Peace Accord in July 1999.[841] Little evidence was adduced concerning unlawful killings or physical violence such as amputations during this period, although the Chamber did find that children were used to participate actively in hostilities; that women were pressed into sexual slavery;[842] that civilians were enslaved to work at certain mines and that one or more were killed who refused; and that a number of UNAMSIL peacekeepers were taken as hostages.[843] There is no indication, however, that any of these crimes were used as a *modus operandi* of combat, or that the nature of these crimes or the manner of their commission would have been in any way foreseeable based on the crimes committed earlier in Freetown in early 1999. The Chamber made no findings that Taylor would have known that these crimes in 1999, 2000 and 2001 were going to be committed by the RUF, much less that any military materiel that he provided would be used in the commission of any of these crimes.

*(v) Conclusion and Remedies*

431. First, the Chamber's own findings, as discussed in section (ii) above, compel the conclusion that the *mens rea* for aiding and abetting was not met in respect of crimes committed with weapons supplied throughout the Junta period. Based on the Chamber's own findings, this means that the convictions must be quashed in respect of crimes committed immediately after the ECOMOG Intervention,[844] and crimes committed in Kono in early 1998.[845]

432. Second, no reasonable trier of fact could have inferred that Taylor supplied materiel to the Sam Bockarie in 1998 knowing that it would substantially contribute to the commission of crimes. The evidence does not exclude the reasonable possibility that Taylor genuinely thought, albeit mistakenly, that Bockarie would use the materiel to consolidate the RUF's position, and that he would use it for that purpose within the bounds of legality. Any convictions resting on aiding and abetting crimes at Fitti-Fatta, by the AFRC in the north of the country, or by the AFRC or the RUF in Freetown and thereafter, are invalid and must be quashed.

433. Third, no reasonable trier of fact could have inferred, beyond a reasonable doubt, that Taylor supplied materiel to Sam Bockarie and then to Issa Sesay knowing

[841] Judgement, para. 6233.
[842] Judgement, para. 5744.
[843] Judgement, paras. 5750-1.
[844] Judgement, paras. 5559-60.
[845] Judgement, para. 5593.

that it would substantially contribute to the commission of crimes. Any conviction resting on aiding and abetting these crimes is invalid and must be quashed.

### iii. GROUND OF APPEAL 19: The Trial Chamber erred in law and fact in failing to make particularized findings concerning Charles Taylor's knowledge or purpose in respect of specific acts of alleged assistance.

434. As argued in Ground 16, the minimum *mens rea* standard in customary international law is purpose. This standard, given the Chamber's own findings, which do not suggest that Mr. Taylor had any such purpose, requires an acquittal on all counts for aiding and abetting. Further, as argued in Ground 23, the Chamber erred in its factual findings that Mr. Taylor facilitated some shipments of materiel into Sierra Leone.

435. Even assuming that neither of these Grounds is sustained, the Chamber committed a legal error by not requiring, or finding, that Mr. Taylor must performed the alleged *actus reus* knowing that it would contribute *substantially* to the commission of crimes. The Chamber, in paragraphs 5528 through 5842, makes findings concerning the nature of Taylor's material assistance to six sets of crimes, defined geographically and/or temporally: (i) crimes by AFRC/RUF forces during the Junta period at Tongo fields and in fighting in Freetown before, during and after the Intervention, and by Sam Bockarie in Kenema during the Junta;[846] (ii) operations in Kono District in early 1998, including during Operation "Pay Yourself";[847] (iii) "Operation Fitti-Fatta in Kono";[848] (iv) Operations in the North in mid-1998, "on Mongor Bengedu and Kabala" and "in the Koinadugu and Bombali Districts from June to October 1998";[849] (v) the December 1998 offensives and the Freetown Invasion;[850] (vi) post-Freetown crimes.[851] The Chamber relies on the conjunction of two subsidiary findings to reach these conclusions: (i) identifying which supply shipments into Sierra Leone Taylor was responsible for facilitating;[852] and (ii) determining which operations or battles those supplies were used in.[853] In determining whether Mr. Taylor's alleged actions had a "substantial effect" on the commission of

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[846] Judgement, paras. 5531-60.
[847] Judgement, para. 5593.
[848] Judgement, paras. 5594-632.
[849] Judgement, paras. 5633-67.
[850] Judgement, paras. 5668-721.
[851] Judgement, paras. 5722-53.
[852] Judgement, paras. 4624-5527.
[853] Judgement, paras. 5528-835.

crimes, the Chamber attempted to make findings as to the quantum of material supplied in each alleged shipment, and to verify that the deliveries made their way and were used by the perpetrators, or that they otherwise permitted the capture of supplies that were then used in the commission of crimes.[854]

436. In contrast to these particularized findings about the *actus reus* of aiding and abetting, the Chamber makes only very general findings about Mr. Taylor's *mens rea*. It found that he knew "as early as August 1997" that crimes were being committed by "AFRC/RUF members during the Junta period" and might recur,[855] referring to this as a "propensity";[856] and as of April 1998 that knowledge appears to be somewhat elevated to knowledge that the AFRC/RUF was engaged in a "campaign" of crimes.[857] On the basis of those findings, the Chamber inferred that every *actus reus* of assistance was performed with the requisite *mens rea* for accessorial liability from August 1997 onwards without any particularized analysis of Mr. Taylor's alleged state of mind when he performed these alleged acts of assistance.

437. This was not a safe or sufficient approach. The Chamber's own analysis of *actus reus* shows, whether crimes actually were committed with the supplies allegedly provided by Mr. Taylor was often serendipitous, uncertain and, therefore, unpredictable. The Chamber was ultimately not able to find beyond a reasonable doubt in several cases that the supplies were so used. Indeed, there is good reason to believe based on those findings that the vast majority of supplies provided were not used in crimes, and were used for lawful purposes. Given the variability of circumstances and result, no analysis could have properly omitted to consider whether Mr. Taylor knew that the facilitation of particular supplies would substantially contribute to the commission of crimes, rather than being used for lawful purposes.

*(i) Aiding and Abetting Requires, By the Chamber's Own Standards, That the Actus Reus Be Performed With Knowledge That The Actus Reus Will Contribute Substantially to the Crimes*

438. Aiding and abetting future crimes involves a prediction. The alleged accessory must be able to predict that the *actus reus* will assist the crime. The prediction must not merely be that the *actus reus* will provide some minor, remote or indirect

[854] These findings are addressed in Ground 23.
[855] Judgement, para. 6882.
[856] Judgement, paras. 6884-5, 6947.
[857] Judgement, para. 6884. Those errors are discussed in Ground 17. The present ground is applicable whether or not Ground 17 is sustained.

assistance, but that the *actus reus* will have "a substantial effect on the realisation of that crime."[858] Other cases formulate the quantum of assistance as requiring that the "conduct substantially contributed to the crime"[859] or require that "the contribution must … always be substantial."[860]

439. *Mens rea* based on predictions as to future events involves some uncertainty. The doctrine of joint criminal enterprise permits some uncertainty in respect of the ultimate crimes because there must always be a predicate criminal intent. This high volitional element justifies extending liability beyond the crime intended, to crimes that were not intended but foreseeable. Aiding and abetting does not involve this high volitional element which, as explained in *Tadić*, which narrows the permissible scope for imposing liability based on predictions of future events:

> The aider and abettor carries out carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.[861]

440. Whether or not "specifically directed" is or is not now a legal element of aiding and abetting,[862] the frequent repetition of the phrase shows that it is a common, if not mandatory feature of aiding and abetting. The actus reus must be performed with a high level of probability, nearing certainty, that the crime is going to be committed *and* that the *actus reus* will contribute substantially to that crime. This must be assessed prospectively, from the point of view of the accessory, and in relation to each crime, in order to constitute part of the *mens rea*. In *Limaj*, for example, the accused "played a pivotal role in the functioning of a prison camp."[863] The Trial Chamber nevertheless conducted a detailed analysis of the extent of Limaj's knowledge of various crimes and entered convictions in respect of only two of the

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[858] *Rukundo* AJ, para. 52; *Muvunyi* AJ, para. 79; *Seromba* AJ, para. 44; *Ntawukulilyayo* AJ, para. 214; *Ndinabahizi* AJ, para. 117.
[859] *Kalimanzira* AJ, para. 74; *Karera* AJ, para. 321; *Nahimana* AJ, para. 482; *Ntagerura* AJ, para. 338.
[860] *Brđanin* AJ, para. 277.
[861] *Tadić* AJ, para. 229. See *Vasiljević* AJ, para. 102.
[862] See the discussion in Ground 22. The ICTR Appeals Chamber has so far declined to follow the 3-2 pronouncement in *Mrkšić* and has subsequently reaffirmed that *actus reus* of aiding and abetting must be "specifically aimed" at the crime. *Ntawukulilyayo* AJ, para. 214; *Rukundo* AJ, para. 52; *Kalimanzira* AJ, para. 74.
[863] *Limaj* AJ, para. 123.

crimes.[864] The analysis would have been very different had Limaj possessed the intent to participate in a JCE to commit these crimes through the prison system over which he had authority. This was not the case, and a conviction for aiding and abetting required a more fine-grained analysis of his knowledge of the crimes.

441. The Chamber's broad brush approach to mens rea in this case contrasts with its own approach to *actus reus*. As a matter of *actus reus*, the Chamber found – as more fully discussed in Ground 23, that most of the deliveries of materiel allegedly facilitated by Taylor were of indeterminate[865] or small quantity[866] – in some cases, no more than what could fit in a pick-up truck. This is true of (i) the supplies of arms and ammunition were sent through, *inter alia*, Tamba (a.k.a. Jungle), Marzah and Weah;[867] (ii) the materiel provided to Sesay during trips he made to Liberia in 2000 to 2001;[868] and (iii) the materiel transported by TF1-567.[869] Given the small size of these shipments, the Chamber had an obligation to determine whether Mr. Taylor not only knew about the deliveries, but also whether he knew that they *would substantially contribute* to the commission of the crimes. Neither an awareness that they *might* substantially assist crimes, nor a certainty that they *might* facilitate crimes less than substantially, does not satisfy the well-established legal requirements for aiding and abetting. The Chamber failed to make any distinct findings (and could not, based on the evidence) that Mr. Taylor knew that these finding would substantially contribute to the crimes for which he was convicted.

442. The absence of those legal findings is not surprising given the absence of underlying factual findings. The Chamber seldom identifies with precision the nature of Mr. Taylor's act of "facilitation"; the timing of the "facilitation"; whether Mr. Taylor knew the composition or size of the supplies; or whether Mr. Taylor knew what happened to the supplies after their arrival in Sierra Leone. The Chamber's own factual findings show that Mr. Taylor could not be presumed to have known that such supplies were used in crimes. The Chamber was unable to conclude beyond a reasonable doubt that even the supposedly large Burkina Faso shipment was used in the commission of crimes, since it could not conclude that crimes were committed

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[864] *Limaj* AJ, para. 123; *Limaj* TJ, paras. 654-63.
[865] Judgement, para. 4965; paras. 5160-1; paras. 5223-4; para. 5249.
[866] Judgement, para. 4965; paras. 5160-1.
[867] Judgement, para. 4965; paras. 5160-1.
[868] Judgement, paras. 5223-4.
[869] Judgement, para. 5249.

during the initial stage of the Freetown offensive of early 1999.[870] Mr. Taylor could well have believed, especially in respect of the small shipments, that those minimal supplies would do no more than prevent the defeat of the RUF, an event that could potentially have unleashed more bloodshed, crimes and instability then just holding their positions.

443. Other findings by the Chamber, or lack thereof, show that it was certainly not a safe to conclude beyond a reasonable doubt that supplies provided at various times would substantially contribute to crimes, much less the specific crimes for which Mr. Taylor was convicted. No findings were made that it was foreseeable, much less probable or nearly certain, that supplies provided to the Junta Government would contribute substantially to massacres following an ECOMOG counter-attack that would drive RUF and AFRC forces into a chaotic retreat from Freetown, accompanied by looting. No findings were made that it was foreseeable, much less probable or nearly certain to him, that supplies would make their way to the North where they substantially contributed to the commission of crimes by the AFRC factions. This is not a case where the precise crime was committed in an unusual manner, whereas the overall type of crime was known to the accused. On the contrary, these are cases where the materiel provided could have been used perfectly lawfully in – and indeed was urgently needed for – combat operations to ensure the very survival of the RUF.

*(ii) Conclusion*

444. The Chamber failed to find that Taylor knew that his acts of facilitation, whatever they may have been, were performed knowing that they would substantially contribute to the crimes for which he was convicted. The Chamber, in light of its detailed findings as to how assistance was rendered to specific crimes, was required to consider whether those events were foreseeable such that he would have known that the assistance to crimes would be provided, and that that assistance would contribute substantially to their perpetration.

445. The absence of such findings is particularly notable and ambiguous in respect of the alleged acts of assistance that were not found to contribute substantially to crimes, as was the case in the Burkina Faso shipment; and in respect of the shipments that the Chamber acknowledged were not large and, therefore, whose effect on crimes

[870] See Ground 22.

was inherently uncertain. No finding could have been made that the effect of these amounts of supplies was to "substantially" contribute to crimes.

446. The *actus reus* of aiding and abetting need not be a *sina qua non* of the perpetration of the crime, but nor does it automatically satisfy the *actus reus*. The assistance must have a substantial effect on the crime. Corresponding to this requirement, the accused must know that the assistance will have that substantial effect. The Chamber failed to make that finding, thus invalidating its conclusion.

**iv. GROUND OF APPEAL 20: The Trial Chamber erred in fact in finding that the accused was aware of the trans-shipment of arms and ammunition through Liberia to Sierra Leone, or that he was aware of other alleged assistance from or via Liberia, including the three main shipments of arms and ammunition identified by the Trial Chamber.**

447. For the reasons expressed under Ground 23 showing that the Chamber made no, or no sufficient findings, to show that Taylor knew about, or that he facilitated, the delivery of supplies to Liberia, it follows that he could not have possessed the *mens rea* for aiding and abetting those acts.

**c. ERRORS RELATING TO THE MATERIAL ELEMENT: MILITARY SUPPORT**

**i. GROUND OF APPEAL 21: The Trial Chamber erred, or misdirected itself, in law and fact in finding that any alleged military assistance to the RUF or AFRC constituted assistance to crimes.**

448. War crimes, regrettably, have been a feature of almost every major armed conflict. The standard of aiding and abetting adopted by the Chamber would mean that any assistance to the parties of a conflict would constitute aiding and abetting war crimes because the supplier would be able to foresee that the assistance, in the aggregate, would contribute to the commission of at least some crime. The level of foreseeability would be even higher in respect of states or armed groups that had had difficulty imposing discipline on their soldiers, or where there had been sporadic but repeated incidents of crimes being committed.

449. This interpretation has strikingly broad consequences. Suppliers of weaponry to armed forces in these circumstances would give rise to liability for aiding and abetting war crimes. The punishment of the principals would not relieve the aider and abettor of responsibility. As long as, to use the Chamber's words, "it was recognized

that any military support could facilitate the commission of the crimes",[871] or that there was "a likelihood ... [of] similar crimes in the future,"[872] that would be sufficient to affix accessorial liability.

450. The Chamber found that it could safely infer that Mr. Taylor knew the content of Amnesty International reports,[873] which implies that any supplier of arms should be deemed on notice of any crimes reported in Amnesty International reports. Based on this standard, support to the Afghan government constitutes aiding and abetting torture, ill-treatment and arbitrary detention;[874] support for the Pakistani government constitutes aiding and abetting torture, arbitrary detention, persecution and murder;[875] and support for the Yemeni government constitutes aiding and abetting arbitrary and unlawful killings, torture, arbitrary detention, indiscriminate targeting in armed conflict.[876] Many States continue to support these countries, viewing the stability of these governments to be in their national interest. These countries do not provide such assistance for the purpose of assisting crimes; their purpose is "military, not criminal"[877] and are part of a "*quid pro quo*"[878] to exclude terrorist organizations from their territory. The leaders of these States would probably be surprised to learn that their purpose in providing support is irrelevant, and that mere awareness of the probability that the support may be used in the commission of crimes is enough for the imposition of international criminal responsibility.

451. This doctrine is belied by the widespread practice of States. In 2010, the Yemeni security forces received $155.3 million from the United States Department of Defence "for two specified purposes – counterterrorism and stability operations."[879] The assistance included "small airplanes and helicopters and other aircraft support to the Yemeni air force."[880] That U.S. Department of State that same year reported that, according to "Human Rights Watch (HRW) and other humanitarian organizations, witnesses reported four separate air raids on September 16 in which government

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[871] Judgement, para. 6881.
[872] Judgement, para. 6882.
[873] Judgement, para. 6883, fns. 15476-15482 (making extensive reference to reports by Amnesty International and Doctors Without Borders).
[874] Afghanistan Human Rights.
[875] Pakistan Human Rights.
[876] Yemen Human Rights.
[877] Judgement, para. 6897.
[878] Judgement, para. 6898.
[879] Serafino Issues for US Congress, p. 2.
[880] Serafino Issues for US Congress, p. 31.

bombs killed almost 90 civilians, mostly women, children, and the elderly."[881] The Report goes on to describe a litany of other possible crimes committed within and outside the context of armed conflict. The standard adopted by the Chamber *prima facie* criminalizes the conduct of any American official who approved or even knew about this support, while also knowing of the probability that that support could, at one time or another, be used in crimes.

452. This cannot be correct. The error, as it turns out, is startlingly straightforward: the assistance must be to the crime, as such. The mother of a criminal does not become an accessory to his crimes by feeding him, allowing him to live in the basement, and even buying tools for him, even if she knows that it is probable that any or all of these things sustains his existence and therefore, in a manner of speaking, has a "substantial effect" on the crimes. The seller of a gun is not liable for murder, even though large manufacturers of handguns in the United States can say with certainty that many of their products will, indeed, contribute substantially to the commission of crime, whether it be robbery or murder. None of these acts constitute aiding and abetting because the assistance must be to the crime.

453. The illegality of the alleged assistance is irrelevant to the categorization of the act as aiding and abetting. The getaway driver for a gang of robbers is as guilty of being an accessory whether he drives above or below the speed limit. Similarly, whether a gun-seller does so legally or through the black market is irrelevant to the issue of their accessorial liability for the crime committed by someone to whom they sell the gun. The essential difference in these cases is not *mens rea*, but that the assistance must be to the crime itself, not something else such as a causal precondition for the crime, such as the existence of the perpetrator or their association together. This incidentally assists in understanding why it is not coherent to speak of "aiding and abetting a joint criminal enterprise."[882] The language of "specifically aimed"[883] and "specifically directed"[884] assists in understanding the "substantial contribution" must be to the criminal conduct itself. Although this is a "fact-based inquiry," the inquiry must always be framed properly: did the assistance encourage the crime in particular? Failure to focus the question in this manner would lead to an improperly

[881] US Yemen Report.
[882] *Kvočka* AJ, para. 91.
[883] *Rukundo* AJ, para. 52; *Kalimanzira* AJ, para. 53; *Muvunyi* AJ, para. 79; *Simić*, AJ, para. 86.
[884] *Ntawukulilyayo* AJ, para. 214 (actus reus consists of acts "specifically aimed at assisting ... the perpetration of a specific crime"); *Seromba* AJ, para. 44; *Ntagerura* AJ, para. 370. See also *Kayishema* AJ, para. 198 ("directly and substantially contributed").

broad definition that would criminalize the actions that States now routinely undertake.

454. The Chamber eliminated this focus in its approach to Taylor's alleged assistance to the RUF. The Chamber asserts, for example, that the "crimes were inextricably linked to the strategy and objectives of the military operations themselves" and that "therefore … any assistance towards these military operations of the RUF and RUF/AFRC constitutes direct assistance to the commission of crimes by these groups."[885] This assertion is, in turn, based on a six paragraph analysis that describes alleged crimes of the RUF over time, invoking a series of crimes and the names of certain operations, that allegedly reflect a "a *modus operandi* based on a campaign of terror against civilians."[886]

455. The categorization of the RUF as, in effect, a criminal organization by-passes the usual standard for determining individual criminal responsibility in the context of collective action. No case at the ICTY or the ICTR has deemed any organization criminal as a means of criminalizing assistance thereto: not the *Interahamwe*, not the Rwandan Government Forces, not the Rwandan Presidential Guard or Paracommando Battalion, not the VRS, not even any of the smaller militia that engaged in many crimes over a long period of time. The London Charter specifically provided in Article 9 that an organization could be deemed a criminal organization, and yet the only organization that was so categorized was the SS – not the not the SA, the Bundeswehr, not even the General Staff of the Army.

456. The reluctance to define organizations as criminal is logical. Article 7(1) defines the modes of liability for individual liability, and declaring organizations criminal simply undermines, and subverts, those standards. As explained in *Tadić*, the whole enterprise of international criminal law is personal, not collective, responsibility: "nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."[887] Thus, criminal liability for individuals acting in an association has been addressed extensively through JCE. Declaring entire parties to be criminal as such would not only re-introduce collective responsibility and undermine Article 6(1) of the Statute, but would also have dangerous and unforeseen consequences on

[885] Judgement, para. 6905.
[886] Judgement, para. 6791.
[887] *Tadić* AJ, para. 186.

international humanitarian law. The whole system is predicated on not outlawing one side or the other. It also risks moving into the realm of criminal law matters that ought to be questions of policy, by deeming organizational assistance to be criminal. Unless individual culpability, as defined by the orthodox criteria of Article 7(1), remains the basis of international criminal law, the entire edifice of international humanitarian law is put at risk. The Chamber's declaration of the RUF and AFRC as a "criminal organization" is therefore inappropriate, unsubstantiated, and dangerously over-extends basic principles of individual criminal liability.

457. All of these consequences are avoided simply by adhering to a simple and, one would think, obvious proposition: assistance must be to the crime. The Chamber deviated from fundamental principle by its tendentious and unsubstantiated declaration that "any assistance towards these military operations of the RUF and the RUF/AFRC constitutes direct assistance to the commission of crimes by these groups."[888] That statement does not accord with reality. The RUF and AFRC were fighting a civil war that required bullets, guns and other supplies. Taylor is alleged to have provided supplies that were appropriate for that purpose. He did not provide, for example, 10,000 machetes in boxes labelled "military supplies", which could have no legitimate purpose in the armed conflict.

458. The Chamber does not suggest that the assistance, though neutral in its nature relative to the crimes, was provided for the purpose of facilitating RUF crimes. The Chamber found the contrary, explaining that prior to the Indictment period "cooperation between the NPFL and RUF was limited in its purpose and it was military, not criminal, in its nature."[889] This is the relationship that Taylor continued to have with the RUF, according to the Judgement: "the Accused and the RUF were military allies and trading partners, but it is an insufficient basis to find beyond reasonable doubt that the accused was part of any JCE."[890]

459. Even assuming that Taylor provided some military materiel to the RUF/AFRC, this does not constitute assistance, much less substantial assistance, to the crimes. The RUF was entitled to fight, and the materiel provided was appropriate to that purpose. Crimes committed as a by-product of bad practices, excesses, poor command and control deserve punishment; but declaring the entire RUF a criminal

[888] Judgement, para. 6905.
[889] Judgement, para. 6897.
[890] Judgement, para. 6899.

organization as a means of affixing criminal liability on Taylor abuses basic concepts of criminal law, undermines international humanitarian law, and risks casting an inappropriately wide net of liability over State practice that only serves to undermine the legitimacy of international criminal law.

**ii. GROUND OF APPEAL 22: The Trial Chamber erred in law and fact in characterizing resources captured from the enemy as resources provided by Charles Taylor.**

*(i) Overview*

460. The Chamber found that the *actus reus* of aiding and abetting crimes committed in relation to the Freetown offensive could be assessed not only in relation to materiel allegedly provided by Taylor, but also on the basis of any materiel *captured* using the materiel allegedly supplied by Taylor. The Chamber therefore considered it unnecessary to consider the extent to which captured resources had sustained those operations, explaining that "in relation to the materiel captured in Kono, the Trial Chamber notes that the Burkina Faso shipment was causally critical to the success of the Kono operation, and hence the materiel captured there."[891] The consequence was that these captured resources were "directly referable" to the materiel supplied by Taylor and that, together, the resources supplied "formed an amalgamate of fungible resources" that contributed to crimes.[892]

461. The Chamber's approach is unprecedented and incorrect. The *actus reus* of aiding and abetting must "substantially contribute[]"[893] or have a "substantial effect"[894] on the perpetration of the crime. The ICTY Appeals Chamber has interpreted this to mean, in accordance with fundamental principles of criminal responsibility, that the accused's "ability to affect the commission of the crime was substantial."[895] The capture of resources from ECOMOG depended on a whole range of variables over which Taylor neither controlled nor would have been able to foresee. The very fungibility of the materiel by the Chamber makes it improper to attribute any and all consequences from the use of those resources to Taylor.

*(ii) The Chamber's Own Approach to Crimes In 1997 and 1998 Rejected the Theory Applied to the Freetown Crimes*

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[891] Judgement, para. 5715.
[892] Judgement, paras. 5715-6. See also Judgement, paras. 5719-21.
[893] *Ntawukulilyayo* AJ, para. 216; *Kalimanzira* AJ, para. 74; *Karera* AJ, para. 321.
[894] *Muvunyi* AJ, para. 79; *Seromba* AJ, para. 44; *Blaškić* AJ, para. 46.
[895] *Blagojević* AJ, para. 191.

462. The "fungible resources" approach is rejected in the Chamber's own analysis of responsibility for crimes committed in 1997 and 1998. In respect of all four crime-sets in 1998 (during and immediately after the fall of the Junta, including in Operation Pay Yourself;[896] in Kono, between March and June 1998;[897] in Fitti-Fatta;[898] and in crimes by AFRC forces in the North in 1998[899]), the Chamber attempted to connect the resources used to shipments facilitated by Taylor. In respect of crimes committed in the North, the Chamber addressed the issue of whether any of the supplies allegedly provided by Taylor for use in Kono District made their way to AFRC forces in the North and were used in crimes there in the latter half of 1998.[900] The Chamber noted that the evidence suggested that the ammunition allegedly supplied by Taylor was not of a substantial quantity, and could "fit into one vehicle."[901] The Chamber carefully distinguished between this supply and other sources of ammunition – notably, ammunition captured from the enemy: "The Trial Chamber considers that in such circumstances, and accounting for captured materiel from military engagements, it is not implausible that the materiel [supplied by Taylor] lasted for several months, until September and October 1998."[902] The Chamber went on to conclude that it was "satisfied that the materiel used by the SLA commanders Brima and Kamara in northern Sierra Leone after the attack on Koidu Geiya *was supplied by the accused*."[903] As if requiring added emphasis, the Chamber repeated that despite the absence of direct evidence that this ammunition had an effect on the capture of children who were pressed into military service, it could "nonetheless reasonably infer that it was used by SLA commanders Brima and Kamara in the course of their activities."[904] An outer limit of this finding is then given by the Chamber to the effect that "Bobson Sesay did not testify, nor does the Prosecution allege, that this ammunition was used after the capture of Rosos."[905] The reason that it could not infer that subsequent crimes had also been committed using these resources is the

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[896] Judgement, paras. 5546-59 ("the AFRC coup in May 1997 to the retreat from Freetown in February 1998").
[897] Judgement, paras. 5560-93 ("Operations in Kono in early 1998").
[898] Judgement, paras. 5594-632 ("Fitti-Fatta in mid-1998").
[899] Judgement, paras. 5633-67 ("Operations in the North"). The Chamber is unclear whether it applied this doctrine in respect of crime after close of Freetown operations. Judgement, para. 5745.
[900] Judgement, paras. 5633, 5638-9 (describing operations "through June to October 1998"), 5659.
[901] Judgement, para. 5655 (Bobson Sesay).
[902] Judgement, para. 5655.
[903] Judgement, para. 5657 (italics added).
[904] Judgement, para. 5659.
[905] Judgmenet, para. 5658.

possibility that other supplies were captured from ECOMOG: "in or around September 1998, [AFRC troops] ... had to make a number of attacks on ECOMOG positions to supplement their dwindling stocks of arms and ammunition, suggesting that after arriving at Eddie Town, Brima's group obtained other sources of materiel."[906]

463. The Chamber's reasoning shows that it rejected the "fungible resources" theory. Assistance was attributed to the Accused beyond a reasonable doubt only where the Chamber was able to distinctly ascertain whether resources were in the possession of forces at the time and at the place where the crimes were committed. Crimes for which no such finding was possible, notably because of the possibility that the arms or ammunition had been captured from the enemy, were found to be beyond the scope of accessorial liability.

464. The Chamber applied this same reasoning to crimes in Kono in 1998, in operation Fitti-Fatta, and those committed during the Junta period and in "Operation Pay Yourself." The Chamber found that ammunition used in field operations in Kono had come from Taylor via Bockarie or Tamba.[907] This finding is challenged in Ground 23, but the salient aspect of the reasoning for present purposes is that the Chamber would not have had to make any such findings if it had simply adopted the "fungible resources" theory. The Chamber similarly found in respect of Fitti-Fatta that "there were several sources for the materiel for Fitti Fatta, and that one of these sources was the Accused."[908] The Defence again challenges the factual correctness and legal sufficiency of this finding in Grounds 23 in Ground 21, respectively; the salient point here is that the Chamber's findings reflect that it could not resort to the "fungible resources" theory as a way around the need to make these findings. The same approach was taken to crimes committed during the Junta period and in Operation Pay Yourself.[909]

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[906] Judgement, para. 5658.
[907] Judgement, paras. 5587-9 ("their accounts consistently support the involvement of the Accused in the supply of material for operations in Kono before Operation Fitti-Fatta"); para. 5591 ("the Trial Chamber is satisfied that the Accused supplied materiel that was used in operations by the RUF and AFRC in Kono in early 1998, before Operation Fitti-Fatta"; para. 5593 ("the Prosecution has proved beyond a reasonable doubt that materiel supplied by the Accused was used in operations in the Kono District in early 1998, before Operation Fitti Fatta and the commission of crimes during those operations").
[908] Judgement, para. 5628.
[909] Judgement, para. 5559-60.

465. The Chamber's own reasoning therefore shows that the approach to the Freetown crimes was incorrect.

*(iii) Attributing To Taylor Responsibility for the Materiel Captured From the Enemy Improperly Broadens the Actus Reus of Aiding and Abetting*

466. The Chamber acknowledged that the "AFRC forces who led the Freetown invasion captured sufficient ammunition *en route* to Freetown to enable them to enter Freetown."[910] Even though the Chamber found that the AFRC had obtained supplies from Taylor earlier in the year, it did not purport to attribute these captured supplies to Taylor. The Chamber accordingly found that AFRC forces were able to take over Freetown without the assistance of *any* materiel supplied by, or otherwise attributable to, Taylor.[911]

467. These findings contrast with those concerning the RUF. The Chamber heard and apparently accepted that the RUF, using materiel from the Burkina Faso shipment allegedly facilitated by Taylor, captured from ECOMOG "large quantities of materiel ... in Kono in December 1998."[912] The captured materiel apparently included substantial quantities of missiles, arms, ammunition and vehicles.[913] Neither the captured materiel nor the Burkina Faso materiel arrived in Freetown until "the third week of January 1999 when Gullit's forces retreated from Freetown."[914] Once it did arrive, however, it was found to have been "used in attacks by the RUF and AFRC on the outskirts of Freetown after the withdrawal of Gullit's forces from the city, and in the commission of crimes committed in the Western Area."[915]

468. The Chamber made a key factual finding about the resources that reached Freetown in the third week of January: "it is not possible to differentiate whether the materiel brought by Issa Sesay ... or generally that the materiel used by the troops on the outskirts of Freetown came from the Burkina Faso shipment or further materiel

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[910] Judgement, para. 5825.

[911] Judgement, para. 5704 ("The Prosecution does not contend that materiel from the Burkina Faso shipment was ever directly supplied to Brima's forces before their entry into Freetown"); para. 5658 ("Bobson Sesay did not testify, nor does the Prosecution allege, that this ammunition [allegedly from supplied provided by Taylor in 1998] was used after the capture of Rosos.... [I]t has been judicially noticed that once the AFRC troops arrived in Colonel Eddie Town, in or around September 1998, they had to make a number of attacks on ECOMOG positions to supplement their dwindling stocks of arms and ammunition"). None of the findings concerning "fungible resources" relate to the AFRC forces that drove into Freetown; those findings all relate to "materiel captured from the December 1998 offensives in Kono". Judgement, paras. 5715-6, 5721.

[912] Judgement, para. 5713.

[913] TT, TF1-367, 20 Aug. 2008, pp. 14184-5, 14188; TT, TF1-375, 23 June 2008, pp. 12543-54; TT, TF1-375, 24 June 2008, pp. 12559-62, 12581-2, 12600; TT, TF1-568, 17 Sept. 2008, pp.16417-9.

[914] Judgement, para. 5709.

[915] Judgement, para. 5721.

captured from the offensives in Kono and Makeni."[916] The Chamber found, however, that it did not need to make that finding for two reasons: (i) the Burkina Faso shipment "was causally critical to the success of the Kono operation, and hence the materiel captured there" and is therefore "directly referable" to the materiel that had been purportedly facilitated by Taylor;[917] and (ii) "therefore … the materiel captured from Kono and the shipment brought by Dauda Aruna Fornie together formed an amalgamate of fungible resources from which Issa Sesay supplied Gullit's troops as they were withdrawing from Freetown."[918] This explanation suggests that Taylor's accessorial responsibility for the crimes arises from the fact he was personally responsible for having provided all the available supplies of materiel: one supply he facilitated or provided directly; one supply for which he is responsible because the assistance he provided previously was "causally critical" to obtaining that supply. The Chamber, in effect, treats that captured materiel in just the same way as if it had been facilitated or supplied directly by Taylor.

469. The notion that Taylor could be held responsible for the captured materiel is incompatible with established definitions of the *actus reus* of aiding and abetting, which requires "acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime."[919] The ICTR Appeals Chamber, by whose jurisprudence the SCSL is uniquely required to be guided, has declined to dispense with "specifically aimed" as a legal element of the *actus reus* of aiding and abetting notwithstanding the 3-2 majority judgement in *Mrkšić*.[920] Whether "specifically aimed" is a legal requirement or not, the language offers meaningful guidance as to the usual attributes of the nature of the acts that qualify as the *actus reus* of aiding and abetting. Thus, in *Blagojević*, where the ICTY Appeals Chamber suggested for the first that "specific direction" was only an "implicit part of the *actus reus* of aiding and abetting" rather than a legal element,[921] the Chamber conditioned its conviction of the accused on the basis that his "ability to affect the commission of the crime was substantial."[922]

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[916] Judgement, para. 5713.
[917] Judgement, para. 5715.
[918] Judgement, para. 5716.
[919] *Ntawukulilyayo* AJ, para. 214.
[920] *Ntawukulilyayo* AJ, para. 214; *Rukundo* AJ, para. 52; *Kalimanzira* AJ, para. 74.
[921] *Blagojević* AJ, para. 189.
[922] *Blagojević* AJ, para. 191.

470. This characteristic is missing in respect of the materiel captured in Kono. Numerous variables affected whether the RUF captured the materiel in Kono, including their autonomous decision to attack Kono; the tactics adopted; the amount of resistance by ECOMOG; the outcome of the battle; the quantity and nature of ECOMOG supplies deployed in Kono; the decision to continue to advance beyond Kono towards Freetown; the decision to use the resources captured in Kono during that subsequent advance; the decision to share that materiel with the AFRC. These various events and decisions occurred over a period up to two months between Taylor's alleged actions of assistance and the crimes that he supposedly assisted. All of these steps, many of which involve unpredictable human agency, intervene between the Burkina Faso shipment and the crimes committed during the retreat from Freetown.

471. The *actus reus* of aiding and abetting has been denied in circumstances where similar steps intervened between alleged support and crime. Thus, *Kalimanzira*'s conviction for aiding and abetting genocide was quashed because of the lack of any proven immediate connection between the speech and specific killings.[923] Similarly, genocidal exhortations in a newspaper prior to the commencement of genocide in Rwanda were found not to fulfil the *actus reus* of aiding and abetting. Even though there was "probably a link" between the accused's actions and the killings, the Appeals Chamber considered that "there was not enough evidence for a reasonable trier of fact to find beyond a reasonable doubt that the Kangura publications in the first months of 1994 substantially contributed to the commission of acts of genocide between April and July 1994."[924] A third striking example involved an exhortation to kill Tutsi at a roadblock, followed by a killing at that roadblock six days later. The ICTR Appeals Chamber quashed a conviction for aiding and abetting genocide, finding that "it is unclear whether the Appellant's acts substantially contributed to Mr. Nors's killing … six days after these acts or even later."[925] These cases illustrate the level of connection between act and crime that is necessary to fulfil the *actus reus* of aiding and abetting. The captured materiel was not supplied by Taylor and cannot be attributed to him based on any recognized interpretation of the *actus reus* of aiding and abetting.

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[923] *Kalimanzira* AJ, paras. 72-80.
[924] *Nahimana* AJ, para. 519.
[925] *Ndindabahizi* AJ, para. 116.

*(iv) The Only Appropriate Remedy, Given the Chamber's Own Findings, Is That the Actus Reus Was Not Fulfilled For Crimes In Relation to Freetown*

472. The Chamber's findings imply that had it not attributed the captured materiel to Mr. Taylor, it could not have found beyond a reasonable doubt that the crimes committed during the retreat from Freetown were committed with arms supplied or facilitating by Mr. Taylor. This follows from the Chamber's own approach to the crimes committed in 1997 and 1998, where it required specific proof that crimes were committed using supplies provided by Mr. Taylor, as well as the Chamber's recognition that the captured materiel was "large" in quantity.

473. Any other approach would not meet the requirement of proof beyond a reasonable doubt that the materiel found to have been provided by the accused "substantially contributed" to the crimes.

474. The Chamber was unable to find beyond a reasonable doubt that crimes were committed during the attacks on Kono and Makeni in which the arms from the Burkina Faso shipment was allegedly used. The Chamber states at paragraph 5717 that certain crimes were committed, referring back to its "Factual and Legal Findings on Alleged Crimes." A review of those findings shows that the Chamber was unable to conclude when these crimes were committed and, in particular, whether they were committed during this offensive using the Burkina Faso shipment.[926] The Chamber apparently recognizes this at paragraph 5718 noting that "even if it were the case that no crimes were committed" in Kono, Kenema and Makeni, Mr. Taylor should be held responsible for crimes in Freetown and the Western Area.[927] The Chamber then contradicts itself in paragraph 5719, stating that there were "crimes in the Kono and Makeni Districts," even though its own findings were that it could not ascertain beyond a reasonable doubt that the crimes in question were committed in December and as part of this offensive[928] The Chamber then appears to correct itself in its ultimate findings, however, omitting any reference to the commission of crimes in the Kono and Makeni Districts during this offensive.[929] Mr. Taylor's conviction is instead based on allegedly aid to crimes committed "in Freetown and the Western Area.".[930] In the final analysis, despite the one erroneous statement at paragraph 5719, the

[926] Judgement, para. 1424 ("approximately December 1998"); para. 1540 ("approximately August through December 1998"); para. 1694 ("approximately December 1998 onwards").
[927] Judgement, para. 5718.
[928] Judgement, para. 5719.
[929] Judgement, para. 5835 (xxxiii).
[930] Judgement, para. 5835 (xxxiv).

Chamber did not find that crimes were committed as part of this offensive. Accordingly, in the absence of the connection to crimes in Freetown and the Western Area, no finding could have been made that the Burkina Faso shipment was used in, much less substantially contributed to, the commission of crimes.

475. The Chamber's erroneous approach to the captured materiel was essential to its findings that Taylor aided and abetted crimes committed in the retreat from Freetown. The cause of the error appears to have been partly an error of law and partly and error of fact. In any event, the errors invalidate the finding and occasioned a miscarriage of justice, requiring reversal.

**iii. GROUND OF APPEAL 23: The Trial Chamber erred in law and in fact in finding that Charles Taylor facilitated the transportation of arms and ammunition into territories of the RUF or AFRC, by road and air, by using emissaries (including, Daniel Tamba, a.k.a. Jungle; Joseph Marzah, a.k.a. Zigzag; Sampson Weah; Ibrahim Bah; Abu Keita; and Varmuyan Sherif) as couriers, facilitators and/or security escorts of such materiel and that such facilitation played a vital role in the operations of the RUF or AFRC**

*(i) Overview*

476. The Chamber found that Taylor facilitated the flow of military materiel to the RUF/AFRC, which was "critical in enabling the operational strategy of the RUF and AFRC" including the commission of crimes.[931] The Chamber found that materiel contributed to six sets of crimes, defined geographically and temporally: (i) crimes by AFRC/RUF forces during the Junta period at Tongo fields and in fighting in Freetown before, during and after the Intervention, and by Sam Bockarie in Kenema during the Junta;[932] (ii) operations in Kono District in early 1998;[933] (iii) "Operation Fitti-Fatta in Kono";[934] (iv) Operations in the North in mid-1998, "on Mongor Bengedu and Kabala" and "in the Koinadugu and Bombali Districts from June to October 1998";[935] (v) the December 1998 offensives and the Freetown Invasion;[936] (vi) post-Freetown crimes.[937] The Chamber found in respect of each of these sets of crimes that "the

[931] Judgement, para. 6914.
[932] Judgement, paras. 5531-60.
[933] Judgement, para. 5593.
[934] Judgement, paras. 5594-632.
[935] Judgement, paras. 5633-67.
[936] Judgement, paras. 5668-21.
[937] Judgement, paras. 5722-53.

provision and facilitation of the supply of arms and ammunition to the RUF/AFRC had a substantial effect on the commission of crimes charged."[938]

477. To find that Taylor performed the actus reus of aiding and abetting crimes falling within these periods and locations, the Chamber was required to make two findings beyond a reasonable doubt: first, that Taylor provided or facilitated the materiel; second, that the materiel in question substantially assisted crimes.

478. No reasonable trier of fact, properly assessing the evidence, could have concluded that Taylor was involved in most of the alleged arms shipments. The Chamber's assessment of the Magburaka shipment, as well as many of the other arms shipments, is deficient, manifestly incorrect, has occasioned a miscarriage of justice, and requires reversal.

479. Even assuming that some of the factual errors fall within the bounds of the Chamber's discretion, no reasonable trial chamber could have found beyond a reasonable doubt that the materiel allegedly supplied by Taylor substantially contributed to the crimes mentioned. Indeed, the Chamber's own findings manifestly reflect reasonable doubt. The Chamber repeatedly indicated that it could not "find conclusively" whether the materiel allegedly facilitated by Taylor was used in these crimes, let alone whether they substantially contributed to them.[939] On other occasions, the Chamber speculated or drew inferences that do not meet the standard for proof by circumstantial evidence.[940] These findings are unsustainable both because of the Chamber's own findings, and the absence of evidence that could have supported any reasonable chamber to make those findings.

480. The present ground is divided into six sections, corresponding to the sets of crimes as defined by the Chamber; within each of these six sections, the errors relating to Taylor's alleged involvement in facilitating materiel will be discussed first,

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[938] Judgement, para. 6915.

[939] Judgement, para. 5745 ("the evidence of relevant witnesses is not sufficiently precise to find conclusively that the materiel supplied by the Accused was used to commit crimes or used even in specific locations"); para. 5751 ("the evidence of the relevant witnesses is not sufficiently precise to find conclusively that the materiel supplied by the Accused was specifically used to commit these crimes or conduct these activities, particularly in light of evidence that the RUF had recourse to alternate sources of material during this period").

[940] Judgement, paras. 5628 ("the evidence that materiel used by the RUF and AFRC for Fitti-Fatta came from other sources does not preclude part of that materiel also being sourced from the Accused, and indeed TF1-275 suggests that the materiel for Fitti-Fatta came from multiple sources"); para. 5558 ("although there is no direct evidence as to how the shipment brought by Tamba was applied except that it was kept by Bockarie in Kenema, the Trial Chamber can nonetheless reasonably infer that it was used by the AFRC and RUF forces under Bockarie's command in the course of their activities in the Kenema District, which included the commission of crimes").

followed by a discussion of the evidence pertaining to the effect of the materiel on the crimes alleged.

*(ii) No reasonable chamber could have found that Taylor substantially contributed to crimes during and immediately after the Junta period by facilitating the Magburaka Shipment or the Tamba delivery*

*(a) Overview*

481. The Chamber found that Taylor was involved in arranging two shipments of materiel to Sierra Leone during this period: (i) a large shipment of materiel to Sierra Leone which arrived at the Magburaka airfield sometime between September and December 1997; and (ii) a non-large truckload of materiel through Daniel Tamba in 1997.[941] The former delivery, according to the Chamber, was used in crimes committed in mining operations during the Junta period and in "'Operation Pay Yourself' and subsequent offensives on Kono"; the latter in crimes "in the Kenema District".[942]

482. No reasonable trial chamber could have concluded that Charles Taylor had any involvement in the Magburaka shipment.[943] Only one witness, TF1-371, connected Taylor to these events,[944] and no reasonable trial chamber could have found that Isaac Mongor and Samuel Kargbo – whose testimony the Chamber largely rejected – provided any corroboration of TF1-371's account. Indeed, the Chamber's own findings show that their testimony did not coincide in any significant regard. Nor could any reasonable trial chamber could have found that Taylor knew about, or was involved, in Tamba supplying one truckload of materiel. The Chamber's own language shows that it entertained doubts given the paucity of evidence and the small-scale of the delivery.

483. Even assuming the evidence could show that either of these deliveries of materiel was provided with the participation of Taylor, no reasonable trier of fact could have inferred that these supplies were used in the crimes mentioned. The Chamber's own findings recognizing the existence of other sources of ammunition reflect this doubt.

484. Sub-sections (b) and (d) examine the errors relating to Taylor's participation in the Magburaka and Tamba supplies, respectively; sub-sections (c) and (e) examine the

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[941] Judgement, para. 4845; para. 5835 (v).
[942] Judgement, paras. 5559-60.
[943] Judgement, paras. 5386, 5388; para. 5396; paras. 5406-8.
[944] Judgement, para. 5393.

errors relating to the finding that these shipments, respectively, substantially contributed to the crimes.

*(b) The Evidence Does Not Establish Beyond a Reasonable Doubt Taylor's Knowledge of, or Participation in, the Magburaka Shipment*

**(1) The testimonies of TF1-371, Isaac Mongor and Samuel Kargbo are not corroborative**

485. The Chamber found that Ibrahim Bah arranged a delivery of military supplies including ammunition to the Magburaka airfield in the fall of 1997, and that he did so with the involvement, knowledge and support of Taylor. The latter part of the finding is based on the testimony of TF1-371, who testified that Ibrahim Bah informed him that he, Bah, had been sent by Charles Taylor to help the Junta government to secure arms and ammunition, and that he was paid in diamonds to do so.[945] TF1-371 never expressly stated that this particular shipment had been arranged by Bah on behalf of Taylor, although the Chamber evidently drew that inference.[946]

486. The Chamber asserts that this account, and in particular the fact that Bah "had been sent by the Accused to Freetown," was "corroborated" by two other witnesses, Isaac Mongor and Samuel Kargbo.[947] An examination of the Chamber's reasons shows, however, that there was no corroboration; on the contrary, their testimony deviates markedly from and even largely contradicts that of TF1-371, requiring the Chamber to largely reject their testimony in order to credit TF1-371. First, Kargbo never testified, as did TF1-371, that Bah came to Freetown during this period. Kargbo testified instead that a delegation went to Sierra Leone, following a conversation between Taylor and Koroma about a promise of arms.[948] The Chamber rejected this account, finding Kargbo's testimony to be of "little probative value"[949] and that the "Prosecution did not adduce evidence regarding the procurement of the arms and ammunition, nor of Taylor's direct involvement in making these arrangements."[950]

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[945] Judgement, para. 5390.
[946] Judgement, para. 5390.
[947] Judgement, para. 5393 "TF1-371's testimony is corroborated by the testimony of TF1-532and TF1-597, both of whom testified that Ibrahim Bah came to Freetown on behalf of the Accused and both of whom linked the arms transaction to Magburaka as well as to the Accused. While these witnesses recount different meetings, the content of what they heard in these meetings consistently indicates that Ibrahim Bah was acting on behalf of the Accused in arranging the arms deal. TF1-371 testified that following these meetings Bah left Freetown with Bockarie, and Kargbo testified that Bah went from Freetown to Liberia").
[948] Judgement, paras. 5361; para. 5380; para. 5390.
[949] Judgement, para. 5380.
[950] Judgement, para. 5390.

