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SCSL-04-15-A
(3013-3255)

3013

SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER

Before: Justice Renate Winter, Presiding Judge
Justice Jon Kamanda
Justice George Gelaga King
Justice Emmanuel Ayoola
Justice Shireen Avis Fisher

Acting Registrar: Binta Mansaray

Date filed: 4 June 2009

THE PROSECUTOR against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-2004-15-A

PUBLIC

APPEAL BRIEF FOR AUGUSTINE GBAO

Office of the Prosecutor

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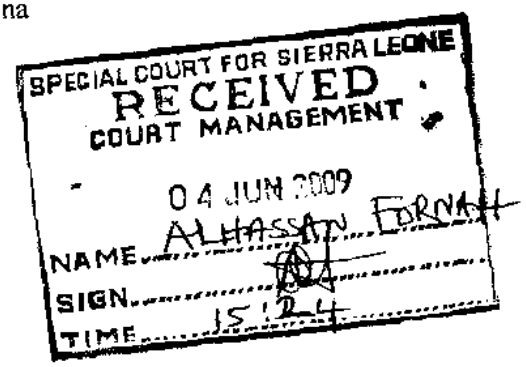

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Introduction

1. Pursuant to Rule 111 of the Rules of Procedure and Evidence, the Gbao Defence hereby files its appellate brief against the Judgement rendered on 2 March 2009[1] and the Sentencing Judgement rendered on 8 April 2009[2] by Trial Chamber I. The grounds of appeal are set out in the Notiee of Appeal for Augustine Gbao, filed 28 April 2009 by the Gbao Defenee.[3]

2. Due to time and page restrictions, the Gbao Defence found it impossible to proceed on Grounds 1, 3, 5, 8(n), 13, 15, 17 as set forth in its Notice of Appeal. The principles underlying the purpose for the ground, however, will be incorporated as necessary in other grounds.

3. The Defence for Augustine Gbao submits that the Trial Chamber committed a multitude of errors of law and fact in its Judgement and Sentencing Judgement. The errors of law constitute discernible errors that invalidate the Trial Chamber's Judgement, as it has misdirected itself as to the legal prineiple to be applied. The errors of fact, even with the customary deference accorded Trial Chamber findings, include numerous incorrect applications of the law and/or were a patently incorrect, wholly erroneous evaluation of the evidence presented by Prosecution and Defence witnesses. These errors were so unreasonable that the only conclusion is that the Trial Chamber failure to exercise its discretion judiciously. No reasonable trier of fact could have reached the same findings. We submit that each suggested error of fact and law below satisfy the standard in this paragraph.

[1] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1234, Judgement (TC), 25 February 2009. ("Trial Judgement").
[2] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1251, Sentencing Judgement (TC), 8 April 2009. ("Sentencing Judgement").
[3] *Prosecutor v. Sesay, Kallon and Gbaa*, Doc. No. SCSL-04-15-A-1253, Confidential Notiee of Appeal For Augustine Gbao, 28 April 2009 ("Notice of Appeal").

Ground 1: The Trial Chamber Erred in Fact by Relying Upon United Nations Reports, Reports from Non-Governmental Organisations and other Documentary Evidenee as Support for Establishing 'Ultimate Issues' in its Convictions Against Gbao

4. Due to page limitations, the Gbao Defence found it impossible to proceed on this Ground in a comprehensive manner. Where particularly relevant, it will be incorporated in other grounds.

Ground 2: The Trial Chamber Erred in Fact by Relying upon Expert Reports as Support for Establishing 'Ultimate' Issues in its Convictions Against Gbao

5. The Trial Chamber erred in fact by misapplying the legal principle that expert evidence and reports cannot be used to answer 'ultimate issues' - specifically, in drawing conclusions about the role of the Accused in the joint criminal enterprise ("JCE"). In this case, the Prosecution presented TF1-369's evidence about sexual violence in Sierra Leone during the war. From this testimony, the Trial Chamber drew conclusions as to Gbao's role, particularly in terms of his intent and his alleged contribution to the JCE.

I. Applicable Law

6. The Trial Chamber noted that in relation to expert witnesses, it "has accepted the evidence of such experts insofar as it relates to their areas of expertise and does not make conclusions on the acts and conduct of the Accused Persons".[4] This standard was also employed in the AFRC Trial Judgement.[5]

7. Evidence that goes to acts and conduct has been defined by Trial Chamber I, as well as other international tribunals, as evidence that the Accused:

i. Committed a crime himself;

ii. Planned, instigated or ordered charged crimes;

iii. Aided and abetted crimes;

[4] Trial Judgement, para. 538.
[5] *Prosecutor v. Brima, Kamara and Kanu*, Doc. No. SCSL-04-16-613-T, Judgment (TC), 20 June 2007, para. 151 ("AFRC Trial Judgement").

iv. Knew or had reason to know that crimes would be committed; or

v. Failed to take steps to punish perpetrators[6]

8. Where the Prosecution case is that the Accused participated in a JCE, and is therefore liable for the acts of others in that JCE, evidence relating to acts and conduct includes any testimony that the Aeeused:

i. Participated in the JCE; or

ii. Shared the requisite intent of the perpetrators who actually committed the crimes.[7]

9. Finally, any evidence related to the Accused's state of mind is considered acts and conduct.[8]

II. Argument

10. The Trial Chamber impermissibly relied upon TF1-369's testimony to support the following assertions:

i. Paragraph 1409, fn 2619: Findings in Kailahun District regarding Counts 7-9;

ii. Paragraph 1412, fn 2625: Findings in Kailahun District regarding Counts 7-9;

iii. Paragraph 1413, fn 2627: Findings in Kailahun District regarding Counts 7-9; and

iv. Paragraphs 1474-75, fn 2767: Findings in Kailahun District regarding Counts 7-9.

A. Findings which Rely Partly Upon Expert Evidence

11. The findings in paragraphs 1409, 1412. and 1413 led to the conclusion that Gbao "shared the requisite intent for rape within the context of 'forced marriage' in order to further the goals of

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[6] *See Prosecutor v. Sesay, Kallon and Gbao*, Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements under Rule 92*bis*, Doc No. SCSL-04-15-T,1125, 15 May 2008, para. 33; *also see Prosecutor v. Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*, 7 June 2002, para. 10; *also see Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Decision on the Prosecution's Motion for the Admission of Written Witness Statements under Rule 92*bis*, 9 March 2004, para. 13. While this definition of acts and eonduct emanated from a Decision on whether to admit documents under Rule 92*bis*, the definition for "acts and conduct" should not change.

[7] *Id.*

[8] *Id.*

the joint criminal enterprise".[9] Since these findings, therefore, went to the acts and conduct of the accused - that he shared the requisite intent of the perpetrators[10] – the conclusions in relation to Gbao's intent should be set aside.

12. Furthermore, the Chamber concluded that in relation to Gbao's alleged significant contribution to the JCE in Kailahun District "the...'forced marriages'...were a logical consequence of the pursuance of the goals prescribed in their ideology, the instruction on which, the Chamber recalls, was imparted particularly by Gbao".[11] Again, the Chamber relied upon paragraphs 1409, 1412, and 1413 to draw conclusions on Gbao's contribution to the JCE (in this case, his teaching of RUF ideology). Since expert evidence and reports cannot be used to go to the acts of conduct of the Accused,[12] these findings should be set aside. The Trial Chamber abused its discretion by relying upon such evidence in its findings against Gbao.

B. Findings which Rely Wholly Upon Expert Evidence

13. In paragraphs 1474-75, the Trial Chamber found through evidence provided by TF1-369 that it was "satisfied that the victims of sexual slavery and 'forced marriage' endured particularly prolonged physical and mental suffering as they were subjected to continued sexual acts while living with their captors".[13] From this finding alone it concluded that victims of the crimes were subjected to outrage upon their personal dignity, and convicted Gbao under Count 9 in Kailahun District.

14. This was, however, the only evidence relied upon to show that Gbao possessed the requisite intent as a member of the JCE pursuant to Count 9 in Kailahun District. As such, the Trial Chamber erred in fact by misapplying the proper legal standard as to the use of expert evidence to determine the intent of the Accused, since expert evidence cannot go to the acts and conduct of the Accused. This led to a miscarriage of justice. We accordingly submit that Count 9 should be overturned as against Gbao in Kailahun District.

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[9] Trial Judgement, para. 2167.
[10] *See* supra, para. 8.
[11] Trial Judgement, para. 2168.
[12] *See supra*, para. 8.

Ground 3: The Trial Chamber Erred in Fact by Failing to Provide a Reasoned Opinion in Writing, thereby Denying Augustine Gbao a Fair Trial

15. Due to page limitations, the Gbao Defence found it impossible to proceed on this Ground in a comprehensive manner. Where particularly relevant, it will be incorporated in other grounds.

Ground 4: The Trial Chamber Erred in Law by Taking Irrelevant Factors Into Consideration and Thereby Lowering the Standard for Specificity in Drafting the Indictment

16. In paragraph 330 of the Judgement, the Trial Chamber held "the fact that the investigations and trials were intended to proceed as expeditiously as possible in an immediate post-conflict environment is particularly relevant" when determining the level of specificity with which it was practicable to expect the Prosecution to plead the allegations in the Indictment.[14] The Trial Chamber thereby created a new legal principle according to which the degree of specificity required in an indictment varies depending on whether it is issued in an immediate post-conflict environment and committed an error of law which resulted in a miscarriage of justice.

17. This principle is not stated within the extensive case law regarding the degree of specificity required in an Indictment. Indeed, the assertion was not supported by reference to any law by the Trial Chamber. Furthermore, this is not the first case initiated in the aftermath of an armed conflict. In fact, the first indictment in the ICTY was issued in November 1994[15] while the conflict was still ongoing in the Former Yugoslavia.[16] The conflict in Rwanda ended in July 1994[17] and the first indictment was issued on February 1996.[18] Nevertheless, this did not diminish the requisite standards for ICTY or ICTR Prosecutors to provide indictments detailing

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[13] Trial Judgement, para. 1474.
[14] *Id.* at para. 330.
[15] Case of Dragan Nikolic. *See* ICTY Website 'ICTY Timeline' at http://www.icty.org/action/timeline/254.
[16] The ICTY has jurisdiction to try crimes committed between 1991 and 2001. *See* ICTY Website 'About the ICTY' at http://www.icty.org/sections/AbouttheICTY.
[17] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998, para. 111 ("*Akayesu* Trial Judgement").
[18] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-PT, Indictment, 12 February 1996.

the alleged crimes committed by those indicted.[19] In the RUF case, the Trial Chamber allowed the Prosecution to lower the standard, as the Prosecution provided only cursory coverage of the crimes alleged to have been committed by Gbao and altogether failed to provide the names of any victims.[20]

18. The new standard created by the Trial Chamber has had the effect of diminishing the standard of specificity required in Indictments before the SCSL. The consequence is that Gbao was not adequately informed of the charges made against him, a violation of his rights.[21] By excusing the lack of speeifieity in the RUF Indictment by citing the 'post-conflict situation' in which the RUF Indictment was issued, the Trial Chamber committed an error of law invalidating its findings that the Indictment was pleaded with sufficient specificity. We submit that its findings should accordingly be overturned and the Appeals Chamber ought to re-assess the speeificity of the RUF Indictment pursuant to the eorreet legal standard.[22]

Ground 5: The Trial Chamber Erred in Law and in Fact in Using Different Evaluative Standards for Prosecution and Defence Witnesses

19. Due to page limitations, the Gbao Defenee found it impossible to proceed on this Ground in a comprehensive manner. Where particularly relevant, it will be incorporated in other grounds.

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[19] For instance in the indictment of Dragan Nikolic, para. 1.1: "From about 13 June 1992 to about 24 June 1992, in Susica Camp, Dragan NIKOLIC committed a grave breach of the Geneva Convention by partieipating, during a period of armed conflict or occupation, in the wilful killing of Durmo HANDZIC, a person protected by that Convention, an offence recognized by Article 2(a) of the Statute of the Tribunal". The Indictment is available at http://www.icty.org/x/cases/dragan_nikolic/ind/en/nik-ii941104e.pdf.

[20] *Ibid.*

[21] As encompassed in Article 17(4)(a) of the SCSL Statute. *See* Statute of the Special Court for Sierra Leone, annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone, 16 January 2002. ('Statute').

[22] *Prosecutor v. Sesay,* Case No. SCSL-04-5-PT-80, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, paras. 6 and 7; *also see Prosecutor v. Rukundo,* Case No. ICTR-2001-72-T, Judgement (TC), 20 February 2009, para. 15 ("*Rukundo* Trial Judgement"), *citing to Prosecutor v. Seromba,* Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008, paras. 27 and 100 ("*Seromba* Appeal Judgement"); *Prosecutor v. Simba,* Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007, para. 63 ("*Simba* Appeal Judgement"); *Prosecutor v. Muhimana,* Case No. ICTR-95-1B-A, Judgement (AC), 21 May 2007, paras. 76, 167 and 195 ("*Muhimana* Appeal Judgement"); *Prosecutor v. Gacumbitsi,* Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 49 ("*Gacumbitsi* Appeal Judgement"); *Prosecutor v. Ndindabahizi,* Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, para. 16 ("*Ndindabahizi* Appeal Judgement").

Ground 6: The Trial Chamber Erred in Law in Using the Incorrect Standard for Evaluating Witnesses who Lied or were Inconsistent Regarding Other Material Matters

20. The Trial Chamber erred in law by using a lower standard than permitted in assessing the credibility of certain Prosecution witnesses who either lied under oath or whose testimony included many material inconsistencies. Ordinarily such situations demand that the totality of the impugned witnesses' testimony be disregarded. The Trial Chamber failed to do so and relied on these witnesses to make findings on Gbao's individual criminal responsibility, thereby abusing its discretion.

21. We suggest that evidence of a witness who admits to lying under oath should be disregarded.[23] The testimony of a witness who disrespects their basic responsibility to tell the truth and lies under oath should not be entitled to serious judicial consideration. Particularly in point was the testimony of TF1-113,[24] TF1-108,[25] and TF1-314.[26] TF1-113 and TF1-314 even admitted in Court to lying under oath. Although these witnesses were found by the Trial Chamber to require corroboration for their testimony, we submit their testimony should be entirely disregarded.

22. In terms of material lies and inconsistencies, no one lied quite as much as TF1-366, who did so 23 times about material matters in relation to Gbao's acts and conduct alone.[27] He lied so often during his testimony it memorably provoked Judge Thompson to remark: "he's virtually repudiating [his own] record".[28]

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[23] *Prosecutor v. Seromba*, Case No., ICTY-2001-66-1, Judgement (TC) 13 December 2006, para. 92 ("Seromba Trial Judgement"); *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003, para. 551 ("*Nahimana et al.* Trial Judgement") *upheld on appeal*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, paras. 819-820 ("*Nahimana et al.* Appeal Judgement").
[24] Transcript, TF1-113, 6 March 2006, pp. 105-06.
[25] This witness testified to the rape and killing of his wife, later demonstrated to be a lie. Transcript, TF1-108, 8 March 2006, pp.50-51; 9 March 2006, pp. 67-68; 13 March 2006, pp.80-84.
[26] On 4 June 2009, the Gbao team will file a motion to add evidence of TF1-314's testimony in the Charles Taylor trial, where she admitted to lying in the RUF Trial.
[27] *See Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1220, Confidential Gbao-Corrected Final Brief, 31 July 2008 (unredacted and corrected) ("Gbao Final Brief") paras. 899, 902, 1062, 1064, 1148, 1286, 1450-55, 1461-65 for a discussion of TF1-366, who lied about material matters on 23 separate occasions.
[28] Transcript, TF1-366, 17 November 2005, p. 95.

23. We suggest the testimony from these witnesses should be disregarded. It is submitted that the gravity of the Trial Chamber's error demands the Appeals Chamber reconsider whether it can sustain the convictions against Gbao without testimony from these witnesses that the Trial Chamber deemed critical, particularly in Kailahun District, during the Junta period.

Ground 7: The Trial Chamber Erred in Fact by Making Legal Findings on Testimony Originating From Witnesses Requiring Corroboration

24. The Trial Chamber erred in fact by convicting Gbao partly pursuant to the testimony of witnesses found to lack reliability who therefore required corroboration of their testimony by a credible witness. Corroboration by a reliable and credible witness was not always available and when it was provided it did not always actually corroborate the testimony it purported to corroborate.

25. This ground will be incorporated into other grounds as neeessary, especially as it coneerns Counts 7-9 and 13 in Kailahun District, where the use of uncorroborated testimony from witnesses requiring corroboration was most common.

26. We submit the that gravity of this error requires the Appeals Chamber to reconsider whether it can sustain the convictions against Gbao regarding several Counts in the Judgement without certain factual and legal findings that the Trial Chamber deemed critieal, particularly in Kailahun District.

Ground 8: The Majority in the Trial Chamber Erred in Law and Fact in Finding the Existence of a Joint Criminal Enterprise and in Finding Gbao as a Member of the Joint Criminal Enterprise

27. The Majority in the Trial Chamber erred in law and fact in paragraphs 991-1014, 1015, 1041, and 1970-2049 by finding Gbao responsible for unlawful killings (Counts 3-5) and pillage (Count 14) in Bo District as a member of the joint criminal enterprise ("JCE") between 1 – 30 June 1997.

28. The Majority also erred in law and in fact in paragraphs 1042-1095, 1096-1135, 1970-1973 and 2050-61 by finding Gbao responsible for unlawful killings (Counts 3-5), physieal violenee (Count 11) and enslavement (Count 13) in Kenema District as a member of the joint criminal enterprise between 1 – 30 June 1997.

29. The Majority also erred in law and in fact in paragraphs 1136-1265, 1266-1379, 1970-1973 and 2062-2155 by finding Gbao responsible for unlawful killings (Counts 3-5), sexual violence (Counts 6-9), physieal violence (Counts 10-11), enslavement (Count 13) and pillage (Count 14) in Kono District as a member of the joint criminal enterprise between February and April 1998.

30. The Majority also erred in law and in fact in paragraphs 1380-1443, 1444-1495, 1970-1973 and 2156-2173 by finding Gbao responsible for acts of terror (Count 1), collective punishments (Count 2), unlawful killings (Counts 3-5), sexual violence (Counts 7-9) and enslavement (Count 13) in Kailahaun District as a member of the joint criminal enterprise from 25 May 1997 - 19 February 1998.

31. We submit, based upon the sub-grounds listed below, that the gravity of this error demands the Appeals Chamber overturn the convictions and sentences entered against Gbao under the JCE doctrine.

Sub-Ground 8(a): Augustine Gbao was not Accorded his Right to a Fair Trial in the Majority's Finding him Guilty as a Member of the Joint Criminal Enterprise

32. The Majority in the Trial Chamber erred in law by finding Gbao to be a member of the JCE through his role as "The Ideologist" of the RUF, as the Indictment never alleged that Gbao was part of a plurality of persons significantly contributing to the alleged JCE in this capacity. Additionally, the Prosecution never sought to adduce evidenee of Ghao's role as the RUF Ideologist over the course of the four-year RUF trial nor was it even suggested by any witness. In attributing criminal responsibility to Gbao and sentencing him to 25 years imprisonment principally based upon this findiug, the Majority has denied him his right to a fair trial.

I. Applicable Law

33. It is well-entrenched in any system of law that the nature of an Accused's participation in an alleged JCE must be pled in the Indictment[29] In the absenee of such pleading, the Aecused would receive no notice, rendering it impossible to defend against charges laid by the Prosecution. In this case, Counsel for Gbao never had the opportunity to respond to Gbao's alleged role as an Ideologist. In fact, the appellate brief represents the first opportunity for the Defence to respond to an otherwise unknown and unanticipated eharge let alone the deliberation and findings set out within the Majority Judgement.

II. Gbao's Right to a Fair Trial was Violated

34. In finding Gbao as the RUF Ideologist without offering an opportunity for him to respond, the Majority failed to respeet Gbao's right to a fair trial and failed to account for why this unequivocal standard, imperative for the fair and professional implementation of any judicial system, was ignored herein. As such, the Majority failed to respeet a basic human right guaranteed to an Aceused in criminal justice systems throughout the world.[30]

35. Justice Boutet appeared to agree with such conclusion. In his Dissenting Opinion, the Learned Judge eompared the Indictment to a "roadmap" of the case against the Aceused. He stated that the Indictment "is designed to show the direction the Proseeution intends to follow

[29] *Rukundo*, para. 24; *Gacumbitsi*, para. 162; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement (AC), 17 September 2003, paras. 138-39 ("*Krnojelac* Appeal Judgement"); *Prosecutor v. Kvocka, Radic, Zigic and Prcac*, Case No. IT-98-30/1-A, Judgement (AC), 28 February 2005, para. 28 ("*Kvocka et al.* Appeal Judgement"); *Prosecutor v. Stanovic and Simatovic*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 3; *Prosecutor v Meakic, Gruban, Fustar, Banovic and Knezevic*, Case No. IT-02-65-PT, Decision on Dusko Knezevic's Preliminary Motion on the Form of the Indictment, 4 April 2003, p. 4.; *Prosecutor v. Krajisnik and Plavsnic*, Case No. IT-00-39 & 40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 13; *Simba* Appeal Judgement, para. 63; *Prosecutor v. Simic B*, Case No. IT-95-9-A, Judgement (AC), 28 November 2006, para. 22 ("*Simic B.* Appeal Judgement").

[30] Article 2 American Convention on Human Rights, signed in 1969 and entered into force on 18 July 1978; Article 14(3) (a) of the International Covenant on Civil and Political Rights, adopted by G.A. resolution 2200A (XXI), UN. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976 ("ICCPR"); Artiele 6(3)(a) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 Rome, 4 June 1950.

when presenting its case and allows an accused person…to know the case that he has to defend against".[31]

36. In addressing the argument that Gbao significantly contributed to the alleged JCE, Justice Boutet wrote that:

> "Over the course of this four year trial, it was never the Prosecution's case that the revolutionary ideology of the RUF advocated the commission of crimes in order to achieve the goal of taking power and control over Sierra Leone, nor did the Prosecution argue that Gbao played a vital role in putting this criminal ideology into practice".[32]

37. Thereby, Justice Boutet appeared to agree that the Prosecution never argued that:

i. The RUF ideology advocated the commission of crimes;

ii. Gbao played a vital role in advocating the RUF ideology; and

iii. The RUF ideology was inherently criminal.

38. He continued by concluding that the Majority had denied Gbao his right to a fair trial. He stated:

> "[I]t would not be in accordance with Gbao's right to a fair trial to centre his liability on a concept of joint criminal enterprise based upon an interpretation of the evidence that was not advanced by the Prosecution as part of their pleadings. I find that Gbao did not receive adequate and sufficient notice of this interpretation at any time".[33]

39. Justice Boutet therefore found that a fundamental right of an Accused had been breached by the Majority in their finding that Gbao had significantly contributed to the JCE as an Ideologist. He concluded by noting "Gbao did not have the opportunity to defend himself against the allegation that his commitment to the RUF ideology…constituted…a significant contribution by Gbao to the Joint Criminal Enterprise".[34]

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[31] Trial Judgement, Dissenting Opinion of Justice Pierre G. Boutet, Trial Judgement, pp. 688-96, para. 4 ("Justice Boutet Dissenting Opinion to Trial Judgement").
[32] Justice Boutet Dissenting Opinion to Trial Judgement, para 5.
[33] Justice Boutet, Dissenting Opinion to Trial Judgement, para. 6.
[34] *Id.*

40. We respectfully endorse Justiee Boutet's position on this issue. We suggest the foundation of sueh a conviction is unpreeedented and unique amongst previous international criminal trials. Notwithstanding, the Majority's finding that Gbao was the RUF Ideologist led to Gbao receiving a 25 year sentenee, as this finding led to convictions on thirteen (13) Counts in the following Districts:

i. Bo District (between 1-30 June 1997): Counts 3-5, and 14;[35]
ii. Kailahun District (between 25 May 1997-19 February 1998): Counts 1, 2, 3-5, 7-9, and 13;[36]
iii. Kenema District (between 1-30 June 1997): Counts 3-5, 11, 13;[37] and
iv. Kono District(between 14 February-April 1998): Counts 3-5, 6-9, 10-11, 13, and 14.[38]

41. Based on this lack of notiee, the convictions based upon JCE should be dismissed in their entirety. In the event the Appeals Chamber were to reject the Defence argument that Gbao's right to a fair trial was violated beeause the Trial Chamber based its convictions under JCE on a fact that was never pleaded by the Prosecution, the grounds that follow challenge the Majority's convictions entered in relation to Bo, Kenema, Kono and Kailahun Districts.

Sub-Ground 8(b): Even if the Majority was Correct in Finding Gbao as the "Ideologist" of the RUF, it Erred in Fact by Finding that Gbao Trained All RUF Recruits Throughout the Indictment Period

42. As stated, the Majority in the Trial Chamber found Gbao was the RUF Ideologist - a judicially-created finding never propounded by the Prosecution. Further, the Majority's conclusion was based upon a finding that Gbao trained *all* RUF reeruits. *This was patently false.*

I. No Evidence in the Trial Record Supports the Finding that Gbao Trained All RUF Recruits

43. Scrutiny of the RUF transcripts reveals an absence of any evidence that Gbao trained *a single recruit* during the Indictment period. Nonetheless, the Majority found that Gbao trained *all*

[35] Trial Judgement, para. 2049.
[36] *Id.* at para. 2172.
[37] *Id.* at para. 2061.
[38] *Id.* at para. 2110.

of them. The most offensive of the findings is found in paragraph 2170 of the Judgement where the Majority stated that "[t]he Chamber is strengthened in drawing this conclusion [in convicting Gbao for the deaths of the alleged Kamajors in Kailahun Town] by the knowledge that Gbao was a strict adherent to the RUF ideology and *[he] gave instruction on its principles to* ***all new recruits*** to the RUF".[39]

44. There is no evidence that Gbao trained ***any*** recruits from 30 November 1996 to 15 September 2000, either from credible or non-credible witnesses. The Trial Chamber's finding is thus not only wholly erroneous, it seriously misrepresents Gbao's role in the RUF. In his dissent, Justice Boutet confirmed this assertion by stating "[t]here is laek of evidence to support the conclusion that [Gbao] was instructing recruits after he assumed his role as [Overall IDU Commander] in 1996".[40]

45. The finding that Augustine Gbao trained every RUF recruit in ideology is the foundation upon which the Majority's JCE theory lies. All JCE findings emanate from this misrepresentation.

46. We submit that the fact that Gbao had been effectively denied the opportunity to respond to the Majority's finding that he was the RUF Ideologist warrants dismissal of convictions on all Counts for which he was convicted under JCE liability. Furthermore, we submit that this factual misrepresentation necessarily requires the Appeals Chamber to overturn all the convictions and sentences entered against Gbao under the JCE doctrine, pursuant to their erroneous foundation upon evidence that was never heard.

II. The Trial Chamber Found that Most RUF Recruits Received no Ideology Training

47. Given the unassailable point made above it is ironic that elsewhere in the Judgement the Trial Chamber appeared to indicate that Gbao may not, in fact, have trained *any* RUF recruits - let alone all of them. This remarkable self-eontradiction appears at paragraph 655: "it appears

[39] Trial Judgement, para. 2170. *Also see* paras. 2012, 2019.
[40] Justice Boutet, Dissenting Opinion to Trial Judgement, para. 5.

that [most RUF]...received *scant ideological training* and were unaware of the proclaimed basic objectives of the RUF movement".[41]

48. It is impossible to reconcile the Majority's finding that Gbao trained *all new recruits* when it simultaneously argued that *most RUF received scant ideological training.* This supports a full dismissal of all convictions in the JCE against Gbao since the factual finding that he trained all RUF recruits formed the foundation of their convictions.

Sub-Ground 8(c): Gbao did Not Act in Concert with the Plurality of RUF and AFRC Fonnd to be Members of the Joiut Criminal Enterprise

49. The Majority in the Trial Chamber erred in law and fact in finding that Gbao was part of a plurality of persons acting in concert, either explicitly or by inference, in an effort to further the common purpose of the JCE. In Paragraphs 1986-92 (Bo District), 2054 (Kenema District), 2077-81 (Kono District), and 2158-60 (Kailahun District) the Trial Chamber made findings on the plurality of persons (RUF and AFRC) acting in concert.

I. Applicable Law

50. To find Gbao a JCE member, he must be part of the plurality of persons acting in concert together. The Trial Chamber found, for a JCE to be established, that:

> "a plurality of persons is required...it needs to be shown that this plurality of persons acted in concert with each other. A common objective in itself is not enough to demonstrate that the plurality of persons acted in concert with each other as different and independent groups may happen to share the same objectives".[42]

II. Gbao did not Act in Concert with the RUF/AFRC Plurality

51. A surprising and, we submit, ultimately reversible error of fact and law appeared in the perfunctory manner with which Gbao was treated by the Majority in their consideration of whether each Accused was part of the plurality of persons in the JCE. Gbao's name was not cited

[41] Emphasis added.

in the following findings that nevertheless led the Majority to conclude that Gbao part of the plurality of persons acting in concert with the AFRC:

i. RUF fighters and Commanders "came from their bases across Sierra Leone to Freetown to join the Junta regime on the invitation of the AFRC and the instructions of Sankoh and Bockarie";[43]

ii. Senior members of the RUF...were members of the AFRC Supreme Council alongside [senior AFRC leaders];[44]

iii. Senior RUF and AFRC members participated in meetings of the Council;[45]

iv. RUF held positions of responsibility in the Junta Government;[46]

v. Following the coup, "high-ranking AFRC members and the RUF leadership agreed to form a joint 'government' in order to control the territory of Sierra Leone";[47]

vi. RUF fighters joined AFRC fighters throughout the country, including Bombali, Tonkolili, Kenema and Bo Districts, as well as Freetown (at Cockerill Barracks);[48]

vii. Close cooperation took place in Kenema Town between RUF and AFRC, including forced mining activities;[49]

viii. Cooperation between some senior AFRC and RUF members in Kono District between February - April 1998;[50] and

ix. RUF maintained military and civil control over Kailahun District, partly through the commission of crimes, thereby giving the AFRC Kailahun District.[51]

52. As stated, even though Gbao was not mentioned in these findings, the Majority found that he was part of the plurality acting in concert with other senior RUF and AFRC officers. The Majority erred in fact, however, by failing to describe *how* Gbao was found to be a member and *how* he acted in concert with the AFRC. Instead they merely stated summary findings of his

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[42] Trial Judgement, para. 257 (other citations omitted).
[43] *Id.* para. 1986.
[44] *Id.*
[45] *Id.* at paras. 1986, 1987.
[46] *Id.* at para. 1987.
[47] *Id.* at para. 1979.
[48] *Id.* at paras. 1987, 1988.
[49] *Id.* at para. 1989.
[50] *Id.* at paras. 2077-81.
[51] *Id.* at paras. 2158, 2159.

membership in the plurality. In fact, while describing his membership in the plurality, the Majority noted that Gbao remained in Kailahun District throughout the entirety of the Junta period, a fact that would appear to militate directly against membership in the JCE, as Kailahun District was largely disconnected (as it remains today in many respects) from the rest of Sierra Leone and the power-base of the Junta government.[52]

53. The *Haradinaj* Trial Judgement stated that, while it was necessary to find the common objective to which a plurality of persons is aspiring, "[i]t is...the interaction or cooperation among persons - their joint action - in addition to their common objective, that forges a group out of a mere plurality. In other words, the persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective".[53] As stated, such joint action between Gbao and the AFRC is absent in the Judgement.

54. We submit that the only proper explanation for this omission is that after full consideration of the evidence it was simply not possible to find that Gbao acted in concert with either junior or senior officers of the AFRC. The Court did not find the existence of a single conversation between Gbao and any AFRC, whether in person or by radio. Similarly the Majority made no legitimate finding to demonstrate that Gbao worked cooperatively with the AFRC in Kailahun District, and not a single example of Gbao acting in concert with the AFRC, whether during the Junta period or otherwise. The Trial Chamber accordingly erred in fact in making a legal finding of such grave consequences in the absence of supportive evidence.

III. Gbao was Not a Senior RUF Officer

55. The Majority in the Trial Chamber further erred in fact by finding that Gbao was a senior leader who was part of the plurality of persons acting in concert in furtherance of the common

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[52] *Id.* at paras. 1986, 2077.

[53] *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-T, Judgement (TC), 3 April 2008, para. 139 ("*Haradinaj et al* Trial Judgement"); *also see Prosecutor v. Fofana and Kondewa*, Doc. No. SCSL-04-14-T-785, Judgement (TC), 2 August 2007, para. 213 ("*CDF* Trial Judgement"); *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-T & ICTR-96-17-T, Judgement and Sentence (TC), 21 February 2003, para. 466 ("*Ntakirutimana and Ntakirutimana* Trial Judgement"); *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Judgement (TC), 27 September 2006, para. 884 ("*Krajisnik* Trial Judgement").

purpose of the JCE. As the Appeals Chamber recalls, only senior members of the RUF and AFRC were found to be JCE members. In this respect, the Trial Chamber found that:

> "there is insufficient evidence to conclude that between 25 May 1997 and 14 February 1998, mid- and low-level RUF and AFRC Commanders as well as rank-and-file fighters were themselves part of an agreement together with the more senior leaders of both movements to take control of the territory of Sierra Leone by means of the commission of crimes specified in the Statute [of the Special Court]".[54]

56. The totality of the findings makes it abundantly clear that Gbao was not a senior RUF officer during the Junta period. These include:

i. Gbao did not have a superior-subordinate relationship over RUF fighters or AFRC fighters;[55]

ii. As overall security commander Gbao did not have effective control over the IDU, MPs, IO and G5 (the administrative/security units of the RUF).[56]

iii. Only RUF and AFRC military officers (not administrative/security officers) were members of the AFRC Supreme Council (thereby demonstrating their superior status in the RUF hierarchy);[57]

iv. Gbao did not participate in any high-level meetings with the RUF or AFRC;[58]

v. He had no contact with senior AFRC or RUF officers during the Junta period;[59]

vi. He was not responsible for the investigation of crimes against civilians;[60]

vii. He never travelled to Freetown;[61]

viii. He did not visit the frontlines,[62] have a personal radio,[63] a radio call name,[64] and did not receive a military promotion at certain times that other high-ranking RUF members received promotions;[65]

ix. He was not receiving any reports from Bo, Kenema, or Kono;[66]

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[54] Trial Judgement, para. 1992.
[55] *See eg. Id.* at paras. 2153-54, 2217, 2237, 2297-98.
[56] *Id.* at para. 2034.
[57] *See* Exhibit 6, which shows a list of members to the Supreme Council during the Junta period.
[58] Trial Judgement, para. 775.
[59] *Id.* at para. 775.
[60] *See Id.* at paragraph 756, where it states that the Supreme Council was charged with the discussion of major issues, including looting and the harassment of civilians.
[61] Trial Judgement, paras. 775, 2010.
[62] *Id.* at para. 844.
[63] *Id.* at para. 844.
[64] *Id.* at para. 717.
[65] *Id.* at paras. 737-38, 806, 904.

x. He was not involved in the operation of security units throughout the country;[67]

xi. He was not "directly involved or did not directly participate in any of the crimes committed" in Bo, Kenema and Kono Districts;[68]

xii. He did not "personally commit any of the crimes" in any district of Sierra Leone during the Junta period.[69]

xiii. He did not have independent power to initiate investigations of misconduct against RUF fighters;[70]

xiv. He did not have the authority to issue orders to fighters;[71]

xv. Gbao, in his position as overall security commander, was not superior to overall unit commanders and could not issue orders to them.[72]

57. Finally, the administrative units of the RUF - IDU, MP, G5, IO - were functionally powerless during the Junta period, as the "AFRC Supreme Council was the sole legislative and executive authority in Sierra Leone"[73] and "the Supreme Council assumed the sole authority to make laws and detain persons in the public interest".[74] This is probably why, during the Junta period, no evidence was presented to demonstrate how the internal security apparatus of the RUF interacted with the AFRC Supreme Council. There was not, we submit, because it did not.

58. Furthermore, from May 1997 to April 1998, Gbao was a mere RUF captain[75] - a mid-level rank.

59. In addition to the above findings, TF1-371, [redacted],[76] was asked by Defence Counsel for Gbao: "[w]hen you returned to Freetown in 1997 [he had been out

[66] *Id.* at paras. 2041, 2057 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kenema) and 2105 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kono).
[67] *See eg. Id.* at para. 2154.
[68] *Id.* at paras. 2010, 2057 (adopting the same finding *mutatis mutandis* in Kenema District about Gbao's lack of direct participation) and 2105 (adopting the same finding *mutatis mutandis* for Kono District as Bo and Kenema).
[69] *Id.* at paras. 1976, 2053, 2066, 2157, 2178, 2181, 2183, 2216, 2219.
[70] *Id.* at para. 684.
[71] *Id.* at para. 697.
[72] *Id.* at para. 698.
[73] *Id.* at para. 754.
[74] *Id.* at para. 1980.
[75] Transcript, DAG-048, 3 June 2008, p.29 ; *also see* Gbao Final Brief para. 23.

of the country], **did you hear of Augustine Gbao as a member of the RUF**?"[77] He responded: "No…I really didn't bother too much about him…I [didn't] concern myself much about him".[78] When asked "**[c]an you remember when you first heard of [Gbao] as an RUF member**?"[79] TF1-371 answered "***[i]t was after the Intervention***".[80] It is hard to imagine how Gbao safely be seen to have acted in concert with TF1-371, [redacted][81] when TF1-371 did not even know whether Gbao was a *member* of the RUF, much less a senior member.

60. The Trial Chamber made another interesting finding in paragraph 1507 of the Judgement. It held that the RUF were not part of the JCE in Bombali District because the most senior RUF commander at the time was one Major Brown, an individual who was "not in a position of command over fighters".[82] Gbao had no ability to command RUF or AFRC fighters (or even members of the IDU, MP, IO or G5).[83] Thus, Gbao should likewise be found a member of the RUF outside the JCE.

61. The totality of these findings leads inexorably to the conclusion that, were the Appeals Chamber to concur that a 'senior member' JCE plurality existed from May 1997 - February 1998, Gbao was not one of the senior members of the RUF. Thus, he may not be found to be a member of the plurality of persons acting in concert pursuant to the common purpose of taking over the country of Sierra Leone.

IV. Conclusion

62. In conclusion, the Majority erred in finding that Gbao was a part of the plurality while failing to find – due to the lack of evidence – that he acted in concert with all the alleged JCE members. Additionally, he was not a senior member of the RUF and, consequently, the Majority

[76] *See* Exhibit 6 and TF1-371, Transcript 20 July 2006, p.18 for the identity of the witness.
[77] Transcript, TF1-371, 1 August 2006, pp. 102, 103.
[78] *Id.* at p. 102.
[79] *Id.*
[80] *Id.*
[81] Trial Judgement, para. 755.
[82] Trial Judgement, para. 1507.
[83] *Id.* at para. 2034.

erred in finding him part of the plurality of persons in the JCE. As a result the Trial Chamber erred in fact as to this fundamental element of JCE. The conviction based on JCE cannot be sustained.

Sub-Ground 8(d): The Majority in the Trial Chamber Erred in Fact in Failing to Make Findings on How Members of the Alleged Joint Criminal Enterprise "Used" the Principal Perpetrators of Various Crimes Found to have been Committed

63. The Majority in the Trial Chamber erred in fact by failing to apply the proper legal standard in detailing, through factual findings, the methods by which the alleged members of the JCE "used" lower-ranking, non-members of the JCE to commit crimes in furtherance of the joint criminal enterprise.

I. Applicable Law

64. In paragraph 263, the Trial Chamber identified the proper standard it was to ostensibly rely upon in relation to crimes committed by non-JCE members:

> "[t]he principal perpetrator [of the crimes committed] need not be a member of the joint criminal enterprise, but may be used as a tool by one of the members of the joint criminal enterprise. The Chamber adopts the view of the ICTY Appeals Chamber in *Brdjanin* that 'where the principal perpetrator is not shown to belong to the JCE, the trier of fact ***must further establish*** that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan'.[84]

65. The Appeals Chamber in the *Brdjanin* case similarly stated that "[i]n cases where the person who carried out the *actus reus* of the crime is not a member of the JCE, the key issue remains that of ascertaining whether the crime in question forms part of the common criminal purpose. *This is a matter of evidence*".[85] The recent *Krajisnik* case affirmed this standard, confirming that 'the establishment of a link between the crime in question and a member of the

[84] Trial Judgement, para. 263, *citing Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Judgment (AC), 3 April 2007, paras. 413, 430 ("*Brdjanin* Appeal Judgement"); *Prosecutor v. Martic*, Case No. IT-95-11-A, Appeal Judgement (AC), 8 October 2008, paras. 161-195 (the relevant cite is actually paragraph 168) ("*Martic* Appeal Judgement"); *also see Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Judgement (AC), 17 March 2009, para. 225, 235-36 (emphasis added) ("*Krajisnik* Appeal Judgement").

JCE is a matter to be assessed on a ease-by-ease basis".[86] Through such analysis, "factors indieative of sueh a link include evidenee that the JCE members *explicitly or implicitly requested* the non-JCE member to eommit such a crime or instigated, ordered, eneouraged, or otherwise availed himself of the non-JCE member to eommit the crime".[87]

66. As such, it was not sufficient for the Trial Chamber merely to state that the non-JCE members who physieally committed the crimes were used by JCE members to eommit them,[88] and that erimes were being committed by mid-ranking or rank-and-file RUF/AFRC fighters (the non-JCE members) during the Junta period. The law requires that there must be a link with one of the JCE members;[89] detailed reasoning as to how a JCE member may have 'used' them to commit crimes in furtherance of the JCE is equally necessary.[90] The Trial Chamber manifestly failed to find such a link with many crimes.

II. *The Trial Chamber Failed to Impute the Crimes Committed by Non-JCE Members to JCE Members*

67. In its findings concerning Bo, Kenema, Kono and Kailahun, the Chamber repeatedly failed to properly connect crimes committed by 'AFRC/RUF fighters' or other perpetrators of erimes to a JCE member. In the majority of crimes found by the Trial Chamber to have been committed pursuant to the JCE, the Chamber failed to make findings or otherwise explain how the relevant non-JCE members were 'used' by JCE members. Whether the non-JCE members were acting pursuant to orders, whether they reported to JCE members after the crimes were committed, whether the RUF or AFRC JCE member exercised any direct or operational control over those who committed the crimes found in the Trial Judgement, or any other finding that could link

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[85] *Brdjanin*, Appeal Judgement, para. 418 (emphasis added).
[86] *Krajisnik* Appeal Judgement para. 226, *citing Brđjanin* Appeal Jndgement, para 413; *Martić* Appeal Judgement, para. 169, (emphasis added).
[87] *Krajisnik*, Appeals Judgement, para. 226.
[88] Trial Judgement, para. 1992.
[89] According to paragraph 1990, this includes Sankoh, Bockarie, Sesay, Kallon, Superman, Eldred Collins, Mike Lamin, Isaac Mongor, Gibril Massaquoi, Gbao and other unnamed RUF Commanders, as well as Johnny Paul Koroma, Gullit, Bazzy, Five-Five, SAJ Musa. Zagalo, Eddie Kanneh and others to hold power in Sierra Leone on or shortly after the 25 May 1997.
[90] In the *Krajisnik* Case, the Appeals Chamber overruled several of the Trial Chamber's findings related to JCE in view of its failure to link the physical perpetrator with one of the JCE members. *Krajisnik* Appeal Judgement, paras. 237, 249, 283-284.

these actors to the crimes they allegedly committed to an act in furtherance of the joint criminal enterprise was simply not discussed in the Judgement.

68. A table of the findings ean be found in Annex 1 to this brief, illustrating where the Court failed to make this linkage. We submit that all counts regarding erimes in whieh the Chamber failed to establish such a link to an RUF or AFRC JCE member should be overturned on appeal. Convicting an Accused for crimes committed by non-JCE members without demonstrating how one of the JCE member 'used' the physical perpetrator to further the JCE is a serious miscarriage of justiee and invalidates the whole findings of the Trial Chamber relating to crimes committed by non-JCE members.

III. Crimes Linked to JCE Member still Must be Committed in Furtherance of the Common Purpose

69. Imputing a crime to a JCE member alone, however, is still not suffieient to impute crimes committed by non-JCE members to the JCE. Paragraph 263 of the Judgement, as well as JCE practiee in general, confirms the Chamber's view that a crime in issue must be found to have been committed *in furtherance* of the JCE's plan.[91] According to the Trial Chamber's own reasoning, if the Chamber were to make no finding that a crime was committed pursuant to the JCE, then it cannot properly be found to be part of the JCE.

70. In the absence of sueh a eonnection, Gbao cannot be held responsible for any erimes found in the Judgement. Without showing that the erimes committed were done pursuant to the JCE, it is improper to hold the JCE members responsible. This is sensible because crimes in Sierra Leone at this time could have been committed for various reasons. Perhaps fighters or random eriminals took advantage of the moment and committed crimes for personal reasons. Perpetrators of crimes may not even have known of a criminal plan intended by the Junta Government to maintain control over the country. Additionally, with the identities of the perpetrators of certain crimes unknown, it raises the possibility that they may have been eommitted by people wholly unrelated

[91] *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Judgement (TC), 26 February 2009, Volume I, para. 99 ("*Milutinovic et al.* Trial Judgement"); *Krajisnik* Trial Judgement, para 885; *Krajisnik* Appeal Judgement, para. 237.

to the RUF and AFRC altogether. In the absenee of sueh a finding, it cannot be proved beyond reasonable doubt that the crimes were eommitted in furtherance of the JCE.

71. Annex I details whether crimes found by the Trial Chamber were aetually committed in furtherance of the JCE.

IV. Conclusion

72. These findings are dangerous. They jeopardise the safe and equitable evolution of JCE and international criminal justice in general. Leaving aside whether the crimes found to have been committed were actually committed, if the Appeal Chamber overlooks the need to link the crime perpetrated by non-JCE members and the JCE members, Gbao faces the inevitable but unpardonable risk of being held responsible for any crime committed by any RUF/AFRC during the Junta period. In essence, this punishes him for RUF membership. As stated in the *Milutinovic* case, "[m]ere membership in a given criminal organisation [is not] sufficient to establish individual criminal responsibility".[92]

73. In the *Krajisnik* Appeals Judgement, the ICTY reviewed and overturned many of the Trial Chamber's findings for lack of evidence as to how the JCE members 'used' the non-JCE members to commit crimes.[93] We suggest the same should apply here to remedy the miscarriage of justice that took place due to the Trial Chamber's findings.

74. We ask that the Appeals Chamber review each crime listed in Annex I and, after review, dismiss all crimes deemed as part of the JCE where the Trial Chamber failed to establish the link between the perpetrators and a JCE member. We suggest the samc measure be taken where the Chamber failed to review whether the crime was done in furtheranee of the JCE.

75. In the absence of such a link, any reasonable trier of faet would surely conclude that those committing erimes were just as likely to be independent groups of criminals pursuing their own

[92] *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, 21 May 2003, para. 25.
[93] *Krajisnik* Appeal Judgement, paras. 237, 249, 283-284.

agenda as they were RUF/AFRC fighters acting on behalf of the JCE. We suggest that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao for crimes committed by non-JCE members that are not linked beyond reasonable doubt to the JCE members and thereby committed in furtherance of the JCE itself. Without that link, it cannot be said that non-JCE members were 'used' by JCE members to further their common purpose and, accordingly, we suggest the Court reject such findings.

Sub-Ground 8(e): The Majority in the Trial Chamber Criminalised a Common Purpose that is not Inherently Criminal

76. The Appeals Chamber accepted in the AFRC Appeal that the Prosecution had pleaded JCE correctly. It was pleaded in the RUF case in an identical manner. However, this conclusion does not necessarily confirm that the alleged common purpose was criminal of itself. A detailed and reasoned analysis of the evidence is required to determine whether, on the facts of the case, it can be established beyond reasonable doubt that the AFRC/RUF intended to control the territory of Sierra Leone through the commission of crimes. In the present case, the Trial Chamber failed to do so and consequently erred in finding that the common purpose to take over Sierra Leone necessarily involved the commission of crimes.