One of the main reasons for rejecting Kargbo's testimony was his claim that Mike Lamin had been part of the delegation to Sierra Leone, whereas TF1-371 denied that to have been the case.[951] Second, both Kargbo and Mongor claimed that Koroma and Taylor were in direct contact, possibly about the procurement of arms.[952] The Chamber expressly rejected this testimony: "[t]he Prosecution did not adduce evidence regarding the procurement of arms and ammunition, nor of Taylor's direct involvement in making these arrangements."[953] Third, Kargbo testified that the arms actually arrived at Magburaka direct from Liberia, and were accompanied by a second AFRC delegation that had travelled there and returned on the same airplane.[954] The Chamber rejected this account as inaccurate and unreliable, finding "Kargbo's testimony in this regard to be of little probative value ... [and] is contradicted by another Prosecution witness, TF1-371."[955] Fourth, Kargbo's only information about Taylor's involvement in the whole transaction was that up to seven months before the shipment itself, "Koroma reportedly told Taylor that he was sending him a delegation led by Mike Lamin and that Ibrahim Bah had been recommended by Sam Bockarie to assist the delegation with the procurement of arms.[956] Kargbo gives no testimony as to how Taylor responded. Furthermore, Kargbo remarked that "he was aware of other telephone calls made to other African leaders at various times therafter, including Presidents Mainassara of Niger, Blaise Compairé of Burkina Faso and Muammar Gaddafi of Libya."[957] Although this might raise a possible inference that Bah was acting with Taylor's knowledge, no reasonable trial chamber could accord it

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[951] Judgement, para. 5380 ("Samuel Kargbo heard Johnny Paul Koroma state at a meeting of the Supreme Council that he was going to send a second delegation to Liberia led by Mike Lamin of the RUF and Lieutenant-Colonel Fonti Kanu of the AFRC to purchase arms and ammunition for the Junta to be facilitated by one General Ibrahim who had been recommended by Sam Bockarie... The Trial Chamber finds Kargbo's testimony in this regard to be of little probative value in establishing a link between this second delegation and the arms shipment as it not only is circumstantial but is contradicted by another Prosecution witness TF1-371, who insisted that Mike Lamin was never on the delegation that went to Liberia to solicit for arms or ammunition.").
[952] Judgement, para. 5390.
[953] Judgement, para. 5390.
[954] TT, TF1-597, 2 June 2008, p. 10710 ("Q. Mr Kargbo, we are dealing with the second delegation. When the second delegation, who had gone you say to get arms and ammunition, came back, what did they tell you? A. Well, when they came back they met us in Magburaka at that time and they came on board a plane with the arms. Q. How long after they had gone to Liberia did they return? A. Within a week. Q. So, they came back before the arms and ammunition came to Magburaka? A. Some of them came on board the aeroplane"); cf. TT, TF1-371, 28 January 2008, pp. 2314-15
[955] Judgement, para. 5380.
[956] Judgement, para. 5360.
[957] Judgement, para. 5360.

significant, much less decisive weight, particularly given that up to seven months elapsed between the conversation and the shipment itself.

487. Mongor's testimony is no more corroborative of Mr. Taylor's involvement. He gave hearsay testimony that Taylor promised in May 1997 that he would "'send something'", but without any further specificity that this was connected to the Magburaka delivery or even to Bah.[958] Mongor testified that Bah had been sent by Taylor to encourage the RUF and AFRC factions of the Junta government to work together.[959] While Mongor testified that the Junta government was happy because Bah "would be able to help them get ammunition", he offers no indication that Taylor knew that Bah was acting as their arms broker.[960] The Chamber was also obliged to reject significant elements of Mongor's testimony that conflict with that of TF1-371, including that the Magburaka delivery had passed through Liberia from Libya – a claim rejected by the Chamber as based on a "a lack of credible evidence"[961] – and the claim that the shipment was small[962].

488. No reasonable trial chamber could have found that Mongor and Kargbo's testimony was anything but contradictory of the main elements of TF1-371's testimony. No significant details overlap or coincide; on the contrary, their testimonies conflict in respect of all significant details, leading the Chamber to reject most of Mongor and Kargbo's testimony. The Chamber's claim that Kargbo and Mongor's testimony "consistently indicates that Ibrahim Bah was acting on behalf of the Accused in arranging the arms deal"[963] has no basis in the Chamber's own findings or the evidence.

**(2) The Trial Chamber failed to assess the credibility of TF1-371**

489. [See Confidential Annex A, para. 3.]

490. [See Confidential Annex A, para. 4.]

**(3) The Trial Chamber failed to assess the credibility of the source of hearsay evidence**

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[958] Judgement, para. 5358.
[959] Judgement, para. 5358; TT, TF1-532, 11 Mar. 2008, pp. 5712-14; Judgement, para. 5390.
[960] TT, TF1-532, 11 Mar. 2008, pp. 5714.
[961] Judgement, paras. 5384-5.
[962] Judgement, paras. 5095, 5384-5.
[963] Judgement, para. 5393.

491. The witnesses who testified that Ibrahim Bah was acting on behalf of Charles Taylor were both giving hearsay evidence based on the same source: Ibrahim Bah.[964] The Chamber undertakes no analysis whatsoever of Bah's credibility or whether he would, under the circumstances, have had any motivation to lie. The circumstances suggest that of course he would have had a motivation to lie, in order to enhance his own credibility and that he was acting with official approval. The Chamber's failure to address this obvious consideration as part of the weight to attach to this hearsay evidence reflects a failure to state reasons, and induced a conclusion that no reasonable trier of fact could have reached. This error on its own or when taken together with other errors invalidates the Trial Chamber's finding that Bah was acting on behalf of Taylor and occasions a miscarriage of justice.

**(4) The Trial Chamber failed to assess the hearsay evidence with due caution**

492. The evidence that Taylor knew that Bah was acting as an arms broker for the AFRC/RUF relies on one source: Ibrahim Bah. Bah had an obvious interest in telling his interlocutors that this was the case – to bolster his own credibility. Not only is it possible that Bah would have wanted to give this impression, it is likely. The Judgement ignores this issue entirely, merely assuming that what Bah told his interlocutors must have been true. The Chamber's unquestioning reliance on evidence

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[964] Judgement, para. 5390 ("A number of Prosecution witnesses implicated the Accused in the supply of the Magburaka arms shipment, at the request of Johnny Paul Koroma. Witness TF1-371 stated that while in Monrovia, his delegation had spoken to officials of the Liberian Government who assured them that President Taylor was already in contact with Johnny Paul Koroma. Upon his return from Monrovia, TF1-371 went to brief Johnny Paul Koroma who confirmed that President Taylor had already communicated with him and promised support in securing recognition by ECOWAS. Subsequently, TF1-371 was at a meeting with Bockarie and Ibrahim Bah at the Cape Sierra Hotel. After Bockarie expressed concern at the constant military attacks on the AFRC by the Nigerian ECOMOG troops and the AFRC Junta's lack of arms and ammunition, Bah responded that Charles Taylor had specifically sent him to negotiate terms with Johnny Paul Koroma that would assist the AFRC secure arms and ammunition. Isaac Mongor was present at a meeting between Ibrahim Bah and senior RUF officials at Sam Bockarie's residence in Freetown when Bah delivered a message from Charles Taylor urging the RUF "to work together with the AFRC". Mongor attended a subsequent meeting of senior AFRC officials at the residence of Johnny Paul Koroma on Spur Road at which Ibrahim Bah repeated the message from Charles Taylor that the RUF and AFRC should "work hand in hand", a message that was "well received" by both the RUF and AFRC. The main topic discussed at this second meeting was the need for ammunition and that the meeting was happy because Bah "would be able to help them get ammunition". Later Koroma told Mongor that he had been in contact with Taylor and that Taylor had said that he was going to "send something" for the Junta Government."); p. 1875, para. 5390 ("Subsequently, TF1-371 was at a meeting with Bockarie and Ibrahim Bah at the Cape Sierra Hotel. After Bockarie expressed concern at the constant military attacks on the AFRC by the Nigerian ECOMOG troops and the AFRC Junta's lack of arms and ammunition, Bah responded that Charles Taylor had specifically sent him to negotiate terms with Johnny Paul Koroma that would assist the AFRC secure arms and ammunition").

that it was obliged by law to assess with caution would not have been committed by a reasonable trial chamber.

493. No reasonable chamber could have rejected the possibility that Bah brokered the Magburaka delivery without Taylor's knowledge. Nothing in the circumstances of the Magburaka shipment implies that it was likely, let alone proven, that Taylor learned of Bah's role. The shipment, as the Chamber found, did not pass through Liberia; Koroma was in direct touch with other African leaders, including the most-likely sources of the Magburaka shipment; and, as the Chamber also found, Bah had the capacity – and did on occasion – act independently of Taylor.[965] Bah, as Kargbo testified, had already been introduced to the Junta government independently of any introduction by Taylor.[966] Mongor similarly suggested that Ibrahim Bah had previously helped the RUF obtain arms and ammunition and was sought out by Koroma for that reason.[967] Bah, according to TF1-371, was living in Burkina Faso a the time the Magburaka shipment was arranged, and was traveling back and forth to Abidjan for face-to-face meetings with Sankoh.[968] TF1-371 even testified that Bah represented himself as being "an advisor to Mr. Sankoh,"[969] suggesting that there was no need for Mr. Taylor to act as an intermediary either between Sankoh and Bah, or between Bah and the Burkinabé authorities. Indeed, TF1-168 testified that Bah and Sankoh travelled together on at least one occasion to Burkina Faso.[970] The Chamber ignored this evidence, which further diminishes the likelihood that Mr. Taylor *had* to be involved in arranging this transaction.

494. The Chamber's evaluation of the evidence is manifestly flawed. No reasonable trier of fact could have ignored the reasonable possibility that Bah acted without Taylor's knowledge or support. The error invalidates the finding that Taylor

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[965] Judgement, para. 2753 ("The Trial Chamber finds beyond reasonable doubt that Ibrahim Bah was an independent businessman who worked, at various times and for particular purposes, for both the RUF and the Accused. He also served as a liaison between the RUF and the Accused but had no permanent affiliation with either the RUF or the Accused.").

[966] Judgement, para. 5390 ( "Samuel Kargbo overheard a telephone conversation between Johnny Paul Koroma and Charles Taylor during which Koroma reportedly told Taylor that he was sending him a delegation led by Mike Lamin and that Ibrahim Bah had been recommended by Sam Bockarie to assist the delegation with the procurement of the arms and ammunition. Subsequently, Kargbo attended a Supreme Council meeting at which Koroma stated that he was sending a delegation to Liberia led by Mike Lamin of the RUF, Lieutenant-Colonel Fonti Kanu of the AFRC and General Ibrahim Bah to purchase arms and ammunition for the Junta").

[967] TT, TF1-532, 4 Apr. 2008, pp. 6649-61; Judgement, para. 5359.

[968] TT, TF1-371, 25 Jan. 2008, p. 2291.

[969] TT, TF1-371, 25 Jan. 2008, p. 2291.

[970] TT, TF1-168, 22 Jan. 2009, p. 23302.

facilitated the Magburaka shipment and, therefore, invalidates the finding that he aided and abetted crimes committed using that materiel.

*(c) The Evidence Does Not Establish Beyond a Reasonable Doubt That the Materiel in the Magburaka Shipment Was Used to Commit Crimes*

**(1) The size of the Magburaka Shipment**

495. A preliminary issue concerning the potential effect of the military supplies contained in the Magburaka delivery is its size. The Chamber on the basis of its discussion of the evidence said that the shipment was "large",[971] but then amplified, without any additional evidence, its size to "very large" in the findings section.[972] The effect of this erroneous transcript is hard to gauge but reflects a not uncommon tendency of the Chamber to disregard, sidestep or alter its own factual findings when reaching ultimate conclusions.[973]

496. Two witnesses, Mongor and Issa Sesay, testified that the quantity was "small".[974] The Trial Chamber preferred the evidence of TF1-371 who, by his own account, was not present at the shipment.[975] The Chamber's reason for preferring TF1-371's account is never made clear. Mongor and TF1-371 were both deemed generally credible by the Chamber. Mongor was present when the shipment arrived and therefore observed it first-hand;[976] TF1-371 was not. Mongor testified in detail about the content of the shipment;[977] TF1-371 was vague about its content and size, admitting that he did not know its exact size.[978] Mongor was able to specifically testify that the shipment did not contain AK-47 ammunition; TF1-371 implausibly claimed that he knew that it did contain AK-47 ammunition. TF1-371's source about the size of the shipment was Issa Sesay,[979] who appeared before the Chamber and said the shipment was small.[980] The Trial Chamber did not even give reasons as to why it preferred the testimony of TF1-371 over the generally-credible eyewitness testimony

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[971] Judgement, para. 5399.
[972] Judgement, para. 5409.
[973] See: Judgement, paras. 5551-2, where the Chamber assumed the materiel must have lasted into 1998 and been used in crimes committed after the ECOMOG Intervention, despite witness testimony that much of the materiel was abandoned in Freetown: Judgement, para. 5547.
[974] Judgement, para. 5398.
[975] Judgement, para. 5397; TT, TF1-371, 28 Jan. 2008, p. 2315.
[976] TT, TF1-371, 28 Jan. 2008, pp. 2316-7.
[977] TT, TF1-532, 4 Apr. 2008, pp. 6644-5.
[978] Judgement, para. 5357.
[979] TF1-371's knowledge of the shipment came from a report he was given by Issa Sesay, but there is no evidence that the report recorded the quantity of materiel delivered: TT, TF1-371, 28 Jan. 2008, p. 2314.
[980] Judgement, para. 5359; para. 5362; para. 5375.

of Mongor. No reasonable trial chamber, without giving a substantial explanation, could have preferred TF1-371's to Mongor's, which was also corroborated by Issa Sesay. This error renders the Chamber's finding invalid and occasions a miscarriage of justice.

497. The finding as to the size and nature of the shipment generally affected the Chamber's reasoning as to the likelihood that the materiel was used in the commission of crimes.[981] The finding that the shipment included AK-47 ammunition had a direct effect on the Chamber reasoning that the shipment contributed to crimes committed in Tongo and elsewhere.[982]

**(2) Tongo Fields**

498. The crime allegedly facilitated by the Magburaka shipment in Tongo Fields was the use of children under 15 years of age to guard the mining operation.[983] The Chamber states only that AK-47's "were distributed" amongst these under-age soldiers,[984] not that any of these weapons were used to force children into service. The Chamber does not explain how the distribution of weapons to children who have already been pressed into service as armed guards "contributes substantially to the realization"[985] of, or "substantially contributed to,"[986] that crime. Indeed, there is no finding at all that these children subsequently, or previously for that matter, participated directly in hostilities. Guarding an economic facility does not satisfy customary international law definition of participating in hostilities.[987]

**(3) Crimes During and After the Intervention, Including in Freetown, in "Operation Pay Yourself", and Kono**

499. The Chamber found that materiel provided in the Magburaka Shipment was also used to commit crimes in the context of the ECOMOG Intervention of February 1998, Operation Pay Yourself and the offensives in Kono District in February/March 1998.[988] It did so on the basis that "[a]s there is no evidence that the Junta obtained further materiel after the Magburaka shipment in late 1997 or that the RUF/AFRC

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[981] Judgement, paras. 5551-2.
[982] Judgement, para. 5546; para. 5549.
[983] Judgement, para. 5546; para. 5559; para. 5835 (xxvii).
[984] Judgement, para. 5546 ("TF1-371 testified that the AK-47's obtained upon the arrival of the Magburaka shipment were distributed amongst the armed guards stationed at the mining operations at Tongo fields, some of whom were as young as 13 years old").
[985] *Renzaho* AJ, para. 52.
[986] *Brđanin* AJ, para. 273.
[987] Commentary API, Art. 51(3), para. 1942.
[988] Judgement, paras. 5559, 5835 (xxvii).

were able to capture a significant amount of supplies in the retreat from Freetown, it is likely that the only supplies that the retreating troops had access to were from the Magburaka shipment."[989] The Chamber then proceeded to find in a separate "findings" section "beyond a reasonable doubt that weapons from the Magburaka shipment were used ... in both "'Operation Pay Yourself' and subsequent offensives on Kono."[990]

500. The Chamber committed at least three errors in reaching this finding. First, it reversed the burden of proof by circumstantial evidence. A circumstantial proposition is proven – and there can be no doubt that the evidence that the Magburaka shipment was used in crimes in purely circumstantial[991] – only where it is "the only reasonable inference based on the totality of the evidence."[992] The Chamber here inferred that proposition based on *the absence of evidence to the contrary*. In other words, the proposition does not need to be the only reasonable inference; it need only be a reasonable inference that has not been contradicted. The reasoning reflects an error of law to which the Chamber is owed no deference.

501. Second, the shifting of the burden of proof was not a harmless error in light of its finding that "the AFRC/RUF also obtained supplies from the existing stockpiles of the Kabbah Government when they took power in May 1997, by capturing them from ECOMOG and UN peacekeepers, and through trade with ULIMO, AFL and ECOMOG commanders."[993] Shifting the burden onto the Defence to prove the relative significance of these various sources was even more prejudicial. It was rather for the Prosecution to prove that these other sources were so insubstantial as to exclude any reasonable possibility that those supplies, rather than those in the Magburaka shipment, were used in crimes. The Chamber made no findings showing that this had been proven; instead, it impermissibly resolved ambiguity and doubt in favour of the Prosecution.

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[989] Judgement, para. 5551.
[990] Judgement, para. 5559.
[991] *Delalić* AJ, para. 458 (a circumstantial case consists of "evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him.") As there is no direct evidence that the ammunition or other supplies from the Magburaka shipment was used in the commission of crimes, the Chamber relied on a "combination" of circumstances to infer that proposition.
[992] *Nahimana* AJ, para. 896; *Seromba* AJ, para. 221.
[993] Judgement, para. 6913.

502. Third, the Chamber ignored its own finding that it was merely "likely" that the Magburaka shipment was used in subsequent crimes. "Likely" does not suffice to establish proof beyond reasonable doubt, yet the Chamber proceeded to this legal conclusion without any reference to its own prior finding. The legal finding is not coherent with the factual findings and is therefore an error of law.

503. No reasonable chamber, correctly applying the burden of proof, the standard of circumstantial evidence, or its own factual findings, could have concluded beyond a reasonable doubt that the Magburaka shipment was used in Operation Pay Yourself or in crimes in Kono in early 1998. The litany of legal and factual errors led to a wrong conclusion that occasions a miscarriage of justice.

*(d) The Evidence Does Not Establish That Taylor Knew About Or Participated In The Small Quantity of Supplies Provided By Tamba in 1997*

504. The Chamber relied on four categories of evidence to find that Daniel Tamba in late 1997 drove "two land-cruiser pick-ups" worth of materiel[994] over the border into Sierra Leone with Taylor's knowledge or support. First, there was TF1-375, a witness whom the Chamber found to be generally unreliable,[995] who testified that this is what he was told by Tamba. Tamba had an obvious incentive to give this impression to bolster his own credibility with his interlocutors, but the Chamber fails to address Tamba's possible motivations for misleading TF1-375.[996] In any event, the Chamber expressly indicated that it would not rely on TF1-375's evidence without corroboration.

505. Second, Jaward testified that the day after the supplies arrived, he saw Bockarie give Tamba a parcel of diamonds with the words, "'this is what I now have for the old man.'"[997] But Jaward also testified that Foday Sankoh was also commonly referred to as "old man"[998] Further, the Chamber noted that Jaward had pre-existing "speculative" belief (i.e. an unsubstantiated belief) that Tamba was acting as an intermediary between Bockarie and Taylor.[999] Jaward's evidence is therefore of little or no value in proving that Taylor knew about this truckload of materiel.

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[994] Judgement, para. 4810.
[995] Judgement, paras. 308-12; 4832.
[996] See Ground 2.
[997] Judgement, para. 4841.
[998] Judgement, para. 4808.
[999] Judgements, paras. 4808, 4841.

506. The third basis for the Chamber's finding is Mongor's testmony that Tamba brought ammunition with Taylor's knowledge before the AFRC coup in May 1997.[1000] The claim is uncorroborated and implausible.[1001] But even assuming it to be true, it has little probative value that Taylor knew, or was involved in, the shipment many months later. Indeed, the Chamber acknowledged that Tamba may have been acting on his account in brokering arms deals with the RUF in 1995 and 1996.[1002] The Chamber recognized that soldiers would often engage in small arms transactions for their own personal gain, which was possible here.

507. Fourth, Fornie testified that he overheard requests for arms and ammunition being sent from Bockarie's radio station to Taylor's radio station, but without any indication as to the response to these requests, nor even confirming a belief that Taylor sent arms to Bockarie in 1997.[1003] TF1-371 similarly expressed a view that Bockarie had sought materiel assistance from Taylor in 1997, but not that there had been an affirmative response, much less that any materiel had been sent through Tamba or any other intermediary.[1004]

508. No reasonable trier of fact could have concluded on the basis of this evidence, that Taylor knew about this small amount of materiel being supplied by Tamba some time in 1997.

*(e) The Evidence Does Not Establish Beyond a Reasonable Doubt That Any of the Tamba Supplies Were Used in the Commission of Crimes*

509. The Chamber was unable to find that supplies provided by Tamba were "large."[1005] Indeed, according to TF1-375, upon whom the Chamber relied, all of the materiel fit into "two land-cruiser pick-ups."[1006] The Chamber acknowledged that there was "no direct evidence" as to how the materiel was used, but found that it "can nonetheless reasonably infer that it was used by the AFRC and RUF forces

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[1000] Judgement, para. 4842.
[1001] Taylor was not yet President of Liberia at the time, and therefore had no access to AFL stockpiles.
[1002] Judgement, para. 4838 ("Even if Tamba was engaged in purchasing materiel from ULIMO and Guinea during earlier periods, it is of little value in determining the provenance of shipments brought during the Junta period, when the supply routes to Monrovia had been re-opened.").
[1003] TT, TF1-274, 2 Dec. 2008, p. 21429.
[1004] Judgement, para. 4843 ("TF1-371 testified that Bockarie told him that he had sought materiel assistance from the Accused in 1997 when he was at Kenema.").
[1005] Judgement, para. 4965.
[1006] Judgement, para. 4810.

under Bockarie's command in the course of their activities in the Kenema District, which included the commission of crimes in that area."[1007]

510. The finding is unvarnished speculation. All of the supplies in this relatively small shipment may have been used in lawful combat. The Prosecution did not prove that crimes were committed in all combat actions, nor did it show that any of these supplies were actually sent to the field. Meanwhile, as the Chamber acknowledged, Bockarie was obtaining supplies from other sources including trading with Guineans, ECOMOG and others.[1008] Although the evidence did not suggest that the amounts from any one source were substantial, nor is there any indication that they were any less substantial that the relatively small size of Tamba's delivery.

511. No evidential foundation existed to infer that the Tamba delivery was used in the commission of crimes, much less that any of these supplies had a substantial effect on the commission of crimes.

*(iii) No reasonable chamber could have found that Taylor substantially contributed to crimes committed in 1998 and early 1999*

*(a) Overview*

512. The Chamber found that Taylor substantially contributed to crimes committed while trying to hold Kono;[1009] crimes committed in operation Fitti-Fatta;[1010] crimes committed during "operations in the north", mainly by AFRC-affiliated forces in Mongor Bengedu and Kabala, and in Koinadugu and Bombali districts;[1011] and crimes committed in the offensive on, and retreat from, Freetown.[1012]

513. Taylor was found to have been involved in three categories of arms shipments that contributed to these crimes: (i) supplies and arms sent to the RUF with Taylor's knowledge by way of intermediaries such as Tamba, Sampson Weah and Joseph Marzah; (ii) supplies provided directly by Taylor to Bockarie on visits to Liberia; and (iii) the "Burkina Faso shipment", that was allegedly facilitated by Taylor.[1013]

514. The Chamber asserts that by the time of the crimes being committed in connection with the Freetown invasion, the materiel allegedly provided by Taylor

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[1007] Judgement, para. 5558.
[1008] Judgement, paras. 5815-23.
[1009] Judgement, paras. 5561-93.
[1010] Judgement, paras. 5594-632.
[1011] Judgement, paras. 5633-67.
[1012] Judgement, paras. 5668-721.
[1013] Judgement, para. 5561.

"formed an amalgamate of fungible resources" that, presumably, substantially assisted the commission of crime.[1014] The Chamber even included, in respect of the Freetown attack, materiel captured from the enemy as assistance attributable to materiel allegedly provided by the accused. This aspect of the Chamber's reasoning is addressed separately in Ground 22. The Chamber does not appear to adopt this "fungible resources" concept in respect of crimes committed before the Freetown attack, where it purports to trace the supply of materiel used in specific operations to specific shipments allegedly provided with Taylor's knowledge. The timing of specific shipments may therefore be of relevance in respect of the first three crime events, but are not of equal relevance given the Chamber's reasoning in respect of Freetown.

515. The next four sections address each of the four alleged sets of crimes, as defined by the Chamber. No reasonable trier of fact could have found that the military materiel in question was supplied with Taylor's knowledge or support. Even assuming that such findings could be sustained, no reasonable trial chamber could have found that that materiel contributed substantially to crimes.

516. The Chamber's findings regarding Taylor's alleged facilitation of materiel to the RUF are infected by the same types of error described in the previous section. The Chamber's findings regarding whether this materiel substantially contributed to the crimes specified are not only the result of errors of fact, but are also undermined by its own acknowledgement that it could not determine beyond a reasonable doubt which supplies were used in which attacks. The Chamber's attempt to rely on materiel captured from the enemy is addressed in Ground 22, which further undermines the Chamber's findings concerning the effect of these alleged shipments on the crimes. No reasonable trial chamber could have made these findings, which in conjunction with a variety of errors of law, invalidate the Chamber's reasoning. All convictions based on the Chamber's analysis of crimes committed in the period February 1998 to 1999 are flawed and should be reversed.

*(b) Kono*

**(1) No Reasonable Chamber Could Have Found That Taylor Facilitated Supply of Military Materiel to the Kono Operation, Either By Supplying Bockarie, or By Facilitating Intermediaries**

[1014] Judgement, para. 5716.

517. The Chamber did not find Taylor responsible for any crimes that may have been committed during the initial RUF takeover of Koidu Town in March 1998,[1015] but did find that supplies he allegedly provided or facilitated were used by the RUF to hold onto Kono district before operation Fitti-Fatta in June 1998, and in the commission of crimes.[1016] These crimes therefore precede the one shipment from 1998 that the Chamber was able to categorize as "large":[1017] the Burkino Faso shipment, that occurred "around November/December 1998."[1018] The Chamber also found, however, that the supplies allegedly obtained by Bockarie from Taylor during "early to mid-1998 were sizeable, although not large in comparison to the Magburaka, Burkina Faso or the March 1999 shipment."[1019]

518. No reasonable trier of fact could have found that Taylor facilitiated or directly supplied any, or any significant quantity, of materiel in 1998 whether by way of intermediaries or through Bockarie's trips to Liberia. Taylor never denied that Bockarie may have made trips to Liberia and that he may have been able to obtain weapons on the black market or through corruption, but steadfastly denied that he had any knowledge that he was engaging in such activities, or that he supported them.

519. Almost all of the evidence concerning Taylor's knowledge of, or involvement in, Bockarie obtaining supplies in Liberia is based on hearsay from a single source: Bockarie himself. Mallah, Kanneh, TF1-371, Kamara, TF1-585, Fornie and Kargbo all received their information that Taylor was the source of the materiel directly from Bockarie.[1020] The Chamber simply accepted the evidence as true, because many

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[1015] Judgement, para. 5581 ("As a preliminary issue, the Trial Chamber is satisfied ... that both the Koidu Geiya attack and the Sewafe attack tookplace prior to the Fitti-Fatta mission in mid-1998, but after the RUF successfully captured Koidu Town in March 1998.... [a]ccording to Bobson Sesay, the materiel allegedly provided by the Accused was not used to attack Koidu Geiya itself but was used for subsequent operations to hold onto Kono"; the Chamber proceeds to accept this evidence).

[1016] Judgement, paras. 5582, 5592 (referring to crimes committed "after the attack on Koidu Geiya and the receipt of this shipment of ammunition"), 5593.

[1017] Judgement, para. 4965 ("there is insufficient evidence to find beyond a reasonable doubt that, except for the Burkina Faso shipment of November/December 1998, the amounts of materiel provided by the Accused in 1998 and 1999 through, inter alia, Daniel Tamba, Sampson Weah and Joseph Marzah were large."

[1018] Judgement, para. 5835 (xxvi).

[1019] Judgement, paras. 5029-30.

[1020] Judgement, para. 5021 ("Mallah was told by Bockarie that the purpose of his trips to Liberia was to secure supplies from the Accused. Kanneh testified that Bockarie told him "Pa Taylor" was sending ammunition to Foya for the RUF... TF1-371 stated on one occasion when Bockarie returned from Liberia with materiel he spoke to his commanders about meeting the Accused and being instructed by the Accused to maintain Kono "to pay for those materials"... Perry Kamara testified that prior to going to Monrovia, Bockarie sent a message relaying his instructions from the Accused for the RUF to hold onto Kono in early 1998 in order to provide the Accused with diamonds in exchange for arms and ammunition."); para. 4982 ("TF1-585 stated that she was told on another occasion by Bockarie that he

witnesses heard Bockarie say the same thing.[1021] As explained in Ground 1, it is an error of law to rest a conviction decisively on an uncross-examined statement. The Chamber seems oblivious, as it was on other occasions, that it should accord no greater weight to hearsay testimony, even hearsay testimony, than it could to a sworn out-of-court statement.

520. The Chamber also failed to analyze, or even mention, Bockarie's potential motives to lie. Bockarie was at this very time locked in a power struggle with Koroma to determine who would head the RUF/AFRC confederation. He had every interest in projecting the image of being backed by a respected and ostensibly powerful neighbour. No reasonable trial chamber could have failed to assess these factors and to treat the reliability of the source of the hearsay with appropriate caution. Strangely, the Chamber at one point tries to justify its reliance on this hearsay testimony, explaining: "This is explicable by the fact that many of the witnesses who testified were not personally present at meeting between the Accused and Bockarie and therefore could not have observed their interaction."[1022] The implication appears to be that the Chamber should be permitted to rely more liberally on hearsay evidence because of the absence of direct evidence. The opposite should be true: the absence of direct evidence is precisely when hearsay evidence should be approached with special caution.

521. The Chamber's own reasons illustrate the danger of hearsay testimony. At one point, the Chamber excuses a striking implausibility in TF1-371's testimony on the basis that he "was simply reporting what he was told by Bockarie."[1023] Reasoning of this sort could quickly give hearsay testimony an allure of reliability that is both unjustified and dangerous.

522. None of the other witnesses provide any information upon which the Chamber could have relied to make its findings beyond a reasonable doubt. Saidu received his

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had gone to Taylor's farm in Gbarnga, where he arranged for material to be transferred to White Flower. From there it was transferred to Yeaten's house and then escorted overland to Buedu."); para. 4974 ("Fornie stated that during the course of the return trip, Bockarie remarked that Taylor had told him that while Taylor did not have much ammunition, he was ready to support the RUF "to the best of his ability"."); para. 4996 ("Kargbo testified that he knew the ammunition came from Liberia because Bockarie had said that "Charles Taylor had sent the vehicles to collect us", and because of the uniforms Jungle and the other SSS men were wearing").

[1021] Judgement, para. 5021.

[1022] Judgement, para. 5012.

[1023] Judgement, para. 5016.

information from one of Bockarie's bodyguards called Shabado,[1024] but it is unknown how Shabado received his information, as there is no indication he ever personally met and spoke with Taylor. As his hearsay evidence is unsourced, it is of low or no reliability.[1025] Jaward's hearsay evidence is also unsourced,[1026] and is likewise unreliable. TF1-371's testimony that Bockarie would return in the company of members of the Liberian SSS is curiously uncorroborated, even though there should have been other witnesses;[1027] in any event, even if this evidence is accepted as true, it but does not exclude the reasonably possibility that they were persuaded or paid to keep Bockarie's activities in obtaining weapons from Mr. Taylor secret. And neither of the two remaining witnesses, Kabbah and Pyne, mentioned Taylor.[1028] Their evidence cannot, therefore, be probative of the allegation that Taylor was involved in supplying Bockarie at all, whether in 1998 or 1999 at all. Indeed, one of the striking aspects of the testimony as a whole is that the Chamber, at the end of the day, was unable to make any definite findings about the date any one shipment, or even that different witnesses were speaking of the same trips.

523. The second manner in which the Chamber found that Taylor supplied the RUF/AFRC from February 1998 through December 1999 by was through support for *inter alia*, Daniel Tamba (a.k.a. Jungle), Sampson Weah and Joseph (a.k.a. Zigzag) Marzah. The Chamber did not find these shipments to be large,[1029] referring to "the evidence of the majority of witnesses" that the arms and ammunition brought "were few",[1030] and that the materiel was "not enough" to enable the RUF/AFRC to defend strategic positions.[1031]

524. In finding that Taylor was aware of and was, in effect, the ultimate source of the shipments delivered by Tamba, Marzah and Weah, the Chamber recognised that the evidence was largely hearsay,[1032] and therefore required corroboration by direct evidence. However, while it believed such hearsay was supported by "other

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[1024] Judgement, para. 4983.
[1025] *Gotovina* TJ Vol. I, para. 51; *Popović* TJ, para. 1532; *Milutonović* TJ Vol. II, paras. 265 and 1175; *Haradinaj* TJ, paras. 196-7 and 317; *Krajišnik* TJ, para. 1190; *Hadžihasanović* TJ, para. 272; *Strugar* TJ, para. 322; *Kordić & Čerkez* AJ, para. 190.
[1026] Judgement, para. 5021 ("While Jaward did not specifically state that Bockarie said these supplies were sourced from Taylor, Jaward told the Trial Chamber that 'whenever Sam Bockarie went to Monrovia we would expect those supplies from Charles Taylor'").
[1027] Judgement, para. 5022.
[1028] Judgement, para. 4984; paras. 4993-4.
[1029] Judgement, para. 4965.
[1030] Judgement, para. 4961.
[1031] Judgement, para. 4960.
[1032] Judgement, para. 4948.

evidence", the supporting evidence it placed "particular weight" on – that of TF1-516, who heard radio communications from the Executive Mansion for the delivery of materiel[1033] – is also hearsay, and therefore could not be supporting direct evidence. Equally, the corroborating documentary evidence – Exhibit P-066 and P-067 – is hearsay, but in written form.[1034] In making such fundamental mistakes as to the nature of the evidence, the Chamber misled itself that the speculative hearsay that Taylor was aware of the shipments delivered by Tamba *et al.* was corroborated by direct evidence, when it was not. The Chamber's language, that it placed "particular weight" on what it mistakenly took to be the direct evidence of TF1-516, suggests that it may not have reached the same conclusion had it correctly evaluated the nature of the evidence in question. The Chamber's error thus invalidates its finding that Taylor was aware of these shipments.

**(2) No Reasonable Trial Chamber Could Have Found That Any Materiel Supplied By Taylor Contributed Substantially to the Commission of Crimes in Kono in 1998**

525. The Chamber relies on two erroneous findings to conclude that the materiel allegedly supplied by Taylor substantially contributed to the commission of crimes in Kono: (i) that the quantum of materiel was large, upon which "substantial contribution" could be inferred; and (ii) the evidence of Bobson Sesay about boxes of ammunition marked "AFL" being sent to the field.

526. The only evidence the Chamber cited which supported the allegation that the shipments were large was from Koker, TF1-567 and TF1-516, whom the Chamber said testified that the materiel delivered by Tamba and Marzah amounted to ten-tyred military trucks full of ammunition.[1035] This is a misstatement of their evidence. TF1-516 testified that Bockarie travelled in a ten-tyred truck to Monrovia and returned with ammunition, but he did not stated the truck was full of ammunition; and he did not link the truck to the visits of Tamba and Marzah, but to Bockarie, whose trips the Chamber considered in another context.[1036] TF1-567 testified that on one occasion he saw a ten-tyred truck in Buedu, but he neither stated this truck was full of ammunition, nor explicitly that it was driven by Tamba and Marzah.[1037] Thus the only

[1033] Judgement, para. 4948. The Chamber also cited Fornie's evidence, which was equally hearsay.
[1034] Judgement, para. 4949.
[1035] Judgement, para. 4959.
[1036] Judgement, para. 4873.
[1037] TT, TF1-567, 2 July 2008, p. 12906.

evidence that shipments comprising significant materiel were delivered by Tamba and Marzah is from Koker, but he did not know the names of the Liberians who brought them and witnessed only one of the shipments himself.[1038] The Chamber also cited Exhibit P-067, which refers to Taylor supplying Bockarie with materiel, but has no mention of Tamba and Marzah in this context. Thus there is no credible evidence that Tamba and Marzah brought significant materiel to the RUF/AFRC in 1998.

527. Therefore, given the vast preponderance of evidence that Tamba and Marzah brought small or insignificant amounts of materiel, which did not assist the RUF/AFRC,[1039] and given the errors made by the Chamber in respect of the little evidence it deemed suggested they brought large amounts of materiel, no reasonable chamber could have found that the shipments delivered by Tamba and Marzah in 1998 amounted to substantial assistance.

528. The direct evidence that any of this ammunition was taken to the field is based solely on the evidence of Alimany Bobson Sesay,[1040] who testified that he overheard a radio communication from Bockarie stating that Taylor had arranged for him [Bockarie] to obtain materiel, and that Bockarie instructed the RUF/AFRC commanders to collect the ammunition for use in Kono.[1041] Alimany Sesay claims that he later saw what he presumed to be this ammunition in boxes marked "Armed Forces of Liberia".[1042]

529. No reasonable chamber could have convicted on such evidence alone. The marking of the boxes is in no way probative that Taylor knew of, or participated in, the shipment. The Defence conceded throughout trial that some supplies may have filtered into Sierra Leone, including by way of corrupt Liberian officials; and indeed the Chamber found that such a private trade existed.[1043] The presence of a box marked "AFL" is, therefore, of no probative value in assessing Taylor's participation. The evidence of Taylor's involvement depends on Alimany Sesay's uncorroborated hearsay evidence. As a matter of law or fact, the Chamber could not have relied on this evidence to directly incriminate Taylor.[1044] The Chamber offers no analysis

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[1038] TT, TF1-114, 15 Jan. 2008, pp. 1286-7, 1293-4.
[1039] Judgement, para. 4960.
[1040] Judgement, paras. 5581-91.
[1041] Judgement, para. 5567.
[1042] Judgement, para. 5567.
[1043] Judgement, para. 5817 ("the Trial Chamber accepts that private trade with AFL officers on the Sierra Leonean-Liberian border was an additional source of supply for the RUF.")
[1044] See Section I of the Defence Appeal Brief.

whatsoever of Bockarie's reliability or whether, at the moment he made the incriminating statement, he would have had any reason to deceive Sesay. Had it done so, it would have had to consider that Bockarie had just before usurped Koroma's position and was, in effect, involved in an internal power-struggle with what remained of the RUF/AFRC alliance. He obviously had a motive to give the impression that Taylor supported him. The absence of any such analysis reflects the Chamber's failure to exercise due caution in analysing evidence that it relied upon to make a highly incriminating finding. No reasonable trier of fact would have been so cavalier, and no court as a matter of law could have relied decisively on an uncorroborated hearsay statement that, by its very nature, the Defence had no opportunity to test or cross-examine.

530. The Chamber claimed that Sesay's evidence was corroborated by evidence of other witnesses who testified generally that materiel made its way to this area from Liberia.[1045] These allegations again are not probative that any of these shipments originated with Taylor's knowledge or participation.

*(c) Fitti Fatta*

**(1) No Reasonable Trial Chamber Could Have Found That Any Materiel Supplied By Taylor Contributed Substantially to the Commission of Crimes in Fitti-Fatta**

531. The discussion of the Chamber's errors in respect of Taylor's alleged supply of arms directly to Bockarie or through intermediaries in respect of Kono is equally applicable in respect of Fitti-Fatta, a battle that occurred shortly afterwards. Those submissions will not be repeated.

532. The alleged support did not contribute substantially to any crimes. Indeed, the Chamber made no findings that crimes were committed at Fitta-Fatta. The RUF obtained no territory as a result of this battle and was in fact badly defeated. Even assuming that any materiel supplied by Taylor was used in this operation, the Chamber made no findings committed in the course, or as a result, of this alleged assistance. This negates the actus reus of aiding and abetting.

533. Even assuming that any such crimes were committed, no reasonable chamber could have found that any assistance allegedly provided by Taylor substantially assisted crimes committed in Operation Fitti Fatta. The Chamber found that the

[1045] Judgement, paras. 5587-9.

RUF/AFRC obtained ammunition for the attack on Kono from different sources, and Taylor was one of those sources.[1046] However, the Chamber found it could not determine the quantity of ammunition it deemed that Taylor supplied.[1047] Indeed it noted that Mongor testified Taylor supplied only a "small quantity" of ammunition. By contrast, TF1-375, whom the Chamber recognised could not be believed without corroboration, testified that Taylor supplied a large amount of ammunition, but because this is uncorroborated, the Chamber does not seem to have relied on it.[1048]

534. Because there was insufficient evidence on the amount of assistance Taylor was alleged to have provided, a fundamental aspect of the allegation as a whole, it was not possible for the Chamber to conclude that any role played by Taylor in Operation Fitti Fatta amounted to substantial assistance. A finding of aiding and abetting was not available to the Chamber and accordingly its conclusions on this point amount to a miscarriage of justice.

*(d) Operations in the North*

(1) No Reasonable Trial Chamber Could Have Found That Any Materiel Supplied By Taylor Contributed Substantially to the Commission of Crimes By the AFRC in the North

535. The discussion of the Chamber's errors in respect of Taylor's alleged supply of arms directly to Bockarie or through intermediaries in respect of Kono is equally applicable in respect of crimes in the North. Those submissions will not be repeated.

536. The Chamber found that ammunition provided by Taylor for Fitti Fatta was used by SAJ Musa and Denis Mingo in attacks on Mongor Bengedu and Kabala, which included the commission of crimes; and by another AFRC group headed by Alex Tamba Brima (a.k.a. Gullit) in attacks on Koinadugu and Bombali Districts, which included the commission of crimes.[1049]

537. In finding that the Brima group used ammunition supplied by Taylor to commit crimes, the Chamber relied exclusively on Alimany Bobson Sesay, who testified that the group brought the ammunition given to them for use in Kono District in early 1998 (as for the evidence that ammunition was supplied by Taylor, see above)

[1046] Judgement, para. 5628.
[1047] Judgement, paras. 5630-1.
[1048] Judgement, para. 5630.
[1049] Judgement, paras. 5666-7.

with them on their way to Eddie Town,[1050] and the Chamber inferred that ammunition was used in committing crimes.[1051]

538. No reasonable chamber could have made such a finding. The Chamber reached its conclusion on the basis that it was "not implausible" that the ammunition lasted from early 1998 to October 1998, despite the fact that in total the ammunition was no more than one truck load,[1052] together with the lack of evidence that Brima's group received ammunition from other sources. There are three fundamental errors in the Chamber's reasoning.

539. First, "not implausible" does not satisfy proof beyond a reasonable doubt. Second, the Chamber reversed the burden of proof by relying on the Defence's failure to show that Brima's group received its ammunition from alternative sources, even though there was abundant contextual evidence (and findings by the Chamber) that those sources existed in general. Third, Bobson Sesay was not in a position to know the sources of ammunition obtained by Brima's group. Bobson Sesay was part of the group led by Hassan Papa Bangura (a.k.a. Bomb Blast), which made its way from Kono District in the second quarter of 1998 and met up with Brima's group at Tombodu.[1053] This Bangura/Sesay group brought ammunition allegedly supplied by Bockarie, but Bobson Sesay never identifies the source of Brima's. The evidence does not exclude that Brima's ammunition came from elsewhere. No reasonable chamber could have excluded the reasonable possibility that the ammunition used in the commission of crimes came from Bockarie or Taylor. The Chamber's finding occasions a clear miscarriage of justice.

540. The Chamber's other finding with regards to operations in the North, is that the ammunition supplied by Taylor for Fitti Fatta was brought by Mingo as he moved north and used to commit crimes in northern Sierra Leone.[1054] The Defence has argued above that Chamber was not entitled to conclude that the ammunition used in Fitti Fatta constituted substantial assistance by Taylor, and thus, as a consequence, the Chamber was also not entitled to find that Taylor aided and abetted crimes committed in the North with the same ammunition.

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[1050] Judgement, paras. 5654-5.
[1051] Judgement, para. 5659.
[1052] Judgement, para. 5655.
[1053] Judgement, para. 5637; TT, TF1-334, 18 Apr. 2008, p. 8038-9.
[1054] Judgement, para. 5666.

541. However, even assuming that the ammunition provided for Fitti Fatta did constitute substantial assistance by Taylor, no reasonable chamber could conclude that Taylor aided and abetted crimes committed in the North. The Chamber based its finding on the evidence of TF1-375 and Perry Kamara. The Chamber did not find that TF1-375 was a generally credible witness,[1055] and required corroboration, but here believed that it was "plausible" that TF1-375 could tell the difference between the ammunition used in Sierra Leone from that used in Liberia.[1056] No reasonable chamber could have believed this: TF1-375 provided no evidence as to how the types of ammunition were different, and it is unclear how they could have been different, given that ammunition does not differ from country to country but from weapon to weapon. The Chamber was not entitled to believe such obvious nonsense, and this forms the basis for a clear miscarriage of justice.

542. The Chamber believed TF1-375's testimony was supported by that of Kamara, but Kamara testified only that Bockarie instructed Mingo to take the ammunition he was given for the Fitti Fatta operation to SAJ Musa;[1057] there is no evidence he did do so, or that this contained the materiel allegedly supplied by Taylor (indeed it is a reasonable possibility that any Taylor-supplied ammunition was exhausted in Fitti Fatta and so could not have been taken to the North), and the Prosecution never sought from Kamara whether this was the case. The Chamber is not, therefore, entitled to infer from Kamara's evidence that any Taylor-supplied ammunition was taken by Mingo to SAJ Musa.[1058] Kamara's evidence thus does not corroborate TF1-375's account.

543. As TF1-375's account remains uncorroborated, and as TF1-375 was lacking in general credibility, the Chamber was not entitled to rely on him. As its finding relies solely on his evidence, the Chamber has committed an error of fact and law which invalidates its finding and occasions a miscarriage of justice

*(e) Freetown*

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[1055] Judgement, paras. 308-12.
[1056] Judgement, para. 5661.
[1057] Judgement, para. 5660.
[1058] *Delalić* AJ para. 452 ("Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution").

### (1) No Reasonable Chamber Could Have Found Beyond a Reasonable Doubt that Taylor Facilitated the Supply of Military Materiel to the RUF's December 1998-January 1999 Offensive by Facilitating the Burkina Faso Shipment or Supplying the Ammunition Transported by Fornie

544. The Chamber found that around November/December 1998, Charles Taylor was "instrumental" in procuring a large quantity of arms and ammunition for the RUF from Burkina Faso.[1059] The Chamber relied heavily on eight witnesses who gave hearsay testimony based on a single hearsay source – Sam Bockarie – who had told them that he had travelled to Burkina Faso, purchased arms and ammunition, and then transported them overland from Liberia from a cargo plane that had arrived at Roberts International Airport.[1060]

545. The Chamber's treatment of the hearsay is manifestly inadequate. The Chamber did not acknowledge or address that Bockarie was the sole hearsay source for all eight witnesses' testimony.[1061] TF1-371, Mongor, Saidu, Mallah, Kanneh and Keita remained in Sierra Leone throughout the entire episode and were only told the details by Bockarie on his return;[1062] Fornie was present in Liberia,[1063] but only learned of Taylor's alleged involvement through Bockarie.[1064]

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[1059] Judgement, para. 5527.

[1060] TF1-371: Judgement, paras. 5416, 5419. TF1-532: Judgement, paras. 5432-5. TF1-577: Judgement, para. 5441. TF1-567: Judgement, para. 5442. TF1-045: Judgement, para. 5444. TF1-338: Judgement, para. 5448. TF1-574: Judgement, paras. 5450-2. TF1-276: Judgement, para. 5462. TF1-274: Judgement, para. 5425-9. TT, TF1-274, 3 Dec. 2008, pp. 21542-3; 10 Dec. 2008, pp. 22078-9 ("Bockarie told the witness after their arrival in Monrovia that the Papay/CIC Taylor had said that the ammunition had been brought to Burkina Faso where Bockarie was to go and receive it"); 3 Dec. 2008, pp. 21551-2 ("Bockarie told the witness that the trucks had been loaded at Roberts International Airport").

[1061] Judgement, para. 5513 ("The Trial Chamber notes that a significant part of the Prosecution's evidence regarding the events in Liberia and Burkina Faso is hearsay. In particular, TF1-371, Mongor, Saidu, and Kanneh did not participate in the RUF mission to Liberia and Burkina Faso. Their account is based on what they observed while in Sierra Leone before the departure and after the return of the RUF delegation, including Bockarie's statement during the debriefing in Buedu in early December 1998. In these circumstances, the fact that their accounts do not coincide exactly on every particular point of the mission in Liberia and Burkina Faso does not affect their credibility. Nonetheless, the fact that most of the evidence of the witnesses is second hand has been fully considered when assessing the weight of their evidence").

[1062] TF1-371: Judgement, paras. 5416, 5419. TF1-532: Judgement, paras. 5432-5. TF1-577: Judgement, para. 5441. TF1-567: Judgement, para. 5442. TF1-045: Judgement, para. 5444. TF1-338: Judgement, para. 5448. TF1-571: Judgement, paras. 5450-52. TF1-276: Judgement, para. 5462.

[1063] Judgement, para. 5429.

[1064] TF1-274: Judgement, para. 5425-7.

546. The Chamber treats the number of hearsay witnesses as significantly corroborative of the underlying claim that Taylor was involved in the transaction[1065] and that they "complement each other on each critical element of the allegation."[1066] While they may lend credibility to the fact that Bockarie may have boasted that Taylor sponsored or brokered the transaction, no multitude of witnesses can change the fact that there was just a single source for their information: Bockarie himself. The testimony of those eight witnesses cannot, therefore, be accorded more weight than would be accorded to the lone uncorroborated testimony of Bockarie if he were to appear as a witness in court – minus a discount for the Chamber's inability to observe him directly, and the defence's opportunity to cross-examine him. Treating the testimony of eight witnesses as a substantial enhancement of reliability when they all have a common source is an error of law that evidently had a significant impact on the Chamber's reasoning.

547. Indeed, the Chamber not only places undue weight on the spurious corroboration of the hearsay witnesses, but also completely fails to consider Bockarie's reliability. No reasonable trier of fact could have failed to at least consider the overwhelming motivation of a man in Bockarie's position to lie about Taylor's involvement to reinforce his own position as a supposedly privileged interlocutor with the President of Liberia. The Chamber undertook neither of these evaluations which, together, reflect a failure to approach this hearsay testimony – which in the event is directly incriminating of the appellant – with appropriate caution.

548. Two additional witnesses did offer evidence that Taylor was involved in the Burkina Faso shipment, at least to the extent of facilitating its passage from the airport to the Liberian border. Marzah testified that he was told by Taylor about the plan to send Bockarie to Burkina Faso to obtain materiel, and, later in Liberia, Marzah said he saw a cargo plane deliver ammunition at Roberts International Airport,

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[1065] Judgement, para. 5514 ("In the Trial Chamber's view however, Prosecution witnesses' testimonies, including those who were allegedly present in Liberia when the shipment was received, effectively complement each other on each critical element of the allegation"); para. 5515 ("TF1-371, Mongor, Marzah and Saidu all testified that the Accused received diamonds in exchange for his help in obtaining these materials."); para. 5519 ("Sesay's initial testimony, four years closer to the events in question, corroborates the evidence of the Prosecution witnesses including TF1-371, TF1-388, Fornie and Kanneh, who testified that the materiel was purchased in Burkina Faso."); para. 5521 ("Under these circumstances, and in light of the overwhelming evidence of Prosecution witnesses and documentary exhibits that arms were shipped from Burkina Faso to Monrovia and particularly noting his initial testimony corroborating this evidence, the Trial Chamber does not find Sesay's testimony that the arms were procured elsewhere to be credible").

[1066] Judgement, para. 5514.

ammunition which he delivered to the RUF.[1067] Sherif testified that he was told by Taylor to receive a shipment of materiel at the airport and, after it arrived, was told by a superior to accompany the shipment from the airport to White Flower.[1068]

549. Neither of these witnesses could have been accepted as reliable by any reasonable trier of fact. The Chamber noted elsewhere that Marzah consistently gave false testimony and was unreliable.[1069] Even in respect of this transaction, the Chamber determined that Marzah had wrongly claimed in his testimony that Mike Lamin was on the delegation that accompanied Bockarie to Burkina Faso and transited with him through Liberia.[1070] The Chamber does not expressly consider whether this was a lie, or merely a lapse of memory. This failure is, in itself, a significant failure of the Chamber to give reasons, considering the importance of the testimony in respect of this specific incident and especially in light of findings Marzah had given false testimony in respect of other events. With respect to the Chamber, these were strong indications that Marzah was lying, and that he would have no compunction to lie to incriminate Taylor if he felt he could secure some benefit as a result.

550. The final witness who requires consideration is Sherif. The Chamber, despite categorizing him as a generally reliable witness, did discard his testimony elsewhere in the Judgement in respect of certain key events, such as the first trip taken by Bockarie to Monrovia.[1071]

551. Even assuming that Sherif's testimony could have been treated as reliable, it is not probative that Taylor played any role, much less an essential role, in facilitating the arms transaction. Insisting that the arms arriving at the airport be taken to a depot for distribution would prove no more than that someone alerted Taylor to the arrival of such a shipment at the airport, containing materiel which he may have believed was for the exclusive use of Liberian forces.[1072] Sherif conspicuously failed to mention that Taylor told him that he had anything to do with facilitating the shipment on behalf of the RUF.

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[1067] Judgement, paras. 5437-38.
[1068] Judgement, para. 5447.
[1069] Judgement, paras. 263-8.
[1070] The Chamber based this finding on the testimony of TF1-371, who testified that Lamin was not present, as is confirmed by two photographs of the delegation in Burkina Faso. Exh. P-046A; P-046B; TT, TF1-371, 28 Jan. 2008, p. 2402-4.
[1071] Judgement, para. 3852; para. 3855; para. 6543.
[1072] TF1-561 testified that Liberia received shipments from Burkina Faso for its own use: Judgement, para. 4740; TT, TF1-561, 14 May 2008, pp. 9882-5.

552. The documentary evidence does not show that Taylor was involved in the transaction. Exhibit P-063 shows only that the RUF delegation made a "courtesy call" on him. The only possible reference to arms and ammunition is that Bockarie signed a "rich contract" in Burkina Faso, but this is not connected with the "courtesy call" on Taylor. Neither of these two references suggests Taylor was instrumental in procuring materiel, and indeed the Chamber only relied on the exhibit to determine that Burkina Faso was the source of the materiel.[1073]

553. The evidence does not show, and no reasonably trier of fact could have found beyond reasonable doubt, that Taylor was instrumental in procuring the Burkina Faso Shipment. The Chamber's finding thus occasions a miscarriage of justice.

554. A second, much smaller delivery of arms was allegedly provided by Taylor through Dauda Aruna during the Freetown invasion in January 1999. Fornie and others allegedly transported materiel provided by the Charles Taylor from Liberia to Sierra Leone.[1074]

555. Fornie testified that, during the Freetown Invasion, he travelled to Monrovia. There he met with Yeaten, who took Fornie to White Flower and provided him with ammunition to take back to Sierra Leone.[1075] Because the materiel came from White Flower and was facilitated by Benjamin Yeaten, the Trial Chamber concluded that Yeaten was acting on behalf of Charles Taylor, and because of this that Taylor knew about this assistance.[1076]

556. No reasonable trial chamber could have reached such a conclusion. The evidence that Taylor was aware of this transaction is purely circumstantial; therefore, in order for the Chamber's inference to meet the correct standard, of beyond a reasonable doubt, it must be the only reasonable conclusion available.[1077] Here, it is clearly not the only reasonable conclusion. Another reasonable inference from the evidence is that Yeaten was acting without authorisation. While the Chamber did not find that Yeaten traded materiel independently with the RUF on a general basis,[1078] it

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[1073] Judgement, paras. 5519-21.
[1074] Judgement, para. 5130.
[1075] Judgement, para. 5113.
[1076] Judgement, para. 5126 ("While Fornie did not directly testify as to the ammunition originating from the Accused, the Trial Chamber considers that his evidence that it came from White Flower and was facilitated by Benjamin Yeaten, the Accused's subordinate, to be sufficient to establish that the Accused either sanctioned or was aware of the supply to Fornie").
[1077] *Delalić* AJ, para. 458.
[1078] Judgement, para. 2629.

did note that Yeaten could take action without authorisation,[1079] accepted corruption in Yeaten's conduct,[1080] and found that Liberian officers did trade materiel with the RUF in a private capacity, independently of Taylor.[1081] It cannot be excluded that in this transaction, Yeaten was acting in a private capacity; especially, in this context, as there was no mention of Taylor. This possibility should have been considered by the Chamber, and, because it was a reasonable possibility that Yeaten was acting independently, its failure to do so constitutes an error which occasions a miscarriage of justice.

**(2) The Evidence Does Not Establish Beyond a Reasonable Doubt That Any of the Materiel Supplied to the RUF/AFRC in the Burkina Faso Shipment and/or the Shipment Escorted by Fornie During the Freetown Invasion Was Used in the Commission of Crimes**

557. The section addresses three potential links between the supplies provided by Taylor and crimes: (i) crimes in the initial operations in Kono and Kenema; (ii) crimes committed in Freetown and the Western Area using materiel brought by Sesay; and (iii) crimes committed in Freetown and the Western Area using materiel brought by Rambo Red Goat.

558. The Chamber made no findings that crimes were committed in Kono and Kenema during the offensive commencing in December 1998. The Chamber does at one point state that "the arms and ammunition from the Burkina Faso shipment were … used in attacks in Kono and Kenema in December 1998 … and in the commission of crimes in the Kono and Makeni districts."[1082] But this finding is, in turn, based on the section of the Judgement entitled "Factual and Legal Findings on Alleged Crimes."[1083] A review of that section of the Judgement, as discussed in Ground 15, shows that there were no findings of crimes committed during this offensive, although there are findings that crimes may have been committed earlier in year – i.e. before the arrival of the Burkina Faso shipment.[1084] The Chamber implicitly recognizes this at paragraph 5718, claiming that Kono and Kenema were not essential to its findings:

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[1079] Judgement, para. 2623.
[1080] Judgement, para. 2628.
[1081] Judgement, para. 5817.
[1082] Judgement, para. 5719.
[1083] Judgement, para. 5717.
[1084] Judgement, para. 1424 ("approximately December 1998"); para. 1540 ("approximately August through December 1998"); para. 1694 ("approximately December 1998 onwards").

"even if it were the case that no crimes were committed in these districts [Kono (including Kenema) and Bombali (including Makeni)] ... crimes, including rape, were committed in Freetown and the Western Area."[1085] Finally, the Chamber's "Arms and Ammunition" findings declare that the Burkina Faso shipment was used in crimes in Freetown and the Western Area, but conspicuously avoids such a finding in respect of Kono District and Makeni.[1086] The only proper reading of the Judgement, therefore, is that the Chamber, notwithstanding the one errant reference in paragraph 5719, did not find that crimes were committed in Kono and Makeni. It follows that Taylor could not have been convicted of aiding and abetting crimes that were not found by the Chamber.

559. The Chamber's reasoning about the alleged materiel brought by Issa Sesay to the environs of Freetown in the third week of January 1999, and allegedly given to Gullit's group in Macdonald, has already been discussed in Grounds 21 and 22.[1087] The Chamber was unable to determine whether that materiel came from the Burkina Faso or Fornie supplies, or had been captured from ECOMOG.[1088] Even assuming that this was not an error, the Chamber further erred by merely assuming, without any evidence, that Issa Sesay distributed ammunition to Gullit's group. The Chamber admitted that it had no such evidence, merely inferring that such distribution was "likely".[1089] This falls blatantly short of the required standard of proof. The Chamber therefore erred in finding beyond a reasonable doubt that materiel from the Burkina Faso shipment was distributed by Sesay to Gullit's forces and used in, let alone substantially contributed to, any crimes.

560. The Chamber's finding that materiel from the Burkina Faso shipment was used in crimes, therefore, boils down to Alimany Bobson Sesay's uncorroborated hearsay testimony that Rambo Red Goat entered Freetown armed with materiel from

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[1085] Judgement, para. 5718.
[1086] Judgement, para. 5835 (xxxiii)-(xxxiv).
[1087] Judgement, para. 5720.
[1088] Judgement, para. 5710; para. 5715-6; para. 5721.
[1089] Judgement, para. 5710. The Chamber similarly found that it was "likely" that Fornie's materiel arrived in Freetown via Issa Sesay. Judgement, para. 5714. Fornie did not testify to this, and the Prosecution failed to clarify the point with him, which should lead to an adverse inference against the finding, even assuming that the "likely" standard was remotely satisfactory for such a finding, which it is not. See *Delalić AJ*, para. 452 ("Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution").

the Burkina Faso shipment.[1090] This, as on so many other occasions, is another example of the Chamber relying on an uncross-examined, and effectively untestable evidence, to make a highly incriminating factual finding. This was both a legal error, and an error of fact that could not have been committed by a reasonable chamber. But even assuming that Bobson Sesay's uncorroborated hearsay testimony was remotely sufficient, the Chamber did not find either that Rambo Red Goat's group itself committed crimes,[1091] or that they distributed their weapons or ammunition to Gullit's forces.[1092] The Chamber's conclusion that Rambo Red Goat's was armed with materiel from the Burkina Faso shipment therefore does not substantiate the different and further claim that this materiel was used in, much less substantially contributed to, the commission of crimes in Freetown or the Western Area.

*(iv) No reasonable chamber could have found that Taylor substantially contributed to crimes committed in 1999, 2000 and 2001*

*(a) Overview*

561. The Chamber found that, from 1999 to 2001, Taylor substantially contributed to the commission of crimes by the RUF/AFRC through his participation in (i) the March 1999 Shipment;[1093] (ii) providing Bockarie with a helicopter of materiel as alleged by TF1-567;[1094] (iii) shipments during the period Issa Sesay was leader of the RUF: through Tamba, Marzah, Weah and others;[1095] during Sesay's trip to Liberia in May 2000;[1096] during trips made by Sesay to Liberia in 2000 to 2001;[1097] and during trips made by TF1-567 and Saidu.[1098] These shipments formed part of the overall supply of materiel used by the RUF/AFRC, and on that basis, the Chamber held Taylor liable for substantially contributing to all crimes committed by the RUF/AFRC from 1999 to 2001.[1099]

562. No reasonable chamber could have reached such conclusions. The Chamber made identifiable errors in its treatment of hearsay evidence, circumstantial evidence

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[1090] Judgement, para. 5706-8 ("the Trial Chamber considers credible Bobson Sesay's evidence that Rambo Red Goat told him it came from Bockarie's distribution prior to advancing towards Kono and Makeni, although Red Goat did not disclose whether the ammunition he brought came from Liberia").
[1091] See Ground 6, Section (v).
[1092] Judgement, paras. 5707-8.
[1093] Judgement, para. 5096.
[1094] Judgement, para. 5110.
[1095] Judgement, para. 5163.
[1096] Judgement, para. 5195.
[1097] Judgement, para. 5224.
[1098] Judgement, paras. 5250-1.
[1099] Judgement, paras. 5752-3.

and purported corroboration, just as it did for the other shipments recorded above. Moreover, in convicting Taylor of accessory liability, the Chamber contradicted its own findings. On the one hand, it recognised that following the Freetown Invasion, there was insufficient evidence to find that materiel supplied by Taylor in 1999,[1100] 2000 and 2001,[1101] was used to commit crimes, and accepted that in many cases it could not establish the size of shipments,[1102] or that materiel provided was ever used.[1103] On the other hand, the Chamber found that Taylor was involved in a number of shipments which were delivered to the RUF/AFRC after the Freetown Invasion, which formed "part of the overall supply of materiel" used by the RUF, and which in such a way made Taylor liable as an accessory for the crimes the RUF committed.[1104]

563. On account of such irreconcilable contradictions, the only proper remedy is to reverse the Chamber's conviction for aiding and abetting in respect of these shipments.

564. Section (b) below examines the March 1999 Shipment; section (c) examines the Chamber's finding that Taylor provided Bockarie with a helicopter of ammunition in 1999; section (d) examines all the shipments Taylor was found to have assisted during Issa Sesay's time as RUF leader in 2000 and 2001; and section (e) examines the errors relating to the finding that these shipments substantially contributed to the crimes.

*(b) The Evidence Does Not Establish Taylor's Participation in the March 1999 Shipment*

565. The Trial Chamber found that on Bockarie's trip to Monrovia around March 1999, he brought back a large shipment of materiel supplied by Taylor.[1105] The Chamber based its finding on the testimonies of TF1-371, TF1-567, TF1-585 and Karmoh Kanneh, which it deemed corroborated each other.[1106]

566. No reasonable chamber could have found that the four witnesses in question corroborated each other. Of these witnesses, only TF1-371 testified specifically to the event in question. His evidence was that, just after the Freetown Invasion, Bockarie

[1100] Judgement, para. 5745.
[1101] Judgement, para. 5751.
[1102] Judgement, paras. 5160-1; paras. 5223-4; para. 5249.
[1103] Judgement, paras. 5160-1; para. 5248.
[1104] Judgement, paras. 5752-3.
[1105] Judgement, para. 5096.
[1106] Judgement, para. 5094.

travelled to Monrovia and returned with a consignment of materiel;[1107] and that this shipment was one of the three major shipments obtained by the RUF/AFRC.[1108] By contrast, none of the other witnesses were specific enough to justify the Chamber's conclusion that they were referring to this same event. TF1-567's evidence was simply a general statement that Tamba, Marzah and others brought ammunition from Liberia to the RUF, which the Chamber recognised.[1109] However, it wrongly used this evidence to support TF1-371's testimony, by claiming that it supported "the arrival of a shipment of arms and ammunition around this time".[1110] TF1-567's evidence cannot be used to support the transportation of the March 1999 Shipment as described by TF1-371, because TF1-567's evidence refers to transportation of materiel by Tamba and Marzah (which the Chamber addressed elsewhere); he does not mention Bockarie transporting a large shipment at this time, and so if anything TF1-567's testimony undermines TF1-371's account.

567. Likewise, Kanneh was not specific. He was unclear about when the shipment occurred, leaving the Chamber to deduce he was referring to the March 1999 Shipment because it occurred when LURD invaded Lofa.[1111] However, this is not specific enough to tie it to this date, as LURD made several attacks on Lofa;[1112] and, moreover, it is unlikely Kanneh was referring to the March 1999 Shipment, which was said by TF1-371 to be one of the three major shipments received by the RUF/AFRC, because he testified that the quantity of ammunition it delivered was "few".[1113] The final witness, TF1-585, testified that Bockarie travelled to Liberia to see Taylor two weeks after the troops retreated from Freetown in 1999; when Bockarie returned from the trip, a day later Jungle brought ammunition.[1114] It is clear

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[1107] Judgement, para. 5048.
[1108] Judgement, para. 5048.
[1109] Judgement, para. 5091 ("TF1-567's testimony does not actually cite a specific shipment. Rather, the way TF1-567 phrased his evidence — "I used to see them bring ammunition" — suggests he was referring to multiple occasions over the period of time he was stationed in Buedu. He stated that when they delivered this ammunition, Marzah, Jungle, and Mike Lama told him that it was the Accused who sent it. However, the Trial Chamber considers that TF1-567's testimony generally supports the arrival of a shipment of arms and ammunitions sent by the Accused to the RUF around this time").
[1110] Judgement, para. 5091.
[1111] Judgement, para. 5090.
[1112] The Chamber did not make factual findings with respect to when exactly and on how many occasions LURD attacked Lofa, but did state that it was "undisputed" there was a "fluctuating battle" in Lofa between LURD and the AFL between 1999 and 2001: Judgement, para. 6722. TF1-516, whom the Chamber deemed credible, testified that in 1999 Voinjama changed hands four times: Judgementpara. 6673. Therefore, it would be impossible to state with any certainty that Kanneh was referring to March 1999 simply because he described a LURD attack on Lofa.
[1113] Judgement, para. 5049.
[1114] Judgement, para. 5050.

from this that TF1-585's testimony does not refer to the same event as described by TF1-371 or by the Chamber. TF1-371 and the Chamber specify that it was Bockarie who returned with the consignment, not Jungle, whereas TF1-585 is specific about it being Jungle who brought the materiel. This cannot be the March 1999 Shipment, brought by Bockarie from Monrovia to Buedu.

568. Given the serious discrepancies between the four accounts, no reasonable Chamber could have concluded that the testimonies of these four witnesses referred, beyond reasonable doubt, to the same event. The Chamber erred in fact in concluding that the testimonies of TF1-371, TF1-567, TF1-585 and Karmoh Kanneh corroborated each other in relation to the March 1999 Shipment.

569. Consequently, only TF1-371 referred to this shipment beyond reasonable doubt, and so any conviction must be based on his uncorroborated hearsay evidence. Yet, his evidence, as the Chamber noted, did not state that the shipment was sent by Taylor.[1115] The Chamber inferred from TF1-371's evidence that Taylor sent it. No reasonable Chamber could safely convict on an inference based on uncorroborated hearsay evidence. On this basis, the Chamber's finding is an error of law and fact, invalidating its finding and occasioning a miscarriage of justice.

570. In addition or alternatively, the Trial Chamber erred in finding that the quantity of materiel was large. In doing so, the Chamber based its finding exclusively on the evidence of TF1-371.[1116] However, as the Trial Chamber recognised, TF1-371 had not mentioned the shipment in previous statements to the Prosecution and testified that he had initially forgotten about it.[1117] By contrast, the Trial Chamber believed that Karmoh Kanneh testified about the same shipment, but rejected his description of the quantity of materiel delivered as "few", on the basis that Kanneh

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[1115] Judgement, para. 5093.

[1116] Judgement, para. 5095 ("In relation to the quantity of the shipment, TF1-371 testified that the shipment was "large" and "major" and was physically transported to Buedu by "pick-ups and trucks". The Trial Chamber notes that while Karmoh Kanneh described the materiel that Bockarie as "few", he initially could not recall the quantity of ammunition they received. In these circumstances, the Trial Chamber accepts TF1-371's testimony that the shipment was large").

[1117] Judgement, para. 5089 ("While TF1-371 described it as one of three "major shipments" received by the RUF, along with the Magburaka shipment in October 1997 and Burkina Faso shipment in November/December 1998, the Trial Chamber notes that his testimony concerning the March 1999 shipment was not as detailed as that relating to the other shipments. TF1-371 failed to mention the alleged March 1999 shipment in an earlier interview in February 2006 and could not explain his failure to do so except for stating that it was "human nature" to forget events that had not occurred "for years". In another prior interview on November 2005 the witness had testified to there being three major shipments, including one in April 1998 and the Magburaka Shipment but did not mention the alleged March 1999 shipment explicitly. The witness also acknowledged that he had forgotten the March 1999 shipment in these interviews").

could not initially recall the quantity.[1118] While the Chamber was of course entitled to reject Kanneh's evidence and accept that of TF1-371, it was not free to do so for a deficiency that equally applied to TF1-371, without significant justification. In the absence of such a justification, a reasonable Chamber faced with the same facts would have been unable to have concluded that the shipment was either large or small. The Trial Chamber has thus erred in fact in finding the shipment was large.

571. Consequently, because there was insufficient evidence on fundamental aspects of the shipment, namely its size, it was not possible for the Chamber to conclude that any role played by Taylor relating to the shipment amounted to substantial assistance. A finding of aiding and abetting was not available to the Chamber and accordingly its conclusions on this point amount to a miscarriage of justice.

*(c) The Evidence Does Not Establish Taylor's Participation in Providing Bockarie with a Helicopter of Materiel At An Undefined Time after the Freetown Invasion, and Between August and October 1999*

572. The Trial Chamber found that Bockarie made a trip to Monrovia as part of the Lomé delegation and returned to Sierra Leone in or around late September to October 1999 with a helicopter of materiel supplied by Charles Taylor.[1119]

573. This finding was based impermissibly on the uncorroborated hearsay evidence of TF1-567.[1120] TF1-567 testified that Yeaten, in the witness's presence, explained to Bockarie that the materiel loaded in the helicopter Bockarie had boarded had been given to him by Taylor.[1121] He is the only witness who testified about this specific allegation, and thus the Chamber was not entitled to convict based solely on his uncorroborated hearsay.[1122]

574. The Chamber wrongly decided that TF1-567's allegation was "supported by the evidence that Bockarie made trips to Monrovia during 1999 from which he

[1118] Judgement, para. 5095.
[1119] Judgement, para. 5110.
[1120] Judgement, para. 5108 ("The Trial Chamber finds that TF1-567's account is reliable, supported by the evidence that Sam Bockarie made trips to Monrovia during 1999 from which he returned with ammunition. For this reason, the Trial Chamber accepts TF1-567's evidence that Bockarie did make a trip to Monrovia at an undefined time after the Freetown invasion from which he returned with a supply of ammunition").
[1121] Judgement, para. 5099 ("The next day Bockarie, TF1-567 and Benjamin Yeaten went to Spriggs Field, where the witness boarded a helicopter with Bockarie which was loaded with up to 15 "sardine" tins of AK rounds and an "RPG bomb with the TNT". Yeaten explained to Bockarie that this materiel was given to him "by my dad, Charles Taylor" to take to Buedu for the purpose of "keeping security" while Sankoh was in Freetown").
[1122] See e.g. *Gotovinia* TJ Vol. I, para. 43 ("The Trial Chamber used as a standard that it would not enter a conviction where the evidence supporting that conviction was based solely on hearsay evidence").

returned with ammunition".[1123] This is a general assertion that mentions nothing probative regarding Taylor's accessory liability as to the allegation at hand, and thus cannot be used as corroboration to convict.

575. The Trial Chamber also failed to assess the credibility of the source of hearsay evidence, namely Benjamin Yeaten. In TF1-567's evidence, Yeaten told Bockarie that Taylor had given Yeaten the materiel in question.[1124] Although the Trial Chamber concluded that TF1-567's account was credible, it did not assess whether Yeaten's purported comments were likely to have been true. As Taylor's subordinate, Yeaten was hardly likely to tell Bockarie that Taylor did not sanction his actions, and had every reason to suggest that Taylor supported what he was doing. Equally, given the Chamber acknowledged that Yeaten could take action without authorisation,[1125] was corrupt,[1126] and that Liberian officers did trade materiel with the RUF in a private capacity, independently of Taylor,[1127] the Chamber was not justified in accepting Yeaten's purported statement without examining its truth or lack thereof. The absence of any such analysis reflects the Chamber's failure to exercise due caution in analysing evidence that it relied upon to make a highly incriminating finding. No reasonable trier of fact would have done so, and no court as a matter of law could have relied decisively on an uncorroborated hearsay statement that, by its very nature, the Defence had no opportunity to test or cross-examine.

576. For the above reasons, the Trial Chamber's finding that Bockarie made a trip to Monrovia as part of the Lomé delegation and returned to Sierra Leone in or around late September to October 1999 with a helicopter of materiel supplied by Charles Taylor,[1128] is invalid and represents a miscarriage of justice.

*(d) The Evidence Does Not Establish Taylor's Participation in Providing the RUF with Materiel While Issa Sesay Was Leader, 2000 to 2001*

577. The Chamber found that Taylor provided the RUF with materiel in four different ways whilst Issa Sesay was leader: through Tamba, Marzah, Weah and

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[1123] Judgement, para. 5108.
[1124] Judgement, para. 5099 ("The next day Bockarie, TF1-567 and Benjamin Yeaten went to Spriggs Field, where the witness boarded a helicopter with Bockarie which was loaded with up to 15 "sardine" tins of AK rounds and an "RPG bomb with the TNT". Yeaten explained to Bockarie that this materiel was given to him "by my dad, Charles Taylor" to take to Buedu for the purpose of "keeping security" while Sankoh was in Freetown").
[1125] Judgement, para. 2623.
[1126] Judgement, para. 2628.
[1127] Judgement, para. 5817.
[1128] Judgement, para. 5110.

others;[1129] during Sesay's trip to Liberia in May 2000;[1130] during trips made by Sesay to Liberia in 2000 to 2001;[1131] and during trips made by TF1-567 and Saidu.[1132]

**(1) Supply Through Tamba, Marzah and Weah**

578. No reasonable chamber could have concluded that Taylor participated in the shipments transported by Tamba, Marzah, Weah and others. The Chamber relied on Marzah's evidence, but only in so far as it was supported by TF1-516. TF1-516 made no claim that Taylor participated in the shipments: he gave evidence that he enabled communications between Sesay and Yeaten.[1133] That Sesay requested and was provided with materiel by Yeaten thus relies on TF1-516's uncorroborated hearsay evidence, and the finding that Taylor participated in this process must be inferred from this evidence. Such an inference, from uncorroborated hearsay evidence, would hardly make for a safe conviction even if it could be justified by appropriate analysis, but the Chamber undertook no examination of whether such an inference was in fact justified; it merely concluded without analysis that Taylor supplied this materiel through Yeaten,[1134] which consitutes an error to give a reasoned judgement. Independently of this, the Chamber found that Taylor did supply the RUF through Roland Duoh, relying on the evidence of TF1-567 and Sherif.[1135] However, this evidence cannot support the finding that Taylor supplied materiel through Yeaten, Tamba, Marzah or Weah, relating as it does to a different intermediary.

**(2) Supply Through Issa Sesay in May 2000**

579. No reasonable chamber could have found that Taylor provided Sesay with materiel on a trip to Liberia in May 2000. In doing so, the Chamber relied on the evidence of TF1-338, which it believed was corroborated by the evidence of TF1-567, Keita and Kamara. It noted the inconsistencies in the witnesses' testimonies,[1136] yet maintained they were sufficiently similar to corroborated each other.[1137] However, they do not corroborate each other; they each relate to a different time.

580. This can be seen if the evidence is laid out in chronological order, as follows. First in time is TF1-338, who testified that Sesay made two trips to Monrovia in May

[1129] Judgement, para. 5163.
[1130] Judgement, para. 5195.
[1131] Judgement, para. 5224.
[1132] Judgement, paras. 5250-1.
[1133] Judgement, para. 5154.
[1134] Judgement, para. 5159.
[1135] Judgement, para. 5156.
[1136] Judgement, para. 5189.
[1137] Judgement, para. 5191.

2000, and received materiel after the first trip he made.[1138] It was on the second trip that he discussed the release of the hostages.[1139] By contrast, Keita testified that Sesay returned to Makeni with ammunition following a meeting to discuss the release of the hostages (i.e. the second trip in TF1-338's account) but before the UN hostages were released.[1140] For his part, TF1-567 testified that Sesay was given ammunition in Monrovia whilst he was there to discuss the release of the peacekeepers (again, the second trip in TF1-338's account). Last in time is Kamara, who testified that Sesay received ammunition which had been sent in the same helicopter which came to pick up the UN hostages in Foya, i.e. as the hostages were being released, and were in Liberia (and so on a separate and later trip).[1141]

581. It is clear from the above that the four witnesses cannot be testifying about the same shipment: the materiel TF1-338 testified about was supplied to Sesay on an earlier trip, and in Kamara's testimony the materiel was provided after the peacekeepers were released. Only in Keita's and TF1-567's testimonies was materiel provided after the meeting to discuss the release of the peacekeepers but before they were actually released. However, as the Chamber noted, Keita and TF1-567 do not corroborate each other because Keita never mentioned a helicopter,[1142] and even if the Chamber was entitled to conclude that TF1-567 and Keita testified about the same event, it was not entitled to conclude that event was the same as the one mentioned by TF1-338, which is clearly earlier in time.

582. Therefore, no reasonable chamber could have found that TF1-338 was corroborated by TF1-567, Keita and Kamara.. While the Chamber was free to accept TF1-338's evidence and reject those of TF1-567, Keita and Kamara, or to accept all the witnesses' accounts as relating to separate acts of assistance, the Chamber did not do so, finding that the evidence only supported one single act of assistance, namely the episode as described by TF1-338. However, as TF1-338's evidence is uncorroborated, the Chamber's finding on the assistance provided was impermissible,[1143] and thus invalid.

**(3) No Practical Or Substantial Assistance**

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[1138] Judgement, para. 5167.
[1139] TT, TF1-338, 2 Sept. 2008, p. 15142.
[1140] Judgement, para. 5169. Sesay returned to Makeni with the ammunition and then discussed releasing the peacekeepers.
[1141] Judgement, para. 5189.
[1142] Judgement, para. 5189.
[1143] See Section 1 of the Defence Appeal Brief.

583. No reasonable chamber could have concluded that (i) the shipments transported by Tamba, Marzah, Weah and others, (ii) the materiel provided to Sesay during trips he made to Liberia in 2000 to 2001, and (iii) the materiel transported by TF1-567 constituted substantial assistance. For all these shipments, the Chamber could not determine the quantity of the materiel involved.[1144] On account of the Chamber's inability to determine the size of the shipment, the Chamber was not entitled to conclude that the shipments represented substantial assistance, and thus that Taylor had liability for aiding and abetting in respect of them. The Chamber's findings on these occasions are invalid and represent a miscarriage of justice.

584. No reasonable chamber could have found that (i) the shipments transported by Tamba and others, and (ii) the materiel transported by Saidu, constituted assistance. In respect of these shipments, the Chamber was unable to determine whether the materiel was ever used in Sierra Leone.[1145] Indeed, the Chamber noted that Saidu testified that the rifles he transported were never used.[1146] The Chamber was therefore not entitled to find these shipments constituted assistance of any kind, and thus that Taylor had liability for aiding and abetting in respect of them. The Chamber's findings on these occasions are invalid and represent a miscarriage of justice.

*(e) The Evidence Does Not Establish Beyond a Reasonable Doubt That Any of the Materiel Supplied to the RUF/AFRC through Tamba, Marzah and Weah, in the March 1999 Shipment, in Bockarie's Helicopter of Materiel, in Fornie's Shipment During the Freetown Invasion and/or Provided to Issa Sesay Was Used in the Commission of Crimes*

585. The Chamber found that there was insufficient evidence to find conclusively that materiel supplied by Taylor in 1999,[1147] and 2000 to 2001,[1148] was used to commit crimes. However, the Chamber concluded that the materiel formed "part of the overall supply of materiel" used by the RUF, which included the commission of crimes.[1149]

586. The Chamber's conclusion that the materiel supplied by Taylor formed "part of the overall supply of materiel", and that it was not necessary to distinguish what crimes the Taylor-supplied materiel assisted is an error of law which has been

[1144] Judgement, paras. 5160-1; paras. 5223-4; para. 5249.
[1145] Judgement, paras. 5160-1.
[1146] Judgement, para. 5248.
[1147] Judgement, para. 5745.
[1148] Judgement, para. 5751.
[1149] Judgement, paras. 5752-3.

addressed under Grounds 21 and 22. Equally, the Chamber was wrong to conclude that materiel which it accepted was never used,[1150] or which it could not show was ever used,[1151] was "used" by the RUF. The evidence is that it was not used; it was not open for the Chamber to conclude that it was.

587. The Chamber was not entitled to find that materiel which it accepted was never used,[1152] or which it could not show was ever used,[1153] or which it could not determine constituted substantial assistance,[1154] assisted the commission of crimes. In doing so the Chamber committed an error of both law and fact, invalidating its finding and occasioning a miscarriage of justice.

**d. ERRORS RELATING TO THE MATERIAL ELEMENT: MILITARY PERSONNEL**

**i. GROUND OF APPEAL 24: The Trial Chamber erred in fact and in law in finding that Charles Taylor provided substantial assistance to crimes in the form of persons whom he did not control.**

*(i) Overview*

588. The Chamber erred in law and fact by relying on Alice Pyne's unsourced and uncorroborated second-hand hearsay evidence as the sole basis for finding that Mr. Taylor sent 20 former NPFL fighters to Sierra Leone.[1155] It committed a further error by rejecting Pyne's alternate testimony that Senegalese and the 20 fighters belonged to the STF, without any independent corroboration of her and Alimany Bobson Sesay's opinions.

589. Even assuming that Pyne's evidence was a sufficient basis on which to find that Mr. Taylor knew about, and approved of, the adhesion of these 20 fighters to the RUF, no reasonable trial chamber could have concluded that these individuals would engage in criminal conduct, instead of restricting themselves to lawful combat. Mr. Taylor had no control over the deployment or activities of these soldiers, and to impute their actions to him in that context is an error of law and fact.

590. Even assuming that neither of the foregoing errors were committed, no reasonable trial chamber could have found, and the Chamber did not find, that these 20 fighters substantially contributed to the commission of crimes. The evidence could

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[1150] Judgement, para. 5248.
[1151] Judgement, paras. 5160-1.
[1152] Judgement, para. 5248.
[1153] Judgement, paras. 5160-1.
[1154] Judgement, paras. 5160-1; paras. 5223-4; para. 5249; and see the arguments in respect of the March 1999 Shipment above.
[1155] Judgement, para. 4384.

not, and did not, sustain a finding that the presence of these 20 fighters had any effect, much less a substantial effect, on the crimes of other persons, particularly in light of the errors enumerated in Ground 23 concerning the alleged source of their arms.

591. Any and all of these errors require that these findings be quashed, along with Mr. Taylor's convictions on Counts 1 to 11 for aiding and abetting crimes committed in in Bombali District and during the Freetown Invasion.

*(ii) The Chamber erred in fact and law in finding that Charles Taylor sent 20 former NPFL fighters to Sierra Leone*

*(a) The Chamber erred in fact and law by accepting Alice Pyne's unsourced and uncorroborated second-hand hearsay evidence as the sole basis for an adverse finding of fact*

592. Alice Pyne testified that Senegalese told her that "Charles Taylor had sent him and others to Sam Bockarie and Sam Bockarie sent them to Superman".[1156] The Chamber's finding rests on this evidence alone, as no other witness or documentary evidence corroborated this claim.

593. No reasonable trial chamber could have found the fact proven on the basis of this evidence. Pyne gives no details that would assist the Chamber in assessing its reliability. Most obviously, Senegalese does not explain whether the basis for this claim is something that he was told by Mr. Taylor, or whether Senegalese merely believed this based on what he was told by someone purporting to act on Mr. Taylor's behalf. Senegalese's reliability is cast into further doubt by the absence of any evidence of any prior relationship with Mr. Taylor or anyone else in the Liberian government.[1157] Indeed, Senegalese's identity is in doubt, as there were apparently multiple individuals potentially known by this name.[1158] The nature of this evidence is so vague that it is essentially untestable. For the reasons set out in Ground 1, reliance on this evidence to infer a directly incriminating fact was an error of law; further, no reasonable trial chamber, exercising due caution and being aware of the principles set

[1156] TT, Alice Pyne, 19 June 2008, p. 12258:29-12259:1.

[1157] As the Chamber noted, witnesses variously identified Senegalese as associated with Charles Taylor's Special Forces (TF1-375, Varmuyan Sherif, Jabaty Jaward); the SLA before the ECOMOG intervention (TF1-516); the RUF during the Junta (Samuel Kargbo); ULIMO or NPFL in 1997 (TF1-367); ULIMO before that group split (Komba Sumana, Augustine Mallah, Issa Sesay): Judgement, para. 4380.

[1158] While the Chamber found that witnesses consistently identified Senegalese as Liberian (Judgement, para. 4380), the evidence suggests that "Senegalese" was a nickname given to a person who was tall (see, for example, TT, DCT-008, 31 August 2010, pp. 47647:3 - 47648:1.)

out in Ground 2, could have accepted this evidence as a basis for the incriminating finding.

594. The purported reliance on TF1-375 as providing corroboration was erroneous.[1159] First, TF1-375 does not mention any connection between these men and Mr. Taylor, much less that he had sent them. Second, the evidence does not establish that the Liberians accompanying Senegalese, who met Pyne in Yomandu, are the same Liberians as those who arrived in Koinadugu with Senegalese and identified themselves as "former NPFL" to TF1-375.[1160] According to Pyne, she entered Koinadugu with some of Superman's bodyguards, Bai Bureh, Senegalese, General Bropleh and all the fighters accompanying them.[1161] The evidence does not establish which, of any number of Liberian fighters with this group, identified themselves to TF1-375 as "former NPFL". Pyne's testimony that the fighters told her that they belonged to the STF[1162] makes it unlikely that these same fighters, a couple of days later, identified themselves as former NPFL.

595. The only corroboration provided by TF1-375, as the Chamber had to acknowledge, was the arrival of a 'group of Liberian men [...] in Koinadugu after the Fitti-Fatta attack with Senegalese'.[1163] This does not corroborate Mr. Taylor's knowledge or support for the adherence of these men to the RUF.

*(b) The Chamber erred in fact and law in accepting Pyne and Bobson Sesay's opinions to reject Pyne's alternate testimony*

596. Pyne herself conveyed alternative hearsay evidence as to the affiliation of the fighers, testifying that fighters themselves told her that they belonged to the STF,[1164] and that Bai Bureh told her that Senegalese also belonged to the STF.[1165] The Chamber explained that this alternative hearsay information did not raise a reasonable doubt about Senegalese's account "because the STF members she knew spoke Krio

[1159] Judgement, para. 4379.
[1160] TF1-375 testified that Senegalese arrived in Koinadugu with about 60 men, the majority of whom were Liberians, and who "they said they were" former NPFL fighters: TT, TF1-375, 24 June 2008, pp. 12566-12567, 12572. Further, the Chamber's summary of TF1-375 mischaracterises his evidence: it is not clear from the transcript whether TF1-375 was told that by any Liberian fighters that they were "former NPFL" or whether he was reporting on a general rumour.
[1161] TT, Alice Pyne, 19 June 2008, pp. 12249, 12251, 12254-5.
[1162] TT, Alice Pyne, 20 June 2008, pp. 12382-5.
[1163] Judgement, para. 4379.
[1164] TT. Alice Pyne, 20 June 2008, pp. 12382-5.
[1165] TT, Alice Pyne, 19 June 2008, pp. 12250, 12253-4; 20 June 2008, p. 12384.

fluently, while Senegalese only spoke Liberian English and Bobson Sesay's explanation that the STF was used as a generic term for the Liberian group."[1166]

597. No reasonable trial chamber could have failed to entertain a reasonable doubt given this alternative hearsay information. First, the alternative information was conveyed to Pyne by several independent sources: the 20 fighters, and Bai Bureh. This evidence, despite its hearsay nature, is therefore prima facie entitled to more weight that Senegalese's uncorroborated story. Second, the Chamber could not have chosen to disbelieve this hearsay information based purely on linguistic usage. The Chamber heard no evidence that all STF spoke fluent Krio, or that Senegalese did not speak Krio.[1167] The Chamber's inference is based purely on conjecture, not evidence. Third, the Chamber disregarded other evidence that Senegalese and his men actually were part of the STF, and that the terms "Liberian" and "STF" were frequently conflated.[1168]

598. The low probative value of Pyne's hearsay in respect of either account could not but have raised a reasonable doubt for a reasonable trier of fact. Pyne's conjecture – and the Chamber's conjecture – based on linguistic usage was certainly not an adequate basis to extinguish reasonable doubt. The Chamber's finding based on this manifestly inadequate evidence caused a miscarriage of justice and should be set aside.

*(iii) The Trial Chamber erred in fact and law in finding that Charles Taylor could assist the commission of crimes by sending persons over whom he had no control or influence*

599. The *actus reus* of aiding and abetting can, according to previous caselaw, be satisfied by a commander permitting the use of resources under his control, including personnel, to facilitate the perpetration of a crime.[1169] Blagojević performed the *actus reus* of aiding and abetting by having "permitted members of the Brutanac Brigade Military Police to participate in the separations of Bosnian Muslim men from the women, children and elderly as well as in guarding the Bosnian Muslim men detained

[1166] Judgement, para. 4380.
[1167] In cross-examination, Alice Pyne clarified that "I did not hear [Senegalese] speak any other dialect apart from Liberian English", and in relation to the 20 fighters, "I did not hear them speak proper Krio." (TT, Alice Pyne, 20 June 2008, pp. 12382, 12384) (emphases added). Surely the witness not having heard Senegalese or the men speaking Krio is not conclusive evidence that they did not.
[1168] See Defence Final Brief, para. 1495.
[1169] *Blagojević* AJ, para. 127, *Krstić* AJ, paras. 137, 144.

in Bratunac town from 12 to 14 July 1995"[1170]; Krstić "knew that those murders were occurring and... permitted the Main Staff to use personnel and resources under his command to facilitate them"[1171]; Borovčanin "left the 1st Company of the Jahorina Recruits in Potočari to assist in the forcible transfer" and "continued to permit them to practically assist on 13 July."[1172] In each of these cases, liability was predicated on direct knowledge of the unlawful task to be carried out by the personnel, combined with the power to command those personnel to engage in the task.

600. In the present case, the Chamber erred in law by finding that Mr. Taylor could be liable for the actions of Senegalese or the 20 men, when it did not find that Mr. Taylor had any contact or influence, let alone exercised effective control, over Senegalese and the 20 fighters in question. In the absence of such a finding to ground Mr. Taylor's liability, the only reasonable conclusion is that these men were free agents acting of their own volition.

601. Further, the Chamber erred in law in finding Mr. Taylor liable, without finding that Senegalese or the 20 fighters were sent to facilitate the commission of crimes. That finding was not open on the evidence, as the eventual deployment of Senegalese and the 20 fighters was far from evident when they arrived in Sierra Leone some five months earlier.

602. In the first place, on the basis of Pyne's testimony that Senegalese and the 20 fighters were sent "to Sam Bockarie",[1173] the Chamber held that "Senegalese was sent by the Accused to be part of reinforcements supplied to Bockarie."[1174] The finding that they were sent as reinforcements is not only unsupported by the evidence, but itself fails to support the assertion that they were sent to facilitate the commission of crimes.

603. Further, witnesses testified that Bockarie sent Senegalese to either kill SAJ Musa,[1175] kill Superman,[1176] retrieve ammunition,[1177] or on a mission to Kono.[1178] With only Bobson Sesay supporting this assertion, the Chamber found itself unable to

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[1170] *Blagojević* AJ, para. 131.
[1171] *Krstić* AJ, para. 144.
[1172] *Popović* TJ, para. 1498.
[1173] TT, Alice Pyne, 19 June 2008, p. 12258-9.
[1174] Judgement, para. 4384.
[1175] TT, Alice Pyne, 19 June 2008, pp. 12248-53; Foday Lansana, 22 Feb. 2008, p. 4530.
[1176] TT, Isaac Mongor, 11 Mar. 2008, pp. 5767-8.
[1177] TT, TF1-375, 24 June 2008, pp. 12563-12567; Issa Sesay, 9 July 2010, p. 44167 and 18 Aug. 2010, pp. 46632-3.
[1178] TT, TF1-516, 10 Apr. 2008, p. 7185.

determine that Senegalese was sent by Bockarie to "as reinforcement to Koinadugu."[1179] The Chamber found that Mr. Taylor did not exercise effective control over Bockarie,[1180] so Bockarie's directions to those forces could not ground Mr. Taylor's responsibility. Further, the evidence indicates that in all likelihood, these men were not following Mr. Taylor's or Bockarie's instructions, but deciding their own fate. Finally, even if it is accepted that Bockarie sending these men at all could possibly be connected to Mr. Taylor's (which it is not), there is no indication that they were sent to facilitate the commission of crimes.

604. These errors of law warrant the quashing of Mr. Taylor's convictions for Counts 1 to 11 of the Indictment, for aiding and abetting crimes committed by troops led by O-Five in Bombali District, and RUF/AFRC troops Freetown and the Western Area in 1998 and January 1999.

*(iv) The Chamber erred in fact and law in finding that these fighters provided substantial assistance to the commission of any crime*

605. The Trial Chamber was unable to find that the 20 AFL fighters personally committed any crimes.[1181] Rather, the Chamber relied on Alimany Bobson Sesay's evidence "to the effect that the Red Lion Battalion was an extremely fierce unit, which boosted the morale of the other RUF soldiers who were glad to fight alongside these soldiers"[1182] to find that sending 20 fighters when "taken cumulatively, and in addition to the arms shipments provided by the Accused... had a substantial effect on the commission of crimes by the RUF and RUF/AFRC."[1183] This is an error.