I. The Trial Chamber's Findings

77. The Trial Chamber found that since the first acts of the Junta were to suspend the Constitution of Sierra Leone, dissolve the Parliament, eject all political parties, appoint a Supreme Council as the sole authority to pass law as well as to authorise the detention of individuals, its goal was thenceforth to maintain its power over Sierra Leone and to subject the civilian population to AFRC/RUF rule by violent means.[94] The Chamber then held that "the means agreed upon to accomplish these goals entailed massive human rights abuses and violence against and mistreatment of the civilian population and enemy forces".[95]

[94] Trial Judgement, para. 1980.
[95] *Id.*

78. These two paragraphs (1980 and 1981) represent the totality of the Trial Chamber's reasoning in finding that from the outset, the AFRC/RUF's common purpose was to control Sierra Leone through the commission of crimes. The Trial Chamber failed to give any explanation as to how it reached the conclusion that the AFRC/RUF intended to use violent means against the civilian population, and how that necessarily entailed massive human rights abuse and mistreatment of the civilian population. We submit that it was not the only reasonable inference the Trial Chamber may have drawn and that it erred in fact in doing so.

79. The Trial Chamber additionally found that whilst the AFRC/RUF conducted armed operations in which crimes were committed, it thereby intended to suppress all opposition to the regime through wholly disproportionate means.[96] It added that "the AFRC/RUF alliance intended through the spread of extreme fear and punishment to dominate and subdue the civilian population in order to exercise power and control over the territory".[97]

80. In paragraph 2016 of the Judgement, the Trial Chamber held that "resorting to arms to secure a total redemption and using them to topple a government which the RUF characterised as corrupt necessarily implies the resolve and determination to shed blood and commit the crimes for which the Accused are indicted".[98] Once again, it failed to explain the relationship between a rebellion, which is not unlawful under international law,[99] and the commission of crimes. It is submitted that where the JCE is the predominant mode of responsibility and is employed to convict persons for acts in which they had no direct participation, utmost caution is required in assessing whether the common goal of the group (in the present case controlling Sierra Leone) involved the commission of crimes. It was not done in the present case.

81. Similarly in paragraphs 2019 and 2020 the Trial Chamber stated that "by receiving and adhering to this ideology and imparting it to all recruits, the RUF and the Accused knew, ought to

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[96] *Id.* at paras. 1980, 1981.
[97] *Id.* at para. 1981.
[98] *Id.* at para. 2016.
[99] *Prosecutor v. Kallon and Kamara*, Case No. SCSL-2004-15-AR72(E)/SCSL-2004-16-AR72(E), Decisions on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 ("Lomé Amnesty Decision"), para. 20, *referring to* M. N. Shaw, International Law (5th ed., 2003) p. 1040, stating that: "[w]hether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the State as a matter of internal law is for the state authority to decide. There is no rule against rebellion in international law."

know, and are in fact presumed to have known, that the Commanders and the fighters under their control targeted, molested and killed innocent civilians who were not taking part in hostilities"[100] and that "crimes were committed by characterising civilians as collaborators of the corrupt regime" which they were determined to topple by eroding or destroying through directly targeting and liquidating its innocent civilian power base in the course of the said "broad based struggle".[101]

II. The Trial Chamber Failed to Provide Sufficient Reasoning for its Finding that the Common Purpose involved the Commission of Crimes

82. It is submitted that the Trial Chamber limited itself to an assertion that the Junta intended the commission of crimes in order to sustain control over Sierra Leone, yet failed to properly explain how the two were related. Merely stating that the Junta intended crimes to be committed in order to reach their goal is insufficient without support in fact and law.

83. JCE theory is the most extensive mode of responsibility. An individual found to be within a JCE is thereby responsible for each and every crime committed pursuant to it. Its common purpose therefore requires careful assessment. Where the common purpose is not inherently criminal, the question of whether the only reasonable inference to be drawn was that it inevitably involved the commission of crimes demands similar scrutiny.

84. The Chamber appeared to find that since the objective of the AFRC/RUF was to take control over the territory of Sierra Leone, and that various AFRC/RUF members committed crimes, then all the members of the RUF must have intended to commit crimes to achieve the objective. We respectfully suggest that this reasoning was unduly simplistic and that it stretched the limits of JCE to a point where it equated to collective responsibility. This was impermissible.

[100] Trial Judgement, para. 2019.
[101] *Id.* at para. 2020.

85. ICTY authority states "mere membership in a given criminal organisation would not be sufficient to establish individual criminal responsibility"[102] and "criminal liability pursuant to JCE is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a JCE, a different matter."[103]

86. It is not appropriate to find alternatively find the existence of a criminal common purpose simply by finding that crimes were committed, even by a large number of RUF members. In order to properly attribute criminal responsibility to the Accused for crimes to which they have no connection save for their alleged membership of a JCE, more compelling findings are required. Having failed to make a sufficient finding as to the criminality of the RUF's common purpose – to take control of the territory of Sierra Leone – the Trial Chamber failed at the outset to establish that the purpose did in fact involve the commission of crimes. This may have been owing to the fact that no evidence was ever adduced to indicate a relationship between the AFRC/RUF's ultimate goal and the commission of those crimes alleged in the indictment.

III. Conclusion

87. The Trial Chamber failed to provide a factual basis to their legal finding that a common criminal purpose existed. We submit that this error of fact, resulting in Gbao's conviction for most of the crimes alleged to have fallen within the JCE, has resulted in a miscarriage of justice. Accordingly we request that all the JCE-related findings should be overturned and the sentences quashed.

Sub-Ground 8(f): The Majority in the Trial Chamber Erred in Fact by Finding Multifarious Common Purposes

88. The Trial Chamber failed to properly define the common purpose. On close analysis it appears to have found several different common purposes. As the objective of ultimate control of

[102] *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction — Joint Criminal Enterprise, 21 May 2003, para. 25.
[103] *Id.* at para. 26.

Sierra Leone has been deemed non-criminal in itself, it remains unclear whieh crimes were actually intended to be in furtherance that control. We submit the Majority in the Trial Chamber erred in apparently finding numerous different common purposes or in routinely re-characterising the nature of the eommon purpose as well as the means to achieve it.

I. The Trial Chamber's Findings

89. In paragraph 1980 of the Judgement, the Trial Chamber stated that the "strategy of the junta was to maintain its power over Sierra Leone and to subject the civilian population to the AFRC/RUF by violent means." Sueh means "entailed massive human rights abuses and violence against and mistreatment of the civilian population and enemy forces."[104]

90. Elsewhere in the Judgement the Trial Chamber found that the purpose of the AFRC/RUF alliance was to be achieved "through the spread of extreme fear and punishment to dominate and subdue the civilian population in order to exercise power and control over eaptured territory".[105]

91. The Chamber also held that the means to terrorise the civilian population comprised all crimes charged in counts 2-14 in the RUF Indictment.[106] As such, it appeared to find the common purpose was to terrorise the eivilian population, rather than to take over the eountry. This was repeated in paragraph 1985. The Trial Chamber appeared to oscillate between finding firstly that terrorism was the eommon purpose, and later that it was contemplated to aehieve thc common purpose of taking control over the territory of Sierra Leone. We submit that a crime cannot constitute the common purpose and simultaneously constitute a *means to achieve* thc eommon purposc. In addition, the Chamber's finding that terrorising the civilian population constituted the common purpose perversely contradicted its earlier ruling (recalled in paragraph 374) that "the Prosecution notiee coneerning Joint Criminal Enterprise made the conduct of a campaign of terror and eollective punishment one of the explicit purposes of the joint criminal enterprise, rather than the means by which the objective of gaining eontrol of Sierra Leone was to be achieved. The Chamber eonsiders that the Proseeution may not unilaterally attempt to alter a

[104] Trial Judgement, para. 1980.
[105] *Id.* at para. 1981.
[106] *Id.* at para. 1982.

material fact in the Indictment more than half-way through a trial".[107] and concluded that it would only consider the JCE as pleaded in the indictment.[108] It failed to do so.

92. The comment in paragraph 1982 that "the crimes charged under counts 1 to 14 were within the JCE" creates further confusion. Therein the Chamber further appeared to confuse the criminal means allegedly used to further the common purpose with the common purpose itself. A criminal conviction under JCE should not be based on such confused determination of the common purpose of the JCE.

93. A final example of the Chamber's disturbing inability to maintain a consistent position lies in the following finding, wherein the Chamber, shifting yet again, explicitly found that the common purpose to which Gbao had adhered was, in fact, the RUF ideology to create a revolution: "where the evidence establishes that there is a criminal nexus between such an ideology and the crimes charged and alleged to have been committed, the perpetrators of those crimes should be held criminally accountable under the rubric of a joint criminal enterprise for the crimes so alleged in the Indictment".[109] The Trial Chamber then found how all crimes charged "were in application and furtherance of the goals stipulated in the ideology of taking power and control over the territory of Sierra Leone",[110] and concluded by stating "the revolution was the ideology in action".[111]

94. It is submitted that the Chamber's finding that the RUF ideology was the underlying motive behind the JCE is irreconcilable with the its earlier finding that the criminal purpose of the JCE was common to both the RUF and AFRC. If the common purpose amounts to the implementation of the RUF ideology, the Trial Chamber failed to justify how such purpose was also applicable to the AFRC. This represents another example of the Trial Chamber's failure to properly define what the JCE's common purpose was. The Chamber erred in failing to properly identify the fundamental purpose of the JCE, and thus erred in its application of this complex

[107] *Id.* at para. 374.
[108] *Id.* at para. 374.
[109] *Id.* at para. 2013.
[110] *Id.* at para. 2029.
[111] *Id.* at para. 2032.

mode of responsibility. As a result we submit that Gbao was wrongly convicted pursuant to a mode of responsibility that was not properly established.

II. Conclusion

95. The Trial Chamber's failure to properly define what the common purpose was renders all its subsequent findings in relation to JCE unsafe since it is unfair to sustain a conviction pursuant to this mode of liability when the common purpose lacks definition. Gbao's conviction as a JCE member in the absence of a proper definition of what the common purpose entailed was thus a miscarriage of justice. We accordingly submit that the JCE be dismissed as against Gbao.

Sub-Ground 8(g): The Majority in the Trial Chamber Erred in Fact by Failing to Demonstrate that Certain Criminal Acts Served as a Means to Achieving the Common Purpose of the Alleged Joint Criminal Enterprise[112]

96. The Majority of the Trial Chamber further erred in their findings that certain activities of the RUF and AFRC during the Junta period constituted the criminal means by which they intended to achieve their goal of taking and maintaining power over the territory of Sierra Leone.

I. The Trial Chamber's Findings

97. The only references as to the crimes forming part of the JCE's common purpose are found in paragraphs 1981, 1982 and 1985. In paragraph 1981, the Trial Chamber stated that AFRC/RUF intended to "dominate and subdue the civilian population in order to exercise power and control over captured territory' through the 'spread of extreme fear and punishment".[113]

98. In paragraph 1982 the Trial Chamber listed unlawful killings (counts 3-5), sexual violence (counts 6-9) and physical violence (counts 10-11) as means to 'terrorise the civilian population'. It also cited enlistment, conscription and use of child soldiers (count 12), forced labour (count

[112] Sub-grounds 8(g) and 8(h) have been consolidated into one ground.
[113] Trial Judgement, para. 1981.

13), pillage (count 14) and collective punishment (count 2) as "additional criminal means to achieve the common purpose".[114] It concluded by findings that these crimes were all committed within the JCE. There was no apparent explanation as to how the Trial Chamber reached such a conclusion.

99. The Trial Chamber failed to explain its finding that counts 1 to 11 and 13 – terror,[115] collective punishment, unlawful killing, sexual and physical violence and forced labour – were intended by the AFRC/RUF as means intended to assist them in their goal of taking over the country. Merely listing crimes and stating that they were necessary for the furtherance of the common purpose is not sufficient.

100. Furthermore, in making these findings, the Trial Chamber failed to explain how the means actually furthered the common purpose. This trial concerned a large geographical area and multitudinous victims. Findings of criminal responsibility for crimes on such a scale demand compelling justification.

II. Failure to Find that Crimes Were Intended and Served as Means to Further the Common Purpose

A. Failure to Find that Crimes Furthered the Common Purpose

101. In *Martic*, the Trial Chamber held "the objective of uniting with other ethnically similar areas did not in and of itself amount to a common criminal purpose within the meaning of the law on JCE"[116] but also that "where the creation of such territories is intended to be implemented through the commission of crimes within the Statute this may be sufficient to amount to a common criminal purpose".[117] After detailed analysis of the facts the tribunal found that the common purpose was to be achieved through criminal means, holding that "the political objective

[114] *Id.* at para. 1982.
[115] The defence submits that the Trial Chamber erred in presenting count 1 as being the common purpose earlier in its findings. *See* para. 91 above.
[116] *Prosecutor v. Martic*, Case No. IT-95-11-T, Judgement (TC), 12 June 2007, para. 442 ("*Martic* Trial Judgement").
[117] *Id.*

to unite Serb areas in Croatia and in Bosnia-Herzegovina with Serbia in order to establish a unified territory was implemented through widespread and systematic armed attacks on predominantly Croat and other non-Serb areas and through the commission of acts of violence and intimidation" and that "the implementation of the political objective to establish a unified Serb territory in these circumstances necessitated the forcible removal of the non-Serb population from the SAO Krajina and RSK territory".[118] In so finding, the Trial Chamber carefully assessed the situation and the role of the Accused during the conflict and how the creation of a Serbian state involved the commission of crimes.[119]

102. In *Krajisnik*, the Trial Chamber gave similarly detailed reasoning in determining both the common purpose and which crimes fell both within and outside of it.[120] In the 2009 *Milutinovic* case – where the criminality of the common purpose was beyond dispute – the Trial Chamber's analysis of the crimes allegedly forming part of the common purpose went to 25 pages.[121] Its findings on the common purpose were detailed in several paragraphs.[122] This is in stark contrast to the two paragraphs in which Trial Chamber I simply listed the crimes and promptly found they constituted the means to achieve the common purpose.

102.1. It is submitted that merely listing crimes alleged by the Prosecution cannot properly suffice in order to sustain the ultimate finding that they were intended by the AFRC/RUF as means to take over Sierra Leone rather than being criminal acts committed in the midst of the conflict by AFRC/RUF elements. The Trial Chamber failed to link those crimes with the common purpose itself, and thus failed to properly define means used to achieve the AFRC/RUF common purpose. Given that the common purpose was rendered criminal only by the fact that the AFRC/RUF allegedly agreed to commit crimes as a means to achieve it, the Trial Chamber should have properly explained why such crimes were indeed found to be a necessary means to achieve the common goal. The Trial Chamber utterly failed to do so. Such a reckless error inevitably tainted virtually all the Trial Chamber's findings, since it went to the most fundamental element of a JCE theory: its common purpose. Without the proper finding of a

[118] *Id.* at para. 445.
[119] *Id.* at para. 443.
[120] *Krajisnik*, Trial Judgement, paras. 1089-1119.
[121] *Milutinovic et al.* Trial Judgement, Volume III, paras. 21-88.

common purpose involving the commission of crime no JCE may be found. In finding that the common purpose involved the commission of crimes the Trial Chamber committed a grave error of fact. Accordingly Gbao's conviction under JCE is unsafe and ought to be dismissed as it amounts to a miscarriage of justice.

B. Failure to Find that the AFRC/RUF Intended the Crimes to Further the Common Purpose

102.2. Furthermore, the Trial Chamber also failed to properly find that the AFRC/RUF *intended* any common purpose involving the commission of crimes, which is fundamental to the issue of whether a common purpose existed.[123] They made no reference to any explicit or implicit agreement or understanding between the AFRC/RUF to the effect that the crimes as charged in the RUF Indictment would be committed as means to achieve their objective.

102.3. Under the circumstances we submit that the Trial Chamber abused its discretion when considering the JCE case against Gbao. In finding that crimes in counts 1-14 were means intended by the AFRC/RUF to achieve their non-criminal purpose to take control over Sierra Leone it committed a serious error of fact. By rendering the inherently non-criminal purpose criminal because it involved the commission of crimes, the Trial Chamber failed to demonstrate that these crimes were done in furtherance of the common purpose. Such a failure precludes those acting in furtherance of the purpose to be held criminally responsible under JCE liability.

102.4. Given that the Trial Chamber failed to establish that the AFRC/RUF intended to control the territory through the commission of crimes, it inevitably erred in finding that a JCE existed between high ranking AFRC/RUF members. It is not sufficient for an International Criminal Tribunal simply to state that crimes were committed and that therefore they must have been intended as means to achieve an otherwise non criminal purpose without satisfactory reasoning.

102.5. We submit that the gravity of this error requires the Appeals Chamber to overturn all convictions and sentences entered against Augustine Gbao based on JCE liability.

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[122] *Id.* at paras. 89-95.
[123] This requirement is clearly established in case law. *See Milutinovic et al.* Trial Judgement, Volume I. para. 101.

Sub-ground 8(i): The Majority in the Trial Chamber Erred in Fact in Finding that Gbao Significantly Contributed as "The Ideologist" to the Joint Criminal Enterprise, Nor for Any Other Reasou Offered by the Majority in its Judgement

103. The Majority of the Trial Chamber further erred by finding that Gbao significantly contributed to the joint criminal enterprise as "The Ideologist" of the RUF. The Majority also erred by finding that Gbao's other alleged contributions - his status, rank, assignment and relationship with Foday Sankoh, his role as overall security commander, in farming in Kailahun District, and in failing to investigate the beating of TF1-113 - significantly contributed to the joint criminal enterprise.

104. It must be noted that Justice Boutet not only dissented to the findings in paragraphs 2009-49, he "fundamentally dissented".[124] While not entirely clear what the Justice intended by inserting footnote 3745, one can comfortably assert that he found these findings to be of particular offenee against Gbao and the Majority's findings of his significant contribution to the JCE.

I. Gbao as the Ideologist of the RUF

105. As stated in tbe grounds of appeal above, Gbao was denied the opportunity to respond to charges that he was the RUF's Ideologist, as nonc were ever made.[125] Additionally, the Majority falsely found that Gbao taught ideology to all RUF recruits during the Indictment period, a patently untrue finding without foundation in any credible or non-credible testimony (and inherently contradicted by their contrary finding that most RUF were never trained in ideology).[126] Additionally, the Trial Chamber erred by finding that Gbao was part of the plurality acting in concert with one another.[127] Wc submit that each of thesc grounds independently negatcs Gbao's convictions upon JCE and wc consequently urge their dismissal.

[124] Trial Judgement, para. 2009, fn 3745.
[125] *See* Sub-Grounds 8(a) and 8(b).
[126] Trial Judgement, para. 655.
[127] *See* Sub-Grouud 8(c).

106. Should the Appeals Chamber continue to deliberate the question of whether Gbao was a member of the JCE, we submit that, in any event, the Trial Chamber erred in fact by finding that Gbao significantly contributed to the JCE as the RUF Idcologist for the reasons detailed below.

A. Gbao was Not the Progenitor of RUF Ideology nor Trained in RUF Ideology

107. Foday Sankoh was the "driving force behind the RUF and shaped its military and political ideology".[128] The Trial Chamber also found that the RUF ideology "was imparted to the Special Forces who were so specially designated because they were trained in Libya. They included Foday Sankoh, Mike Lamin, Mohamed Tarawallie and Gibril Massaquoi".[129] The ideological training was "instituted and taught by the Special Forces like Mike Lamin in Camp Naama".[130] There are no findings nor any evidence that Gbao was the progenitor, or part of a larger "braintrust", of the RUF ideology.

108. Furthermore, there is no evidcnee that Gbao was ever trained in RUF ideology himself. The Trial Chamber erred in fact in paragraph 2012 by finding that Gbao received military and ideological training at Camp Naama before the RUF launched attacks in Sierra Leone because there appears to be no evidence that Gbao was ever trained there. It was not disputed that Gbao was arrested by Foday Sankoh just before the RUF entered Sierra Leone in March 1991, for spying on the RUF on behalf of the Sierra Leonean government. The RUF entered Sierra Leone shortly thereafter and there is no evidence to demonstrate that Gbao received any training at the camp. Citations to evidenee of Gbao's alleged training are absent in the Majority's findings.

B. There were no Findings Describing the Ideological Training Imparted by Gbao to RUF Recruits

109. Even were Gbao properly found responsible for teaching RUF ideology to all recruits, it is unclear whether that would have prompted the eommission of crimes under the Speeial Court Statute. This is especially significant given the Majority's finding that "Exhibits 38, 273, and 367

[128] Trial Judgement, para. 651.
[129] *Id.* at para. 2012.
[130] *Id.*

relating to the RUF ideology contain some ideal, attractive and virtuous norms in that they proscribe and would not tolerate" crimes under the Statute.[131] Such exhibits cannot simply be ignored by the Trial Chamber, especially where they would create reasonable doubt.

110. Without explanation, however, the Chamber found that RUF recruits were not taught these norms at all (even though there are no other ideology books on the court record). Instead, without citation to any testimonial or circumstantial evidence, the Chamber found the "declared norms were only included to boost the domestic and international perception and image of the RUF"[132] in order to mask the brutal crimes they would later commit.

111. By failing to make particularised findings as to the ideology Gbao taught the Majority's finding that he significantly contributed to the JCE as an ideology instructor should be dismissed.

C. *There is No Evidence that Gbao Taught Ideology to the Physical Perpetrators of Crimes*

112. If the Appeals Chamber were to accept that Gbao was teaching a criminal ideology (rather than the just ideology reflected in the Exhibits), there is no evidence that he taught any of the perpetrators of the crimes found to have been committed. Should the Appeals Chamber, however, find that Gbao did in fact train all RUF recruits and that this teaching was criminal or inherently criminal, we observe that the Majority failed to link his criminal ideological training to the subsequent commission of crimes. We respectfully recall Justice Boutet's assessment that "the Prosecution has not proved [nor did the Majority in the Trial Chamber demonstrate in its findings] that the perpetrators of the crimes received ideology training or were instructed by Gbao himself".[133]

113. In summary, should Gbao be found to have significantly contributed to the JCE as a senior member of the RUF by teaching a criminal ideology to all RUF recruits (all of which we dispute), the law clearly requires that his acts must yet be found to have been in furtherance of the JCE. Consequently, we submit, the Majority should have demonstrated that Gbao's criminal

[131] *Id.* at para. 2021.
[132] *Id.*
[133] Justice Boutet Dissenting Opinion to Trial Judgement, para. 5.

teaching was imparted to the perpetrators of the crimes found in the Judgement to have been committed. They failed to do so.

II. Gbao's Other Alleged Contributions

114. Gbao's other JCE contributions also related to his imputed role as RUF Ideologist, an imputation that Gbao had no opportunity to dispute. By extension of the preceding arguments we accordingly submit the findings within paragraphs 2009-49 should also be dismissed were the Appeals Chamber accept our pleadings within sub-grounds 8(a) and 8(b) above.

A. Status, Rank, Assignment and Relationship with Foday Sankoh

i. Gbao's Status/Assignment

115. The Majority found that, through his role as the RUF Ideologist, Gbao also contributed to the JCE in his supervisory role over the IDU, MP, IO and G5 in Kailahun District[134] (not in Bo, Kenema or Kono).

116. Again, Justice Boutet "fundamentally dissented" on this section of the Majority's findings.[135] We respectfully endorse his assessment. Just as Gbao's purported role as the RUF's Ideologist was judicially created, the findings in this section appear judicially manipulated. The Majority repeatedly contradicted various of their previous findings, cited sections of the transcript that did not exist, and erroneously relied on witnesses that required corroboration owing to their dubious credibility. This produced a conclusion that appeared at best arbitrary and, at worst, pre-ordained. The Trial Chamber erred in fact by giving weight to non-existent factors in its finding that Gbao significantly contributed to the JCE, which resulted in a miscarriage of justice.

[134] Trial Judgement, para. 2034.
[135] *Id.* at para. 2009, fn 3745.

a. Gbao did Not Implement the Ideology Through the Various RUF Security Apparatuses

117. In paragraphs 2034 and 2035, the Majority found that Gbao had a supervisory role over the security apparatus of the RUF - IDU, MP, IO and G5 - and that through this role he could ensure that RUF ideology was implemented, thereby furthering the JCE.

118. However, these four units had a nominal role to play during the Junta period, especially in remote Kailahun District. In fact, the security functions they performed prior to the Junta period were effectively removed from 25 May 1997 to February 1998, as the "AFRC Supreme Council was the sole legislative and executive authority in Sierra Leone"[136] and "the Supreme Council assumed the sole authority to make laws and detain persons in the public interest".[137] Thereby, the Trial Chamber implicitly found that RUF security units had little or no relevance during the Junta rule.

119. In his Dissenting Opinion, Justice Boutet stated that that the administrative / security apparatus, of which Gbao had been a part, had had no role to play during the Junta rule. He observed a "complete absence of evidence that would tend to prove the manner in which the internal security apparatus of the RUF [the MP, G5, IO and IDU] may have interacted with, supported or complemented the internal structures of the AFRC or of the Junta".[138] This diminished status was demonstrated by the fact that there were no members of the RUF security units on the Supreme Council.[139] In reality, Gbao and other members of the security units only ever held low to mid-level positions within the RUF's overall hierarchy and were left behind when the RUF came to power.

120. More generally, in terms of Gbao's role as OSC and Overall IDU commander, the Majority found that Gbao had no effective control over any security unit other than the IDU,

[136] Trial Judgement, para. 754.
[137] *Id.* at para. 1980.
[138] Justice Boutet Dissenting Opinion to Trial Judgement, p. 691, para. 8.
[139] *See* Exhibit 6.

whether during the Junta period or not.[140] He was not superior to the Overall Unit Commanders in any locations throughout Sierra Leone (including Bo, Kenema, Kono and Kailahun Districts) and had no power to issue orders to them.[141] Additionally, throughout the entire Indictment period (including Junta rule), Gbao had no independent right as IDU Commander or Overall Security Commander to initiate investigations against RUF fighters for mistreating civilians, such a right only being held by the Battle Group Commander, Battlefield Commander and Area/Brigade Commander and, at times, civilians.[142] Most disputes, investigations and subsequent punishments were not dealt with by the security apparatus and were instead handled by the local Area Commander where the crime was alleged to have taken place.[143]

121. On occasion, Gbao would receive investigative reports from the IDU. There is no evidence that he ever reeeived reports concerning any investigations during the Junta period, however. He enforced no punishments, as only the AFRC Supreme Council or RUF High Command could decide the guilt or innocence of a fighter under investigation.[144] Gbao similarly had no right to initiate Joint Security Boards of Investigations, which was also the exclusive right of RUF High Command.[145] He was never involved with any JSBI investigation outside of Kailahun District during the Junta period.

122. Being that Gbao was not a fighter, never left Kailahun District, was a security officer with no right to initiate investigations or to punish, and received no reports of misconduct in Bo, Kenema and Kono (and there was no evidence he received them during the Junta period in Kailahun District either), it is hard to eomprehend the logic of the Majority's finding that by his status as Overall Security Commander ("OSC") he significantly contributed to the JCE by implementing the ideology throughout the country.

123. The Majority actually *affirmed* Gbao's nominal role outside Kailahun Distriet by finding "the Chamber has heard no credible evidence that would tend to indicate that Gbao actually

[140] Trial Judgement, paras. 2034, 2153.
[141] *Id.* at para. 698.
[142] *Id.* at para. 684.
[143] *Id.* at para. 685.
[144] *Id.* at para. 686.
[145] *Id.* at para. 702.

received reports regarding unlawful killings" in Bo, Kenema and Kono Districts.[146] It also found that "there is also insufficient credible evidence to prove that Gbao failed in his duty to ensure that investigations were properly undertaken [in Bo, Kenema and Kono]".[147]

124. In his Dissenting Opinion Justice Boutet found no evidence to demonstrate that Gbao "had any *de facto* responsibility for investigating criminal aets outside of Kailahun District during [the Junta period]".[148] He continued: "[m]oreover, there is no evidence that Gbao received any reports or had any responsibility for investigating or punishing crimes committed during the retreat following the Intervention, or in Kono District between 14 February 1998 and the end of April 1998".[149]

125. Judge Boutet further stated that "[n]o evidence was put forth by the Prosecution to demonstrate that the OSC played any significant role, or that his was a position of such authority so as to allow such proper infcrences to be drawn regarding the nature and extent of Gbao's contribution to the joint eriminal enterprise".[150]

126. It is difficult to comprehend how Gbao could be found to have significantly contributed to the crimes in Bo, Kenema, Kono without evidence that he even knew about them. The Majority appears to have rclied entirely on Gbao's teaching of ideology in order to link him to the crimes committed in these areas. It imputes all findings of knowledge through Gbao's allcged ideology training. This, in our submission, is entirely without foundation and grossly unfair.

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[146] Trial Judgement, paras. 2041, 2057 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kenema) and 2105 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kono).
[147] *Id.*
[148] Justice Boutet Dissenting Opinion to Trial Judgement, p. 691, para. 8.
[149] *Id.*

b. Gbao did not Travel Throughout Kailahun District Reporting on Whether the MP and G5 were Implementing RUF Ideology

127. The Majority found that Gbao travelled widely throughout Kailahun District, ensuring RUF ideology was implemented.[151] It is difficult to comprehend how this finding eventually led to an ultimate finding of criminal liability under JCE in Bo, Kenema and Kono. Nevertheless, the Majority did find as such,[152] basing the same on the testimony of DIS-188. This was ironic, given the Majority's finding earlier in its Judgement that DIS-188 "was inconsistent" as a witness and "was not genuinely assisting the Court to arrive at the truth".[153] The Majority stated they would accept his testimony only where it was "corroborated and confirmed by the evidence of reliable witnesses".[154] Needless to say, DIS-188's testimony cited in paragraph 2035 was *not* corroborated by any witness.

128. Should the Appeals Chamber nevertheless decide to take DIS-188's uncorroborated testimony into account, we submit that, in any event, the Majority erred by relying upon testimony that simply did not exist. In its attempt to implicate Gbao on the basis of allegedly ensuring 'RUF ideology was put into practice', the Majority relied upon citations of the transcript that bear no relation to this issue.[155] It concluded this section of the Judgement by extraordinarily stating that Gbao's supervisory role had entailed "the monitoring and implementation of the ideology" in the absence of evidence in support of such a claim.

c. Alleged Forced Farming in Kailahun District

129. The Majority found that Gbao's alleged involvement in forced farming in Kailahun District significantly contributed to the JCE. For reasons explained in Sub-Ground 8(s), II, Annex III below, the Trial Chamber failed to establish beyond reasonable doubt that forced farming took place in Kailahun District during the Junta period. Consequently it cannot properly

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[150] Justice Boutet Dissenting Opinion to Trial Judgement, p. 690, para. 7.
[151] Trial Judgement, para. 2035.
[152] As these arguments were adopted *mutatis mutandis* in Kenema and Kono.
[153] Trial Judgement, paras. 567-568.
[154] *Id.* at para. 568.
[155] Trial Judgement, para 2035, fn 3770, 3771.

be found that Gbao significantly contributed to the JCE through the commission of this alleged crime.

130. If having reviewed the Trial Chamber's factual and legal findings on forced farming the Appeals Chamber were to find that such crimes did take place in Kailahun District during the Junta period, we submit it should specifically review whether the Trial Chamber's findings necessarily:

i. Implicate Gbao with crimes taking place within the temporal scope of the JCE's existence (25 May 1997 to 19 February 1998); and

ii. Demonstrate how the forced farming significantly contributed to the JCE.

1. The Majority Presented No Credible Evidence Implicating Gbao During the Junta Period

131. All testimony related to Gbao and forced farming took place in Kailahun District. Therefore, it will be discussed in Grounds 8(s) and 11 below. This section will discuss only findings on whether the farming furthered the interests of the JCE.

2. The Alleged Forced Farming in Kailahun District did not Further the Goals of the Junta Government

132. The Majority failed to explain how the alleged farming in Kailahun District furthered the goals of the Junta government. Besides making generic findings that Gbao's role in forced farming "significantly contributed to maintaining the strength and cohesiveness of the RUF fighting force",[156] the Majority did not demonstrate how produce from Kailahun District actually significantly contributed to the Junta Government's continued hold on power throughout Sierra Leone.

[156] Trial Judgement, para. 2039.

133. In relation to Gbao's alleged farm, even had the relevant testimony been credible it remains unclear how food for his personal consumption could have furthered the Junta Government's goal of maintaining power over Sierra Leone.

134. More importantly, even if produce from Kailahun District did contribute to the Junta government's hold on power, the Trial Chamber failed to make findings as to how Gbao's involvement with it furthered the goals of the JCE, besides their general assertions. This was a critical omission and, even if Gbao was found to be involved in farming in Kailahun District, the Majority failed to show how his aetions in partieular furthered the JCE.

135. In his Dissenting Opinion, Justice Boutet made clear that he believed the alleged forced farming in Kailahun did not, in fact, further the JCE. He stated "I find that there is only a limited relationship between the enslavement of eivilians in Kailahun Distriet and the furtherance of the goals of the joint criminal enterprise during the period of the Junta government".[157] He continued: "there is insufficient evidence to conclude that the only reasonable inferenee to be drawn is that the enslavement of civilians in Kailahun District was directed to achieving the goals" of the JCE.[158] He then compared the alleged forced farming with forced mining in Tongo Field, which he *did* find to be directly related to furthering the JCE.[159]

136. He concluded that even if there was any relationship between farming in Kailahun and furthering the JCE, Gbao could not be said to have been directly involved in these activities.[160]

ii. Gbao's Rank

137. The Majority noted that Gbao's rank was significant in its determination that he significantly contributed to the JCE. However, they never specified the actual rank Gbao held pursuant to that eonelusion. At the relevant period of time (for JCE purposes) Gbao was a

[157] Justice Boutet Dissenting Opinion to Trial Judgement, para. 14.
[158] *Id.*
[159] *Id.*
[160] *Id.* at para. 15.

captain: a mid-level officer in the RUF[161] who remained in Kailahun District during the Junta period and was never appointed to the AFRC Supreme Council.

iii. Gbao's Relationship with Foday Sankoh

138. The Trial Chamber also found that Gbao had prestige in Kailahun District given his personal relationship with Foday Sankoh.[162] Beyond this general assertion, however, there was no evidence that Gbao attained any additional prestige or power within the RUF as a result of any personal connection to Sankoh during the Junta period.

139. The Defence knows of no testimony of a single conversation between Gbao and Sankoh during Junta rule. As the Trial Chamber itself found, Gbao was given no special responsibilities outside of Kailahun District during the Junta period. More importantly, if Gbao had been a close ally of Sankoh, one would expect him to have been invited to join the AFRC Supreme Council. Sesay and Kallon's membership of the Supreme Council, meanwhile, has never been in dispute, notwithstanding that neither were alleged to have been personally close to Sankoh.

iv. Gbao's Alleged Failure to Investigate the Beating of TF1-113

140. In paragraph 2039, the Majority found that Gbao significantly contributed to the JCE in that he failed to investigate the alleged beating of TF1-113 in Kailahun District. It is difficult to understand how this failure could have been capable of significantly contributing (if at all) to furthering the goals of the plurality of AFRC/RUF to take or maintain power over the country, in particular through mining diamonds.

141. Furthermore, TF1-113 was a wholly unreliable witness who the Chamber found required corroboration when testifying about Gbao's acts and conduct. Her allegation clearly fell within the category of "acts and conduct" under the generally accepted definition presented in

[161] Transcript, DAG-048, 3 June 2008, p.29.
[162] Trial Judgement, para. 2033.

paragraphs 7-9 above. Consequently, by failing to find corroboration of her account the Majority were in breach of their own ruling as stated earlier in the Judgement.

142. In addition, TF1-113 admitted to lying under oath.[163] Testimonial evidence from a witness who admits to lying under oath should be disregarded.[164]

III. Conclusion

143. For these reasons, if the Appeals Chamber decides to consider the question of whether Gbao significantly contributed to the JCE based primarily on his role as the RUF Ideologist, we submit that such findings should be dismissed in their entirety, as Gbao did not make a significant contribution to Junta rule.

Sub-Ground 8(j): The Majority in the Trial Chamber Erred in Fact by Finding Gbao Individually Criminally Responsible Using the Mens Rea Standard under the Extended Form in Attributing Individual Responsibility

144. The Majority of the Trial Chamber erred in fact by finding Gbao individually criminally responsible as a member of the joint criminal enterprise by using the extended JCE form *mens rea* standard against him in Bo, Kenema and Kono Districts when all crimes found to be part of the JCE were found to have been committed pursuant to the first form of JCE.[165] Whilst maintaining our challenge to the Majority's findings that Gbao was ever part of the JCE, we submit that should the Appeals Chamber still entertain the question of Gbao's criminal culpability in Bo, Kenema and Kono, his alleged JCE membership must in any event be dismissed as Gbao did not possess the requisite intent.

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[163] Transcript, TF1-113, 6 March 2006, pp.105-06.
[164] *Seromba* Trial Judgement, para. 92; *Nahimana et al.* Trial Judgement, para. 551, *upheld on appeal Nahimana et al* Appeal Judgement,, para. 820.
[165] Trial Judgement, para. 1985.

I. Applicable Law

145. The three forms of JCE have three different *mens rea* standards for liability under JCE "according to the category of common design under consideration".[166] The first JCE requires that "the Accused must intend to commit the crime and intend to participate in a common plan whose object was the commission of the crime"[167] and that such intent be shared amongst all the JCE members.[168] The third category of JCE requires "the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise".[169] Responsibility under the third form of JCE arises if "under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk".[170]

145. In the case at hand, the Chamber found that crimes pursuant to Counts 1-14 in the Indictment lay within the joint criminal enterprise and were intended by the participants to further the common purpose to take power and control over Sierra Leone. In paragraph 1982, it stated that "the crimes charged under Counts 1 to 14 were *within* the joint criminal enterprise and [were] *intended* by the participants to further the common purpose to take power and control over Sierra Leone".[171] As the Trial Chamber found the first form of JCE applied to the RUF Accused, in order to find criminal responsibility as a JCE member, one must establish that each JCE member had the common intent to commit the crimes in Counts 1-14 as a means to achieve their common purpose.

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[165] *Prosecutor v. Tadic D.*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, para. 227, 228 ("*Tadic D.* Appeal Judgement"). The second *mens rea* standard is not relevant to this case, as the Trial Chamber found that only two of the three were properly pleaded by the Prosecution in its RUF Indictment. Trial Judgement, paras 384, 385, 471.

[167] Trial Judgement, para. 265; CDF Trial Judgement, para. 217; *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgement (AC), 13 December 2004, para. 467 ("*Ntakirutimana and Ntakirutimana* Appeal Judgement"); *Milutinovic et al.* Trial Judgement, Volume I, para. 107 (other citations omitted).

[168] CDF Trial Judgement, para. 218; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 467; *Milutinovic et al.* Trial Judgement, Volume I, para. 108; *Krajisnik* Appeal Judgement, para. 707.

[169] *Tadic D.* Appeal Judgement, para. 228; CDF Trial Judgement, para. 219; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 467; *Milutinovic et al.* Trial Judgement, Volume I, paras 96, 110-112; *Krajisnik* Trial Judgement, para. 883.

[170] *Id.*

[171] Emphasis added. It reiterates this Form I finding for Counts 1-14 in paragraph 1983, where it stated that "the evidence shows that the crimes contemplated within the joint criminal enterprise" and in paragraph 1985, where it stated that "[t]he Chamber finds that crimes were contemplated by the participants of the joint criminal enterprise to be within the common purpose".

II. The Trial Chamber's Findings

146. The Majority of the Trial Chamber found that in Bo District Gbao "did not intend [Counts 3-5 and 14] as a means of achieving the common purpose" of the JCE.[172] Similarly, in Kenema District it found that Gbao "did not intend [the committed crimes] as a means of achieving the common purpose".[173] As for Kono District, the Majority found that Gbao "did not intend [Counts 3-5, 6-9, 10-11, 13 and 14] as a means of achieving the common purpose".[174] In each of these three areas, it also found that Gbao "willingly took the risk" that crimes might be committed by other members of the JCE or persons under their control.[175]

III. The Trial Chamber Used the Wrong Mens Rea Standard in Convicting Gbao

147. In all three locations, Gbao was convicted of first form of JCE by way of the *mens rea* standard applicable to the *third form* of JCE. It erred in law by applying the wrong legal standard. All the crimes were found to have been contemplated within the JCE, and were thus basic form JCE crimes. The Majority needed to find that Gbao *intended* to commit the crime and intended to participate in a common plan in order to safely return convictions against him. It failed to do so and erred in law by convicting Gbao under the *mens rea* standard of a JCE that did not exist in the RUF case.

148. It is impossible to find that for one JCE, some crimes for some JCE members were within the JCE and for others outside of the JCE. The basic element of JCE, the common purpose, either has such crimes within it or as a reasonable and foreseeable consequence of it. The only reasonable inference from the fact that the Trial Chamber was unable to find that Gbao shared the criminal intent of all the JCE members is that Gbao was not part of this JCE.

[172] Trial Judgement, para. 2048.
[173] *Id.* at para. 2060.
[174] *Id.* at para. 2109.
[175] *Id.* at paras. 2048, 2060, 2109.

IV. Conclusion

149. We submit that the gravity of this error of law requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under JCE in Bo, Kenema and Kono.

Sub-Ground 8(k): Gbao did not Share the Intent With Other Members of the Joint Criminal Enterprise in Bo, Kenema and Kono

150. The Majority in the Trial Chamber erred in law by finding Gbao individually criminally responsible for crimes in Bo, Kenema and Kono Districts as a member of the joint criminal enterprise because he could not properly have been found to have shared the intent in these three locations with other members of the JCE. Whilst we challenge the Majority's findings that Gbao was ever part of the JCE for the reasons listed above, should the Appeals Chamber entertain the issue of Gbao's criminal culpability in Bo, Kenema and Kono, the convictions against him must be dismissed for the reason posited above.

I. Trial Chamber's Findings

151. Again, the Chamber found that all the crimes committed pursuant to the JCE were "intended by the participants to further the joint criminal enterprise".[176] According to the Trial Chamber, as well as other international tribunals, "[t]he intent to commit the crime[s] *must be shared by all participants in the joint criminal enterprise*".[177]

152. In relation to Bo District, the Majority of the Trial Chamber found that Gbao "did not intend [Counts 3-5 and 14] as a means of achieving the common purpose" of the JCE. Meanwhile, the Trial Chamber found that Sesay and Kallon "shared with the other participants in the joint criminal enterprise the requisite intent to commit" Counts 3-5 and 14.[178]

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[176] Trial Judgement, paras. 1982, 1983, 1985.
[177] Trial Judgement, para. 265; *CDF* Trial Judgement, para. 218; *Tadic D.* Appeal Judgement, para. 228; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 467 ('*Ntakirutimana and Ntakirutimana* Appeal Judgement'); *Kvocka et al.* Appeal Judgement, para. 110; *Krnojelac* Appeal Judgement, para. 84; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement (AC), 25 February 2004, para. 101 ('*Vasiljevic* Appeal Judgement').
[178] Trial Judgement, para. 2002, 2008.

153. In relation to Kenema District, the Majority found that Gbao "did not intend [the committed crimes] as a means of achieving the common purpose".[179] It found however that both Sesay and Kallon "shared, with the other participants, in the joint criminal enterprise the requisite intent to commit" the crimes in Kenema.[180]

154. As for Kono District, the Majority in the Trial Chamber held that Gbao "did not intend [Counts 3-5, 6-9, 10-11, 13 and 14] as a means of achieving the common purpose". It found meanwhile that Sesay and Kallon "shared with the other participants in the joint criminal enterprise the requisite intent to commit" the crimes he was convicted.[181]

155. The Trial Chamber was correct on the facts: Gbao did not share the intent to commit the crimes with the JCE members, but it erred in its legal conclusion by finding that Gbao was nonetheless criminally responsible. As the *mens rea* element of JCE is not met, a conviction under this mode of responsibility is impermissible. By convicting Gbao whilst one element of the mode of responsibility was missing, the Trial Chamber erred in law and caused a miscarriage of justice.

156. We submit that the gravity of this error requires the Appeals Chamber to dismiss all convictions and pursuant sentences in relation to crimes in Bo, Kenema and Kono Districts, since Gbao was not found to have intended the crimes as an alleged member of the plurality in furtherance of the JCE.

Sub-Ground 8(I): The Trial Chamber Erred in Fact by Finding Gbao Individually Criminally Responsible for Crimes under Form III Liability

157. The Trial Chamber erred in fact by finding that crimes found to have been within the common purpose (Form I), and therefore intended by the JCE members, could also be found to have been outside the common purpose (Form III), but a reasonable and foreseeable consequence of JCE membership. The Trial Chamber's found that crimes in Bo, Kenema and Kono were

[179] *Id.* at para. 2060.
[180] *Id.* at para. 2056.
[181] *Id.* at para. 2092, 2103.

intended by Sesay, Kallon and other JCE members to further the JCE, but were not intended by Gbao to further the same JCE.

158. Should the Appeals Chamber consider the question of Gbao's culpability in Bo, Kenema and Kono Districts under the extended form of JCE liability, it should dismiss the charges owing to the Majority's failure to make any findings linking Gbao to the crimes committed by the physical perpetrators. Additionally, the Trial Chamber failed to adequately explain how Gbao could have reasonably foreseen the commission of these crimes in the absence of evidence supporting such finding in the Trial Record. Finally, it failed to explain their finding that Gbao willingly took the risk that such crimes would be committed in Bo, Kenema and Kono.

159. If it is necessary to consider this ground, it is suggested that the gravity of this error of fact – a conviction in the absence of evidence - requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under JCE in relation to Bo, Kenema, and Kono.

Sub-Ground 8(m): The Majority in the Trial Chamber Erred in Fact by Finding that Gbao Knew or Had Reason to Know about Crimes in Bo, Kenema and Kono

160. The Majority in the Trial Chamber erred in fact by finding that Gbao had any knowledge whatsoever about the crimes it found to have been committed in Bo, Kenema and Kono Districts. The Chamber made this finding principally based upon Gbao's alleged role in training all RUF recruits.[182]

I. Trial Chamber's Findings

161. In finding Gbao responsible in Bo, it stated that "by receiving and adhering to this ideology and imparting it to all recruits...the Accused knew, ought to know, and are in fact presumed to have known, that the Commanders and the fighters under their control targeted, molested and killed innocent civilians who were not taking part in hostilities" between 1-30 June

[182] Trial Judgement, para. 2019.

1997.[183] In Kenema, the Majority found that he knew or had reason to know that physical violence and enslavement took place in Kenema between 1-30 June 1997.[184] In Kono, the Trial Chamber summarily inferred that Gbao knew or had reason to know of the crimes committed between February and April 1998.[185]

II. Trial Chamber Failed to Support Its Conclusion that Gbao Knew or Had Reasons to Know About Crimes Committed

162. It must be reiterated that, contrary to the Majority's findings, Gbao did not train any RUF recruits during the Indictment period. Nevertheless, if the Appeals Chamber accepts that Gbao was the RUF Ideologist, we submit that it is not proper to conclude Gbao somehow 'knew or had reason to know' of the crimes that were committed in Bo, Kenema and Kono Districts.

163. The Trial Chamber offered cursory conclusions regarding Gbao's knowledge, generically establishing that he possessed knowledge of the crimes committed but failed to support it with evidence from the trial record. These unsubstantiated conclusions stand in contrast to the many findings that would tend to indicate that Gbao actually did not know or have reason to know that the crimes found to have been committed actually took place.

III. The Findings of the Trial Chamber Support the Fact that Gbao Did not Have Knowledge Nor Reasons to Know

164. First, Gbao was not in Bo, Kenema or Kono during the Junta period (or at any other time). He was in Kailahun District until at least February 1999.[186] Study of the findings make this clear, as Gbao's name is not mentioned in any of the factual or legal findings related to these three locations.[187]

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[183] *Id.*
[184] *Id.* at para. 2058.
[185] *Id.* at paras. 2106-08.
[186] *Id.* at para. 1986, where it stated that Gbao was in Kailahun during the Junta period; *also see* para. 2153, where it found that Gbao was in Kailahun District until February 1999.

165. Second, Gbao did not communicate with anyone located in Bo, Kenema or Kono Districts during the Junta period. Additionally, throughout the entirety of the war, the Chamber found that he did not have a personal radio[188] nor did he have a radio call name.[189] Gbao was likewise not communicating with the AFRC Supreme Council. This is supported by the Trial Chamber's findings that Gbao never "met with the AFRC leaders or communicated with the Junta leaders during the Junta period".[190]

166. Third, the Chamber found no evidence to indicate that Gbao received reports on unlawful killings in Bo, Kenema, or Kono.[191] Finally, Gbao "did not visit the frontlines and was not involved in military planning.[192] In general, the IDU as a unit had no power or authority regarding military activities.[193]

167. Therefore, there was no evidence to indicate that Gbao knew or had reason to know of the crimes in Bo, Kenema, and Kono.