606. First, Bobson Sesay's evidence, as well as the Chamber's findings, pertain to events after the Red Lion Battalion joined Gullit's troops in Colonel Eddie Town and headed towards Freetown. The Chamber did not make a finding that the 20 AFL members substantially contributed to the commission of crimes by O-Five's group during the earlier attacks on Karina and Kamalo in the Bombali District.[1184] Mr. Taylor's conviction for crimes committed in Karina and Kamalo[1185] is therefore

[1179] Judgement, para. 4385.
[1180] Judgement, para. 6981.
[1181] Judgement, para. 4393. Rather, they were found to have participated in attacks where crimes were committed by others: Judgement, paras. 4394, 4395, 4618(i)-(ii).
[1182] Judgement, para. 6923.
[1183] Judgement, para. 6924.
[1184] Judgement, paras. 4388, 4394.
[1185] Judgement, para. 1565.

unsustainable both because of the Chamber's own finding and because of the absence of evidence pertaining to the effect of the 20 AFL fighters on the crimes alleged.

607. Second, Bobson Sesay's testimony does not support the proposition that the Red Lion Battalion (as a whole) substantially contributed to the commission of crimes by RUF or RUF/AFRC forces. The witness stated that the Red Lion Battalion was fierce and dangerous to the ECOMOG and civilians, because most of them had no "relations" in Freetown and so did not care.[1186] He described the effect of the Red Lion Battalion as being to make other troops "happy… because they were really hard fighters."[1187] Boosting the morale of fighters during the course of a military operation does not imply a substantial contribution to the commission of crimes. To the contrary, Bobson Sesay himself distinguished between the Red Lion Battalion and "us who had family members in Freetown" and thought "Okay, let me be careful what I do."[1188]

608. Moreover, Bobson Sesay testified[1189] about the Red Lion Battalion as a whole, found to be comprised of 200 fighters.[1190] Without any indication that he was testifying about these specific 20 AFL fighters specifically "boosting morale", rather than any other members of the 200 strong Red Lion Battalion, the Chamber is not in a position to accept that these 20 AFL fighters substantially contributed to the commission of crimes by the 1,000 fighters[1191] who entered Freetown.

609. Finally, the Chamber found that sending the 20 fighters could not constitute a significant contribution alone, but only when taken together with arms shipments.[1192] However, the Chamber did not, and could not,[1193] find that any arms from the Burkina Faso shipment ended up in the hands of any of O-Five's or Gullit's troops who committed the crimes in question. With no link between the arms and the crimes, or a reasoned opinion as to how one could support the other, the Chamber has no basis for finding that these two alleged instances of aiding and abetting *could* be taken together at all.

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[1186] TT, Alimany Bobson Sesay, 23 Apr. 2008, p. 8321.
[1187] TT, Alimany Bobson Sesay, 23 Apr. 2008, p. 8320.
[1188] TT, Alimany Bobson Sesay, 23 Apr. 2008, p. 8321.
[1189] TT, Alimany Bobson Sesay, 23 Apr. 2008, pp. 8319-21.
[1190] Judgement, para. 4395.
[1191] Judgement, para. 4395.
[1192] Judgement, para. 6924.
[1193] The Burkina Faso shipment was found to have arrived in November or December 1999 (Judgement, para. 5527), and therefore following these troops advance on Freetown.

610. The Chamber erred in fact and law in finding that sending these 20 fighters substantially contributed to the commission of crimes, and therefore that Mr. Taylor aided and abetted the commission of crimes in Bombali District, Freetown and the Western Area. These errors, taken together or individually, warrant the quashing of Mr. Taylor's convictions for Counts 1 to 11 for aiding and abetting the crimes in question.

*(v) Conclusion*

611. The Trial Chamber erred in its findings that Mr. Taylor sent Senegalese or 20 former NPFL fighters to Sierra Leone, that he could be liable in the absence of any communication, let alone influence or effective control over these men, and that they substantially contributed to the commission of crimes. Each of these errors taken alone, and any combination of them, extinguish an indispensible link between Mr. Taylor and the crimes in question.

612. Consequently, the precise relief sought is reversal of the convictions on Counts 1 to 11 for aiding and abetting crimes committed (i) by the 200 fighters with O-Five in Bombali District and (ii) the 1,000 RUF/AFRC fighters in Waterloo, Fisher Lane, Hastings, Freetown and the Western Area in December 1998/January 1999.

**ii. GROUND OF APPEAL 25: The Trial Chamber erred in fact in finding that safe haven was provided to the RUF in Liberia, and that deserters or other aliens found in Liberia were returned to Sierra Leone, and in law that either of these alleged actions assisted the commission of crimes.**

*(i) The Chamber erred in fact and law in finding that the return of former SLAs constituted practical assistance with substantial effect on the commission of the crimes*

613. The Chamber considered that the return to Sierra Leone of at least four former SLA fighters who had retreated to Liberia constituted practical assistance to the commission of crimes.[1194] The Chamber could not find that this assistance in isolation had a substantial effect on the commission of crimes,[1195] but nevertheless reasoned that "taken cumulatively, and in addition to the arms and ammunition provided by the Accused, the military personnel provided by the Accused constituted practical

[1194] Judgement, para. 6920.
[1195] Judgement, paras. 6922-4.

assistance which had a substantial effect on the commission of crimes by the RUF and RUF/AFRC."[1196]

614. In reaching this conclusion, the Chamber erred in law and fact. The return of these SLAs should not have been considered as part of the cumulative calculus of assistance, as the Chamber itself found that the men did not commit any crimes.

615. Although the Chamber found that these four SLAs participated in the attack on Kono in December 1998,[1197] as previously discussed,[1198] the Chamber was unable to find that *any* crimes were committed during the attack on Kono in December 1998.[1199] Further, it was "unable to consider the impact this group of men had on the commission of crimes since the testimony of Bobson Sesay is vague with regard to the number of men sent by the Accused, and no evidence was introduced to show that the men sent by the Accused committed crimes."[1200]

616. Absent any evidence that practical assistance was provided by the SLAs, no aiding and abetting liability could have arisen in respect of their return. The precise relief sought, therefore, is the quashing of the Chamber's findings, insofar as they consider that Mr. Taylor sending back these SLAs constituted substantial practical assistance to the commission of crimes.

*(ii) The Chamber erred in fact and law in finding that the provision of safe-havens and return of deserters constituted practical assistance with substantial effect on the commission of crimes*

617. The Chamber found that providing safe-haven for RUF fighters during their retreat from Zogoda,[1201] and the capture and return of deserters to Sierra Leone,[1202] "supported, sustained and enhanced the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed."[1203]

618. The Chamber's analysis reflects a legal misconception of aiding and abetting, misapplies the *actus reus* element of aiding and abetting, and therefore constitutes an error of law that invalidates its findings. The *actus reus* of aiding and abetting

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[1196] Judgement, para. 6924.
[1197] Judgement, para. 6920. The Defence notes that the Chamber did not find that repatriated Sierra Leonean refugees participated in attacks in Sierra Leone (Judgement, para. 6920).
found that repatriated Sierra Leonean refugees.
[1198] Ground 11, section (iii) and Ground 23, section (iii)(e)(2) are incorporated here.
[1199] Those submissions are incorporated here.
[1200] Judgement, para. 4565.
[1201] Judgement, Operational Support: Alleged Provision of Safe Havens.
[1202] Judgement, Provision of Military Personnel: Alleged Cooperation in Return of Deserters to Sierra Leone.
[1203] Judgement, paras. 6935-6.

requires that any alleged assistance be shown to have substantial effect upon the crimes committed.[1204] Facilitating the continued existence of an organization, with no further indication of the connection with or impact on any crimes, cannot meet this threshold. One is not guilty, as discussed in Ground 21, for keeping a criminal alive, housing them, feeding them, educating them, or doing anything else facilitating their continued existence. What is required is assistance that substantially contributes to their criminal act and there is no such evidence here. The findings in respect of "safe-haven" and "deserters" are particularly clear in this regard. The Chamber could make no findings that either of these forms of support had any direct or substantial impact on the commission of crimes, as opposed to the pursuit of lawful combat – or even that it had an impact on the manner in which operations were pursued. The most that could be said is that these actions preserved the "existence" of the RUF/AFRC. There is no evidence that this had "a substantial effect upon the perpetration of the crime."[1205]

619. First, the Chamber also reached factual conclusions that could have been reached by no reasonable trial chamber. No reasonable trier of fact could have found beyond a reasonable doubt that safe haven was provided after, instead of before, the beginning of the Indictment period, which commences with the signing of the Abidjan Peace Accord on 30 November 1996.[1206] The Chamber held that the SLA and Kamajors attacked Zogoda and forced the RUF from their stronghold in November 1996.[1207] TF1-371 and TF1-362, on whom the Chamber relied to find that Mr. Taylor provided safe-haven to RUF combatants retreating after the fall of Zogoda, testified, respectively, that Zogoda was attacked (i) while peace talks were ongoing and to put pressure on the RUF in the negotiations,[1208] and (ii) after Foday Sankoh left for Abidjan.[1209] Further, witnesses TF1-338, Dauda Aruna Fornie, Jabaty Jaward, Mohamed Kabbah, Perry Kamara, Alice Pyne, Augustine Mallah, Charles Ngebeh, Martin George and Issa Sesay (whose testimony the Chamber failed to consider in this regard) consistently stated that Zogoda fell before the signing of the Abidjan

[1204] See Ground of Appeal 16.
[1205] *CDF* TJ, para. 229; See Ground of Appeal 16 regarding the applicable legal standards for aiding and abetting.
[1206] Judgement, para. 40
[1207] Judgement, para. 40.
[1208] TT, TF1-371, 25 Jan. 2008, pp. 2268-9, 2276 (CS).
[1209] TT, TF1-362, 27 Feb. 2008, pp. 4855-8 (CS); 3 Mar. 2008, pp. 5080-9, 5096 (CS).

Peace Accord, and in violation of a ceasefire in place to allow for the negotiations.[1210] The Chamber did not find, and there is no basis for finding, that these combatants arrived in Liberia following the signing of the Abidjan Peace Accord and therefore during the indictment period. This error warrants the quashing of this finding.

620. Second, the Chamber failed to find that either providing safe-haven to retreating RUF combatants or returning deserters Fonti Kanu and Dauda Aruna Fornie to Sierra Leone had any concrete effect on the commission of crimes. On the contrary, the Chamber found that "once the RUF combatants crossed into Liberia they were disarmed by ULIMO, and subsequently serviced by the International Committee for the Red Cross."[1211] Further, there is no finding that, following their disarmament and contact with the Red Cross, these same RUF members ever crossed back into Liberia and, if they did, that they committed crimes. Similarly, the return of deserters Fonti Kanu and Dauda Aruna Fornie is not found to have had any impact on the commission of crimes.[1212] No accessorial liability could be attributed in the absence of such findings.

621. Third, no reasonable trier of fact would have concluded beyond a reasonable doubt that Mr. Taylor provided safe-haven or expelled illegal aliens with the requisite intent to assist the commission of crimes.[1213] Significantly, the providing of safe-haven resulted in disarming the RUF combatants and assuring them access to the Red Cross. Further, states have a broad discretion in exercising their right to expel aliens under customary international law,[1214] and it was for the Chamber to conclude that this was exercised arbitrarily in the instance of Fonti Kanu and Dauda Aruna Fornie.

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[1210] TT, Charles Ngebeh, 23 Mar. 2010, pp. 37841-3 (The RUF was finally pushed out of Zogoda on 12 November 1996. Sankoh was in Abidjan asking Tejan Kabbah to respect the ceasefire.); TF1-338, 1 Sept. 2008, p. 15113 (Zogoda fell two weeks after Sankoh left for Abidjan, while peace talks were ongoing.); Dauda Aruna Fornie, 11 Dec. 2008, p. 22152 (The SLPP government acted in bad faith in invading Zogoda during the Abidjan peace talks); Jabaty Jaward, 16 July 2008, p. 13812 (The RUF were driven out of Zogoda by government troops and Kamajors during the time Sankoh was negotiating a peace accord in Abidjan); Mohamed Kabbah, 17 Sept. 2008, pp. 16411-2 (The Kamajor attack on Zogoda, while Sankoh was engaged in talks before the signing of the peace accord in Abidjan, destroyed the prospect for peace at that time); Perry Kamara, 5 Feb. 2008, p. 3084 (The Kamajors attacked Zogoda while Sankoh was negotiating peace in Abidjan); Alice Pyne, 17 June 2008, p. 12126 (Zogoda was attacked before the signing of the Abidjan Peace Accord); Issa Sesay, 2 Aug. 2010, p. 45180 (The SLA and Kamajors attacked Zogoda during the Abidjan peace talks, in violation of the ceasefire); Augustine Mallah, 12 Nov. 2008, p. 20109 (Zogoda fell in 1996 when Sankoh was in the Ivory coast negotiating the Yamoussoukro Peace Accord); Martin Geroge, 23 Apr. 2010, p. 39750 (Sankoh was in Abidjan for peace talks when Zogoda was overrun).

[1211] Judgement, para. 4171.

[1212] See Judgement, paras. 4616-7, 4618 (xi).

[1213] See discussion on applicable *mens rea* for aiding and abetting in Ground 16.

[1214] Sir Jennings, Robert QC and Sir Watts, Arthur KCMG QC, Oppenheim's International Law, Vol. 1, Oxford University Press (Oxford, 9th Ed.), p. 940, para. 413.

Finally, the Chamber fails to find that Mr. Taylor knew or had any reason to know that, on two occasions, illegal aliens were expelled by Liberian police authorities.

622. The incorrect appreciation and application of the law and the facts by the Chamber invalidates its findings and occasions a miscarriage of justice. The precise relief sought is therefore the reversal of the Chamber's findings that providing safe-haven to RUF combatants after the fall of Zogoda and expelling deserters Fonti Kanu and Aruna Dauda Fornie constituted operational support that substantially assisted the commission of crimes.

**e. ERRORS RELATING TO THE MENTAL ELEMENT: ADVICE**

**i. GROUND OF APPEAL 26: The Trial Chamber erred in fact in finding that Charles Taylor gave military or operational advice to the RUF or AFRC, and erred in law and in fact in finding that any such alleged advice constituted assistance to crimes.**

*(i) Overview*

623. The Trial Chamber found that Taylor offered the following military or operational advice to the RUF or AFRC: (i) advising Johnny Paul Koroma to capture Kono in late February/early March 1998;[1215] (ii) advising Bockarie to be sure to maintain control of Kono for the purpose of trading diamonds with him for arms and ammunition;[1216] (iii) advising Bockarie to recapture Kono so that the diamonds there would be used to purchase arms and ammunition, which resulted in the Fitti-Fatta attack in mid-June 1998;[1217] (iv) advising Bockarie in relation to the progress of the operations in Kono and Freetown in the implementation of their plan;[1218] (v) advising Bockarie to send prisoners released from Pademba Road Prison to RUF controlled areas;[1219] (vi) advising Bockarie to open a training base in Bunumbu, Kailahun District;[1220] and (vii) advising Boackarie in 1998 to construct or re-prepare the airfield in Buedu.[1221]

624. Even assuming this advice to have been given, which could not have been found beyond a reasonable doubt based on the evidence, none of it, viewed cumulatively or separately, substantially contributed to the commission of any crimes.

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[1215] Judgement, para. 3611 (ii).
[1216] Judgement, para. 3611 (iii).
[1217] Judgement, para. 3611 (v).
[1218] Judgement, para. 3611 (xiv).
[1219] Judgement, para. 3611 (xvii).
[1220] Judgement, para. 4248 (xxxiii).
[1221] Judgement, para. 4248 (xxxvi).

The advice, in most cases, concerned matters that would have been utterly obvious to Koroma and Bockarie, or to anyone with a passing acquaintance with Sierra Leonean geography.

*(ii) Advice Relating to Capturing or Holding Kono*

*(a) Taylor's Advice to Capture Kono*

625. The Chamber found that Taylor advised Koroma to capture Kono following the Junta's eviction from Freetown in February 1998;[1222] Bockarie to maintain control of Kono in March 1998;[1223] and Bockarie to recapture Kono resulting in the Fitti Fatta offensive in June 1998.[1224]

626. The Chamber recognised that the allegation that Taylor advised Koroma to capture Kono came exclusively from the Kargbo's evidence, but accepted Kargbo's account, despite the fact that it found his general account was "often imprecise" and at times inconsistent with other witnesses.[1225] No reasonable chamber could have found this uncorroborated and "often imprecise" evidence proved the allegation beyond a reasonable doubt. Moreover, Kargbo's evidence was also hearsay. The Chamber was not entitled to rely upon uncorroborated hearsay as determinative evidence.[1226] The Chamber's improper evaluation of the evidence has occasioned a miscarriage of justice.

627. The Chamber based its finding that Taylor advised Bockarie to maintain control of Kono on the evidence of Kamara,[1227] and TF1-371.[1228] Both witnesses testified that they heard Bockarie say that Taylor told him to hold Kono, though their evidence relates to different times.[1229] No reasonable chamber could have relied on such evidence. Firstly, both witnesses' evidence is second hand hearsay, relayed through Bockarie, and thus is not only unreliable as hearsay evidence, but also cannot corroborate the underlying allegation (that Taylor told Bockarie to hold Kono) because the evidence has Bockarie as its common source. The most the hearsay evidence can prove is that Bockarie made assertions that Taylor had told him to hold Kono, but this amounts to no more than Bockarie's uncorroborated testimony, which

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[1222] Judgement, para. 3611 (ii); para. 2863.
[1223] Judgement, para. 3611 (iii); para. 2864.
[1224] Judgement, para. 3611 (v); para. 2951.
[1225] Judgement, para. 2855.
[1226] See Section I of the Defence Appeal Brief.
[1227] Judgement, para. 2856.
[1228] Judgement, para. 2861.
[1229] Judgement, para. 2856; TT, TF1-360, 5 Feb. 2008, pp. 3102, 3142; TT, TF1-371, 28 Jan. 2008, pp. 2384-5.

the Defence cannot cross-examine, and thus is of limited if any weight. It certainly cannot be relied upon by a reasonable chamber to prove an allegation beyond reasonable doubt.

628. The Chamber, as on many other occasions throughout the Judgement, undertook no assessment of Bockarie's reliability as the source of the hearsay evidence, and so failed to consider his motives for lying or exaggerating his links with Taylor. Had it done so, it would have recognised that Bockarie, having just usurped Koroma's position as de facto leader of the RUF/AFRC, had every incentive to lie or exaggerate the support Taylor gave him to project himself over his rivals. No reasonable chamber could have failed to undertake such a crucial evaluation of the evidence. The Chamber's failure (i) to recognise that the hearsay evidence of Kamara and TF1-371 cannot corroborate each other on the truth of the underlying allegation; and (ii) to undertake an assessment of Bockarie's credibility as the source of the hearsay evidence, has led it to make errors which invalidate its finding and occasion a miscarriage of justice.

629. No reasonable chamber could have found that Taylor advised Bockarie to attack Kono in the offensive known as Fitti Fatta. In making its finding, the Chamber relied upon three key witnesses: Saidu, Kabbah and Kanneh.[1230] The Chamber recognised it could not rely on the evidence of the meeting provided by Kamara, because his memory of the meeting was influenced by subsequent events,[1231] or TF1-585, whose evidence was of "little probative value".[1232] Equally, the Chamber acknowledged that Kanneh's recollection of the meeting involved events which referred to later in 1998, and only relied upon him to the extent that his evidence of planning of Fitti Fatta was corroborated by Saidu and Kabbah.[1233] And the Chamber recognised that Kabbah's knowledge of military matters was limited.[1234]

630. As such the Chamber based its finding primarily on Saidu's testimony. In doing so, it recognised that Saidu's testimony was inconsistent with statements previously given to the Sesay defence team in 2005 and 2007, but excused these inconsistencies, believing Saidu's explanation that these previous statements related to a meeting Saidu heard over the radio, a meeting to discuss Issa Sesay's punishment

[1230] Judgement, para. 2938.
[1231] Judgement, para. 2934.
[1232] Judgement, para. 2930.
[1233] Judgement, para. 2941.
[1234] Judgement, para. 2942.

for the loss of diamonds, which was different from the meeting he was testifying about, the meeting to discuss the planning of Fitti Fatta.[1235] However, the Chamber found elsewhere that Sesay's loss of the diamonds and the planning of Fitti Fatta were discussed at the same meeting,[1236] a number of credible witnesses, including Saidu himself, testified as such,[1237] and that Saidu, in a previous statement to the Prosecution, put to him in court, said that Sesay's punishment was decided at the same meeting.[1238] By contrast, no witness referred to another separate meeting to discuss Sesay's loss of the diamonds or his punishment for that loss. Equally, when asked to clarify by Justice Sebutinde, Saidu struggled to answer, testifying first that the issue was discussed at that meeting, and soon after that it was not, and then blaming the Prosecution for recording his statement inaccurately.[1239] Given such evasiveness on Saidu's part, together with the lack of evidence for a separate meeting to discuss Sesay's punishment, no reasonable chamber could have accepted Saidu's excuse, and consequently no reasonable chamber could have accepted his evidence of the meeting.

631. Even if it was entitled to accept all the witnesses' evidence as credible, the Chamber failed to recognise that the allegation (Taylor advised the RUF/AFRC to attack Kono) came from Bockarie and Tamba. It, therefore, failed to conduct any evaluation of Bockarie's or Tamba's credibility. Had it done so, it would have recognised both had an incentive to lie or exaggerate Taylor's support for the RUF/AFRC's offensive, given their need to project themselves as privileged interlocutors with the neighbouring president, an image they needed to maintain their status with the rest of the RUF/AFRC. No reasonable chamber could have failed to address this point.

632. As such the Chamber's evaluation of the evidence of the meeting at which Fitti Fatta was planned, and which was supposedly the result of Taylor's advice to

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[1235] Judgement, para. 2943.
[1236] Judgement, para. 2938.
[1237] Judgement, para. 2929; para. 2938.
[1238] TT, TF1-577, 6 June 2008, pp. 11175-6.
[1239] TT, TF1-577, 6 June 2008, pp. 11177-8 ("JUDGE SEBUTINDE: You are saying that it is not true, it didn't happen in the meeting, or that you weren't in the meeting? I don't understand. What are you saying? THE WITNESS: After the meeting - during this meeting – to say that after this meeting - at that meeting we discussed sending Issa Sesay at the front line. That's what I'm talking about. It was not at that meeting. The front line which Issa went to when Sam Bockarie sent him there, that was an issue between Sam Bockarie and Issa. But here I am seeing the Prosecution - I am seeing that the Prosecution has written it there so that's what I'm saying, that it might be a mistake on the part of the Prosecution").

recapture Kono, was improper and fundamentally flawed. The Chamber's finding that Taylor did give such advice has occasioned a miscarriage of justice.

*(b) Advice Relating to the RUF's December 1998 – January 1999 Offensive*

633. The Chamber found (i) Taylor gave advice to Bockarie and received updates in relation to the progress of the operations in Kono and Freetown in the implementation of their plan;[1240] and (ii) Taylor directed Bockarie to send prisoners released from Pademba Road Prison to RUF controlled areas.[1241] Although the Chamber made a general finding that Taylor gave advice to Bockarie in relation to the operations in Kono and Freetown, it found that only one such instruction could be proved beyond a reasonable doubt: that Taylor advised Bockarie to release prisoners from Pademba Road.[1242]

634. No reasonable chamber could have found that Taylor directed Bockarie to send prisoners released from Pademba Road Prison to Buedu. The Chamber based its finding on Fornie and TF1-516.[1243] Fornie testified that he overheard Bockarie speak to Yeaten over the satellite phone, and that Bockarie then told Kabbah that Taylor had instructed him, through Yeaten, to release the prisoners.[1244] His evidence that the instruction came ultimately from Taylor is thus third hand hearsay, and is unsupported by Kabbah who did not mention any such instruction, despite being the person to whom Bockarie purportedly spoke.[1245] TF1-516 testified that after the prisoners were released, he overheard Yeaten called Bockarie over the radio to congratulate him; he also testified that the release of the prisoners occurred after Bockarie had called Yeaten.[1246] TF1-516's evidence is second hand hearsay, and has no mention of Taylor being behind the instruction. The finding that Taylor advised Bockarie to release the prisoners, therefore, rests on Fornie's third hand hearsay, unsupported by a key witness to the event, corroborated only circumstantially by TF1-516's second hand hearsay. No reasonable chamber could find that such evidence proves the allegation beyond a reasonable doubt. The Chamber's finding represents a miscarriage of justice.

*(c) Advice Relating to Bunumbu Training Camp*

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[1240] Judgement, para. 3611 (xiv).
[1241] Judgement, para. 3611 (xvii); para. 3591.
[1242] Judgement, para. 3605.
[1243] Judgement, para. 3591.
[1244] Judgement, para. 3588; TT, TF1-274, 3 Dec. 2008, pp. 21581-7.
[1245] Judgement, para. 3589.
[1246] Judgement, para. 3588; TT, TF1-516, 8 Apr. 2008, pp. 6938-9, 6977-8.

635. No reasonable chamber could have found that Taylor advised Bockarie to open Bunumbu Camp. The Chamber recognised that TF1-362 is the only witness who testified about Taylor's involvement in the creation of Bunumbu camp and that her evidence was hearsay.[1247] TF1-362's evidence was that Bockarie told her that Taylor had instructed him to open a training camp at Bunumbu.[1248] Later, after the camp was set up, Issa Sesay told her that Taylor had asked Bockarie to train SLA soldiers who returned to Sierra Leone from Liberia. TF1-362 testified that Monica Person trained these soldiers and that Sesay told Pearson that Taylor thanked her for doing so.[1249] Thus, TF1-362's evidence that Taylor advised the setting up of Bunumbu is second hand hearsay, and her evidence that Taylor advised the training of the SLAs is third hand hearsay. The Chamber was not entitled to accept such uncorroborated hearsay evidence as proof of the allegation beyond a reasonable doubt.[1250] The Chamber's approach to the evidence constitutes a clear error of law, which invalidates its finding that Taylor advised Bockarie to open the camp.

636. The Chamber found that TF1-516's evidence that Yeaten ordered Bockarie to open the base "is not very detailed" and "erroneously places the event in 1999".[1251] It decided that TF1-516's account corroborated TF1-362's account rather than undermined it, on the basis that Yeaten was Director of the SSS and worked for Taylor, and so carried out his orders. No reasonable chamber could have relied on this evidence as corroboration. TF1-516's evidence is vague, and there is no obvious basis for his knowledge of Yeaten's conversation with Bockarie, given that Yeaten and Bockarie were said to have had this discussion at a private meeting at which the witness was not present. Further, it is not clear the event described by TF1-516 is the same event as described by TF1-362, given the different individuals, places and timeframes involved (the Chamber's belief that TF1-516 "erroneously places the event in 1999" is speculation, and it provided no justification as to why it thought this was the case). On account of such major problems, the Chamber was not entitled to rely on TF1-516's evidence to corroborate TF1-362's testimony.

*(d) Advice Relating to Buedu Airfield*

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[1247] Judgement, para. 4106.
[1248] Judgement, para. 4097; TT, TF1-362, 27 Feb. 2008, pp. 4866-8.
[1249] Judgement, para. 4099; TT, TF1-362, 27 Feb. 2008, pp. 4895-7.
[1250] See Section I of the Defence Appeal Brief.
[1251] Judgement, para. 4107.

637. No reasonable chamber could have found that Taylor advised Bockarie to construct an airfield at Buedu. In its analysis, the Chamber relied on the evidence of Saidu, Kamara and TF1-585.[1252] No reasonable chamber could have relied on such evidence. TF1-585's evidence, which she learned from Bockarie's wife, was that Bockarie was at Taylor's farm to discuss the construct of an airfield.[1253] The Chamber failed to examine how reliable such hearsay is, or from where Bockarie's wife would have received her information. Even if it was directly from Bockarie (and there is no reason to believe it was), the evidence TF1-585 provided is second hand hearsay, which should not have been relied upon by the Chamber without extreme caution, which the Chamber conspicuously failed to exercise. However, even taken at its height, TF1-585's evidence only suggests that Bockarie was at a meeting at Taylor's farm to discuss the building of an airfield. There is no evidence that Taylor was present at this meeting, what was decided, or whether Taylor agreed with whatever was decided. It is certainly not evidence that Taylor advised Bockarie to construct the airfield, and cannot corroborate any account that Taylor provided such advice.

638. Saidu testified that in a meeting in April 1998 to talk over Issa Sesay's loss of diamonds, Daniel Tamba conveyed Taylor's advice that the RUF and AFRC should work together and that while the meeting discussed the construction of an airfield, Tamba said that the RUF should construct it as soon as possible for the emergency landing of aircraft.[1254] Once, again, even taken at its height, the evidence shows only that Tamba encouraged the RUF/AFRC to construct the airfield (and he did not initiate this: the evidence is clear the RUF/AFRC members present were already discussing its construction). It does not show that Taylor advised or supported the airfield's construction. Furthermore, the meeting at which this was supposedly discussed, the April 1998 meeting to talk over Issa Sesay's loss of the diamonds, is a well-recorded meeting of the RUF/AFRC, about which several other witnesses testify. Only Kabbah testified that at this meeting there was a discussion concerning the construction of an airfield,[1255] but he stated that it was Bockarie who discussed the airfield's construction so that the RUF/AFRC could receive arms and ammunition from Libya; there is no mention here that Bockarie's proposal was supported by

[1252] Judgement, para. 4149.
[1253] Judgement, para. 4136; TT, TF1-585, 8 Sept. 2008, p. 15662.
[1254] Judgement, para. 4135; TT, TF1-577, 5 June 2008, pp. 11056-7. Saidu's testimony on this meeting should have been treated with caution, given the points raised in section (b) above.
[1255] The Chamber concluded that Kabbah's testimony on this point was referring to the same meeting as that testified about by Saidu: Judgement, para. 2938.

Tamba, still less was supported by Taylor.[1256] Significantly, TF1-585 and Kamara were also at this same meeting,[1257] yet despite the fact these two witnesses supposedly corroborate the allegation that Taylor advised Bockarie to construct an airfield, neither mentioned any discussion concerning the construction of an airfield. Therefore, no reasonable Chamber could rely on Saidu's evidence that at this meeting there was such a discussion; and even if it could, it could only interpret this as evidence that Tamba supported the construction of the airfield. No reasonable chamber could conclude from this evidence that Taylor advised its construction.

639. The final witness, and in fact the only witness who actually testified that it was Taylor who advised Bockarie to construct the airfield is Perry Kamara. He testified that following the ECOMOG Intervention, Taylor sent Bockarie a message telling him to reconstruct the airfield.[1258] Kamara's evidence is hearsay, as he heard this report only from Bockarie, and as uncorroborated hearsay, the Chamber was not entitled to base its finding upon it.[1259] Moreover, Bockarie's message, as reported by Kamara, was that the RUF should use forced labour to construct the airfield, yet the Chamber rejected the allegation that Taylor told Bockarie to used forced labour.[1260] Having found that one part of Bockarie's message was unreliable, no reasonable chamber could then rely on the other part of the same message without some significant justification, which the Chamber failed to provide. Therefore, no reasonable chamber could have relied upon Kamara's evidence, and the Chamber was wrong to rely upon it.

640. Nevertheless, the Chamber concluded that the evidence of the three witnesses proved that Taylor perceived a need for an airfield to receive arms and ammunition from Liberia.[1261] Even at its height, regardless of all the errors committed by the Chamber, the evidence does not show this. As explained above, the evidence of TF1-585 and Saidu evinces nothing of Taylor's motives or needs because neither referred to Taylor in the context of the construction of the airfield. Kamara, meanwhile, heard that Taylor advised Bockarie to construct an airfield, but mentioned nothing about this being in connection with the delivery of arms and ammunition. The Chamber's conclusion is totally unjustified.

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[1256] Judgement, para. 4138; TT, TF1-568, 12 Sept. 2008, pp. 16147-8.
[1257] The Chamber found that Kamara and TF1-585 were at this meeting: Judgement, para. 2930.
[1258] Judgement, para. 4132; TT, TF1-360, 5 Feb. 2008, p. 3105.
[1259] See Section I of the Defence Appeal Brief.
[1260] Judgement, para. 4150.
[1261] Judgement, para. 4149.

*(iii) No Reasonable Trial Chamber Could Have Concluded That Any of This Advice Contributed At All, Much Less Substantially, to the Crimes In Question*

641. The Chamber could not have concluded that Taylor's advice substantially contributed to any of the alleged crimes. Even assuming, for example, that Taylor advised Bockarie to construct an airfield, there is no evidence or indication that Taylor suggested that the RUF/AFRC should use forced labour to do this, much less that they would do so. The airfield was ultimately never used,[1262] played no role in assisting the RUF/AFRC war effort, and so cannot constitute practical assistance in respect of other crimes.

642. All the other items of advice would have been abundantly obvious to Koroma or Bockarie. There is no evidence showing that the advice in question altered the behaviour of Koroma or Bockarie, that it induced them to commit more crimes than would otherwise have been the case, or even that it prolonged or diminished the existence of these fighting forces. None of this advice could reasonably have been found to substantially contribute to any crimes.

*(iv) Conclusion*

643. No reasonable trial chamber could have concluded that Taylor gave the advice as found by the Chamber. Those factual findings should be quashed, and any contribution of those findings to the ultimate legal conclusions should be set aside.

644. Even if the Chamber was entitled to find that Taylor gave advice the advice, no reasonable chamber could have found that it had any effect on the commission of crimes, substantial or otherwise, or that Taylor knew this to be the case when he gave the advice. As the Chamber found, Taylor's advice was at times not followed,[1263] suggesting the RUF/AFRC merely followed his advice when it fitted in with its intended course of action. No evidence has been brought to show that any advice Taylor gave affected the RUF/AFRC's behaviour in any way, much less that it had a substantial effect on its conduct of the war in Sierra Leone and the commission of crimes. Because there is no evidence of such a nature, no reasonable chamber could have concluded that the advice given constituted practical assistance or had a substantial effect on the commission of crimes. For that reason also, Taylor's convictions in respect of accessory liability for all instances of providing advice should be quashed.

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[1262] Judgement, para. 4144.
[1263] Judgement, para. 6973.

## f. ERRORS RELATING TO THE MATERIAL ELEMENT: "OPERATIONAL SUPPORT"

### i. GROUND OF APPEAL 27: The Trial Chamber erred in law and in fact in finding that alleged provision of communication devices, radio training and "warning messages" constituted assistance to crimes.

*(i) Overview*

645. The Chamber found that (i) providing Sam Bockarie and Issa Sesay with satellite phones, (ii) allowing RUF members occasional access to radio equipment in Liberia, and (iii) "448 messages" sent from Liberia, "supported, sustained and enhanced the functioning the RUF and its capacity to undertake military operations in the course of which crimes were committed."[1264] The Chamber found that these forms of operational support "improved coordination and facilitated the trade for and vital flow of arms and ammunition to the RUF/AFRC" and thereby constituted practical assistance for the commission of crimes.[1265]

646. The Chamber's analysis misapplies the *actus reus* element of aiding and abetting, and therefore constitutes an error of law that invalidates its findings. The *actus reus* of aiding and abetting requires that any alleged assistance be shown to have a substantial effect upon the crimes committed.[1266] Facilitating the improved communication of members of the RUF with Mr. Taylor and amongst each other, with no further indication of the connection with or impact on any crimes, does not meet this threshold. The alleged assistance made it no more likely that crimes would be committed in the course of the armed conflict. To the contrary, the Chamber's own findings show that it was unable to (i) connect the provision of, and access to, communications equipment, or the issue of warning messages to any crime, or (ii) find that such assistance was substantial, especially when compared to the RUF/AFRC's existing communications and monitoring capabilities. There is no evidence that the alleged assistance provided had "a substantial effect upon the perpetration of the crime."[1267]

*(ii) Satellite phones*

647. Sam Bockarie and Issa Sesay possessed several satellite phone obtained from different individuals, and the Chamber was unable to determine whether any of them

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[1264] Judgement, para. 6936.
[1265] Judgement, para. 6936.
[1266] See Ground of Appeal 16.
[1267] *CDF* TJ, 2 Aug. 2007, para. 229; See Ground of Appeal 16 regarding the applicable legal standards for aiding and abetting.

were used in relation to military activities, let alone that the phones provided by Mr. Taylor were so used. Bockarie had at least two satellite phones, and the Chamber was "unable to ascertain from the evidence whether any of the calls made by Bockarie to the Accused and others in relation to RUF/AFRC activities were made on the satellite phone that the Accused gave Bockarie."[1268] The Chamber nevertheless vaguely found that since one of those phones was given to Bockarie by Mr. Taylor, this "enhanced his communications infrastructure."[1269] The Chamber was similarly unable to determine whether Sesay used a satellite phone provided by Mr. Taylor, resorting to the finding that the phone contributed to Sesay's "communications capability."[1270]

648. The Chamber purported to link the use of satellite phones to crimes in one instance, where it noted communication between Mr. Taylor and Bockarie "in furtherance" of the Freetown Invasion.[1271] This finding was erroneous in both fact and law. The Defence submits, firstly, the Chamber erred in fact and law in accepting that these calls occurred.[1272] Second, even if accepted, the dearth of testimony going to the contents of these conversations means that it is impossible to conclude that the satellite phones used to conduct them constituted practical assistance that made a substantial contribution to the commission of any crime. For instance, the Chamber presumed that communications in the lead up to Freetown were to inform Mr. Taylor as to the "continuing evolution" of the alleged plan.[1273] In other words, unable to find that Mr. Taylor said anything of assistance to the operation, the Chamber only found that he received updates. Importantly, as above, the Chamber is unable to find that, in the course of the Freetown Invasion, Bockarie or Sesay were using the satellite phones provided to them by Mr. Taylor or the satellite phones they already had.

649. The Chamber's findings were therefore erroneous for two main reasons. First, it mischaracterised the provision of satellite phones to Sam Bockarie and Issa Sesay as assistance to criminal acts, whereas, on the contrary, no findings were made (or could have been made on the evidence) that these phones ever assisted in the commission of a crime under the Statute. Second, the Chamber erred in law and logic in finding that the provision of these two satellite phones constituted substantial

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[1268] Judgement, para. 3726.
[1269] Judgement, para. 3726.
[1270] Judgement, para. 3727.
[1271] Judgement, para. 6928, referring to findings in Operational Support: Communications, Satellite Phones, especially paras. 3723-4.
[1272] Submissions made in Grounds of Appeal 7 and 12 in this regard are incorporated here.
[1273] This presumption was erroneous: see Ground of Appeal 12(iii)(b).

assistance in the sense of leading to an "enhanced" communications capacity, when it found that both Bockarie and Sesay already had a satellite phone each, on top of a number of alternate means of communication available to them. These errors warrant the quashing of this finding.[1274]

*(iii) Use of Liberian communications equipment by the RUF/AFRC*

650. The Chamber found that (i) various occasions of RUF members using Liberian radio communication equipment in Monrovia[1275] and (ii) Base 1 (the radio station at Benjamin Yeaten's home) being used for communications with Bockarie and Sesay,[1276] constituted the *actus reus* for aiding and abetting.[1277] Each relevant finding is considered in turn.

651. Sankoh's communication while detained: Witnesses testified about a number of different messages passed through the NPFL communication network. Upon a close examination of the Chamber's deliberations, it is clear that the Chamber only accepted one instance of Sankoh using the NPFL communication network: his instruction to Bockarie to follow the Accused's orders.[1278] As the Chamber did not find Mr. Taylor liable for ordering, it is difficult to see how Sankoh's messages could have constituted practical assistance to the commission of crimes.[1279]

652. Communications between Memunatu Deen and Sam Bockarie in 1997: The Chamber found that Mr. Taylor provided practical assistance in the form of allowing two RUF radio operators to communicate to each other using an NPFL radio about an arms shipment that the Prosecution alleged Mr. Taylor sent to Bockarie. The Chamber found, however, that the evidence was insufficient to conclude that Mr. Taylor sent this shipment to Bockarie.[1280] Any alleged communication relating to this shipment, even if it did occur, could not have had any effect, much less a substantial effect, on any crime.

653. Communications relating to Eddie Kanneh in Liberia in 1998: The Chamber found that radio communications were sent between Bockarie and Base 1 or Base 020 in Monrovia, and later from Issa Sesay, to report the movements of Eddie Kanneh

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[1274] Judgement, paras. 6928, 6931.
[1275] Operational Support: Communications, Use of Liberian Communications by the RUF.
[1276] Operational Support: Communications, Use of Liberian Communications by the RUF.
[1277] Judgement, paras. 6929, 6931.
[1278] Judgement, para. 3831. In this regard, the Chamber is unconvinced that Sankoh used NPFL communications equipment to promote Bockarie, given Isaac Mongor's conflicting testimony (Judgement, paras. 3832).
[1279] Further, please refer to Ground 26 for mr. Taylor's aliability for 'advice'.
[1280] Judgement, para. 3842, referring to 4854.

between Liberia and Sierra Leone in the course of an alleged diamond transaction[1281] The Chamber makes no findings as to how these movements, or any information arising therefrom, contributed in any degree to any crime, much less had a substantial impact on any crime.[1282]

654. Communications between Dauda Aruna Fornie and Sierra Leone in 1998: The Chamber's found that "on one of Sam Bockarie's first trips to Monrovia after the Intervention, radio operator Dauda Aruna Fornie... kept Bockarie appraised of events in Sierra Leone by using Base 1, a radio station at Benjamin Yeaten's home in Monrovia."[1283] Even if these factual findings are accepted, in the absence of any evidence or findings as to what information Bockarie was appraised of, or what he did with any such information, and how this was related to the commission of crimes by the RUF, this finding does not reflect practical assistance in any degree.

655. Communications during Mosquito Spray incident: The Chamber found that "the RUF sent a radio operator to Liberia who worked directly with Benjamin Yeaten, in order to coordinate communications between Yeaten and the RUF."[1284] This could not have constituted practical assistance to the commission of crimes charged in the Indictment by Mr. Taylor because (i) the radio operator was sent *by the RUF*, not by the Accused, and (ii) this RUF radio is found to have coordinated joint operations of the RUF and Liberian troops *outside Sierra Leone*, and therefore outside the territorial jurisdiction of the Special Court.[1285]

656. None of these finding could constitute the *actus reus* of aiding and abetting. Not one of the above instances constitutes practical assistance to the commission of any crime, let alone substantial assistance.

*(iv) "448" Warnings*

657. The Chamber finds, generally speaking, that communications support, in the form of "448 messages" (warning the RUF when ECOMOG jets left Monrovia to attack AFRC/RUF forces in Sierra Leone) were sent by subordinates of Mr. Taylor in Liberia and constituted practical assistance to the commission of crimes.[1286]

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[1281] Judgement, para. 3848.
[1282] The Arguments made in Ground of Appeal 32 and 33 are incorporated here.
[1283] Judgement, para. 3856; the Defence submissions made in Ground 12 in this regard, are incoproated here as if set out in full.
[1284] Judgement, para. 3884.
[1285] Judgement, para. 3880, 3882; Judgement, Relationship of the Accused with the RUF: Operations Outside Sierra Leone.
[1286] Judgement, paras. 3914, 6930, 6931.

658. The sending of "448 messages", potentially assisting a combatant to avoid being killed (facilitating their continued existence), does not contribute to their criminal conduct. There is no evidence that the sending of any warning message could logically be linked to the commission of a crime. That liability for sending a 448 warning could not be linked to specific crimes, or even operations generally, becomes patently obvious when we consider that the Chamber did not determine a time-frame for when ECOMOG jets were based in Robertsfield International in Monrovia (and were thereby potentially monitored by radio operators in Liberia), rather than Lungi Airport in Sierra Leone.[1287]

659. On a related note, the Chamber accepts that 448 messages also originated in Sierra Leone.[1288] It accepts the evidence of Isaac Mongor that "most" operators were from the SLA, and TF1-516's evidence that "most" messages were sent in Morse code.[1289] In this regard, whilst the Chamber disregards Issa Sesay's testimony that only former SLAs were trained in Morse code, it ignores Mongor's testimony that SLAs had trained with ECOMOG and thereby knew the same code.[1290] Even if the sending of warning messages could be considered to constituted assistance to the commission of crimes, in the absence of findings as to (i) the time-frame when 448 messaged were sent from Liberia and (ii) the proportion of warnings coming from Liberia at any given time, the Chamber was not in a position to determine that any effect 448 messaged had was "substantial."

*(v) Conclusion*

660. The Chamber therefore erred in law and fact in finding that the *actus reus* of aiding and abetting was performed. The precise relief sought is the quashing of these findings.[1291] This error, viewed cumulatively with all the other errors identified in this Part, invalidates the conclusion that Mr. Taylor aided and abetted the commission of crimes through the provision of operational support and the consequent convictions on Counts 1 to 11 of the Indictment.

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[1287] Prosecution witness Perry Kamara testified that in 1998 ECOMOG fighter jets were flying from Lungi airport to attack RUF positions in Kailahun, Koinadugu and Koidu, and 448 messages were sent from SLA radio operators in Sierra Leone (TT, Perry Kamara, 6 Feb. 2008, pp. 3223-4). Several other witnesses have mentioned ECOMOG's use of Lungi airport: see, amongst others, TT, Isaac Mongor, 11 Mar. 2008, p. 5733; Abu Keita, 23 Jan. 2008, p. 2024.

[1288] Judgement, para. 3909.

[1289] Judgement, para. 3910.

[1290] Judgement, para. 3910; TT, Isaac Mongor, 11 Mar. 2008, pp. 5772-5.

[1291] Judgement, paras. 6930, 6931.

**ii. GROUND OF APPEAL 28: The Trial Chamber erred in law and fact in finding that Charles Taylor assisted crimes by providing a guesthouse in Monrovia for use by the RUF.**

661. The Trial Chamber erred in law and in fact in finding that the provision of a guesthouse assisted any or all crimes committed during the Indictment period.[1292]

662. The existence of the Guesthouse from October 1998 to early 2001 has never been at issue in this case.[1293] The only relevant issue was whether Mr. Taylor knew that that Guesthouse was being used for any criminal purpose, or indeed for any purpose at all, other than facilitating the peace process. No reasonable trier of fact could have found otherwise.

663. The Chamber concluded that during its existence, the Guesthouse was used by the RUF in furtherance of the peace process and for diplomatic purposes.[1294] The Chamber found, however, that it was also used to facilitate the transfer of arms and ammunition to the RUF in exchange for diamonds.[1295] These transactions were found to play "a vital role" in the military operations of the RUF during which crimes were committed.[1296] Significantly, the Chamber agreed with the Defence that there was little evidence regarding how the Guesthouse was used by the RUf, prior to the signing of the Lomé Peace Accords, and the evidence adduced by the Prosecution regarding its use pertains to events occurring after January 1999.[1297] As such, only the period after January 1999 and the closure of the Guesthouse in early 2001 is relevant for purposes of the Chamber's findings.

664. As has been discussed above in Ground 23, no reasonable trial chamber properly directing itself to the evidence and the applicable standard of proof could have found that Mr. Taylor knew about or was involved in these transactions. Further, as discussed in Grounds 32 and 33 below, the Chamber found that the evidence does "not establish that every delivery of diamonds to the Accused was matched by a delivery of arms and/or ammunition to the RUF"[1298] and could not infer that Mr. Taylor was in receipt of diamonds in supposed payment for this materiel. It follows that the Chamber's findings concerning the Guesthouse are also wrong.

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[1292] Judgement, paras. 4239, 4241-3, 4246-7, 4248 (xl), 4249, 4261-2, 4261, 6933.
[1293] Judgement, paras. 4194, 4239.
[1294] Judgement, paras. 4261, 4247.
[1295] Judgement, paras. 4261, 4247.
[1296] Judgement, paras. 4261, 4247.
[1297] Judgement, para. 4239.
[1298] Judgement, para. 5936; see Ground of Appeal 32 and 33.