168. Judge Boutet made similar findings. He observed that "[a]ccording to the evidence, Gbao's actions were and continued to be essentially limited to Kailahun District. There is no evidence to suggest that, at any time during the Junta period and during the Intervention, Gbao was involved with the commission of crimes outside of Kailahun District".[194]

169. He continued: "There is an absence of evidence which could establish that Gbao actually received reports of crimes in Kenema or Bo Districts [or from other parts of Sierra Leone][195]

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[187] *See* paras. 954-1387 of the Judgement. Gbao's name is not mentioned in any of the factual or legal findings in Bo, Kenema or Kono Districts.
[188] *Id.* at para. 844.
[189] *Id.* at para. 717.
[190] *Id.* at paras. 775, 2010.
[191] *Id.* at paras. 2041, 2057 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kenema) and 2105 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kono).
[192] For a negative finding, *see Id.* at para. 844.
[193] *Id.* at para. 682.
[194] Justice Boutet Dissenting Opinion to Trial Judgement, para. 13.
[195] *Id.* at para 8, fn 4010.

during the Junta period, or that he had *de facto* responsibility for investigating criminal acts outside of Kailahun District" during the Junta period.[196]

IV. Conclusion

170. In conclusion, there is no basis upon which the Majority could properly find that Gbao knew about the crimes found to have been committed in Bo, Kenema and Kono. Based upon the above recitation of facts found by the Trial Chamber, it likewise cannot be inferred from direct or circumstantial evidence that Gbao possessed such knowledge. We submit that the gravity of this error requires the Appeals Chamber to overturn the Majority's findings where such cursory, unsubstantiated findings are made. The Trial Chamber committed a miscarriage of justice by finding that Gbao had knowledge of the crimes committed in Bo, Kenema and Kono Districts.

Sub-Ground 8(n): The Majority in the Trial Chamber Erred in Fact by finding Gbao Responsible for Specific Intent Crimes under Form III Liability in Bo, Kenema and Kono

171. The Gbao Defence has decided not to proceed on this sub-ground.

Sub-Ground 8(o): The Majority in the Trial Chamber Erred in Fact in Finding that Gbao Shared the Intent of the Principal Perpetrators of Count 1 in Kailahun District

172. The Majority in the Trial Chamber erred in fact in paragraphs 1380-1443, 1444-1495, 1970-1973, and 2156-2173 by convicting Gbao of Count 1 in Kailahun District without making any explicit finding to demonstrate that he held the intent to commit an act of terror as a member of the JCE.[197] In the absence of findings that Gbao shared the intent to willfully make the Kailahun population the object of an act of violence (the general intent) and to carry out these

[196] *Id.* at para. 8.
[197] *See* Trial Judgement, paras. 2156-2160, 2164-2173, where there are no findings demonstrating Gbao's specific intent.

acts with the specific intent to spread terror (the specific intent),[198] he cannot be held individually criminally responsible since necessary elements of the crime have not been established.[199]

173. Furthermore, not only was the Majority inattentive to its mandate to ensure it returned convictions only in the event that all requisite elements of crimes had been established, it made explicit findings that, remarkably, were in flat contradiction of its subsequent finding of guilt on this Count. The Majority stated in paragraph 2047 that "*the Prosecution has failed to adduce evidence of acts of terrorism in the parts of Kailahun District that were controlled by the RUF and where Gbao was located*".[200]

174. It may well be the case that the Majority failed to make findings on Gbao's general and specific intent under Count 1 because the Prosecution had failed to adduce evidence linking Gbao to acts of terror or to the physical perpetrators of the crimes. Notwithstanding the fact that evidence linking Gbao to acts of terror or to the physical perpetrators of the crimes was never presented, the Majority felt justified in finding a conviction and sentenced Gbao to 25 years imprisonment on Count 1 regarding crimes in Kailahun District.[201] In doing so, Gbao was convicted in the absence of a vital element of the crime being established beyond reasonable doubt. A miscarriage of justice occurred as a result.

I. Gbao did not Possess the Requisite Intent in the Killing of 63 Alleged Kamajors in Kailahun District

175. Should the Appeals Chamber consider whether a finding of intent can be properly found against Gbao, notwithstanding the Majority's explicit findings to the contrary, we submit that there was no evidence whatsoever that Gbao willfully made the civilians the object of an act of terror. We submit further that there was no evidence that Gbao specifically intended acts under

[198] *See generally* Trial Judgement, paras. 110-121.
[199] The elements to establish an act of terror can be found at paragraph 113 of the Trial Chamber's Judgement.
[200] Emphasis added.
[201] It is important to note that Gbao, unlike Sesay and Kallon, was not convicted under Count 1 in Bo, Kenema and Kono. *See* Trial Judgement, paras. 2002, 2008, 2047, 2056, 2059, 2091, 2102, 2109, 2110.

Counts 3-5 and 7-9 to spread terror amongst the civilians of Kailahun.[202] In the absence of such findings, there was no basis upon which Gbao could have been found to have shared the intent of the principal perpetrators of the crimes. Consequently we submit that he cannot properly be held responsible as a member of the JCE in Kailahun District pursuant to these counts on the indictment. The convictions should be accordingly dismissed.

176. We accept Gbao was in Kailahun Town when Bockarie killed the 63 alleged Kamajors under investigation. Prior to their execution, an additional group of 45 were arrested on suspicion of being Kamajor infiltrators.[203] They were investigated by an RUF MP, Tom Sandy, and released by a Joint Security Board of Investigation chaired by Gbao.[204] The aforesaid 63 were released on parole during the investigation, and were permitted freedom of movement during the daytime.[205] Before the investigation was concluded, Bockarie learned that the first 45 had been released, whereupon he demanded that they be "re-arrested and killed".[206] The executions were carried out by Bockarie, his bodyguards and RUF MPs.[207]

177. As we aver above, the Majority made no specific findings of intent relating to Gbao on Count 1. Should the Appeals Chamber nevertheless attempt to draw an inference upon the facts, we further submit that Gbao could not be properly said to have shared the intent of Bockarie and his men to kill the 63 or to make the civilians of Kailahun Town the object of an act of terror. It is not disputed that Gbao presided over the panel that elected to release the first group of 45 and later to allow the others to be released on parole. These findings, especially in the light of an absence of findings to the contrary, tend to suggest that even if the Appeals Chamber were to deliberate the issue of whether to draw an inference as to Gbao's intent, he clearly did not possess that intent. On the contrary: the evidence tends to suggest he was doing his best to facilitate their

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[202] *See Prosecutor v. Fofana and Kondewa*, Doc. No. SCSL-04-14-A-829, Judgement, Appeals Chamber, 28 May 2008, para. 356, which requires the Prosecution, under Count 1 "to prove not only that the perpetrators of acts of threats of violence accepted the likelihood that terror would result, but that it was the result which was specifically intended" ("*CDF* Appeal Judgement").
[203] Trial Judgement, para. 1388.
[204] *Id.* at para. 1390.
[205] *Id.* at para. 1391.
[206] *Id.* at para. 1392.
[207] *Id.* at paras. 1393-95.

release. Such action on the part on Gbao, taken together with the fact that he was instrumental in securing the release of the first 45 suspects, goes against the conclusion that he intended to terrorise the civilian population. The evidence does not support the finding that Gbao intended the 63 alleged Kamajors to be the object of violence (general intent) nor did he intent to terrorise the civilian population of Kailahun (specific intent).

178. Judge Boutet "fundamentally dissented"[208] with these findings and, in general, agreed with the aforementioned analysis. He stated "I find it significant that the first group of civilians who were suspected of being Kamajors investigated by a JSBI *led by Gbao* were released".[209] He continued: "The JSBI investigation into the second group, again led by Gbao, was on-going when Bockarie intervened and ordered that these alleged Kamajors be executed".[210] With reference to Gbao's intent he found "[g]iven that the specific order was issued by Boekarie, it is difficult to infer that Gbao intended to facilitate the killings, particularly in the absence of any convincing evidence".[211]

II. Gbao did not Possess the Requisite Intent under Count 1 in Relation to the Sexual Violence Found to have Taken Place in Kailahun District

179. For the reasons explained in Sub-Ground 8(r) below, the Majority erred in finding that Gbao held the requisite intent for the crimes found under Counts 7-9 to terrorise the civilian population in Kailahun District during the Junta period. These arguments apply equally to the Trial Chamber's finding that Gbao held the requisite intent under Count 1 for these Counts.

180. In the absence of any discussion or finding satisfying the necessary elements of a particular crime, the Majority was not at liberty to convict Gbao on Count 1 for acts under counts 7-9.[212] Should any findings have safely been inferred in the Judgement, they could only have been that Gbao did not intend those crimes leading to conviction under Count 1 in Kailahun

[208] Trial Judgement, para. 2164, fn 3859.
[209] Justice Boutet Dissenting Opinion to Trial Judgement, para. 9 (emphasis added).
[210] *Id.*
[211] *Id.* at para. 11.
[212] *See* Trial Judgement Disposition, p.684.

District. We request that the Appeals Chamber reverse the findings of the Majority in relation to Gbao and dismiss his 25 year sentence accordingly as a miscarriage of justice occurred.

Sub-Ground 8(p): The Majority in the Trial Chamber Erred in Fact in Finding that Gbao Shared the Intent of the Principal Perpetrators of Count 2

181. The Majority of the Trial Chamber erred in paragraphs 1380-1443, 1444-1495, 1970-1973, and 2156-2173 by convicting Gbao without making a finding to demonstrate, through direct or circumstantial evidence, that he held the specific intent to commit the crime of colleetive punishment under Count 2.[213] As with Count 1, the Majority of the Trial Chamber summarily found Gbao guilty under Count 2 without finding that he shared the intent to colleetively punish the 63 alleged Kamajors. Without the requisite findings as to the elements of the crime, the Majority was not at liberty to hold Gbao individually criminally responsible, and erred in fact in doing so.[214]

182. Should the Appeals Chamber nevertheless consider whether a finding of intent can be found against Gbao (notwithstanding the fact that the Majority made no relevant factual finding against him), we submit that such a finding would be improper, as Gbao did not indiscriminately punish the 63 civilians with the specific intent to punish them collectively.

183. The factual findings relating to Gbao's actions around the time the 63 were killed apply with equal significance to the issue as to whether Gbao possessed the specific intent to collectively punish this group. We suggest Justice Boutet's "fundamental" dissent to these findings carry similar weight.

184. Gbao simply cannot be said to have shared the specific intent of the principal perpetrators - Bockarie, his bodyguards, and RUF MPs in Kailahun Town - to punish collectively. Ironically, it does not appear that even Bockarie himself possessed this specific intent, as he was informed

[213] *See* Trial Judgement, paras. 2156-2160, 2164-2173, where there are no findings demonstrating Gbao's speeific intent.
[214] The elements of the crime of collective punishment can be found at paragraph 126 of the Trial Chamber's judgement.

that the first group had been found not to inelude Kamajors and that the seeond group had been released on parole pending final investigation. Moreover, Bockarie appeared to act pursuant to impulsive criminality, rather than a desire for collective punishment.

185. Either way, Gbao had eontributed to a joint seeurity board of investigation to facilitate the release of these men. Every factual finding indicates that Gbao shared the sentiments of the investigative board that these men were not, in faet, Kamajors. It would be surprising if he had suddenly had a change of heart and then decided punish them eollectively for being Kamajors. To make this paradigm shift on the issue of Gbao's intent, as it seems the Majority did in its findings, there should at least be some factual findings that lead one to that eonclusion. The Trial Chamber's eonelusion was far from being the only reasonable inferenee from the evidenee. Therefore, in finding Gbao guilty under Count 2 for this aetion, it wholly erred and abused its discretion.

186. Without making findings that satisfy the necessary elements of a crime, the Majority could not properly have convicted Gbao on Count 2.[215] Should any findings have been inferred, they should have been that Gbao did not intend the crimes leading to a conviction on Count 2 in Kailahun District. We accordingly request that the Appeals Chamber reverse the findings of the Majority as it relates to Gbao and dismiss his 20 year custodial sentence under eount 2.

Sub-Ground 8(q): The Majority in the Trial Chamber Erred in Fact in Finding that Gbao Shared the Intent of the Principal Perpetrators of Connts 3-5

187. The Majority in the Trial Chamber erred in law and fact in paragraphs 2156-2173 by finding that Gbao intended the 63 alleged Kamajors detained in Kailahun Town to be killed. This finding led to Gbao's conviction as a JCE member in Kailahun Distriet.[216]

188. In contrast to Bo, Kenema and Kono Distriets, Gbao was found to have intended to commit erimes in furtherance of the JCE's criminal plan in Kailahun District. The killing of the

[215] *See* Trial Judgement Disposition, p.684.
[216] Trial Judgement, para. 2172.

Kamajors was one of the crimes found to be "within the joint criminal enterprise"[217] and therefore led to individual criminal responsibility under JCE. For the Majority's Judgement to be upheld, it must have properly found that Gbao "intend[ed] to commit the crime and intend[ed] to participate in a common plan whose object was the commission of the crime".[218]

I. Applicable Law

189. Regarding Counts 3-5 in Kailahun, Gbao must be found to have shared the intent with other JCE members (and, by extension, the perpetrators "used" by JCE members) to kill the 63 in Kailahun Town, and he must have intended to participate in the JCE whose object included the killing of these men. Specifically, it must be found that Gbao intended to participate in killing in an effort to take power over the country of Sierra Leone.

190. The *mens rea* requirement under Count 3 that Gbao must possess required the Trial Chamber to find that Gbao shared the intent with the principal perpetrators that the 63 alleged Kamajors should be killed, and on a massive scale.[219] Under Counts 4 & 5, Gbao must be found to have shared the intent to kill the alleged Kamajors or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.[220] . The Chamber also must have found that Gbao intended this crime to further the JCE.

II. The Trial Chamber's Findings

191. The Majority made two findings in relation to Gbao's intent:

i. "Gbao intended the death of the Kamajors as a consequence of his failure to halt the executions;[221] and

ii. "Gbao intended that this crime be committed in order to strengthen the power and control of the RUF over Kailahun District and the civilian population there, which

[217] *See* paragraph 1982, which makes clear that Counts 3-5 in Kailahun District were part of the JCE.
[218] Trial Judgement, para. 265, *citing Brdjanin* Appeal Judgement, para. 365; *Tadic D.* Appeal Judgement, para. 228; *Kvocka et al.* Appeal Judgement, para. 82; *Vasiljevic*, Appeal Judgement, paras. 97, 101.
[219] The Trial Chamber set forth the *mens rea* elements for extermination in paragraphs 131 and 134.
[220] Trial Judgement, paras. 138, 142.
[221] Trial Judgement, para. 2166.

in turn [would] enhance the power and capacity of the RUF to pursue the goals of the common purpose".[222]

III. The Evidence and Trial Judgement Demonstrate that Gbao Could Not Have Stopped Bockarie

192. To find Gbao guilty under Counts 3-5 as a member of the JCE for failing to halt the executions implies that Gbao had the power to stop the executions. Not only was Bockarie *de facto* leader of the RUF, earlier findings by the Trial Chamber demonstrated that Gbao could do nothing in regards to actions by Bockarie: "[t]he Chamber considers that Gbao's ability to exercise his powers effectively in areas where Bockarie ordered the commission of crimes is doubtful".[223] Also, it found that Gbao "did not have the ability to contradict or *influence the orders* of men such as Sam Bockarie".[224] Finally it is worth noting here as well that, besides a propensity to be dictatorial, Bockarie did not like and constantly harassed Gbao.[225]

193. It requires creative thinking to impute murderous intent from the failure to stop exeeutions ordered by the *de facto* leader of the RUF. If Gbao had attempted to stop them, he would have been killed and the 63 would be executed shortly thereafter. We submit that no reasonable tribunal could fairly have fairly inferred as the only conclusion available from the facts that Gbao possessed the intent to kill the 63 individuals under investigation on the basis that he did not stop the executions. In fact, the only inference one could draw, we submit, is that Gbao was doing all in his power to release these men just before Bockarie ordered that they be killed and that Gbao had no power to stop Bockaric from committing the killing.

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[222] Trial Judgement, para. 2166.
[223] Trial Judgement, para. 2041.
[224] RUF Sentencing Judgement, para. 268 (emphasis added).
[225] This was not discussed by the Trial Chamber in its findings, but Gbao was constantly harassed by RUF leadership, in particular Bockarie *See Gbao Final Brief*, paras. 24-44. It is unclear whether the Trial Chamber

IV. The Trial Chamber Failed to Take Into Account Gbao's Previous Actions With Regards to the Alleged Kamajors

194. As the above findings demonstrate,[226] Gbao was asked to investigate whether those arrested were Kamajor spies. He led an investigation that released the first 45 and paroled the 63 others. Bockarie was responsible for having these men "re-arrested and killed".[227]

195. The Trial Chamber determined Gbao's intent by making inferences from the evidenee. We submit that, however, a finding of guilt must be the only reasonable inference from the evidence. In view of the faet that Gbao released the first group of alleged Kamajors and that the Trial Chamber itself found that 'Gbao's ability to exercise his powers effeetively in areas where Boekarie ordered the commission of crimes is doubtful',[228] it is submitted that no reasonable tribunal could have concluded that he bore the intent to execute this group of men. In finding the contrary, the Trial Chamber erred in fact.

196. Again, Judge Boutet was "fundamentally"[229] opposed to the Majority's findings in regards to Gbao's intent. He made clear that he found that Gbao did not possess the requisite intent as a member of the JCE, "partieularly in the absence of any eonvincing evidence".[230]

V. Conclusion

197. If the Appeals Chamber were to accept the Majority's findings regarding Gbao's principal contribution to the JCE role as RUF Ideologist, it should nevertheless independently dismiss the conviction against Gbao in Kailahun District, as he did not share the intent to eommit the crimes under Counts 3-5. The Trial Chamber erred in fact by convicting Gbao where guilt was far from being the only reasonable inference available from the evidence. The conviction should be dismissed and the sentenee consequently reduced.

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accepted this evidence or not, but they relied upon several of the witnesses cited in this seetion of the Gbao Final Brief (DAG-080, DAG-101 in particular) in their Judgement.

[226] *See supra*, paras. 175-78 above.

[227] Trial Judgement, para. 1392.

[228] *Id.* at para. 2041.

[229] *Id.* at para. 2164, fn 3859.

Sub-Ground 8(r): The Majority in the Trial Chamber Erred in Fact in Finding that Gbao Shared the Intent of the Principal Perpetrators of Counts 7-9

198. The Majority erred in fact by finding that Gbao shared the requisite intent as a member of the JCE under Counts 7-9 in Kailahun District. In relation to Gbao's intent under Counts 7-9, it made the following findings:

i. "Gbao shared the requisite intent for rape within the context of 'forced marriage' in order to further the goals of the joint criminal enterprise";[231]

ii. By virtue of Gbao's role as RUF Ideologist, forced marriages "were a logical consequence to the pursuance of the goals prescribed in [RUF] ideology, the instruction on which, the Chamber recalls, was imparted particularly by Gbao."[232]

199. The finding that Gbao shared the requisite intent for rape within the context of forced marriage was made without foundation; there are no findings connecting Gbao to Counts 7-9 save for the arbitrary conclusion that he shared the intent for rape. The Trial Chamber erred in fact by failing to support its conviction with any evidence or reasoning. This failure should dismiss the finding that Gbao intended the crimes under these counts.

200. Regarding the second finding of intent - that Gbao was an RUF Ideologist - we reiterate the objections cited in paragraphs 32-48 above.

201. Should the Appeals Chamber consider whether intent can be safely inferred from the totality of the evidence, we submit there were no findings of fact which would permit a reasonable tribunal to conclude that Gbao intended the crime of forced marriage in Kailahun District.

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[230] Justice Boutet Dissenting Opinion to Trial Judgement, para. 11.
[231] Trial Judgement, para. 2167.
[232] *Id.* at para. 2168.

I. Analysis of Factual and Legal Findings regarding Counts 7-9 in Kailahun District

202. Factual and legal findings related to Counts 7-9 in Kailahun District can be found at paragraphs 1405-13, 1460-75, 1490, 1493-95, 2156, 2158, 2167, 2168, and 2171-72. The error made by the Trial Chamber is straightforward: it relied on evidence that, according to its own findings, was impermissible. It does not appear that a single assertion in the paragraphs cited above survives the Chamber's own analysis. These errors included the employment of:

i. Expert evidence in support of an "ultimate issue";

ii. One Sesay defence witness who, besides lacking credibility, rejected the notion that forced marriages took place in Kailahun District;

iii. Witnesses, credible or not, who testified to acts that, if true, took place after the Junta period in Kailahun District; and

iv. Testimony which, according to the Trial Chamber's findings, required corroboration when going to the acts and conduct of the Accused.

203. Each is discussed below.

A. Expert Evidence

204. As discussed in Ground 2, expert evidence to establish acts and conduct of the Accused is expressly forbidden, including its use in order to establish Gbao's intent under Counts 7-9.

B. Use of Defence Witness Testimony

205. The Trial Chamber relied upon DIS-080 to support the argument that women faced sexual violence during the Junta period in Kailahun District.[233] Not only did the Trial Chamber likely find that this witness lacked credibility,[234] but the witness appears to have unequivocally denied

[233] Trial Judgement, para. 1412, fn 2624.

[234] *See* Trial Judgement, para. 531, where the Chamber found that some of the Sesay witnesses "testified out of loyalty to the RUF...and evidently were trying to assist Sesay and Kallon in this trial, and not necessarily to assist the Chamber in its search for the truth...the Chamber has rejected the version of events presented by these witnesses because their testimony to this effect, in the circumstances, is not credible". While it is not known whether DIS-080 fits into this category, it rejected DIS-080's testimony in support of Sesay.

that forced marriages occurred in Kailahun.[235] Once again the Trial Chamber erred in fact and misrepresented the evidence.

C. *Testimony Outside Junta Period*

206. The Trial Chamber relied upon TF1-114, who testified about forced marriages in Kailahun District. However, this witness was testifying about forced marriage *after* the Junta period of 25 May 1997 – 19 February 1998 in Kailahun District.[236] He was in Freetown during the Junta government and did not move to Buedu (in Kailahun District near the Liberian border) until after Intervention. His testimony clearly related to his personal experiences in Buedu and therefore is not temporally relevant.

D. *Testimony Requiring Corroboration*

207. The remaining witnesses all required corroboration for their testimony, which was not provided. According to the Trial Chamber's findings, TF1-314,[237] TF1-093,[238] TF1-371,[239] TF1-366,[240] and TF1-045[241] all required corroboration where their testimony related to Gbao's acts and conduct. Again, established precedent in this case, as well as in the ICTY and ICTR, define the term "acts and conduct" to mean, *inter alia*, any evidence that the Accused:

i. Participated in the JCE; or

ii. Shared the requisite intent of the perpetrators.[242]

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[235] *See* Transcript, DIS-080, 8 October 2007, p.11. The witness was asked by the Prosecution: "some of those captured women were forced to marry the freedom fighters in Giema, weren't they? A: No".
[236] *See* Transcript, TF1-114, 28 April 2005, pp. 40-41, 52-56, 61.
[237] *Id.* at para. 594.
[238] *Id.* at para. 603.
[239] *Id.* at para. 543.
[240] *Id.* at para. 546.
[241] *Id.* at para. 561.
[242] *See Prosecutor v. Sesay, Kallon and Gbao*, Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements under Rule 92*bis*, Doc No. SCSL-04-15-T-1125, 15 May 2008, para. 33. *Also see Prosecutor v. Galic*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*, 7 June 2002, para. 10; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on the Prosecution's Motion for the Admission of Written Witness Statements under Rule 92*bis*, 9 March 2004, para. 13.

208. As stated, these witnesses were employed to find that Gbao possessed the requisite intent under the JCE. However, since these witnesses had questionable credibility, unless their relevant testimony were corroborated, it could not properly be used in support of Gbao's alleged intent.

209. While at times they were corroborated, they were only corroborated *by each other*. However, a witness found by the Trial Chamber to lack credibility can hardly be rehabilitated by another witness it found equally lacking. This common sense rationale has been accepted by the ICTR.[243]

II. Conclusion

210. These witnesses - TF1-314, TF1-093, TF1-371, TF1-366, TF1-045, TF1-114 (Dennis Koker), TF1-369 – were the foundation upon which the Trial Chamber made *all* of their factual and legal findings relating to counts 7-9 in Kailahun District. If none of their testimony can be used for the reasons provided above, it does not appear that there are any other findings in the Judgement that support the Majority's finding that "Gbao shared the intent for rape within the context of 'forced marriage' in order to further the goals of the joint criminal enterprise".[244]

211. In the absence of the support of credible and temporally relevant witness testimony, it was clearly inappropriate and wrong to conclude that Gbao possessed the requisite intent under Counts 7-9. In doing so, the Trial Chamber abused its discretion and erred in fact, resulting in Gbao being convicted and sentenced for a crime for which he did not have the intent. This resulted in a miscarriage of justice.

212. Should the Appeals Chamber accept the Majority's findings as to the *actus reus* under Counts 7-9 in the JCE (Gbao's being part of the plurality and his significant contribution), it

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[243] *See Nahimana*, Appeal Judgement, para. 669, where, in its review of the factual findings, resolved that "the Appeals Chamber has already concluded that...the testimony of Witness AFX cannot be relied on in the absence of corroboration by other credible evidence. The same applies with respect to the testimony of Witness Serushago. *These two testimonies are not capable of corroborating one another*, and the Appeals Chamber accordingly reverses the finding' (other citations omitted) (emphasis added).
[244] Trial Judgement, para. 2167; *also see* para. 2172.

should nevertheless dismiss Gbao's conviction in relation to Kailahun District, as there was no evidence to demonstrate Gbao's intent to commit crimes there pursuant to Count 7-9.

Sub-Ground 8(s): The Majority of the Trial Chamber Erred in Fact in Finding that Gbao Shared the Intent of the Principal Perpetrators of Count 13

213. The Majority of the Trial Chamber erred in fact in paragraphs 2036, 2037, 2156-2173 by finding that Gbao shared the requisite intent for enslavement under Count 13 as a member of the joint criminal enterprise. Three primary activities related to enslavement were found during the Junta period (25 May 1997 - 19 February 1998) in Kailahun District:[245] (i) farming; (ii) mining; and (iii) military recruitment.

214. Regarding Gbao's intent within the JCE in relation to enslavement, the Majority found the following:

i. Forced labour was a logical consequence of the RUF ideology, which was imparted by Gbao in particular;[246] and

ii. As Gbao was directly involved in the planning and maintaining of a system of enslavement he shared the requisite intent to further the goals of the JCE.[247]

215. The Defence for Gbao reiterates its objections to the Majority's novel approach in attributing responsibility to Gbao as the RUF Ideologist (and finding that he trained every RUF recruit in ideology)[248] during the Junta period. Additionally, Gbao was not involved with military training, forced or not, at the RUF training camps during the Junta period. Findings of forced farming and mining are dealt with below.

[245] *See* Trial Judgement, para. 2172.
[246] *Id.* at para. 2168.
[247] *Id.* at para. 2167.
[248] *Id.* at para. 2170.

I. Gbao's Alleged Involvement in Forced Farming in Kailahun District

216. None of the testimony relied upon by the Trial Chamber to find convictions on forced farming, except that from TF1-108, TF1-330 and TF1-366, concerned events during the Junta period. Findings outside 25 May 1997 – 19 February 1998 are therefore irrelevant to the JCE. Therefore, these witnesses cannot be used to establish Gbao's alleged significant contribution or intent within the JCE.

216. This testimony included that of TF1-141,[249] TF1-036,[250] TF1-367,[251] TF1-045,[252] TF1-114,[253] and TF1-113,[254] all of whom testified in relation to events that took place after 19 February 1998, when the JCE terminated in Kailahun District.[255]

217. TF1-108 and TF1-366 cannot be used to establish Gbao's intent as to forced farming under the JCE since they both required corroboration of testimony going to Gbao's acts and conduct.[256] This includes any finding that Gbao possessed the requisite intent as a member of a JCE.[257] Additionally, TF1-108 and TF1-366 were arguably the two most impeachable witnesses in the entire RUF trial, as both lied repeatedly throughout their testimony, displaying a cynical disregard for the truth.[258]

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[249] *See* Trial Judgement, para. 1423, *citing* to Transcript, TF1-141, 12 April 2005, pp.16-18, who testified about forced farming taking place in Bendemu and Buedu "after the end of the Junta period".

[250] *See* Transcript, TF1-036, 27 July 2005, p.57-58, where he stated the screening he witnessed taking place was in 1995-96.

[251] *See* Transcript, TF1-367, 22 June 2006, pp.23-24, where, although the witness incorrectly noted the date he was in Kailahun, he agreed he was in Kailahun after the RUF was "pushed out of Freetown by ECOMOG".

[252] While the witness does not note exactly when he witnessed forced farming, he was not in Kailahun until the 63 were killed by Boekarie in Kailahun Town on 19 February 1998. Transcript 21 November 2005, p. 41. For detail of TF1-045's whereabouts, *see* Transcript, TF1-045, 18 November 2005, pp.49, 50, 52, 57, 58, 79, 80, 94, 103.

[253] TF1-114 did not live in Buedu until after Intervention. He was in Freetown during the Junta government. *See* Transcript, TF1-114, 28 April 2005, pp. 40-41, 52-56, 61.

[254] *See* Trial Judgement, para. 1424; *also see* Transcript, TF1-113, 6 March 2006, pp.32-33.

[255] *See* Trial Judgement, para. 2172.

[256] *See* Trial Judgement, paras. 546, 597.

[257] *See supra* paras. 7-9 for a definition of what constitutes acts and conduct.

[258] There is not sufficient space to detail why TF1-108 and TF1-366's testimony should be entirely disregarded. However, the Appeals Chamber can read the Gbao Defence Final Brief for details. *See* Gbao Final Brief, paras. 284-345, which details the credibility concerns with TF1-108's testimony. *Also see* paras. 899, 902, 1062, 1064, 1148, 1286, 1450-55, 1461-65 for a discussion of TF1-366, who lied about material matters on 23 separate occasions.

218. TF1-330's testimony laeks eredibility for the reasons listed in paragraph 269 below. His evidenee should have, at the least, required corroboration from a eredible source.

219. In relation to Gbao's alleged personal farm, the Trial Chamber relied upon TF1-108 and TF1-330 in finding that he indeed had a farm where civilians were forced to work. We submit the Trial Chamber erred in fact in finding that TF1-330 testified that eivilians were forced to work on his farm. TF1-330 simply stated that Gbao had a farm in Kailahun District.[259] He did not state that civilians were forced to work there. Besides this, only TF1-108 testified that Gbao had a farm where civilians worked involuntarily.[260] Since TF1-108 was found to require corroboration, and the testimony from TF1-330 does not corroborate Tf1-108, the Majority's finding that Gbao ran a personal farm where he forced civilians to work must accordingly be dismissed. At any rate, it is unclear whether this all took place during the Junta period and, more generally, it is far-fetched to say the least that this activity could somehow have furthered the JCE.

220. We submit that Count 13 as it rclates to farming and mining should be dismissed for the reasons listed in Sub-Ground 8(s) and Ground 11 below. Howevcr, if the Appeals Chamber finds that forced farming and mining can be established beyond rcasonable doubt, we submit there is no credible testimony regarding farming during the Junta period capable of proving that Gbao possessed the requisite intent to further the interests of the JCE. If there is no such evidence, there can be no finding of intent.

11. Gbao's Alleged Involvement in Forced Farming in Kailahun District from Section in Bo

221. There are two seetions of the Judgement which discuss forced farming in Kailahun District. This section covers findings showing Gbao's significant contribution to the JCE in Bo, Kenema, and Kono Districts[261] (even though the findings relate solely to Kailahun District).

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[259] Transcript, TF1-330, 14 March 2006, p.27. The witness was stopped because, while he testified during his direct examination, he was remarking for the first time that Gbao had a farm in Kailahun District.
[260] *See* Trial Judgement, paras. 1425-26.
[261] *Id.* at paras. 2041, 2057 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kenema) and 2105 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kono).

222. The Majority relied upon six witnesses to support the finding in paragraph 2036, footnote 3772 that physical violence took place on RUF farms during the Junta period. In reference to these individuals cited, TF1-114 and TF1-113 are not relevant, as the Court's findings relate to farming *after* February 1998, when the JCE between the AFRC and RUF in Kailahun District terminated.[262] TF1-045 and TF1-108 required corroboration by reliable witnesses when testifying about Gbao's acts and conduet.[263] Since this testimony was used to demonstrate Gbao's participation in the JCE, it clearly went to his acts and conduct and therefore was impermissible unless eorroborated by a credible sourcc. DAG-110 did not testify about physical violencc at RUF farms in thc transcript pagcs cited.[264] TF1-330 was an unreliable witncss for the reasons discussed in paragraph 269 below. Consequently, his testimony requires corroboration, at the least.

223. The seeond sentence in paragraph 2036 stated that "civilian farming in Kailahun District during thc Junta period was coordinatcd by the RUF on a large seale and the produce used by the RUF in its operations". To support this assertion, the Majority relied upon TF1-108 and TF1-330. Neithcr of these witnesses can be found credible, as explained in paragraphs 266, 267 and 269 below.

224. The Majority noted in paragraph 2037 that Gbao managed the large-scalc forced civilian farming in Kailahun from 1996 to 2001. However, the alleged JCE time-frame in Kailahun District is 25 May 1997 to 19 Fcbtuary 1998.[265] Evidenee of events outside the relevant period cannot be used to support a proper finding that Gbao significantly eontributed to the JCE, as the JCE would either not yet have come into existenee or would already havc terminatcd. The finding was also erroneous in fact in that Gbao actually left Kailahun District for Magburaka in March 1999.[266] To sustain a finding that he managed the said forced farming Majority would neeessarily

[262] TF1-114 did not live in Buedu until after Intervention. He was in Freetown during the Junta government. *See* Transcript, TF1-114, 28 April 2005, pp. 40-41, 52-56, 61; TF1-113, 6 March 2006, pp.32-33; *also see* Transcript, TF1-114, 28 April 2005, p.61, where he stated that he only saw foreed labour twice and it was when Issa Sesay was in Buedu, which was not during the Junta period.
[263] Trial Judgement, para. 561, 597.
[264] Additionally, in almost every other respect, the Trial Chamber found DAG-110 to lack credibility.
[265] Trial Judgement, para. 2172.
[266] *Id.* at para. 928.

have to have found that Gbao was somehow able to manage the Kailahun farming from Bombali District (in Magburaka and later Makeni). This they failed to do.

225. The Majority also stated that "[i]n 1997 and 1998, Gbao met with civilian commanders and instructed them about the quantities of produce civilians in their towns were to produce and labour they were to provide in support of the war".[267] They referred to TF1-108, who did not testify to this on the pages cited, and also to TF1-330. However, TF1-330 lacks credibility for the reasons listed in paragraph 269 below.

III. Farming in Kailahun District did not Further the Goals of the JCE

226. The Majority did not explain how the alleged farming in Kailahun District furthered the goals of the Junta government. Besides making generic findings that his role in forced farming "significantly contributed to maintaining the strength and cohesiveness of the RUF fighting force",[268] the Majority failed to demonstrate how produce from Kailahun District made a significant contribution to the Junta Government's continued hold on power throughout Sierra Leone.

227. In relation to the farm that Gbao allegedly had, even if the relevant testimony were credible it remains unclear how food destined for his personal consumption was in any way able to further the Junta Government's goal of maintaining power over Sierra Leone.

228. More importantly, even if produce from Kailahun District contributed to the Junta government's hold on power, the Trial Chamber failed to make findings as to Gbao's involvement in furthering the goals of the JCE through this farming, besides making general assertions. This was a critical omission and, even if Gbao was found to be involved in farming in Kailahun District, the Majority failed to make findings to the effect that his actions in particular furthered the JCE.

[267] Trial Judgement, para. 2037.
[268] Trial Judgement, para. 2039.

229. In his Dissenting Opinion, Justice Boutet made clear that he believed the forced farming in Kailahun did not, in fact, further the JCE. He stated "I find that there is only a limited relationship between the enslavement of civilians in Kailahun District and the furtherance of the goals of the joint criminal enterprise during the period of the Junta government".[269] He continued: "there is insufficient evidence to conclude that the only reasonable inference to be drawn is that the enslavement of civilians in Kailahun District was directed to achieving the goals" of the JCE.[270] He proceeded to compare the alleged forced farming with forced mining in Tongo Field, which he found to be directly related to furthering the JCE.[271]

230. He concluded that even if there was any relationship between farming in Kailahun and furthering the JCE, Gbao could not be said to have been directly involved in these activities.[272]

IV. Conclusion

231. Additionally, and for the same reasons, the Appeals Chamber should dismiss the Trial Chamber's finding that Gbao was directly involved in the planning and maintaining of a system of enslavement and that he therefore shared the requisite intent to further the goals of the joint criminal enterprise. In the alternative, we submit it is clear that forced farming, even if it did exist, was not shown to have been done in furtherance of the JCE, and therefore that Gbao could not have shared the requisite intent.

V. Gbao's Alleged Involvement in Forced Mining

232. We further submit that the witnesses referenced in this section - TF1-366, TF1-108, TF1-330 and TF1-371 - failed to establish that the mining took place during the Junta period. In the alternative, we submit the Chamber erred in fact by finding that the evidence demonstrated Gbao's intent to further the JCE, as the JCE no longer existed: a clear abuse of the Chamber's discretion.

[269] Justice Boutet Dissenting Opinion to Trial Judgement, para. 14.
[270] *Id.*
[271] *Id.*
[272] *Id.* at para. 15.

233. The Chamber relied upon the evidence of TF1-371 to establish that mining was a vital source of income for the Junta and was overseen by AFRC/RUF fighters; however, he testified in relation to Kenema and Kono Districts rather than Kailahun, as the transcript indicates.[273] TF1-330 testified about mining activities taking place during 1998 at a time when Bockarie was in Kailahun District.[274] This was after the Junta. But even if this evidence is accepted as taking place during the Junta period, TF1-330 did not explicitly testify that the work was forced.

234. TF1-108 and TF1-366 were found to require corroboration for testimony relating to Gbao's alleged possession of the requisite intent to act in furtherance of the alleged JCE. Needless to say, they were not corroborated by any other witness. None of the evidence of the witnesses relied upon by the Trial Chamber provided evidenee allowing for a finding of guilt for mining in Kailahun District.

235. Even if the Appeals Chamber were to find that the events testified to did oceur during the Junta period, there is no evidence that a single diamond from Kailahun went to support the Junta. The Chamber stated that "the mining activities were an important and vital source of income for the RUF, and later the AFRC/RUF Junta".[275] No diamonds, however, were ever found in Kailahun Distriet. The suggestion to the contrary was the result of an elaborate ruse devised by Pa Patrick, who was eventually elevated to oversee the "fake" diamond mining.[276]

236. We submit that Count 13 as it relates to mining should be dismissed. However, even if the Appeals Chamber were to find that forced mining can be cstablishcd beyond reasonable doubt, we submit there is no credible testimony regarding farming during the Junta period capable of resulting in thc conclusion that Gbao possessed the requisite intent to further the interests of the JCE. Without such evidence, there can be no finding of intcnt. In the alternative, since no Kailahun diamonds were ever used to support the Junta, there ean be no finding that this furthcred the objectives of the JCE.

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[273] *See* Transcript, TF1-371, 20 July 2006, pp.34-37; 54; where he testified that "the Supreme Council appointed...senior members to supervise the mining of alluvial diamonds, in traditional areas of mining for diamonds in Sierra Leone that is Kono and Kenema District".
[274] *See* Trial Judgement, paras. 1432, 1433.
[275] Trial Judgement, para. 1432.
[276] *See* Transcript, DAG-110, 2 June 2008, pp. 86-90.

237. The Trial Chamber erred fact by finding that Gbao possessed the requisite intent for forced labour, forced mining and foreed military training during the Junta period. It convicted him on the basis of evidence that either lay outside of the indictment period or that was not credible, which would tend to invalidate the entirety of the findings against Gbao. He was convicted in the absence of any credible evidence supporting a finding of guilt, and in doing so the Majority of the Trial Chamber committed a miscarriage of justice.

Ground 9: The Trial Chamber Erred in Finding that the Killing of Kaiyoko in Kailahun District in February 1998 Constituted Murder as a Crime Against Humanity under Count 4

238. The Trial Chamber erred in law in paragraph 2156 by finding that the killing of one *hors de combat* SLA soldier killed on Bockarie's orders in Kailahun on 19 February 1998 constituted a conviction under Count 4 of murder as a crime against humanity. In its legal findings, the Trial Chamber noted that "it is trite law that an armed group cannot hold its own members as prisoners of war" and that it was "not prepared to embark on such an exercise", and that the killing of Kaiyoko did not constitute a war crime. Yet the Chamber later contradicted itself in attributing individual criminal responsibility to the Aecused for this alleged erime.

239. It is suggested that the gravity of this error requires the Appeals Chamber to overturn Gbao's JCE conviction under JCE for this crime, and to reduce his sentence accordingly.

Ground 10: The Trial Chamber Erred in Law and Fact by Finding Connts 7-9 Established in Kailahun District, as the Prosecution Failed to Demonstrate Their Existence Beyond Reasonable Doubt

240. The Trial Chamber erred in both law and fact by finding in paragraphs 1405-1413, 1459-1475 that the Prosecution proved Counts 7-9 in Kailahun District. The Prosecution failed to adduce credible evidence that would lead a reasonable finder of fact to conclude that these counts had been proved beyond reasonable doubt.

I. Counts 7 and 8

241. The Court relied upon the following findings to hold that Counts 7 & 8 in Kailahun District had been proved beyond reasonable doubt:

i. Testimony from TF1-314 and TF1-093 regarding their own forced marriages; and

ii. Testimony from insider witnesses of the widespread practice of forced marriage throughout Kailahun District during the Junta period.

242. Each of these will be discussed below.

A. TF1-314

243. TF1-314 was an unreliable witness.[277] The Gbao Defence will file a motion on 4 June 2009 apprising the Appeals Chamber that TF1-314 admitted in the Charles Taylor Trial to lying during the RUF trial. Testimonial evidence from a witness who admits to lying under oath should be disregarded.[278] Before her appearance at the Taylor trial, TF1-314's testimony was already tarnished to the point that it required corroboration regarding the acts and conduct of the Accused.[279] Consequently, since her claims lack the requisite credibility to be considered as evidence, it should be dismissed in its entirety. In failing to consider the arguments of the Gbao defence relating to TF1-314's credibility and by relying upon her evidence to support a finding against Gbao, the Trial Chamber erred in fact.

B. TF1-093

244. TF1-093 was similarly unreliable. [redacted] However, Superman was in Freetown during the Junta period.[280] Moreover, the Trial Chamber made no findings placing Superman in Kailahun before, during or after the

[277] This was detailed at great length in the Gbao Final Brief, paras. 428-61.
[278] *Seromba* Trial Judgement, para. 92; *Nahimana*, Trial Judgement, para. 551; *Nahimana*, Appeal Judgement, para. 820.
[279] Trial Judgement, para. 594.
[280] *See infra*, fn 281.

Junta period - despite many factual findings to the contrary elsewhere.[281]

245. Additionally, the Trial Chamber found TF1-093's testimony "generally unreliable" and stated that "[t]he Chamber has otherwise relied upon her evidence to the extent that it was corroborated by reliable witnesses";[282] Her testimony was not corroborated in relation to forced marriage;[283] nevertheless, it was used in support of Gbao's convictions under Counts 7-9.[284] We submit that the Trial Chamber erred in relying on her evidence to convict Gbao. The Appeals Chamber should not rely upon this evidence and accordingly should disregard it.

C. *Testimony of Insider Witnesses*

246. The testimony of insider witnesses, and the conclusions drawn by the Trial Chamber based on it, was similarly flawed. Of fundamental concern was the Chamber's finding that it was permissible to imply a lack of consent to a sexual relationship in relation to all women in Kailahun District during the Junta period.[285] The Trial Chamber erred in law by finding that "in hostile and coercive circumstances of this nature, there should be a presumption of absence of genuine consent to having sexual relations or contracting marriages with the said RUF fighters".[286] It violated the fundamental principle that each element of a crime needs to be established beyond reasonable doubt.[287]

247. While there is precedent for this finding in international tribunals, the body of law relied

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[281] Superman was located at the following locations during the following times: 1994: Western Jungle, para 726, fn 1379; November 1996: Port Loko District, para. 735, fn 1403; March 1997: Western Jungle, paras. 738, fn 1408, 751, 753, 755, 779, 780; after Intervention (approximately February 1998): Masiaka and Makeni: paras. 783, 787; after Masiaka and Makeni: Koinadugu District, para. 789; no firm date, but between preceding and succeeding dates: Makeni, para. 791; between February and April 1998: Kono District, paras. 795, 798, 813; 814. 823; August 1998: Koinadugu District, para. 851; December 1998: Bombali District, para. 869. February 1999: Lunsar, paras. 904-05; July 1999: Makeni, para. 907; Lunsar: October 1999, para. 910. The only evidence linking Superman to Kailahun District is found in paragraph 824, which stated that "Bockarie ordered Superman to report to Headquarters in Buedu but Superman refused to do so".

[282] Trial Judgement, para. 603.

[283] *See* Trial Judgement, paras. 1408, 1462-64, 1475.

[284] *Id.* at paras. 1462-64, 1475, 2172.

[285] Trial Judgement, paras. 1470-71.

[286] *Id.* at para. 1471.

[287] *Milutinovic et al.* Trial Judgement, Volume I, paras. 62; 63; *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgement (AC), 22 March 2006, para. 219 ("*Stakic* Appeal Judgement"); *Prosecutor v. Ntagerura, Bagambiki and Iminishimwe*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 174 ("*Ntagerura et al.* Appeal Judgement").

upon by the Trial Chamber (*Kunarac* and others) relates to crimes of enslavement *taking place in situations of custodial detention*.[288] There is logic in presuming a lack of consent, since no one consents to imprisonment. Where sexual violence occurs under conditions of detention, it may be reasonable to imply a lack of consent. We suggest that the Appeals Chamber ought not expand this reasoning to non-custodial situations.

248. Additionally, even in custodial situations, a finding of enslavement is still required. The absence of consent "may be relevant from an evidentiary perspective in establishing whether or not the Accused exercised any of the powers attaching to the right of ownership".[289] Therefore, even if the Appeals Chamber were to accept that the Chamber did not need to make findings on the lack of consent, it must still show that conditions of enslavement existed. From an evidentiary perspective, the Chamber was required to find that RUF fighters exercised ownership over women in Kailahun District. Beyond this generic statement of the facts it failed to do so.

249. The consequence of making presumptions that forced marriages were widespread, we suggest, would be to set a novel and dangerous preeedent. While there are no findings that Gbao personally committed any crimes under Counts 7 and 8, these conclusions otherwise implicate every AFRC/RUF member for rape/forced marriage if they had a sexual relationship between 25 May 1997 and 19 February 1998.

250. In conclusion, besides TF1-314 and TF1-093's unreliable testimony and insider testimony naming about a few commanders with forced wives, if Gbao's conviction were to be sustained, it could only be done by reliance upon vague and generic testimony from insider witnesses of unknown women being forcefully married in unknown locations throughout all of Kailahun District at unknown times. Each of them would have to be presumed to have been raped or forcefully married by unknown RUF fighters. This conclusion, we suggest, defies common sense as well as logic and is offensive to the most basic standard of fundamental fairness. The Trial Chamber violated the principle of a finding of guilt beyond reasonable doubt, and did not make detailed finding as to exactly how it could find that this 'unknown number of women' were in a

[288] *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Judgement (AC), 12 June 2002, para. 132 ("*Kunarac* Appeal Judgement").
[289] Trial Judgement, para. 163.

forced conjugal association. It failed to demonstrate that each element of the offence of forced marriage was established with regards to this 'unknown number of women'. This is a grave error of fact and in committing it, the Trial Chamber violated one of the most fundamental principles of criminal law. A miscarriage of justice occurred as a result.

251. The consequent failure to make proper findings, or at least to demonstrate evidence of a coercive atmosphere[290] prevailing during the Junta period that might support a presumption of such a widespread lack of consent, demands the reversal of Gbao's convictions upon Counts 7 and 8 in Kailahun District.

II. Count 9

252. The Majority convicted Gbao solely upon expert evidence that those who were married against their will were humiliated, degraded or otherwise had their dignity violated during the Junta period.[291] As discussed in Ground 2 above, wherever an expert report goes beyond its parameters by drawing conclusions touching on the 'ultimate issue' in a case, (e.g. the individual criminal responsibility of the Accused), the Trial Chamber should disregard its findings. The Appeals Chamber should, therefore, reverse Gbao's conviction upon Count 9 as being a member of the JCE in Kailahun District.

Ground 11: The Trial Chamber Erred in Law and Fact by Finding Enslavement in Kailahun District Under Count 13 of the Indictment, as the Prosecution Failed to Demonstrate its Existence Beyond Reasonable Doubt

253. The Trial Chamber erred in both law and fact by finding that the Prosecution proved beyond reasonable doubt the existence of enslavement in Kailahun District between 25 May 1997 and 19 February 1998.[292] The Trial Chamber erred in finding that enslavement existed at all in Kailahun District during the entirety of the Indictment period.

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[290] This was not the case at this time, as there was no fighting in Kailahun during the Junta period.
[291] Trial Judgement, paras. 1474-75; 2172.
[292] There is confusion as to the actual date the Trial Chamber made findings in relation to Kailahun District. It convicts Gbao for membership in the JCE from 25 May 1997 to 19 February 1998. *See* Trial Judgement, para. 2172.

254. The RUF Judgement contains a staggering number of critical factual and legal errors, particularly in relation to testimony related to forced farming, often leading to equally erroneous findings. Considering the page and time limits imposed on the Appeal proceedings, this unnecessary burden has put the Defence to a disadvantage in its primary task of preparing grounds of appeal, and we deeply regret the time required to be spent on researeh we expeeted not to have been neeessary. In short, the Chamber erred in fact in finding the existence of enslavement, as it:

i. Made sufficient findings to demonstrate that workers were actually remunerated "in kind" for their work and were not foreed to work under gunpoint;

ii. Committed more than 40 factual misrepresentations and other errors in its findings;

iii. Wrongly relied upon uncorroborated testimony requiring corroboration; and

iv. Wrongly made findings based upon testimony from non-eredible witnesses.

I. The Chamber Accepted that Civilians were Paid "in Kind" for Their Efforts

255. The Trial Chamber erred by disregarding evidenee that Kailahun civilians were given food, access to healthcare, education and other benefits as "payment in kind" for farming on bchalf of the RUF. Ironically, the Chamber actually made several findings that civilians were paid "in kind" for their efforts, including:

i. "The RUF opened schools in Kailahun and provided books and chalk. *Parents agreed to gather food as their contribution for the free education.* The RUF 'government' in Kailahun provided free medical services to civilians and their children at a hospital in Giema. Therc was no apparent discrimination in the distribution of medical carc and education to both civilians and fighters".[293]

ii. "In return for their work and produce...civilians received free medical treatment at RUF hospitals".[294]

However, it convicts Sesay and Kallon for membership in the JCE in Kailahun from 25 May 1997 until April 1998. *See* Trial Judgement, para. 2163.

[293] Trial Judgement, para. 1384 (other citations omitted) (emphasis added).

256. Several defence witnesses also supported the notion that farming in Kailahun was remunerated. All of them eategorieally denied that labour was forced in any respeet before, during and after the Junta period.[295] While they were relied upon heavily in supporting the Trial Chamber's eonvietions under Count 13, they were disregarded where they made exeulpatory remark about the Defenee. It was improper for the Trial Chamber to rely so heavily upon these witnesses to support a finding of guilt against Gbao, but then ultimately reject their eontention that labour was not forced and instead remunerated with food and other necessities. Furthermore, most of them denied that armed mcn oversaw the workers on these farms, while others simply notcd that they were there to protect eivilians.[296] We submit the Appeals Chamber should either accept their evidence that labour was not forced or remove all references to defence witnesses based upon their lack of eredibility. Thc Trial Chamber should not be permitted to pick-and-choose evidence, kecping incriminating testimony and ignoring exculpatory statements.

257. TF1-036, TF1-114, TF1-113 and TF1-367 - four of the nine Prosecution witnesses relied upon in the Trial Chamber's findings upon this Count - also stated that civilians worked for food or other 'payment in kind' in Kailahun District.[297] TF1-113 and TF1-367 agreed that civilians were given free healthcare in exchange for their work.[298] TF1-367 also agreed that Kailahun children were getting frec education, with the RUF providing books, chalk and other incentives.[299] Whilst the Chamber appeared to have found the Prosecution witness testimony credible, it found those receiving payment 'in kind' comprised a "limited few privileged people

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[294] *See* Trial Judgement, para. 1421, citing to Transcript, TF1-113, 6 March 2006, pp.25-31; Transcript, TF1-367, 23 June 2006, pp. 40-42.

[295] *See* Transcript DIS-074, 4 October 2007, pp. 56-57, 64, 66, 67-68; Transcript DIS-080, 5 October 2007, pp. 112-113; Transcript, DIS-080, 8 October 2007, pp. 19, 20, 22, 24-25; Transcript, DIS-302, 27 June 2007, pp. 8, 26, 36, 38, 39; Transcript, DIS-157, 25 January 2008, pp. 31-32, 57, 83; Transcript, DIS-157, 28 January 2008, pp. 14-16 and 34-35; Transcript, DIS-178, 18 October 2007, pp. 77-78; Transcript, DIS-174, 22 January 2008, pp. 45-46; Transcript, DAG-110, 2 June 2008, pp. 44-46, 83-86, 89-90, 145; Transcript, DAG-048, 3 June 2008, pp. 92-94, 98; Transcript, DAG-048, 5 June 2008, p. 23; Transcript, DAG-080, 6 June 2008, pp.26, 36-37.

[296] *See* Transcript, DIS-074, 4 October 2007, p. 64; Transcript, DIS-080, 5 October 2007, pp. 112-113; Transcript, DIS-080, 8 October 2007, p. 24; Transcript, DIS-302, 27 June 2007, p.8, 39; Transcript, DIS-157, 25 January 2008, pp. 67-68; Transcript, DAG-110, 2 June 2008, p. 83.

[297] *See* Trial Judgement, paras. 1421; *also see* Transcript, TF1-036, 1 August 2005, p.16, who testified that Kailahun citizens were able to take produce from RUF land for their own use; Transcript, TF1-113, 6 March 2006, pp.25-31; Transcript, TF1-367, 23 June 2006, pp.40-42; Transcript, TF1-114, 28 April 2005, p.100, where he stated the RUF "provided condiment for work". He also testified that everyone received medical treatment. *Id.* at pp.102-03.

[298] *See* Trial Judgement, para. 1421.

[299] *See* Transcript, TF1-367, 26 June 2006, p.45.

who had access to such amenities [food, education, healthcare]",[300] and accordingly rejected the argument- leading one to conclude that this 'privileged' group must have included all eight Defence witnesses, four Prosecution witnesses and every village named in their testimony. Furthermore there is no evidence in the trial record supporting the finding that the payment in kind was limited to just a few.

258. The finding concurring the "limited few privileged people" appears to be contradicted by the Trial Chamber's findings about Kailahun civilians in paragraph 1384. Here, it stated that "[t]he RUF attempted to establish good relationships **with the civilian population** in order to maintain Kailahun as a defensive stronghold..." This, coupled with the fact that there appeared to be "no apparent discrimination in the distribution of medical care and education to both civilians and fighters", appears to challenge the Trial Chamber's finding that only a 'privileged' few received free education and healthcare.

259. The Trial Chamber's finding as to the absence of payment in kind was largely based upon NGO reports from *Medicines sans frontiere*, Human Rights Watch,[301] TF1-330, TF1-108 and TF1-366: all of whom denied that such services were provided.[302]

260. In actual fact the Trial Chamber erroneously concluded that TF1-330 was not paid for his work, as the contrary was demonstrated in Exhibit 84b [redacted] We submit TF1-330's evident lack of candour requires, at the least, corroboration from a credible source. The hapless lack of credibility of TF1-108 and TF1-366 is discussed in paragraphs 266-68 below.

261. In conclusion, we submit the Trial Chamber erred by concluding that whilst some people were paid in kind for their work, such evidence was insufficient to prove that forced labour did not take place. We submit that this amounted to a reversal of the burden and standard of proof. A miscarriage of justice occurred as a result, and the Trial Chamber's finding should be overturned.

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[300] Trial Judgement, para. 531.
[301] *See* paragraph 531, fn 989.
[302] *See* Trial Judgement, para. 1421.
[303] [redacted]

We further submit the Appeals Chamber reconsider the issue of remunerated work, particularly in the context of the prevailing circumstances at the time and overturn Gbao's conviction.

II. The Trial Chamber's Findings are Corrupted by Many Factual Misrepresentations and Other Errors

262. Annex III comprises a spreadsheet of the Trial Chamber's factual misrepresentations and other errors in its findings of fact regarding forced farming and mining. These misrepresentations emanate from most, if not all, paragraphs in the Judgement where forced farming and mining are referred to. We request the Appeals Chamber carefully reconsider the Judgement's factual findings as to enslavement, as the Trial Chamber has on countless occasions either dangerously exaggerated or wholly misrepresented findings that went to findings that related to Gbao's membership of the JCE.

263. The multitude of factual misrepresentations are such, we suggest, that it would be wholly unreasonable for any tribunal to find that labour was forced, whether during the Junta period or after. Once again, the Trial Chamber clearly abused its discretion as a trier of fact and based convictions on misrepresentations and sometimes non-existing evidence. Gbao was convicted in the absence of credible evidence, constituting a miscarriage of justice.

III. Gbao Played No Personal Role in Illegal Forced Farming Taking Place in Kailahun District

264. Should the Appeals Chamber accept the Defence contention that, given the paucity of evidence, JCE findings related to forced farming should be dismissed, it may nevertheless go on to consider the issue of Gbao's alleged individual criminal responsibility under Count 13. We submit that this too cannot be established.

265. Only four of the nine Prosecution witnesses relied upon to support allegations of RUF enslavement during the Junta period mentioned Gbao's name. TF1-113's testimony mentioned the existence of a farm after the Junta period in 1999. This was irrelevant to the case against

Gbao as he was in Makeni in December 1999, when TFI-113 alleged that forced farming was taking place near Pendembu.[304] TF1-367 did not mention Gbao's name in connection with forced farming; neither did TF1-141. The same applied to TF1-036, TF1-045 and TF1-114: all major Prosecution witnesses who testified to farming in Kailahun, yet did not mention Gbao's role.[305] One may have expected that Gbao's role might have been remembered by the relevant RUF insiders if he had truly been responsible for planning the enslavement of Kailahun civilians.

266. Only three witnesses - TF1-108, TF1-366 and TF1-330 - testified that Gbao played any role in forced farming in Kailahun District throughout the Indictment period. TF1-108 was perhaps the least reliable witness in the entire case, lying about the rape and *killing* of his wife by the RUF,[306] [redacted] We submit that there can be no justification for the Chamber's adoption of any evidence from a witness who so cynically betrayed his oath and deliberately perverted the course of justice in such a calculated manner.[308]

267. When the Prosecution subsequently investigated whether [redacted] he lied again and attempted to corrupt TF1-330, [redacted].[309] If this sorry tale is not sufficient for the Appeals

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[304] *See* Trial Judgement, para. 1424

[305] See generally, Trial Judgement, paras. 1414-1433.

[306] Transcript, TF1-108, 8 March 2006, pp.50-51; 9 March 2006, pp.67-68; 13 March 2006 pp.80-84. [redacted]

[308] *Seromba* Trial Judgement, para. 92; *Nahimana et al.* Trial Judgement para. 551 ; *Nahimana et al.* Appeal Judgement para. 820. In the *Seromba* case, Witness FE36 testified that CBJ stated that his entire family had been killed, whereas CBJ had, in fact, only stated that certain members of his family were dead. This led to his evidence being disregarded.

[309] *See generally* Transcripts, 21 January 2008, pp. 5 to 14 [redacted] The Prosecution opposed it on the basis that it had no disclosure); *also see* Transcript, 22 January 2008, pp. 82-113. (*Id*); Transcript, 1 February 2008, pp. 63 to 70 (Sesay Defence asked for Disclosure of Rule 68 by Prosecution); Transcript, 4 February 2008, pp. 4 to 33 (Discussion about rule 68 disclosure); *also see generally* the filings related to this matter: *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-968, Public with Redactions and Confidential Annexes Defence Motion Requesting the Trial Chamber to (i) Sanction the Prosecution for Deliberately Concealing Rule 68 Material Abusing the Court's Process; (ii) Order the Prosecution to State Their Case with Particularity; (iii) Recall to Testify Prosecution Witnesses TF1-108; and (iv) to Admit the Written Statement of TF1-330 as Evidence in Lieu of Oral Testimony Pursuant to Rule 92bis, 6 February 2008; Doc. No. SCSL-04-15-T-978, Public Prosecution Response to Sesay Defence Motion For Various Relief Dated 6 February 2008, 12 February 2008; Doc. No. SCSL-04-15-T-988, Defence Reply to Prosecution Response to the Defence Motion Requesting Various Relief from the Trial Chamber, Including Requesting the Trial Chamber to Sanction the Prosecution for Deliberately Concealing Rule 68 Material and Abusing the Court's Process, 15 February 2008; Doc.

Chamber to disregard TF1-108's testimony in its entirety, we refer the Chamber to the Gbao Final Brief in which we list the wealth of other lies told by TF1-108.[310] We unequivocally submit that all evidence from this utterly discredited witness should be disregarded.

268. TF1-366's testimony was similarly tarnished. He lied so often during his testimony it memorably provoked Judge Thompson to remark: "he's virtually repudiating the [his own] record".[311] The Gbao Final Trial Brief Defence listed a staggering 23 material lies or misrepresentations[312] uttered from this witness.

269. TF1-330's testimony also lacked credibility. Most importantly, his testimony was inconsistent with the documentary evidence of letters [redacted] that referred to Kailahun citizens being paid "in kind" for working for the RUF, including the TF1-330 himself.[313] Moreover, TF1-330 implicated Gbao in forced farming for the first time in statement form just a couple of months before he testified, having failed to mention Gbao's alleged role on a single occasion to the Prosecution during the previous two years while statements were being taken from him - a surprising fact given that, in court, he claimed to recall the significant role Gbao played in his daily life over a period of some three years. Other concerns over TF1-330's credibility were covered in the Gbao Final Brief.[314] We submit his testimony should be disregarded. If it is not we submit it should at least require corroboration.

270. If it be the case that the Majority's finding that "Gbao was directly involved in the planning and maintaining of a system of enslavement"[315] was largely founded upon TF1-330's testimony, there is no known evidence therein that demonstrated Gbao had any role in planning any system of enslavement. If Gbao had been responsible for planning the enslavement of Kailahun citizens, it might be expected that Prosecution witnesses - especially those in more senior positions - would have testified as such. Even were one to take TF1-330's testimony as

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No. SCSL-04-15-T-1147, Confidential Decision on Sesay Defence Motion for Various Relief Dated 6 February 2008, 26 May 2008.

[310] *See* Gbao Final Brief, paras. 284-345.

[311] Transcript, TF1-366, 17 November 2005, p.95.

[312] *Also see* Gbao Final Brief, paras. 899, 902, 1062, 1064, 1148, 1286, 1450-55, 1461-65 for a discussion of TF1-366, who lied about material matters on 23 separate occasions.

[313] *See* Exhibit 84b.

[314] *See* Gbao Final Brief, paras. 1254-80.

true, there is still no evidence that he "contemplated designing the commission of [forced labour] at both the preparatory and execution phases", as is required, in the Trial Chamber's Judgement, in order for criminal responsibility to be found for planning. TF1-330 merely stated that [redacted] who passed it along to Gbao, who passed it along to Sesay. Even if believed, we submit that these alleged facts taken at their highest do not satisfy the requisite elements of the crime of planning civilian enslavement.

271. In actual fact, TF1-330 testified that Gbao was not involved in the planning of the work he was allegedly forced to do. He stated that it was Prince Taylor, the overall G5 commander, who instructed the Kailahun civilians what to do. He said "Morie Fekai, he had his own boss. He was called Prince Taylor. In fact, it was in stages. [Morie Fekai] was the one who told us. He was working with the civilians. Whatever he tells us to do, that's what we would do. [redacted]".[316]

A. Gbao's Alleged Farm

272. Annex III refers to allegations concerning Gbao's farm in detail. In short, besides TF1-108, there were no allegations that Kailahun civilians worked against their will on Gbao's farm appeared. The Trial Chamber misled the reader in paragraph 1425 by compressing its findings that Sesay, Gbao and Bockarie each had farms at which civilians were forced to work. However, the only witnesses referenced that actually mentioned Gbao's farm were TF1-108 and TF1-330. As stated, in the evidence relied upon by the Trial Chamber, TF1-330 testified only that Gbao had a farm, not that civilians were forced to work on it. TF1-108's testimony (upon which the Trial Chamber found that Gbao's farm was overseen by an armed guard) was found to require corroboration, which was not provided.

273. At any rate, there were no particulars in the Indictment about Gbao forcing Kailahun civilians to work on his farm. "The Prosecution's duty to provide particulars in the Indictment is at his highest when it alleges that the Accused have personally committed a crime".[317] The

[315] Trial Judgement, para. 2167.
[316] Transcript, TF1-330, 15 March 2006, p.21.
[317] AFRC Appeal Judgement, para. 38, cited in Trial Judgement, para. 397.

Indictment should sufficiently plead the material facts underlying allegations of personal commission of crimes.[318] Should the Indictment fail to provide such particulars, it becomes defective.[319] This was accepted by the Trial Chamber in paragraph 399.

274. The only mention of forced farming in Kailahun District is as follow: 'At all times relevant to this Indictment, captured civilian men, women and children were brought to various locations within the District and used as forced labour.'[320] There is no mention there or elsewhere in the Indictment of Augustine Gbao having a farm. Consequently, Gbao was never on notice that he was charged with a crime of personal commission under count 13. As a result, this caused a material prejudice to the Third Accused, who was unaware that he was accused of personally committing forced farming, and unable to properly defend himself as a result. He was materially prejudiced and according to the law on Indictment specificity, this allegation should be ignored.

B. Gbao's Alleged Role in Mining

275. Factual findings that misrepresent mining in Kailahun District are equally troubling, and can be found in Annex III. Not only did this take place after the Intervention, there is no evidence that AFRC/RUF fighters actually supervised it.[321]

276. TF1-330 never testified that civilians were forced to work in these mines. The finding that "Gbao and Patrick Bangura oversaw the civilians mining" was an error of fact, as the Chamber noted in the preceding paragraph that it was overseen by Mr. Patrick alone.[322] The finding that Gbao oversaw the civilians was derived from the following testimony:

> Q. When you say that "they" were doing a saerifice, who are you talking about?
> A. The person who was overseeing the mining, Mr Patrick Bangura. He was overseeing the mining. Augustine Gbao was the head security commander then".[323]

[318] Trial Judgement, para. 399.
[319] *Id.*
[320] RUF Indictment, para. 74.
[321] *See supra* fn 275.
[322] *See* Trial Judgement, para. 1432.
[323] Transcript, TF1-330, 14 March 2006, p.49-50.

277. We suggest, especially in light of the finding in the immediately preceding paragraph, that this hardly demonstrated that Gbao supervised the farming. Additionally, based on the following extract, the Chamber found in paragraph 1433 that the civilians worked without food.

> "Q. Can you say how the people doing the mining were treated?
> A. They didn't eat food there. They were just working on empty stomach, on that day that I went when I met them there".[324]

278. We submit that a finding that civilians worked without food can hardly be properly based upon the testimony of TF1-330, who visited the mines on one day at an unknown time and for an unknown duration.

279. Other factual findings appear to be founded upon the testimony of TF1-108 and TF1-366 and should be dismissed for the reasons listed in paragraphs 266-68 above. Even if the Appeals Chamber were to refuse to disregard these witnesses in totality, their testimony required corroboration as it relates to Gbao that was not provided.

280. We submit the Appeals Chamber should reverse the aforementioned findings in Kailahun District in relation to forced farming and mining within Count 13 and make the appropriate adjustment in sentence for the Third Accused pursuant to the many errors of fact prevalent throughout the entire set of findings.

Ground 12: The Trial Chamber's Convictions in Counts 7-9 do Not Constitute Acts of Terror

281. If the Appeals Chamber decides that convictions on Counts 7-9 can be upheld, which we suggest they cannot,[325] it should at the least dismiss these convictions as constituting acts of terror, as the Trial Chamber erred in fact in finding that crimes committed under counts 7-9 constituted acts of terror.

282. When determining that the crimes under counts 7-9 committed in Kailahun District

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[324] *Id.* at pp. 49.
[325] As argued in sub-ground 8(r) above.

constituted terror, the Trial Chamber referred to its general findings on sexual violence and terrorism.[326] Notably, the majority of the acts to which the Trial Chamber referred were not found to have taken place in Kailahun.[327] As far as forced marriage was concerned, the Trial Chamber held that 'the practice of forced marriage and sexual slavery stigmatised the women.[328] It concluded that 'the patter of sexual enslavement (...) was a deliberate system intended to spread terror by the mass abductions of women, regardless of their age or existing marital status, from legitimate husbands and families'.[329]

283. It is well established that the main element of the crime of terrorism is that the act of violence is committed with the primary intent to spread terror amongst the civilian population.[330] It is not sufficient to accept the likelihood that terror would result from the acts; terror must be the result specifically intended.[331] The AFRC Trial Chamber wisely noted that "the purpose behind an individual act of violence may not necessarily correspond with that of the campaign in which it simultaneously occurs".[332] The Gbao Defence adopts this conclusion.

284. In the present case, the Trial Chamber failed to even consider this. The evidence point to the fact that the intent of the physical perpetrators when committing forced marriage and sexual slavery was to satisfy their own sexual desires, not to terrorise the civilian population. When one looks at the factual and legal findings related to Kailahun district[333] there is not even an indicia of an intent to terrorise the civilian population on the part of the physical perpetrators.

285. The Trial Chamber seemed to agree with this when it held that 'the prosecution has failed to adduce evidence of acts of terrorism in the parts of Kailahun District that were controlled by the RUF and where Gbao was located.'[334]

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[326] Trial Judgement, para. 1493. Citing to paras. 1346 to 1352.
[327] *Id.* at para. 2156.
[328] *Id.* at para. 1351.
[329] *Id.*
[330] CDF Appeal Judgement, para. 350.
[331] *Id.* at para. 356.
[332] AFRC Trial Judgement, para. 1445.
[333] Trial Judgement, paras. 1405-1413 (factual findings), 1460-1475 (legal findings).
[334] *Id.* at para. 2047.

286. This argument is supported by the AFRC Trial Chamber who found that 'in the particular factual circumstances before it, the primary purpose behind commission of sexual slavery was not to spread terror among the civilian population, but rather was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual desires and to fulfil other conjugal needs.'[335]

287. The Trial Chamber reached its legal conclusion that crimes under counts 7-9 in Kailahun district amounted to terrorism without any support from the evidence. In failing to do so, the Trial Chamber committed a miscarriage of justice by convicting Gbao for a crime one of the elements of which has not been established.

288. The Appeals Chamber should reverse this finding and, if it has not dismissed all counts against Gbao for his membership in the joint criminal enterprise based upon the reasons enumerated above, it should reduce the sentence for the Third Accused under count 1.

Ground 13: The Trial Chamber Erred in Fact and Law by Not Staying the Proceedings Against Gbao Under Counts 15-18 of the Indictment After Finding the Prosecution's Material Breach of its Rule 68 Obligations

289. Due to page limitations, the Gbao Defence found it impossible to proceed on this Ground in a comprehensive manner. Where particularly relevant, it will be incorporated in other grounds.

Ground 14: The Trial Chamber Erred in Refusing to Respond to the Third Accused's Submission that the Prosecution Refusal to Disclose [redacted] Statement Constituted an Abuse of Process

290. The Trial Chamber erred in law in its 22 July 2008 "Written Reasoned Decision on Gbao Motion Requesting the Trial Chamber to Stay Trial Proceedings of Counts 15-18 Against the Third Accused for Prosecution's Violation of Rule 68 and Abuse of Process" by declining to

[335] AFRC Trial Judgement, para. 1459. This was not ruled upon by the Appeals Chamber. AFRC Appeal Judgement, paras. 172-174.

make any findings in support of the Defence allegation that the Prosecution abused the process of the Court by failing to disclose a highly exculpatory statement made by one [redacted] taken before the Prosecution case began, but not disclosed until after it concluded.

I. Factual Background

291. [redacted] interviewed by the Prosecution on 21 June 2004, approximately two weeks before it opened its case in which it claimed that Gbao was individually criminally responsible for crimes concerning the conflict with UNAMSIL, especially concerning his actions on 1 May 2000. In his statement,[336] however, [redacted] contradicted the gravamen of the Prosecution case against Gbao by asserting *inter alia*, that:

i. Gbao was at the Makump DDR camp on 1 May 2000. [redacted] Gbao saw Morris Kallon shooting into the air and at the ground. Kallon was just 5 yards (4.5 metres) away [redacted] and stopped shooting only when Gbao restrained him;

ii. Kallon then approached the MILOB Major Salahueddin and slapped him several times. Salahueddin did not retaliate. Gbao again tried to restrain Kallon before he slapped Salahuedin again.

iii. After RUF combatants took the Prosecution witness Ganase Jaganathan from the DDR camp,[337] [redacted] Down the road, unnamed "RUF [fighters] dismounted from the truck, [redacted] the looting and beating "only stopped when Gbao arrived. He told [these anonymous RUF] to return our weapons [to the UN troops], but they refused and left".[338]

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[336] See Annex IV.

[337] See circumstances that led to Lt Colonel Jaganathan Ganase being taken from the Makump DDR camp at paragraphs 1791-1794 in the Trial Judgement.

[338] A detailed account of the facts can be found in the Gbao Motion Requesting the Trial Chamber to Dismiss Counts 15-18 Against the Third Accused for the Prosecution's Violation of Rule 68 and Abuse of Process. *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1174, Urgent and Confidential With Redactions and Annex Gbao-Motion Requesting the Trial Chamber to Stay Trial Proceedings of Counts 15-18 Against the Third Accused for Prosecution's Violation of Rule 68 and Abuse of Process, 9 June 2008. ("Gbao Motion on Abuse of Process").

292. Reprehensibly [redacted] statement - taken just weeks before the Prosecution case started - was not disclosed pursuant to the Prosecution's Rule 68 obligations until 20 October 2006, after the Prosecution had closed its case. For reasons passing understanding the Prosecution delayed the service of this vital document for 15 months. Whilst nothing can of course be proved, the suspicious timing of these events raises, at the very least, serious questions as to how and why this extraordinary oversight occurred.

293. After no doubt careful deliberation the Prosecution chose not to call [redacted] as a witness in support of their case. Presumably his contribution was deemed unnecessary (if not inconvenient) and that Gbao's conviction regarding the Makump incident could more easily be secured by way of testimony from Brigadier Ngondi and Lt Colonel Ganese Jaganathan (two other UN-related witnesses). This was deplorable.

294. But this is what appears to have happened, if one reviews Ngondi and Jaganathan's testimony. Brigadier Ngondi (TFI-165) had no firsthand knowledge of the incident at the Makump DDR camp on 1 May 2000. Instead, his account was almost entirely based on hearsay radio conversations [redacted].[339] As such, Ngondi stated, *inter alia*: (i) Gbao was at the DDR camp on 1 May 2000; (ii) Ganase Jaganathan was arrested by the RUF; (iii) Maroa went with three men to follow Ganase Jaganathan; and (iv) Gbao left the DDR camp around the same time as Maroa (when Maroa left to follow Ganase Jaganathan).[340] Ngondi additionally stated "[b]ack in my headquarters I knew Maroa - I suspeeted Maroa was held hostage by RUF. This is because he could not answer or respond to my radio call".[341] From his testimony it is not clear who he thought had abducted Maroa.

295. Whilst Ngondi testified to what happened to Maroa before his abduction, Ganase Jaganathan (TFI-042), testified to what happened after. He stated that once Kallon had taken him to Teko Barracks in Makeni, Maroa and his men also arrived shortly afterwards. He added "[w]hilst I was still at the communieations centre Major Maroa and the three soldiers came with the Land Rover, eseorted by Colonel Gbao, and I noticed that Major Maroa was bleeding from

[339] *See generally* Transcript, Ngondi, 29 March 2006, pp. 26-34.
[340] *Id.* at p.30.
[341] Transcript, Ngondi, 29 March 2006, p.32.

his mouth and the other three soldiers were limping. And I also noticed Colonel Gbao opening the boot of his car and taking out three rifles".[342]

296. This implicatory narrative of events was adduced during Ngondi and Ganase Jaganathan's evidence in chief. It was presumably adduced by the Prosecution in support of their case that Gbao took part in Maroa's abduction. At that time the Defence had no idea that the Prosecution were in possession of a statement [redacted] pre-dated the trial. Nor had the Defence any idea that [redacted] statement told a different story.

297. After the Rule 98 pleadings, the Prosecution finally served [redacted] statement on the defence. It was 15 months late. Eventually, the Defence discovered the existence of this document. In acknowledgement of this alarming omission and delay the Prosecution blandly conceded in subsequent pleadings that "it should have been disclosed earlier".[343]

II. Trial Chamber's Decision and Standard of Review

298. In its 22 July 2008 decision, in response to the Defence arguments that the Prosecution breached its Rule 68 obligations and abused the processes of the Court, the Trial Chamber found that Gbao had not been materially prejudiced by the Prosecution's failure to comply with its Rule 68 obligations.[344] Regarding the abuse of process submission, the Chamber ruled that it "is not inclined to address fully the issue, judicially or legally" since no material prejudice to the Defence had been found to lie under rule 68.[345]

299. The Trial Chamber erred in law in making this Decision. It confused the elements necessary to determine a violation of Rule 68 and the requirements to demonstrate an abuse of process, as prejudice is not a necessary element for demonstrating an abuse of process. We

[342] Transcript, Jaganathan, 20 June 2006, p.31 (emphasis added).
[343] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1177, Confidential-Prosecution Response and Annexed to Gbao Motion Requesting the Trial Chamber to Stay Trial Proceedings of Counts 15 to 18, 12 June 2008, para. 3.
[344] The motion was dismissed orally on 16 June 2008. Transcript, 16 June 2008, pp. 52-55. See the written decision: *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1201, Written Reasoned Decision on Gbao Motion Requesting the Trial Chamber to Stay Trial Proceedings of Counts 15-18 Against the Third Accused for Prosecution's Violation of Rule 68 and Abuse of Process, 22 July 2008, para. 62 ("Abuse of Process Decision").

submit that finding so was an error of law that effectively invalidates the Trial Chamber's decision.

300. We therefore request that the Appeals Chamber reverse the requirement that the Defence need to show material prejudice in order to establish abuse of process. In the alternative, we suggest that the Trial Chamber erred in fact by finding that such tardy disclosure did not amount to material prejudice.

III. Applicable Law

301. As stated by the ICC in *Lubanga*, "the doctrine of abuse of process had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of...the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice".[346] "It is not a necessary precondition, therefore, for the exercise of this jurisdiction that the prosecution is found to have acted *mala fides*. **It is sufficient** that this has resulted in a violation of the rights of the accused in bringing him to justice".[347]

302. *Lubanga* does not appear to require a finding of material prejudice to establish abuse of process. Additionally, it does not appear that the AFRC Trial Chamber required a finding of prejudice as a precondition to abuse of process. It noted that "[i]f the rights of the Accused have been violated, **that is sufficient** for the Chamber to find that the integrity of the judicial process has been undermined".[348] It continued: "[t]he question to be addressed is whether proceedings

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[345] *See* Abuse of Process Decision, para. 64.
[346] *Situation in the Democratic Republic of The Congo In the Case of The Prosecutor v. Lubanga Dyilo*, ICC Decision No. ICC-01/04-01/06, Urgent Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (TC), 13 June 2008, para. 90 (other citations omitted). ("*Lubanga* Decision on Rule 68 Violation").
[347] *Id* (emphasis added).
[348] *Prosecutor* v. *Brima, Kamara and Kanu*, Doc. No. SCSL-04-16-PT-47, Written Reasons for the Trial Chamber's Oral Decision on The Defence Motion on Abuse of Process Due to Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts (TC), 31 March 2004, para. 26 (emphasis added).

with the Prosecution under any or all of the counts brought against the Accused would contravene the Court's sense of Justice, **due to pre-trial impropriety or misconduct**".[349]

303. We suggest that this dictum should be adopted as the prevailing standard in international tribunals. We submit that prejudice should not be a necessary precondition, as the mischief to be prevented relates not only to individual abuses of an Accused's right to a fair trial, but equally to abuses of the judicial process itself. In short, when the integrity of the proceedings have been affected by the action, or inaction, of the Prosecution, the detrimental effect on the fair and impartial administration of justice is just as significant as any perceived injustice to the Accused, if not more so, in certain circumstances. Justice must not only be done: *it must be seen to be done.*

304. We submit that if the Appeals Chamber were to accept this reasoning it should reverse the Trial Chamber's decision not to make any findings and subsequently go on to consider whether the Prosecution abused the court process by disclosing this document after its case had concluded. If, however, the Appeals Chamber were to find that material prejudice is requisite, we submit additionally that the Trial Chamber erred in fact and in law in finding no material prejudice was imported into this case.

IV. Argument

305. The Gbao Defence reiterates its arguments made at the trial stage as to the alleged abuse of process by the Prosecution.[350] We submit that the abuse in this case centred on the Prosecution's failure to responsibly comply with its most basic and fundamental of responsibilities. By continuing to seek a conviction against an Accused whilst knowingly being in possession of compelling evidence from a witness that could have absolved an Accused of guilt the Prosecution flagrantly and irreparably damaged the integrity of proceedings. In particular we submitted in our original argument that the Prosecution:

[349] *Id.* at para. 27 (emphasis added).
[350] *See* Gbao Motion of Abuse of Process.

i. Withheld a compelling exculpatory document for the entirety of its case, in cynical violation of its Rule 68 obligations;

ii. Failed to fulfill their obligation to the court not to bring the administration of justice into disrepute;

iii. Failed to impartially discharge its duties; and

iv. Failed to act in accordance with the presumption of innocence.

306. As stated in our original brief, these concerns are founded in part upon counsel's duty to adhere to the Special Court's Code of Conduct.[351] The nature and gravity of the abuse cited here raises concerns not only for prosecutorial ethics but also for the perception and legitimacy of this tribunal as a whole.

A. While it is not Necessary to Show Material Prejudice, it is Manifestly Demonstrable in Regard to [redacted] *Statement*

307. Should the Appeals Chamber require a demonstration of prejudice to the Accused, we submit the following:

i. Had the Prosecution properly acted in accordance with the presumption of innocence of the Accused, disclosure of this document shortly after July 2004 may have led to a dismissal of the instant case against Gbao, as [redacted] claimed to be present for the events of 1 May 2000 and tended to indicate that Gbao did not possess the necessary *actus reus* or *mens rea* during those events to commit crimes against UN Peacekeepers;

ii. The statement was unavailable for the cross-examination of Lt Colonel Jaganathan Ganase and Brig Ngondi. Had it been available, much could have been challenged, including the suggestion, derived from testimony from Jaganathan and Ngondi, that Gbao was somehow involved in the abduction of Maroa; and

iii. Had we been in possession of [redacted] statement, the Gbao defence strategy in relation to the UNAMSIL allegations may have been different.

[351] Code of Professional Conduct with the Right of Audience Before the Special Court for Sierra Leone, amended on 13 May 2006.

308. Beyond this demonstration of prejudice, the Gbao Defence would have been precluded from pursuing alternative remedies during trial, including calling [redacted] or recalling Jaganathan or Ngondi. Calling or re-ealling any of these witnesses would not have been permitted, as the Trial Chamber persistently forbade testimony from Gbao defence witnesses that might have implicated a eo-accused (even where not to hear such testimony served to deprive the Chamber of hearing the whole facts).[352] Attempting to call [redacted] would have been obstructed for the same reason as his testimony to the whole facts would neeessarily have implicated the Accused Kallon.

V. Conclusion

309. We agree with Justice Itoe that this matter was "the most important, controversial, challenging, and passionately contested Motion this Chamber has ever had to grapple with on the Prosecution's Rule 68 disclosure obligations".[353] By continuing to prosecute an offenee whilst in possession of a reliable eyewitness aecount to the contrary there can be no doubt the Proseeution failed to observe even the most basic professional and ethieal standards. At best, they displayed a reckless disregard for Gbao's right to a fair trial as well as their duty to impartiality. At worst, they suppressed the truth. Whatever the facts, the Prosecution flagrantly misused and misled the eourt. Whilst boasting to the human rights of victims of the war in Sierra Leone and elsewhere they eynically failed to observe the basic human rights of the Accused. Even when confronted with this matter during the Defence case the Proseeution refused to withdraw their allegations under Count 15 (for which Gbao was subsequently senteneed to 25 years imprisonment). This gave the appearance of seeking to aehieve a eonviction at all eosts. The Dcfence rhetorically ask that if this sorry episode-whieh the Proseeution never suffieiently explaincd-does not qualify as an abuse of the court's process, then one eannot imagine what would.

[352] *See generally* Transcript DAG-111, 17 June 2008, pp. 100-132. The Gbao Defence was disallowed from presenting any testimony that may have incidentally affected the Second Accused's alibi claim regarding the events of 1 May 2000. Each of these witnesses, in describing the events at the Makump Camp on that day, would have necessarily mentioned Kallon's name.

[353] Abuse of Process Decision, Separate and Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber's Written Reasoned Decision on Gbao Motion Requesting the Trial Chamber to Stay Trial Proceedings of Counts 15-18 Against the Third Accused for Prosecution's Violation of Rule 68 and Abuse of Process, para. 10.

310. We finally submit that, whilst the Defence need to demonstrate prejudice pursuant to proof of a Rule 68 violation, there is no such requirement in order to support a claim of abuse of process. The Trial Chamber, therefore, erred in law in its 22 July 2008 decision in a manner which invalidates its decision that made prejudice to the Accused a prerequisite before considering arguments on abuse of process. The effect of this error requires, we submit, that the Appeals Chamber consider *de novo* the arguments made by the Defence as to whether the Prosecution abused the processes of the Court by failing to disclose this highly exculpatory document.

311. Upon review, with the legitimacy and proper development of international criminal justice in mind, we submit the Appeals Chamber should find that the Prosecution perpetrated an abuse of the process in this case. Accordingly we ask that any UNAMSIL-related conviction against Gbao be dismissed, as it is the only appropriate remedy in view of the gravity of the Prosecution's conduct.

Ground 15: The Trial Chamber Denied Gbao the Rights Guaranteed to Him Under Article 17 of the Statute of the Special Court for Sierra Leone

312. Due to page limitations, the Gbao Defence found it impossible to proceed on this Ground in a comprehensive manner. Where particularly relevant, it will be incorporated in other grounds.

Ground 16: The Trial Chamber Did Not Properly Find the Requisite Actus Reus or Mens Rea Whilst Convicting Gbao for Aiding and Abetting Certain Alleged Attacks Against Major Salahuedin and Lieutenant Colonel Jaganathan

313. The Trial Chamber erred in fact by convicting Gbao for rendering practical assistance, encouragement or moral support to Kallon and other RUF at the Makump DDR camp on 1 May 2000. This assistance led to an aiding and abetting conviction for the physical assault on Major Salahuedin and Lt Colonel Ganese Jaganathan. We submit that Gbao's actions were not specifically directed to assist the perpetration of the crime, as witnesses for both the Prosecution and Defence testified unequivocally that Gbao attempted to calm Kallon before such crimes were

perpetrated. Therefore, we submit Gbao did not possess the requisite *actus reus* or *mens rea* to constitute aiding and abetting.

I. Findings by the Trial Chamber

314. The Chamber made the following factual findings as against Gbao in relation to his conviction for aiding and abetting two attacks on the UNAMSIL Peacekeepers:

i. Gbao went to the Makump DDR camp on 1 May 2000 with 30-40 armed fighters, upset by his belief that 5 RUF had been forcefully disarmed;

ii. Gbao spoke to several people at the scene, including Jaganathan, regarding the perceived unlawful disarmament, demanding "give me back my five men and their weapons, otherwise I will not move an inch from here".[354] The matter could not be resolved.[355] The UN men returned to the camp while Gbao stayed outside.[356]

iii. Major Maroa, a UN Peacekeeper, was then instructed by Brigadier Ngondi to go to the camp and discuss matters with Gbao. After Maroa's arrival Kallon arrived with other RUF. They were firing guns. Maroa reported Kallon was enraged and that Gbao was trying to cool down Kallon.[357]

iv. Kallon entered the camp and assaulted Salahuedin and Jaganathan. Gbao remained outside and Jaganathan passed him as he was forcibly removed from the camp by Kallon's men. The Chamber found that Jaganathan tried to speak to Gbao at this point but that Gbao "did not make any move".[358] According to the witness, Gbao was now holding an AK-47.[359]

315. Legal findings based upon these facts included:

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[354] Trial Judgement, para. 1786.
[355] *Id.* at para. 1786.
[356] *Id.* at para. 1787.
[357] *Id.* at para. 1790.
[358] *Id.* at para. 1792.
[359] *Id.*

i. *Actus reus*: In arming himself with an AK-47 after the assaults, Gbao tacitly approved of Kallon's attacks on Salahuedin and Jaganathan and had a substantial effect on their perpetration;[360]

ii. *Actus reus*: Gbao deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation at the Makump DDR camp in 1 May 2000;[361] and

iii. *Mens rea*: The only reasonable inference to be drawn from the evidence is that Gbao possessed the requisite *mens rea* as he took up arms and stood by while the attacks were carried out and in doing so he intended to assist Kallon in their commission.[362]

II. Errors of Fact on Other UNAMSIL Findings

A. Gbao did not Threaten Any RUF with Execution if they Disarmed

316. The Chamber erred in fact by finding, relying upon the testimony of TF1-071, that Gbao threatened to execute RUF combatants who secretly disarmed.[363] Whilst this did not in the event amount to a finding of individual criminal responsibility, it erroneously represented Gbao as opposed to RUF disarmament. Given that TF1-071 had claimed he only became aware of Gbao in 2000 or 2001[364] it might appear unlikely that he would have been aware of Gbao's attitude to disarmament in early 2000. Even if he had known Gbao prior to May 2000, he elsewhere shamelessly lied about the UNAMSIL incident, testifying through hearsay that on 1 May 2000 Gbao "ordered the securities to open arms at the peacekeepers" at the *Lunsar* DDR camp at the same time as the fighting in *Magburaka*.[365] This was against the weight of all other testimony in the case, was plainly false and demonstrated a patent disregard for the truth.

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[360] *Id.* at para. 2263.
[361] *Id.*
[362] Trial Judgement, para. 2264.
[363] *See* Trial Judgement, para. 1780.
[364] Transcript, TF1-071, 26 January 2005, p.62. This witness was relied upon to draw up the RUF command structure, a massive exhibit where Gbao's name was conspicuously absent. *See* Exhibit 20.

B. Gbao's Previous Conflict With UN Peacekeepers Ended Peacefully

317. The Trial Chamber made findings relating to an earlier incident on 17 April 2000, when Gbao allegedly went to protest at the Reception Centre near Makeni (where RUF were supposed to be eventually disarming). This event is instructive in understanding Gbao's state of mind during this time and specifically in relation to the events that took place on 1 May 2000.

318. Gbao was in Makeni at the time. UN Peacekeepers were present throughout the area. Gbao arrived at the Reception Centre, which was the UN headquarters for the Makeni area. He was unarmed but accompanied by armed fighters, in an angry demonstration of opposition to RUF disarmament. He was, at that time, seemingly unaware of its voluntary nature.[366]

319. The Trial Chamber found that Gbao met Ngondi (TFI-165) on 17 April 2000, either while he was protesting at the Reception Centre, or shortly thereafter (but definitely on the same day). They spoke about RUF disarmament. Ngondi testified that Gbao "**couldn't give me the reason why they're not going to do that [disarm]. And as usual, we had a lot of understanding and respect for one another with Augustine Gbao...he said that our reception centre should remain and since the disarmament is for long term**, we should - each party should report, give a report to their headquarters on what is going on in the crowd, that **there was no need of having combatants demonstrating in town**".

320. It appears that, in addition to discussing disarmament in general, Gbao and Ngondi went on to discuss other protests going on in the Makeni area at that time. In conclusion, Defence counsel asked him: "Would you agree it was Augustine Gbao, on the RUF side, who was instrumental in urging those people to disperse peacefully on the 17th?"[367] He answered: "**Yes, yes yes, Gbao. I commend him for that**".[368]

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[365] Transcript, TF1-071, 24 January 2005, pp.10-14.
[366] *See* Trial Judgement, para. 1778.
[367] Ngondi, RUF Transcripts 31 March 2006, pp 17-18.
[368] *Id.*

321. This evidence would tend to show that while Gbao did go to the Reception Centre to angrily protest against what he perceived to be premature disarmament, he committed no eriminal offenee. Indeed, following his exchange with Ngondi, it appears that he assisted in dispersing protests elsewhere.

III. Gbao did not Aid and Abet the Assault of Major Salahuedin and Ganase

A. Relevant Factual Findings in the Trial Chamber's Judgement

322. The Chamber found that Gbao arrived with 30 to 40 RUF men at the Makump DDR camp on 1 May, angrily demanding the return of the RUF men he wrongly believed had been forcibly disarmed. While the Defence submits that there was only one eyewitness to Gbao's arrival - DAG-111 - his testimony was disappointingly dismissed in its entirety, despite remaining unimpeached. Nevertheless, there was no evidence that, during the entire time he was at the camp, Gbao issued orders to this group before, during or after the confrontation that followed.[369]

323. Jaganathan and Major Odhiambo attempted to negotiate with Gbao upon his arrival at the camp.[370] They were not successful. Later, Ngondi ordered Maroa to go to the eamp and urge Gbao to go to KENBATT HQ to discuss the matter further.[371] As mentioned above, on the last occasion that Gbao had come to protest he had not only complied with Ngondi's request to meet him and negotiate, but he had gone on to disperse further RUF protests within Makeni Town.[372] On this occasion any peaceful progress was immediately thwarted by Kallon's arrival at the camp, with his men firing into the air.[373]

324. Crucially, when Kallon arrived "**Gbao was now trying to cool down Kallon** beeause he was even firing shots on the ground between him and the UN people".[374] Kallon rushed into the

[369] TF1-042, Jaganathan Ganase, RUF Transcripts, 21 Jnne 2006, p.14.
[370] Trial Judgement, paras. 1786-88.
[371] *Id.* at para. 1788.
[372] *Id.* at para. 1778.
[373] *Id.* at paras. 1789-90.
[374] *Id.* at para. 1790 (emphasis added).

camp itself, punching Salahuedin and allegedly trying to stab him.[375] Salahuedin was taken to safety by other peacekeepers.[376] Kallon and/or his men then assaulted and arrested Ganase Jaganathan. As he was led from the camp Jaganathan passed Gbao and claimed to see him carrying an AK-47. He claimed Gbao did nothing to assist. This finding led to Gbao's conviction for aiding and abetting the two assaults, the Trial Chamber holding his passivity indicated a tacit acceptance of the crimes committed.

325. There are a number of objections to these factual and legal findings discussed below.

B. General Errors in the Trial Chamber's Findings

i. The Finding that Led the Court to Conclude that Gbao Aided and Abetted Took Place After the Commission of the Crime and Kallon and Gbao had no Prior Agreement to Attack the UN Peacekeepers

326. Even if the Trial Chamber had correctly found that Gbao tacitly approved and encouraged the assaults on Salahuedin and Jaganathan, the act of taking up an AK-47 and standing passively while Jaganathan was asking for assistance occurred *after* the two UN men had been physically assaulted and after the order for Jaganathan's arrest had been issued. As stated by the Trial Chamber "[i]f the aiding and abetting occurs after the crime, it must be established that a prior agreement existed between the principal and the person who subsequently aided and abetted in the commission of the crime".[377] Other cases have supported this notion: "[i]t is required for *ex post facto* aiding and abetting that at the time of the...execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets" the crime.[378]

327. The Chamber indicated no finding of a prior agreement between Gbao and Kallon to commit the assaults on either Salahuedin or Jaganathan. As such, the Chamber's consequent finding that Gbao aided and abetted their assaults was arbitrarily without foundation. Jaganathan's arrest inside the camp by Kallon's men was clearly ordered and effected before he

[375] *Id.* at para. 1791.
[376] *Id.* at para. 1791.
[377] Trial Judgement, para. 278, *citing Prosecutor v. Blagojevic and D. Jokic*, Case No. IT-02-60-T, Judgement (TC), 17 January 2005, para. 731.

eame aeross Gbao outside the camp holding an AK-47. Aecordingly, sinee there was no evidenee of a prior agreement, the Trial Chamber erred in faet and we submit Gbao's eonvietion on Count 15 should therefore be dismissed.

ii. In Arming Himself with an AK-47. Gbao Could not have Tacitly Approved or Encouraged Kallon to Commit the Physical Assault on Salahuedin

328. Even if the Appeals Chamber were to find that a prior agreement existed between Gbao and Kallon to assault Salahuedin and Jaganathan at the Makump DDR camp, we submit that, in any event, the Trial Chamber erred in finding that Gbao possessed the requisite intent to aid and abet the assault on Salahuedin. The Trial Chamber found that Gbao possessed the requisite *mens rea* because "he took up arms and stood by while the attacks were carried out and in doing so he intended to assist Kallon in their commission".[379] However, there is no evidence that Gbao was holding any weapon whilst Kallon assaulted Salahuedin. Immediately before Kallon attacked Salahuedin, Gbao was attempting to 'cool him down', which flies in the face of tacit approval.