665. In any event, there was no evidence suggesting that Mr. Taylor was ever at the Guesthouse during its existence, or was aware of any exchange of diamonds for materiel facilitated through the Guesthouse. Applicable jurisprudence requires that the act provide some form of practical assistance and must have a "substantial effect on the commission of the crime."[1299] There is no evidence establishing that the Guesthouse provided practical assistance, or even that it had a substantial effect on the commission of charged crimes. Indeed, the Chamber failed to identify and specify which precise crimes were aided and abetted in consequence of the Guesthouse, aside from a nebulous catchall of "military operations" by the RUF.[1300]

666. In concluding that the Guesthouse was a form of assistance that played a vital role in the military operations of the RUF,[1301] the Chamber viewed the Guesthouse as forming part of the cumulative assistance by the Accused that contributed to the commission of crimes.[1302]As such, the Guesthouse was lumped together with "financial support" and other alleged forms of assistance that were subsumed under the "military operations" of the RUF,[1303]all without any pronouncement of the specific crimes that were aided and abetted by virtue of the Guesthouse, and despite the fact that some of the disparate forms of assistance were found to have been insignificant to the operations of the AFRC/RUF.[1304]

667. Significantly, and in its deliberations and findings regarding the Guesthouse, the Chamber noted the importance of the transfer of funds made at the Guesthouse[1305] when it had previously determined the funds to be insignificant to the operations of the AFRC/RUF.[1306] For example, the Chamber cited the payment of $USD 15,000 to Johnny Paul Koroma[1307] at the Guesthouse in furtherance of its finding that the Guesthouse was used for illegal purposes. However, such determination was inconsistent with the Chamber's previous findings that the money was for clothing and personal items, not to mention the Chamber's finding that the Prosecution had

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[1299] *Blagojević* TJ, para. 726; *CDF* AJ, para. 72; *Furundžija* TJ, paras. 209, 234.
[1300] Judgement, para. 4247.
[1301] Judgement, para. 4247.
[1302] Judgement, paras. 6925, 6929.
[1303] Judgement, para. 4247.
[1304] Judgement, para. 4026. See also, Ground 31 of the Defence Appeal Brief.
[1305] Judgement, paras. 4243, 4247.
[1306] Judgement, para. 4026. See also, Ground 31 of the Defence Appeal Brief.
[1307] Judgement, paras. 4200, 4243; TT, TF1-567, 4 July 2008, pp. 12978-9.

failed to prove beyond a reasonable doubt that the money was sent by the Accused to Koroma at the RUF Guesthouse.[1308]

668. Likewise, and when considering money given to Issa Sesay at the Guesthouse, the Chamber again engaged in the practice of assigning inculpatory weight to events that it previously found to have not been criminal in nature. The example at issue involves two occasions of money given to Issa Sesay at the Guesthouse: $USD 15,000 purportedly not to disarm[1309] and $USD 300,000 that was split in half, with the Accused supposedly holding on to $USD 150,000 for safekeeping.[1310] In both instances, the individual events were part of an overall finding regarding financial support, which was found not to have had a direct impact on the operations of the AFRC/RUF.[1311] Nevertheless, the Chamber proceeded to rely on "financial support" to sustain the conclusion of assistance by virtue of the Guesthouse. These inconsistent findings by the Chamber and the irreconcilable and illogical weight attached to the same evidence amounts to errors of fact and law, occasioning a miscarriage of justice.

669. The findings of the Chamber with regard to the provision of the Guesthouse implicate serious errors in law and in fact that have resulted in a miscarriage of justice by contributing to the Chamber's erroneous determination that Charles Taylor had "substantially assisted" the commission of crimes.[1312] These errors, viewed cumulatively with all the other errors identified in this Part, invalidate that conclusion, and occasion a miscarriage of justice.

### iii. GROUND OF APPEAL 29: The Trial Chamber erred in law and in fact in finding that Charles Taylor assisted crimes by providing "herbalists".

670. The finding that Taylor sent "herbalists" to bless fighters in the Fitti-Fatta operation depends on two witnesses: Alice Pyne, who testified that she was told this by an unidentified "elderly Gbandi woman" in the field;[1313] and Perry Kamara, who testified he was told this by Sam Bockarie during a commander's meeting in

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[1308] Judgement, paras. 3982-3.
[1309] Judgement, paras. 4243.
[1310] Judgement, paras. 4219. In its findings regarding Financial Support, the Chamber found that there was no exchange of funds later on with regard to this amount, Judgement, para. 4022.
[1311] Judgement, para. 4026.
[1312] Judgement, para. 4248 (xl), 4249, 4261-2, 6910-5.
[1313] Judgement, para. 4072 ("Pyne also testified that an elderly Gbandi woman had told her that the herbalists' boss was a Loma tribesman and they had been sent to Bockarie by Taylor to help protect the RUF fighters, particularly those who would go to recapture Koidu Town from ECOMOG"); para. 4086.

Buedu.[1314] Pyne's testimony is of no probative value. Her alleged source of information was not identified beyond the vaguest of descriptions. The Defence had no avenue to verify much less challenge information arising from an unidentified source. It makes no sense that the Chamber could give any weight at all to an anonymous source identified by a witness on the stand, whereas no statement could even be admitted into evidence from "an elderly Gbandi woman." No reasonable trier of fact could have attributed any weight at all to Pyne's testimony without more information about the identity of the woman, how old she was, her potential motivations for making the statement, her state of mind at the time, the circumstances, and the many other variables that would give the Defence at least a minimal opportunity to test the evidence. The Chamber, in the circumstances, could not in law nor as a reasonable trier of fact accorded any weight to Pyne's testimony based on this anonymous source.

671. Further, Pyne and Kamara's testimony are not corroborative. Kamara makes no mention of an "elderly Gbandi woman", referring instead to a male herbalist to whom he was introduced during a commanders' meeting in Buedu. The Chamber nevertheless wrongly asserted that Kamara "corroborated" Pyne's account[1315] – as if perhaps to say that no matter how divergent two testimonies might be, corroboration could validly arise as long as they both implicate Taylor's guilt. That standard would of course mean that all Prosecution evidence is corroborative, no matter how divergent the details.

672. The Chamber does not approach Kamara's hearsay evidence with anything resembling caution. On the contrary, the Chamber justifies the hearsay nature of the evidence, explaining that none of the Prosecution witnesses would "conceivably have been present when the Accused would allegedly have made the requisite arrangements."[1316] This is an improper and irrelevant consideration. Evidential standards cannot be lowered based on the deficient nature of the witnesses brought by the Prosecution. Such an approach reflects nothing more than a bias towards the

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[1314] Judgement, paras. 4074, 4086. Witness TF1-375, Samuel Kargbo, Komba Sumana, and Alimamy Bobson Sesay were only able to verify the "herbalists" were Liberian, not that they had been sent by Taylor. Judgement, paras. 4075-9. Indeed, two of those witnesses suggested they had been sent by others. TT, Komba Sumana, 6 Oct. 2008, pp. 17981-3; Alimamy Bobson Sesay, 21 Apr. 2008, pp. 8075-6.

[1315] Judgement, para. 4085.

[1316] Judgement, para. 4085.

credibility of Prosecution evidence. The hearsay nature of the evidence does not justify a more permissive approach; it requires a more cautious approach.

673. Even assuming that a reasonable trial chamber could have found that Taylor sent these herbalists, the net effect of their "treatment" was a devastating defeat for the RUF. Large numbers of fighters were apparently slaughtered in the fighting because of a false sense of invulnerability. Kamara testified that "the reason so many of the fighters died or were wounded during Fitti-Fatta was 'because they met the man Sam Bockarie said Taylor sent.'"[1317] The Chamber apparently accepted this testimony, summarizing that both Sesay and Kamara "testified to the heavy losses that the RUF incurred in the Fitti-Fatta operation and the belief of many fighters that they were invincible."[1318] Notwithstanding that the potential perpetrators were encouraged by these "herbalists", the concrete effect of their involvement in no way assisted the commission of crimes. On the contrary, their intercession led to the RUF's catastrophic defeat. The Chamber therefore erred in law in finding that the *actus reus* of aiding and abetting was performed.

674. Finally, the Chamber made no finding that any crime whatsoever was committed during, or as a consequence of, the Fitti Fatta attack. No finding is made that any territory was seized, or that any civilians came under the power of the RUF, as a result of this attack. No accessorial responsibility could be attributed in the absence of such findings.

675. The Chamber's errors of fact led directly to its conviction of Mr. Taylor for aiding and abetting, and invalidates the legal grounds on which this conviction is based. The finding should be reversed any conviction based on it quashed.

**iv. GROUND OF APPEAL 30: The Trial Chamber erred in law and fact in finding that Charles Taylor assisted crimes by providing medical support to RUF fighters.**

676. The Chamber found that Mr. Taylor provided "medical care to RUF/AFRC members"[1319] which, in addition to other forms of alleged assistance, "supported sustained and enhanced the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed."[1320] No reasonable chamber could have found that Mr. Taylor provided such support, much less that any

[1317] Judgement, para. 4074.
[1318] Judgement, para. 4092.
[1319] Judgement, para. 4248 (xxxi).
[1320] Judgement, para. 6935.

such support that was provided contributed substantially to the commission of any crimes. Even if both of these findings could have been reached by a reasonable trial chamber, providing medical support to wounded fighters, regardless of their past actions or affiliation, is an obligation prescribed by international humanitarian law and is therefore justified according to the doctrine of necessity.

677. The Chamber's finding that Mr. Taylor provided medical assistance to RUF fighters is based on the testimony of TF1-360 and TF1-406, and a concession made by Mr. Taylor that he permitted injured RUF members to receive medical treatment in Liberia "during the very tough period"[1321] on humanitarian grounds.[1322] The Chamber found that the evidence of TF1-360 and TF1-406 was "not very specific,"[1323] and that it was not clear "how continuous or substantial the provision of medical care was throughout the Indictment period."[1324]

678. No reasonable trier of fact would have concluded beyond reasonable doubt that Charles Taylor provided medical assistance or care to the RUF for criminal rather than humanitarian reasons, and with the requisite intent to assist the commission of crimes[1325] falling within the Indictment. Significantly, the "provision of medical assistance"[1326] on the face of the evidence on record was justified in law, and it was error for the Trial Chamber to conclude otherwise.

679. The Chamber's errors in law and fact, viewed cumulatively with all the other errors identified in this Part, invalidates the conclusion regarding medical assistance and occasions a miscarriage of justice, insofar as they mischaracterize certain actions as assistance to crimes and contributed to the Chamber's determination that Charles Taylor "substantially assisted" the commission of crimes.[1327]

680. The Chamber deemed both TF1-360 and TF1-406 to be "generally credible"[1328] witnesses. However, and contrary to the Chamber's finding, their respective testimony is not corroborative of one another, especially since they testified about different time periods and Sherif's testimony and the concession by Mr. Taylor

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[1321] Judgement, para. 4054; TT, Charles Taylor, 16 Sept. 2009, p. 29013.
[1322] Judgement, paras. 4032-6, 4062-3 and 4054.
[1323] Judgement, para. 4063.
[1324] Judgement, para. 4063.
[1325] See discussion on applicable *mens rea* for aiding and abetting in Ground of Appeal 16.
[1326] The Accused's concession in this regard was limited to "permitting RUF fighters to receive treatment in Liberia." Judgement, para. 4054.
[1327] Judgement, paras. 6910-5; paras. 4062-3, 4066; paras. 4068; para. 4248-9 (xxxi); para. 4258.
[1328] See, para. 236 for Perry Kamara (TF1-360) and paras. 2623 and 5324 for Varmuyan Sherif (TF1-406).

pertained to alleged acts of medical assistance outside the geographic scope of the Indictment.

681. TF1-360 testified to an arrangement between Bockarie and the Accused for the medical care of wounded RUF fighters in Monrovia in 1998 and 2000,[1329] whereas TF1-406 testified that RUF fighters who participated in fighting in Lofa County in 1999, outside of Sierra Leone, were taken to a hospital in Monrovia.[1330] Mr. Taylor testified that he permitted injured RUF members to receive medical treatment in Liberia "during the very tough period,"[1331] on humanitarian grounds. The Chamber found that such assistance (cumulatively with other forms of operational support) contributed to the "well-functioning and continued existence of the [RUF/AFRC]."[1332] Consequently, the Chamber found that the operational support from the Accused, of which medical assistance was one component, cumulatively supported, sustained and enhanced the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed.[1333] It constituted practical assistance[1334] for the commission of the charged crimes and had a substantial effect on the commission of crimes.[1335]

682. The Chamber erred in its application of the law and facts. Aiding and abetting requires a substantial assistance to the crimes committed;[1336] and there is no such evidence here. Furthermore, the Chamber's finding was based on the "continued existence" of the RUF/AFRC rather than the existence of a nexus with the commission of crimes, or a substantial effect on the commission of crimes, as is required for aiding and abetting liability under international law. "Continued existence" is not a crime and the erroneous application of this standard as equating to all crimes subsequently committed is untenable and illogical. Significantly, no consideration was given to, nor any analysis undertaken to determine, whether the alleged and conceded acts of medical assistance were "specifically directed to assist,

[1329] Judgement, paras. 4032-3; TT, TF1-360, 5 Feb. 2008, pp. 3089, 3161; 6 Feb. 2008, pp. 3181-2, 3200.
[1330] Judgement, paras. 4036; TT, TF1-406, 10 Jan. 2008, pp. 898-900.
[1331] Judgement, para. 4054; TT, Charles Taylor, 16 Sept. 2009, p. 29013.
[1332] Judgment, para. 6935.
[1333] Judgment, para. 6936.
[1334] Judgment, para. 6936.
[1335] Judgement, paras. 6935-7.
[1336] See Ground of Appeal 16.

encourage or lend moral support to the perpetration of a certain crime" and that they had "a substantial effect upon the perpetration of the crime."[1337]

683. The incorrect appreciation and application of law by the Chamber invalidates its findings and occasions a miscarriage of justice that requires reversal of the relevant finding.

684. The same applies to the Chamber's reliance on testimony by Mr. Taylor that he permitted injured RUF members to receive medical treatment in Liberia "during the very tough period,"[1338] on humanitarian grounds. Such reliance was improper in the absence of adequately, or at all considering and addressing his mental element in allowing such medical treatment, and whether such "assistance" had a substantial effect on the perpetration of a crime. Indeed, the Chamber failed to adequately consider and address the stated humanitarian reasons for permitting the medical assistance.[1339] Significantly, the permission granted by Mr. Taylor was lawful and the contrary has not been demonstrated. If giving words of moral support and encouragement to Kamajor fighters who were about to conduct military operations... and providing them with medicine which the Kamajors believed would protect them against the bullets did not constitute aiding and abetting in the CDF case, permitting RUF fighters to receive medical treatment in Liberia -- unconnected with any specific military operation, much less with identified crimes within the Indictment -- cannot constitute aiding and abetting.[1340]

685. Additionally, Common Article 3 of the Geneva Conventions I – IV requires the humane treatment of all persons not taking active part in hostilities and for the treatment of wounded and sick.[1341] This rule of international law is extended to non-international armed conflicts in Additional Protocol II to the Geneva Conventions, which repeat the same language regarding the care and protection of the wounded or sick. Furthermore, the practice of States makes it illegal to deny medical care to the

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[1337] *CDF* TJ, para. 229; See Ground of Appeal 16 regarding the applicable legal standards for aiding and abetting.

[1338] Judgement, para. 4054; TT, Charles Taylor, 16 Sept. 2009, p. 29013.

[1339] Judgement, para. 4054; TT, Charles Taylor, 16 Sept. 2009, p. 29013.

[1340] *CDF* AJ, paras. 110-1.

[1341] Geneva Conventions, art. 3.

> (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction found on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. [...] (2) The wounded and sick shall be collected and cared for.

sick or wounded.[1342] Refusing to provide medical care to dying men might, itself, have been a crime and was necessary to avoid harm to life. The doctrine of necessity permits actions in such circumstances.[1343]

686. For the foregoing reasons, the Chamber erred in finding that medical care provided to RUF fighters aided and abetted crimes.

### v. GROUND OF APPEAL 31: The Trial Chamber erred in law and fact in finding that Charles Taylor assisted the commission of crimes by providing sums of money.

687. The Chamber found that Mr. Taylor provided financial support to the RUF/ AFRC in varied amounts on different occasions.[1344] Mr. Taylor conceded that he provided some of these funds, notably the 10 million CFA francs given to the RUF in the Côte d'Ivoire[1345], the money given to Johnny Paul Koroma following the Lomé Accords[1346], and $USD 4,000 to 5,000 given to Sam Bockarie between September 1998 and November 1999 as traditional gifts from an African leader.[1347]

688. With the exception of the funds allegedly given to Sam Bockarie "in the tens of thousands of US Dollars," to buy arms and ammunition from ULIMO, the funds allegedly given by Mr. Taylor to various individuals were for unspecified or personal use.[1348] Thus, the 10 million CFA francs allegedly given to the RUF were found not to have been used for purposes of facilitating arms and diamond deals for the RUF.[1349]

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[1342] Henckaerts, Jean-Marie and Doswald-Bec, Louise, *Customary International Humanitarian Law. Volume I: Rules*, Cambridge University Press (2005), p. 401, fn. 36.

[1343] Rome Statute, Art. 31(1)(d) ("1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: [...] (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control").

[1344] Judgement, paras. 4023 and 6932.The specific findings were the provision of the following funds: (i) 10 million CFA francs to the RUF in Côte d'Ivoire (ii) unspecified funds to RUF personnel stranded in Côte d'Ivoire after Foday Sankoh was detained in Nigeria; (iii) unspecified funds to the RUF, in the tens of thousands of dollars, to buy arms and ammunition from ULIMO; (iv) $USD 10,000 to Sam Bockarie after ULIMO and LURD invaded Lofa; (v) $USD 20,000 to Foday Sankoh in Lomé before the negotiations began; (vi) $USD 15,000 to Sam Bockarie following the Lomé Accords; (vii) $USD 5,000 to 10,000 to Johnny Paul Koroma following the Lomé Accords; (viii) $USD 15,000 to Issa Sesay to support the RUF; and (ix) $USD 50,000 to Issa Sesay in 2001. Judgement, paras. 4023 and 4257.

[1345] Judgement, para. 4024.

[1346] Mr. Taylor conceded giving Koroma $USD 5,000 to $USD 10,000 at a meeting after the Lomé Accords. Judgement, para. 3981.

[1347] Judgement, paras. 4024, 3949, 3969, 3971; TT, Charles Taylor, 26 Nov. 2009, pp. 32568-72.

[1348] Judgement, paras. 4257 and 4024..

[1349] Judgement, paras. 4023 (i) and 4257.

The funds given Foday Sankoh before the Lomé Accords was for "personal use," and that given JP Koroma was for his delegation to "buy personal items" in Monrovia.[1350] Other funds allegedly given were for unspecified purposes and the Chamber concluded that the RUF also received financial support for arms and ammunition from sources other than Mr. Taylor.[1351]

689. Significantly, the Chamber concluded that:

> In light of the relatively few and small amounts of funding provided to the RUF or AFRC by the Accused, and considering that most of this funding was for personal or unspecified uses, the Trial Chamber is unable to find that the financial support provided by the Accused, in itself, had a direct impact on the operations of the AFRC/RUF.[1352]

690. Despite this finding, the Chamber found that the funds given to Bockarie for the purchase of arms and ammunition from ULIMO, and the alleged safekeeping of diamonds and money for the RUF/AFRC,[1353] were forms of assistance that "supported, sustained and enhanced the functioning of the RUF and its *capacity* to undertake military operations in the course of which crimes were committed."[1354] The Chamber therefore apparently distinguishes between "capacity" and "operations", finding that the money provided enhanced the former, but did not have a direct impact on the latter. Nevertheless, the Chamber concluded that, viewed in conjunction with other alleged forms of support, notably alleged supply of materiel, the financial support had a "substantial effect on the commission of crimes charged in... the Indictment."[1355]

691. The Chamber's own reasoning is legally incoherent. Aiding and abetting requires assistance to a crime. Assistance to an organization whose members may from time to time commit, or have committed, crimes is not aiding and abetting. What is required in such circumstances is that the aider and abettor has provided assistance to *the crime*, and to the individuals perpetrating that crime. Extending liability to support to the organization, as discussed in Ground 21, bypasses the principles of liability hitherto established in international criminal law. The Chamber at first seems to accept that the financial support pertained, at most, to the RUF's "capacity", rather

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[1350] Judgement, para. 4257.
[1351] Judgement, para. 4257.
[1352] Judgement, para. 4026.
[1353] The issue of safekeeping money or diamonds for the RUF/ AFRC is addressed in relation to Grounds of Appeal 32 and 33.
[1354] Judgement, para. 6932-7 (emphasis added). Although not listing financial support explicitly, the Chamber includes all "aforementioned forms of assistance" in its findings on legal responsibility.
[1355] Judgement, para. 6937.

than its "operations". Assistance to organizational "capacity" is not aiding and abetting.

692. No reasonable trier of fact could have concluded that such financial support had a "substantial effect" on the commission of charged crimes. The Chamber erred in fact and law in reaching the opposite conclusion and, viewed cumulatively with all the other errors identified in this Part, its errors invalidate the conclusion regarding financial support and occasion a miscarriage of justice, insofar as they mischaracterize certain actions as assistance to crimes and contributed to the Chamber's determination that Charles Taylor "substantially assisted" the commission of crimes.[1356]

693. The Chamber erred in its application of the law and facts. Aiding and abetting requires a substantial assistance to the crimes committed,[1357] and the funds allegedly given to Bockarie to buy arms and ammunition from ULIMO, after February 1998,[1358] do not suffice as "substantial assistance," bearing in mind that the RUF received financial support from sources other than the Accused and the purposes for which each installment of provided funds was used has not been demonstrated, much less a showing that all such funds were used for unlawful acts.

694. Furthermore, the Chamber's finding was based on the "continued existence" of the RUF/AFRC rather than the existence of a nexus with the commission of crimes, or a substantial effect on the commission of crimes, as is required for aiding and abetting liability under international law. "Continued existence" is not a crime and the erroneous application of this standard as equating to all crimes subsequently committed is untenable and illogical. Significantly, no consideration was given to, nor any analysis undertaken to determine, whether the alleged and conceded acts of financial support were "specifically directed to assist, encourage or lend moral support to the perpetration of a certain crime" and that they had "a substantial effect upon the perpetration of the crime."[1359]

695. The incorrect appreciation and application of law by the Chamber invalidates its findings and occasions a miscarriage of justice that requires reversal of the relevant finding.

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[1356] Judgement, paras. 6910-5; paras. 4062-3, 4066; paras. 4068; para. 4248-9 (xxxi); para. 4258.
[1357] See Ground of Appeal 16.
[1358] Judgement, para. 6932.
[1359] *CDF* TJ, para. 229; See Ground of Appeal 16 regarding the applicable legal standards for aiding and abetting.

696. The Defence emphasizes that Chamber found a lack of direct impact of the financial support on the operations of the AFRC/RUF.[1360] This was an explicit finding and to subsequently extend and have this finding subsumed under the purview of "cumulative impact" on the functioning, existence and support of the RUF/AFRC in its capacity to commit crimes during military operations was an error that is irreconcilable with the explicit finding by the Chamber of no direct impact.[1361]

697. The Chamber also erred in failing to give due consideration to the traditions that dictated Mr. Taylor's actions in providing occasional monetary gifts to the RUF/ AFRC. Mr. Taylor testified that the practice of monetary gifts has a traditional aspect to it[1362]; such tradition, it is submitted, helps form regional customary practice.[1363] Regional or local customary practices are customary international laws which are "applicable only within a defined group of States."[1364] The practice of local customary international law finds its basis in, *inter alia*, two judgements of the International Court of Justice: the *Asylum*[1365] and *Right of Passage over Indian Territory*[1366] cases. The monetary gifts to Foday Sankoh by President Olusegun Obasanjo of Nigeria and President Gnassingbe Eyadema of Togo[1367], may thus be viewed as consistent with a rule of local customary international law regulating the diplomatic practice of states in Africa and, more specifically, West Africa, which the Accused relied upon when providing the said gifts. The Trial Chamber erred in fact by failing to adequately consider Mr. Taylor's testimony regarding local customary practices and obligations which obtained at the time of the giving of the gifts.

698. The Chamber's erroneous approach to the financial support issue served as part of its justification for its conclusion that Mr. Taylor aided and abetted the commission of charged crimes by the RUF/AFRC. For the foregoing reasons, the

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[1360] Judgement, para. 4026.
[1361] Judgement, para. 4026.
[1362] Judgement, para. 3974; TT, Charles Taylor, 26 Nov. 2009, pp. 32568-72.
[1363] See Ground 16 for a discussion of customary international law more generally explained.
[1364] Thirlway, Hugh, "The Sources of International Law" in Evans, Malcolm D. (ed.), *International Law*, Oxford University Press (Oxford 3rd ed., 2010), p. 106.
[1365] *Assylum Case* Judgement, p. 276-7. Although the Court did not find state practice supporting the finding of local custom, it determined that a rule of international law established by and applicable as a local custom could be established by State practice requiring "constant and uniform usage, accepted as law, with regard to the alleged rule."
[1366] *Passage over Indian Territory* Judgement, p. 6 at 39. The Court also recognized the existence of a special custom as being established by only two states and the regulation of their relations.
[1367] Judgement, paras. 3956, 3962; TT, Charles Taylor, 14 Sept. 2009, pp. 28816-7; and 14 July 2009, pp. 24340-1.

Chamber erred in finding that financial support provided to the RUF/ AFRC aided and abetted crimes.

vi. **GROUND OF APPEAL 32: The Trial Chamber erred in fact in finding that Charles Taylor facilitated the sale, transfer or production of Sierra Leoneon of diamonds, and erred in fact and in law in finding that any such alleged facilitation aided and abetted crimes.**

vii. **GROUND OF APPEAL 33: The Trial Chamber erred in law and fact to the extent that it found that Charles Taylor aided and abetted crimes by facilitating the sale of diamonds.**

*(i) Introduction*

699. This section deals with the issue of diamonds and consolidates Defence submissions relating to Grounds of Appeal 32 and 33.

700. The significance of diamonds to the allegations against Mr. Taylor was varied and confused throughout the trial of the case. The Judgement, in the section dealing specifically with "Diamonds" (Section VIII.G), made a number of findings.[1368] These findings, at best, provide a general contextual understanding of the Sierra Leonean conflict. Importantly, the Chamber exonerated[1369] Mr. Taylor from JCE liability by concluding that diamonds were a commodity that was, at times, traded on a *quid pro quo* basis[1370] and the Accused had no plan or motivation to terrorise the people of

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[1368] That Mr. Taylor **(i)** provided diesel fuel and mining equipment to the RUF on one occasion between 1998 and 2002 (paras. 6136, 6139 (viii) and 6148); **(ii)** sent two men to visit and assess a mining site in Kono (paras. 6137, 6139 (ix) and 6148); **(iii)** facilitated a relationship in 2001 between Issa Sesay/RUF and a Belgian diamond dealer ("Alpha Bravo") for purposes of diamond transactions (paras. 6139 (vii), 6147, 6092 and 6103); **(iv)** diamonds given to Issa Sesay around April 1998 and intended for delivery to Ibrahim Bah were lost by Sesay in Monrovia (5978, 5975 and 6139 (iii)); **(v)** Foday Sankoh delivered diamonds to the Accused in February or March 2000 (paras. 6139 (iv), 6144 and 5990); **(vi)** diamonds were delivered to the Accused on Sankoh's behalf before or in 1999 while Sankoh was in detention (paras. 6139 (iv), 6144 and 5989 - 5990); **(vii)** diamonds mined in Kono and Tongo Fields were delivered from the AFRC/RUF to the Accused by Daniel Tamba (a.k.a., Jungle) between May 1997 and February 1998 in exchange for arms and ammunition (paras. 5873 – 5874, and 6139 (i)); **(viii)** diamonds were delivered to the Accused between February 1998 to July 1999, directly by Sam Bockarie and indirectly by Eddie Kanneh and Daniel Tamba, sometimes for safekeeping until Sankoh's return or, in order to obtain arms and ammunition from the Accused (paras. 6139 (ii), 6142, 5930, and 5947 - 5948); **(ix)** between June 2000 and the end of hostilities in 2002, Issa Seay delivered diamonds to the Accused, sometimes in return for supplies and/or arms and ammunition and other times for safekeeping until Sankoh's release from detention (paras. 6139 (v), 6057 and 6145); and **(x)** Eddie Kanneh delivered diamonds to the Accused on Sesay's behalf "on occasion" between June 2000 and the end of hostilities in 2002, sometimes in exchange for supplies and/or arms and ammunition and other times for safekeeping until Sankoh's release from detention (paras. 6145, 6139 (vi), 6050 and 6058). There are no findings of aiding and abetting any charged crimes, in consequence of diamonds, in the Diamonds section of the Judgement. Further, these findings, even if accepted, do not constitute aiding and abetting of any charged crime.

[1369] Judgement, para. 6900.

[1370] Judgement, paras. 6898-6899.

Sierra Leone. The Chamber finding dealt a final blow to the heart of the Prosecution's case theory that the Accused formulated a plan to gain or maintain political power or control over the territory of Sierra Leone (the diamond mining areas, in particular) in order to exploit the natural resources of the country.[1371]

701. In turn, section IX.A.2, of the Judgement which deals with Mr. Taylor's individual criminal responsibility for aiding and abetting, makes scant references to diamonds. Insofar as it does, however, this section will address the Chamber's errors of fact and law.

*(ii) Indirect findings on aiding and abetting and diamonds*

702. The Chamber mentioned diamonds indirectly in its discussion of the forms of "operational support" that allegedly aided and abetted the commission of crimes. First, in finding that Mr. Taylor provided "communications support", the Chamber mentions that some communications were in relation to diamond transactions.[1372] The Defence has addressed the Chamber's findings on "communications support" in Ground 27.

703. Second, the Chamber considered that Mr. Taylor's provision of a Guesthouse in Monrovia was used, in part, to facilitate the alleged delivery of diamonds to Mr. Taylor.[1373] The Chamber's findings in relation to the Guesthouse have been dealt with in Ground 28.

704. Third, the Chamber held that Mr. Taylor aided and abetted crimes by providing "encouragement and moral support", when he (i) told Bockarie, generally, to "keep control over [Kono] for the purpose of maintaining the trade of diamonds for arms and ammunition" and (ii) advised Bockarie to recapture Kono in mid-June 1998 "in order to mine diamonds which would be used to purchase arms and ammunition, following which the RUF carried out Operation Fitti-Fatta."[1374] These findings are addressed Grounds 20 and 26.

705. In addition, the Defence makes the following observations about diamonds: Whilst it found that Mr. Taylor provided Foday Sankoh with arms and ammunition for an attack on Kono around November 1992,[1375] the Chamber noted that the

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[1371] Pre-Trial Conference Materials, para. 6; TT, Prosecution Opening Statement, 4 June 2007, p. 271; Notification of Amended Case Summary, para. 42; Original Indictment, paras. 23-5; Amended Case Summary, paras. 42-4.
[1372] Judgement, para. 6929.
[1373] Judgement, para. 6933.
[1374] Judgement, para. 6942.
[1375] Judgement, para. 5507.

acquisition of diamonds was not the primary purpose of the attack on Kono.[1376] The Defence notes the Chamber's finding that a shipment of arms and ammunition in November or December 1998 was paid for with diamonds;[1377] that shipment has been addressed in Ground 23. Finally, the Defence notes, regarding the Magburaka shipment, that Mr. Taylor did not send arms and ammunition and did not receive the 90 carats of diamonds or $US 90,000 given to Ibrahim Bah.[1378]

*(iii) Aiding and abetting liability for diamonds*

706. The Chamber held that Mr. Taylor "kept diamonds and money in 'safekeeping' for the RUF/AFRC"[1379] and this constituted operational support which "supported, sustained and enhanced the functioning of the RUF and its capacity to undertake military operations in the course of which crimes were committed."[1380] Further, as all forms of operational support "improved coordination and facilitated the trade for and vital flow of arms and ammunition to the RUF/AFRC," they constituted practical assistance for the commission of crimes.[1381] Further, all forms of operational support "taken cumulatively, and having regard to the military support provided by the Accused to the AFRC/RUF... had a substantial effect on the commission of crimes charged in Count 1 to 11 of the Indictment."[1382] The finding of the Chamber that the retention of diamonds for "safekeeping" (usually in anticipation of Sankoh's release from detention) assisted the commission of any crime, let alone had a substantial effect in this regard, is an error of law and logic.

707. As discussed above,[1383] the applicable jurisprudence requires that the act in question provide some form of practical assistance and have a "substantial effect on the commission of the crime."[1384] The Chamber does not, and could not, link the "safekeeping" of diamonds to the commission of any crime. Indeed, the very notion of "safekeeping" entails the storage of a valuable asset for its safety or preservation - as opposed to its utilization. Placing an object in safekeeping is, by definition, making it unavailable for use, including to assist in the commission of a crime. If anything,

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[1376] Judgement, para. 2456. Obviously, this incident also falls outside the indictment period.
[1377] Judgement, paras. 5507, 5524, 5841.
[1378] Judgement, paras. 5388, 5559, 5840.
[1379] Judgement, para. 6932.
[1380] Judgement, para. 6936.
[1381] Judgement, para. 6937.
[1382] Judgement, para. 6937.
[1383] The legal arguments and discussion made in Grounds 27 to 31 are incorporated here insofar as they relate to the Chamber's approach towards aiding and abetting liability.
[1384] *Blagojević* TJ, para. 726; *CDF* AJ, para. 72; *Furundžija* TJ, paras.209, 234.

the safekeeping of diamonds, by removing them from the use of the RUF or RUF/AFRC would prevent their use in the commission of crimes.

708. There is no nexus between the deposit of any diamond for safekeeping and the commission of any crime. In this regard, and even taking into account all instances of diamond deliveries and not solely ones for "safekeeping", the Chamber held that "the evidence does not establish that every delivery of diamonds to the Accused was matched by a delivery of arms and/or ammunition for the RUF."[1385] Further, the relevant witnesses testified that diamonds were given to Mr. Taylor for safekeeping until Foday Sankoh was released from detention,[1386] presumably to be utilized by the RUF in some manner at that time. No witness testified, and no finding was made, that Sankoh or any other member of the RUF received back these diamonds and utilized them in some manner that facilitated an identified crime within the Indictment, or even in any manner whatsoever.[1387] In the absence of such a crucial link, it cannot be said that the "safekeeping" of diamonds had even the remotest connection to the commission of any crime.

709. The incorrect appreciation and application of law by the Chamber invalidates its findings and occasions a miscarriage of justice that warrants reversal of the relevant finding.

## D. PART IV: ERRORS RELATING TO IRREGULARITIES IN THE JUDICIAL PROCESS

### i. GROUND OF APPEAL 36: The Trial Chamber erred in law and/ or procedure in that deliberations, as contemplated and required by Rule 87, Rule 16*bis* and Rule 26*bis*, were not undertaken by the Trial Chamber in this case, as was declared in open court by Alternate Judge El Hadji Malick Sow on 26 April 2012 after the oral pronouncement of the Judgement.

710. The Chamber delivered an oral summary of the Judgement on 26 April 2012. At the conclusion of the sitting, Alternate Judge, Justice Sow, declared in open court in the presence of the parties:

> "The only moment where a Judge can express his opinion, is during the deliberations or in the courtroom, and pursuant to the Rules, *where there is*

[1385] Judgement, para. 5936.
[1386] Judgement, para. 5881, 5893, 5994.
[1387] TF1-338, Transcript 2 September 2008, pp. 15192-15193; TF1-567, Transcript 8 July 2008, p. 13201; Isaac Mongor, Transcript 31 March 2008, pp. 6193-6194

> *no ^ deliberations*, the only place left for me in the courtroom. I won't get -- because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. *And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.* Thank you for your attention." ("Justice Sow's Statement" or "Statement.")[1388]

711. Justice Sow's Statement contains direct evidence of grave errors of law and procedure in relation to the proceedings in the Judgement against Mr. Taylor. Two significant errors are identified. The first is that the Trial Chamber failed to deliberate pursuant to the Rules. The second is that the process was conducted in a manner inconsistent with fundamental principles and values of international criminal law. These errors also constitute a breach of the right of the Defendant to a fair and public trial. Individually or collectively, the errors vitiate the proceedings, occasion a miscarriage of justice and invalidate the Judgement. Accordingly they should lead to a reversal of all adverse findings in the Judgement, the quashing of all convictions, and vacatur of the Judgement and Sentencing Judgement.

712. The first error is addressed under this ground. The second error is addressed under Ground 37 in the context of other serious breaches of procedure and the fair trial rights of Mr. Taylor, relating to the making of the Statement and related facts.

713. The existence of Justice Sow's statement cannot be disputed, having already been implicitly confirmed by the Plenary Decision to remove him for judicial misconduct.[1389] A majority of this Appeals Chamber has held that the Plenary Decision "did not pronounce on nor express any views concerning the content of Justice Sow's Statement" and concerned "only... his behaviour in court."[1390] Further, this Camber has held that "Justice Sow's credibility, professional or otherwise, was

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[1388] (Emphasis added.) See Public Annex C, Statement of Justice El Hadji Malick Sow on 26 April 2012.

[1389] "1. The plenary declares that Justice Malick Sow's behaviour in court on the 26th of April, 2012, amounts to misconduct rendering him unfit to sit as an Alternate Judge of the Special Court. 2. The plenary recommends to the appointing authority pursuant to Rule 15 bis (B) to decide upon the further status of Justice Malick Sow. 3. Pursuant to Rule 24(iii), the plenary directs Justice Malick Sow to refrain from further sitting in the proceedings pending a decision from the appointing authority." ("Plenary Decision"). Trial Transcript 16 May 2012, T. 49682- T. 49683. Disqualification Decision & Disqualification Decision, Separate Op.

[1390] Disqualification Decision, para. 29.

not before the Plenary and was not judged by the Plenary."[1391] Thus, these findings make it clear that the Plenary Decision and Justice Sow's behaviour does not affect the way in which this Court will consider the content of the Statement or the credibility of Justice Sow.

714. The requirement that Judges carefully deliberate on the evidence presented to them prior to making a determination on the guilt or innocence of an accused person is a fundamental and inviolable principle of criminal justice. It is one of the cornerstones of a fair trial and underlines the very integrity of judicial proceedings. Any violation of this principle, including Judges' failure to participate in them, constitutes a fundamental breach of applicable procedural requirements and the fair trial rights of the Defendant amounting to a miscarriage of justice.

715. The ordinary meaning of 'deliberations' encompasses "the act of carefully considering issues and options before making a decision or taking some action".[1392] Final deliberations after the conclusion of a trial are mandatory. Rule 87 requires that the "Trial Chamber *shall* deliberate".[1393] The "Trial Chamber" in this provision, refers to all the members of the Trial Chamber. Therefore each member of the Trial Chamber is obligated to be present during all deliberations. An Alternate Judge designated to a particular trial in accordance with Article 12(4) of the Statute[1394] is required to be present at all times during deliberations despite not being entitled to vote on the guilt of the Defendant on each count of the indictment.[1395] In this case, Judge El Hadji Malick Sow was the Alternate Judge of the Trial Chamber, who was present throughout five years of trial and the purported deliberations of the Chamber.[1396] Final trial deliberations can only commence once the Presiding Judge has declared a hearing closed.[1397]

716. The purpose of such deliberations is to consider and reach a decision on whether the Defendant is guilty beyond reasonable doubt on each count of the indictment.[1398] Each voting Judge votes separately on each count.[1399] If the Trial

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[1391] Disqualification Decision, para. 28.
[1392] Garner, Bryan A, *Black's Law Dictionary* (West, 9th ed., 2009), p. 492.
[1393] Rule 87(A) of the Rules.
[1394] Statute.
[1395] Rule 16*bis* (C) of the Rules.
[1396] Justice Sow was designated as an Alternate Judge by Justice Sebutinde pursuant to Article 12(4) of the SCSL Statute. See Order Designating Alternate Judge.
[1397] Rule 87(A) of the Rules.
[1398] Rule 87(A) of the Rules.
[1399] Rule 87(B) of the Rules.

Chamber finds the accused guilty on one or more counts it shall also determine the penalty to be imposed for each of the counts.[1400] A Trial Chamber of the ICTY has described the process, stating that "[d]uring its final deliberations, the Trial Chamber has [...] assessed the weight of the relevant facts, taking into consideration the totality of the trial record and, most particularly, any evidence submitted by the non-moving party to rebut the adjudicated fact."[1401]

717. Justice Sow's Statement suggests that the Chamber failed to properly conduct the process of deliberations under the Rules, that is, to attend all deliberations together, consider the guilt of Mr. Taylor beyond reasonable doubt with reference to the totality of the trial record and to decide upon this issue by voting on each count of the indictment. This failure constitutes an error of both law and procedure that invalidates the Judgement.

718. Deliberations after the close of proceedings are the most solemn and significant aspect of the decision making process of the court whereby the guilt of the accused is discussed in light of the relevant evidence and law, and the fate of the accused is finally decided in terms of both guilt and sentence. The importance of deliberations therefore is not only a requirement of law and procedure but is also a fundamental aspect of fair trial. The Defence has made detailed legal submissions in Ground 37 regarding the applicable standards of a fair and public trial and hereby incorporates those submissions by reference. That a failure of deliberations constitutes a denial of the right to a fair trial as enshrined in the Rules of the Special Court, cannot be gainsaid.[1402] A failure to deliberate also implicates another aspect of fair trial rights concerning the conduct of judges. The right to a fair trial includes the right to an impartial tribunal, of persons of high moral character, impartiality and integrity who have made a solemn declaration to serve honestly, faithfully, impartially and conscientiously.[1403] If these standards are breached then the right to a fair trial has been infringed. A failure to deliberate may well be viewed as breaching this solemn duty.

719. Justice Sow's Statement has substantial probative value. Regardless of the propriety of the manner in which he conveyed the information, his statement

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[1400] Rule 87(C) of the Rules.
[1401] *Popović* TJ, para. 71.
[1402] Article 17(2) of the Statute & Rule 26 *Bis.* Rules. This fundamental right has recently been confirmed by this Appeals Chamber. Disqualification Decision, para. 23, fn.59.
[1403] Disqualification Decision, para. 23 citing Article 13(1) of the Statute and Rule 14(A) of the Rules.

constitutes compelling and voluntarily provided evidence from a professional judge who was legally obliged to attend all and any of the purported deliberations of the Chamber. He was therefore in a unique position of a first-hand observer to whatever did, or in this case, did not occur during that process. This contrasts with previous cases where such claims have been rejected in the absence of direct evidence of a failure to deliberate.[1404]

720. Rule 29 of the Rules provides that "deliberations are to take place in private and remain secret" and Rule 87(A) states that deliberations after the conclusion of the evidence in the case in order to consider the guilt of the accused beyond a reasonable doubt, are to be conducted "in private".[1405] Rule 29 applies to all the deliberations of Chambers,[1406] including all decisions and orders prior to the final decision. Rule 87(A) expressly applies to the final deliberations after the close of the hearing.

721. These provisions are intended to cover the substance of the deliberations in Chambers when assessing the applicable law and facts leading to either a decision during the proceedings or leading to a vote on the guilt of the accused under each count of the indictment, after the close of the hearing.[1407] Both the Prosecutor of the ICTR and the Appeals Chamber of the ICTR have agreed that what is protected by secrecy is the *substance* of deliberations with the Appeals Chamber stating:

> Deliberations for Judgements of the Tribunal are strictly privileged and confined to the staff of each Trial Chamber; staff of different Trial Chambers are thus prohibited from discussing the *substance* of any Judgements with any other person.[1408]

722. The implication is that secrecy relates to the substance, not the very existence, of deliberations.

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[1404] See eg. in the case of *Prosecutor v Krajišnik,* the ICTY Appeals Chamber rejected the *Amicus Curiae* submission that the Trial Chamber had failed to properly deliberate on the basis that it had failed to adduce evidence to substantiate its claim. *Amicus Curiae* asserted it was impossible to for the Trial Chamber to properly deliberate the case and deliver a comprehensive Trial Judgement in the way that it had within only 18 days, alleging that deliberations had commenced prior to the closing of the case. However, in the absence of any further evidence substantiating such claim, the Appeals Chamber was not prepared to draw that inference. *Krajišnik* AJ,paras. 133-4.

[1405] Rules 29 & 87(A) of the Rules.

[1406] *AFRC* Leave to Appeal Decision, p. 1.

[1407] With respect to deliberations after the close of proceedings, the final voting on each count is ultimately revealed in the written judgment of the Trial Chamber because Judges are empowered to issue dissenting opinions indicating a disagreement with the majority on counts of the indictment. Rule 88(C) of the Rules.

[1408] *Semanza* AJ, para. 56.

723. Furthermore, and in any case, there are certain circumstances where Judges are permitted to state publically what occurred during the deliberative process, including the conduct of their colleagues, if this is necessary in order to address serious procedural irregularities which in their view undermine the fundamental integrity of the legal process and therefore the fairness of the proceedings. As such, these statements are lawfully made statements in the interests of justice. Furthermore, they fulfil a Judge's solemn declaration to serve honestly, faithfully, impartially and conscientiously.[1409]

724. Judges of the Special Court have publically explained what has occurred during deliberative processes relating to matters falling for decision by the Special Court. Two examples of such expressions have related to a decision of Trial Chamber II in the *Brima* case not to reinstate defence counsel,[1410] and a subsequent decision by the same Trial Chamber to grant leave to appeal that same decision.[1411] In Justice Sebutinde's dissenting opinion to the decision refusing re-appointment of defence counsel, Her Honour referred to and appended an internal memorandum sent by her to the other Judges of Trial Chamber.[1412] In that memorandum she disclosed, in detail, what she viewed as serious procedural problems pertaining to the matter before the Chamber including conversations she had with Justice Doherty, the Presiding Judge of the Trial Chamber, the conduct of the Presiding Judge, and her own conduct. In that memorandum she also expressed her opinion on substantive issues relating to matters before the court to the other Judges of the Chamber. Justice Sebutinde further stated that she was writing the memorandum because "I feel that it would be a betrayal of my solemn declaration and undertaking if I did not make public my position on and the extent of my involvement in the issue."[1413]

725. Justice Doherty publically responded to Justice Sebutinde's dissenting opinion and her annexed memorandum by appending "Comments" to the a subsequent decision by the Trial Chamber to grant leave to appeal the decision.[1414] In these comments, Justice Doherty gave a detailed account of the discussions between herself and the other Judges of the Trial Chamber, including Justice Sebutinde, and the

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[1409] Disqualification Decision, para. 23 citing Article 13(1) of the Statute and Rule 14(A) of the Rules.
[1410] *AFRC* Re-Appointing Decision & *AFRC* Re-Appointment Dissenting Opinion.
[1411] *AFRC* Leave to Appeal Decision.
[1412] *AFRC* Re-Appointment Dissenting Opinion, Annex to Dissenting Opinion of Justice Sebutinde.
[1413] *AFRC* Re-Appointment Dissenting Opinion, Annex to Dissenting Opinion of Justice Sebutinde, para. 2.
[1414] *AFRC* Leave to Appeal Decision.

conduct of the Judges in relation to the matter before the Chamber. In so doing she acknowledged that such disclosure would not ordinarily be permitted but that she felt impelled to do so because these matters were already public and she was entitled to do so in order to correct incorrect or misleading facts. She said:

> I consider some facts stated are incorrect or misleading. .... I consider Rule 29 of the Rules of Procedure and Evidence does not permit any Judge to publish or discuss matters that have been discussed in Chambers however since several matters have been brought into the public arena by the publication of both the Dissenting Opinion and the interoffice memorandum I consider I am entitled to put the following before the Appeal Chamber.[1415]

726. Another more recent example where a Judge stated publically what occurred during a deliberative process in order to address what, in his view, was a serious procedural irregularity occurred in the context of the Disqualification Decision. In his separate opinion to the decision, Justice King declined the relief sought by the Defence motion on the basis that he did not participate in two days of deliberations and the subsequent Plenary Decision which found that Justice Sow had engaged in misconduct for his behaviour in making the Statement.[1416] In so doing he provided his account of the procedure and conduct of Judges with respect to the Plenary Decision and in particular the conduct of Justice Sebutinde. He stated that "at the start of deliberations, [...] Justice Julia Sebutinde of Trial Chamber II read a written 6 page statement on behalf of Trial Chamber II, which purported to be a complaint against Justice Malick Sow",[1417] and that "Justice Malick Sow, against whom the allegations in the statement were made was not given prior notice of it and, consequently, had not been given the opportunity to respond."[1418] Justice King characterised the allegations as "sudden and scurrilous".[1419] As a result of this "procedural irregularity, which patently impinged on Justice Sow's right to be heard...[and] was against basic principles of natural justice",[1420] Justice King made it clear that he did not participate in the deliberations of the Emergency Plenary of the SCSL "either on 7 or 10 May 2012 or in any decision taken by the Plenary on the matter."[1421] Justice King therefore publically described the conduct and process of

[1415] *AFRC* Leave to Appeal Decision, p.1.
[1416] Disqualification Decision, Separate Op.
[1417] Disqualification Decision, Separate Op., para. 5.
[1418] Disqualification Decision, Separate Op., para. 7.
[1419] Disqualification Decision, Separate Op., para. 8.
[1420] Disqualification Decision, Separate Op., para. 8.
[1421] Disqualification Decision, Separate Op., para. 10.

deliberations in the context of procedural irregularities which in his opinion breached fundamental fair hearing rights.