329. Analysis of the ehronological events at the Makump DDR camp is instructive. The Chamber found that after Gbao tried to placate Kallon, Kallon nevertheless entered the camp and assaulted Salahuedin.[380] Other UN Peacekeepers then took Salahuedin away to safety.[381] The Chamber found that Kallon then assaulted Jaganathan, arrested him, and took him to his car. It was found that Gbao was holding an AK-47 close to Kallon's car when Jaganathan walked by.[382] Common sense dictates that even if Gbao were holding an AK47 at that point this could not properly be taken as evidence of support for Kallon's assault on Salahuedin. *The assault had already taken place*. It was unfair and illogical of the Chamber to both retroactively and speculatively attribute Gbao's subsequent carrying of a weapon as evidence that he tacitly approved of Salahuedin's prior assault and thereby that he intended the commission of the crime.

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[378] *Prosecutor v. Blagojevic and D. Jokic*, Case No. IT-02-60-T, Judgement (TC), 17 January 2005, para. 731.
[379] Trial Judgement, para. 2264.
[380] *Id.* at paras. 1790-91.
[381] *Id.* at para. 1791.
[382] *Id.* at paras. 1791-92.

330. To be criminally culpable of a crime, a perpetrator must possess the requisite *mens rea*.[383] We submit that, for these reasons, the Trial Chamber failed to demonstrate the requisite *mens rea* of aiding and abetting the physical assault on Major Salahuedin. The Trial Chamber therefore committed an error of fact that amounts to an abuse of its discretion and the conviction should be dismissed.

C. *The Court Erred in Finding that the Actus Reus and Mens Rea under Count 15 were Established Based upon Gbao's Actions*

i. *Gbao's Actions at the Makump DDR Camp did not Substantially Effect the Commission of the Two Assaults and Subsequent Arrest*

a. *Actus Reus: Even if Gbao Held an AK-47 Outside the Makump DDR Camp, that did Not Signal his Tacit Support and Encouragement for the Crimes Committed*

331. According to the Chamber's findings, Gbao did not actively assist either of the two assaults. In fact, the only facts on the record before the assaults took place demonstrate that he attempted to prevent them. Nonetheless, the Trial Chamber convicted Gbao on account of his tacit approval of the assaults and encouragement of their commission. According to the Trial Chamber's findings, as well as holdings at the ICTY and ICTR, to establish tacit approval, the Trial Chamber must have established that Gbao was present at the scene of the crime and that:

i. He possessed the superior authority such that, by his non-interference, he tacitly approved and encouraged Kallon's acts;[384]

ii. This non-interference amounted to a substantial contribution (as is required for any aiding and abetting conviction);[385]

iii. The substantial contribution had a 'significant legitimising or encouraging effect on the principal perpetrator";[386] and

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[383] *Prosecutor v. Kajileji*, Case No. ICTR-98-44A-T, Judgement and Sentence (TC), 1 December 2003, para.767, *quoting Kayishema and Ruzindana*, Judgment (AC), para. 187; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003, para. 387.

[384] Trial Judgement, para. 279.

[385] *Id.* at para. 277; *also see Brdjanin*, Appeals Judgement, para. 277, which discusses the 'silent speetator' basis for attributing individual criminal responsibility to an Accused.

iv. He knew that by his acts he would assist the commission of the crime being committed by Kallon and his men.[387]

332. Each of these will be discussed below.

1. Gbao did not Possess Superior Authority within the RUF

333. Firstly, we submit that Gbao did not possess such superior authority that his non-interference could necessarily be perceived as tacit support for the crimes that were later committed. The Chamber repeatedly emphasised throughout its Judgement that Gbao had no effective control over either RUF fighters, security officers or others.[388] Although the Chamber found that Gbao did have some measure of control over the 30-40 RUF fighters at Makump, whilst unclear to what degree, Jaganathan agreed that he never issued an order to them while at the camp.[389] However, Gbao had no control over Kallon and his men, as Kallon was RUF Battle Group Commander, and second-in-command of RUF armed forces.[390].

334. For the purposes of Count 15 the Chamber appeared to betray their findings that Gbao lacked authority; however, the only justification it offered in support of their finding that Gbao did have the power to act against the RUF second-in-command was merely that Kallon and Gbao "knew each other well" and that, due to this relationship, Gbao would have had the ability to stop him from acting.[391] Given that Kallon and Gbao were elsewhere found to have rarely been in the same location over the previous 10 years, this came as a surprise. Additionally, there is no known reference in the transcripts of this 4 year trial that indicates they shared this close relationship.

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[386] *See Furundžiza*, Trial Judgement, para. 232, which stated that "[w]hile any spectator can be said to be encouraging any spectacle-an audience being a necessary element of a spectacle-the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals"

[387] *See* AFRC TC Judgement, para. 776, *upheld on appeal*, AFRC AC Judgement, paras. 241-51; CDF AC Judgement para. 366.

[388] *See Sub-ground 8(c); also see eg.* paras. 2034, 2041, 2153, 2155, 2178, 2217, 2219, 2237, 2294, 2299.

[389] Transcript, Jaganathan, 21 June 2006, p.14.

[390] *See* Trial Judgement, para. 640, where it stated that "Kallon was a Battle Ground Commander, the highest ranking RUF officer in the Makeni area, and second only in rank to Sesay" (other citations omitted). *But see* para. 662, which stated that battle group commander was "third-in-command of the RUF".

[391] Trial Judgement, para. 2262.

335. Gbao's evident lack of authority at Makump on May 1st was corroborated by Jaganathan Ganase himself. In evidence he acknowledged that although Gbao was allegedly holding an AK-47, he nevertheless appeared powerless in his attempt to intervene; any intervention would inevitably have been in vain, according to Jaganathan, "because of the hierarchy of the RUF".[392] According to Jaganathan, Gbao was "powerless".[393]

2. *Gbao's Acts did not Substantially Effect the Commission of the Crime*

336. Even if the Appeals Chamber were to find that Gbao's presence and superior authority at the camp allows the conclusion that his non-interference could have been perceived as tacit support for the later crimes, a conclusive finding as such may only be justified where Gbao's contribution had "a substantial effect on the perpetration of a certain crime".[394] It is difficult to appreciate how Gbao's actions at the camp could have had such an impact.

337. Prior to Kallon's arrival at the Makump DDR camp with his men, Gbao had not entered the DDR camp (he had remained on the road), had issued no orders to the 30-40 fighters he had apparently brought with him and was himself unarmed. Once Kallon arrived, Gbao tried to placate him. Gbao remained outside the camp while both assaults were committed by Kallon and Kallon's men. Gbao was similarly outside the camp when Kallon ordered Ganese Jaganathan's abduction. Even if Gbao was armed with an AK-47 while Jaganathan was being taken to Kallon's car, a comprehensive review of the evidence demands that to conclude he substantially effected the commission of the crime defies both fact and logic.

3. *No Findings Indicate that Gbao's Actions Would Have a Significant Legitimising or Encouraging Effect on the Principal Perpetrator of the Crimes*

338. There were no findings to the effect that Gbao knew or believed that his presence would neeessarily be seen as encouragement to commit the offences. The fact that Gbao was seen and

[392] Transcript, Jaganathan, 21 June 2006, p.25
[393] *Id.*

heard attempting to placate Kallon and his men would on any sensible view tend to point to the opposite.

b. Actus Reus: Gbao did Not "Orchestrate" the Conflict at the Makump DDR camp

339. As part of Gbao's *actus reus* findings, the Chamber found that Gbao deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation at the Makump DDR camp on 1 May 2000.[395] We submit this finding constitutes a clear error of fact and should be reversed.

341. Put simply, there was no criminal conduct at Makump DDR camp until Kallon arrived. Whilst those who were found to have arrived with Gbao were armed, there was no evidence that a single shot was fired, nor that any of them attempted to enter the camp, let alone commit any assaults or threaten the same. Indeed, the most serious threat uttered by Gbao was that he would 'not move an inch from here' until those he believed had been forcibly disarmed were released.[396] To conclude in spite of the foregoing undisputed facts that Gbao in fact orchestrated a conflict with the men that allegedly arrived with him flies in the face of the evidence. The dramatic turn of events heralded by Kallon's arrival only serves to emphasise Gbao's lack of participation both in the criminal course of conduct that followed as well as his lack of knowledge and approval as to what was to transpire over the following days.

342. In addition, there is no dispute that Gbao tried to "cool down" Kallon as he and other RUF threatened to enter the camp. Common sense dictates that if Gbao had been in situ for more than an hour before Kallon's arrival,[397] doing no more than castigating UNAMSIL officers for what he perceived as forceful RUF disarmament, and then tried to prevent the RUF group that was firing weapons from entering the camp, that he was hardly "orchestrating" a conflict. Several UN Peacekeepers spoke to Gbao at the scene and he made no attempt to harm them. By virtue of the

[394] *See* Trial Judgement, para. 276, *citing Tadic* Appeals Judgement, para. 229; *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Judgement (TC), 30 November 2005; *Prosecutor v Krstic*, Case No. IT-98-33-T, Judgement (TC), 2 August 2001, para. 601.
[395] Trial Judgement, para. 2263.
[396] *Id.* at para. 1786.

fact that various UN personnel came out of the camp to negotiate with Gbao it would appear they felt they were not in danger. This recalls Gbao's conduct at the same camp on 17 April 2000: whilst angry to begin with he departed after he had spoken to Ngondi and other UNAMSIL officers in charge.[398] Upon his return to Makeni Town Gbao then rendered further assistance by peacefully dispersing further protests:[399] a matter for which Ngondi later commended him.

343. It is highly significant that there was no evidence to suggest that Kallon and Gbao were in contact before Kallon arrived at the camp. If Kallon and his men—the perpetrators found to have individually committed the crimes, were not in contact with Gbao, they could not have known Gbao was intending to orchestrate a conflict. Even on the hypothetical basis that he was, they were not and could not have been aware of any of his acts and conduct prior to their arrival. In the absence of such evidence the Chamber performed something of a quantum leap in concluding that Gbao had "orchestrated an armed confrontation" at the Makump DDR camp: to do so was entirely without evidential foundation and was totally unjustified.

344. In conclusion, if neither Gbao nor the 30-40 RUF that he arrived with were involved in any physical assaults themselves, and given that the criminal conduct did not take place until Kallon arrived, and that Gbao tried to prevent it from taking place, it is an error of fact to conclude that, somehow, Gbao orchestrated the conflict that followed. Especially relevant is that there is no evidence in this case that Gbao was in contact with Kallon before the attacks took place. We accordingly submit the Trial Chamber abused their discretion in concluding that Gbao somehow took steps to orchestrate the crimes that took place at the Makump DDR camp.

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[397] According to the findings, Gbao arrived at 1:45pm (13h45) and Kallon arrived at 2:50pm (14h50), *See* paras. 1785, 1790.
[398] *See* Trial Judgement, paras. 1777-78.
[399] Transcript, Ngondi, 31 March 2006, pp.17-18.

c. *Mens Rea: Gbao did not Possess the Requisite Intent to Support the Commission of the Assaults of Salahuedin and Jaganathan*

345. To be criminally culpable of a crime, its perpetrator must possess the requisite *mens rea*.[400] In relation to aiding and abetting, the *mens rea* requirement will be fulfilled "where an individual acts with the knowledge that his or her act(s) assist in the commission of the crime by the actual perpetrator".[401] As noted above, Gbao was found by the Chamber to possess the requisite intent on the basis he was holding an AK-47 whilst Kallon was in the process of arresting Jaganathan and bringing him to his vehicle.[402]

346. For the aforementioned reasons, we submit it was wrong to find that Gbao had the requisite intent to support the assault on Major Salahuedin, as there was no evidence that Gbao was in possession of the AK47 when Salahuedin was attacked.

347. Assessment of whether Gbao possessed the *mens rea* to aid and abet the assault on Jaganathan requires comparison between the Trial Chamber's findings and Jaganathan's actual testimony. The Trial Chamber found:

> "Gbao was not initially armed but that as Jaganathan was dragged towards Kallon's vehicle and placed inside, Gbao was standing at the vehicle armed with an AK-47. Gbao did not respond when Jaganathan attempted to speak to him."[403]

348. This was a grossly misleading interpretation of Jaganathan's actual testimony, which cast Gbao's disposition in a wholly different light. Jaganathan stated that as he was being abducted he attempted to explain to Gbao the reasons why he was at the DDR Camp, but that Gbao, who had suddenly "sobered up", "just froze" and stood "statue-like".[404] Any attempt by Gbao to intervene at that point would have been in vain, according to Jaganathan, "because of the hierarchy of the RUF".[405]

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400 *Prosecutor v. Kajileji*, Case No. ICTR-98-44A-T, Judgement and Sentence (TC), 1 December 2003, para.767, *quoting* Kayishema and Ruzindana, Judgment (AC), para. 187; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003, para. 387.
401 *Kajileji*, Judgement (TC), para. 768.
402 *See* supra, para. 2263.
403 *See* Trial Judgement, para. 2261.
404 Transcript, Jaganathan, 20 June 2006, p. 26.
405 Transcript, Jaganathan, 21 June 2006, p.25

349. This, we submit, places Gbao's state of mind into a more objective perspective. Not only was he powerless to intervene "because of the hierarchy of the RUF", he was apparently frozen stiff. This reealls Gbao's general reputation-as confirmed time and again by countless witnesses throughout this trial - as a coward who never fought once between 30 November 1996 and September 2000. Additionally, there can be no dispute that Kallon and his men were angry, armed and went on to assault the UN Peaeekeepers. One may reasonably infer from the above that Gbao did not respond because he could not: he was terrified. Jaganathan's actual testimony would appear to corroborate this.

350. Seeondly, we submit that in order to justify their finding that Gbao was in possession of the requisite *mens rea* to support the assaults and arrests the Chamber relied solely upon evidence that he was seen standing outside the camp holding an AK47. This was to ignore the wider picture, recalled by both Jaganathan and Ngondi, that rather than acting as a passive participant during the RUF's attaek on the camp following Kallon's arrival, Gbao had actively (and no doubt at some personal risk) tried to prevent the assaults on Salahuedin and Jaganathan that immediately ensued.

351. In summary, given that Gbao clearly attempted to prevent the assaults at the outset, and in the absence of any intervening event to indieate a change of mind, it was erroneous of the Chamber to infer that he tacitly approved and or encouraged the offences for which he was convieted either before, during or after their commission.

1. Gbao did not Know that his Acts Would Assist in the Commission of the Crime by Kallon and his Men

352. Thcre was no evidence that Gbao believed or may have belicved that any of his conduct at the eamp would have been perceived as rendering practical assistance or support to or approval of Kallon's actions. Given the evidence that Gbao had tried to plaeate Kallon at the outset it would be contradictory and illogieal to conclude that he sought to assist Kallon in the commission of the crime so shortly afterwards in the absence of any intervening event or change of mind.

353. In conclusion, the Chamber's finding that Gbao failed to respond when Jaganathan tried to address him was thus misleading. Rather than cynically ignoring Jaganathan's plea it is far more reasonable to assume that Gbao was both incapable and afraid. Should the Appeals Chamber concur with this submission we ask it reverse all findings by the Trial Chamber that Gbao implicitly endorsed Kallon's acts on the basis that Gbao could not be said to possess the requisite *mens rea* to sustain a safe conviction on the basis of aiding and abetting either of the assaults as alleged.

IV. Conclusion

354. Because Gbao did not possess the requisite *actus reus* or *mens rea* to be held individually criminally responsible under Count 15, we urge the Appeals Chamber dismiss this conviction. It erred in fact in a manner which abused its discretion and therefore the charges must be dismissed.

Ground 17: The Trial Chamber Erred in Law and Fact in Finding that the Initial Attacks UN Personnel at the Makump DDR Camp on 1 May 2000 Constitute a Serious Violation of International Humanitarian Law

355. The Gbao Defence has decided not to proceed on this ground.

Ground 18: The Trial Chamber Abused its Discretion and Imposed a Manifestly Excessive Sentence, Overstating the Criminal Culpability of the Accused and Understating the Mitigating Nature of his Acts During and After the War, as well as Other Mitigating Factors

356. Should the Appeals Chamber uphold Augustine Gbao's convictions for JCE membership and aiding and abetting crimes committed against UNAMSIL personnel, it will be necessary for it to consider the propriety of the 25-year sentence the Majority imposed. The Majority in the Trial Chamber erred in law and fact in imposing this sentence, as it:

(i) unfairly aggregated the gravity of Gbao's conduct by combining his culpability with convictions of the other two Accused and calculated the gravity cumulatively;

(ii) failed to otherwise accurately reflect the gravity of the Accused's conduct;

(iii) included findings that served to raise Gbaos' sentence which were not proven beyond reasonable doubt;

(iv) mistakenly attributed an aggravating sentencing factor;

(v) failed to properly mitigate his sentence by ignoring a wealth of factors; and

(vi) cannot be reconciled with the sentencing principles and objectives of the Special Court or any other international tribunal and is generally out of proportion with a line of sentences passed in similar circumstances for similar offences.

357. In short, we submit that the Trial Chamber disregarded the criteria by which sentences should be assessed. The gravity of these errors constituted an abuse of the Court's sentencing discretion by way of its overstatement of Gbao's criminal culpability (as stated by Judge Boutet in his dissent in the Sentencing Judgement) and should invalidate the Majority's decision. If the Appeals Chamber were to uphold Gbao's convictions, we submit it should markedly reduce his sentence to that of time served.

Sub-Ground 18(a): The Trial Chamber did not Correctly Assess the Gravity of the Crimes in Relation to Gbao's Conduct

358. In its Sentencing Judgement, the Trial Chamber erred by inaccurately assessing the gravity of the crimes for which Gbao was convicted. It abused its sentencing discretion by taking into account factors were not relevant to the Defendant and by relying upon factors that were not proved beyond reasonable doubt. In relation to the gravity of the offence, the Chamber took into account the:

i. Scale and brutality of the offences committed;

ii. Role played by the Accused in their commission;

iii. Degree of suffering or impact of the crime on the immediate victim, as well as its effect on relatives of the victim; and

iv. Vulnerability and number of victims."[406]

359. While the Trial Chamber used appropriate factors in their assessment of the gravity of the offences, it nevertheless erred by repeatedly caleulating Gbao's culpability according to findings in relation to which he was not convicted, made findings that were not proven beyond reasonable doubt, and failed to accurately reflect Gbao's individual circumstances cither at the time of the JCE or the UNAMSIL conflict.

I. The Trial Chamber Made Findings on Crimes of Which Gbao was Acquitted

A. Sentence for Joint Criminal Enterprise

360. In its Sentencing Judgement, the Trial Chamber erred in faet by repeatedly attributing findings (on at least 22 occasions) to Gbao for crimes of which he was acquitted as a JCE member, despite their repeated pronouncements that each Aeeused should be individually assessed regarding sentence for personal culpability during the Indictment period, and despite the faet that the Gbao Defenee raised the issue in sentencing pleadings.[407]

361. The Court's Senteneing Judgement largely approaehed the gravity of the offences by grouping the three Aceused together. Had Sesay, Kallon and Gbao been convicted upon identical charges, there would be nothing inherently wrong with aggregating them since they were held responsible as JCE members. This however was not always the case.

362. Gravity of the offence must be assessed individually, even for JCE members.[408] Since Sesay and Kallon were convicted of certain offences within the JCE for which Gbao was acquitted, it was inappropriate to aggregatc the three together in respect of all Counts. For example, whilst Gbao was acquitted of Count 1 and 2 in Bo, Kenema and Kono Districts, Sesay

[406] Sentencing Judgement, para. 19.
[407] Gbao Sentencing Brief, paras. 40-45. See also Transcripts, Sentencing Hearing, pp. 112-118.
[408] The Prosecution agrees with this principle and has cited as such in its draft. *See* Prosecution Sentencing Brief, para. 16, *citing* AFRC Sentencing Judgement, para. 19; *Prosecution v. Blagojevic*, Case No. IT-02-60-T, Judgement (TC), 17 January 2005, para. 832.

and Kallon were convicted. When assessing the gravity of Gbao's guilt, these crimes should not have been taken into account.

363. These errors were widespread and are itemised in Annex III. We submit the Appeals Chamber should re-evaluate Gbao's sentence as a JCE member and reduce it accordingly:. especially in relation to Counts 1 & 2.

364. Additionally, any crimes committed outside the Junta period (and hence outside the period of the JCE), particularly in Kailahun District, should be ignored when assessing the gravity of Gbao's offending.

B. Sentence for UNAMSIL Attacks

365. In their assessment of gravity of crimes against UNAMSIL, the Trial Chamber appeared to take into account ***all*** offences committed against UN Peacekeepers, instead of individualising the gravity of Gbao's conduct alone. The findings in relation to Gbao's individual participation at Makump on 1st May 2000 were the only findings of guilt attributed to Gbao within the UNAMSIL conflict, and related to just two of the fourteen attacks alleged, It was thus inappropriate for the Chamber to include any other findings when considering Gbao's sentence and in so doing the Trial Chamber abused its discretion, effectively sentencing Gbao for acts he had not committed. This, we observe, occurred on several occasions within the Sentencing Judgement.

366. The aforementioned errors are also listed in Annex V. We submit the Appeals Chamber ought to accordingly re-evaluate the ultimate findings upon which Gbao was sentenced,

II. Other Errors by the Trial Chamber

367. The Trial Chamber additionally erred in fact by making findings based upon expert reports, by using findings as to events occurring *after* the JCE ceased to exist in order to assess

gravity of offences committed whilst the JCE was extant, and by making particular findings that were nevertheless not proven beyond reasonable doubt during the trial.

368. In paragraph 128 of the Sentencing Judgement, the Trial Chamber erred in fact by misapplying the legal prineiple that expert evidence and reports may not be used to form conclusions as to an Accused's acts and conduct.[409] The Chamber nevertheless did so, in abuse of its discretion when assessing the gravity of Gbao's guilt. Such findings should be ignored by the Appeal Chamber in reconsideration of Gbao's sentence.

369. In paragraph 113, the Chamber found that "between May 1998 and June 1998, after the JCE had ceased to exist, an additional 29 murders were eommitted in Kono District at PC Ground, Koidu Buma and Wendedu. 8 of these murders, committed by Captain Banya on Superman's orders. were an act of terrorism". It neglected to point out that Gbao was not convicted of any offences in Kono after the JCE ceased to exist. Such erimes should therefore not have been considered when assessing the gravity of Gbao's eonduct.

370. The Trial Chamber also erred by referring in its Sentencing Judgement to various findings not proven beyond reasonable doubt during the trial. Worse, some assertions appear to have no evidential basis on the record whatsoever. These inelude:

i. In paragraph 165, the Chamber noted in relation to enslavement in Kailahun District that "some commanders had private mines where they mined while child soldiers stood guard", citing paragraph 1259 of the Trial Judgement which related to findings in Kono District, not Kailahun. There were no such findings in relation to Kailahun District.

ii. Noting that eivilians in Kailahun District were "restrained in ropes and chains", when this finding was not made in the Trial Judgement.[410]

iii. Finding that civilians in Kailahun District were "forced to live in camps and manner by armed guards", when this finding was not known to have been made in the Judgement.[411]

[409] *See* Trial Judgement, para. 538.
[410] *See* Sentencing Judgement, para. 168.
[411] *See* Sentencing Judgement, para. 168.

371. The Trial Chamber thereby abused its sentencing discretion, resulting in Gbao being sentenced for acts he did not commit. These errors require wholesale reconsideration of the gravity of Gbao's offences and a commensurate reduction in sentence.

III. The Trial Chamber's Sentencing Judgement Did not Accurately Reflect the Gravity of the Accused's Conduct

372. Further to the above matters, the Trial Chamber failed to give sufficient weight to Gbao's limited role both as a JCE member and in his individual criminal responsibility within Count 15, as he was convicted for his passive aiding and abetting of just two of the fourteen attacks against UNAMSIL.

A. Accused's Conduct for Crimes under the JCE

373. In its Sentencing Judgement, the Trial Chamber made signifieant findings regarding Gbao's limited role in the JCE. It found that:

> "Gbao did not have direct control over fighters. He was not a member of the AFRC/RUF Supreme Council, and he remained in Kailahun during the Junta regime.[412] He did not have the ability to contradict or influence the orders of men such as Sam Bockarie. He was not directly involved and did not share the criminal intent of any of the crimes committed in Bo, Kenema or Kono Districts.[413]
> ...
> We have also found that Gbao's personal role within the overall enterprise was neither at the policy making level, nor was it at the "fighting end" where the majority of the actual atrocities were committed. Indeed, as the Gbao Defence pointed out in its closing submissions, Gbao 'has not been found to have ever fired a single shot and never to have ordered the firing of a single shot'".[414]

374. The Trial Chamber failed to acknowledge this in its Sentencing Judgement, notwithstanding its earlier findings as to Gbao's role during the Junta period in its earlier Trial Judgement, including:

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[412] Trial Judgement, para. 775.
[413] Sentencing Judgement, para. 268.
[414] *Id.* at para. 270.

i. Gbao did not personally commit any of the crimes in any district, including Kailahun District;[415]

ii. He "was not directly involved or did not directly participate in any of the crimes committed" in Bo, Kenema and Kono Districts.[416]

iii. As overall security commander Gbao did not have effective control over IDU, MP's, IO and G5;[417]

iv. He was not involved, in any way, in military planning and never visited the frontlines;[418]

v. He could not initiate investigations of misconduct as overall IDU commander and overall security commander;[419]

vi. He received no reports on unlawful killings in Bo, Kenema and Kono;[420]

vii. He was not found to have been involved with the operation of any of the security units in Bo, Kenema, or Kono.[421]

375. Despite this, the Trial Chamber sentenced Gbao to 25 years imprisonment, based on his role as an ideology instructor and his involvement in planning forced farming in Kailahun District.[422] Even if these two findings are sustained on appeal, we submit such a lengthy sentence for JCE membership cannot be justified in the presence of so many other limiting factors. By failing to give them sufficient weight, the Trial Chamber again abused its discretion in passing sentence.

B. Accused's Conduct under Count 15

376. In relation to the UNAMSIL attacks, the Trial Chamber found that "the Chamber recognises that Gbao was not primarily responsible for the attack, and may not have been able to

[415] Trial Judgement, paras. 1976, 2053, 2066, 2157, 2178, 2181, 2183, 2216, 2219.
[416] *Id.* at paras. 2010, 2057, 2105 (adopting the same findings *mutatis mutandis* in Kenema District about Gbao's lack of direct participation in Kenema and Kono Districts).
[417] Trial Judgement, para. 2034.
[418] *Id.* at paras. 682, 844.
[419] *Id.* at para. 684.
[420] *Id.* at paras. 2041, 2057, 2105.
[421] Trial Judgement, para. 2154. This paragraph refers specifically to Kono; however, there are no findings in the sections on Bo and Kenema that describe Gbao's involvement with their functioning.
[422] Sentencing Judgement, para. 270.

prevent it, although he remains criminally responsible for his direct involvement in it".[423] Nevertheless, it imposed a 25 year sentence for the offence of aiding and abetting the assaults on two UN Peacekeepers and the arrest of one. The sentence vastly inflated the gravity of the offences for which Gbao was convicted.

377. In assessing gravity, the Chamber first considered the scale and brutality of the offences. Despite Gbao's limited involvement in commission of crimes, it aggregated the three Accused together, distorting Gbao's degree of guilt. Gbao's conviction of aiding and abetting the assaults and abduction in Count 15 were substantially less grave than the other crimes found by the Chamber to have been committed by others.[424]

378. The second issue to be considered - the role played by the Accused - has been discussed above. The Chamber found Gbao stood passively by while Jaganathan was abducted, after which Gbao was uninvolved in the detention and subsequent fighting between the two groups. We submit the Trial Chamber failed to give this sufficient consideration.

379. In paras. 197-98 Chamber considered the impact on the victims. In relation to Gbao we submit the Chamber should have considered the attacks on Salahuedin and Jaganathan only. It did not. Extraneous findings should have been ignored when calculating the gravity of the Gbao's offending.

380. The final factor - the number of victims subject of the offences for which Gbao was convicted - was similarly inflated. In paragraph 196, the Chamber took into account those missing peacekeepers who were later declared dead, as well as a "vast number" who suffered physical assault. Gbao played no part in these events and the Chamber was wrong to effectively hold them against him in determining sentence.

381. In summary, Gbao was convicted of aiding and abetting the physical assault of Salahuedin and Jaganathan and the latter's abduction only. He was aequitted of:

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[423] *Id.* at para. 264.
[424] *Id.* at paras. 191-93.

i. The abduction of Mendy and Gjellesdad;

ii. The abduction of Odhiambo's group;

iii. The abduction of Rono's group;

iv. Any offences concerning the peacekeepers' treatment at Teko Barraeks; and

v. Events surrounding the transfer of peacekeepers from Teko Barracks to Small Sefadu.

382. Regarding attacks against UNAMSIL camps on 2 May 2000 and following, Gbao was acquitted of the following offences that the Court found were committed:

i. On 2 May 2000 on the Makump DDR camp;

ii. On 2 May 2000 at B Company Base at the Magburaka Islamic Centre;

iii. On 2 May 2000 at KENBATT peacekeepers at the DDR Camp near a place called Waterworks;

iv. On 3 May 2000 against ZAMBATT peacekeepers;

v. The 3 May 2000 abduction of Kasoma and 10 ZAMBATT peaccekeepers;

vi. The 3 May 2000 abduction of other ZAMBATT peacekeepers;

vii. The 3 May 2000 transfer of ZAMBATT peacekeepers from Makeni to Yengema; and

viii. The holding of UNAMSIL peacekeepers in various locations throughout Kono District throughout May 2000.

IV. Conclusion

383. In conclusion, before the Appeals Chamber considers Gbao's appropriate sentence it should assess those crimes that Gbao was found to have committed as a JCE member and/or in aiding and abetting Count 15 alone. By so doing, and in observing Gbao's limited overall culpability, we submit his sentence merits drastic reduction. No other counts are relevant, as they related to charges for which Gbao was acquitted or otherwise uninvolved. Sentencing Gbao on the basis of acts he did not commit amounts to a miscarriage of justice.

384. When one considers the factors utilised to assist a Trial Chamber in making a gravity assessment, it becomes clear that Gbao's overall criminal culpability is limited. The Third

Aceused submits that, in view of the Trial Chamber's manifest abuse of discretion, the Appeals Chamber should consider the gravity of the crimes Augustine Gbao was convieted of, and substantially reduce his sentence

Sub-grouud 18(b) The Trial Chamber Erred in Fact by Finding an Aggravating Factor Against Gbao

385. In its Sentencing Judgement, the Trial Chamber found Gbao was the most senior commander present until Kallon's arrival at the Makump DDR camp on 1 May. It found he was also the commander with the largest number of fighters present. Thereby it found Gbao abused his leadership and authority, which they deemed an aggravating factor regarding sentence.[425] The Defence submits that the Trial Chamber erred in fact, and abused its discretion by failing to correctly apply the law to the facts.

I. The Aggravating Factor Found is an Element of the Offence for Which Gbao was Convicted

386. In its Judgement, the Trial Chamber convicted Gbao under Count 15 for tacitly approving and encouraging thc attacks on UN Peacekeepers by Kallon and his men, and thereby aiding and abetting these attacks. Such liability falls within the exception to the general principlc that "mere presence at thc scene of the crime will not constitute, without more, aiding and abetting". In so finding, the Trial Chamber must establish that, *inter alia*, Gbao possessed the superior authority such that, by his non-interference at the camp, he tacitly approved and encouraged Kallon's acts.[426] The Trial Chamber made these findings in arriving at Gbao's conviction, holding that Gbao was the senior commander present until Kallon's arrival and thereafter remained the commander with thc largest number of fighters present.[427]

387. In its Sentencing Judgement, the Chamber also found that Gbao abused his leadership position because he was "thc most senior RUF commander present until Kallon's arrival and he

[425] Sentencing Judgement para. 272, *referring to* Trial Judgement, para. 2262.
[426] Trial Judgement, para. 279.
[427] *Id.* at para. 2262.

remained the Commander with the largest number of fighters present"[428] and thereby established an aggravating factor.

388. A fact that is a prerequisite element of an offence cannot be additionally used as an aggravating factor.[429] Gbao's conviction on the basis of his tacit approval of Kallon's crimes at the Makump DDR camp clearly required a prerequisite finding as to his leadership position. We submit the Trial Chamber erred by employing their findings as to Gbao's leadership position to establish both his conviction of aiding and abetting on count 15 and subsequently an aggravating factor to sentence.[430] This, we submit, is clearly prohibited and the aggravating factor should be set aside accordingly.

II. The Aggravating Factor was Attributed to Gbao's Acts Based upon his Leadership Position Alone, not Actions Demonstrating how he Abused this Position

389. Should the Appeals Chamber reject our submission that Gbao's conviction of aiding and abetting pursuant to Count 15 was founded upon the same facts that led to the finding of an aggravating factor, we submit in the alternative that the Trial Chamber erred in finding the existence of an aggravating factor based merely on the fact of Gbao's leadership role at the Makump DDR camp, not whether he actually abused it.

390. The Chamber's analysis fails to demonstrate how Gbao actually abused his position. In finding it was the fact of his position of leadership and authority alone rather than actual abuse of it that constituted the aggravating factor, the Trial Chamber erred in fact by failing to properly apply the law, thereby abusing its discretion.

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[428] Sentencing Judgement, para. 272.
[429] Sentencing Judgement, para. 24, *citing Blaskic* Appeals Judgement, para. 693; *Vasiljevic* Appeals Judgement, paras 172-73; *Ndindabahizi* Appeals Judgement, para. 137.
[430] Trial Judgement, para. 2262.

391. The fact of a leadership position, without more, may only constitute an aggravating factor when the Accused has been convicted under both Articles 6(1) and 6(3).[431] In this case, the Trial Chamber did not find Augustine Gbao responsible as a superior under Article 6(3).[432]

392. Furthermore, it is established that '[a] high rank in the military or political field does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence.'[433] It was found that 'the contention that [the Accused] must receive a harsher sentence based on his high level of authority is not substantiated by the practice of the International Tribunal.'[434] What matters is not the position of authority taken alone, but that position coupled with the manner in which the authority is exercised.'[435] As a result, since the Chamber found that Gbao abused his leadership position by nothing more than holding a leadership position it was not at liberty to find this as an aggravating factor.

III. Being A Senior RUF at the Makump Camp is Not Sufficient to Demonstrate Aggravating Factor Without Concomitant Showing of Effective Control

393. Furthermore, being the most senior commander present (until the arrival of Kallon) cannot in itself necessarily amount to leadership or authority over others at the scene. The relevant test to be applied is whether Gbao had effective control over RUF fighters.[436] It is significant that the Trial Chamber found that "the fact that Gbao was able to command fighters at the Makump DDR camp on 1 May 2000 does not establish that he possessed the material ability

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[431] *AFRC* Appeal Judgement, para. 215. See also *Stakic* Trial Judgement para. 912; *Celibici* Appeal Judgement, para. 745 ; *Karera* Trial Judgement, para. 577; *Kupresic et al.* Appeal Judgement, para.451. Note that one of the cases relied upon by the Trial Chamber (Sentencing Judgement, para. 26), supports such finding as the Accused was found responsible under both 7(1) and 7(3), *Obrenovic* Trial Judgement, para. 85.
[432] Trial Judgement, paras. 2293-2299. See generally Boutet Dissenting Opinion to Trial Judgement, paras. 20-22.
[433] *Ndindabahizi* Appeal Judgement, para. 136. *See also Hadzihasanovic and Kubura*, Appeal Judgement, para. 320. *See also Martic*, Appeal Judgement, para. 350; *Krajisnik* Trial Judgement, para. 1156; *Krstic* Trial Judgement, para. 709; *Stakic* Appeal Judgement, para. 411; *Blagojevic and D. Jokic* Appeal Judgement, para. 324; *Simba* Appeal Judgement, para. 284; *Kamuhanda* Appeal Judgement, para. 347; *Babic* Sentencing Appeal Judgement, para. 80 (Note that this was one of the cases relied upon by the Trial Chamber, Sentencing Judgement, para. 26), *Jokic* Trial Judgement, para. 61 (Note that one of the cases relied upon by the Trial Chamber, Sentencing Judgement, para. 26).
[434] *Hadzihasanovic and Kubura*, Appeal Judgement, para. 321.
[435] *Ndindabahazi* Appeal Judgement, para. 136.
[436] *CDF* Trial Judgement, para. 238, *citing to Celibici* Appeal Judgement, para. 197; *Kayishema and Ruzindana* Appeal Judgement, para. 294; *Kunarac* Trial Judgement, paras 396-397.

to prevent or punish the RUF perpetrators of the subsequent attacks";[437] as was their conclusion "the Prosecution has failed to establish that Gbao was able to exercise effeetive control over RUF fighters in the Makeni, Magburaka and Kono areas".[438]

394. We submit since effective control, and not simply senior status, is required to prove the existence of an aggravating factor, the finding of such in these circumstances must be dismissed and Gbao's sentence reduced accordingly.

IV. The Trial Chamber Erred in Finding that Gbao Abused his Position

395. Should thc Appeals Chamber disregard the above arguments, we alternatively submit the Trial Chamber erred in finding that Gbao abused his leadership position in relation to the events at the Makump DDR camp on 1 May 2000.

396. We submit that there is no support within the RUF Judgement for the finding that Augustine Gbao held a position of leadership and authority over the RUF fighters present at the scene. We reiterate the arguments made in paragraphs 333-338 and, generally, in Sub-Ground 8(c). Of particular note, Gbao attempted to placate Kallon and there is no evidence that any of the men allegedly under his authority committed any crimes at the camp. We submit therefore that the Trial Chamber failed to establish beyond reasonable doubt that Augustine Gbao abused his position of leadership/authority.

V. Conclusion

397. By their finding an aggravating factor on the basis that Gbao abused his leadership position, the Trial Chamber impermissibly relied upon the same facts employed to return a eonviction against Gbao on Count 15 as they did in finding the existence of an aggravating factor. Additionally and/or in the alternative, by merely stating that he abused his position of leadership and authority, without finding more, the Trial Chamber erred in fact. Further and/or in

[437] Trial Judgement, para. 2297.
[438] *Id.* at para. 2298.

the alternative, the Chamber utilised an incorrect test in finding that Gbao's sernior status at the camp represented an aggravating factor, when according to the law a finding of effective control was actually required. Finally, the Trial Chamber erred in finding-even if Gbao did possess the requisite senior status- that either Gbao or the men apparently under his command committed any offenees at the camp on 1 May.

398. These errors led to the imposition of a 25 year sentenee on Count 15. In view of the fact that he was convicted of merely aiding and abetting two of the fourteen attacks on UNAMSIL, it is submitted this sentence must have been significantly inflated by the Chamber's finding that Gbao abused his position. We submit this finding was wholly erroneous and that it should be overturned. Should the Appeals Chamber not dismiss the Trial Chamber's finding of guilt under Count 15 for aiding and abetting, we suggest it reject their finding that Gbao abused his leadership position and accordingly substantially reduce Augustine Gbao's sentence on count 15.

399. Should the Appeals Chamber reject all the arguments above, it is submitted in the alternative that the Trial Chamber erred in fact by lending disproportionate weight to the aggravating factor cited, especially in view of its finding that Augustine Gbao tried to 'cool down' Kallon when he arrived.[439] This was especially significant given Gbao's passive role in the events. Even if the Appeals Chamber were to find an aggravating factor, it should reduce Augustine Gbao's sentence to more appropriately reflect his overall criminal culpability.

Sub-ground 18(c) The Trial Chamber Erred iu Law and Fact by Refusing or Failing to Consider Certain Factors as Mitigating Under a Balancc of Probabilities Standard

400. The Trial Chamber erred both in law and fact by ignoring or failing to give sufficient weight to various mitigating factors proposed by thc Defence in its Sentencing Brief.

[439] Trial Judgement, para. 1790.

I. *The Trial Chamber Erred in Law by Refusing to Mitigate Gbao's Sentence Since it will Likely be Served in a Foreign Country*

401. On a balance of probabilities it is likely that Gbao will have to serve his sentence abroad.[440] The Trial Chamber appeared to agree, holding that "whilst it seems **more likely than not** at this stage that the convicted persons in this trial will serve sentences outside of Sierra Leone"; yet they refused to lend this any weight, explaining "this is a decision that ultimately lies within the discretion of the President of the Court".[441] Nevertheless, the Chamber did observe "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 of sentence".[442]

402. We submit that the Trial Chamber erred in law by finding that it was unable to mitigate Gbao's sentence according to where it was likely to be served. While the Chamber found that, on the balance of probabilities it will be served in a foreign country, it avoided the issue of whether it could mitigate Gbao's sentence accordingly.

403. While the Court is obligated only to take into account an Accused's co-operation with the Prosecution, it retains a wide discretion to consider other mitigatory factors. While other Special Court cases do not appear to have considered the issue, the serving of one's sentence abroad has been identified as a factor to be taken into account at the ICTY.[443]

404. The Trial Chamber should have utilised their discretion in the circumstances, especially since it appeared to indicate that it would have passed a reduced sentence if felt it had the power to do so. We suggest that even if all other arguments herein are rejected Gbao's 25 year sentence should be dramatically reduced, as he is "more likely than not" going to serve this sentence in a foreign country.

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[440] Gbao Sentencing Brief, paras. 66-71.
[441] Sentencing Judgement, para. 205 (emphasis added).
[442] *Id.* at para. 206.
[443] *Prosecutor v. Mrda*, Case No. IT-02-59-S, Sentencing Judgement (TC), 31 March 2004, para. 109.

II. The Trial Chamber Erred in Law and Fact by Ignoring Other Mitigating Factors

405. The Trial Chamber erred both in law and fact by failing to consider several of the mitigating factors proposed by the Gbao Defence in its Sentencing Brief. It erred in law by failing to pursue its legal obligation to 'take into account any mitigating factor',[444] and in fact by failing to consider various relevant factors, thereby abusing its discretion.

406. In its brief, cited several factors in mitigation. The Chamber concurred that Gbao's advanced age and lack of previous convictions constituted mitigating factors[445] but rejected two others (in addition to that of serving a sentence abroad).[446] Five were not considered at all:

i. Gbao's personal and family circumstances[447] (although family circumstances were considered for both Sesay and Kallon);[448]

ii. The inevitable fact that a 40 year sentence would amount to life imprisonment, an outcome prohibited under the Special Court statute;[449]

iii. Health considerations;[450]

iv. General character;[451]

v. Gbao's role in releasing the first group of alleged Kamajors.[452]

407. Three factors were rejected since they were based upon facts not found in the Judgement:

i. The productive working relationship with UNAMSIL in promoting peace and disarmament;[453]

ii. Gbao's work in rebuilding Makeni the after Lome Agreement;[454]

iii. Assistance in the rehabilitation of former child soldiers[455] and

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[444] As stated by 101(B) (ii) of the Rules of Procednre and Evidence, Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended 27 May 2008.
[445] Sentencing Judgement, paras. 278 and 279.
[446] Serving of the sentence in a foreign country, remorse from Gbao and that countries where there is a lower life expectancy deserve lower sentences. *RUF* Sentencing Judgement, paras. 205, 277, 278.
[447] Gbao Sentencing Brief, paras. 47, 57-59 and Annex I.
[448] RUF Sentencing Judgement, paras. 230, 254.
[449] Gbao Sentencing Brief, paras. 52-56.
[450] *Id.* at paras. 60-61, and Confidential Annex II.
[451] *Id.* at paras. 63-65.
[452] *Id.* at , para. 82.
[453] *Id.* at paras. 72-74.
[454] *Id.* at paras. 75-79.

408. Rule 101 (B) (ii) imposes an obligation on the Trial Chamber to 'take into account any mitigating factor.'[456] The case law in other international tribunals also states that the Trial Chamber has such an obligation.[457] We submit that by either refusing to accept or rejecting five arguments, the Trial Chamber erred, as it is not clear whether these arguments were 'taken into account' or not.

409. Several suggested factors that the Trial Chamber chose to ignore were nevertheless recognised as capable of amounting to mitigation in its Sentencing Judgement. These included personal and family circumstanees and good character.[458] We request the Appeals Chamber reconsider these arguments and mitigate Gbao's sentence appropriately.

410. In relation to the other three factors submitted as mitigation, the Trial Chamber held that no weight would be attached to evidence adduced at trial pleaded in support of mitigation, unless such evidence was itself also a factual finding within the RUF Judgement.[459] The Chamber attempted to justify its position by stating "some of the evidence adduced at trial was found no be not credible and therefore attached no probative value to it.'[460] We submit this amounts to both an error of law and of fact, which resulted in a miscarriage of justice.

411. Refusing to consider such arguments essentially betrays the nature of this judicial process, as it fails to recognise the nature of bifurcated trials—one phase assessing guilt or innocence and one assessing sentence. In this case, since no testimony was permitted at the sentencing hearing,[461] both the Defence and Prosecution were restricted to the trial testimony in presenting sentencing arguments. Much evidence, whilst perhaps irrelevant to the determination of guilt or innocence, was clearly relevant to the assessment of appropriate sentence and should have been considered, especially that which was found to be credible.

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[455] *Id.* at paras. 80-81.
[456] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended 27 May 2008. ('RPE').
[457] *Kordic and Cerkez* Appeal Judgement, paras. 1051-1052; *Bralo* Sentencing Appeal Judgement, paras. 16 and 37, *citing* to *Jokic* Judgement on Sentencing Appeal, para. 6, *Deronjic* Judgement on Sentencing Appeal, para. 149, *Musema* Appeal Judgement, para. 395 and *Serushago* Appeal Judgement, para. 22.
[458] *See* Sentencing Judgement, para. 29(iii) and (iv).
[459] Sentencing Judgement, para. 207.
[460] Sentencing Judgement, para. 207.
[461] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1235, Scheduling Order for Sentencing Hearing and Judgement, 2 March 2009, p. 2.

412. Neither the SCSL rules nor case law offers any support to the notion that mitigatory arguments are to be restricted to factual findings in the Judgement. ICTY and ICTR practice demonstrates that it is common to rely upon the trial record in such circumstances.[462] In *Oric*, the Trial Chamber adopted evidence from the record in order to find that Oric's cooperation with the stabilisation force in Bosnia Herzegovina be advanced in mitigation.[463] In *Milutinovic* case, the Trial Chamber relied upon witness testimony in order to assess the character of Sanovic.[464]

413. Even if its conduet were generally acceptable, the reason provided by the Trial Chamber for rejecting testimony outside its factual findings - that the Defenee had relied upon non-credible testimony - did not apply to the Gbao Defence. In faet, the Gbao Defence relied primarily upon Ngondi, who was both found to be credible and was extensively cited within the RUF Judgement.[465] There is no rational reason as to why his testimony should have been ignored for the purposes of mitigation, especially sinee the Trial Chamber's own justification for overlooking testimony outside its finding of fact did not apply to Ngondi's evidence, which was entirely aceepted. It was illogical of the Chamber to convict Gbao largely on the strength of Ngondi's testimony and yet refuse to consider the same source when it came to mitigating his sentence.

414. It is notable that Trial Chamber I in the CDF case found that Fofana's eontribution to peace was eonsidered a mitigating factor.[466] Since a contribution to peace does not bear on his guilt or innocence, it appears that the Chamber may not have instituted the same standard in thc two cases.