727. Accordingly, while deliberations as to the substance of matters before Chambers are generally secret, there are exceptional circumstances where Judges may speak out publically and address the conduct of deliberations. They may do so if it is in the interests of justice or fairness or in accordance with a Judge's solemn declaration to serve honestly, faithfully, impartially and conscientiously.

728. In the present case the first few phrases of Justice Sow's Statement are instructive. Justice Sow said "The only moment where a Judge can express his opinion, is during the deliberations or in the courtroom, and pursuant to the Rules, *where there is no ^ deliberations*, the only place left for me in the courtroom." As such his Statement was guided by his conviction that he was speaking out at the only appropriate forum left open to him, which was in the court room. He then proceeded to voice his grave concerns about the process against Mr. Taylor as set out in this ground and Ground 37.

729. Statements made under these circumstances, such as the Statement of Justice Sow, should be considered as compelling evidence of grave procedural irregularities because they are made by Judges who are experts in their field, direct observes as to the events they are speaking of and because their purpose and duty is to protect the fairness and integrity of the judicial process

730. As noted in Mr. Taylor's Notice of Appeal dated 19 July 2012, this ground is subject to a filing under Rule 115 to present additional evidence before the Appeals Chamber.[1422] As such the Defence reserves the right to present further argument on this ground after the resolution of the matters relating to additional evidence.

**ii. GROUND OF APPEAL 37: The Trial Chamber erred in law and/ or procedure, in that there were recurring irregularities in the judicial process during the proceedings before the Trial Chamber, contrary to Rule 26*bis* and fundamental principles of due process.**

731. On the 26 April 2012, Justice Sow, the Alternate Judge in this case made an unprecedented Statement[1423] speaking out publically about what in his opinion was a process that was not consistent with "all the values of international criminal justice". The Defendant was denied the right to a fair and public trial by serious procedural

[1422] Notice of Appeal, para. 104.
[1423] See Ground 36.

irregularities associated with the making of this Statement. A sitting Judge's microphone was silenced in open court; his Statement was removed from the official transcript of the proceedings when the statement was already recorded on the unofficial live note transcript; and his name was removed from official transcripts, orders and judgment cover pages after he spoke out. Each of these actions was undertaken without any decision or order from the Trial Chamber setting out the legal basis upon which they were taken. Each of these actions constitute a serious procedural irregularity which breached Mr. Taylor's right to a fair and public hearing.

732. These measures were taken in the context of at least one serious public dispute between the Trial Judges about the proper composition of the Trial Chamber in the absence of one of the Judges and the subsequent refusal to let Justice Sow sit as a Judge in that situation.

733. The right to a fair trial is a fundamental pillar of international criminal justice and of the conduct of proceedings before the Special Court.[1424] Security Council Resolution 1315 (2000) makes it clear that the Trial Chamber must ensure that the proceedings before it observe "international standards of justice, fairness, and due process of law".[1425] Any deviation from these standards compromises the integrity of the judicial processes and therefore the fairness of the trial process against Mr. Taylor.[1426]

734. The right to a fair and public trial is a universally recognised right. It is provided for in all of the seminal international human rights instruments.[1427] Importantly, the right to a fair and public trial is enshrined in the SCSL Statute and

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[1424] Disqualification Decision, para. 23.

[1425] Security Council Resolution 1315, Adopted by the Security Council at its 4186th meeting, on 14 August 2000.

[1426] It has been recognised that it is axiomatic that an international tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. See Report of the Secretary-General pursuant to paragraph 2 of resolution 808 of the Security Council, 3 May 1993, S/25704. This comment was specifically made with respect to the ICTY but is equally applicable to all international courts and tribunals.

[1427] Article 10 of the UDHR provides, for instance, that '[e]veryone is entitled in full equality to **a fair and public hearing** by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.' Article 14(1) ICCPR provides that, '[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a **fair and public hearing** by a competent, independent and impartial tribunal established by law.'[1427] Article 6 of the ECHR provides that "everyone is entitled to a **fair and public hearing** within a reasonable time by an independent and impartial tribunal established by law". This is similarly provided for under Article 8(1) of the ACHR and Article 26(2) of the *American Declaration on the Rights and Duties of Man*. Article 8(5) of the ACHR provides that, '**[c]riminal proceeding shall be public, except insofar as it may be necessary to protect the interests of justice**.' (Emphasis Added.)

Rules of Evidence and Procedure. The right to a *'fair and public hearing'* is enunciated in Article 17(2) of the Statute of the SCSL,[1428] which mirrors Article 14(1) of the ICCPR. Rule 26*bis* of the Rules of Procedure and Evidence affirms the court's duty to "ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused".[1429] Accordingly, the central issue before the Appeal Chamber is whether the trial proceedings as a whole have been conducted publically and fairly.

735. This general right is given further expression in Article 17(4) of the Statute of the SCSL, which provides a number of *minimum* guarantees to which the accused is entitled.[1430] The ICTY Appeals Chamber in *Tadić* has held that "the relationship between [the right to fair and the minimum guarantees] is of the general to the particular".[1431] Thus, the minimum guarantees in Article 17(4) are specific examples of the broader right to a fair trial laid down in Article 17(2). It is therefore not necessary for the accused to point to any particular breaches of Article 17(4) in order to establish an infringement of the right to a fair trial.[1432] This interpretation is consistent with both jurisprudence and customary international law. For instance, Judge Sylvia Steiner, acting as Single Judge of the ICC's Pre-Trial Chamber I, has emphasised that "the concern is whether the proceedings, as a whole, are fair".[1433] Likewise, the ECHR has repeatedly confirmed that the right to a fair trial requires that

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[1428] Statute.

[1429] Rules. This fundamental right has been recently confirmed by this Appeals Chamber, Disqualification Decision, para. 23, fn.59. Similar guarantees of the right to a fair and public hearing can be found in the Statutes of the ICTY, ICTR, the Special Tribunal for Lebanon, the Rome Statute, and the ECHR. See Article 21(2), ICTY Statute; Article 20(2), ICTR Statute; Article 67 (1), Rome Statute; Article 16, STL Statute; Article 6(1), ECHR.

[1430] Article 17(4) of the Statute.

[1431] *Tadić* AJ, para. 47.

[1432] Zahar and Sluiter , *International Criminal Law*, (Oxford University Press 2008), p. 293.

[1433] *Lubanga Dyilo* Judgement on Appeal against the Decision on Jurisdiction, "Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*, it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory of the courts [...]". Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice. In both Courts, the concern is whether the proceedings, as a whole, are fair."

the proceedings as a whole are fair.[1434] The general entitlement to due process is now so entrenched that a reference to it was dropped from the Rome Statute because it was seen as redundant.[1435] Moreover, academic commentary suggests that "[t]he term 'fair hearing' also suggests that, where individual problems with specific rights set out in Article 67 do not, on their own, amount to a violation, the requirement of a fair hearing may allow a cumulative view and lead to the conclusion that there is a breach where there have been a number of apparently minor or less significant encroachments on Article 67".[1436]

736. The Appeals Chambers of the ICTY,[1437] ICTR,[1438] and SCSL[1439] have consistently affirmed the importance of due process and the right to a fair trial. The European Court of Human Rights has on a number of occasions stipulated that, "[t]he right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees ... of the Convention restrictively."[1440]

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[1434] *Edwards* Judgement, paras. 33-4: "The Court recalls that the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1). In the circumstances of the case it finds it unnecessary to examine the relevance of paragraph 3 (d) (art. 6-3-d) to the case since the applicant's allegations, in any event, amount to a complaint that the proceedings have been unfair. It will therefore confine its examination to this point. In so doing, the Court must consider the proceedings as a whole including the decision of the appellate court. [...] The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair. *Stanford* Judgment, para. 24: "The Court must consider the proceedings as a whole including the decisions of the appellate courts. Its task is to ascertain whether the proceedings in their entirety, as well as the way in which evidence was taken, were fair". *Taxquet* Judgment, para. 84: "Accordingly, the institution of the lay jury cannot be called into question in this context. The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6. The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair."

[1435] Schabas, 'Article 67' in O. Triffterer, ed., *Commentary on the Rome Statute*, Beck (Baden-Baden 2nd ed., 2008), p. 848.

[1436] Schabas, William, *An Introduction to the Criminal Court*, Cambridge University Press (Cambridge 3rd ed., 2011) p. 207.

[1437] The ICTY Appeals Chamber has affirmed this right on numerous occasions. For example "The right to a fair trial is central to the rule of law: it upholds the due process of law." *Tadić* AJ, para. 43. Similarly, in *Furundžija* the Appeals Chamber held that "Trial Chambers have been consistently mindful of the primary function of the International Tribunal, which is to ensure that justice is done and that the accused receives a fair trial." *Furundžija* AJ, para. 148. "Any accused before the International Tribunal has a fundamental right to a fair trial, and Chambers are obliged to ensure that this right is not violated." *Simić* AJ, para 71.

[1438] For instance, the Appeals Chamber of the ICTR has held that "[w]here the failure to give sufficient notice of the legal and factual reasons for the charges against him violated the right to a fair trial, no conviction can result" *Nahimana* AJ, para 326.

[1439] For example the Appeals Chamber has held that "The Statute and Rules provide for an accused's right to a fair trial". *AFRC* AJ, para. 220.

[1440] *A.B.* Judgment, para 54; *Azevedo* Judgment, para. 66. *Cable* Judgment, Partly Dissenting Opinion of Judge Zupančič: "It cannot be logically maintained that a conviction and sentence in a criminal case are legitimate if the criminal procedure in question violates the essential precepts of a fair trial, due process and so on. The legitimacy of a substantive judgment depends on the legitimacy of the

737. The conduct and disposition of judges is an indispensible foundation of the right to a fair trial. An accused has the right to an impartial tribunal which, in turn, is guaranteed by requiring that judges be independent and persons of high moral character, impartiality and integrity who have made a solemn declaration to serve honestly, faithfully, impartially and conscientiously.[1441]

738. The Defence submits that there have been a number of serious procedural irregularities that, if considered individually or collectively, amount to a contravention of the above outlined fundamental principles of a fair and public trial as well as due process, and occasion a miscarriage of justice which invalidates the Judgment.

739. The first of these irregularities relate to the conduct of Judges in the Trial Chamber, and in particular to the refusal "on principle"[1442] by a Judge to attend a hearing on 25 February 2011 and the subsequent failure of the Trial Chamber to properly constitute itself.[1443] In this regard the Trial Chamber adjourned the disciplinary hearing against Lead Trial Counsel for Mr. Taylor indefinitely on 25 February 2011[1444] after Justice Sebutinde had stated that she would not attend the hearing due to recent and unspecified developments in the Trial Chamber.[1445] The Presiding Judge, stating that "this is not a situation to which rule 16 applies",[1446] refused to allow the Alternate Judge to participate in the proceeding, although he had expressed himself ready and willing to do so. Justice Sow said, "Let me make this very clear: This Bench is regularly composed with three judges sitting, as it shows, Two judges cannot sign decisions. When the Bench is sitting, it's sitting with three judges, not two judges, and I don't know what. I'm not here for decoration. I am a

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procedure by which it was arrived at. To hold otherwise – that is, to separate the procedure entirely from its substantive outcome (conviction and sentence) – would reduce the meaning and import of the procedure to an ancillary status. This would mean, as it used to mean in the purely inquisitorial procedure, considering the procedure a mere "adjective" to the "substantive" importance of the case. That, however, is no longer a tenable position. If it were, a fair trial would not be as central to the meaning of Article 6 of the Convention as it is, neither would the exclusionary rule figure as an essential procedural sanction in most national jurisdictions as well as in some international instruments such as the United Nations Convention against Torture (Article 15)."

[1441] Disqualification Decision, para. 23 citing Article 13(1) of the Special Court Statute and Rule 14(A) of the Special Court Statute.

[1442] TT, 25 Feb. 2011, p. 49316, lines 12-3.

[1443] TT, 25 Feb. 2011, p. 49316, lines 5-13.

[1444] TT, 25 Feb. 2011, p. 49318, lines 8-10: "this Trial Chamber is not properly constituted and we consider we have no alternative but to adjourn this hearing..."

[1445] TT, 25 Feb. 2011, p. 49316, lines 9-10.

[1446] TT, 25 Feb. 2011, 49318, lines 7-8.

judge. This Bench is regularly composed, as everybody can see... We are three judges sitting."[1447]

740. The role of an Alternate Judge according to Article 12(4) of the Statute is to "replace a judge if that judge is unable to continue sitting". Rule 16(B) provides that "[i]f a Judge is, for any reason, unable to continue sitting in a proceeding [...] the President may designate an alternate Judge as provided in Article 12(4) of the Statute". In order to avoid disruption of the proceedings in the event that a Judge could not continue to sit, the President had designated Justice Sow as Alternate Judge for the entire trial of Mr. Taylor.[1448] As Alternate Judge, Justice Sow "may perform such other functions within the Trial Chamber or Appeals Chamber as the Presiding Judge in consultation with the other judges of the Chamber may deem necessary."[1449]

741. Thus, when Justice Sebutinde was unable to sit in the proceedings of 25 February 2011, the Trial Chamber should have made use of the Alternate Judge whose sole function was to replace Judges who are unable to sit. This is particularly so considering that the only party to the proceeding had invited Justice Sow's participation.[1450] Instead, the remaining Judges rejected Justice Sow's involvement outright and without explanation, notwithstanding that allowing his participation would have allowed the hearing to continue without interruption.

742. Given that Justice Sebutinde had refused "on principle" to attend the proceedings, and the requirements in Article 12(4) and Rule 16(B) had been fulfilled, the Trial Chamber's failure to even consider Justice Sow as replacement for Justice Sebutinde is one of a number of procedural irregularities which undermine Mr. Taylor's right to a fair and public hearing.

743. A second significant procedural irregularity in this regard is the removal of the Alternate Judge's Statement[1451] from the trial record from 26 April 2012.

744. The video footage of the oral pronouncement of Judgment on 26 August 2012[1452] shows that the proceedings were declared adjourned by the Presiding Judge

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[1447] TT, 25 Feb. 2011, p. 49317, lines 22-7, and p. 49318, lines 3-4 See, also, Defence Motion Seeking Termination of the Disciplinary Hearing and Order on Defence Motion Seeking Termination of the Disciplinary Hearing.
[1448] Order Designating Alternate Judge, p. 2.
[1449] Rule 16*bis*(D) of the Rules.
[1450] TT, 25 Feb. 2011, p. 49317, lines 18-21: "Yes, thank you, Madam President, we would like to invite the Chamber to invite Justice Sow to participate, so the Bench is constituted of three regularly constituted judges."
[1451] See Ground 36.

at 13:15:44. After this, at 13:15:45, Justice Sow began to speak, stating: "Excuse me, I would like to say just something before the court is adjourned". The registrar then states "All rise"[1453] and three Judges of the Trial Chamber, excluding Justice Sow who is pictured sitting, rise and leave the bench. Immediately after this, at 13:16:04, the screen goes black. From that moment Justice Sow can be heard stating "the only moment when a judge...". Then his microphone goes dead to match the black screen. The video and audio record ends.

745. Justice Sow continued to make his Statement. It was transcribed by the court reporters and appeared on the live note transcript contemporaneously. The live note transcript notes that the sitting on that day ended after Judge Sow's Statement at 1.17 p.m. In contrast, the official transcript of that sitting day does not record Justice Sow's statement.[1454] It records the Presiding Judge's last statement that court was adjourned[1455] and in the next line states that the hearing was adjourned at 1.17 p.m.[1456] Thus, both the live note and official transcripts record proceedings ending at precisely the same time, however the transcription of Justice Sow's Statement has been removed from the official record prior to its official publication.

746. While the Statement was made and recorded, the general public did not hear anything but the first few words of Justice Sow's Statement, nor is it contained in the official record of the proceeding. The Trial Chamber did not issue any order or decision setting out to the parties or to the public the basis upon which Justice Sow was publically silenced while making his Statement or subsequently, the basis of the removal of his Statement from the official record.

747. A majority of this Appeals Chamber has subsequently addressed this issue stating:

> ...the Defence's submissions with respect to the trial record are ill founded. The hearing of 26 April 2012 officially concluded when it was adjourned by the Presiding Judge of Trial Chamber II. The official transcript accordingly ends with that adjournment, and could not have included further statements made after the hearing was officially closed. On 16 May 2012, the Presiding Judge described for the record Justice Sow's behaviour following the adjournment. The Plenary Resolution regarding Justice Sow's behaviour was further entered into the official record. The Defence is fully aware of

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[1452] Public Annex B, Copy of video footage of the last 11 minutes 48 seconds of the Taylor Delivery of Judgement as retained by Court Management Section.
[1453] Public Annex B, Copy of video footage of the last 11 minutes 48 seconds of the Taylor Delivery of Judgement as retained by Court Management Section, 13:15:55.
[1454] TT, 26 Apr. 2012, pp. 49623-79.
[1455] TT, 26 Apr. 2012, p. 49679.
[1456] TT, 26 Apr. 2012, p. 49679.

> the content of Justice Sow's statement. There is no basis to suggest that the official transcript is anything but accurate and transparent.[1457]

748. The Defence appreciates that this finding was made specifically in relation to an issue it had raised in its motion and prior to the full ventilation of arguments on applicable law and facts on the substance of this appeal. However, in so far as the finding informs or affects or constitutes a judgment on the substance of Mr. Taylor's appeal, it respectfully submits that it should be (re)considered in light of the following submissions.

749. As noted above, a Chamber must ensure that a trial is both fair and public. A public hearing is mainly for the benefit of the accused because the purpose of allowing the public and the press access to a hearing is that their presence contributes to ensuring a fair trial.[1458] In so doing a public hearing offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered.[1459] The importance of holding public hearings was underlined by Chief Justice Warren of the United States Supreme Court, when he stated that:

> There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, *cause all trial participants to perform their duties more conscientiously...* [1460]

The right to a fair and public hearing under the Statute of the Special Court is only "subject to measures ordered by the Special Court for the protection of victims and witnesses".[1461] This is reflected in the rules which permit Chambers to deviate from the fundamental requirement of a public trial in ordering protective measures for witnesses.[1462] The Rules also permit the Trial Chamber to exclude the press and the public from all or part of the proceedings for reasons of national security or in the interests of justice.[1463] This case is not one where the protection of witnesses or national security is implicated. Therefore the discretion of the Chamber to exclude the press and the public should have been exercised considering "the interests of justice".

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[1457] Disqualification Decision. para. 33.
[1458] *Delalić* Decision on Protective Measures, para. 34.
[1459] *Pretto* Judgement, cited in *Delalić* Decision on Protective Measures, para. 34.
[1460] (Emphasis Added.) *Estes v Texas*, 381 U.S. 532 at 583 (1965).
[1461] Article 17(2) of the Statute.
[1462] Rules 75, 79(A)(ii) of the Rules.
[1463] Rule 79(A)(i) & (A)(iii) of the Rules.

750. In this case it is not disputed that Justice Sow made the Statement and that his behaviour in making it was the basis of a finding of judicial misconduct by a majority of the Plenary in the Plenary Decision.[1464] Nor is it contentious that this Statement was not publically broadcast when it was uttered or made publically available on the official record, by the Trial Chamber. The contents of the Statement was not put on the public record on 16 May 2012 by the Presiding Judge when he described Justice Sow's behaviour following the adjournment; nor were they put on the record in the Plenary Decision. While the Defence was fortunate to have captured the live note screen shot of the Statement and to have brought it into the public domain after the hearing and in its Preliminary Motion;[1465] it was not broadcast to the public and it was not published to the parties or the public on the official record, by the Trial Chamber. Thus, as a matter of fact, the video recording and the official trial transcript are neither accurate nor transparent to the parties or to the public of all that transpired in the court room on 26 April 2012.

751. A majority of Judges of this Chamber have opined that the official transcript does not include Justice Sow's Statement because it was made after the Presiding Judge of the Trial Chamber had adjourned and the proceedings were officially closed. The legal issue therefore is whether the right of the accused to a public and fair trial ends with the official adjournment of a trial, or whether this right transcends this formal break in proceedings and may include the statements of a sitting Alternate Judge who is publically expressing his professional opinion about whether or not the trial and deliberations have been conducted in accordance with the applicable legal principles in open court. The Defence submits that to ask that question is to answer it. The interest of justice dictate that such a statement should have been included on the public trial record by the Trial Chamber on the basis of fundamental fairness, transparency and on the basis of the Defendant's right to appeal.

752. This conclusion is even more pressing considering that the Trial Chamber would use the fact that Justice Sow made the Statement as a basis for a complaint to the Plenary which ultimately resulted in the Plenary Decision finding that Justice Sow had engaged in judicial misconduct and sanctioning him for such misconduct. If the making of the Statement was considered serious enough by the Trial Chamber for the purpose of sanctioning a sitting Alternate Judge for misconduct, then the contents of

[1464] TT, 16 May 2012, pp. 49682-3.
[1465] Disqualification Decision, Annex A.

that Statement should also have been considered serious enough to be included on the official trial record by the Trial Chamber in order to fully inform the public and the parties about the exact nature of that Alternate Judge's behaviour and the reasons for it.

753. A third significant procedural irregularity in this regard is the Trial Chamber's unexplained and unjustified removal of the Alternate Judge's name from transcripts, orders and judgment cover pages from the date he made his Statement on 26 April 2012.

754. It had been the practice of the Trial Chamber of the Special Court to include Justice Sow's name, as Alternate Judge, on each of the transcripts, orders and decisions in the trial. Justice Sow's name appeared on the official transcripts up until the delivery of summary judgement on 26 April 2012, and thereafter was removed. Similarly, the Trial Chamber had included Justice Sow's name on every decision and order of the Trial Chamber since 22 May 2007.[1466]

755. After his Statement on 26 April 2012, Justice Sow's name was omitted from the subsequent orders in this case.[1467] Further, his name was removed from the cover pages of the written judgements in this case.[1468] Not witstanding this removal, Justice Sow is referred to as the Alternate Judge in footnote 8 and paragraph 4 of Annex B of both the written and subsequently corrected version of the judgment.[1469] Thus, he remained an Alternate Judge of the Trial Chamber, however his name was inexplicably removed from the judgments of the Chamber.

756. According to the Rules, judgments must be rendered by a majority of Judges and shall be accompanied by a reasoned decision in writing.[1470] Therefore, it may be reasonably inferred that the Trial Chamber, which was formally responsible under the Rules for the production of the written judgments, removed Justice Sow's name from these orders and judgments for reason(s) that have not been disclosed to the Defence

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[1466] The first time the Trial Chamber included Justice Sow's name on the cover of a filing was in this decision: Decision on Adequate Time and Facilities.

[1467] Order Authorising Court Photography on 16 May 2012; Order Authorising Court Photography on 30 May 2012.

[1468] *Prosecutor v. Taylor*, SCSL-03-01-T-1281, [Written] Judgement, 18 May 2012; *Prosecutor v. Taylor*, SCSL-03-01-T-1283, [Corrected] Judgement, 30 May 2012 ("Judgement"): *Prosecutor v. Taylor*, SCSL-03-01-T-1284, Corrigendum to Judgement filed on 18 May 2012, 30 May 2012 ("Corrigendum to Judgement"); *Prosecutor v. Taylor*, SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 ("Sentencing Judgement").

[1469] *Prosecutor v. Taylor*, SCSL-03-01-T-1281, [Written] Judgement, 18 May 2012 & *Prosecutor v. Taylor*, SCSL-03-01-T-1283, [Corrected] Judgement, 30 May 2012.

[1470] Rule 88(C) of the Rules.

or the public. This constitutes yet another breach of Mr. Taylor's right to a fair and public hearing by the Trial Chamber.

757. A fourth and most important factor which establishes the most serious breaches of principles and values of international criminal law and fundamentally undermines fairness of the trial, was the content of the Statement by the Alternate Judge made in open court on 26 April 2012:

> And my only worry is *that the whole system is not consistent with all the principles we know and love*, and the *system is not consistent with all the values of international criminal justice*, and I'm afraid *the whole system is under grave danger of just losing all credibility*, and I'm afraid *this whole thing is headed for failure*.[1471]

758. This can be characterised as a courageous statement from a sitting Alternate Judge in a trial, who was in a unique position to have insider knowledge about the conduct of proceedings. He possessed the expert professional qualifications and experience in order to make an assessment about the consistency of the trial with fundamental principles and values of international criminal justice.[1472] Justice Sow found the process so severely deficient that he took the unprecedented step of speaking out publically and declaring it to be inconsistent with "all the values of international criminal justice" and "all the principles we know and love". In his view these inconsistencies were so grave that "the whole system is under grave danger of losing all credibility" and "headed for failure". The strength of these words and these assessments cannot be underestimated or summarily swept away.

759. This evidence alone is sufficient to establish significant procedural errors and a serious breach of the fairness of the trial that should lead to the reversal of all adverse findings against Charles Taylor in the Judgment, the quashing of all convictions, and vacatur of the Judgement and Sentencing Judgement. This conclusion is only strengthened when it is seen in the context of actions by the Trial Chamber to deny the Defendant a fair and public trial.

760. As noted in Mr. Taylor's Notice of Appeal dated 19 July 2012, this ground is subject to a filing under Rule 115 to present additional evidence before the Appeals Chamber.[1473] As such the Defence reserves the right to present further argument on this ground after the resolution of the matters relating to additional evidence.

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[1471] (Emphasis Added.) See Public Annex C, Statement of Justice El Hadji Malick Sow on 26 April 2012. See Ground 36.
[1472] Article 13(1) of the Statute.
[1473] Notice of Appeal, para. 104.

iii. **GROUND OF APPEAL 38: The Trial Chamber erred in law and/ or procedure, in that the Trial Chamber was irregularly constituted with a Judge of the International Court of Justice (ICJ) from the time of that Judge's election to the ICJ until the time Judgement was rendered against the Accused, in the absence and fulfilment of undertakings by that Judge to the Plenary of the Special Court for Sierra Leone (SCSL) – notified to the parties – (i) that if elected as a Judge of the ICJ they would fulfil their judicial functions at the SCSL on a full-time basis, (ii) that the Judge would not assume any of their functions at the ICJ until completion of their tenure as a member of the Trial Chamber, (iii) that their duties at the ICJ would not be incompatible with their judicial duties at the SCSL, and (iv) that they would not to be diverted by anything from the fulfilment of their mandate at the SCSL.**

761. The constitution of the Trial Chamber with Justice Sebutinde, who was for a significant period contemporaneously a Judge of the ICJ, was irregular because she failed to seek, give and fulfil undertakings to the Plenary, with notification to the parties, that, if elected as Judge of the ICJ she would fulfil her judicial obligations at the SCSL in the trial of Mr. Taylor conscientiously, to the exclusion of other outside activities and giving absolute precedence to the work of the court. To that end, the following undertakings should have been given: (i) that if elected as a Judge of the ICJ she would fulfill her judicial functions at the SCSL on a full-time basis, (ii) that the Judge would not assume any of her functions at the ICJ until completion of her tenure as a member of the Trial Chamber, (iii) that her duties at the ICJ would not be incompatible with her judicial duties at the SCSL, and (iv) that she would not to be diverted by anything from the fulfillment of their mandate at the SCSL (Undertakings). The failure to seek, give and therefore fulfill such undertakings constitutes an error of law and procedure and a breach of the fair trial rights of the Defendant because it contravened applicable requirements of the lawful constitution of the Trial Chamber and of judicial independence, impartiality, integrity and conscientiousness.

762. From 6 February 2011 up until 30 May 2011, for a significant period of time amounting to 16 weeks, Justice Julia Sebutinde was contemporaneously both a Judge

of the SCSL in the Trial of Mr. Taylor and a Judge of the ICJ.[1474] This period was critical to the proceedings against Mr. Taylor. It encompassed the time period between the end of trial hearings and the delivery of Judgment. As such it represented the important time during which deliberations on the guilt or innocence of Mr. Taylor would ordinarily have been conducted and concluded by the Trial Chamber.[1475] This period also encompassed the hearings and submissions on sentencing and therefore represented the critical period during which deliberations on sentencing were conducted and concluded by the Trial Chamber.

763. The Defendant has a right to a 'fair and public hearing' at the Special Court which has been addressed in legal submissions made under Ground 37, which are hereby incorporated by reference. An integral aspect of a fair and public trial is the right to a tribunal which is independent, impartial and which is established under law.[1476] This requirement for an independent and impartial tribunal, as well as the applicable law of the Special Court, mandate that Judges are persons of "high moral character, impartiality and integrity"[1477] who have made a solemn declaration to serve "honestly, faithfully, impartially and conscientiously."[1478] Therefore the fair trial requirement of an independent and impartial tribunal incorporates principles of judicial integrity and conscientiousness.

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[1474] Justice Julia Sebutinde was a Judge of Trial Chamber II from her assignment to the Chamber on 17 January 2005 during the Pre-Trial Phase of the proceedings against Mr. Taylor. See the Second Annual Report of the President of the Special Court for Sierra Leone, 2004-2005, p. 5. She served continuously as a Judge of the Trial Chamber until the conclusion of the trial on 11 March 2011 (TT, 11 March 2011, p. 49622, lines 12 – 15). On 26 July 2011, while the trial against Mr. Taylor was ongoing, the Secretary-General of the United Nations announced Justice Sebutinde's nomination as a Judge of the ICJ (List of Candidates by Nominated National Groups, Note by the Secretary-General, 26 July 2011 A/66/183-S/2011/453, p. 5). She was subsequently elected to that position on 13 December 2011 and her term as a Judge on the ICJ commenced on 6 February 2012. United Nations Security Council 6682nd Meeting, 13 December 2011 (S/PV.6682).

[1475] TT, 11 Mar. 2011, p. 49622, lines 12-5.

[1476] The independence and impartiality of a tribunal which is legally established or constituted is an absolute right, provided for in numerous international law instruments: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him", Article 10 of the UDHR; "In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law", Article 14(1) ICCPR; "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", Article 6 ECHR. Also see Article 8(1) ACHR & Article 26(2) of the *American Declaration of the Rights and Duties of Man*, 2 May 1948. As noted by the ICTY Appeals Chamber, the 'fundamental human right to be tried before an independent and impartial tribunal' is 'an integral component' of the right and guarantee to a fair trial. *Furundžija* AJ, para. 177.

[1477] Article 13(1) of the Statute.

[1478] Rule 14(A) of the Rules, Disqualification Decision, para. 23.

764. Judges of international courts and tribunals are required to comply with a number of principles pursuant to the fair trial rights of the Defendant to an independent and impartial tribunal whose Judges act with judicial integrity and conscientiousness. The first and most fundamental principle is that Judges must not engage in outside activities that may interfere with their judicial functions. Secondly, in the event that a Judge wishes to engage in an outside activity, the Judge must notify the parties to any proceedings in which the Judge is sitting as well as the court of which they are currently serving as a Judge or the authority that appointed them as a Judge. Thirdly, it is for that court or authority to decide whether any outside activities are compatible with a Judge's judicial duties and if so, on what basis.

765. These principles are embodied in the Statute and applicable procedure of the ICJ. Article 16(1) of the ICJ Statute provides that, '[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.'[1479] Pursuant to Article 16(2), "[a]ny doubt on this point shall be settled by decision of the court." The ICJ has interpreted the provisions of Article 16 as prohibiting Judges of the Court from engaging in any other occupation of a professional nature.[1480] This does not debar ICJ Judges from limited participation in other judicial or quasi-judicial activities of an occasional nature.[1481] But permitting ICJ Judges to engage in any outside activities is subject to the precondition that "the judges must give absolute precedence to the obligations as members of the Court."[1482]

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[1479] ICJ Statute. Article 13*bis* (3) of the ICTY Statute states that with respect to permanent judges of the ICTY, '[t]he terms and conditions of service shall be those of the judges of the International Court of Justice.' Therefore the prohibition on engaging 'in any other occupation of a professional nature' and the ICJ's interpretation of this provision is also applicable to ICTY Judges.

[1480] *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General,* UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 46

[1481] *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General*, UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 47. ICJ judges were in the past, on occasion, permitted to sit simultaneously in the European Court of Human Rights and the ICJ, given that the workload of the ICJ has not always been as immense as it is today. However, today such a practice is inconceivable. *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General,* UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 49; The ICJ has also interpreted Article 16(1) 'as permitting acceptance of occasional appointments as arbitrators.' The Secretary-General in his report notes that the courts of a number of UN Member States, permit a similar practice. *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General*, UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 47.

[1482] *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice: Report of the Secretary-General*, UN GAOR, 5th Comm, 53rd sess, Agenda Item 113, UN Doc A/C.5/53/11 (6 October 1998), para. 48.

766. These principles are also embodied in the Rome Statute of the ICC. Article 40(3) provides that, "Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature."[1483] Article 40(4) states that "[a]ny question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges". Article 3 (2) of the Code of Judicial Ethics for the ICC provides that "Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence."[1484]

767. Similarly, Article 21(3) of the European Convention on Human Rights provides that "[d]uring their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality *or the demands of a full-time office*; all questions arising from the application of this paragraph shall be decided by the Court." A prohibition on Judges engaging in any outside occupation "incompatible with their independence and impartiality or with the demands of a full-time office" can also be found under Rule 4 of the Rules of Court applicable to the European Court on Human Rights. Any Judge of the Court who engages in an "additional activity" is required to declare this to the President of the Court, and any disagreement between the President and the Judge in question in relation to this activity must be settled by a Plenary of Judges of the European Court of Human Rights.[1485]

768. These principles are also encompassed in numerous international instruments on judicial independence, conduct and ethics, which is indicative of their general acceptance as applicable principles of judicial conduct.[1486] For example, Principle

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[1483] (Emphasis Added.) Article 40(1) provides that, '[t]he judges shall be independent in the performance of their functions.' Pursuant to Article 40(2) '[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.'

[1484] ICC Code of Judicial Ethics.

[1485] ECHR Rules of Court; See also, COE Judicial Ethics Resolution. A similar approach is taken with respect to judges of the European Court of Justice, under Article 4 of the Statute of the Court of Justice. Article 4 provides that 'Judges may not hold any political or administrative office. They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority. When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising there from...Any doubt on this point shall be settled by decision of the Court of Justice...'. *Protocol (No. 3) on the Statute of the Court of Justice of the European Union*, 1 83/210 *Official Journal of the European Union*, 30 March 2010.

[1486] Principle 8(1) of the Burgh House Principles provides that, '[j]udges shall not engage in any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members, or that may affect or may reasonably appear to affect their independence or impartiality.' Pursuant to Principle 14(1), international judges 'shall disclose to the court and, as appropriate, to the parties to the proceeding any circumstances which come to their notice

17(1) of the *Mount Scopus Approved Revised International Standards of Judicial Independence* states that international Judges should avoid engaging in "any extra-judicial activity that is incompatible with their judicial function or the efficient and timely functioning of the court of which they are members...". Principle 23(1) states that Judges shall disclose to the court and, as appropriate, to the parties to the proceedings any matters which come to their notice at any time by virtue of which any of Principles 16 to 22 apply. Pursuant to Principle 24(1) a Judge may continue to sit in a case where "appropriate disclosure" has been made, and "where the court expresses no objections and the parties give their express and informed consent to the judge acting."[1487]

769. These principles are also embodied in UN regulations regarding outside employment. These regulations prohibit staff members from engaging in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General. Further, it is at the discretion of the Secretary-General to authorize the outside employment, but he may do so if it does not conflict with the staff member's official functions.[1488] These provisions are also consistent with standards of conduct for the international civil service which state that it is improper for

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at any time by virtue of which any of the Principles 7 to 13 apply.' The Burgh House Principles, the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, June 2004. Principle 4(2) of COE Charter for Judges states that: "[j]udges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited *except* in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, *or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.* COE Charter for Judges. The explanatory memorandum on Principle 4(2) states that: "The Charter deals here with activities conducted alongside judicial functions. It provides that judges may freely exercise activities outside their judicial mandate, including those which are the embodiment of their rights as citizens. This freedom, which constitutes the principle, may not know of limitation except only in so far as judges engage in outside activities incompatible either with public confidence in their impartiality and independence or *with the availability required to consider the cases submitted to them with due care and within a reasonable time.* The Charter does not specify any particular type of activity. *The negative effects of outside activities on the conditions under which judicial duties are discharged must be pragmatically assessed. The Charter stipulates that judges should request authorisation to engage in activities other than literary or artistic when they are remunerated*, COE Charter for Judges, para. 4.2. This has been the subject of approval by the Consultative Council of European Judges which has stated that maintaining the dignity of judicial office requires that judges 'behave in such a way as to avoid conflicts of interest or abuses of power. This requires judges to refrain from any professional activity which might divert them from their judicial responsibilities...' CCJE Principle Governing Judges, para. 37.

[1487] Mount Scopus Standards.

[1488] Regulations 1.2(o) & 1.2(p), UN Staff Regulations UNOPS. The Regulations relating to outside activities were phrased identically in 2011. Secretary-General's Bulletin Staff Regulations, UN Doc ST/SGB/2011/1.

international civil servants to engage, without prior authorization, in any outside activity that interferes with the primary obligation to devote their energies to the work of their organizations.[1489] The UN Secretary-General appointed Justice Sebutinde as a Judge of the SCSL.[1490] To the extent that these provisions were applicable to Her Honour,[1491] she ought to have sought authorisation for her contemporaneous appointment as a Judge to both the Special Court and the ICJ.

770. The relevant practice from other international tribunals in situations similar to that of Justice Sebutinde establish that if judges wish to undertake a full time outside activity, they may be permitted to do so on the basis that they have sought, given and fulfilled undertakings (also otherwise referred to as assurances or guarantees), that they will perform their judicial obligations conscientiously.

771. An important international precedent for good judicial practice and adherence to this principle can be found in the *Čelebići case* in relation to Judge Odio Benito, who continued to sit on the Trial Chamber of the ICTY after being elected as Vice President of Costa Rica. Her Honour commenced a four year term as Judge of the ICTY on 17 November 1993.[1492] Her term of office at the ICTY was to expire in November 1997 and she was not re-elected for another term. On 27 August 1997 the UN Security Council, on the basis of a recommendation by the UN Secretary-General and following a request by the President of the ICTY, passed Resolution 1126, which

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[1489] The UN Standard of Conduct, provide that: "The primary obligation of international civil servants is to devote their energies to the work of their organizations. It is therefore improper for international civil servants to engage, without prior authorization, in any outside activity, whether remunerated or not, that interferes with that obligation or is incompatible with their status or conflicts with the interests of the organization. Any questions about this should be referred to the executive head." See UN Standard of Conduct, para 41, in UN Standards of Conduct, para. 42. See, UN Human Resources Handbook.

[1490] Judgement, fn. 8: "Composed of Justice Teresa Doherty (Norther Ireland), appointed by the Secretary General of the United Nations; Justice Richard Lussick (Samoa), appointed by the Government of Sierra Leone; **Justice Julia Sebutinde (Uganda), appointed by the Secretary General of the United Nations**; Justice El Hadji Malick Sow (Senegal) appointed as Alternat Judge by the Secretary General of the United Nations and by the Government of Sierra Leone" (emphasis added).

[1491] UN Staff Rules and Regulations are attached to individual staff members' letters of appointment. UN Staff Regulations provide that: '[t]he Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat. For the purposes of these Regulations, the expressions "United Nations Secretariat", "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 10, paragraph 1, of the Charter.' UN Staff Regulations. See, UN Human Resources Handbook; See also, *Turner* Judgement, para 28.

[1492] *Delalić* AJ, para. 652.

explicitly permitted Judge Benito to continue to serve as an ICTY Judge on the *Čelebići* case until the case was completed.[1493]

772. Upon expiration of her term as a Judge of the ICTY, Judge Benito had planned to stand for election as Vice President of Costa Rica. Since her term had been extended by the Security Council, there were concerns that her potential election to a political office would be incompatible with her judicial functions. Addressing these concerns, in a letter dated 16 October 1997 to the then President of the ICTY, Antonio Cassese, Judge Benito undertook that, *if elected, she would not take office before the end of her functions as a Judge sitting in Čelebići and in addition undertook, if elected, to fulfil her judicial functions on a full time basis*. In the light of this commitment, President Cassese decided that Judge Odio Benito was entitled to run as a candidate for the position of Vice-President. Nonetheless, President Cassese felt that it was advisable to submit the matter to the Plenary. He did so and the Fourteenth Plenary assembly of all Judges endorsed the decision of the President.[1494]

773. In February 1998, prior to the completion of the *Čelebići* case, Judge Benito was elected as the Second Vice President of Costa Rica.[1495] Hence the issue arose again after her election. The then President of the ICTY, Judge McDonald, noted *the renewed commitment of Judge Odio Benito not to assume the functions of Second Vice-President prior to the termination of her tenure as a Judge. Judge Odio Benito further undertook not to be diverted by anything from the fulfilment of her mandate as a Judge* until November 1998.[1496] In light of these undertakings, President McDonald decided that there was no incompatibility between Judge Odio Benito's judicial duties and her new status of Second Vice-President of Costa Rica. President McDonald also felt it was advisable to submit the matter to the Seventeenth Plenary of Judges on 11 March 1998. The Plenary assembly of Judges unanimously endorsed President McDonald's decision.[1497]

774. On 25 May 1998, the four accused in the *Čelebići* case submitted a Motion on Judicial Independence, arguing that Judge Benito should recuse herself on the grounds

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[1493] *Delalić* AJ, para. 674.
[1494] *Delalić* Decision on Disqualification or Recusal, para. 12.
[1495] Judge Benito took an oath of office for the role of Vice President on 8 May 1998. Thereafter she was also appointed as Minister for Environment and Energy in Costa Rica and as a member of the Board of Mediators.
[1496] *Delalić* Decision on Disqualification or Recusal, para. 12.
[1497] (Emphasis added.). *Delalić* Decision on Disqualification or Recusal, para. 12; See, also, *Delalić* AJ, para. 684.

that, having taken on an executive role, she was no longer qualified as an ICTY Judge.[1498] In addition, they claimed that her impartiality might be undermined, contrary to Rule 15 (A) of the ICTY's Rules of Procedure and Evidence, which prohibits ICTY Judges from sitting on cases in which their independence or impartiality may be affected.[1499] The motion was referred by the Presiding Judge to the Bureau pursuant to Rule 15(B).[1500] Drawing on the case law of the European Court of Human Rights, the Bureau considered it relevant whether the Judge had given sufficient guarantees so as not to place his/her impartiality into question.[1501] The Bureau further stated that the real question was not whether a prohibition existed with respect to the exercise of an outside political or administrative function, but rather whether any such function was actually exercised by the Judge, in light of the undertakings that the Judge had given. It found that Judge Benito was Vice President 'in name only', and consequently no inconsistency arose.[1502]

775. The four accused appealed. The Appeals Chamber noted that, prior to accepting the nomination as Vice President of Costa Rica, Judge Benito had given ample assurances to the President of the ICTY that she would not assume any of her duties as a Vice President until the case was completed. This was put to a Plenary of ICTY Judges who accepted her undertaking. When Judge Benito was elected as Vice President a Plenary of ICTY Judges approved her taking the oath of office. Judge Benito's undertaking not to assume the office of Vice President until 17 November 1998 was supported by a letter from the President of Costa Rica.[1503] Thus, the

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[1498] *Delalić* AJ, para 653. At the time, Article 13 of the ICTY Statute (which has since been slightly amended by SC Resolution 1329) provided that: 'The judges shall be persons of *high moral character, impartiality and integrity* who possess the qualifications required in their respective countries for appointment to the highest judicial offices...'. The highest judicial office in Costa Rica is a magistrate of the Supreme Court. Therefore the defence argued that Judge Benito was constitutionally disqualified from election as a magistrate on appointment as Vice President, which in turn disqualified her from acting as a judge at the ICTY. The Prosecution in turn argued that Article 13 did not apply in so far as SC Resolution 1126 took precedence in permitting Judge Benito to remain on the *Čelebići* case. The Appeals Chamber rejected the defence argument that Judge Benito was disqualified from serving as an ICTY judge on the basis of being constitutionally disqualified in Costa Rica to serve as a judge. The Appeals Chamber in *Čelebići* made clear that what the SC Resolution did was extend the terms of office of the three judges in *Čelebići* as ICTY judges, if only for the limited purpose of completing the case. *Delalić* AJ, paras. 656-681.

[1499] (Emphasis Added.) *Delalić* AJ, para. 653; *Delalić* Motion on Judicial Independence, p. 8.

[1500] *Delalić* AJ, paras. 653; See also, *Delalić* Decision on Judicial Independence.

[1501] *Delalić* Decision on Judicial Independence, pp. 7-8. Again drawing on the case law of the European Court of Human Rights, the Bureau noted a number of factors to be taken into account in measuring independence, including the manner of appointment, duration of office, guarantees given by judges, and appearance of independence.

[1502] *Delalić* Decision on Judicial Independence, pp. 9-11.

[1503] *Delalić* AJ, para. 684.

conscientious assurances given by Judge Benito that her election as Vice President of Costa Rica would in no way interfere with her duties as a Judge on the ICTY were of the essence in permitting her to continue in her function as a Judge on the ICTY.

776. An important international precedent for good judicial practice and adherence to these principles can also be found in the case of Judge Byron. In 2011, Judge Dennis Byron, then President of the ICTR, sent a letter to the UN General Assembly and Security Council, requesting that he be authorized to continue to work on a part-time basis as a Judge in the *Karemera et al* case while engaged in another judicial occupation.[1504]

777. Judge Byron had been elected as President of the Caribbean Court of Justice. He was due to take up this appointment on 1 September 2011, but the judgement in *Karemera* was not due to be delivered until December 2011. In his letter he guaranteed that for the duration of this period he would remain committed "to the work of the Tribunal and the complete and honourable discharge" of his obligations. He further stated that, "[t]his arrangement will not give rise to any conflict of interest and will not delay the judgement delivery in this case."[1505]

778. Judge Byron's request was authorized by the Security Council pursuant to SC Res 1995, on the basis that such practice is "exceptional" and should not be considered precedent. The Security Council stated that "[t]he President of the International Tribunal shall have the responsibility to ensure that this arrangement is compatible with the independence and impartiality of the judge, does not give rise to conflicts of interest and does not delay the delivery of the judgment."[1506] Once more, the conscientious assurances provided by Judge Byron that he would not become diverted from his judicial duties were of the essence in permitting him to sit as a Judge on two courts contemporaneously.

779. In the present case there is no evidence that Justice Sebutinde sought, gave or fulfilled any such undertakings or assurances or guarantees to the Special Court, with notification to the parties, before taking up a contemporaneous appointment as an ICJ Judge. She continued to sit as a Judge in the Trial Chamber despite the fact that an

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[1504] See, *Letter dated 5 May 2011 from the President of the international Criminal Tribunal for Rwanda addressed to the Secretary-General*, UN GAOR, 65th sess, Agenda item 125, UN Doc A/65/855, UN SCOR, 66th sess, UN Doc S/2011/329 (25 May 2011), Annex, pp. 3-4.

[1505] See, *Letter dated 5 may 2011 from the President of the international Criminal Tribunal for Rwanda addressed to the Secretary-General*, UN GAOR, 65th sess, Agenda item 125, UN Doc A/65/855, UN SCOR, 66th sess, UN Doc S/2011/329 (25 May 2011), Annex, pp. 3-4.

[1506] Security Council Resolution S/RES/1995, 6 July 2011, para. 4.

Alternate Judge could have been designated in the circumstances.[1507] This resulted in errors in the application of applicable procedure and law, and the denial of a fair trial to Mr. Taylor.

780. These errors are material and applicable to all findings made, and convictions entered,[1508] in the Judgement. Individually or collectively, the errors vitiate the proceedings, occasion a miscarriage of justice and invalidate the decision. The specific remedy requested is the reversal of all adverse findings against Charles Taylor in the Judgment, the quashing of all convictions, and vacatur of the Judgement and Sentencing Judgement.

**iv. GROUND OF APPEAL 39: The Trial Chamber erred in law, in fact and/ or procedure in finding that the Defence failed to make a *prima facie* showing that there "has been" interference with the independence and impartiality of the Court, despite being satisfied that statements in leaked Wikileaks cables attributed to sources within the Prosecution, Registry, and Chamber indicate that information may have been provided to the United States Government (USG) by employees within the Court.**

781. The Trial Chamber erred in fact, law, and procedure in dismissing the Defence's Wikileaks Motion regarding United States Government (USG) sources within the Prosecution, Registry and the Chamber.[1509] The errors involved the misapplication of the *prima facie* legal standard in respect of a request for disclosure and/ or an investigation pursuant to Rule 54 of the Rules, and the failure to consider relevant factors, or to give them sufficient weight.

782. More specifically, the Trial Chamber erred in finding that the Defence failed to make a *prima facie* showing that there "has been"[1510] interference with the independence and impartiality of the Court, despite being satisfied that statements in leaked Wikileaks cables attributed to sources within the Prosecution, Registry, and Chamber indicate that information may have been provided to the USG by employees within the Court.[1511]

783. No reasonable trier of fact, having assessed the totality of the import of the cables, could have concluded that the Defence had failed to show the appearance of

[1507] Rules 16 and 16*bis* of the Rules.
[1508] Judgement, para. 6994.
[1509] Wikileaks Decision. Interlocutory leave to appeal was denied the Defence by Wikileaks Decision on Leave to Appeal.
[1510] Wikileaks Decision, page 7.
[1511] (Emphasis added) Wikileaks Decision, page 7.

bias or interference with the independence and impartiality of the Court. The errors compromised the independence and/ or integrity of the judicial process and occasion a miscarriage of justice invalidating the decision, in that they contravene the principles that undergird Article 13(1), and Article 15(1) of the Statute, and Rule 54 and Rule 26*bis* of the Rules. The resulting errors are material and applicable to all findings made and convictions entered.[1512]

784. The Wikileaks Motion was based on two diplomatic "code cables" that were made public by the Wikileaks website in late 2010.[1513] The previously confidential cables disclosed in no uncertain terms the position of the USG vis-à-vis Charles Taylor: the U.S. Ambassador to Liberia, Linda Thomas-Greenfield, states in a cable dated 10 March 2009 that "...the best we can do for Liberia is to see to it that Taylor is put away for a long time and we cannot delay for the results of the present trial to consider next steps. All legal options should be studied to ensure that Taylor cannot return to destabilize Liberia."[1514] A second cable, dated 15 April 2009, revealed that sensitive information about Mr. Taylor's trial before the Special Court was leaked to the United States Embassy in The Hague by unnamed contacts in the Trial Chamber, the Office of the Prosecutor (OTP) and the Registry.[1515]

785. The cables also underscored the financial dependence of the Special Court on USG funding and support, in order to engage other countries in financial donations to the Court. Moreover, language used in the cables to describe communications suggest a close relationship between the Court officials in question and the USG representative, such as, that the source "intimated" to the USG representative.[1516] One of the cables went further by indicating that "one Chamber contact believes that the Trial Chamber could have accelerated the Court,s [sic] work... Moreover, contacts in Prosecution and Registry speculate that Justice Sebutinde may have a timing agenda. They think she, as the only African judge, wants to hold the gavel as presiding judge when the Trial Chamber announces the Taylor judgment."[1517] This resulted in Justice Sebutinde voluntarily withdrawing herself from participating in the deliberations and

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[1512] Judgement, para. 6994.
[1513] Wikileaks Motion.
[1514] See Exh. D-481; Annex A to Wikileaks Motion. Reference by Ms. Thomas-Greenfield to the results of "the present trial" were to the outcome of the trial proceedings in this case. No reference was made by Ms. Thomas-Greenfield to Taylor's guilt or innocence regarding any alleged crimes in Sierra Leone.
[1515] See Exh. D-482; Wikileaks Motion, Annex B.
[1516] See Exh. D-482; Wikileaks Motion, Annex B.
[1517] See Exh. D-482; Wikileaks Motion, Annex B.

the Decision on the Wikileaks Motion and other related motions.[1518] Indeed, Justice Sebutinde gave a telephone interview to a newspaper in Uganda, indicating that the allegations against her were "odd and factually incorrect," that since she was "the only African Judge, some of these racists think it is easier to target the black one," and that the cable in question contained manifest "ignorance and racism."[1519]

786. The Wikileaks Motion requested the Chamber to order the immediate disclosure and/ or investigation into the identity of sources within the Chambers, the Prosecution and the Registry who communicated with USG officials outside the official lines of communication, pursuant to Rules 54 and Rule *26bis of* the Rules.[1520]

787. In denying the Wikileaks Motion, the Chamber held that: "The Defence has not shown any *prima facie* evidence that there **has been** interference with the independence and impartiality of the Court, and therefore has shown no evidentiary basis for either disclosure by, or an investigation of, any organ of the Court (emphasis added)."[1521]

788. The Defence submits that no such showing was required and the Chamber erred in applying a higher legal standard than the correct standard which was articulated in the same decision, but ultimately not followed. Having considered the jurisprudence of the Special Court dealing with a request for disclosure or an investigation, the Chamber concluded that "in determining whether an order for disclosure and/ or an investigation pursuant to Rule 54 is necessary, the Trial Chamber must determine whether a *prima facie* case has been established that there **may have been** interference with the independence and impartiality of the Court."[1522] This was a correct statement of the threshold showing that the Defence had to make – a showing that involves a probability of interference (there "may have been") and not actual interference (there "has been") with the independence and impartiality.

789. All that was required of the Defence was a *prima facie* showing that there *may have* been interference with the independence and impartiality of the Court and that

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[1518] See, Declaration of Justice Julia Sebutinde, 26 January 2011, appended to the Wikileaks Decision. See also, Declaration of Justice Julia Sebutinde, 27 January 2011, appended to *Prosecutor v. Taylor*, SCSL-03-01-T-1171, Decision on Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor, 27 January 2011.

[1519] See Annex A to *Prosecutor v. Taylor*, SCSL-03-01-T-1155, Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference Pursuant to Rule 65*Bis* and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 14 January 2011.

[1520] Wikileaks Motion, paras. 17-8.

[1521] Wikileaks Decision, page 7.

[1522] (Emphasis added) Wikileaks Decision, page 6.

showing was made, considering that the Chamber was satisfied that statements in the cables attributed to sources within the Prosecution, Registry, and Chamber, indicate that information may have been provided to the USG by employees within the Court.[1523] That should have reasonably led the Chamber to order an investigation, or at the very least, order disclosure as requested by the Defence. The Chamber erred in deciding otherwise and thereby breached its obligations under Rule 26*bis*.

790. The Chamber's application of an incorrect standard invariably derived from its reliance on a decision in the *Sesay, et al.*, case.[1524] The Sesay Chamber observed that "mere evidence of the cooperation between the Prosecution and the FBI or the US Government, without proof that the former received instructions from the latter, including the nature and contents of such instructions, does not, per se, fulfil the test to establish a violation of Article 15(1) of the Statute."[1525] The Chamber drew from the articulated standard in *Sesay* without appreciating the differences between the Wikileaks Motion and motion that was at issue in *Sesay*.[1526]

791. First, *Sesay* involved a finding that the Prosecution was exercising its legitimate prosecutorial authority by seeking assistance from the USG, as can permissibly be done, in certain instances, under the Statute and Rules.[1527] Second, the Defence in *Sesay* contended that the Prosecution violated Article 15 of the Statute,[1528] while the Defence at bar did not contend that an actual breach had occurred, arguing instead that the cables created "serious doubts" regarding the impartiality and independence of Court that required further investigation in order to see determine whether or not a breach occurred.[1529] Third, and significantly, the motion in *Sesay* was denied because:

> in seeking to establish a breach of Article 15(1) of the Statute, there has been a total lack of specificity of instructions received which the Defence alleges amount to a breach by the Prosecution of its statutory obligations under Article 15(1)....
> ...In this regard, the Chamber would like to state here that for the Defence to succeed in this Motion, it is not enough to premise its application either on presumptions, on speculations or on probabilities. If it does, as it seems, seek to establish the subservience of the Prosecutor to a foreign Government or Agency, it must provide concrete proof of those instructions and their contents and not just invite this Chamber, merely on the basis of speculation

[1523] Wikileaks Decision, page 7.
[1524] See, e.g., *RUF* USG Agencies Decision, paras. 21-2, 41, 43.
[1525] *RUF* USG Agencies Decision, para. 52.
[1526] Wikileaks Decision, page 7.
[1527] See, e.g., Article 15(2) of the Statute and Rules 8(C),(D) and (E), and Rule 40 of the Rules.
[1528] *RUF* USG Agencies Decision, para. 2.
[1529] See Wikileaks Motion, paras. 19 and 21.

> and without any legal or factual proof, to draw such a conclusion or even such an inference.[1530]

792. Unlike in *Sesay*, what was at issue in this case were "communications" with, and not "instructions" from, the USG sources. The Defence presented *specific evidence*, in the form of the cables, indicating that inappropriate communications outside official channels took place between Court officials and the USG. The Wikileaks Motion was grounded on objective facts and not on "presumptions, speculations or probabilities." Accordingly, the Chamber erred in law when it focused its evaluation on whether or not the cables disclose that Court officials received *instructions* from the USG. The misplaced inquiry into whether or not it had been demonstrated that instructions were received contributed to the Chamber's erroneous conclusion that the Defence had failed to make the requisite *prima facie* showing.[1531]

793. In applying the standard of the Sesay USG Agencies Decision to the Wikileaks Motion, the Chamber erred when it sought evidence of "instructions" between the Court sources and the USG. It was not necessary for the Defence to prove an actual violation of Articles 13(1) and 15(1) of the Statute to satisfy the requisite standard. The Chamber erred in failing to conclude that the cables sufficiently demonstrate that *there may have been* interference by the USG. Instead, the Chamber sought evidence conclusively indicating that interference *had actually occurred.* This requirement for a conclusive finding of fact is inconsistent with the '*prima facie*' threshold announced by the Chamber.

794. The Chamber also erred in fact whilst ruling on the Wikileaks Motion. While the first cable was admittedly focused on the specific interest of the USG in the outcome of the trial (i.e., the conviction of Mr. Taylor),[1532] the second cable went far beyond that framework.[1533] Indeed, the contents of the second cable were serious enough to impel a Judge of the Chamber to voluntarily withdraw from participating in the deliberations and decision of the Wikileaks Motion. Moreover, the Chamber found the communications at issue in the second cable to be a source of concern. Thus, is it is illogical and incongruous to state, on the one hand, that the

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[1530] *RUF* USG Agencies Decision, paras 50 – 52.

[1531] Wikileaks Decision, page 7 ("...while statements attributed to the sources within the Prosecution, Registry, and Chambers in the Second USG Cable indicate that *information may have been provided* to the USG government by employees within the Court, the statements do not demonstrate that such sources were receiving *instructions* from the USG" (emphasis added).

[1532] See Exh. D-481; Annex A to Wikileaks Motion.

[1533] See Exh. D-482; Wikileaks Motion, Annex B.

communications are a source of concern and "information may have been provided to the USG," by employees within the Court and, on the other hand, attempt to encompass such developments within the framework of legitimate/official communications. The Chamber clearly failed to accord sufficient weight[1534] to the contents of the cables and no reasonable trier of fact, having assessed the totality of the import of the cables, would have failed to conclude that the Defence had met the requisite legal standard for the ordering of disclosure and/ or an investigation.

795. Considering that the resulting errors – including a violation of Rule 26*bis* -- are material and applicable to all findings made and convictions entered,[1535] the requested remedy is reversal of all adverse findings against Charles Taylor in the Judgement, the quashing of all convictions, and vacatur of the Judgement and Sentencing Judgement. Alternatively, and at a minimum, a reduction of fifteen years in the imposed sentence is requested.

## E. PART V: ERRORS UNDERMINING THE FAIRNESS OF THE PROCEEDINGS

### i. GROUND OF APPEAL 40: GROUND OF APPEAL 40: The Trial Chamber erred in law and in fact in failing to find that payments and incentives received by certain Prosecution witnesses (specifically, TF1-276[1536], TF1-334[1537], TF1-532[1538], TF1-548[1539], TF1-274[1540]) went beyond that which is reasonably required for the management of a witness, were objectively unreasonable or excessive, and/ or amounted to an abuse of the Prosecution's discretion pursuant to Rule 39(ii), thereby necessitating that their respective testimony be treated with caution.[1541]

*(i) Introduction*

796. The fairness of proceedings is undoubtedly compromised whenever the evidence of witnesses is influenced by ulterior motives, such as financial gain. However, and to ensure that witnesses are not financially penalised as a result of their

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[1534] *CDF* AJ, para. 36.
[1535] Judgement, para. 6994.
[1536] Judgement, paras. 218-9; Defence Final Brief at paras. 1397-8; TT, TF1-276, 24 Jan. 2008, pp. 2154-5.
[1537] Judgement, paras. 287-9; TT, TF1-334, 29 Apr. 2008, pp. 8889-90.
[1538] Judgement, paras. 269-74; TT, TF1-532, 7 Apr. 2008, pp. 6703-11.
[1539] Judgement, para. 2222; TT, TF1-548, 13 Feb. 2008, p. 3805.
[1540] Judgement, paras. 357-8; TT, TF1-274, 11 Dec. 2008, pp. 22247-51.
[1541] Judgement, Sections IV(B)(h) and III(E). See also TT, 10 Mar. 2011; Defence Final Brief at paras. 23-6.

participation in international criminal trials, it is accepted practice that they are entitled to receive assistance necessary for their support and safety, which can include payments "reasonably required for [their] management."[1542] This is not controversial.

797. In the present case, the Court's Witnesses and Victims Section (WVS) provided assistance to both Prosecution and Defence witnesses. Prosecution witnesses also regularly received additional payments and assistance from the Prosecution's Witness Management Unit (WMU).[1543] Indeed, one potential prosecution witness, DCT-097 (a.k.a., TF1-354), received sums totalling $40,441.37[1544] from the Prosecution and the Chamber at one time noted that "The payments do not appear to have been made by the Witness and Victims Service of the Special Court (WVS) and on the face of it, appear to be beyond that which is reasonably required for the management of witnesses or victims."[1545] These WMU payments were governed by Rule 39(ii), which provides that the Prosecutor may:

> take all measures deemed *necessary* for the purpose of the investigation, including the taking of any special measures to provide for the safety, the support and the assistance of potential witnesses and sources.

798. The difficulty in this case is not that Prosecution witnesses received payments from either the Court's WVS or the Prosecution's WMU. The problem arises because payments made by the Prosecution's WMU to certain witnesses were egregiously excessive, and simply unjustifiable. Some payments fell clearly outside the plain meaning of Rule 39(ii) as being *necessary* for the witness' safety, support and the assistance. Others were demonstrably exorbitant and irregular, and were duplicative of payments made by the Court's WVS.

*(ii) The Chamber erred in failing to make findings as to whether payments by the Prosecution to witnesses went beyond that which is reasonably required for the management of a witness, were objectively unreasonable or excessive, and/or amounted to an abuse of the Prosecution's discretion pursuant to Rule 39(ii)*

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[1542] Disclosure Decision relating to DCT-097, para. 21; Disclosure Decision relating to DCT-032, para. 30, citing *Karemera* Disclosure Decision, para. 6.

[1543] See, Defence Contempt Motion , paras. 19-28 and related annexes, K, L and N. See, also,Corrigendum to Defence Contempt Motion. See, also, Defence Motion relating to DCT-097 and Disclosure Decision relating to DCT-097, paras. 17- 20. The witness was, in the first instance, a prospective Prosecution witness known by the pseudonym, TF1-354. See para. 10 of said Decision.

[1544] Contempt Decision, para. 111.

[1545] Disclosure Decision relating to DCT-097, para 22.

799. The Defence raised the issue of excessive payments/ benefits given to witnesses by the Prosecution during the trial[1546] and in the Defence's Final Trial Brief.[1547] The Chamber delayed its adjudication of the issue, noting that "whether there has been any abuse of the Prosecution's discretion under Rule 39(ii)... would be considered at the final stage of deliberations."[1548]

800. The Chamber then stated in the Judgement that:

> [i]n assessing witness credibility, the Trial Chamber has therefore taken into account information about witness payments made both by the WVS and by the Prosecution... in particular, the Trial Chamber has considered, on a case by case basis whether the benefits conferred upon and/or payments made to witnesses went beyond that "which is reasonably required for the management of a witness". In assessing whether such a payment is "reasonably required", the Trial Chamber has also taken into account the cost of living in West Africa and the station in life of the witness receiving the payment.[1549]

801. This was the last word on the subject. Credibility assessments did not address whether payments went beyond what was "reasonably required for the management of a witness," nor did the Chamber draw any conclusions as to whether payments constituted an abuse of the Prosecution's discretion under Rule 39(ii). The Chamber simply noted when payments had been made and then, without exception, concluded that these payments had no impact on credibility, without performing any substantive analysis of the appropriateness of the payments in question.[1550]

802. The Chamber's failure to make findings as to the propriety of these payments was an error. No reasonable trier of fact could have concluded that payments to Prosecution witnesses TF1-276, TF1-334, TF1-532, TF1-548 and/or TF1-274 fell within the scope of the Prosecution's discretion under Rule 39(ii). As a result of these errors, the Chamber failed to treat the evidence of these witnesses with appropriate caution, undermining factual findings which rely on their testimony.

*(a) TF1-334*

803. In addition to the general costs associated with bringing a witness to testify in The Hague, the SCSL spent an additional 30,000 US Dollars on TF1-334. The large amount of money involved begs the related questions of "why" and "how" was this

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[1546] See, Defence Contempt Motion and Defence Motion to Recall Witnesses.
[1547] See, Defence Final Brief, paras. 23-6, 1396.
[1548] Contempt Decision.
[1549] Judgement, para. 195.
[1550] Judgement, paras. 218 (TF1-276), 257 (TF1-532), 287 (TF1-334), 357 (TF1-274) and 2222 (TF1-548).

necessary, considering that his rent was paid by the Court between 2006 and 2008 – i.e., in the two years leading up to his testimony.[1551]

804. Many of the payments made to this witness are entirely unjustifiable. The witness was imprisoned in 2004 and despite this continued to receive payments for 'transport' to interviews.[1552] In 2006, TF1-334 received payments on 47 separate occasions for transportation, meals, communication and lost wages, despite there being no corresponding interviews or records of meetings with the Prosecution during that period.[1553]

805. In such circumstances, it is difficult to reasonably view these payments as anything other than rewards or encouragement for continued favourable cooperation with the Prosecution. The Chamber held that these payments did not appear to influence TF1-334's testimony.[1554] It made no finding as to whether the payments were objectively excessive or constituted an abuse of the Prosecution's discretion pursuant to Rule 39(ii).

*(b) TF1-276*

806. TF1-276 was provided funds apparently for travel expenses, far in excess of what he could possibly have needed to pay. In a period as short as three days, the witness received a total amount of USD 2,502 from the Prosecution's WMU; USD 2,180 for travel and hotel expenses and an additional USD 322 for unspecified "other expenses". These payments of USD 2,502 correspond to a single interview with the Prosecution.[1555] TF1-276 also received payments from the Court's WVS, but was not able to estimate the amount.[1556]

807. Again, such significant payments go beyond that which is reasonably necessary for the management of the witness. The Chamber determined that the payments received by TF1-276 did not undermine his credibility,[1557] but made no finding in relation to the Prosecution's discretion, or the abuse thereof, under Rule 39(ii).

*(c) TF1-532*

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[1551] TT, TF1-334, 24 Apr. 2008, p. 8537; 29 Apr. 2008, p. 8896.
[1552] TT, TF1-334, 29 Apr. 2008, pp. 8884-5.
[1553] TT, TF1-334, 29 Apr. 2008, pp. 8889-99.
[1554] Judgement, para. 287.
[1555] TT, TF1-276, 24 Jan. 2008, pp. 2154-5; Defence Final Brief, paras. 1397-8.
[1556] TT, TF1-276, 24 Jan. 2008, p. 2156.
[1557] Judgement, para. 218.

808. Between 30 August 2006 and 5 December 2007, TF1-532 was interviewed by the Prosecution on at least 26 different dates. On each occasion, he received a payment from the WMU, in an amount varying between 15,000 and 120,000 Leones.[1558] Needless to say, all these payments were made by the WMU in addition to payments made by the WVS, which started from 10 March 2007 onwards.[1559]

809. From 10 March 2007, the purpose of the payments made by the Prosecution is hard to understand, as the Court's WVS had covered all the possible expenses the witness could have incurred; including 234,600 Leones for medical expenses for the witness and his family, 660,000 Leones for childcare, 285,000 Leones for transportation (for the witness to visit his family in the provinces, thus private trips, rather than covering his travel expenses when meeting with the investigators), 3,117,000 Leones for rent, maintenance and utility bills and 7,852,000 Leones for food only – a total of 14,337,000 Leones.[1560] Further, 2,223,400 Leones was paid for the witness for unspecified other expenses, not falling into any of the categories mentioned above.[1561]

810. Accordingly, all additional payments provided by the Prosecution's WMU after 10 March 2007 fall outside the constraints of Rule 39(ii). The Chamber stated that TF1-532 "did not testify for monetary gain." It neither considered nor evaluated whether the payments were objectively excessive or unreasonable.[1562]

*(d) TF1-548*

811. In addition to other smaller payments, TF1-548 regularly received USD 100 for interviews with the Prosecution.[1563] In the witness's own words: "they have given me assistance on many occasions."[1564] From 27 February 2007 onwards, TF1-548 received a total of USD 1,506.18 from the Prosecution's WMU.[1565] He was also receiving payments before that.[1566] It is particularly the discrete and unexplained payments of USD 100 per witness interview which are objectively unreasonable, on grounds that include the doubtful fact that the witness' personal expenditure on every

[1558] TT, TF1-532, 7 Apr. 2008, pp. 6703-10.
[1559] TT, TF1-532, 7 Apr. 2008, p. 6711.
[1560] TT, TF1-532, 7 Apr. 2008, p. 6712-14.
[1561] TT, TF1-532, 7 Apr. 2008, p. 6715-6.
[1562] Judgement, para. 271.
[1563] TT, TF1-548, 13 Feb. 2008, pp. 3773, 3788, 3790, 3791-2, 3793, 3800, 3802.
[1564] TT, TF1-548, 13 Feb. 2008, p. 3799.
[1565] TT, TF1-548, 13 Feb. 2008, p. 3805.
[1566] TT, TF1-548, 13 Feb. 2008, p. 3805.

occasion was a neat USD 100. As such, these payments also constitute an abuse of the Prosecution's discretion.

812. The Chamber concluded that it considered TF1-548 "to be generally credible".[1567] The issue of the payments received by this witness, or the propriety of these payments by the Prosecution, was simply ignored.

*(e) TF1-274*

813. In addition to extensive medical expenses paid for the witness by the Prosecution (amounting to 893,000 Leones),[1568] TF1-274 received frequent payments in exchange for information, and to allegedly compensate for lost wages, food and transportation during periods when no interviews with the witness were taking place.[1569] Moreover, the witness was provided the sum of 480,000 Leones for a year's rent.[1570] He also received further payments for his assistance to Prosecution investigations.[1571]

814. All these amounts were provided by the Prosecution's WMU; again, in addition to substantial sums of money paid by the Court's WVS. Specifically, TF1-274 received 1,720,000 Leones from the WVS for transportation, 695,000 Leones for medical costs and an additional 2,154,000 and 1,548,850 Leones for an unspecified "Witness Attendance Allowance" and for "miscellaneous" costs.[1572] In total, TF1-274 was provided the sum of 3.9 million Leones by the Prosecution and nearly 6.5 million Leones by the WVS.[1573] These substantial and regular payments are not justifiable as being reasonable required for the management of the witness.

815. The Chamber concluded that "these payments do not appear to be unreasonable."[1574] No reference was made to Rule 39(ii), nor was any basis given for the Chamber's conclusion, nor was it one that a reasonable Trial Chamber could have reached, given the duplicative and unspecified nature of these substantial payments.

*(iii) Impact of the Chamber's error*

816. Elsewhere in the Judgement, the Chamber acknowledged that in assessing the evidence of an accomplice, it was required to consider whether the accomplice "has

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[1567] Judgement, para. 2222.
[1568] TT, TF1-274, 11 Dec. 2008, pp. 22233 (182,000 Leones for medical treatment), 22234 (110,000 Leones), 22236 (425,000 Leones) and 22238 (176,000 Leones).
[1569] TT, TF1-274, 11 Dec. 2008, pp. 22226-7, 22231-7, 22243.
[1570] TT, TF1-274, 11 Dec. 2008, p. 22242.
[1571] TT, TF1-274, 11 Dec. 2008, pp. 22243-5.
[1572] TT, TF1-274, 11 Dec. 2008, pp. 22247-50.
[1573] TT, TF1-274, 11 Dec. 2008, p. 22251.
[1574] Judgement, para. 357.

an ulterior motive to testify as he did."[1575] All of the foregoing witnesses were linkage witnesses who fall within the purview of being considered accomplices to the charged crimes. Significant payments to such witnesses, made simultaneously with (or immediately following) instances of favourable cooperation, reasonably give rise to the risk, or indeed likelihood, that such witnesses would seek to perpetuate continued payments through on-going cooperation. This is particularly the case when such payments cannot be linked to any particular reimbursement, or are for services or expenditures that have already been paid for.

817. It is for this reason, as discussed in Ground 5 above, that the ICTY and ICTR automatically apply caution to the testimony of witnesses who have received significant financial or personal benefits as a result of their association with the Prosecution.[1576] In failing to find that the payments to TF1-276, TF1-334, TF1-532, TF1-548 and/or TF1-274 were objectively unreasonable or excessive, or constituted a breach of the Prosecution's discretion under Rule 39(ii), and thus failing to treat their evidence with the requisite caution, the Trial Chamber erred in fact and law.

*(iv) The Chamber's error warrants relief*

818. The Chamber erred by failing to make findings regarding the exercise the Prosecution's discretion (or the abuse thereof), pursuant to Rule 39(ii), even in the face of manifestly excessive and duplicative payments in respect of witnesses TF1-276, TF1-334, TF1-532, TF1-548 and/or TF1-274. This error occasioned the further error of failing to treat the evidence of these witnesses with the requisite caution and warrants a reversal of all factual findings and subsequent convictions which rely, in whole or in part, on the evidence of witnesses TF1-276, TF1-334, TF1-532, TF1-548 and/or TF1-274.[1577] In the alternative, the Appeals Chamber is respectfully requested

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[1575] Judgement, para. 183.

[1576] *Martić* TJ, paras. 36-8. *Karemera* Decision on Abuse of Process, para. 7. *Karemera* TJ, paras. 623-4. *Bizimungu* TJ, paras. 830-1. *Zigiranyirazo* TJ, para. 139-40.

[1577] **TF1-276** – Judgement, paras. 2702; 2706 – 2709; 2718; 2744; 2749; 2753; 3092; 3110; 3116; 3129 – 3130; 3373; 3399; 3481 – 3486; 3555; 3563; 3606; 3609; 3723; 3726 – 3727; 3729 – 3730; 3906; 3909; 3914; 3915; 3918; 4065; 4068; 4147; 4152; 4381; 4383; 4394 – 4396; 4452 – 4462; 4469; 4471; 4476 – 4477; 4480 – 4481; 4487 – 4489; 4491; 4493 – 4495; 4618 (iv), (v); 4620; 4716; 4723 – 4724; 4734; 4943 – 4944; 4965; 5152; 5184; 5189; 5191; 5195; 5220; 5224; 5525; 5527; 5702; 5719 – 5720; 5738; 5750; 5752 – 5753; 5937 – 5938; 5940 – 5941; 5947; 5948; 6399; 6402 – 6404; 6406; 6408; 6412; 6414; 6656; 6658 – 6660; 6662; 6663; 6704; 6706; 6715; 6725; 6727; 6768; 6783.
**TF1-334** – Judgement, paras. 2335; 2831; 2835 – 2839; 2841 – 2842; 2863 – 2864; 2933; 2944; 2951; 3091; 3106; 3121; 3123 – 3125; 3129 – 3130; 3370 – 3371; 3373 – 3375; 3382; 3385; 3388; 3394 – 3396; 3398; 3400 – 3401; 3403 – 3404; 3407 – 3409; 3411; 3413 – 3414; 3425 – 3426; 3428; 3435; 3437; 3445; 3450; 3454 – 3455; 3457; 3462; 3464; 3468; 3472; 3475; 3481 – 3486; 3659; 3665 – 3666; 3832; 3834; 3906; 3912 – 3913; 3914; 3979 – 3980; 3982; 4090; 4094; 4365; 4368 – 4373; 4375 – 4378; 4380; 4382; 4385; 4388 – 4393; 4394 – 4396; 4556 – 4560; 4562 – 4565; 4579, 4581 – 4583;

to overturn all factual findings and subsequent convictions which rely in whole or in part on the evidence of these witnesses, in the absence of corroboration by another witness whose evidence is not subject to treatment with caution.[1578]

## F. PART VI: MISCELLANEOUS GROUNDS

### i. GROUND OF APPEAL 41: The Chamber erred in law and in fact by entering impermissible cumulative convictions for rape and sexual slavery.

819. The Appeals Chamber set out the applicable test for the determination of the permissibility of cumulative convictions in the RUF Appeal Judgement:

> The test applied is therefore two-part: first it is permissible to enter cumulative convictions under different statutory provisions for the same

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4946; 4957; 4965; 5384; 5389; 5395; 5397 – 5399; 5403; 5406 – 5409; 5581 – 5586; 5591 – 5593; 5652 – 5659; 5666 – 5667; 5706 – 5709; 5711; 5713; 5718; 5719 – 5721; 5742; 5752 – 5753; 5825; 5832 – 5834; 6341; 6343 – 6344; 6345; 6656; 6659; 6663; 6749 – 6750; 6759; 6761 – 6762; 6768; 6776; 6792.

**TF1-532** – Judgement, paras. 2320 – 2321; 2323 – 2329; 2331 – 2332; 2334; 2337; 2366 – 2367; 2378; 2390 – 2391; 2476 – 2478; 2480; 2481; 2553 – 2559; 2561; 2703; 2706; 2711; 2718; 2744 – 2745; 2747; 2753; 2831; 2838 – 2839; 2841 – 2842; 2844; 2853; 2857; 2863 – 2864; 2927; 2929; 2932; 2951; 3090; 3093; 3100 – 3101; 3107; 3116; 3119 – 3120; 3125; 3129 – 3130; 3369; 3371; 3375 – 3376; 3383; 3388; 3393; 3397; 3399; 3406; 3410 – 3412; 3417; 3437; 3447; 3464; 3466; 3480; 3481 – 3486; 3660; 3662; 3664; 3665 – 3666; 3832; 3834; 3906; 3910; 3914; 4065; 4068; 4147; 4152; 4385; 4394 – 4396; 4467; 4491; 4493 – 4495; 4833; 4842; 4844; 4845; 4946 – 4947; 4960; 4965; 5345; 5384; 5389 – 5390; 5394 – 5395; 5397; 5399; 5402; 5404; 5406 – 5408; 5511; 5513; 5515; 5525; 5527; 5546; 5554; 5559 – 5560; 5587 – 5588; 5591; 5593; 5621 – 5622; 5629 – 5631; 5632; 5702 – 5703; 5719 – 5721; 5820; 5826; 5832 – 5834; 5868 – 5869; 5873; 5874; 5923; 5931; 5948; 6188; 6191 – 6192; 6515; 6518; 6520; 6544; 6546 – 6547; 6656; 6659; 6663; 6761; 6764; 6768; 6772; 6776; 6790; 6792.

**TF1-548** – Judgement, paras. 2219; 2222 – 2223; 2225; 2227; 2230; 2251 – 2253; 2259; 2702; 2747 – 2748; 2753; 5940 – 5941; 5948; 6769.

**TF1-274** – Judgement, paras. 2367; 2379 – 2380; 2387; 2390 – 2391; 2448; 2451; 2457 – 2458; 2626; 2629; 2765; 2769; 3100; 3110; 3129 – 3130; 3369; 3384; 3394 – 3400; 3405; 3410; 3413; 3416 – 3419; 3437 – 3438; 3440 – 3442; 3445 – 3447; 3449; 3451; 3454; 3456; 3464; 3473; 3478; 3481 – 3486; 3554 – 3556; 3562 – 3563; 3565; 3567 – 3568; 3571 – 3572; 3575; 3577 – 3578; 3587 – 3589; 3591; 3596; 3600; 3606, 3609; 3660 – 3661; 3665 – 3666; 3722; 3724; 3726; 3729 – 3730; 3783 – 3785; 3787 – 3788; 3795 – 3797; 3801; 3803; 3804 – 3805; 3832; 3834; 3840; 3842; 3855; 3862; 3856; 3868 – 3869; 3915; 3918; 3936; 3937; 4239 – 4240; 4247; 4248 (ix, xi); 4612 – 4613; 4800; 4802; 4843; 4943; 4946; 4948; 4965; 5008; 5014; 5021 – 5022; 5028; 5030 – 5031; 5123; 5126; 5128; 5130; 5316; 5325; 5329 – 5330; 5511; 5514 – 5515; 5519; 5527; 5587 – 5588; 5591; 5593; 5702; 5705; 5714 – 5716; 5719 – 5721; 5722(d); 5829; 5835 (xi, xxxv); 6222; 6280; 6519; 6520; 6659; 6663; 6768; 6792.

[1578] **TF1-276** – Judgement, paras. 3909; 3914; 4452 – 4458; 4476; 4480 – 4481; 4488; 4491; 4493 – 4495; 4618 (iv), (v); 4620.

**TF1-334** – Judgement, paras. 3394 – 3396; 3398; 3400 – 3401; 3403 – 3404; 3462; 3481 – 3486; 4388 – 4393; 4394 – 4396; 4556 – 4560; 4562 – 4565; 4579, 4581 – 4583; 5581 – 5586; 5591 – 5592; 5593; 5652 – 5659; 5666 – 5667; 5711; 5713; 5718; 6343 – 6344; 6345.

**TF1-532** – Judgement, paras. 3125; 3129 – 3130; 3383; 3399; 3447; 3481 – 3486; 3664; 3665 – 3666; 5587 – 5588; 5591; 5593; 6792.

**TF1-274** – Judgement, paras. 2626; 2629; 2765; 2769; 3384; 3394 – 3400; 3405; 3410; 3413; 3416 – 3419; 3440 – 3442; 3445 – 3447; 3449; 3456; 3481 – 3486; 3554 – 3556; 3606, 3609; 3801; 3804 – 3805; 3936; 3937; 4612 – 4613; 4800; 4802; 5126; 5128; 5130; 5325; 5329 – 5330; 5587 – 5588; 5591; 5593.

> criminal act if each statutory provision has a 'materially distinct element' that is not contained in the other statutory provision. Second, if this is not the case then the conviction for the criminal act should be upheld under the 'more specific provision.' It is the legal elements of each statutory provision, and not the acts themselves that must be considered when applying this test. The issue of whether the same act can lead to a conviction under multiple statutory provisions is a question of law."[1579]

820. In assessing whether convictions under sexual slavery and rape can be based on the same criminal conduct in this case, the Chamber stated:

> The Trial Chamber considers that it is permissible to enter multiple convictions for the crime charged under Count 5 (sexual slavery) and the crime charged under Count 4 (rape). While both are forms of sexual violence, each offence contains a distinct element not required by the other. The offence of rape requires non-consensual sexual penetration. The definition of rape does not require that the perpetrator exercise ongoing control or ownership over the victim, as is required by the crime of sexual slavery. The Trial Chamber further notes that the requisite sexual act in the definition of sexual slavery can be committed by multiple means, and does not necessarily entail non-consensual sexual penetration. The Trial Chamber therefore finds that rape (Count 4) and sexual slavery (Count 5) contain materially distinct elements, and that it is legally permissible to enter convictions on both counts.[1580]

821. Notably, this is a departure from the precedent set by Trial Chamber I in the RUF Trial Judgement, which stated:

> The Chamber considers that the crime charged under Count 7 (sexual slavery) requires a distinct element from the crime of rape (Count 6). The offence of rape requires sexual penetration, whereas sexual slavery requires the exercise of powers attaching to the right of ownership and acts of sexual nature. As the acts of a sexual nature do not necessarily require sexual penetration, and rape does not require that the right to ownership is exercised, the Chamber finds that sexual slavery is distinct from rape. Where the commission of sexual slavery, however, entails acts of rape, the Chamber finds that the act of rape is subsumed by the act of sexual slavery. In such a case, a conviction on the same conduct is not permissible for rape and sexual slavery.[1581]

822. The Chamber erred in law when it stated that "each offence contains a distinct element not required by the other."[1582] Not only did it depart from the precedent set by Trial Chamber I, but it also departed from its own jurisprudence in the AFRC Trial Judgement, which states:

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[1579] *RUF* AJ, para. 1190. This formulation was based on the test to determine the permissibility of cumulative convictions as set out in the *Delalić* AJ, paras. 412-3.
[1580] Judgement, para. 6989.
[1581] *RUF* TJ, para. 2305.
[1582] Judgement, para. 6989.

> **Sexual slavery, which may encompasses [sic] rape** and/or other types of sexual violence as well as enslavement, entails a similar humiliation and degradation of personal dignity.[1583] (Emphasis added.)

The offence of rape[1584] does not contain any materially distinct element from the offence of sexual slavery[1585] and the former is, therefore, entirely subsumed by the latter. Non-consensual sexual penetration, an element of rape, is contained within the offence of sexual slavery as the offence requires that "[t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature"[1586] whilst the perpetrator "exercised any or all of the powers attaching to the right of ownership".[1587] Causing a person to engage in sexual acts whilst under the duress of ownership clearly encompasses "non-consensual sexual penetration," as was recognised by the Chamber in the AFRC Trial Judgement.[1588]

823. The Chamber further implicitly acknowledged that non-consensual sexual penetration is encompassed by sexual slavery when it stated, "the requisite sexual act in the definition of sexual slavery can be committed by multiple means, and does not necessarily entail non-consensual sexual penetration."[1589]

824. However, the fact that the "sexual act" can be committed by multiple means does not support the Chamber's finding that the cumulative convictions are permissible.[1590] It is irrelevant that sexual slavery can be committed in multiple ways. The only relevant fact is that the offence of rape has no materially distinct element not

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[1583] *AFRC* TJ, para. 719.

[1584] As laid out in the Judgement at para. 415: "In addition to the *chapeau* requirements of Crimes against Humanity pursuant to Article 2 of the Statute, the following elements of the crime of rape must be proved beyond reasonable doubt:

> i. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
> ii. The perpetrator must have the intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."

[1585] As laid out in the Judgement at para. 418: "In addition to the *chapeau* requirements of Crimes against Humanity pursuant to Article 2 of the Statute, the following elements of the crime of sexual slavery must be proved beyond reasonable doubt:

> i. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
> ii. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;
> iii. The perpetrator intended to engage in the act of sexual slavery or acted with the reasonable knowledge that this was likely to occur."

[1586] Judgement, para. 418(ii).

[1587] Judgement, para. 418(i).

[1588] *AFRC* TJ, para. 719.

[1589] Judgement, para. 6989.

[1590] Judgement, para. 6989.

contained in the offence of sexual slavery.[1591] Therefore, the offence of rape is subsumed by the offence of sexual slavery as sexual slavery is the "more specific provision".[1592]

825. Consequently, the Chamber erred by finding that it is legally permissible to enter convictions on both rape and sexual slavery for the same conduct. The finding is impermissible and, therefore, invalid. The Appeals Chamber is requested to reverse this finding[1593] and any convictions for rape based on the same conduct establishing the convictions for sexual slavery.[1594]

## G. PART VII: ERRORS IN SENTENCING

### i. GROUND OF APPEAL 42: The Trial Chamber erred in fact and in law when it imposed on Charles Taylor a sentence of 50 years imprisonment, which is manifestly unreasonable in the circumstances of this case.

*(i) Introduction*

826. It is a fundamental principle of international criminal law that persons are convicted and sentenced on the basis of their individual conduct and not on the basis of their official position. The Trial Chamber has considered the conduct of the accused in this case but has impermissibly given much greater and undue adverse weight to the official position of Mr. Taylor as a Head of State of Liberia. As such, in addition to other errors in sentencing, the Trial Chamber has transgressed the applicable principles of sentencing with the result that the sentence against Mr. Taylor is manifestly excessive.

*(ii) Preliminary Matter*

827. As a preliminary matter, the Defence requests that in so far as any of its Grounds of Appeal on the Merits are upheld, the Appeals Chamber should revise (or

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[1591] See the formulation of the test by the Appeals Chamber in the *RUF* AJ, para. 1190. "The test applied is therefore two-part: first it is permissible to enter cumulative convictions under different statutory provisions for the same criminal act if each statutory provision **has a 'materially distinct element' that is not contained in the other statutory provision**. Second, if this is not the case then the conviction for **the criminal act should be upheld under the 'more specific provision**." (Emphases added).

[1592] See *RUF* AJ, para. 1190.

[1593] Judgement, para. 6989.

[1594] Specifically the rape convictions based on these findings of rape (the corresponding sexual slavery findings are cited also): Judgement, paras. 893-4, 1127; paras. 898 (see also para. 967) and 1116-8; paras. 908 and 1094; paras. 913 and 1108; paras. 914 and 1132; paras. 919 and 1108; paras. 929-30 and 1142-3; paras. 931-2; paras. 961 and 1060; paras. 966 and 1066; paras. 970 and 1071-2; paras. 971-2; paras. 999 and 1169; paras. 1007 and 1179; paras. 1015 and 1187; para. 1016; paras. 1073-5; paras. 1144-6; paras. 1188-91.

quash, as may be appropriate) the sentence to reflect any diminution of Mr. Taylor's criminal liability.

*(iii) Applicable Law*

828. As a general rule, the Appeals Chamber will not revise a sentence, unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[1595]

829. In order to establish that the Trial Chamber committed a discernible error in exercising its discretion, "the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly".[1596]

830. The Trial Chamber has made a number of discernible errors of law and of fact and in the exercise of its discretion according to this standard, resulting in a manifestly excessive sentence.

*(a) The Trial Chamber erred in law by finding that serving sentence abroad is not a factor to be taken into account during sentencing and erred in fact and in the exercise of its discretion by failing to consider this factor.*

831. The Trial Chamber held that "the fact that a sentence is to be served in a foreign country should not be considered in mitigation".[1597] However the RUF Appeals Chamber Judgment finding that it cited for this proposition does not support this legal finding.[1598] In the RUF case, the Trial Chamber finding on applicable legal

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[1595] *RUF* AJ, para. 1202; *CDF* AJ, para. 466.

[1596] *RUF* AJ, para. 1203; *CDF* AJ, para. 46; *AFRC* AJ, para. 309.

[1597] Sentencing Judgement, para. 35 citing *RUF* AJ, paras. 1246, 1316.

[1598] Sentencing Judgement, paras. 35 and 93, citing *RUF* AJ, paras. 1245-6.
"The Appeals Chamber finds no error in the Trial Chamber's decision not to mitigate the Appellants sentences as a consequence of the fact that they will likely be served outside of Sierra Leone. As discussed in the *Mrđa* case, which is relied upon by Sesay, it is common practice that convicted persons from international criminal tribunals serve their sentences in foreign countries. Sesay does not refer to any case in which serving the sentence in a foreign country has been considered as a mitigating factor for sentencing purposes." This Appeals Decision is in turn based on para. 109 of *Mrđa* SJ, which states: "Nevertheless, the fact remains that Darko *Mrđa* will serve his sentence in a state different from his country of origin and at some distance from his wife and children. This is however a common aspect of the prison sentences imposed by the Tribunal. *The Trial Chamber takes into account this factor in determining the length of imprisonment*, but it does not consider it to be a mitigating circumstance" (emphasis added). Also see para. 126. Therefore this trial decision, properly understood, stands for the proposition that even if serving a sentence in a foreign country is not

principles recognised that "in general terms, sentences served abroad, where family visits are likely to be few, may be harder to bear. Such circumstances would normally amount to a factor in mitigation."[1599] However, the *Sesay* Trial Chamber declined to find this as a matter of mitigation because it did not have conclusive factual information regarding where sentences would be served. The appellate finding in respect of the Trial Chamber's findings of law and of fact in that case was that there was "no error in the ... decision not to mitigate the Appellants sentences as a consequence of the fact that they will likely be served outside of Sierra Leone."[1600] The Trial Chamber in this case has therefore erred in law by finding that serving a sentence abroad is not a factor to be taken into account for sentencing.

832. The Trial Chamber, having made this finding, failed to consider the substantive factual submissions of the defence on this issue.[1601] The Trial Chamber does make reference to the fact that the determination as to where Mr Taylor will serve his sentence will be made by the President of the Special Court.[1602] Notwithstanding the fact that this decision was pending conclusion of the legal process, as a result of the operation of the Rules of the Special Court and the public Enforcement Agreements entered into by the Special Court, sentences can only be served in: Sierra Leone, Rwanda, Finland, Sweden and the United Kingdom.[1603]

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considered a factor in mitigation it should be taken into account when considering the length of imprisonment.

[1599] "The Trial Chamber found that: '[W]hilst it seems more likely than not at this stage that the convicted persons in this trial will serve sentences outside Sierra Leone, this is a decision that ultimately lies within the discretion of the President of the Court, based upon agreements concluded by the Registrar. The Chamber is unable to speculate on the result of these negotiations and decision-making processes, upon which it has no conclusive information, which lie outside of its control. It therefore notes for purposes of record that it has not given any weight to this factor in the consideration of the sentences of any of the convicted persons in this case. The Chamber, however, wishes to recognize that, in general terms, sentences served abroad, where family visits are likely to be few, may be harder to bear. Such circumstances would normally amount to a factor in mitigation'." *RUF* AJ, para. 1245, quoting *RUF* SJ, paras. 205-6.

[1600] *RUF* AJ, para. 1246.

[1601] The Trial Chamber made reference to these arguments but did not consider them substantively as a result of its legal finding. Sentencing Judgement, para. 68. See, also, Defence Sentencing Brief, paras. 200-11.

[1602] Sentencing Judgement, para. 93.

[1603] Rule 103(A) of Rules; Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone, 9 July 2007; Agreement between the Special Court for Sierra Leone and the Government of Sweden on the Enforcement of Sentences of the Special Court for Sierra Leone, 15 October 2004; Agreement between the Special Court for Sierra Leone and the Government of Finland on the Enforcement of Sentences of the Special Court for Sierra Leone, 29 June 2009; Amended Agreement between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone, as amended on 16 September 2009.

Accordingly, the only factual finding open to the Trial Chamber on this issue was that Mr. Taylor would serve his sentence in a foreign state, other than his native Liberia. Therefore the serious consequences of serving a sentence in a foreign State referred to in the Defence submissions, were relevant to the length of his imprisonment and should have served to reduce it.[1604]

*(b) The Trial Chamber erred in law by taking into account the extraterritoriality of Mr. Taylor's conduct based on principles of State Responsibility as an aggravating factor.*

833. The Trial Chamber held that "it had taken into account, as an aggravating factor, the extraterritoriality of the criminal acts of the accused." [1605] It made this finding on the basis of case law from the International Court of Justice (ICJ) which has held that acts of intervention by a State in support of an opposition within another State constitute a breach of the customary principle of non-intervention and may constitute a breach of the principle of non-use of force. The Trial Chamber acknowledged that these provisions of customary law govern conduct between States but nonetheless, and without any further reasoning, held that it "considers the violation of this principle by a Head of State individually engaging in criminal conduct can be taken into account as an aggravating factor."

834. As explicitly acknowledged by the Trial Chamber, the principles it relied upon are customary international law principles of state responsibility. Customary international law principles and rules may be used "where applicable" before the Tribunal.[1606] Custom is used to determine the substantive crimes punishable before this court.[1607] The principles of state responsibility do not have any legal application to sentencing in criminal trials. There is no basis in the ICJ case law, customary international law or international criminal law to apply these principles as a basis for asserting that the extraterritoriality of conduct by a Head of State is an aggravating factor in sentencing him as an individual in a criminal trial.