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[462] *Hadzihasanovic and Kubura* Trial Judgement, paras. 2080, 2081, 2089, 2090; *Martic* Trial Judgement, paras. 503-507. *Stakic* Trial Judgement, paras. 921- 922; *Ndindabahizi* Trial Judgement, para. 506; *Rukundo* Trial Judgement para. 602; *Seromba* Trial Judgement, para. 395; *Krajisnik* Trial Judgement, paras. 1163, 1169.
[463] *Oric* Trial Judgement, para. 765.
[464] *Milutinovic et al.* Trial Judgement, vol. III, para. 1181.
[465] TF1 174: footnotes 58, 86, 1245, 1710, 1716, 1752, 1843, 3096-3099, 3101, 3115-3117, 3121-3122, 3127, 3286, 3291, 3293, 3301-3303, 3398-3399, 3421, 3508, 3514, 3538, 3543, 3599 and 3977. Ngondi: footnotes 1051-1052, 1095, 1307, 1799, 1804-1806, 1809, 1821, 1828, 1845, 3294-3296, 3341, 3343, 3347-3348, 3364, 3382, 3384, 3386-3389, 3391-3397, 3400-3401, 3404-3406, 3408, 3413, 3416-3417, 3425-3426, 3428-3429, 3433, 3435, 3442, 3445, 3448-3449, 3450-3451, 3462-3464, 3466-3472, 3503-3504, 3506-3512, 3514-3516, 3518-3519, 3521-3524, 3570-3578, 3662-3663.
[466] CDF Sentencing Judgement, para. 91.

415. By failing to eonsider mitigating faetors presented by the Gbao Defenee, the Trial Chamber failed its legal obligation and erred in law. We request that the Appeals Chamber give full consideration to thc foregoing arguments and reduce Gbao's sentence accordingly.

Sub-ground 18(d): Even Without Additional Mitigating Factors Considered to Reduce Gbao's Sentence, the Sentence Imposed by the Majority in the Trial Chamber was Excessive

416. Even if the Appeals Chamber were to reject the grounds of appeal eited elsewhere, it is submitted that the Majority in the Trial Chamber imposed a manifestly disproportionate sentence upon Augustine Gbao given his limited eontribution to the JCE and in relation to his conviction for aiding and abetting just two of the fourteen attacks against UNAMSIL.

417. Justice Boutet's Dissenting Opinion was significant: "my learned colleagues have overstated the culpable criminal conduct of Augustine Gbao".[467]

I. Applicable Law

A. Imposing a Sentence

418. Article 19(2) of the SCSL Statute states that "in imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person",[468] with priority placed upon individualising the sentences.[469] This practice is known as the totality principle: passing sentence to reflect the totality of one's criminal conduct.[470]

419. Underlying these sentencing principles is the requirement that sentences be proportionate to an Accused's criminal conduct. According to the *Nikolic case*, 'a sentence must reflect the

[467] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1251, Sentencing Judgement (TC), 8 April 2009, Separate and Dissenting Opinion of Justice Pierre G. Boutet, para. 3.
[468] Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone, 16 January 2002. ('Statute').
[469] Emphasis added.
[470] CDF Appeal Judgement, para. 546.

predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.'[471]

B. Law Relevant to Underlying Crimes

420. It is established case law that '[i]n assessing the role of the Accused in the crime, the Chamber has taken into account the mode of liability under which the Accused was convicted, as well as the nature and degree of his participation in the offence. In particular, the Chamber has considered whether the Accused was held liable as an indirect or a secondary perpetrator.'[472] Observing this standard, we submit that Gbao should have received a far lower sentence for his JCE role.

421. In the CDF case the same Trial Chamber stated '[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 imposed for more direct forms of participation".[473] We submit that the Court ignored these basic sentencing practices and abused its discretion by imposing a 25 year sentence on Gbao for Count 15.

II. Gbao's Sentence was Disproportionate to his Individual Criminal Responsibility

422. It is submitted that the Trial Chamber failed to individualise Gbao's sentence and accurately reflect his criminal conduct. It imposed a wholly disproportionate sentence and gave insufficient weight to the limited role Gbao played during both the Junta period and the UNAMSIL events.

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[471] *Prosecutor v. D.Nikolic*, Case No. IT-94-2-S, Sentencing Judgement (TC), 18 December 2003, para. 144.
[472] CDF Sentencing Judgement, para. 34, citing *Prosecutor v. Ntagerura, Bagambiki and Iminishimwe*, Case No. ICTR-99-46-T, Judgement and Sentence (TC), 25 February 2004, para. 813; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement (AC), 25 February 2004, para. 182 ('*Vasiljevic* Appeal Judgement').
[473] CDF Sentencing Judgement, para. 50 (other citations omitted); also see *Vasiljevic* Appeal Judgement, para. 182; i. *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgement and Sentence (TC), 28 April 2005, para. 593; *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement (TC), 2 August 2001, para. 714 ('*Krstic* Trial Judgement'); *Krstic* Appeal Judgement, para. 268.

423. As detailed above, the Trial Chamber erred in assessing the gravity of Gbao's conduct in relation to his alleged membership in the JCE and during the UNAMSIL confrontation. Besides attributing crimes to Gbao for which he was acquitted or otherwise uninvolved, the Trial Chamber failed to adequately assess the limited role he played in crimes for which he was convicted. The Trial Chamber erred in law and fact in making these findings.

424. Furthermore, the Trial Chamber erred in finding an aggravating factor as to Gbao's conduct and in ignoring certain mitigating arguments. These errors have been discussed in sub-grounds 8(b) and 8(c) above. Should the Appeals Chamber reject the grounds of the appeal against sentence, it is submitted that a 25 year sentence pursuant to Gbao's JCE contribution as an ideology instructor and latterly for his role in forced farming under Count 13 was manifestly disproportionate and excessive. Likewise, his role in aiding and abetting two crimes involving the physical assault and abduction of two UN Peacekeepers did not merit 25 year sentences. In finding so, the Trial Chamber wholly abused its discretion and committed an error of law.

425. Review of other sentences imposed for the aiding and abetting of far more serious crimes at the SCSL, ICTR and ICTY clearly illustrates the disproportionality of Gbao's sentence herein.. One has strikingly observed that even sentences for genocide have been markedly more lenient than that imposed on Gbao for his limited participation in the JCE and for aiding and abetting the attack on two men.

A. Gbao's Role in the JCE

426. The average sentence at the ICTY for membership of a joint criminal enterprise is 13 years,[474] placing Gbao's sentence of 25 years at the high end of the sentencing speetrum. Ironically, the Trial Chamber elaimed Gbao's "individual contribution to the joint criminal enterprisc, and his own particular criminal responsibility, to be on the *lower end* of the continuum, and eonsiders his role as diminishing his responsibility for sentencing purposes".[475]

[474] Barbara Hola, Alette Smeulers, and Catrien Bijleveld, "Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice", Leiden Journal of International Law, 22 (2009) pp.79-97.
[475] Sentencing Judgement, para. 271 (emphasis added).

427. We submit that Gbao's role in the JCE does indeed belong to the lower end of the sentencing spectrum and he should have been sentenced accordingly. In order to emphasise the disproportionality of Gbao's sentence we submit the following case review is instructive.

i. The Trial Chamber's Sentence Imposed is Disproportionate in View of the Sentences Given at the SCSL in the CDF Case

a. Fofana

428. Fofana was convicted of aiding and abetting murder and cruel treatment in Tongo Field.[476] *Inter alia*, he was found to have aided and abetting are the killing of more than 200 men, a 12 year old boy, the hacking to death of more than 20 men and the shooting at a crowd of civilians.[477]

429. Fofana was the CDF Director of War[478] and was held responsible under 6(1) liability for his conduct during a meeting in which Norman gave the instructions for the Tongo operation. During a speech to fighters, Norman told them that the attack on Tongo would determine who won the war. He said there was no place to keep captured Junta soldiers or their collaborators, and directed the Kamajors to chop off the left hand of any captured junta soldier.[479] Fighters were ordered not to spare the Juntas' houses.[480]

430. Fofana followed by exhorting those present not to fail to perform accordingly: those "losing your own ground" should kill themselves rather than return to Base Zero.'[481] The Trial Chamber found that such action rendered Fofana guilty of aiding and abetting murder and cruel treatment in Tongo Field, by providing encouragement and support of Norman's instructions to kill enemy combatants and collaborators.[482]

[476] CDF Trial Judgement, para. 763. Fofana was acquitted of aiding and abetting collective punishment by the Appeals Chamber, CDF Appeal Judgement, para. 231.
[477] CDF Trial Judgement, para. 756 (murder) and 762 (cruel treatment).
[478] *Id.* at para. 721(i).
[479] *Id.* at para. 321.
[480] *Id.* at para. 321.
[481] *Id.* at para. 321; 721(x).
[482] *Id.* at para. 722.

431. Fofana was also found responsible under Article 6(3) for Counts 2, 4 and 7 in Koribondo[483] and for Counts 2, 4, 5 and 7 in Bo.[484]

432. When assessing Fofana's sentence, the Chamber found the crimes he committed under 6(1) were on a large scale with a significant degree of brutality.[485] They were particularly serious as some were committed against unarmed and innocent civilians who had been perceived as 'rebel collaborators'[486] who were found to be particularly vulnerable.[487]

433. The Trial Chamber found that Fofana's crimes in Tongo Field amounted to aiding and abetting since he was not present at the scene and that his actions amounted only to encouragement.[488]

434. It also found that by committing these crimes Fofana had breached his position of trust within the community.[489] The Chamber gave mitigatory weight to his remorse,[490] lack of education and training,[491] good conduct in the peace process and in detention[492] and lack of previous convictions.[493]

435. The Trial Chamber imposed a sentence of 15 years on Fofana for murder and cruel treatment under Article 6(1) by aiding and abetting the crimes in Tongo Field, and under Article 6(3) for the crimes in Bo and Koribondo. He received 15 years for cruel treatment under Article 6(1) by aiding and abetting the crimes in Tongo Field, and under Article 6(3) for the crimes in Bo and Koribondo. The sentences were to run concurrently.

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[483] *Id.* at para. 798.
[484] *Id.* at para. 846.
[485] CDF Sentencing Judgement, para. 47.
[486] *Id.* at , para. 47.
[487] *Id.* at para. 48.
[488] *Id.* at para. 50.
[489] *Id.* at para. 60.
[490] *Id.* at para. 64.
[491] *Id.* at para. 66.
[492] *Id.* at para. 67.
[493] *Id.* at para. 68.

b. Kondewa

436. Kondewa was likewise found to have aided and abetted the preparation of the crimes committed in Tongo Field. He too was convicted of hacking to death, arbitrary killings and shooting at civilians. Kondewa was the high priest of the Kamajors.[494] No Kamajor would go to war without his blessing.[495]

437. Following Norman's instructions and Fofana's exhortations regarding Tongo, Kondewa told those present that the time for the rebels' surrender had long been exhausted: they did not need any surrendered rebels. He then gave his blessings."[496]

438. Such action was found both to have supported Norman's instructions and encouraged the Kamajors to kill captured enemy combatants and collaborators, inflict physical suffering or injury upon them and to destroy their houses.[497] The Trial Chamber reiterated the fact that "no fighter would go to war without Kondewa's blessings because they believed that Kondewa transferred his mystical powers to them and made them immune to bullets".[498]

439. Kondewa was also found to be criminally responsible as a superior under Article 6(3) in Bonthe District for Counts 2, 4 and 7.[499]

440. The Trial Chamber found that the crimes for which Kondewa was held responsible under Article 6(1) were of a large scale and of a barbaric nature,[500] the victims being particularly vulnerable.[501] It found that whilst Kondewa was convicted only as an aider and abettor for the crimes in Tongo Field, he was also held liable as a superior under Article 6(3) and to have directly participated in offences in other parts of the country.[502]

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[494] CDF Trial Judgement, para. 721(i).
[495] *Id.* at para. 721 (vii)
[496] *Id.* at para. 721(x).
[497] *Id.* at para. 735.
[498] *Id.* at para. 735.
[499] *Id.* at para. 903. Fofana was acquitted for his other convictions by the Appeals Chamber, see CDF Appeal Judgement, paras. 203, 216 and 146.
[500] CDF sentencing Judgement, para. 53.
[501] *Id.* at para. 54.
[502] *Id.* at para. 57.

441. The breach of trust inherent in his position in the community was found to be an aggravating factor.[503] Remorse,[504] lack of education and training[505] and lack of prior convictions[506] were taken into account as mitigation.

442. Kondewa received 20 years for his personal commission of murder in Kenema District, for aiding and abetting the preparation of the crimes in Tongo Field and for his Article 6(3) liability in Bonthe District. He received the same for cruel treatment, for which he was responsible under Article 6(1) by virtue of aiding and abetting the preparation of the crimes in Tongo Field, and as a superior under Article 6(3) for Bonthe District.

c. Comparison between the Sentences and Criminal Conduct of Fofana, Kondewa and Gbao

443. In comparison to the CDF case, Augustine Gbao was given a 25 years sentence for his role in the JCE. The Defence submits it was manifestly disproportionate for Augustine Gbao to be sentenced to 25 years, while Fofana and Kondewa, who aided and abetted the preparation of many violent crimes, many of which resulted in death, and who were also responsible as superiors, were sentenced to 15 and 20 years, respectively. By passing such a heavy sentence, the Trial Chamber wholly erred and abused its discretion. It is submitted that the sentence be quashed and that the Appeals Chamber substitutes its own sentencing discretion in order to avoid a miscarriage of justice.

444. The Appeals Chamber is also requested to take into account the fact that Kondewa personally committed the crime of murder, for which he received a lesser sentence than Gbao.

445. Given the nature of the crimes committed in Tongo Field, the number and vulnerability of victims as well as the personal acts of Kondewa and Fofana it cannot rationally be suggested that Augustine Gbao's conduct merited a sentence 10 years longer than Fofana.

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[503] *Id.* at para. 62.
[504] *Id.* at para. 65.
[505] *Id.* at para. 66.
[506] *Id.* at para. 68.

446. We submit the sentences passed were arbitrary, excessive and out of proportion with sentencing in the CDF case and that the Appeals Chamber should thereby substantially reduce the sentenees imposed on Gbao for his role in the JCE. While a Trial Chamber's sentencing discretion is quite extensive, it is not unlimited and should be overruled when the sentences given are manifestly disproportionate.

B. Conviction for Aiding and Abetting Kallon at Makump DDR Camp on 1 May 2000

447. The sentence imposed upon Gbao for his aiding and abetting 2 physieal assaults on Salahuedin and Jaganathan and the abduction of the latter were similarly disproportionate.

448. Arguments based on eomparison with the CDF case apply even more forcefully given Gbao's 25 year sentence on Count 15. For Gbao to reeeive 5-10 years more than the CDF Defendants, notwithstanding the crimes they were found to have aided and abetted that ineluded *inter alia* the personal commission of murder, the death of 150 civilians was manifestly unfair. Nobody lost their life as a result of Gbao's conduct and it is unclear whether anyone even suffered any serious injury.

449. The following comprehensive comparison of aiding and abetting senteneing outside the SCSL further demonstrates the Trial Chamber's abuse of discretion in imposing a 25 years sentence on Gbao for Count 15.

a. The Trial Chamber's Sentence Imposed was Disproportionate in View of the Sentences Given at the ICTR

1. Ntakirutimana and Ntakirutimana Case[507]

450. E. Ntakirutimana was sentenced to 10 years for genocide and extermination by aiding and abctting the killing and serious bodily or mental harm of Tutsis in Bisesero. He was found to

[507] *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-T & ICTR-96-17-T, Judgement and Sentence (TC), 21 February 2003 ('*Ntakirutimana and Ntakirutimana* Trial Judgement'); *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgement (AC), 13 December 2004. ('*Ntakirutimana and Ntakirutimana* Appeal Judgement').

have transported armed attackers to where Tutsi refugees were located.[508] Several aggravating factors were established, including breach of his position of trust as a pastor and use of his position of authority to sanction crimes and attacks against places of worship.[509] Mitigating factors included his previous good character, the fact that he did not play a leading role in the attacks, his age and his poor health condition.[510]

451. Gerard Ntakirutimana, his son, received 20 years for aiding and abetting genocide and extermination. His acts included providing ammunition for attacks and other direct participation.[511] The Appeals Chamber found that the crimes he aided and abetted were extremely grave.[512] The Trial Chamber found that he abused his position of trust (he was doctor), personally shot at refugees and participated in attacks where the refugees had sought shelter.[513]

452. The Defence submits that the unreasonableness of the sentence imposed by the Trial Chamber upon Gbao is further exemplified when one compares it with the sentences imposed in the Ntakirutimana case for more serious crimes

2. *Muvunyi Case*[514]

453. Muvunyi was convicted of an act of genocide by aiding and abetting the killing of a group of Tutsi refugees.[515] His conduct included sending armed soldiers to attack unarmed refugees whilst passing instructions that members of certain families should not be harmed (indicating, implicitly, that others should be killed). He was also convicted for direct and public incitement to commit genocide and other inhumane acts. The Trial Chamber found the crimes committed to be inherently grave, that he abused his position of authority and that he ordered the ethnic separation and subsequent killing of orphan children.[516]

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[508] *Ntakirutimana et Ntakirutimana* Appeal Judgement, para. 566.
[509] *Ntakirutimana et Ntakirutimana* Trial Judgement, paras. 900 to 905.
[510] *Id.* at paras. 894-897.
[511] *Ntakirutimana et Ntakirutimana* Appeal Judgement, para. 559.
[512] *Id.* at para. 562.
[513] *Ntakirutimana et Ntakirutimana* Trial Judgement, para. 910-912.
[514] *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Judgement and Sentence (TC), 12 September 2006.
[515] *Id.* at para. 496.

454. Muvunyi was also convicted of aiding and abetting genocide, and of having committed direct and public incitement to commit genocide. He was also found to be responsible for genocide as a superior. Several aggravating factors were established, and yet, **he received the same sentence as Augustine Gbao.**

3. Zigiranyirazo Case[517]

455. Zigiranyirazo, the *préfet* of the province of Ruhengeri, after seeing three corpses, ordered the man in charge of the Kiyoyu roadblock (his guard) to check the identity papers of people passing through 'since Tutsis have changed their identification papers.'[518] He ensured that food was given to those in charge of the roadblock.[519] Between 10 and 20 people with Tutsi identity cards were taken aside and killed.[520] The Trial Chamber found that his order to check identity papers and to ensure the supply of food was brought to the men provided practical assistance to the killers.[521]

456. Zigiranyirazo was sentenced to 15 years for aiding and abetting the genocide of 10-20 people. There were no aggravating or mitigating factors.

457. The Defence submits that if one compares the sentence imposed on Zigiranyirazo for the death of 10-20 people as part of a genocide with the sentence imposed on Augustine Gbao, it is clear that Gbao's sentence vastly inflates the gravity of the his criminal conduct, and is clearly disproportionate.

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[516] *Id.* at paras. 539-540.
[517] *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgement (TC), 18 December 2008.
[518] *Id.* at para. 413.
[519] *Id.*
[520] *Id.*
[521] *Id.* at , para. 453.

b. The Trial Chamber's Sentence Imposed is Disproportionate in View of the Sentences Given in other Cases at the ICTY

1. Aleksovski case

458. Aleksovski, a prison warden in the Kaonik prison, was found to have aided and abetted outrages upon human dignity (whilst also being convicted under other modes of responsibility) including physical and mental abuse of detainees in the prison[522], the use of detainees to dig trenches and as human shields.[523]

459. The Trial Chamber found that he was not a principal perpetrator and had no discriminatory intention, that he made some attempts to improve the conditions in the prison and also took into account the fact that he was married with two young children.[524] The Appeals Chamber found that the Trial Chamber failed to give enough weight to the gravity of the offences and that his crimes were aggravated by his superior responsibility, as well as the fact that he participated in some of them.[525]

460. The Appeals Chamber increased the original sentence of 2 ½ years imposed by the Trial Chamber to 7 years. In doing so it held "[i]n imposing a revised sentence the Appeals Chamber bears in mind the element of double jeopardy in this process in that the Appellant has had to appear for sentence twice for the same conduct, suffering the consequent anxiety and distress, and also that he has been detained a second time after a period of release of nine months. Had it not been for these factors the sentence would have been considerably longer."[526]

461. Notwithstanding the increase in Aleksovski's sentence, that imposed on Augustine Gbao once again appears unreasonable and excessive considering the gravity of Aleksovski crimes. Not only was he present during their commission, he was found also to be responsible as a superior, and to have aided and abetted the mistreatment of detainees. The scope and gravity of

[522] *Aleksovski* Trial Judgement, paras. 86-88.
[523] *Id.* at para. 229.
[524] *Id.* at paras. 236-238.
[525] *Alekovski*, Appeal Judgement, paras. 183-184.

Aleksovski's criminal conduct and the consequences thereto were much worse than Augustine Gbao's; yet his sentence was substantially more lenient.

2. Blagojevic and Jokic Case[527]

462. Blagojevic was convicted of aiding and abetting murder as a violation of the laws and customs of war, and of aiding and abetting forcible transfer (murder, persecution and other inhumane acts). He was found responsible for the killing of more than 50 Bosnian Muslim men[528] and for the forcible transfer of thousands of Bosnian Muslims from Srebrenica.[529]

463. Jokic was convicted of aiding and abetting murder as a violation of the laws and customs of war, and of aiding and abetting extermination and persecution. He aided and abetted mass executions in which 1000 and 2500 Bosnian Muslims died[530] and the digging of mass graves.[531]

464. When determining sentence the Trial Chamber gave special consideration to the discriminatory nature of the crimes that he aided and abetted and to the enormous scale of the persecution campaign which encompassed a criminal enterprise to murder more than 7,000 Bosnian Muslim men and forcibly transfer more than 25,000 Bosnian Muslims.[532] It accepted that neither of the two accused were major participants,[533] but the vulnerability of the victims[534] and the impact of the crimes upon them were found to be an aggravating factor,[535] while the work of both Accused in de-mining after the war was given some mitigating value.[536]

465. Blagojevic was sentenced to 15 years imprisonment for aiding and abetting the murder and forcible displacement of thousands of civilians; Jokic received 9 years imprisonment for

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[526] *Id.* at para. 190.
[527] *Prosecutor v. Blagojevic and D. Jokic*, Case No. IT-02-60-T, Judgement (TC), 17 January 2005. *Prosecutor v. Blagojevic and D. Jokic*, Case No. IT-02-60-A, Judgement (AC), 9 May 2007.
[528] *Blagojevic and Jokic* Trial Judgement, paras. 271 and f.
[529] *Blagojevic and Jokic* Appeal Judgement, para. 104.
[530] *Id.* at paras. 147 and 165.
[531] *Id.* at para. 159.
[532] *Blagojevic and Jokic* Trial Judgement, para. 837.
[533] *Id.* at para. 836.
[534] *Id.* at para. 844.
[535] *Id.* at , para. 845.
[536] *Id.* at para. 860.

mass murder, extermination and persecution. Augustine Gbao received 10 years more than Blagojevic and almost three times more than Jokic, while the gravity, scale and consequences of his conduct were objectively and realistically far less serious. When comparing the sentences given in *Blagojevic and Jokic* to that imposed upon Gbao, the disproportionality and unfairness imposed by the Trial Chamber speaks for itself.

3. *Limaj et al Case*[537]

466. Bala was convicted of aiding and abetting the cruel treatment of L04, and the torture of another, L12. L04 was beaten, pushed on the floor and kicked in Bala's presence.[538] He was then required to bury to bodies of three men, one of them being a fellow detainee. The bodies showed evidence of mistreatment.[539] L12, who Bala had physically beaten,[540] was blindfolded and seriously beaten by Bala.[541]

467. The Trial Chamber found that Bala was not in a position of command and that although he took part in some mistreatment it had not been with 'zeal'.[542] However, it found the detainees had been defenceless, and that 9 were killed, although not on his own initiative.[543] No aggravating factors were found, but his family situation, his health and the fact that his detention would bring hardship on he and his family were taken into consideration in mitigation, as was[544] his good treatment of some detainees.[545]

468. For aiding and abetting torture, both committing and aiding and abetting cruel treatment, and for having personally participated in the murder of 9 detainees, Bala received just 13 years imprisonment. Once again, Augustine Gbao's 25 year sentence appears vastly disproportionate by comparison.

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[537] *Prosecutor v. Limaj, Bala and Musliu*, Case No. IT-03-66-T, Judgement (TC), 30 November 2005. *Prosecutor v. Limaj, Bala and Musliu*, Case No. IT-03-66-A, Judgement (AC), 27 December 2007.
[538] *Limaj et al.* Trial Judgement, para. 311.
[539] *Id.* at para. 312.
[540] Bala was found to have personally committed this crime. *Limaj et al.* Trial Judgement, para. 658.
[541] *Id.* at para. 316.
[542] *Id.* at para. 726.
[543] *Id* at para. 727.
[544] *Id.* at para. 732.
[545] *Id.* at para. 733.

469. Whilst Bala's case relates to the aiding and abetting of offences against only two individuals, he was also convicted of personally committing the murder of 9 detainees, of the mistreatment of further 3 detainees and for his personal role in the maintenance and enforcement of inhumane conditions of detention in the camp. Despite that, he received 12 years less than Augustine Gbao.

4. Furundjiza Case[546]

470. Furundjiza was convicted of aiding and abetting the rape and sexual assaults on a woman ('Victim A') by another person ('Accused B') while he was interrogating her.[547] Victim A was raped publicly.[548] The Trial Chamber found that Furundjiza's presence and continued interrogation of Victim A encouraged Accused B and substantially contributed to the criminal acts committed by him.[549] Furundjiza was found guilty of aiding and abetting outrages upon personal dignity, including rape, a violation of the laws and custom of war.

471. When determining whether aggravating factors applied to sentence, the Trial Chamber noted that the circumstanees of the rape of Victim A were particularly horrifying, finding she was treated with the utmost cruelty and barbarity.[550] The Accused played a prominent part in their commission[551] in his role as the commander of the Jokers (a special unit within the armed forces of the Croatian Defenee Council).[552] The Trial Chamber also took into aceount the fact that the victim was a eivilian detainee at the mercy of the perpetrators.[553] The Chamber gave limited weight to the Aecused's lack of previous convictions, that he had children and his young age at the time of the offences as mitigation.[554]

[546] *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement (TC), 10 December 1998. *Prosecutor v Furundzija*, Case No. IT-95-17/1-A, Judgement (AC), 21 July 2000.
[547] *Furundjiza* Trial Judgement, para. 270.
[548] *Id.* at para. 272.
[549] *Id.* at para. 274. *Furundjiza* Appeal Judgement, para. 126.
[550] *Furundjiza* Trial Judgement, para. 282.
[551] *Id.*
[552] *Id.* at para. 283.
[553] *Id.*
[554] *Id.* at para. 284.

472. Furundjiza was sentenced to 8 years imprisonment by the Trial Chamber for aiding and abetting outrages upon personal dignity. We submit the gravity of these repellent crimes far outweighed those for which Gbao was convicted, and is another illustration of the disproportionality of Gbao's 25 year sentence for aiding and abetting the attacks on two UNAMSIL soldiers.

5. Mrksic et al. Case[555]

473. Mrksic was convicted of aiding and abetting the cruel treatment, torture and murder of 194 people[556] Sljivancanin was convicted of aiding and abetting the same. [557] The victims had been taken as prisoners from a Vukovar hospital,[558]were beaten and mistreated, and removed to a hangar.[559] Their remains were then found in a mass grave.[560]

474. The Trial Chamber found they were all murdered in a single day. It found additionally that the anguish of such a tragedy was aggravated by the uncertainty as to the fate of the victims.[561] It gave little mitigating weight to Mrksic's family circumstances, whilst finding that Sljivancanin allowed some family members of hospital staff to join those civilians who were evacuated to safety.[562] Ultimately however the Chamber held that Sljivancanin's had acted deceitfully by preventing an international representative access to the hospital.[563]

475. Mrskic was sentenced 20 years, Sljivancanin to 17. It is submitted the acts aided and abetted by Augustine Gbao pale into insignificance by contrast. As such we submit this is another illustration of the disproportionality and arbitrary nature of Gbao's 25 year sentence.

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[555] *Prosecutor v. Mrksic, Radic and Sljivancanin,* Case No. IT-IT-95-13/1-T, Judgement (TC), 27 September 2007. *Prosecutor v. Mrksic and Sljivancanin,* Case No. IT-IT-95-13/1-A, Judgement (AC), 5 May 2009.
[556] *Mrksic et al.* Trial Judgement, para. 712.
[557] *Mrksic et al.* Trial Judgement, para. 715. See also *Mrksic et al.* Appeal Judgement, Disposition: the Appeals Chamber found Sljivancanin guilty of aiding and abetting the murder of 194 persons.
[558] *Mrksic et al.* Trial Judgement, para. 686.
[559] *Id.* at para. 686.
[560] *Id.*
[561] *Id.* at para. 685.
[562] *Id.* at para. 704.
[563] para. 704.

6. Milutinovic et al. Case[564]

476. In *Milutinovic*, the Accused Ojanovic and Lazarevic were convicted of aiding and abetting deportation as well as other inhumane acts (forcible transfer)[565] in over 22 locations throughout Kosovo. The crimes they aided and abetted were defined as 'forcible transfer and deportation of hundreds of thousands of people',[566] and were found to form part of a widespread and systematic campaign of terror and violence.[567] The Chamber noted the particularly vulnerable nature of the victims.[568]They were both sentenced to 15 years imprisonment.[569]

477. Considering the gravity, scale and consequences of Odjanovic and Lazarevic's offending it appears, again, that Gbao's sentence of 25 years was disproportionate and arbitrary.

7. Martinovic and Naletilic Case[570]

478. Martinovic was convicted of aiding and abetting murder and wilful killing. He encouraged his soldiers to brutally mistreat one Harmandzic, designating him as "game" to be randomly mistreated and humiliated by his soldiers.[571] He prevented Harmandzic from returning to the Heliodrom with other prisoners, instructing them not to speak of what they had witnessed at the base.[572] He gave orders as to the burial of the body, thereby initiating and substantially contributing to covering up Harmandzic's murder.[573]

479. Martinovic was also convicted of various crimes against humanity and breaches of the Geneva Conventions including persecution and inhumane acts, inhumane treatment, wilfully causing great suffering or serious injury to body or health and the unlawful transfer of a civilian.

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[564] *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Judgement (TC), 26 February 2009.
[565] *Milutinovic et al.* Trial Judgement, Volume III, para. 630 (Ojdanovic) and 930 (Lazarevic).
[566] *Id.* at para. 1172.
[567] *Id.* at para. 1173.
[568] *Id.*
[569] Note that they were both also convicted for committing certain crimes.
[570] *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgement (TC), 31 March 2003. *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006.
[571] *Martinovic and Naletilic* Trial Judgement, para. 507.
[572] *Id.*
[573] *Id.*

He was further convicted pursuant to articles 7(1) and 7(3) of unlawful labour and of the plunder of public or private property as violations of the laws or customs of war. [574]

480. The Trial Chamber held that these were most heinous crimes,[575] and that Martinovic's conduct was of grave significance given his position as a commander who both permitted and directly participated in the commission of atroeities. Needless to say these were found as aggravating faetors.[576] Martinovie received an 18 year sentence.

481. Once again, taking all matters into account, we submit this case also illustrates the disproportionality and arbitrary appearance of Augustine Gbao's 25 year sentence.

III. Conclusion

482. By reason of the foregoing case analysis we submit the Trial Chamber's imposition of a 25 year sentence on Augustine Gbao on the basis of his aiding and abetting two assaults and a single abduction on a single occasion on 1st May 2000, without evidence of serious injury or lasting harm to the victims was so disproportionate as to amount to an unpreeedented and irrational act of judicial retribution. This sentence was devoid of any justification in law or morality. It represents a disturbing abuse of sentencing discretion and is aggravated by its entire absence of support from other international tribunals. It has set a disastrous precedent for the future of international criminal justice as a whole.

483. We submit that the Trial Chamber abused its discretion when imposing a 25 year sentence upon Augustine Gbao in relation to his JCE membership and his aiding and abetting the two attacks at the Makump DDR camp on 1 May 2000.

484. We submit that a reasonable and impartial analysis of Gbao's wrongdoing merited a far lesser sentence than that which the Trial Chamber imposed and respeetfully urge the Appeals Chamber to substantially reduce the sentenee accordingly.

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[574] *Martinovic and Naletilic* Appeal Judgement, para. 6.
[575] *Martinovic and Naletilic* Trial Judgement, para. 758.
[576] *Id.* at para. 751.

Ground 19: The Majority of the Trial Chamber Erred in Fact by Convicting Augustine Gbao for Acts Based upon the Same Conduct

485. We reiterate our grounds of appeal in relation to Gbao's conviction as a JCE member. Should the Appeals Chamber reject our submissions and find Gbao individually criminally responsible for these acts, we nevertheless submit that the Trial Chamber duplicitously sentenced Gbao for the same conduct under different counts.

486. The Trial Chamber held that "it is impermissible to convict for both murder and extermination under Count 4 and 3 based on the same conduct. However, the Chamber finds that it is permissible to convict on both counts if each count is based on *distinct* conduct".[577] Despite this, both in its findings and in its disposition the Trial Chamber convicted Augustine Gbao of both murder and extermination in all locations pursuant to the same criminal conduct.

487. In Bo District, Gbao was convicted for both extermination and murder in relation to the killing of civilians at Tikonko Junction on 15 June 1997.[578] The same was done regarding the killings at Cyborg Pit in Tongo Field in Kenema District.[579] In relation to Kono District, Gbao was convicted of both extermination and murder in relation to the killing of civilians by men under Savages' command in Tombodu between February and March 1998,[580] and in relation to the killing of civilians by the RUF Commander Rocky in April 1998 in Koidu Town.[581] As for Kailahun District, the Trial Chamber convicted Augustine Gbao both under count 3 and 4 for the killing of Kamajors in Kailahun town.

488. We submit the Trial Chamber erred in fact by convicting Augustine Gbao for both murder and extermination pursuant to the same conduct for the findings mentioned in the above paragraph, thus violating the prohibition against cumulative conviction and creating a miscarriage of justice. We submit the Appeals Chamber should dismiss one or other of the convictions under count 3 or count 4 in relation to the killings committed in Bo, Kenema, Kono and Kailahun

[577] Trial Judgement, para. 2304.
[578] *Id.* at . 1974, 2.1.1, (i) and (ii). For a detail of the factual findings see paras. 1020-1022.
[579] *Id.* at para. 2050, 3.1.1, (x) to (xiv). For a detail of the factual findings see paras. 1106-1107.
[580] *Id.* at para. 2063, 4.1.1.1, (iii) to (vii). For a detail of the factual findings see paras. 1273-1275.

Districts. Gbao's sentence pursuant to counts 3 and/or 4 should accordingly be substantially reduced.

Filed in Freetown, 4 June 2009

John Cammegh

Scott Martin

[581] *Id.* at para. 2063, 4.1.1.1, (viii) to (ix).

Annex I

Crimes Found and Relevant Grounds of Appeal for Gbao

All grounds

[illegible] Relevant [illegible]	[illegible]
[illegible]	**Relevant Ground(s) of Appeal**
Grounds Applicable to All Counts	4, 6, 7
Grounds Related to All JCE Locations	8(a), 8(b), 8(c), 8(e), 8(f), 8(g), 8(i)
Bo District	
AFRC/RUF fighters killed an unknown number of civilians at Tikonko Junetion.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed 14 civilians at a house in Tikonko.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed 3 civilians on the street in Tikonko.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed 200 civiliansduring attaek on Tikonko on 15 June 1997.	8(d), 8(j), 8(k), 8(l), 8(m),
AFRC/RUF fighters killed Tommy Boekarie during attack on Sembehun in June 1997.	8(j), 8(k), 8(l), 8(m)
AFRC fighters killed Paramount Chief Demby, Pa Sumaili, 5 civilians near market and an unknown number of other civilians during attack on Gerihun on 26 June 1997.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters committed extermination in Tikonko on 15 June 1997.	8(d), 8(j), 8(k), 8(l), 8(m), 19
Bockarie looted Le 800.000 from Ibrahim Kamara in June 1997 in Sembehun.	8(j), 8(k), 8(l), 8(m)
Kenema District	
AFRC/RUF fighters killed BS Massaquoi, Andrew Qee and 4 other civilians on the orders of Bockarie around 8 February 1998.	8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed Mr Dowi in Kenema Town.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed 3 civiliansat a house on Mambu Street, Kenema Town.	8(j), 8(k), 8(l), 8(m)
Bockarie killed a eivilian farmer aeeused of being a Kamajor boss in Kenema Town.	8(j), 8(k), 8(l), 8(m)
Killing of an alleged Kamajor Boss during operation no living thing. **NOTE: Not listed as one of the crimes in the part on responsibility but listed in the legal findings.**	8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed Bonnie Wailer and 2 others on the orders of Bockarie in Kenema Town.	8(j), 8(k), 8(l), 8(m)

Kenema District (2)	
Bockarie or AFRC/RUF fighters under his command killed 2 alleged thieves in Kenema Town.	8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed a Limba man in Tongo Field.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed a civilian at Lamin Street in Kenema Town.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed over 68 civilians at Cyborg Pit in Tongo Field.	8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters committed extermination by killing over 63 civilians at Cyborg Pit.	8(j), 8(k), 8(l), 8(m), 19
AFRC/RUF fighters beat TF1-122 in Kenema Town.A34	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels, including Sesay, repeatedly inflicted physical violence on TF1-129 during his initial arrest in Kenema Town.	8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels including Bockarie beat BS Massaquoi, Andrew Quee, Brima Kpaka, TF1-129, Paramount Chief Moinama Karmoh and 4 others in January 1998 in Kenema Town.	8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels forced an unknown number of civilians to mine for diamonds at Cyborg Pit in Tongo Field between about 1 August 1997 and about 31 January 1998.	8(j), 8(k), 8(l), 8(m)
Kono District	
AFRC/RUF fighters killed an unknown number of civilians during the February/Mareh 1998 Attack on Koidu town.	8(j), 8(k), 8(l), 8(m)
RUF fighters acting under the command of Officer Med killed chief Sogbeh at Tombodu sometime in February/March 1998.	8(d), 8(j), 8(k). 8(l), 8(m)
AFRC/RUF fighters under the command of Savage killed about 200 civilians in Tombodu between February and March 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters under the command of Savage killed about 47 civilians in Tombodu between February and March 1998.	8(d), 8(j). 8(k), 8(l). 8(m)
AFRC/RUF fighters under the command of Savage killed three civilians in Tombodu sometime in March 1998.	8(d), 8(j), 8(k), 8(l). 8(m)

Kono District (2)	
AFRC/RUF fighters under the command of Savage killed an unknown number of civilians by burning them alive in a house in Tombodu about March 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
RUF Commander Rocky killed 30 to 40 civilians in April 1998 in Koidu Town.	8(j), 8(k), 8(l), 8(m)
Fighters under the command of Rocky killed by a fifteen year old boy by amputating his arms and feet in April 1998 in Koidu Town	8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels killed six captured civilians in Yardu in April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters killed at least 29 civilians in Penduma on orders of Staff Alhaji in April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters under the command of Savage committed extermination in Tombodu between February and March 1998.	8(d), 8(j), 8(k), 8(l), 8(m), 19
RUF Commander Rocky committed extermination in April 1998 in Koidu Town.	8(j), 8(k), 8(l), 8(m), 19
AFRC/RUF rebels raped an unknown number of women during the February/March 1998 attack on Koidu.	8(j), 8(k), 8(l), 8(m)
AFRC/RUF fighters forcibly took an unknown number of women as "wives" during the February/March 1998 attack on Koidu Town.	8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels raped TF1-218 twice in Bumpeh on or about March 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels forced a couple to have sexual intercourse in front of other captured civilians and their daughter was then forced to wash her father's penis in Bumpeh on or about March 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
Staff Alhaji raped a woman in Tombodu in April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels raped TF1-217's wife right times and also raped an unknown number of other women in Penduma in April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
Rebels raped an unidentified female civilian in Bomboafuidu by inserting a pistol into her vagina on or about April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels forced approximately 20 captured civilians to have sexual intercourse with each other in Bomboafuidu on or about April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)

Kono District (3)	
AFRC/RUF rebels used knives to slit the genitalia of several captured male and female civilians in Bomboafuidu on or about April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels raped TF1-195 five times and raped five other women in Sawao between February and April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
RUF fighters forcibly married an unknown number of women in the civilian camp at Wendedu on or about April 1998.	8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels severely beat TF1-197 near Tombodu in February or March 1998.	8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels knocked out several of TF1-015's teeth in Wendedu in March 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
Rebels led by Staff Alhaji amputated the hands of three civilians in Tombodu in April 1998	8(d), 8(j), 8(k), 8(l), 8(m)
Rebels amputated the hands of at least three men in Penduma in April 1998	8(d), 8(j), 8(k), 8(l), 8(m)
Rebels amputated TF1-197's arm in Yardu in April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
TF1-197 and his brother were flogged by rebels under the command of Staff Alhaji in Tombodu in April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels carved "AFRC" and/or "RUF" on the bodies of 18 civilians in Kayima between February and April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels amputated the hands of five civilian men in Sawao between February and April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels beat an unknown number of civilians with sticks and the butts of guns in Sawao between February and April 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels used an unknown number of civilians for forced labour between February and April 1998.	8(j), 8(k), 8(l), 8(m)
Rebels pillaged the property of TF1-197 near Tombodu on or about February/March 1998.	8(d), 8(j), 8(k), 8(l), 8(m)
AFRC/RUF rebels committed an unknown number of acts of pillage during the February/Mareh 1998 attack on Koidu Town.	8(j), 8(k), 8(l), 8(m)
AFRC and RUF rebels looted funds from Tankoro bank in Koidu Town on or about March 1998.A76	8(j), 8(k), 8(l), 8(m)

Kailahun District	
Bockarie killed 3 civiliansand ordered the killing of another 63 in Kailahun Town on 19 February 1998.	8(o), 8(p), 8(q), 19
One hors de combat SLA Soldier was Killed on Bockarie's orders in Kailahun on 19 February 1998.	8(q), 9
TF1-314 was forcibly married to an RUF fighter between 1994 and 1998.	2, 8(o), 8(r), 10, 12
TF1-093 was forcibly married to an RUF fighter between 1996 and 1998.	2, 8(o), 8(r), 10, 12
Unknown number of women were forcibly married to RUF fighters between November 1996 and about 15 September 2000.	2, 8(o), 8(r), 10, 12
Unknown number of civilians were foreed to work on RUF "government" farms and farms owned by eommanders from 30 November 1996 to about 15 September 2000.	6, 7, 8(s), 11
Unknown number of civilianswere forced to work and carry loads to and from different areas of Kailahun Distriet from 30 November 1996 and 15 September 2000.	6, 7, 8(s), 11
Unknown number of civilianswere forced to mine for diamonds in different arcas of Kailahun Distriet from 30 November 1996 and 15 September 2000.	6, 7, 8(s), 11
Unknown number of civilians were forcibly trained for military purposes from 30 November 1996 to 1998.	8(s), 11
UNAMSIL	
Physical Assault on Salahuedin	14, 16
Physical Assault and Abduction of Jaganathan	14, 16
Note: Gbao was not convicted of anything outside these two crimes in relation to the events surrounding UNAMSIL	
SENTENCE	
General Appeal against Sentence	18(d)
Gravity of the Crimes	18(a)
Aggravating Factors	18(b)
Mitigating Factors	18(c)

Count	Ground(s) of Appeal
All Counts All Locations	4, 6, 7, 18(a), 18(b), 18(c), 18(d),
Counts 1-14	8(a), 8(b), 8(c), 8(e), 8(f), 8(g), 8(i)
Bo District	
Count 3	8(d), 8(j), 8(k), 8(l), 8(m), 19
Count 4	8(d), 8(j), 8(k), 8(l), 8(m)
Count 5	8(d), 8(j), 8(k), 8(l), 8(m)
Count 14	8(j), 8(k), 8(l), 8(m)
Kenema District	
Count 3	8(j), 8(k), 8(l), 8(m), 19
Count 4	8(d), 8(j), 8(k), 8(l), 8(m)
Count 5	8(d), 8(j), 8(k), 8(l), 8(m)
Count 11	8(d), 8(j), 8(k), 8(l), 8(m)
Count 13	8(j), 8(k), 8(l), 8(m)
Kono District	
Count 3	8(d), 8(j), 8(k), 8(l), 8(m), 19
Count 4	8(d), 8(j), 8(k), 8(l), 8(m)
Count 5	8(d), 8(j), 8(k), 8(l), 8(m)
Count 6	8(d), 8(j), 8(k), 8(l), 8(m)
Count 7	8(d), 8(j), 8(k), 8(l), 8(m)
Count 8	8(d), 8(j), 8(k), 8(l), 8(m)
Count 9	8(j), 8(k), 8(l), 8(m), 8(d)
Count 10	8(d), 8(j), 8(k), 8(l), 8(m)
Count 11	8(d), 8(j), 8(k), 8(l), 8(m)
Count 13	8(j), 8(k), 8(l), 8(m)
Count 14	8(d), 8(j), 8(k), 8(l), 8(m)
Kailahun District	
Count 1	8(o), 12
Count 2	8(p)
Count 3	8(q), 19
Count 4	8(q), 9
Count 5	8(q), 9
Count 7	2, 8(r), 10
Count 8	2, 8(r), 10
Count 9	2, 8(r), 10
Count 13	7, 8(s), 11
Bombali District	
Count 15	14, 16

Annex II

Findings of Crimes Committed By Non-JCE Members

Sub-Ground 8(d)

Findings on Crimes Committed by Non-JCE Members

Findings in Bo District

Crime	Count(s)	Relevant Paragraph(s)	Physical Perpetrators	Link with JCE Member	Did Member Act in Accordance with JCE?
Gbao was not convicted as a member of the JCE in Bo under Count 1 and 2, paras. 2047 and 2049.					
AFRC/RUF fighters killed an unknown number of civilians at Tikonko Junction.	4 and 5	996-997, 1018, 1974	A group of heavily armed fighters, para. 996.	None	Not applicable
AFRC/RUF fighters killed 14 civilians at a house in Tikonko.	4 and 5	1000, 1020, 1974	A group of heavily armed fighters, para. 996.	None	Not applicable
AFRC/RUF fighters killed 3 civilians on the street in Tikonko.	4 and 5	1001, 1003, 1021, 1974	A group of heavily armed fighters, para. 996.	None	Not applicable
AFRC/RUF fighters killed 200 civilians during attack on Tikonko on 15 June 1997.	4 and 5	1004, 1022, 1974	A group of heavily armed fighters, para. 996.	None	Not applicable
AFRC fighters killed Paramount Chief Demby, Pa Sumaili, 5 civilians near market and an unknown number of other civilians during attack on Gerihun on 26 June 1997.	4 and 5	1012, 1014, 1024-1025, 1974	Amongst the people who entered paramount chief's house were Boysie Palmer, AF Kamara and ABK, para. 1012.	None	Not applicable
AFRC/RUF fighters committed extermination in Tikonko on 15 June 1997.	3	1004, 1022, 1974	A group of heavily armed fighters, para. 996.	None	Not applieable

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Findings in Kenema District					
Crime	**Count(s)**	**Relevant Paragraph(s)**	**Physical Perpetrators**	**Link with JCE Member**	**Did Member Act in Accordance with JCE?**
Gbao was not convicted as a member of the JCE in Kenema under Count 1 and 2, paras. 2059 aud 2060.					
AFRC/RUF fighters killed Mr Dowi in Kenema Town.	4 and 5	1060, 1100, 2050	AFRC and RUF, para. 1060.	None	Not applicable
AFRC/RUF fighters killed a Limba man in Tongo Field.	4 and 5	1081, 1105, 2050	An AFRC/RUF fighter, para. 1081.	None	Not applicable
AFRC/RUF fighters killed a civilian at Lamin Street in Kenema Town.	4 and 5	1080, 2050	AFRC/RUF fighters, para. 1080.	None	Not applicable
AFRC/RUF fighters beat TF1-122 in Kenema Town.	11	1047, 1110, 2050	RUF/AFRC rebels, para. 1047.	None	Not applicable

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Findings in Kenema District					
Crime	**Count(s)**	**Relevant Paragraph(s)**	**Physical Perpetrators**	**Link with JCE Member**	**Did Member Act in Accordance with JCE?**
Gbao was not convicted as a member of the JCE in Kenema under Count 1 and 2, paras. 2059 and 2060.					
AFRC/RUF fighters killed Mr Dowi in Kenema Town.	4 and 5	1060, 1100, 2050	AFRC and RUF, para. 1060.	None	Not applicable
AFRC/RUF fighters killed a Limba man in Tongo Field.	4 and 5	1081, 1105, 2050	An AFRC/RUF fighter, para. 1081.	None	Not applicable
AFRC/RUF fighters killed a civilian at Lamin Street in Kenema Town.	4 and 5	1080, 2050	AFRC/RUF fighters, para. 1080.	None	Not applicable
AFRC/RUF fighters beat TF1-122 in Kenema Town.	11	1047, 1110, 2050	RUF/AFRC rebels, para. 1047.	None	Not applicable