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[1604] Defence Sentencing Brief, paras. 200-11.
[1605] Sentencing Judgement, paras. 27, 98.
[1606] Rule 72*bis* (ii) of the Rules.
[1607] The Secretary-General in his report on the creation of this Court has reflected that "[i]n recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime. U.N. Secretary General, Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 12.

835. The Defendant may have held the position of the Head of State of Liberia but he was convicted on the basis of individual criminal responsibility for his conduct.[1608] It was not alleged that Liberia was responsible under customary principles of State responsibility for the crimes alleged against Mr. Taylor. This would have been beyond the jurisdiction of the Special Court. Therefore, the territoriality or extra-territoriality of the criminal conduct of an individual is not an aggravating factor relevant in sentencing.

836. This has been implicitly confirmed by a recent decision of the ICTY Trial Chamber in the Perišić case.[1609] The accused, who was Chief of the General Staff of the Yugoslav Army, was convicted for supplying ammunition, weaponry, fuel, technical expertise, repair services and personnel training and payments to the Bosnian Serb Army, which operated across a state border in Bosnia.[1610] In that case, there was no reference to extraterritoriality as a factor in aggravation of sentence; rather, the Trial Chamber considered the actual role and conduct of the defendant in aiding crimes and not whether that conduct traversed an international border, for the purposes of sentencing.[1611]

837. In sum, it was legally impermissible and beyond the jurisdiction of the Special Court to utilise these principles of state responsibility and consequent factor of extraterritoriality, against Mr. Taylor. As such, the sentence against Mr. Taylor should be reduced to reflect this discernible error of law and the consequent error in exercise of discretion by the Trial Chamber when using this as a factor in aggravation in Mr. Taylor's sentence.

*(c) The Trial Chamber made a discernible error in the exercise of its discretion by giving weight to a breach of trust as an aggravating factor.*

838. The Trial Chamber held that "a breach of trust or authority, where the accused is in a position which carries with it a duty to protect or defend the victims, such as in the case of a governmental official, police chief or commander, can be an aggravating factor."[1612] The Trial Chamber went on to find that as the President and Commander-in-Chief of the Liberian Army, Mr. Taylor held a position of public trust with inherent

[1608] Judgement, para. 14.
[1609] *Perišić* TJ.
[1610] *Perišić* TJ, paras. 1622-3.
[1611] *Perišić* TJ, paras. 1815-26.
[1612] Sentencing Judgement, para. 29.

authority which he abused. The Trial Chamber utilised Mr. Taylor's breach of trust as an aggravating factor on the basis of his role as a foreign head of state in international peace negotiations.[1613] However, this factor has been considered as an aggravating factor when the person in authority has a direct duty or obligation to protect or defend civilians under his protection, such as governmental officials, police chiefs or army commanders, and he breaches this obligation.[1614] Mr. Taylor undoubtedly held a position of public trust and authority with respect to the population of Liberia. However, he did not hold such a position of public trust and authority in relation to the victims of crimes committed in Sierra Leone, nor has this been established beyond reasonable doubt.[1615] Accordingly, the Trial Chamber erred when it gave weight to abuse of trust as an aggravating factor.

*(d) The Trial Chamber erred in law and made a discernible error in the exercise of its discretion by failing to take into account the sentencing practices of the Special Court, ICTR, and ICTY and by failing to apply the principle that aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation.*

839. The Trial Chamber stated that it should take into account the sentencing practices of the SCSL as well as those of the ICTY and the ICTR. Further it recognised the principle that aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation.[1616] The Trial Chamber also stated that

> while generally *the application of the principle would indicate a sentence in this case that is lower than the sentences that have been imposed on the principal perpetrators* who have been tried and convicted by this Court, the *Trial Chamber considers that the specific status of Mr. Taylor as Head of State puts him in a different category of offenders for the purposes of sentencing.....Mr. Taylor was functioning in his own country at the highest*

[1613] Sentencing Judgement, para. 97.
[1614] The Trial Chamber referred to several authorities where breach of trust has been utilised as an aggravating factor. Sentencing Judgement, para. 29, fn. 58. In each of these cases, the accused had a legal obligation to protect or defend civilians under their authority. Jean Kambanda was Prime Minister of Rwanda and he and his government were responsible for maintenance of peace and security in Rwanda. He abused his authority and the trust of the civilian population by personally participating in the genocide of the Rwandan population: *Kambanda* SJ, para. 44. Athanase Seromba was a priest who betrayed the trust of parishioners who were seeking refuge in his church, by participating in its destruction and their killing; *Seromba*AJ, para. 230. Emmanuel *Ndindabahizi* was a Minister in the Interim Rwandan Government who participated in the killings of Rwandans. *Ndindabahizi* AJ, para. 136.
[1615] Sentencing Judgement, para. 24.
[1616] Sentencing Judgement, paras. 21, 36, 100.

> *level of leadership, which puts him in a class of his own* when compared to the principal perpetrators who have been convicted by this Court.[1617]

840. The Trial Chamber thus declined to follow the applicable law, not on the basis of the conduct of the accused, but on the basis of his official status as Head of State. This approach contravenes one of the fundamental pillars of international criminal law that an accused individual should be convicted and sentenced on the basis of their conduct and not on the basis of their official status.[1618] As such, the Trial Chamber erred in making a legal finding that an aider and abettor will not receive a lower sentence than a principle perpetrator, if that aider and abettor is a Head of State. The Trial Chamber should have followed the applicable law and found a lower sentence than it did. Had the Chamber followed Special Court practice vis-á-vis accused convicted of aiding and abetting, a significantly lesser sentence would have been imposed.

*(1) Special Court Sentencing practice for Aiding and Abetting*

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[1617] Sentencing Judgement, paras. 100-1 (Emphasis added).

[1618] At the ICTY, the *Delalić* TJ stated, at para. 1225, "[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence is the gravity of the offence." Shortly thereafter, the *Kupreškić* TJ stated it as follows, at para. 852: "[t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crimes." This statement in the *Kupreškić* TJ has been endorsed by the ICTY Appeals Chamber in the *Aleksovski* AJ, at para. 182; the *Furundžija* AJ, at para. 249; the *Delalić* AJ, at para 731; and the *Kupreškić* AJ, at para. 442. The ICTY Appeals Chamber recalled the principle in the *Vasiljević* AJ, at para. 182, by stating, "[t]he Appeals Chamber recalls that the sentence to be imposed must reflect the inherent gravity of the criminal conduct of an accused. The *Blaškić* AJ further refined it at para. 683, drawing on the wording of the *Delalić* TJ, by stating, "[t]he gravity of the offence is the primary consideration in imposing a sentence and is the 'litmus test' in the determination of an appropriate sentence. The Appeals Chamber has ruled that sentences to be imposed must reflect the inherent gravity or totality of the criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime." In discussing how to approach the gravity of the offence, the *Galić* AJ, at para. 409, stated: "[w]hen addressing the gravity of the offence, a Trial Chamber must take into account the inherent gravity of the crime and criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case and the crimes for which the accused was convicted, as well as the form and degree of participation of the accused in those crimes." At the Special Court, this principle has been followed and applied by this Appeals Chamber, at para. 546 of the *CDF* AJ, which stated: "the Trial Chamber ultimately must impose a sentence that reflects the totality of the convicted person's culpable conduct. The totality principle is, in fact, recognized by all Parties and firmly supported in the case law of the international criminal tribunals. The totality principle requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused." In stating that, this Appeals Chamber cited authorities in the form of the *Furundžija* AJ at para. 249, *Blaškić* AJ at para. 683, *Aleksovski* AJ at para. 182, and *Delalić* AJ at para. 731, as stated above. The principle was reiterated by this Appeals Chamber in the *RUF* Appeal Judgement, at para. 1229, which stated: "[a] Trial Chamber must ultimately impose a sentence that reflects the totality of the convicted person's culpable conduct. This principle, the totality principle, requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused in the crimes."

841. In the AFRC case, the accused Brima was convicted pursuant to Article 6(1) of the Statute of aiding and abetting the murders of civilians in Fourah Bay, Freetown and Western Area.[1619] He was also found liable under other modes of liability under Article 6(1) (committing, planning, and ordering)[1620] and as a superior pursuant to Article 6(3).[1621] Furthermore, Brima was found to be a primary perpetrator of murders.[1622]

842. The 2nd AFRC accused, Kamara, was convicted pursuant to Article 6(1) of the Statute of aiding and abetting the murder/ extermination of civilians in Fourah Bay, Freetown and Western Area, and aiding and abetting the mutilation of civilians in Freetown and Western Area.[1623] He was also found liable under other modes under Article 6(1) (planning and ordering)[1624] and as a superior pursuant to Article 6(3) for crimes committed by his subordinates.[1625] Kamara was found to be a "violent and active participant in the crimes" involving the killing of civilians by his subordinates on his orders.[1626]

843. The 3rd AFRC accused, Kanu, was convicted pursuant to Article 6(1) of aiding and abetting the murder/ extermination of civilians at Fourah Bay in Freetown, and the Western Area.[1627] He was also found liable under other modes of liability within Article 6(1) (committing, planning, instigating, and ordering)[1628] and as a superior pursuant to Article 6(3) for crimes committed by his subordinates.[1629] Kanu was found to be a direct participant in unlawful killings, mutilations, the recruitment and use of child soldiers, enslavement and outrages upon personal dignity.[1630]

844. Brima, Kamara, and Kanu received global sentences of 50, 45, and 50 years imprisonment, respectively.[1631] Those sentences were upheld on appeal.[1632]

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[1619] *AFRC* SJ, para. 41; *AFRC* TJ, paras. 1785-6.
[1620] *AFRC* SJ, para. 41; *AFRC* TJ, paras. 1709, 1711, 1716, 1719, 1755, 1760, 1764, 1769, 1770, 1775, 1776, 1778, 1779, 1780, 1782, 1783, 1827, 1834, 1835, 1836, 1837.
[1621] *AFRC* SJ, para. 42; *AFRC* TJ, paras. 1744, 1810.
[1622] *AFRC* SJ, para. 43; *AFRC* TJ, paras. 1709, 1755, 1760, 1764.
[1623] *AFRC* SJ, para. 70; *AFRC* TJ, paras. 1939-41.
[1624] *AFRC* SJ, para. 70; *AFRC* TJ, paras. 1915-16.
[1625] *AFRC* SJ, para. 71; *AFRC* TJ, paras. 1893, 1926-8, 1950, 1969, 1976. On appeal, the Appeals Chamber revised the "Trial Chamber's Disposition by substituting Article 6(3) for Article 6(1) in respect of Counts 9, 12 and 13." *AFRC* AJ, paras. 239-40.
[1626] *AFRC* SJ, para. 86.
[1627] *AFRC* SJ, para. 94.
[1628] *AFRC* SJ, para. 94; *AFRC* TJ, paras, 2052, 2056-61, 2063, 2092-8.
[1629] *AFRC* SJ, para. 95; *AFRC* TJ, paras. 2044, 2080.
[1630] *AFRC* SJ, para. 99.
[1631] *AFRC* SJ, p. 36.
[1632] *AFRC* AJ, pp. 105-6.

845. In the RUF case, Augustine Gbao was the only accused found guilty of aiding and abetting, pursuant to Article 6(1) of the Statute. For the act of aiding and abetting attacks on peacekeepers (Count 15), Gbao received a sentence of 25 years imprisonment.[1633] Besides aiding and abetting, Gbao (like the other RUF Accused – Sesay and Kallon) was convicted of more serious modes of liability under Article 6(1), including "committing" crimes by way of participation in a joint criminal enterprise.[1634] Unlike Sesay and Kallon, however, Gbao was not found guilty of any crime by virtue of having been a superior, pursuant to Article 6(3) of the Statute.[1635]

726. Sentences imposed against the RUF Accused for individual crimes were made to run concurrently,[1636] with 52 years as the highest sentence imposed against Sesay, 40 years in respect of Kallon, and 25 years against Gbao.[1637] Despite revisions to the imposed sentences for certain counts, the Appeals Chamber upheld global sentences that corresponded to the highest sentence imposed against each accused by the Trial Chamber.[1638]

846. In the CDF case, both accused were found liable for aiding and abetting Counts 2, 4 and 7, pursuant to Article 6(1) of the Statute, and responsible as a superior under Article 6(3) for crimes committed by subordinates (Counts 2, 4, 5 and 7).[1639] In sentencing both accused, the Trial Chamber took into account the mode of liability under which the accused were convicted and considered, in particular, "whether the Accused was held liable as an indirect or secondary perpetrator."[1640] With respect to the Accused Moinina Fofana, the Chamber observed that he was found liable for aiding and abetting and was not present at the scenes of the crimes, and his degree of participation amounted to only encouragement.[1641] The Chamber also noted that "[t]he jurisprudence of the ICTY and ICTR indicates that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more

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[1633] *RUF* SJ, p. 98.
[1634] *RUF* SJ, paras. 3-10; *RUF* TJ, pp. 677-87. The RUF Trial Chamber determined that "committing" under Article 6(1) includes "committing through participation in a joint criminal enterprise." See *RUF* TJ, para. 244.
[1635] *RUF* TJ, pp. 677-87; *RUF* SJ, paras. 3-10.
[1636] *RUF* SJ, pp. 93-8.
[1637] *RUF* SJ, pp. 93-8. Gbao also received a sentence of 25 years imprisonment for "committing" Acts of Terrorism (Count 1) and Enslavement (Count 13) by participation in a joint criminal enterprise. *RUF* SJ, pp. 96 and 98.
[1638] *RUF* AJ, p. 480.
[1639] *CDF* SJ, paras. 45 and 52.
[1640] *CDF* SJ, para. 34.
[1641] *CDF* SJ, para. 50.

direct forms of participation."[1642] Concurrent sentences of three, four and six years imprisonment were consequently imposed against Fofana.[1643]

847. With respect to the Accused Kondewa, the Chamber noted that while he was found liable as an aider and abettor and as a superior, "he was also liable for the direct perpetration of some acts, including the shooting of a town commander in Talia/Base Zero," and for the enlistment of child soldiers.[1644] Concurrent sentences of five, six, seven, and eight years imprisonment were consequently imposed against Kondewa.[1645]The Appeals Chamber revised the sentences of both CDF accused upwards, sentencing Fofana to concurrent sentences of 15 and 5 years for the various counts on which he was convicted and Kondewa to concurrent sentences of 20 and 7 years for the various counts on which he was convicted.[1646]

848. This review of SCSL sentencing practices with respect to aiding and abetting makes clear that as a lesser mode of liability, it carries along with it significantly lesser sentences than more serious forms of participation, especially where the accused (such as Fofana) is not a direct perpetrator and was not present at the scene of the crimes. The fact that Gbao received a significantly lesser sentence (25 years) than Sesay (52 years) and Kallon (40 years) is primarily-related to his conviction for aiding and abetting and the absence of any convictions as a superior. It is also noteworthy that Gbao's age of 60 years was found to be a factor in mitigation by the Trial Chamber.[1647]

849. In this case, there is no dispute that Charles Taylor never set foot in Sierra Leone during the entire indictment period.[1648] Neither was he liable for any crimes on the basis of participation in a joint criminal enterprise under Article 6(1) (as was Gbao) or superior responsibility, pursuant to Article 6(3) (as were Fofana and Kondewa). Unlike Gbao and Kondewa, Mr. Taylor was an indirect or secondary

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[1642] *CDF* SJ, para. 50.
[1643] *CDF* SJ, pp. 33-4.
[1644] *CDF* SJ, para. 57.
[1645] *CDF* SJ, pp. 33-4..
[1646] *CDF* AJ, pp. 188-91. The sentences were revised upwards because the Appeals Chamber determined that inappropriate considerations were taken into account by the Trial Chamber -- namely, consideration of "just cause" and "civic duty" – in the exercise of its discretion, leading to the erroneous conclusion that the sentences of the accused deserved to be reduced. *CDF* AJ, paras. 559-60. In revising the sentences, the Appeals Chamber, however, took "note of the opinion of the Majority of the Trial Chamber that Fofana and Kondewa have been found responsible mainly as aiders and abettors and the gravity of their respective responsibility as superiors in respect of some of the crimes." *CDF* AJ, para. 566.
[1647] *RUF* SJ, para. 278.
[1648] Sentencing Judgement, para. 98.

participant in the crimes for which he was convicted. Bearing in mind these factors and the sentencing practice of the SCSL for aiding and abetting, the 50 year sentence that imposed on Mr. Taylor is manifestly excessive in relation to the range of sentences imposed at the SCSL for a person convicted of aiding and abetting. In the light of Mr. Taylor's age, he has effectively been sentenced to life imprisonment. This is manifestly unjust and should give rise to an inference that the Trial Chamber failed to exercise its discretion properly.

850. The sentence against Mr. Taylor should be reduced to reflect this discernable error of law and the consequent error in exercise of discretion by the Trial Chamber by failing to take into account relevant sentencing practices and by failing to apply the principle that aiding and abetting as a mode of liability warrants a lesser sentence than that imposed for more direct forms of participation.

*(e) The Trial Chamber erred in law and made a discernible error in exercising its discretion by considering Mr. Taylor's official position as a Head of State on multiple occasions under several factors in aggravation and as a factor precluding reduction of sentence, thereby impermissibly multiplying the significance of this factor.*

851. The leadership role of an accused is one relevant aggravating factor in sentencing.[1649] However, this factor cannot be used repeatedly against the accused to inflate the factors leading towards a higher sentence. Double-counting the accused's role in the crimes is impermissible because it allows the same factor to detrimentally influence the accused's sentence more than once.[1650] It is well-settled in the jurisprudence of the SCSL that "double-counting" is impermissible.[1651] Indeed, this Chamber has held that "A Trial Chamber must ensure that they do not allow the same factor to detrimentally influence the Appellant's sentence twice."[1652]

852. In this case, the Trial Chamber based at least 5 (five) significantly weighted adverse findings against Mr. Taylor in sentencing, on his official role as a Head of State of Liberia. First, it relied upon Mr. Taylor's role as President of Liberia and as a member of the ECOWAS Committee of Five as a leadership role constituting an

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[1649] Sentencing Judgement, para. 25.
[1650] *Nikolić* AJ, para. 61.
[1651] *RUF* SJ, para. 23. *AFRC* AJ, para. 317. *RUF* AJ, paras. 1235-7.
[1652] *RUF* AJ, para. 1235. Having found that the RUF Trial Chamber "impermissibly double-counted the specific intent of acts of terrorism and collective punishments as increasing the gravity of the underlying offences, the Appeals Chamber" revised the relevant sentences, as appropriate. *RUF* AJ, para. 1237.

aggravating factor.[1653] Second, it relied upon Mr. Taylor's role as President of Liberia and as a member of the ECOWAS Committee of Five and Committee of Six, as the basis for finding the aggravating factor of abuse of trust.[1654] Third, it found that Mr. Taylor's role as the President of Liberia was the factual basis for finding that the extraterritoriality of his criminal acts were an aggravating factor.[1655] Fourth, it found that the special status of Mr. Taylor as a Head of State precluded the Trial Chamber from applying the established legal principle that an aider and abettor generally warrants a lesser sentence than a direct perpetrator.[1656] Fifth, the Trial Chamber held that Mr. Taylor's "unique status as Head of State *and* other factors above, should be reflected in his sentence."[1657] Hence, the Trial Chamber considered Mr. Taylor's role as Head of State for the fifth time, separate from the preceding aggravating factors, noted herein, which were all in turn based on this same position Mr. Taylor held as a Head of State. This constitutes both an error of law and a discernible error in the exercise of discretion in relation to the aggravating factor which was given most weight by the Trial Chamber. These errors had a significant impact on Mr. Taylor's sentence.[1658]

853. The sentence against Mr. Taylor should be reduced to reflect this discernable error of law and the consequent error in exercise of discretion by the Trial Chamber when using repeatedly considering Mr. Taylor's official position as Head of State as a factor in aggravation in Mr. Taylor's sentence.

854. Based on the submissions relating to this Ground 42, the Trial Chamber committed discernable errors of law and of fact, and in the exercise of its discretion, and, as a consequence, imposed a sentence on Mr. Taylor which is manifestly unreasonable and excessive in the particular circumstances of this case. No reasonable trier of law and fact, having assessed the totality of the evidence on the record, could have imposed such a harsh punishment. The sentence of 50 years' imprisonment must be quashed and replaced by a new and significantly lower sentence.

**ii. GROUND OF APPEAL 43: The Trial Chamber committed discernible error when it noted Sierra Leonean law on sentencing practice when Mr**

[1653] Sentencing Judgement, para. 96.
[1654] Sentencing Judgement, para. 97.
[1655] Sentencing Judgement, para. 98.
[1656] Sentencing Judgement, para. 100.
[1657] Sentencing Judgement, para. 103.
[1658] Cf., *AFRC* AJ, para. 320.

**Taylor has not been convicted of any offences under Article 5 of the Statute.**

855. Article 19(1) of the Statute of the Special Court for Sierra Leone states:

> The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.[1659]

856. In the Sentencing Judgement, the Trial Chamber stated:

> Article 19(1) of the Statute directs the Trial Chamber to consider, where appropriate, the sentencing practices of Sierra Leonean national courts. This does not oblige the Trial Chamber to conform to that practice, but rather to take into account that practice as and when appropriate. In the present case, the Trial Chamber notes that Mr. Taylor was not indicted for, nor convicted of, offences under Article 5 of the Statute in the Sierra Leonean law. Nevertheless, it has noted with regard to its consideration of the appropriate relative penalties for different modes of liability that the law of Sierra Leone provides that an accessory to a crime "may be indicted, tried, convicted and punished in all respects as if he were a principal felon".[1660]

857. The Trial Chamber committed a discernable error when it noted Sierra Leonean law on sentencing practice when Mr. Taylor has not been convicted of any offences under Article 5 of the Statute. The jurisprudence of both the Trial Chambers and the Appeals Chamber in previous cases before the SCSL has consistently found that a Trial Chamber is to have recourse to the national courts in Sierra Leone only for convictions under Sierra Leone law contained in Article 5 of the Statute.

858. In the *AFRC* Sentencing Judgement, Trial Chamber II stated:

> Article 19(1) states that as appropriate, the Trial Chamber shall have recourse to the practice regarding prison sentences in the national courts of Sierra Leone as and when appropriate. This does not oblige the Trial Chamber to conform to that practice, but rather to take into account that practice as and when appropriate. The Trial Chamber finds that it is not appropriate to adopt the practice in the present case since none of the Accused was indicted for, nor convicted of, offences under Article 5 of the Statute.[1661]

859. In the *CDF* Sentencing Judgement, Trial Chamber I stated:

> Article 19(1) authorizes the Trial Chamber to consider, where appropriate, the sentencing practices of Sierra Leonean domestic courts. The Prosecution contends that in determining the gravity of the offence, the Chamber should consider that the offences for which the Accused have been found guilty,

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[1659] Article 19(1), Statute.
[1660] Sentencing Judgement, para. 37.
[1661] *AFRC* SJ, para. 32, citing, also, *Serushago* AJ, para. 30; *Semanza* AJ, para. 377.

> would attract the death penalty or life imprisonment under Sierra Leonean law. Both Fofana and Kondewa submit that given that the Accused were not convicted of any offences under Article 5 of the Statute which incorporates offences under Sierra Leonean legislation, the court should not consider Sierra Leonean sentencing practice.
> In this regard, the Chamber notes that the Accused were neither indicted nor convicted for any of the offences enumerated under Article 5 of the Statute. Furthermore, the Statute of the Special Court does not provide for either capital punishment or imposition of a "life sentence", which are the punishments that the most serious crimes under Sierra Leonean law attract. For these reasons, the Chamber finds that it would be inappropriate to rely on the sentencing practices of Sierra Leonean Courts in determining the punishment to be imposed on either Fofana or on Kondewa.[1662]

This finding was challenged on appeal by the Prosecution, who argued that the Trial Chamber should have taken into account, *inter alia*, the sentencing law and practice of Sierra Leone even though Fofana and Kondewa were not convicted pursuant to Article 5 of the Statute.

860. In the *CDF* Appeal Judgment, the Appeals Chamber rejected the submissions put forward by the Prosecution and ruled on the proper construction and application of Sierra Leonean law in relation to sentencing pursuant to Article 19(1) of the Statute:

> The Appeals Chamber notes that at the time the ICTY Statute took effect, the former Yugoslavia had domestic legislation criminalizing "acts against humanity and international law." Similarly, at the time the ICTR Statute took effect, Rwanda had domestic legislation criminalizing war crimes, crimes against humanity and genocide. In contrast, Sierra Leone has not criminalized war crimes and crimes against humanity as such, and consequently there is no specifically relevant sentencing practice for a Trial Chamber to refer to.
> The Special Court has jurisdiction over crimes defined in Sierra Leone law in addition to certain international crimes. Bearing this in mind, the Appeals Chamber is of the view that the best interpretation of the word "appropriate" is that a Trial Chamber is to have recourse to the practice of the ICTR for convictions for war crimes and crimes against humanity and is to have recourse to the national courts in Sierra Leone for convictions under Sierra Leone law contained in Article 5 of the Statute.
> In the result, the Appeals Chamber concludes that the Trial Chamber did not err in holding that it will not consider the sentencing practice of Sierra Leone.[1663]

The Appeals Chamber therefore found that the a Trial Chamber "is to have recourse to the national courts in Sierra Leone for convictions under Sierra Leone law contained in Article 5 of the Statute".

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[1662] *CDF* SJ, paras. 42-3.
[1663] *CDF* AJ, paras. 475-7.

861. The Trial Chamber misdirected itself and committed a discernable error at paragraph 37 of the Sentencing Judgement when it noted Sierra Leonean law with regard to its consideration of the appropriate relative penalties when Mr. Taylor was not indicted for, nor convicted of, offences under Article 5 of the Statute in the Sierra Leonean law. The Chamber should not have considered this factor in determining sentence. It was an error of law to consider the practice of the national courts of Sierra Leone in the circumstances of this case.

862. The Appeals Chamber is requested to correct this error of law by quashing the sentence imposed by the Trial Chamber and to impose a new and appropriate sentence in conformity with the law of the SCSL.

iii. **GROUND OF APPEAL 44: The Trial Chamber committed a discernible error when it considered *proprio motu*, aggravating factors that the Prosecution did not plead and, consequently to which, the Defence has not had the opportunity to respond.**

863. In this case, the Trial Chamber considered the following to be aggravating factors: (a) Extraterritoriality;[1664] (b) Mr Taylor's leadership role;[1665] (c) Mr Taylor's special status, and his responsibility at the highest level;[1666] (d) Exploitation of the conflict for financial gain.[1667] Only one of these factors, Mr Taylor's leadership role, was argued by the Prosecution in its sentencing brief.[1668] The Defence had no notice of the other three factors, including the aggravating factor to which the Trial Chamber ostensibly attached the greatest weight - Mr Taylor's unique and special status as a Head of State.[1669] The Trial Chamber erred in law and fact by considering these factors *proprio motu* and placing substantial weight on them as factors in aggravation of sentence without according the Defence its basic fair trial right to be heard. These errors have been accorded significant weight in sentencing. As a result, the imposed sentence against Mr. Taylor should be significantly reduced (by at least two-thirds), in light of the impermissible emphasis the Trial Chamber placed on these factors.

864. The Rules of the Special Court enshrine the right of the parties to be heard on sentencing. Rule 100(A) provides that after conviction or plea "the Prosecutor shall submit any relevant information that may assist the Trial Chamber in determining an

[1664] Sentencing Judgement, paras. 27, 98.
[1665] Sentencing Judgement, paras. 25, 29, 96, 101 and 102.
[1666] Sentencing Judgement, paras. 97 and 100-3.
[1667] Sentencing Judgement, paras. 23 and 99.
[1668] Prosecution Sentencing Brief, paras. 83-9.
[1669] Sentencing Judgement, paras. 97 and 100-3.

appropriate sentence" and then that the "Defendant shall thereafter... submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence". The Trial Chamber then has the discretion to hear submissions of the parties at a sentencing hearing, pursuant to Rule 100(B). This discretion is retained in respect of relevant sentencing information provided and briefed by both parties, and cannot be read as being tantamount to a discretion to consider factors *proprio motu* without affording the parties the opportunity to be heard. Such an understanding follows and emanates from the rules and established practice of international criminal tribunals to give the parties the opportunity to present submissions in the form of evidence and law which they consider relevant to the Trial Chamber's determination of sentence.[1670]

865. The sequence of these submissions as set out in the Rules is significant. The Prosecution must first present its evidence and law. The Defence, having had notice of the Prosecution's arguments then makes its submissions of evidence and law. This practice thereby provides the Defence with a fair opportunity to answer the submissions of the Prosecution. This process is consistent with the principle of *audi alteram partem*.[1671] This is a principle of natural justice which means that a decision cannot stand unless the person directly affected by it was given a fair opportunity, both to state his case and to know and answer the other side's case.

866. The right to be heard extends beyond simply answering the other parties in litigation but also encompasses the fundamental fair trial right[1672] of parties to address proposed findings of law and fact raised *proprio motu* by a Chamber before they are made. In the *Jelisić* case, the Appeals Chamber of the ICTY held that:

> the fact that *a Trial Chamber has a right to decide proprio motu* entitles it to make a decision whether or not invited to do so by a party; *but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.* Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. *The Rules* must be read on this basis, that is to say, that *they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber.* The

[1670] Rule 100(A), ICTY RPE; Rule 100(A), ICTR RPE (for guilty pleas). The practice is evident from the procedural histories and summaries of arguments in the sentencing judgments from the ICTY, ICTR and SCSL.

[1671] "To hear the other side". See *R v Chief Constable of North Wales Police, ex p Evans* [1982] 1 WLR 1155 (HL). See *Jelisić* AJ, para. 26.

[1672] The right to a 'fair and public hearing' is reaffirmed in Article 17(2) of the Statute, which mirrors Article 14(1) of the ICCPR. Rule 26*bis* of the Rules, affirms the Court's duty to "ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused".

> availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law.[1673]

A similar finding has been made by the ICC, expressly in relation to sentencing. The Trial Chamber in the *Lubanga* case held that under Article 76(1) of the ICC Statute, the Chamber should, when considering the appropriate sentence, take into account the evidence presented and submissions made during the trial that are relevant to sentencing. Further and pursuant to Article 76(2) of the ICC Statute, the Trial Chamber may on its own motion, and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence. On this basis, the evidence admitted at the sentencing stage can exceed the facts and circumstances set out in the Confirmation Decision, "*provided the defence has had a reasonable opportunity to address them.*"[1674] The *Lubanga* Chamber found that its extensive sentencing process had ensured that the defence "had adequate notice of the matters that may be taken into consideration by the Chamber" at the sentencing stage.[1675]

867. Indeed, after the Defence had been given sufficient notice about the relevant sentencing matters, the Defence in *Lubanga* sought and was permitted to introduce additional witness testimony and documents for the purposes of additional arguments on sentence.[1676] The principle that parties should have the opportunity to present evidence on sentencing has also been confirmed at the ICTY.[1677]

868. If a factor in aggravation has not been raised during the sentencing phase of proceedings, and therefore the Defence has not had an opportunity to be heard on it, that factor should not be considered by the Trial Chamber in reaching sentence. In the

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[1673] Emphasis Added. *Jelisić* AJ, para. 27.
[1674] Emphasis *Lubanga Dyilo* Decision on Sentence, para. 29.
[1675] "As set out above, during the preparation stage of the trial, the Chamber indicated that it would hold a separate sentencing hearing in the event of a conviction and, for reasons of efficiency and economy, it ordered that evidence relating to sentence could be admitted during the trial. The defence has had a sufficient opportunity to challenge the evidence and the allegations relevant to the sentence as advanced during the trial. In addition, the Chamber has provided the defence an opportunity to respond to all the submissions and evidence that have been relied on for the purposes of sentence following Mr Lubanga's conviction. The Chamber requested written submissions on: (i) the procedure to be adopted for sentencing and the principles to be applied by the Chamber; and (ii) the relevant evidence presented during trial, the aggravating and mitigating factors, and the sentence to be imposed on Mr Lubanga. This has ensured that he has had adequate notice of the matters that may be taken into consideration by the Chamber at this stage of the proceedings." *Lubanga Dyilo* Decision on Sentence, para. 30.
[1676] *Lubanga Dyilo* Decision on Sentence, paras. 10-1.
[1677] *Delalić* Scheduling Order, p. 2; *Delalić* AJ, para. 83.

case of *Prosecutor v Kvočka et al.*, the Trial Chamber rejected the Defendant's submission that intoxication should be a mitigating factor and instead found that it was an aggravating factor. However, and because the issue was not raised by the Prosecution during sentencing, the Trial Chamber declined to treat it as an aggravating factor in determining sentence.[1678]

869. For all of the foregoing reasons, the Trial Chamber erred in law and fact by considering and placing substantial weight on the said factors as factors in aggravation of sentence without according the defence its basic right to be heard. The imposed sentence against Mr. Taylor should consequently be reduced by at least two-thirds, in light of the impermissible emphasis the Trial Chamber placed on these factors.

**iv. GROUND OF APPEAL 45: The Trial Chamber committed a discernible error in failing to consider expressions of sympathy and compassion in the statement of Charles Taylor and those made during the trial by the Defence as a factor in mitigation, due to the impermissible finding that "[a]lthough the Defence accepted that crimes were committed in Sierra Leone, it nevertheless put the Prosecution to proof beyond reasonable doubt of the crimes charged in the Indictment, necessitating the testimony of numerous victims who relived in this Court the pain and suffering they experienced."**

870. Article 17 of the Statute of the Special Court for Sierra Leone provides:

> 4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
> [...]
> e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;[1679]

871. In the Sentencing Judgement, the Trial Chamber stated:

> The Defence submits that expressions of sympathy and compassion by Mr. Taylor for the victims of the crimes committed should be taken into account as a mitigating factor. **Although the Defence accepted that crimes were committed in Sierra Leone, it nevertheless put the Prosecution to proof beyond reasonable doubt of the crimes charged in the Indictment, necessitating the testimony of numerous victims who relived in this Court the pain and suffering they experienced.** In his statement to this Court, Mr. Taylor stated that "Terrible things happened in Sierra Leone and

[1678] *Kvočka* TJ, para. 748.
[1679] Article 17(4)(e), Statute.

> there can be no justification for the terrible crimes." Mr. Taylor has not accepted responsibility for the crimes of which he stands convicted, and the Trial Chamber does not consider this statement, and the other comments made by Mr. Taylor, to constitute remorse that would merit recognition for sentencing purposes.[1680] (Emphasis added.)

872. The Trial Chamber committed a discernible error by giving weight to the consideration that, in exercising the right to cross-examine Prosecution witnesses and put them to proof of the crimes, the Defence caused pain and suffering to witnesses who relived their experiences in Court. The right to cross-examine witnesses is a fundamental right recognised under international human rights law.[1681] This right has been codified in Article 17(4)(e) of the Statute of the Special Court as a "minimum guarantee" to which the accused shall be entitled. The Trial Chamber should not have given weight to this consideration when deliberating the mitigating factors put forward by the Defence. Giving weight to this impermissible consideration is an error of law.

873. The Appeals Chamber is requested to correct this error of law by quashing the sentence imposed by the Trial Chamber and to impose a new and appropriate sentence in conformity with the minimum guarantees accorded to Mr. Taylor under Article 17(4)(e) of the Statute.

## IV. CONCLUSION

874. The fundamental errors identified in the Grounds of Appeal above render Mr. Taylor's convictions unsafe, warranting appellate intervention. The Chamber's reasoning is replete with significant errors of fact, law and procedure. These errors lead to conclusions which no reasonable trier of fact could reach, are invalid and occasion miscarriages of justice. The weight of the evidence before the Chamber establishes Mr. Taylor's remoteness from the atrocities which occurred in Sierra Leone, and demonstrates that he neither planned nor aided and abetted the crimes which occurred during the Indictment period. The Chamber also abused its discretion in imposing a manifestly excessive sentence based on the discernible errors identified above.

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[1680] Sentencing Judgement, para. 91.

[1681] *Prlić* Decision relating to Cross-Examination, p. 2: "Considering that the right to cross-examine witnesses is a fundamental right recognized under international human rights law". In support of this statement, the ICTY Appeals Chamber cited Article 14(3)(e) ICCPR; article 6(3)(d) ECHR; article 8(2)(f) ACHR; *see* also *e.g.* General Comment No. 13, para. 12; *Peart* Communications, paras. 11.4-11.5; *Saïdi* Judgement, paras. 43-4; *van Mechelen* Judgement, para. 51; *Krasniki* Judgement, para. 75; *Kostovski* Judgement, para. 41; *P.S.* Judgement, para. 21."

875. For the foregoing reasons, Charles Taylor respectfully requests that the Appeals Chamber:

(i) reverse the convictions entered against him on Counts 1-11 for aiding and abetting the commission of crimes pursuant to Article 6.1 of the Statute during the Indictment period;[1682]

(ii) reverse the convictions entered against him on Counts 1-11 for planning the commission of crimes pursuant to Article 6.1 of the Statute in the attacks on Kono and Makeni in December 1998, and in the invasion of and retreat from Freetown, between December 1998 and February 1999;[1683] and

(iii) quash the sentence imposed of a single term of imprisonment of fifty years.[1684]

Respectfully submitted,

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| **Morris Anyah**<br>**Lead Counsel for**<br>**Charles G. Taylor** | Eugene O'Sullivan<br>Co-Counsel for<br>Charles G. Taylor | Christopher Gosnell<br>Co-Counsel for<br>Charles G. Taylor | Kate Gibson<br>Co-Counsel for<br>Charles G. Taylor |

Dated this 1st Day of October 2012, The Hague, The Netherlands

[1682] Judgement, para. 6994(a).
[1683] Judgement, para. 6994(b).
[1684] Sentencing Judgement, p. 40.

# Annex B

## Book of Authorities of Appellant's Submissions of Charles Ghankay Taylor

# BOOK OF AUTHORITIES[1]

## INTERNATIONAL JUDGEMENTS AND DECISIONS

*Special Court for Sierra Leone*

*AFRC* Case

| | |
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| *AFRC* AJ | *Prosecutor v. Brima et al.*, SCSL-04-16-A-675, Judgement, dated 22 February 2008, filed 3 March 2008 |
| *AFRC* TJ | *Prosecutor v. Brima et al.*, SCSL-04-16-T-628, Judgement, dated 20 June 2007, filed 20 July 2007, pursuant to *Prosecutor v. Brima, et al.*, SCSL-04-16-T, Corrigendum to Judgement filed on 21 June 2007, dated 19 July 2007, filed 20 July 2007 |
| *AFRC* SJ | *Prosecutor v. Brima et al.*, SCSL-04-16-T-624, Sentencing Judgement, 19 July 2007 |
| *AFRC* Leave to Appeal Decision | *Prosecutor v Brima et al,* Case No. SCSL-04-16-T-367, Decision on Brima-Kamara Application for Leave to Appeal from Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel, Comment of Justice Doherty, 5 August 2005 |
| *AFRC* Re-Appointment Dissenting Opinion | *Prosecutor v Brima et al,* Case No. SCSL-04-16-T-330, Dissenting Opinion of the Hon. Justice Julia Sebutinde from the Majority Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, 11 July 2005 |
| *AFRC* Re-Appointment Decision | *Prosecutor v Brima et al,* Case No. SCSL-04-16-T-305, Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, 9 June 2005 |
| *AFRC* Indictment Decision and Order | *The Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT-46, Decision and Order on Defence Preliminary Motion on |

[1] Article 7 of the Special Court Practice Direction on dealing with Documents states that documents shall be filed with a "list of the authorities referred to". However, Rule 15 of the Special Court Practice Direction on Structure of Appeal states that "parties' Submissions shall be accompanied by a 'Book of Authorities'".

Defects In The Form of the Indictment, 1 April 2004

*CDF* Case

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| *CDF* AJ | *Prosecutor v. Fofana et al.*, SCSL-04-14-A-829, Judgement, 28 May 2008 |
| *CDF* SJ | *Prosecutor v. Fofana et al.*, SCSL-04-14-T-796, Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, 9 October 2007 |
| *CDF* TJ | *Prosecutor v. Fofana et al.*, SCSL-04-14-T-785, Judgement, 2 August 2007 |

*RUF* Case

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| *RUF* AJ | *Prosecutor v. Sesay et al.*, SCSL-04-15-A-1321, Judgement, 26 October 2009 |
| *RUF* SJ | *Prosecutor v. Sesay et al.*, SCSL-04-15-A-1251, Sentencing Judgement, 8 April 2009 |
| *RUF* TJ | *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1234, Judgement, 2 March 2009 |
| *RUF* Adjudicated Facts Decision | *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1184, Decision on Sesay Defence Application for Judicial Notice to be taken of Adjudicated facts under Rule 94(B), 23 June 2008 |
| *RUF* USG Agencies Decision | *Prosecutor v. Sesay, et al.*, SCSL-04-15-T-363, Decision on Sesay – Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005 |

*Taylor* Case

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| Disqualification Decision, Separate Op. | *Prosecutor v. Taylor*, SCSL-03-01-A-1-1324, Separate Opinion of Justice George Gelaga King on Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012 |
| Disqualification Decision | *Prosecutor v. Taylor*, SCSL-03-01-A-1-1323, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Judges, 13 September 2012 |
| Disqualification Motion | *Prosecutor v. Taylor*, SCSL-03-01-A-1302, Public with Public Annex A and Confidential Annex B, Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges, 19 July 2012 |

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| Notice of Appeal | *Prosecutor v. Taylor*, SCSL-03-01-A-1301, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012; Corrigendum to Notice of Appeal, SCSL-03-01-A-1304 |
| Sentencing Judgement | *Prosecutor v. Taylor*, SCSL-03-01-T-1285, Sentencing Judgement, 30 May 2012 |
| Corrigendum to Judgement | *Prosecutor v. Taylor,* SCSL-03-01-T-1284, Corrigendum to Judgement Filed on 18 May 2012, 30 May 2012 |
| Judgement | *Prosecutor v. Taylor*, SCSL-03-01-T-1283, Judgement, dated 18 May 2012, filed 30 May 2012 |
| Order Authorising Photography on 30 May 2012 | *Prosecutor v. Taylor,* SCSL-03-01-T-1282, Order Authorising Court Photography on 30 May 2012, 30 May 2012 |
| | *Prosecutor v. Taylor,* SCSL-03-01-T-1281, Judgement, 18 May 2012 |
| Statement Charles Taylor | *Prosecutor v. Taylor*, SCSL-03-01-T-1280, Public with Annexes A & B Statement of DahKPannah Dr. Charles Ghankay Taylor, 18 May 2012 |
| Order Authorising Photography on 16 May 2012 | *Prosecutor v. Taylor,* SCSL-03-01-T-1279, Order Authorising Court Photography on 16 May 2012, 11 May 2012 |
| Defence Sentencing Brief | *Prosecutor v. Taylor*, SCSL-03-01-T-1278, Public with Annexes A-AH and Confidential Annex AI Sentencing Brief on behalf of Charles Ghankay Taylor, 10 May 2012 |
| Order on Defence Motion Seeking Termination of the Disciplinary Hearing | *Prosecutor v. Taylor,* SCSL-03-01-T-1234, Order re: Defence Motion Seeking Termination of the Disciplinary Hearing for Failure to Properly Constitute the Trial Chamber and/or Leave to Appeal the Remaining Judges' Decision to Adjourn the Disciplinary Hearing, 18 March 2011 |
| Defence Final Brief | *Prosecutor v. Taylor,* SCSL-03-01-T-1229, Defence Final Trial Brief, 9 March 2011 |
| Defence Motion Seeking Termination of the Disciplinary Hearing | *Prosecutor v. Taylor,* SCSL-03-01-T-1220, Defence Motion Seeking Termination of the Disciplinary Hearing for Failure to Properly Constitute the Trial Chamber and/or Leave to Appeal the Remaining Judges' Decision to Adjourn the Disciplinary Hearing, 28 February 2011 |
| Wikileaks Decision on Leave to Appeal | *Prosecutor v. Taylor*, SCSL-03-01-T-1193, Decision on Defence Motion Seeking Leave to Appeal the Decision on Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 7 February 2011 |
| Wikileaks Decision | *Prosecutor v. Taylor*, SCSL-03-01-T-1174, Decision on |

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| | Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 28 January 2011 |
| | *Prosecutor v. Taylor*, SCSL-03-01-T-1171, Decision on Urgent and Public with Annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor, 27 January 2011 |
| Prosecution Final Brief | *Prosecutor v. Taylor*, SCSL-03-01-T-1156, Prosecution Final Trial Brief, 14 January 2011 |
| | *Prosecutor v. Taylor*, SCSL-03-01-T-1155, Defence Motion Seeking Leave to Appeal the Decision on Defence Request for a Status Conference Pursuant to Rule 65*bis* and Defence Motion for Stay of Proceedings Pending Resolution of Outstanding Issues, 14 January 2011 |
| Wikileaks Motion | *Prosecutor v. Taylor*, SCSL-03-01-T-1143, Urgent and Public with Annexes A-N Defence Motion for Disclosure and/or Investigation of United States Government Sources within the Trial Chamber, the Prosecution and the Registry based on Leaked USG Cables, 10 January 2011 |
| Defence Motion to Recall Witnesses | *Prosecutor v. Taylor*, SCSL-03-01-T-1142, Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 17 December 2010 |
| Contempt Decision | *Prosecutor v. Taylor,* SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 11 November 2010 |
| Disclosure Decision relating to DCT-032 | *Prosecutor v. Taylor,* SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information relating to DCT-032, 20 October 2010 |
| Corrigendum to Defence Contempt Motion | *Prosecutor v. Taylor*, SCSL-03-01-T-1090, Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 October 2010 |
| Defence Contempt Motion | *Prosecutor v. Taylor* SCSL-03-01-T-1089, Public, with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 24 September 2010 |

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| Decision on Judicial Notice of AFRC Adjudicated Facts | *Prosecutor v. Taylor,* SCSL-03-1-T-765, Decision on Defence Application for Judicial Notice of Adjudicated Facts from the AFRC Trial Judgement pursuant to Rule 94(B), 23 March 2009 |
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| Decision on Adequate Time and Facilities | *Prosecutor v. Taylor,* SCSL-03-01-PT-249, Decision on Defence Application for Leave to Appeal the 25 April 2007 'Decision on Defence Motion Requesting Reconsideration of "Joint Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence," Dated 23 January,' 22 May 2007 |
| Order Designating Alternate Judge | *Prosecutor v Taylor,* SCSL-03-1-PT-240, Order Designating Alternate Judge, 18 May 2007 |
| Pre-Trial Conference Materials | *Prosecutor v. Taylor,* SCSL-03-01-PT-218, Rule 73*bis* Pre-Trial Conference Materials Pre-Trial Brief, 4 April 2007 |
| Amended Case Summary | *Prosecutor v. Taylor,* SCSL-03-01-PT-75, Case Summary accompanying Amended Indictment, 16 March 2006 |
| Original Indictment | *Prosecutor v. Taylor,* SCSL-03-01-I, Indictment, 7 March 2003 |

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| *Lubanga Dyilo* Judgement on Appeal against the Decision on Jurisdiction | *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006 |

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| *Bagosora* AJ | *Bagosora and Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement, 14 December 2011 |
| | http://www.unictr.org/Portals/0/Case/English/Bagosora/Judgement/111214-%20Appeals%20Judgement.pdf |
| *Bagosora* TJ | *The Prosecutor v. Bagosora et al.*, Case No. IT-98-41-T, Judgement and Sentence, 18 December 2008 |
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| *Bizimungu* TJ | *The Prosecutor v. Casimir Bizimungu et al,* Case No. ICTR-99-50-T, Judgement and Sentence, 30 September 2011 |
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| *Kalimanzira* AJ | *Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 |
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| *Kambanda* TJ | *The Prosecutor v. Kambanda,* Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998 |

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| *Kanyarukiga* TJ | *The Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Judgement and Sentence, 1 November 2010 |
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| *Karemera* TJ | *The Prosecutor v. Karemera et al*, Case No. ICTR-98-44-T, Judgement and Sentence, 2 February 2012 |
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| *Karemera* Appeals Chamber Decision on Adjudicated Facts | *Prosecutor v. Karemera et al.*, ICTR-98-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006 |
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| *Ntagerura* AJ | *The Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006 |
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