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Findings in Kono District					
Crime	**Count(s)**	**Relevant Paragraph(s)**	**Physical Perpetrators**	**Link with JCE Member**	**Did Member Act in Accordance with JCE?**
Gbao has not been convicted under count 1 or 2 for the crimes committed in Kono, para. 2110.					
RUF fighters acting under the command of Officer Med killed chief Sogbeh at Tombodu sometime in February/March 1998.	4 and 5	1170, 1276, 2063	People acting under the orders of Officer Med, para. 1170.	None	Not Applicable
AFRC/RUF fighters under the command of Savage killed about 200 civilians in Tombodu between February and March 1998.	4 and 5	1165, 1274, 2063	Perpetrators acting the orders of AFRC commander Savage, para. 1165.	None	Not Applicable
AFRC/RUF fighters under the command of Savage killed about 47 civilians in Tombodu between February and March 1998.	4 and 5	1165, 1274, 2063	Savage and his men, para. 1165.	None	Not Applicable
AFRC/RUF fighters under the command of Savage killed three civilians in Tombodu sometime in March 1998.	4 and 5	1166, 1274, 2063	Rebels, who had captured the people under the orders of Staff Alhaji's boss, para. 1166.	None	Not Applicable
AFRC/RUF fighters under the command of Savage killed an unknown number of civilians by burning them alive in a house in Tombodu about March 1998.	4 and 5	1167, 1274, 2063	Savage, para. 1167.	None	Not Applicable
AFRC/RUF rebels killed six captured civilians in Yardu in April 1998.	4 and 5	1186, 1279, 2063	No detail. The only indication is that the killings took place in the rebel base in Yardu, para. 1186.	None	Not Applicable

Findings in Kono District (2)					
Crime	**Count(s)**	**Relevant Paragraph(s)**	**Physical Perpetrators**	**Link with JCE Member**	**Did Member Act in Accordance with JCE?**
AFRC/RUF fighters killed at least 29 civilians in Penduma on orders of Staff Alhaji in April 1998.	4 and 5	1192, 1195, 1196, 1278, 2063	Staff Alhaji, Junior (a SLA Vigilante), Tamba Joe (AFRC fighter) and Lt Jalloh were present, paras. 1191, 1193; Rebels shot at civilians, para. 1192; Tamba joe killed TF1-217's wife, para. 1195; Rebels acting under the orders of Alhaji killed about 15 people in a house and set the house on fire, para. 1196.	None	Not Applicable
AFRC/RUF fighters under the command of Savage committed extermination in Tombodu between February and March 1998.	3	1165-1167, 1275, 2063	People under the orders of AFRC commander savage, para. 1165; Savage and his men, para. 1165; People acting under the orders of Staff Alhaji's boss (but no evidence that they were acting under his order when committing the killings), para. 1166; Savage, para. 1167.	None	Not Applicable
AFRC/RUF rebels raped TF1-218 twice in Bumpeh on or about March 1998.	6 and 9	1206, 1290, 1299, 2063	Rebels, para. 1206.	None	Not Applicable
AFRC/RUF rebels forced a couple to have sexual intercourse in front of other captured civilians and their daughter was then forced to wash her father's penis in Bumpeh on or about March 1998.	9	1205, 1305-1306, 2063	Rebels, para. 1205.	None	Not Applicable
Staff Alhaji raped a woman in Tombodu in April 1998.	6 and 9	1171, 1288, 1299, 2063	Staff Alhaji, para. 1171.	None	Not Applicable
AFRC/RUF rebels raped TF1-217's wife right times and also raped an unknown number of other women in Penduma in April 1998.	6 and 9	1193-1195, 1290, 1299, 2063	8 fighters, including Junior and Tamba Joe, para. 1193; Staff Alhaji was present, para. 1193; Lieutenant Jalloh was also there, para. 1191.	None	Not Applicable

Findings in Kono District (3)					
Crime	**Count(s)**	**Relevant Paragraph(s)**	**Physical Perpetrators**	**Link with JCE Member**	**Did Member Act in Accordance with JCE?**
Rebels raped an unidentified female civilian in Bomboafuidu by inserting a pistol into her vagina on or about April 1998.	6 and 9	1208, 1290, 1299, 2063	About 50 armed men mostly in combat uniform, para. 1207.	None	Not Applicable
AFRC/RUF rebels forced approximately 20 captured civiliansto have sexual intercourse with each other in Bomboafuidu on or about April 1998.	9	1207, 1309, 2063	About 50 armed men mostly in combat uniform. para. 1207.	None	Not Applicable
AFRC/RUF rebels used knives to slit the genitalia of several captured male and female civiliansin Bomboafuidu on or about April 1998.	9	1208, 2063	About 50 armed men mostly in combat uniform, para. 1207; Rebels, para. 1208.	None	Not Applicable
AFRC/RUF rebels raped TF1-195 five times and raped five other women in Sawao between February and April 1998.	6 and 9	1181, 1185, 1290, 1299, 2063	Rebels, para. 1180-1181, 1185; Lieutenant T, gave the order to kill the civilians, para. 1182.	None	Not Applicable
RUF fighters forcibly married an unknown number of women in the civilian camp at Wendedu on or about April 1998.	7 to 9	1178-1179, 1294, 1297,1299, 2063	AFRC/RUF rebels, para. 1178; Captain Bai Bureh, para. 1178; Lieutenant Jalloh was also present, para. 1178; Commanders, para. 1179.	None	Not Applicable
AFRC/RUF rebels severely beat TF1-197 near Tombodu in February or March 1998.	10 and 11	1163, 1312, 2063	AFRC/RUF rebels, para.1161; TF1 197 was told that tthe leader of these rebels, Named Musa, reported to Staff Alhaji. However one of the rebels referred to his boss as commando, para. 1164.	None	Not Applicable

Findings in Koŋo District (4)					
Crime	Count(s)	Relevant Paragraph(s)	Physical Perpetrators	Link with JCE Member	Did Member Act in Accordance with JCE?
AFRC/RUF rebels knocked out several of TF1-015's teeth in Wendedu in March 1998.	10 and 11	1177, 1315, 2063	Captain Banya, para. 1177; TF1 197 was taken in Wendedu camp by Rocky, para. 1177.	None	Not Applicable
Rebels led by Staff Alhaji amputated the hands of three civilians in Tombodu in April 1998.	10 and 11	1172, 1311, 2063	Staff Alhaji and the rebels, para. 1172.	None	Not Applicable
Rebels amputated the hands of at least three men in Penduma in April 1998.	10 and 11	1197, 1198, 1318, 2063	Rebels and Staff Alhaji, para. 1197 and 1198.	None	Not Applicable
Rebels amputated TF1-197's arm in Yardu in April 1998.	10 and 11	1187, 1319, 2063	Rebels from the rebel base in Yardu, paras. 1186-1187.	None	Not Applicable
TF1-197 and his brother were flogged by rebels under the command of Staff Alhaji in Tombodu in April 1998.	11	1173, 1313, 2063	Rebels under the command of Staff Alhaji, and staff Alhaji was watching, para. 1173.	None	Not Applicable
AFRC/RUF rebels carved "AFRC" and/or "RUF" on the bodies of 18 civilians in Kayima between February and April 1998.	10 and 11	1190, 1315, 2063	Rebels led by one Bangalie, para. 1190.	None	Not Applicable
AFRC/RUF rebels amputated the hands of five civilian men in Sawao between February and April 1998.	10 and 11	1184, 1316, 2063	Small boys instructed by the Rebels, following the order of Lieutenant T to kill the civilians, paras. 1182, 1184.	None	Not Applicable

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Findings in Kono District (5)					
Crime	**Count(s)**	**Relevant Paragraph(s)**	**Physical Perpetrators**	**Link with JCE Member**	**Did Member Act in Accordance with JCE?**
AFRC/RUF rebels beat an unknown number of civilianswith sticks and the butts of guns in Sawao between February and April 1998.	11	1184, 1317, 2063	Rebels, following the order of Lieutenant T to kill the civilians, paras. 1182, 1184.	None	Not Applicable
Rebels pillaged the property of TF1-197 near Tombodu on or about February/March 1998.	14	1164, 1335, 2063	TF1 197 was told that the leader of the rebels, Musa, reported to Staff Alhaji. Another rebel referred to his boss as Commando, para. 1164.	None	Not Applicable

Annex III

Errors Under Count 13: Farming and Mining in Kailahun District: Factual Misrepresentations

Sub-grounds 8(i) and 8(s); Ground 11

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (paragraphs 1414-1431)					
2630	TF1-113	2 March 2006, pp.37-38	Misstated facts. "Exercised extreme caution and often found it necessary to seek other corroborative evidence" (para. 600).	RUF used civilians as forced labour prior to 30 November 1996 and this practice continued thereafter.	[redacted] Not entirely clear that she was forced; only testified that she didn't receive food from the RUF. (transcripts of 2 March 2006, p.37-39)
2631	DIS-302	27 June 2007, pp.22-26, p.62	Lacks credibility (paras 485; 531).	RUF fighters captured civilians at the war front and sent them to Kailahun District.	The civilians had to work, like all the civilians did, but were not punished if they refused t work nor were they prevented from going back to their villages.
2632	DIS-080	5 October 2007, p.87	Lacks credibility (paras 485; 531).	The captured civilians were placed in the custody of the G5 for screening (purpose of screening was to allocate forced labour).	Civilians were returned from the frontlines. The G5 took them so they could "find a place and ask that civilian the place where he could stay so that there would not be any problem, so that nobody could force him".

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (2)					
2632	DIS-080	8 October 2007, p.9	Lacks credibility (paras 485; 531).	The captured civilians were plaeed in the custody of the G5 for screening (purpose of screening was to allocate forced labour).	Civilians were returned from the frontlines. 'If there were no securityfor that person's life, they would bring that person and handle -- and hand that person over to the G5 so that thatperson's life would be saved.'
2637	TF1-367	23 June 2006, pp.46-47	Generally credible.	Many of thc civilians were forced to live in Zoo Bushed, which were for mining or farming communities guarded by RUF fighters 'for protection'.	Witness talks about Kono (Guinea Highway) not Kailahun. (p.48).

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Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (3)					
2639	TF1-113	6 March 2006, pp.25-30	Misstated facts. "Exercised extreme caution and often found it necessary to seek other corroborative evidence" (para. 600).	Pass system was a means of exercising control over the population.	There was no mention in this testimony of the pass system being a tool used to control the population. It stated, in relevant part, 'And in order to move through the Kailahun District in 1998 civilians would obtain passes from the G5; am I right? A. Yes... [w]herever you wanted to go they would give you pass'. (p.26); 'The pass would mean that nobody suspected the civilian of being an enemy combatant? A. Yes. Q. So nobody would harm the civilians if they had a pass? A. No, as long as you were travelling. If you were travelling and you had the pass, nobody would do anything wrong to you.' (p.27).
2645	TF1-113	2 March 2006, p.50	Misstated facts. "Exercised extreme caution and often found it necessary to seek other corroborative evidence" (para. 600).	Activities of the civilians who were forced to work.	Relates to testimony on killing of the Kamajors.

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (4)					
2650	TF1-114	28 April 2005, pp.57, 61, 100	No witness assessment in Judgement.	Unlike the fighters, workers were neither given a salary nor given anything to eat, feeding off bush vegetables.	[Witness only saw what he testified to as forced farming twice] P. 61: "These civilians were from the whole of the chiefdom...when they come [to farm on RUF farms], they walk for the whole day and they go back. They only prepare food for them, no salary. After working they give you food, and then you walk on foot back" p.100: "They were provided condiment [food] for work".
2650	TF1-113	6 March 2006, pp.32-38	Misstated facts. "Exercised extreme caution and often found it necessary to seek other corroborative evidence" (para. 600).	Unlike the fighters, workers were neither given a salary nor given anything to eat, feeding off bush vegetables.	Witness had knowledge of just one farm that she visited one time (6 March 2006, pp.32-33, 35). She spoke of workers being forced to go work on RUF farms, but not whether they were given a salary or anything to eat. She conceded that the civilians received education and healthcare.

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (5)					
2650	TF1-108	13 March 2006, pp.32-33	Testimony only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597). Evidenee on matters within his personal knowledge credible only if corroborated with credible and reliable evidence (para. 597).	Unlike the fighters, workers were neither given a salary nor given anything to eat, feeding off bush vegetables.	No testimony in this citation that relates to text.
2658	TF1-108	7 March 2006, pp. 104-105	Testimony accepted on matters within his personal knowledge and touching on his activities and involvement in the conflict within his locality as credible where corroborated by other credible and reliable evidence particularly on issues of forced labour (...) (para. 597).	Approximately 300 civilians were forced to work on the two big government farms in Giema.	Uncorroborated. Witness testimony should be entirely disregarded.

Footnote number	Witness	Date Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (6)					
2659	TF1-108	7 March 2006, pp.105-06	Testimony accepted on matters within his personal knowledge and touching on his activities and involvement in the conflict within his locality as credible where corroborated by other credible and reliable evidence particularly on issues of forced labour (...) (para. 597).	Could not refuse to farm because there were armed men observing and supervising them when farming.	Uncorroborated. Witness testimony should be entirely disregarded.
2671	TF1-108	7 March 2006, pp. 110-11	Testimony accepted on matters within his personal knowledge and touching on his activities and involvement in the conflict within his locality as credible where corroborated by other credible and reliable evidence particularly on issues of forced labour (...) (para. 597).	Civilians were foreed to work on Gbao's farm from 1995 to 2000.	The farming that started in 1995 started with Issa. We started doing a farm for him. So when we started doing it in 1996, we farmed for Issa, Sam Bockarie and Mr Gbao. In 1997 we did it again. In 1998 we did it again. In 1999 we did it again. The one we did in 2000, it was done on the main highway before the war eould end. That was more than 100 bushels.'

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (7)					
2671	TF1-330	14 March 2006, p.27	No witness assessment in Judgement.	Civilians were forced to work on Gbao's farm from 1995 to 2000.	"We cultivated a farm for Augustine Gbao" [No discussion of whether it was forced labour or not].
2671	TF1-330	16 March 2006, pp.45-46, 51-52	No witness assessment in Judgement.	Civilians were forced to work on Gbao's farm from 1995 to 2000.	Gbao's name is not mentioned. Concerns farm of Issa Sesay.
2671	DIS-302	27 June 2007, pp. 6-9, 10-13	Lacks credibility (paras 485; 531).	Civilians were forced to work on Gbao's farm from 1995 to 2000.	Gbao's name is not mentioned. Concerns RUF farms overseen by Issa Sesay.
2672	TF1-330	14 March 2006, pp.30-31	No witness assessment in Judgement.	Civilians were treated badly, worked at gunpoint and sometimes beaten.	No mention of Gbao's farm. Testimony relates to Sesay's farm. No mention of being forced to work under gunpoint.

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (8)					
2672	DIS-178	19 October 2007, p.7	Lacks credibility (paras 485; 531).	Civilians were treated badly, worked at gunpoint and sometimes beaten.	No mention of Gbao's farm. Testimony relates to Sesay's farm. Witness mentions only that Sesay's bodyguards were armed, but not whether they forced eivilians to work under gunpoint at their farm.
2675	TF1-108	7 March 2006, p.113	Testimony only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597).	Civilians were forced to work in Gbao's farm in Giema.	Uncorroborated (beeause TF1-330 does not eorroborate witness. See next citation). Testimony from TF1-108 only aceepted when corroborated by a credible source when dealing with acts and conduct of the Aeeused (para 597).

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (9)					
2675	TF1-330	14 March 2006, pp.28-29	No witness assessment in Judgement.	Civilians were forced to work in Gbao's farm in Giema.	"Q: You've talked about civilians working on farms for commanders. What do you mean by that? A: Like Issa Sesay, we cultivated the farm for him. We cultivated a farm for Augustine Gbao..." [No discussion of whether it was forced or not. Additionally, in the many years of asking questions to this witness, the Prosecution never elicited UNTIL TRIAL that Gbao had a farm...] (p.27).
2676	TF1-108	7 March 2006, p.113	Testimony only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597).	Bodyguard named Korpomeh guarded civilians who worked on Gbao's farm.	Uncorroborated. Testimony from TF1-108 only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597).

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (10)					
2683	TF1-108	10 March 2006, pp. 32-33	Testimony only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597).	All 10 districts of Luawa Chiefdom were forced to provide goods to the RUF.	Uncorroborated. Testimony from TF1-108 only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597).
2684	TF1-108	10 March 2006, pp. 32-33	Testimony only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597).	1997-99, in Talia and other villages, up to 150 civilians would 'subscribe' to harvest about 300 bags of cocoa per year to G5.	General evidence about the amount needed to be sent to the RUF, but nothing about Talia, 1997-99 or 150 civilians sending 300 bags of cocoa.
2684	TF1-330	14 March 2006, pp.42-48	No witness assessment in Judgement.	1997-99, in Talia and other villages, up to 150 civilians would 'subscribe' to harvest about 300 bags of cocoa per year to G5.	No mention of Talia, 150 civilians, or 300 bags of cocoa per year to the RUF in this footnote.
2684	TF1-330	15 March 2006, pp. 50-54	No witness assessment in Judgement.	1997-99, in Talia and other villages, up to 150 civilians would 'subscribe' to harvest about 300 bags of cocoa per year to G5.	In 1997, 35 bags of cocoa were subscribed in Talia. In 1998, 37 bags. And in 1999, 40 bags.

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (11)					
2691	TF1-108	10 march 2006, p. 27	Testimony only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597).	Between 100 and 200 civilians were forced to carry the goods on their heads from Giema to Gbao in Kailahun.	Uncorroborated. Testimony from TF1-108 only aecepted when corroborated by a crcdible source when dealing with acts and conduct of the Aceused (para 597).
2693	DIS-174	21 January 2008, pp. 73-74	Lacks credibility (paras. 485; 531).	Civilians were forced to transport goods to the trading site at the Guinean border.	This section discusses trade at the Guinea border, but nothing about anyone forced to do anything. The witness said that people were in a good mood.
2694	(*DAG-110*) Actually it is DIS 157	25 January 2008, pp. 31-32	Generally unreliable witness. Some aspects of DIS-157's testimony accepted as credible where supported by the general evidence or corroborated by some other reliable evidence (paras. 569-570).	Civilians were escorted to trading sites by Commanders and fighters.	Civilians were escorted to the trading sites by armed men, but they proceeded to the site voluntarily.

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Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Farming (12)					
2700	TF1-108	10 March 2006, pp. 32-33	Testimony only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597).	Civilians carried palm oil, cocoa and coffee and exchanged for rice, salt and maggi and sometimes clothes.	No mention in the citation provided.
2700	(*DAG-110*) Actually it is DIS 157	25 January 2008, pp. 31-32	Generally unreliable witness. Some aspects of DIS-157's testimony accepted as credible where supported by the general evidence or corroborated by some other reliable evidence (paras. 569-570).	Civilians carried palm oil, cocoa and coffee and exchanged for rice, salt and maggi and sometimes clothes.	No mention in the citation provided.
2703	(*DAG-110*) Actually it is DIS 157	25 January 2008, pp. 31-32	Generally unreliable witness. Some aspects of DIS-157's testimony accepted as credible where supported by the general evidence or corroborated by some other reliable evidence (paras. 569-570).	Approximately 500 civilians and fighters participated in trade at the trading site.	Uncorroborated. Misleading in asserting that civilans involved went involuntarily.

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Mining (paragraphs 1432-33)					
2706	TF1-371	20 July 2006, pp. 34-37, 54	Testimony relating to role of Gbao or anything relating to acts and conduct of the three Accused requires corroboration (para. 543).	Work in the mines was done by civilians who were forced to work under the supervision of AFRC/RUF fighters.	The citation refers to mining in Kenema and Kono (p.36), Kono (p.37) and Kenema (Tongo Field) (p.54). There is no mention of Kailahun District.
2708	TF1-330	14 March 2006, pp. 48-49	No witness assessment in Judgement.	In 1998 and 1999, civilians were captured forced to mine diamonds for Bockarie in Giema.	No mention that the workers were captured or forced to work. He went once and thought that they were hungry.
2708	TF1 108	8 March 2006, p.37	Testimony only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused. (para 597) Evidence on matters within his personal knowledge credible only if corroborated with credible and reliable evidence. (para. 597)	In 1998 and 1999, civilians were captured foreed to mine diamonds for Bockarie in Giema.	Accurate (only related to one event with Bockarie though) but uncorroborated sinee TF1 330's evidence were misrepresented.

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Mining (2)					
2709	TF1-330	14 March 2006, pp. 48-49	No witness assessment in Judgement.	Bockarie came from Buedu to Giema and took civilians to mine.	No mention of Boekarie eoming from Buedu with civilians.
2709	TF1 108	8 March 2006, p.37	Testimony only accepted when corroborated by a credible source when dealing with acts and eonduet of the Accused (para 597). Evidence on matters within his personal knowledge credible only if corroborated with credible and reliable evidence (para. 597).	Bockarie came from Buedu to Giema and took civilians to mine.	Accurate but uncorroborated since TF1 330's evidenee was misrepresented.

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Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Mining (3)					
2711	TF1-108	8 March 2006, pp.38-40	Testimony only accepted when corroborated by a credible source when dealing with acts and conduct of the Accused (para 597). Evidence on matters within his personal knowledge credible only if corroborated with credible and reliable evidence (para. 597).	Forced mining for the RUF was also carried out in Yandawahun, in Mafindo (Mafindor), on the Guinea border, Nyandehun and in Jojoima in Malema Chiefdom.	Accurate but uneorroborated since TF1 330's evidence was misrepresented.
2711	TF1-330	14 March 2006, pp. 48-50	No witness assessment in Judgement.	Forced mining for the RUF was also carried out in Yandawahun, in Mafindo (Mafindor), on the Guinea border, Nyandehun and in Jojoima in Malema Chiefdom.	No mention that workers were forced to work against their will and there is no evidence that the RUF were involved. Nyandehun and Mafindor are mentioned, but not Yandawahun and Jojoima.

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Mining (4)					
2712	TF1-366	10 November 2005, pp. 7-8	Evidence disregarded as it relates to Gbao's aets and conduct without corroboration in some material aspect by a reliable witness (para. 546).	Other mining locations included Yenha, Jabama and Golahun.	No mention that workers were forced to mine on behalf of the RUF. Also, not clear that the RUF received the diamonds, instead [redacted] and Sesay personally.
2713	TF1-330	14 March 2006, pp. 48-50	No witness assessment in Judgement.	Gbao and Patrick Bangura oversaw the mining in Giema as well as 'the soldiers who had guns'.	Witness stated that Patrick and Gbao oversaw the mining (p.49). But the next time witness only mentions Gbao as being the OSC in the area. Also on 17 March 2006, p.32, he stated that "Pa Patrick was in charge of that mining", resolving that Gbao's role as involved was only because "that sort of work would not be happening [in the Kailahun area]...and Augustine Gbao was not there".

Footnote number	Witness	Date of Testimony	Witness Assessment	Text of Judgement	Actual Testimony
Mining (5)					
2714	TF1-330	14 March 2006, p. 49	No witness assessment in Judgement.	The civilians worked without food.	The witness went one time, did not reference any subsequent conversations with the people at the mines and did not state that they were never given food. He stated "[t]hey didn't eat food there. They were just working on empty stomach, on that day that I went when I met them there". DIS-157, who was found credible for earlier testimony relating to diamond mining, stated that the workers were fed.

Annex IV

Redacted Statement [redacted]

Sub- Ground 14

CONFIDENTIAL

Annex V

Senteneing: Findings relied Upon to Assess the Gravity of the Crimes While Gbao Has Not Been Convicted for Them

Sub-Ground 18(a)

Sentencing: Findings Relied Upon to Assess the Gravity of the Crimes While Gbao Has Not Been Convicted For Them			
Finding	**Paragraph(s)**	**Relates to:**	**Why Finding is Not Permitted Against Gbao**
All the killings in Bo District constituted acts of terrorism.	110	Acts of Terror in Bo	Acquitted under Count 1 in Bo District.
72 people died because of acts of terrorism, 11 beeause of collective punishment in Kenema District during Junta period.	111	Acts of terror in Bo; Collective Punishments in Bo	Acquitted under Counts 1 & 2 in Kenema District.
Discussing the killing of 230 people for collective punishment in Kono District.	112	Collective Punishment in Kono	Acquitted under Counts 1 & 2 in Kono District.
Murders committed by Colonel Banya.	113	Acts of terror in Bo	Acquitted under Counts 1 & 2 in Kono District.
Killing of 15 civilians by RUF Rambo.	113	Acts of terror in Bo	Acquitted under Counts 1 & 2 in Kono District.
Acts 1 & 2 will increase the gravity of the underlying offence.	116	Acts or terror; collective punishment	Can only relate to Gbao in Kailahun District, as Gbao was acquitted of Counts 1 & 2 in Bo, Kenema and Kono Districts.
Sexual crimes were committed to terrorise the population.	123	Acts of terror (no finding of Count 1 against Gbao in Kono)	Can only relate to Gbao in Kailahun District, as Gbao was acquitted of Counts 1 & 2 in Bo, Kenema and Kono Districts.
All rapes and forced marriages constitute acts of terrorism.	131	Acts of terror	Can only relate to Gbao in Kailahun District. as Gbao was acquitted of Counts 1 & 2 in Bo, Kenema and Kono Districts.
The Accused persons, by their criminal acts, have committed acts of terror and collective punishments.	139	Collective Punishments regarding Counts 10-11	Gbao was not convicted, as a member of the the JCE, for any acts of terrorism or collective punisbments in relation to Counts 10-11.
Findings of physical violence coustituting acts of terrorism and/or collective punishment in Kenema District.	141, 143 (civilians tied up & beaten); 148 (physieal violence of TF1-217)	Acts of terrorism and collective punishments regarding Counts 10-11	Gbao was not convicted, as a member of the the JCE, for any acts of terrorism or collective punishments in relation to Counts 10-11.

Finding	Paragraph(s)	Relates to:	Why Finding is Not Permitted Against Gbao
Findings of physical violence constituting acts of terrorism and/or collective punishment in Kono District.	144 (beating of civilians); 145 (knocking out of TF1-015's teeth by Major Rocky); 146 (amputations); 147 (civilains tied and locked in a house set ablaze); 150 (amputations)	Acts of terrorism and collective punishments regarding Counts 10-11	Gbao was not convicted, as a member of the the JCE, for any acts of terrorism or collective punishments in relation to Counts 10-11.
Crimes of physical violence that are also considered collective punishment increase the gravity of the sentence.	151; 158	Acts of terrorism and collective punishments regarding Counts 10-11	Gbao was not convicted, as a member of the the JCE, for any acts of terrorism or collective punishments in relation to Counts 10-11.
At least 16 crimes of physical violence in Kenema District amounted to acts of terrorism and collective punishment.	153	Acts of terrorism and collective punishments regarding Counts 10-11	Gbao was not convicted, as a member of the the JCE, for any acts of terrorism or collective punishments in relation to Counts 10-11.
Crimes of enslavement that are also found to constitute acts of terrorism or collective punishment willl increase the gravity of the offence.	171	Acts of terrorsm and collective punishment under Count 13	Gbao was not convicted, as a member of the the JCE, for any acts of terrorism in relation to Count 13.
Findings in relation to looting in Bo & Kono Districts amount to acts of terror.	172, 173	Acts of terror in Bo District	Gbao was not convicted, as a member of the the JCE, for any acts of terrorism in relation to Count 14.
Crimes of looting that are also considered acts of terror and collective pnnishments increase the gravity of the criminal conduct.	178	Acts of terror and collective punishment in Bo	Gbao was not convicted, as a member of the the JCE, for any acts of terrorism in relation to Count 14.
Acts of burning under Count 1.	265	Acts of terror in Bo & Kenema	Gbao was not convicted, as a member of the the JCE, for any acts of terrorism in relation to Count 14.

Finding	Paragraph(s)	Relates to:	Why Finding is Not Permitted Against Gbao
UNAMSIL			
14 attacks were directed against UNAMSIL peacekeepers in a hort period of time.	191	Scale and Brutality of the Offences Against UNAMSIL	Gbao was only convicted for aiding and abetting by tacitly approving the physical assault on Salahuedin and the first part of the attack on Lt Colonel Jaganathan Ganase.
Attacks were characterised by abductions, captures, brutality, threats of death and the disarming of UNAMSIL peacekeepers.	191	Scale and Brutality of the Offences Against UNAMSIL	Gbao was only convicted for aiding and abetting by tacitly approving the physical assault on Salahuedin and the first part of the attack on Lt Colonel Jaganathan Ganase.
RUF fighters assaulted individual members of the peacekeeping force, such as Salahuedin, Jaganathan, Maroa's group, Odhiambo's group and Rono's group.	192	Scale and Brutality of the Offences Against UNAMSIL	Gbao was only convicted for aiding and abetting by tacitly approving the physical assault on Salahuedin and the first part of the attack on Lt Colonel Jaganathan Ganase.
RUF fighters used dishonest means to lure the peacekeepers, pretending to display interest in resolving the situation but only then to seize and capture.	192	Scale and Brutality of the Offences Against UNAMSIL	Gbao was not involved in this action, individually or under Article 6.3.
Several peacekeepers were detained in small filthy rooms with no food to eat at Teko Barracks, some peacekeepers were photographed as they were forced to stand behind dead bodies covered with blood-stained blankets. Sex peacekeepers were stripped to their underwear, hands tied behind their backs with electrical wire; some were beaten and slapped. Many captured peacekeeepers were reeklessly transported in trucks from one location to another, guarded by armed RUF fighters. At least 10 peacekeepers were seriously injured in an accident involving such transfers.	193	Scale and Brutality of the Offences Against UNAMSIL	Gbao was not involved in this action, individually or under Article 6.3.
Fighters also staged ambushes and launched violent offensive against the peacekeepers, even children under the age of 15 years armed with grenades and rockets where used to ambush peacekeepers on the Makeni-Magburaka highway.	193	Scale and Brutality of the Offences Against UNAMSIL	Gbao was not involved in this action, individually or under Article 6.3.

Finding	Paragraph(s)	Relates to:	Why Finding is Not Permitted Against Gbao
UNAMSIL (2)			
Kasoma and 10 of his men from the Zambian Battalion (ZAMBATT) were then captured and held captive for 23 days. Three other peacekeepers were attacked in Lunsar and two of them disappeared never to be seen again.	193	Scale and Brutality of the Offences Against UNAMSIL	Gbao was not involved in this action, individually or under Article 6.3.
Approximately 100 peaeekeepers in convoy were surrounded and forcibly disarmed by 1000 RUF fighters.	193	Scale and Brutality of the Offences Against UNAMSIL	Gbao was not involved in this action, individually or under Article 6.3.
Some peacekeepers were deprived of their liberty, constantly confined under guard, their passports and money confiscated, stripped naked.	193	Scale and Brutality of the Offences Against UNAMSIL	Gbao was not involved in this action, individually or under Article 6.3.
The fighters further launched attacks by opening gunfire on UN helicopters in Yengema and engaging peacekeepers in crossfire in Magburaka.	193	Scale and Brutality of the Offences Against UNAMSIL	Gbao was not involved in this action, individually or under Article 6.3.
Several peacekeepers were captured, injured or killed as a result of these attacks. Thesc included, KENBATT peacekeepers Private Yusif and one Wanyama who died as a result of injuries inflicted during the attacks.	196	UNAMSIL: Number of Victims	Gbao was only convicted for aiding and abetting by tacitly approving the physical assault on Salahuedin and the first part of the attack on Lt Colonel Jaganathan Ganase.
Two unidentified KENBATT peacekeepers and three UN peacekeepers in Lunsar went missing and two never returned and were declared dead.	196	UNAMSIL: Number of Victims	Gbao was not involved in this action, individually or under Article 6.3.
A vast majority of peacekeeper suffered physical assault and were forcibly detained these included Kasoma and ten ZAMBATT's who were detained for 23 days, 100 UNAMSIL peacekeepers were captured by approximately 1000 RUF fighters.	196	UNAMSIL: Number of Victims	Gbao was only convicted for aiding and abetting by tacitly approving the physical assault on Salahuedin and the first part of the attack on Lt Colonel Jaganathan Ganase.

Finding	Paragraph(s)	Related Issue	Why Finding is Not Permitted Against Gbao
UNAMSIL (3)			
Peacekeepers suffered severe phyiscal and psychlogical pain and injury as a direct consequence of the attacks by the RUF fighters.	197	UNAMSIL: Impact on Victims and Degree of Suffering	Gbao was only convicted for aiding and abetting by tacitly approving the physical assault on Salahuedin and the first part of the attack on Lt Colonel Jaganathan Ganase.
Salahuedin was punched in the face by Kallon, who then attempted to stab him. Jaganathan was beaten and forcibly abducted in a vehicle and taken to different locations where he was held for approximately three weeks.	198	UNAMSIL: Impact on Victims and Degree of Suffering	Gbao was not involved in Jaganathan's three week detention, but was convicted for aiding and abetting these two attacks by Kallon.
Maroa and three other peacekeepers were shot at, disarmed, beaten and consequently detained. Gjellesdad and Mendy were detained for several weeks. Rono and three others suffered the same fate.	198	UNAMSIL: Impact on Victims and Degree of Suffering	Gbao was not involved in this action, individually or under Article 6.3.
The conditions of detention were very poor and unsuitable for their purpose. The Chamber concludes that the attacked and captured UNAMSIL peacekeepers suffered physical and psychological harm, as well as humiliation and degrading treatment.	198	UNAMSIL: Impact on Victims and Degree of Suffering	Gbao was not involved in this action, individually or under Article 6.3.

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Annex VI

Review of Aiding and Abetting Convictions in SCSL, ICTR and ICTY (Execrpt)

Sub-Ground 18(d)

Review of Aiding and Abetting Convictions in SCSL, ICTR and ICTY (Excerpt)[1]

SCSL
CDF Case *Prosecutor v. Fofana and Kondewa*, Doc. No. SCSL-04-14-T-785, Judgement, Trial Chamber, 2 August 2007. *Prosecutor v. Fofana and Kondewa*, Doc. No. SCSL-04-14-A-829, Judgement, Appeals Chamber, 28 May 2008.
Crimes that were Aided and Abetted (Tongo Field)
A 12 year-old boy named Foday Koroma was killed in Talama because he was related to a rebel from Tongo; 150 Loko, Limba and Temne tribe members were separated from members of other tribes and were killed in Talama; Two men identified as rebels were killed by Kamabote at the NDMC Headquarters in Tongo; Kamabote killed a man named "Dr. Blood" and a woman named Fatmata Kamara at the NDMC Headquarters in Tongo. Both were considered to be collaborators; 20 men who had been accused of being rebels were hacked to death with machetes at the NDMC Headquarters in Tongo; Kamajors shot at a crowd of civilians at the NDMC Headquarters in Tongo. Many civilians were hit by stray bullets and at least one died; TF2-048's brother was killed by a Kamajor; Kamajors at a cheekpoint hacked one man to death for carrying a photograph of a rebel; Kamajors at another checkpoint hacked a boy named Sule to death for carrying a wallet that resembled SLA fatigues; Kamajors separated men and women in Bumie and killed five men after making them stare at the sun. (xiii) Shortly after the third attack on Tongo, a group of 65 civilians was separated into two lines in Kamboma; the Kamajors shot the first 57 people and rolled the bodies into a swamp behind a house. The last eight people were hacked in the neck with machetes and rolled into the swamp with the other bodies. Only one man survived; Aruna Konowa was killed in Lalehun, on the order of a Kamajor boss named Chief Baimba Aruna, because he was considered to be a collaborator; Brima Conteh was killed in Lalehun by Kamajors who accused him of being "the chief of the rebels".[2] A Kamajor hacked at three people with a cutlass; At a checkpoint in Dodo, Kamajors hacked the right hand of a man they thought was a rebel; A group of 65 civilians was separated into two lines in Kamboma; 64 were killed. One man was hacked in the neck with a machete but survived; Some time after escaping from a checkpoint in Panguma, Kamabote found TF2-035 in Ngiehun. On discovering that TF2-035 was a Limba, Kamabote ordered a child soldier named "Small Hunter" to kill TF2-035. Small Hunter shot TF2-035 five times; one bullet is still in his body.[3]

[1] If there is no note on the appeal judgement, this means that the relevant findings were not discussed during the appeal.
[2] *CDF* Trial Judgement, para. 750.
[3] *Id.* at para. 756.

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Position(s) of the Accused	
Fofana	Director of War.[4] He was the overall boss of the commanders at Base Zero'[5] Together with Norman and Kondewa they were 'essential components of the leadership organisation' 'They were the exeeutives of the CDF actually taking the decisions. while nobody else could take a decision in their absence. They were the leaders of the CDF and all the Kamajors looked up to them.'[6] Group which 'made strategic war decisions of determining when and where to go to war.'[7] 'Fofana (...) planned and executed the war strategies and received frontline reports from the eommanders.'[8] 'Fofana selected commanders to go to battle and could, on occasion, issue direct orders to these commanders. (...) Fofana was responsible for the receipt and provision of ammunitions at Base Zero to the cominanders upon the instruction of Norman.'[9]
Kondewa	High Priest of the Kamajors. 'Kondewa in his capacity as High Priest was in charge of the initiations at Base Zero and was the head of all the CDF initiators in the eountry.'[10] Together with Norman and Fofana they were 'essential eomponents of the leadership organisation' 'They were the executives of the CDF actually taking the decisions, while nobody else could take a decision in their absence. They were the leaders of the CDF and all the Kamajors looked up to them.'[11] He was part of the group which 'made strategic war decisions of determining when and where to go to war.'[12] 'Kondewa attended passing out parades at Base Zero, which signified that the Kamajors had passed their training and could present their skills. He, along with Norman and Mbogba, signed a training eertificate, which each trainee received after the training.'[13]

[4] *Id.* at para. 721(iv).
[5] *Id.* at para. 121 (vi).
[6] *Id.* at para. 721(i).
[7] *Id.* at para. 721 (iii).
[8] *Id.* at para. 721(iv).
[9] *Id.* at para. 121(v).
[10] *Id.* at para. 721 (vii).
[11] *Id.* at para. 721(i).
[12] *Id.* at para. 721 (iii).

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Description of the Aiding and Abetting	
Order of Norman	'At a passing out parade at Base Zero between 10 and 12 Deeember 1997 Norman gave instructions for the Tongo and Black December operations. Norman said that the attack on Tongo would determine who wins the war. He also said that there was no place to keep captured prisoners like the juntas, let alone their collaborators. He directed the Kamajors that instead of wasting their bullets, to chop off the left hand of any captured junta as a signal to any group that would want to seize power through the barrels of the gun and not the ballot paper. He also told the fighters not to spare the houses of the juntas. After hearing Norman's instructions, Fofana addressed the Kamajors saying that any commander failing to perform accordingly and "losing your own ground", should kill himself and not come to report to Base Zero. Then all the fighters looked at Kondewa, admiring him as a man with a mystic power, and he gave the last comment saying that the time for the surrender of rebels had long been exhausted and that they did not need any surrendered rebels. He then gave his blessings.'[14]
Fofana	'Based on the above evidence the Chamber finds that Fofana's speech at the passing out parade in December 1997 when the attack on Tongo was diseussed was clearly an encouragement and support of Norman's instruetions to kill captured enemy combatants and "collaborators", to infliet physical suffering or injury upon them and to destroy their houses. At this parade Fofana, as Director of War, addressed the fighters immediately after the National Coordinator for the CDF had given his instructions about Tongo. Fofana not only encouraged the Kamajors to follow Norman's unlawful orders to commit eriminal acts but also told them that if they failed to perform accordingly, they should not come baek to Base Zero to report but to kill themselves rather than losing their own ground. As found by the Chamber above, those Kamajors who then proeeeded to attack Tongo not only received a direction from Norman to commit specific criminal acts, they also had a clear

[13] *Id.* at para. 721 (viii)
[14] *Id.* at para. 721(x).
[15] *Id.* at para. 722.

	encouragement and support from Fofana, as one of their leaders, to commit such acts.'[15] Substantial effect on the commission of the crimes.[16] 'The Chamber finds, however, that Fofana's speech at the passing out parade constitutes aiding and abetting only of the preparation of those criminal acts which were explicitly ordered by Norman, namely, killing of captured enemy combatants and "collaborators", infliction of physical suffering or injury upon them and destruction of their houses, which the Chamber found were committed by the Kamajors in the towns of Tongo Field during the second and third attacks.'[17]
Kondewa	'The Chamber finds that at the passing out parade in December 1997 when the attack on Tongo was discussed Kondewa addressed the fighters as the High Priest after the National Coordinator and the Director of War had made their comments. All the fighters looked at Kondewa, admiring him as a man with mystic powers, and he made the last comment saying that the time for the surrender of rebels had long been exhausted and that they did not need any surrendered rebels. The Chamber finds that in uttering these words Kondewa effectively supported Norman's instructions and encouraged the Kamajors to kill captured enemy combatants and "collaborators", to inflict physical suffering or injury upon them and to destroy their houses. Kondewa then gave his blessings for these criminal acts as the High Priest. The Chamber notes that no fighter would go to war without Kondewa's blessings because they believed that Kondewa transferred his mystical powers to them and made them immune to bullets.'[18] Substantial effect.[19]
Convictions	
Fofana	Aiding and abetting the preparation of murder in Tongo Field (Violence to life, health and physical or mental well-being of persons, in particular murder, violation of common article 3);[20] Aiding and abetting the preparation of cruel treatment in Tongo Fields (Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, violation of common article 3);[21]

[16] *Id.* at para. 723.
[17] *Id.* at para. 727.
[18] *Id.* at para. 735.
[19] *Id.* at para. 736.
[20] *Id.* at para. 763.

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	Responsible as a superior under art. 6(3) for counts 2, 4 and 7 in Koribondo.[22] Responsible as a superior under art. 6(3) for counts 2, 4, 5 and 7 in Bo.[23] Murder and Other inhumane acts as crimes against humanity.[24]
Kondewa	Aiding and abetting the preparation of murders in Tongo Field (Violence to life, health and physical or mental well-being of persons, in particular murder, violation of common article 3)[25] Aiding and abetting the preparation of cruel treatment in Tongo Fields (Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, violation of common article 3)[26] Responsible as a superior under article 6(3) for counts 2,4 and 7 in Bonthe D.[27] Murder and Other inhumane acts as crimes against humanity.[28]
Aggravating/Mitigating Factors	
Fofana	*Nature of the Crimes:* 'Serious nature',[29] 'committed against innocent civilians',[30] 'large scale and significant degree of brutality',[31] 'committed against unarmed and innocent civilians, solely on the basis that they were unjustifiably perceived and branded as 'rebel collaborators.'[32] 'Many of the victims were young children and women, and were therefore particularly vulnerable',[33] 'significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community,'[34] 'lasting effect of these crimes'[35]

[21] *Id.*
[22] *Id.* at para. 798.
[23] *Id.* at para. 846.
[24] *CDF* Appeal Judgement, para. 322.
[25] *CDF* Trial Judgement, para. 764. Upheld on appeal, *CDF* Appeal Judgement, para. 79.
[26] *Id.*
[27] *CDF* Trial Judgement, para. 903.
[28] *CDF* Appeal Judgement, para. 322.
[29] *CDF* Sentencing Jndgement, para. 46.
[30] *Id.*
[31] *Id.* at para. 47.
[32] *Id.*
[33] *Id.* at para. 48.
[34] *Id.* at para. 49.

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	Individual Circumstances: 'Aider and abettor under Article 6(1) of the Statute, (...) not present at the scenes of the crimes and that the degree of his partieipation amounted only to encouragement.'[36] 'Gravity of the offences committed by Fofana in his leadership role as a superior who failed to prevent his subordinates from committing erimes is 'greater than that of the actual perpetrators of the crimes.'[37] *Aggravating:* Breach of trust due to his position in the community.[38] *Mitigating:* Remorse.[39] Lack of education and training.[40] Good conduct in the peace process and in detention.[41] Lack of prior convictions.[42]
Kondewa	*Nature of the Crimes*: 'Serious nature',[43] 'scale and barbaric nature of the crimes',[44] and that the 'victims were particularly vulnerable;'[45] 'Significant physical and psychological impaet on the victims of such crimes. on the relatives of the victims, and on those in the broader community.'[46] *Individual Circumstances:* 'Aiding and abetting',[47] 'was also held liable for the direct perpetration of some acts, including the shooting of a town eommander in Talia/Base Zero.'[48] 'With respect to Kondewa's liability under Article 6(3) (...) the gravity of the offence eommitted by Kondewa is greater than that of the actual perpetrators of the crimes."[49] The Trial Chamber concluded that "the fact that Kondewa's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit

[35] *Id.*
[36] *Id.* at para. 50.
[37] *Id.* at para. 51.
[38] *Id.* at para. 60.
[39] *Id.* at para. 64.
[40] *Id.* at para. 66.
[41] *Id.* at para. 67.
[42] *Id.* at para. 68.
[43] *Id* at para. 53.
[44] *Id.*
[45] *Id.* at para. 54.
[46] *Id.* at para. 56.
[47] *Id.* at para. 57.
[48] *Id*
[49] *Id.* at para. 58.

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	effect of encouraging his subordinates to believe that they could commit further crimes with impunity, and therefore increases the seriousness of the crimes for which he has been convicted."[50] *Aggravating:* Breach of trust due to his position in the community.[51] *Mitigating Factors:* Remorse.[52] Lack of education and training.[53] Lack of prior convictions.[54] Motive of civic duty.[55] The AC overruled the TC's finding that motive of civic duty was a mitigating factor.[56]
Sentence	
Fofana	Violence to life....in particular murder as a violation of common article 3 (6(1) in Tongo Field, 6(3) in Koribondo and Bo): (Trial Chamber: 6 years). Increased to 15 years by the Appeals Chamber.[57] Violence to life....in particular cruel treatment as a violation of common article 3 (6(1) in Tongo Field, 6(3) in Koribondo and Bo): (Trial Chamber: 6 years). Increased to 15 years by the Appeals Chamber.[58] Pillage a violation of common article 3 (6(3) in Bo): (Trial Chamber: 3 years). Increased to 5 years by the Appeals Chamber.[59] Murder as crime against humanity: 15 years. Other inhumane acts as crime against humanity: 15 years.

[50] *Id.* at para. 58
[51] *Id. at* , para. 62.
[52] *Id. at* , para. 65.
[53] *Id. at* , para. 66.
[54] *Id. at* , para. 68.
[55] *Id. at* , para. 94.
[56] *CDF* Appeal Judgement, para. 535.
[57] *Id.* at para. 565.
[58] *Id.*
[59] *Id.*

Kondewa	Violence to life....in particular murder as a violation of common article 3 (6(1) in Tongo Field, 6(1) commission in Kenema, 6(3) in Bonthe): (Trial Chamber: 8 years). Increased to 20 years by the Appeals Chamber.[60] Violence to life....in particular cruel treatment as a violation of common article 3 (6(1) in Tongo Field, 6(3) in Bonthe): (Trial Chamber: 8 years). Increased to 20 years by the Appeals Chamber.[61] Murder as crime against humanity. 20 years. Other inhumane acts as crime against humanity: 20 years.

[60] *Id.*
[61] *Id.*

ICTR	
Ntakirutimana and Ntakirutimana Case *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-T & ICTR-96-17-T, Judgement and Sentence (TC), 21 February 2003. *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgement (AC), 13 December 2004.	
Crimes Aided and Abetted (same underlying acts for genocide and extermination)	
'A large number of men, women and children, the majority unarmed Tutsi, sought shelter from violence and attaeks around Mugonero (...) and many assembled at the Mugonero Complex for that purpose. (...) the attaek of 16 April at the Complex, whieh lasted throughout the day and into the night, claimed hundreds of lives among the refugees at the Complex and left many wounded. (...) the attaek speeifically targeted the Tutsi population - irrespective of age or sex - for the sole reason of their ethnieity.'[62] 'A large number of men, women and ehildren, who were predominantly Tutsi, sought refuge in the area of Bisesero (...) where there was widespread violenee during that period, in the form of attacks targeting this population on an almost daily basis. Witnesses heard attackers singing songs referring to the extermination of the Tutsi.'[63]	
Position of the Accused	
E. Ntakirutimana	He was a pastor.[64] E. Ntakirutimana was president of the West Rwanda Association of the SDA (7th day Adventist church).[65]
G. Ntakirutimana	He joined the staff of the SDA's hospital at Mugonero Complex, Gishyita commune, in April 1993. There he worked as a medical doetor under the supervision of the hospital's direetor, until the latter's departure in April 1994.[66]

[62] *Ntakirutimana et Ntakirutimana* Trial Judgement, para.785.
[63] *Id.* at para. 826.
[64] *Id.* at para. 36.
[65] *Id.* at para. 37.
[66] *Id.* at para. 38.

Description of the Aiding and Abetting	
E. Ntakirutimana	'He transported armed attaekers who were chasing Tutsi survivors at Murambi Hill.'[67] 'He brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searehing for Tutsi refugees and chasing them. Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees singing: 'Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests'.'[68] 'He arrived at Ku Cyapa in a vehicle followed by two buses of attackers and he was part of a convoy, which included attackers.'[69] 'Hc conveyed attackers to Murambi Church and ordered the removal of the church roof so that it could no longer be used as a hiding placc for thc Tutsi, and in so doing, he facilitated the hunting down and the killing of the Tutsi refugees hiding in Murambi Church in Bisesero.'[70]
G. Ntakirutimana	'Participated in an attack at Gitwe Hill, near Gitwe Primary School, (...) where he pursued and shot at Tutsi refugees'[71] 'Participated in an attack at Mubuga Primary School (...) and shot at Tutsi refugees.'[72] 'Killed Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard.'[73] 'Attended a meeting with the commander of the Kibuye gendarmerie camp and Obed Ruzindana in Kibuye town (...) and he procured gendarmes and ammunition for the attaek on Mugonero Complex .'[74]

[67] *Ntakirutimana et Ntakirutimana* Appeal Judgement, para. 566.
[68] *Id.* at para. 566.
[69] *Id.*
[70] *Id.*
[71] *Id.* at para. 556.
[72] *Id.*
[73] *Id.* at para. 557.
[74] *Id.*

Conviction(s)	
E. Ntakirutimana	Aiding and abetting genocide, in aiding and abetting the killing and causing serious bodily or mental harm to Tutsi in Bisesero.[75] Aiding and abetting extermination, in aiding and abetting the killing and causing serious bodily or mental harm to Tutsi in Bisesero.[76]
G. Ntakirutimana	Aiding and abetting genocide, for the procurement of gendarmes and ammunition for the attack on the Mugonero complex.[77] Aiding and abetting extermination as a crime against humanity, for the procurement of gendarmes and ammunition for the attack on the Mugonero complex.[78] Aiding and abetting genocide for his participation in the attack at Gitwe Hill, near Gitwe Primary School, and in the attack at Mubuga Primary School.[79] Aiding and abetting extermination as crime against humanity for his participation in the attack at Gitwe Hill, near Gitwe Primary School, and in the attack at Mubuga Primary School.[80]
Aggravating/Mitigating Factors	
E. Ntakirutimana	*Mitigating:* prior 'good moral character',[81] no leading role in the attacks, no personal participation in the killings, and was he found to have fired on refugees or even to have carried a weapon,[82] old age and fragile health.[83] *Aggravating:* Abuse of trust,[84] failure to help some of the victims under his responsibility,[85] abuse of position of authority in sanctioning the crimes of genocide,[86] and attacks against places of worship/safe heaven.[87]

[75] *Id.* at para. 567.
[76] *Id.* at para, 568.
[77] *Id.* at para. 559.
[78] *Id.*
[79] *Id.* at para. 560.
[80] *Id.*

G. Ntakirutimana	*Gravity of the crimes*: Extremely grave.[88] *Aggravating*: Abuse of personal position in the community to commit the crimes, personally shot at Tutsi refugees, and participated in attacks at the Mugonero Complex, where he was a doctor, as well as in other safe havens in which refugees had sought shelter.[89] *Mitigating*: aggravating circumstances outweight the mitigating circumstances.[90]
Sentence (Only convicted of aiding and abetting)	
E. Ntakirutimana: 10 years G. Ntakirutimana: 25 years	

[81] *Ntakirutimana et Ntakirutimana* Trial Judgement, para. 895.
[82] *Id.* at para. 894.
[83] *Id.* at para. 897.
[84] *Ntakirutimana et Ntakirutimana* Trial Judgement, paras. 900 and 903.
[85] *Id.* at para. 902.
[86] *Id.* at . 904.
[87] *Id.* at , para. 905.
[88] *Ntakirutimana et Ntakirutimana* Appeal Judgement, para. 562.
[89] *Id.* at . 563.
[90] *Ntakirutimana et Ntakirutimana* Trial Judgement, para. 913. *Ntakirutimana et Ntakirutimana* Appeal Judgement, para. 563.

Muvunyi Case *Prosecutor v. Mitvunyi*, Case No. ICTR-2000-55A-T, Judgement and Sentence (TC), 12 September 2006. No Appeal Judgement yet.
Crimes Aided and Abetted
Killing of a group of Tutsi civilians' refugees.[91]
Position of the Accused
Interim Commander of the *École des sous-officiers* (ESO) Camp and was the most senior military officer in Butare *préfecture*. He was responsible for all military activities in the area.[92]
Description of the Aiding and Abetting
'When soldiers from the ESO were in the process of attacking unarmed civilian Tutsi refugees at the *Groupe scolaire*, the Accused refused to come to the refugees' assistance. Instead, he gave instructions that members of a certain family should be separated from the other Tutsi refugees and should not be harmed. Indeed, even when one child from this family was mistakenly taken away together with the other Tutsi refugees, the Accused sent a vehicle to try to rescue the child.'[93] 'The overall conduct of the Accused during this event, including the fact that he implicitly allowed a large contingent of soldiers under his command to leave their Camp fully equipped with arms and ammunition to attack unarmed refugees, his instruction to these soldiers not to kill or otherwise harm members of the Bicunda family, while leaving the vast majority of unarmed Tutsi refugees at the mercy of the genocidal killers, amounted to tacit approval of the unlawful conduct of the ESO soldiers. This approval assisted and encouraged the killing of the Tutsi civilians at the *Groupe scolaire*.'[94] 'There is no doubt that in light of the general situation in Rwanda, and specifically in Butare in 1994, the Accused had knowledge that ESO

[91] *Muvunyi* Trial Judgement, para. 494.
[92] *Id.*
[93] *Id.* at para. 495.
[94] *Id.*
[95] *Id.*

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soldiers, who were his subordinates, had attacked or were about to attack unarmed Tutsi civilians at the *Groupe scolaire* for no other reason than their Tutsi ethnic identification. By his tacit approval of the conduct of the ESO soldiers, the Accused substantially contributed to the crime of genocide.'[95]
Conviction(s)
Aiding and abetting genocide (Also guilty as a superior for genocide); Direct and public incitement to commit genocide; Other inhumane acts as crime against humanity.
Aggravating/Mitigating Factors
Gravity: Inherently grave crimes.[96] *Aggravating*: position of trust but failure to prevent his soldiers from committing crimes,[97] ethnic separation and subsequent killing of orphan children at the *Groupe scolaire* by soldiers under the command of the Accused in collaboration with civilian militia,[98] fact that the Accused chastised the *bourgmestre* in Nyakizu *commune* for hiding a Tutsi man and that pursuant to his instructions, the said man was produced and killed by an armed mob.[99] *Mitigating*: no orders given, no direct commission, no encouragement of crimes.[100] Wife and three children, spent most of his life working for the defence of his country.[101]
Sentence: 25 years. (No detail)

[96] *Id.* at para. 538.
[97] *Id.* at para. 539.
[98] *Id.*
[99] *Id.*
[100] *Id.* at para. 542.
[101] *Id.* at para. 543.

Zigiranyirazo Case *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgement (TC), 18 December 2008. No Appeal Judgement yet.
Crimes Aided aud Abetted
Killing of at least between 10 and 20 people at the Kiyovu roadblock.[102]
Position of the Accused
Zigiranyirazo: brother-in-law of the late President.[103] 'Zigiranyirazo first entered politics in 1969 as a Member of Parliament. He was appointed *préfet* of Kibuye in 1973 and later, *préfet* of Ruhengeri from 1974 until 1989. After participating in Rwandan politics for 20 years, Zigiranyirazo resigned and left Rwanda to pursue further studies at the University of Québec in Montreal. In 1993, he returned to Rwanda to work as a businessman.'[104]
Description of the Aiding and Abetting
Accused substantially contributed to the killings of Tutsi at the Kiyovu roadblock. 'Zigiranyirazo aided and abetted those manning the roadblock by giving instructions to cheek identity papers with specific reference to Tutsi, which indicated his approval of the killings and encouraged those manning the roadblock to kill Tutsi, and by ordering Corporal Irandemba to ensure that food was brought to the men, which provided practical assistance to the killers and further demonstrated Zigiranyirazo's support for the killings committed there.'[105] 'The Accused's instruction to check identity cards "well" with specific reference to Tutsi, after having seen dead bodies at the roadblock, and in light of the context of widespread and systematic attacks against Tutsi in Rwanda at that time, indieated to those manning the roadblock, his approval of, and support to, the killings. (...) his instruction must have been perceived by the people manning the roadblock as an encouragement to kill Tutsi. Additionally, in view of the Accused's authority, and the Chamber's finding that those with Tutsi identity cards were taken aside and killed, the Chamber has no doubt that his encouragement substantially impacted on the perpetrators of the killings of Tutsi at the roadblock.

[102] *Zigiranyirazo* Trial Judgement, para. 413.
[103] *Id.* at para. 4.
[104] *Id.* at para. 5.
[105] *Id.* at para. 453.

Indeed, checking identity cards was a necessary step in the proeess of killing Tutsi at the roadblock and by his instruction that this be done well, the Accused eneouraged the acts of killing whieh followed.'[106] 'The Accused's instruction (...) to ensure that the men reeeived food so that they could remain at the roadblock and continue with their duties, which was, to take Tutsi aside and kill them, would have had a substantial effect on the perpetration of the killings. Not only did his instruction have the effect of providing practical assistance to the killers, as food was delivered on another day from Camp Kigali, but it further demonstrated to Corporal Irandemba the Aceused's support for the killings, thereby encouraging even more the eommission of the crimes.'[107] 'In view of the above, particularly the context within which the roadblock existed, the killing of Tutsi at the roadblock, the Accused having seen corpses at the roadbloek, and having issued instructions to check identity cards well, with speeific reference to Tutsi, shows beyond reasonable doubt that the Aceused, at the very least. knew that those he encouraged and assisted possessed genocidal intent. Thus, the Chamber finds beyond reasonable doubt that the Accused possessed the requisite intent for aiding and abetting genocide at the Kiyovu roadblock.'[108]
Conviction(s)
Aiding and abetting genocide.
Aggravating/Mitigating Factors
Gravity: nothing specific listed for the crimes at the roadblock.[109] *Aggravating:* no aggravating eircumstanees.[110] *Mitigating:* no mitigating circumstances.[111]
Sentence: Aiding and abetting genocide: 15 years. (Other convictions too but sentence given for each count.)

[106] *Id.* at para. 422.
[107] *Id.* at para. 423.
[108] *Id.* at para. 424.
[109] *Id.* at para. 453.
[110] *Id.* at para. 461.
[111] *Id.* at para. 466.

ICTY

Aleksovski Case

Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement (TC), 25 June 1999.
Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement (AC), 24 March 2000.

Crimes Aided and Abetted

Physical and mental abuse of detainees during search

'The insults, threats, thefts and assaults detainees suffered in the presence of the accused during body searches.'[112] Threats to kill the detainees made by search guards, beatings and mistreatments.[113] Thefts during searches.[114] Mistreatment of detainees during their interrogation after the escape of a detainee.[115] Violence on detainees in detention.[116]

Psychological terror

Guards entering detainees' cells during the night to beat them, insult them and ask them for money, sometimes the guards were drunk.[117] Some detainees were taken outside and robbed.[118] Screams of people being beaten were played at night over a loudspeaker, preventing the detainees from sleeping.[119] Thefts.[120] 'The searching of some detainees accompanied by threats, the noise and screams relayed over the loudspeaker and the nocturnal visits of the soldiers to the cells clearly constituted serious psychological abuse of the detainees.'[121]

Use of detainees as human shields and trench digging

'The detainees who were taken to the villages of Skradno and Strane testified that they were called out by Deputy Commander Marko Krilic, and tied together by HVO soldiers. One of these detainees added that the accused was present. Witness Novalic, who had been sent to the village of Strane to negotiate with its inhabitants the surrender of the village, explained that first a guard and then the accused had offered him the opportunity to leave the second warehouse he was held in and to take the cell of his choice as a reward for the mission he had performed. The witness added that the accused had however stated that he disapproved of using the detainees as human shields. The detainees who were taken to the village of Merdani explained that they had been selected at random by HVO soldiers. One of them said that the accused had been present.'[122]

[112] *Aleksovski* Trial Judgement, para. 87.
[113] *Id.* at para. 185.
[114] *Id.* at para. 186.
[115] *Id.* at paras. 205-210.
[116] *Id.* at para. 191. For more details see paras. 192-204.
[117] *Id.* at para. 187.

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Position of the Accused
Prison warden.[123]
Description of the Aiding and Abetting
Mistreatment of detainees 'The accused was responsible for the detention conditions. (...) it was his duty, as prison warden, to see to the conditions as regards hygiene and the health and welfare of detainees.'[124] 'In his capacity as prison warden he was clearly in charge of organising the body-searches of detainees and of supervising them. By being present during the mistreatment, and yet not objecting to it notwithstanding its systematic nature and the authority he had over its perpetrators, the accused was necessarily aware that such tacit approval would be construed as a sign of his support and encouragement. He thus contributed substantially to the mistreatment. Accordingly, the accused must be held responsible for aiding and abetting (...) in the physical and mental abuse which detainees were subjected to during the body searches on 15 and 16 April 1993.'[125] 'Abuse of this kind was frequent and was committed day and night near the accused's office so that the accused could hardly not have not been aware of it. Yet he did not oppose or repress it, as his position required. On the contrary, his silence could only be taken as a sign of his approval, given that he participated actively in the initial abuse of these two detainees; the accused could hardly have been unaware that his silence would amount to encouragement to the perpetrators. This silence evinces a culpable intent of aiding and abetting such acts as contemplated in Article 7(1).'[126] *Use as Human Shields* 'The Trial Chamber notes that the accused in fact sometimes took part in designating the detainees to be sent off to dig trenches and made sure they returned. The accused's involvement in selecting detainees admittedly was not systematic, nor was his active participation essential for carrying out these acts. But this is not required for him to be held responsible pursuant to Article 7(1). Actually, all that is involved is ascertaining

[118] *Id.* at para. 187.
[119] *Id.* at para. 187.
[120] *Id.* at para. 188.
[121] *Id.* at para. 190.
[122] *Id.* at para. 122.
[123] *Id.* at para. 86.
[124] *Id.* at para. 86.
[125] *Id.* at para. 87.
[126] *Id.* at para. 88.

whether through his acts or omissions the accused contributed significantly to the commission of the crimes. The Trial Chamber notes the recurring nature of these crimes and considers moreover that the accused contributed substantially to the practice being pursued by not ordering the guards over whom he had authority to deny entrance to HVO soldiers coming to get detainees and by participating, be it on an on-and-off basis, in picking out detainees. Likewise, by his attitude towards Witness Novalie and his passive presence when the detainees were taken away to serve as human shields, he manifested his approval of this practice and contributed substantially to the commission of the crime. Consequently the Trial Chamber finds the accused responsible under Article 7(1) for having aided and abetted in the use of detainees as human shields and for trench-digging.'[127] 'He took part in designating detainees for trench digging and made sure that they returned; he did not prevent HVO soldiers coming to get detainees and participated in picking out detainees; he was present when detainees were taken to serve as human shields and thus manifested his approval of the practice.'[128]
Conviction(s)
Aiding and abetting (amongst others modes of participation under 7(1)) outrages upon personal dignity, violation of common article 3. Aiding and abetting the use of detainees as human shields or trench-diggers, an outrage upon personal dignity, violation of common article 3.
Aggravating/Mitigating Factors
Mitigating: Accused was not a principal perpetrator and no discriminatory intention,[129] made some attempts to improve conditions in the prison,[130] married and has two young children.[131] *Aggravating*: his superior responsibility aggravated the crimes, as well as to the fact that he participated in some crimes.[132] 'In imposing a revised sentence the Appeals Chamber bears in mind the element of double jeopardy in this process in that the Appellant has had to appear for sentence twice for the same conduct, suffering the consequent anxiety and distress, and also that he has been detained a second time after a period of release of nine months. Had it not been for these factors the sentence would have been considerably longer.'[133]
Sentence: 7 years. Outrages upon personal dignity, violation of common article 3, responsible under 7(1) and 7(3).

[127] *Aleksovski* Appeal Judgement, para. 129.
[128] *Id.* at para. 175.
[129] *Aleksovski* Trial Judgement, paras. 236-237.
[130] *Id.* at para. 238.
[131] *Id.*
[132] *Aleksovski* Appeal Judgement, para. 183.
[133] *Id.* at para. 190.

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Blagojevic and Jokic Case *Prosecutor v. Blagojevic and D. Jokic*, Case No. IT-02-60-T, Judgement (TC), 17 January 2005. *Prosecutor v. Blagojevic and D. Jokic*, Case No. IT-02-60-A, Judgement (AC), 9 May 2007.	
Crimes Aided and Abetted	
Blagojevic	*Killing of more than fifty Bosnian Muslim men in and around the Vuk Karadzic School in Bratunac town* (murder as crime against humanity) Around 2000-3000 men who were detained in the school in poor conditions. Often taken outside and beaten. Some people were in another building next to the school, and some of them were beaten and died during the night due to the lack of spaee/air. Prisoners coming from the toilet were randomly killed. Some were detained in buses outside of the school. Between 80 and 100 Bosnian Muslims had been killed, 50 bodies were found.[134] *Forcible transfer of thousands of Bosnian Muslims from Srebrenica* 'It is established that the Bosnian Muslim population was forcibly displaced from the Srebrenica enelave through Potočari, including the women, children and elderly who were transported to Kladanj, and the Bosnian Muslim men who were bussed out of Potočari to temporary detention facilities in Bratunac.'[135]
Jokic	Mass executions at Orahovac, Pilica School/Branjevo Military Farm, and Kozluk between 14 and 17 July 1995. 'Between 1,000 and 2,500 Bosnian Muslim men detained at Grbavci School in Orahovac were executed in a nearby field beginning on the afternoon of 14 July 1995 and continuing until around 5 a.m. on 15 July 1995'[136] 'On 16 July 1995, Bosnian Muslim men, who had been detained for two days at the Pilica School. were taken by bus to the nearby Branjevo Military Farm and exeeuted. Additionally, the Trial Chamber found that, on 16 July 1995, the Zvornik Brigade First Battalion requested that a loader, an excavator, and a dump truck be brought to the Branjevo Military Farm. The Trial Chamber further concluded that, on 17 July 1995, the Zvornik Brigade Engineering Company provided an excavator and that Cvijetin Ristanovic used the excavator to dig a mass grave.'[137] 'Between 15 and 16 July 1995 around 500 men were executed and buried at the edge of the Drina River at Kozluk'[138]

[134] *Blagojevic and Jokic* Trial Judgement, para. 271.
[135] *Id.* at para. 616.
[136] *Blagojevic and Jokic* Appeal Judgement, para. 147.

Position of the Accused	
Blagojevic	After serving in the Army of the Socialist Federal Republic of Yugoslavia, Blagojevic rose to the rank of colonel in the VRS, commanding the Bratunac Brigade in July 1995.[139]
Jokic	Jokic joined the VRS on 16 May 1992 and, in July 1995, held the position of Chief of Engineering of the Zvornik Brigade, with the rank of major.[140]
Description of the Aiding and Abetting	
Blagojevic	'Blagojevic permitted members of the Bratunac Brigade Military Police to participate in the separations of Bosnian Muslim men from the women, children, and elderly in Potočari on 12 and 13 July 1995 and in the subsequent transfer from the Srebrenica enclave of the women, children, and the elderly as well as in guarding the Bosnian Muslim men detained in Bratunac town from 12 to 14 July 1995. (...) [M]embers of the Bratunac Brigade's Second Battalion and Third Artillery Group played a role in shelling and shooting around civilians *en route* to Potočari on 11 July 1995, in patrolling the area in and around Potočari on 12 and 13 July 1995, and in assisting in the transfer operation. The Trial Chamber further concluded that Blagojevic had command and control over these elements.'[141] 'Use of the Bratunac's resources to commit the crimes.[142] *Forcible Transfer* 'Members of the Bratunac Brigade gave practical assistance by separating the men from the women, children, and the elderly; loading buses; counting people as they entered buses; escorting the buses; and patrolling the area where the population was being held pending the completion of the transfer'.[143] *Mistreatment and Murder* 'Members of the Bratunac Brigade Military Police gave "practical assistance" by guarding the detainees and helping to

[137] *Blagojevic and Jokic* Appeal Judgement, para. 159.
[138] *Id.* at para. 165.
[139] *Id.* at para. 3.
[140] *Id.* at para. 4.
[141] *Id.* at para. 131.
[142] *Id.* at para. 132.
[143] *Id.*

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	control aecess to them which ensured their further detention and allowed the murders to take place.'[144] *Persecutions* 'Members of the Bratunac Brigade gave practical assistance to terrorising the civilian population and to creating the inhumane conditions in Potočari and Bratunac town from 11 to 14 July 1995 by shelling and shooting around the civilians moving toward Potočari on 11 July; by participating in the separation process; by patrolling in Potočari on 12 and 13 July; and by guarding the detainees in Bratunac town from 12 to 14 July.[145]
Jokic	'Practical assistance, including co-ordinating, sending, and monitoring the deployment of Zvornik Brigade resources, which had a substantial effect on the mass executions at Orahovac, Pilica School/Branjevo Military Farm, and Kozluk between 14 and 17 July 1995'[146] *Orahovac* 'Around 12 p.m. on 14 July 1995, Jokic told Cvijetin Ristanovic, a machine operator with the Zvornik Brigade Engineering Company, in the presence of Slavko Bogičevic, the deputy commander of the Zvornik Brigade Engineering Company, to go to Orahovac with an excavator where Bogičevic instrueted Ristanovic as to how to dig mass graves. (...) Dragan Jokić knew that Bosnian Muslim prisoners were detained at the Grbavci School awaiting their execution when he told Ristanović to go there. The Trial Chamber therefore finds that Dragan Jokié knew that Ristanović was sent to Orahovac specifically in order to dig mass graves for the victims of the executions. By telling Cvijetin Ristanovic to take the excavator to Orahovac, Dragan Jokié provided practical assistance that had a substantial effect on the commission of the crime.'[147] *Pilica School* 'Jokic knew of the detention of the Bosnian Muslim men at the Pilica School as early as 14 July 1995, that he was informed of the request for heavy machinery as Chief of Engineering for the Zvornik Brigade, and that he eontacted the brigade's Engineering Company to effectuate the request. The Trial Chamber held that Jokic knew that the resources were sent to dig a mass grave.'[148] *Kozluk*

[144] *Id*
[145] *Id.* at para. 132.
[146] *Id.* at para. 143.
[147] *Id.* at para. 147.
[148] *Id.* at para. 160.

	'Around 8 a.m. on 16 July 1995, Jokic told Miloš Mitrovic, a machine operator with the Zvornik Brigade Engineering Company, and Nikola Ricanovic, another member of the Engineering Company, to go to Kozluk with an excavator where they would receive additional instruetions from Damjan Lazarevic, the commander of the Engineering Company's fortification platoon. The Trial Chamber found that, on arrival, Damjan Lazarevic ordered Miloš Mitrovie to put earth on bodies already in mass graves, which he did until it was decided that the excavator, whieh was operating at only 30 percent capacity, was not capable of completing the work. Based on Jokic's instruction to Miloš Mitrovic, (...) that Jokic not only knew about the intended use of the excavator at Kozluk but also about the killings which occurred there.'[149]
Conviction(s)	
Blagojevic	Aiding and abetting murder as a violation of laws and customs of war; Aiding and abetting murder, persecution and other inhumanc acts (forcible transfer) as crime against humanity.
Jokic	Aiding and abetting murder as a violation of the laws or customs of war; Aiding and abetting extermination and persecutions as crime against humanity.
Aggravating/Mitigating Factors	
Gravity of the crimes: special attention due to the discriminatory nature of the crimes that were aided and abetted;[150] Blagojevic and Jokic not one of the major participants;[151] enormous scale of the campaign of persecution.[152] *Aggravating* (for both): vulnerability of the victims;[153] impact on victims.[154] *Mitigating* (for both): work in de-mining after the war.[155] (for Jokic): ensured the safe passage through a minefield of a group of Bosnian Muslim boys;[156] family circumstances (limited);[157] cooperation with OTP.[158]	
Sentence (No conviction other than aiding and abetting) Blagojevic: 15 years. Jokic: 9 years.	

[149] *Blagojevic and Jokic* Appeal Judgement, para. 165.
[150] *Blagojevic and Jokic* Trial Judgement, para. 834.
[151] *Id.* at paras. 835 and 836.
[152] *Id.* at para. 837.
[153] *Id.* at para. 844.
[154] *Id.* at para. 845.
[155] *Id.* at para. 860.
[156] *Id.* at para. 854.
[157] *Id.* at para. 855.
[158] *Id.* at para. 857.

Limaj et al. Case[159]

Prosecutor v. Limaj, Bala and Musliu, Case No. IT-03-66-T, Judgement (TC), 30 November 2005.
Prosecutor v. Limaj, Bala and Musliu, Case No. IT-03-66-A, Judgement (AC), 27 December 2007.

Crimes Aided and Abetted

Cruel Treatment of L04

'In one instance, L04 testified, two KLA soldiers, whom he referred to as Tamuli and Shala[160], came to the cowshed, blindfolded him and took him to a room where a man, whom L04 said was Qerqiz, was waiting. It is L04's evidence that as soon as L04 entered the room, Qerqiz insulted him and began beating him with a stick while Tamuli kicked him. L04 testified that Qerqiz then threw him on the floor, kicked him and twisted his arm. L04 testified that up until today he has pain to his right leg and arm due to the beating he sustained.'[161]

'L04 further testified that on another occasion, he and two other prisoners were taken by Shala from the Llapushnik/Lapusnik prison camp to an unknown location in the mountains where they were required to bury the bodies of three men. L04 testified that one of the men he was told to bury was Agim Ademi, a fellow detainee at the prison camp. (...) The bodies showed evidence of maltreatment. The Chamber accepts that this incident occurred and that the circumstances would have subjected L04 to a degree of psychological trauma.'[162]

Torture of L12

'On L12's evidence, some days after his arrival at the camp, the individual referred to as Shala came to the cowshed, blindfolded L12 and took him to a barn located 500 metres away from the cowshed, where L12 was beaten. (...) [L12] was seriously mistreated on this occasion. L12 testified that while he was beaten, he was asked about the whereabouts of an individual and that the beating stopped when he answered that "the Serbs [had] killed him". L12 explained that until the present day his body is covered with scars due to the beatings sustained at the Llapushnik/Lapusnik prison camp during his detention there and that he is unable to work because of the pain he still endures.'[163]

'During the period of his detention by the KLA in the cowshed at the Llapushnik/Lapusnik prison camp, L12 was subjected to physical mistreatment as described in his evidence, as a result of which L12 still endures pain. (...) the conditions of detention in the cowshed were such that detention there constituted the offence of mistreatment. Accordingly the Chamber is satisfied that the offence of cruel treatment has been

[159] Note: Bala was the only one convicted, the other two Accused were acquitted.
[160] Shala was the nickname of Bala. *Limaj et al.* Appeal Judgement, para. 44.
[161] *Limaj et al.* Trial Judgement, para. 311.
[162] *Id.* at para. 312.
[163] *Id.* at para. 316.
[164] *Id.* at para. 318.

established with respect to L12. This is established both by virtue of the detention, and quite separately or together, by virtue of the psychological and physical mistreatments inflicted on L12.'[164]

Position of the Accused

Prison guard.[165]

Description of the Aiding and Abetting

L04's Cruel Treatment

'L04 stated that Shala was told by Tamuli to untie L04. As established earlier, L04 was then blindfolded, taken out of the room and beaten by individuals L04 believed to be Tamuli and Qerqiz. Shala had an automatic weapon and was guarding the door. He, however, did not personally join in the beating of L04. (...) Haradin Bala did not inflict physical suffering on L04. He did, however, provide practical assistance to the direct perpetrators of the offence of cruel treatment. He better ensured there was no prospect of L04 escaping from the beating, or of the beating being seen or disrupted by third persons. In the Chamber's finding, Haradin Bala's involvement had thus a "substantial effect on the commission" of the crime of cruel treatment. In the circumstances, Haradin Bala could not have been ignorant of the intentions of the direct perpetrators. He certainly knew that a crime was being committed. Nonetheless, he remained and so he facilitated its commission.'[166]

L12's Torture

'L12 was beaten in a barn. Haradin Bala blindfolded L12 and brought him to a barn, where the beating took place. L12 testified that Shala was present during the incident. The Chamber accepts L12's evidence, however, that Haradin Bala's involvement in the incident was limited to bringing L12 to the perpetrators and being present while the beating was taking place. The Chamber finds that by bringing L12 to the barn and being present throughout the beating by others, Haradin Bala did contribute to the commission of the crime substantially enough to regard his participation as aiding the offence committed by the direct perpetrators. In the circumstances, Haradin Bala must have become aware, at least at the time of the beating, that the assailants were committing a crime and of their state of mind.'[167]

Conviction(s)

Torture, a violation of the laws or customs of war, under Article 3 of the Statute, for having aided the torture of L12.

Cruel treatment, a violation of the laws or customs of war, under Article 3 of the Statute, for having personally mistreated detainees L04, L10 and

[165] *Id.* at para. 649.
[166] *Id.* at para. 656.
[167] *Id.* at para. 658.

L12, and aided another episode of mistreatment of L04, and for his personal role in the maintenance and enforcement of inhumane conditions of detention in the Llapushnik/Lapusnik prison camp. Murder, a violation of the laws or customs of war, under Article 3 of the Statute, for having personally participated in the murder of nine detainees in the Berishe/Berisa Mountains.
Aggravating/Mitigating Factors
Gravity: Not in a position of command, took personally part in some of the mistreatments but without zeal, detainees were defenceless, execution of nine detainees, which is the most serious part of his conduct, but he did not do it on his own initiative.[168] *Aggravating*: none.[169] *Mitigating:* family situation: 7 children including a paralysed one, bad health, detention would be hardship for his family and harder for is, good treatment of some detainees (not much weight).[170]
Sentence (No detail): 13 years.

[168] *Id.* at paras. 726-727.
[169] *Id.* at para. 731.
[170] *Id.* at para. 732.

Furundzija Case *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement (TC), 10 December 1998. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgement (AC), 21 July 2000.
Crimes Aided and Abetted
'Witness A was subjected to rape and serious sexual assaults by Accused B in the course of the interrogation by the accused.'[171] 'Rapes and sexual assaults were committed publicly; members of the Jokers were watching and milling around the open door of the pantry. They laughed at what was going on. The Trial Chamber finds that Witness A suffered severe physical and mental pain, along with public humiliation, at the hands of Accused B in what amounted to outrages upon her personal dignity and sexual integrity'[172]
Position of the Accused
Commander of the Jokers, a special unit within the armed forces of the Croatian Community of Herzeg-Bosna, known as the Croatian Defence Council.[173]
Description of the Aiding and Abetting
'The accused's presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him.'[174] 'The Appellant's presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him. As the Trial Chamber found that the Appellant was not only present in the Pantry, but that he acted and continued to interrogate Witness A therein'[175]
Conviction(s)
Aiding and abetting outrages upon personal dignity, including rape, as a violation of the laws and customs of war.

[171] *Furundzija* Trial Judgement, para. 270.
[172] *Id.* at para. 272.
[173] *Id.* at para. 262.
[174] *Id.* at para. 273.
[175] *Id.* at para. 274; *Furundzija* Appeal Judgement, para. 126.

Aggravating/Mitigating Factors	
Aggravating (for the aiding and abetting count): horrifying circumstanees of the attack: 'A woman was brought into detention, kept naked and helpless before her interrogators and treated with the utmost cruelty and barbarity.'[176] Played a prominent part in their commission,[177] commander of the Jokers,[178]victim was a civilian detainee and at the total mercy to the perpetrators.[179] *Mitigating:* Young age of the aceused at the time of the offenees and no previous eonvietion and ehildren (limited weight for the last two).[180]	
Sentence: 8 years for aiding and abetting outrage upon personal dignity. (10 years for the eommission of torture).	
Mrksic et al. Case *Prosecutor v. Mrksic, Radic and Sljivančanin,* Case No. IT-IT-95-13/1-T, Judgement (TC), 27 September 2007. *Prosecutor v. Mrksic and Sljivancanin,* Case No. IT-IT-95-13/1-A, Judgement (AC), 5 May 2009.	
Crimes Aided and Abetted	
Mrkšić	*Torture and cruel treatment of the approximately 200 prisoners held at Ovčara and Murder of 194 prisoners held at Ovčara* 'On 20 November 1991 (...) over 200 persons were removed as prisoners from the Vukovar hospital by JNA soldiers of OG South under thc command of Mile Mrksic. The prisoners were almost all men, at least the vast majority of whom had been members of the Croat forees. They were taken to a hangar at Ovcara, near Vukovar, where they were subjeeted to beatings and other forms of mistreatment. That evening JNA military police guarding the prisoners were withdrawn by order of Mile Mrksic. Following this, prisoners were taken in groups from the hangar to a nearby site by Serb TO and paramilitary forees of OG South who then executed them. The bodies of 200 were buried in a mass grave, whieh had been dug during the afternoon. The grave remained undiscovered for nearly a year. The eonvietion of murder is in respect of 194 prisoners, the remains of

[176] *Furundzija* Trial Judgement, para. 282.
[177] *Id.* at para. 282.
[178] *Id.* at para. 283.
[179] *Id.* at para. 283.
[180] *Id.* at para. 284.
[181] *Mrksic and Sljivancanin* Trial Judgement, para. 686.

	190 of whom were found in the mass graves and have been identified and also four other identified victims.'[181]
Šljivančanin	*Aiding and abetting the murder of 194 individuals*[182] Same facts as for Mrksic. *Aiding and abetting by omission the torture of the prisoners of war at Ovčara* 'On 20 November 1991 over 200 prisoners of war from Vukovar hospital were brought by buses to Ovcara, where TOs and paramilitary soldiers mistreated many of them by severe beatings intended to punish them for their involvement in the Croat forces.'[183]
Position of the Accused	
Mrksic	'During the time relevant to the Indictment, he was a colonel in the JNA and commander of the Guards Motorised Brigade and operational group ('OG') South. As commander of OG South, he had command of all Serb forces including JNA, TO and paramilitary forces.'[184]
Šljivančanin	'He was a major in the JNA and held the post of head of the security organ of both the *Guards Motorised Brigade* and the OG South.'[185]
Deseription of the Aiding and Abetting	
Mrkšić	*Aiding and abetting murders of Prisoners of War* 'Following his return to Negoslavci from Ovčara. Vojnović had reported to Mrkšić twice that the prisoners of war from the Vukovar hospital had been mistreated and that the security situation at Ovčara was serious. (...) in Mrkšić's view Vojnović and his troops should not be at Ovčara at that stage; aecordingly he withdrew his troops from Ovčara and sent Vukosavljević to convey the order.'[186] 'On the basis of its findings regarding Mrkšić's awareness of the essential nature of the criminal conduct against thc prisoners of war kept at Ovčara under his orders. and his state of knowledge on 20 November 1991, the Trial Chamber concluded that when Mrksic ordered the withdrawal of the military police, he knew that this left the TOs and paramilitaries with unrestrained

[182] *Mrksic and Sljivancanin* Appeal Jndgement, Dispositions.
[183] *Mrksic and Sljivancanin* Trial Judgement, para. 689.
[184] *Mrksic and Sljivancanin* Appeal Judgement, para. 2.
[185] *Id.*
[186] *Id.* at para. 332.

access to the prisoners of war and that by enabling this access, he was assisting in the commission of their murder. Mrkšić fails to show that the Trial Chamber committed any error of law invalidating the Trial Judgement in reaching its findings on Mrkšić's *mens rea* for aiding and abetting the commission of the murder of the prisoners of war.'[187]

Aiding and abetting cruel treatment and torture of Prisoners of War

'Mrkšić was cognisant of the essential nature of the criminal conduct against the prisoners of war kept at Ovčara under his orders, namely, cruel treatment and torture, and that he was well aware of the propensity of the TO and paramilitary personnel towards extreme violence against the prisoners of war and of their desire to punish them. (...).'[188]

'Mrkšić subsequently ordered that the prisoners of war be taken to Ovčara, and then the military police of 80 Motorised Brigade were despatched to Ovčara so that they would be ready to secure the prisoners of war once the buses had arrived. (...) once Mrkšić learned about the crimes committed against the prisoners kept at Ovčara under his orders, he did nothing.'[189]

'After recalling its findings on the mistreatment and beatings suffered by the prisoners of war upon their arrival at Ovčara, at the hands of the Serb TO and paramilitary personnel and the attempts of the JNA to remove the TO and paramilitary personnel from the hangar, the Trial Chamber concluded that this state of affairs was reported to Mrkšić. (...) in addition to these reports, Mrkšić was aware of the level of animosity of TO and paramilitary personnel toward the Croat forces and had received earlier reports of the killing of Croat prisoners by TO and paramilitary personnel. Despite this, he took no steps during the afternoon of 20 November 1991 to reinforce security at Ovčara.'[190]

'The conduct of the TO members and paramilitaries constituted the offence of torture because the primary motivation of the TO and paramilitary forces was to punish and take revenge against the members of the Croat forces. These motives were underlying the ferocity of the beatings which had the obvious purpose of inflicting severe pain and suffering upon the victims. (...) Mrkšić was aware of the essential nature of the conduct and of the intention of the perpetrators to punish the prisoners of war. The Trial Chamber further concluded that his failure to act, which rendered practical assistance and encouragement to the perpetrators and had a substantial effect on the continuance of the acts of cruel treatment and torture,

[187] *Id.* at para. 333.
[188] *Id.* at para. 336.
[189] *Id.* at para. 337.
[190] *Id* at para. 338.
[191] *Id.* at para. 338.

	amounted to aiding and abetting the crimes of cruel treatment and torture.'[191]
Šljivančanin	*Aiding and abetting murder* 'Upon his return to Negoslavci, Šljivančanin met with his deputy Major Vukašinović who informed him of the problems with the TOs in Ovčara; Šljivančanin then met with Captain Borisavljević who told him about the meeting of the SAO "government"; finally, Šljivančanin met with Mrkšić and Panić.'[192] 'With regard to his meeting with Milc Mrksie on the night of 20 November 1991 (...) Mrkšić must have told Šljivančanin that he had withdrawn the JNA protection from the prisoners of war held at Ovčara and thus also Šljivančanin's responsibility for the prisoners of war. (...) Šljivančanin learned of the withdrawal of the JNA troops in the eourse of his meeting with Mrkšić on the night of 20 November 1991. (...) upon learning of the order to withdraw the troops, Šljivančanin must have realised that the killing of the prisoners of war at Ovčara had become a likely occurrence.'[193] 'Similarly, knowing that the killing of prisoners of war was the likely outcome of their being lcft in the custody of the TOs and paramilitaries, Šljivančanin must have also realised that, given his responsibility for the prisoners of war, if he failed to take action to ensure the continued protection of prisoners of war he would be assisting the TOs and paramilitaries to carry out the murders. (...) upon learning of the order to withdraw the JNA troops from Mrkšić at their meeting of the night of 20 November 1991, (...) Šljivančanin must have been aware that the TOs and paramilitaries would likely kill the prisoners of war and that if he failed to aet. his omission would assist in the murder of the prisoners. (...)Šljivančanin formed the *mens rea* for aiding and abetting murder.'[194] 'Šljivančanin was under a duty to protect the prisoners of war held at Ovčara and that his responsibility included the obligation not to allow the transfer of custody of the prisoners of a war to anyone without first assuring himself that they would not be harmed. Mrkšić's order to withdraw the JNA troops did not relieve him of his position as an officer of the JNA. As sueh. Šljivančanin remained an agent of the Detaining Power and thus continued to be bound by Geneva Convention III not to transfer the prisoners of war to another agent who would not guarantee their safety.'[195] 'The only reasonable inference available on the evidence is that Šljivančanin learned of the withdrawal order at his meeting

[192] *Id.* at para. 61.
[193] *Mrksic and Sljivancanin* Appeal Judgement, para. 62.
[194] *Id.* at para. 63.
[195] *Id.* at para. 74.

	with Mrkšić npon his return to Negoslavci on the night of 20 November 1991. (...)Šljivančanin knew that TOs and paramilitaries were capable of killing, and that if no action was taken "there was a real likelihood that the violenee would escalate just as it had at Velepromet the night before and that the TOs and the paramilitaries would succeed in fully satisfying their revenge and kill the prisoners of war". Aecordingly, Šljivančanin knew that following the withdrawal of the military police the killing of the prisoners of war was probable and that his inaction assisted the TOs and paramilitaries.'[196] 'Šljivančanin's failure to act pursuant to his duty substantially contributed to the killing of the prisoners of war.'[197] 'Šljivančanin guilty for aiding and abetting the murder of 194 individuals'[198] *Aiding and abetting torture by omission* 'Duty to protect the prisoners of war was imposed on Šljivančanin by the laws and customs of war.'[199] 'Šljivančanin was present at Ovčara on the afternoon of 20 November 1991 and witnessed the mistreatment of the prisoners of war, (...)in light of the fact that Šljivančanin saw the mistreatment of the prisoners of war at Ovčara oceurring despite the presenee of JNA troops, it must have been clear to him that the JNA officers and troops present were either unable or unwilling to prevent the beatings. (...) witnessing the beatings at Ovčara must have indicated to Šljivančanin that the offieers did not have everything under control at this time. (...) Šljivančanin had been delegated with the responsibility for the evacuation of the prisoners of war from the Vukovar hospital, and Mrkšić authorised him to use as many military police as necessary to escort the prisoners of war and ensure their safe passage, Šljivančanin must have known that it was his responsibility to protect the prisoners of war and that he had the authority to take action. Knowing what he did, the only reasonable conclusion is that he knew that his failure to take any action to protect the prisoners of war assisted in the mistreatment of the prisoners of war by the TOs and paramilitaries.'[200]
Conviction(s)	
Mrkšić	Murder, a violation of the laws or customs of war, for having aided and abetted the murder of 194, at a site located near the hangar at Ovcara on 20 and 21 November 1991.

[196] *Id.* at para. 101.
[197] *Id.* at para. 102.
[198] *Id.* at para. 103.
[199] *Id.* at para. 150.
[200] *Id.* at para. 206. *Mrksic and Sljivancanin* Trial Judgement, para. 626.

	Torture, a violation of the laws or customs of war, for having aided and abetted the torture of prisoners of war at the hangar at Ovcara on 20 November 1991. Cruel treatment, a violation of the laws or customs of war, for having aided and abetted the maintenance of inhumane conditions of detention at the hangar at Ovcara on 20 November 1991.
Šljivančanin	Murder, a violation of the laws or customs of war, for having aided and abetted the murder of 194 persons, at a site located near the hangar at Ovcara on 20 and 21 November 1991. Torture, a violation of the laws or customs of war, for having aided and abetted the torture of prisoners of war at the hangar at Ovcara on 20 November 1991.
Aggravating/Mitigating Factors	
Mrksic	*Mitigating:* family circumstances, but to a very limited extent since weighted against the gravity of his conduct.[201]
Šljivančanin	*Gravity of the crimes:* consequences of the torture upon the victims and their families, particular vulnerability of the prisoners, and very large number of victims.[202] *Mitigating*: Šljivančanin some allowed some spouses and family members of hospital staff to join the civilians who were evacuated to safety.[203] *Aggravating:* Šljivančanin actions were deceitful in preventing international representative to gain access to the hospital in Vukovar from which the people were removed under his direction,[204] and failure to act to protect.[205]
Sentence (No other conviction but under aiding and abetting): Mrkšić: 20 years. Šljivančanin: 17 years.	

[201] *Mrksic and Sljivancanin* Trial Judgement, para. 703.
[202] *Mrksic and Sljivancanin* Appeal Judgement, para. 413.
[203] *Mrksic and Sljivancanin* Trial Judgement, para. 704.
[204] *Id.*
[205] *Id.* at para. 705.

Crimes Aided and Abetted	
The crimes committed included targeting of civilians, shelling of towns, burning of houses together with racist comments towards the Kosovo Albanian civilians, detention and mistreatments of civilians, sexual violence, looting, killings…[206] 'The Chamber has found that, from March to June 1999, VJ and MUP forces carried out a campaign of widespread and systematic forcible displacements in numerous villages across 13 municipalities in Kosovo, which involved the commission of crimes against hundreds of thousands of Kosovo Albanians.'[207]	
Position of the Accused	
Lazarevic	'After holding numerous positions in the JNA and the VJ, he was appointed Chief of Staff of the Priština Corps in January 1998. On 25 December 1998 Lazarević was appointed Commander of the Priština Corps and remained in that position until 28 December 1999, when he was appointed Chief of Staff of the 3rd Army. Subsequently, on 13 March 2000, he was appointed Commander of the 3rd Army, and in early 2002 he became the Assistant for Ground Forces within the General Staff of the VJ. His military career ended on 5 October 2004 at his personal request. Lazarević was promoted to the rank of Lieutenant- General in June 1999 and to the rank of Colonel-General on 30 December 2000.'[208]
Odjanovic	'Ojdanić first joined the Yugoslav Army in his teenage years, enrolling in the non-commissioned officers' school of the infantry branch of the VJ Land Forces, serving at almost every level of its ranks, including combat command positions, eventually attaining the position of Deputy Chief of the General Staff on 1 July 1996, and serving in that position until 24 November 1998, when he was appointed Chief of the General Staff. Subsequently, in February 2000, he was appointed FRY Minister of Defence. Concurrently with his VJ service, he continued his education, attaining a Masters degree in military science, but aborted his doctoral studies before obtaining that qualification.'[209]

[206] For a detail description see the factual findings, see Volume II of the Judgement, paras 1179-1262.
[207] *Milutinovic et al* Trial Judgement, Volume III, para. 922.
[208] *Id.* at para. 791.
[209] *Id.* at para. 478.

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Description of the Aiding and Abetting	
Ojdanic	'Ojdanić was provided with information indicating that VJ and MUP personnel were responsible for serious criminal aets committed against ethnic Albanians within Kosovo. (...) this made Ojdanié aware that excessive uses of foree and forcible displaeements were likely to occur if he ordered the VJ into Kosovo in 1999.'[210] 'The Chamber has found that, from March to June 1999, VJ and MUP forces earried out a widespread and systematic attaek on numerous villages across 13 municipalities in Kosovo, which involved the eommission of crimes against hundreds of thousands of Kosovo Albanians.'[211] 'As Chief of the General Staff, with both *de jure* and *de facto* power over the VJ forces in Kosovo, he met daily with Milošević to diseuss tbe actions of the VJ and the situation in Kosovo and attended meetings with MUP, VJ, and other FRY leaders, (...) to diseuss the eommission of crimes by VJ and MUP forees in Kosovo. (...) The combination of Ojdanić's general knowledge of the widespread displaeement of Kosovo Albanians in the eourse of VJ operations and his speeifie knowledge of the loeations of those operations, including at most of the locations named in the Indictment, lead the Chamber to conclude that the only reasonable inferenee is that he knew of the campaign of terror, violence, and foreible displaeement being carried out by VJ and MUP forees against Kosovo Albanians.'[212] 'Ojdanić provided practical assistance, encouragement, and moral support to the VJ forees engaging in the forcible displacement of Kosovo Albanians in co-ordinated aetion with the MUP. He contributed by issuing orders for VJ participation in joint operations with the MUP in Kosovo during the NATO air campaign, by mobilising the forces of the VJ to partieipate in these operations, and by furnishing them with VJ military equipment. In addition to issuing orders allowing the VJ to be in the loeations where the erimes were committed, he also refrained from taking effective measures at his disposal, sueh as specifieally enquiring into the forcible displacements, despite his awareness of these incidents. Furthermore, Ojdanić contributed to the commission of crimes in Kosovo by the VJ through his role in arming the non-Albanian population and ordering its engagement in 1999. These contributions had a substantial effect on the commission of the crimes, because they provided assistance in terms of soldiers on the ground to carry out the acts, the VJ weaponry to

[210] *Id.* at para. 623.
[211] *Id.* at para. 624.
[212] *Id.* at para. 625.

	assist these acts, and encouragement and moral support by granting authorisation within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes.'[213] 'Ojdanić's failure to take effective measures against Pavković provided practical assistance, encouragement, and moral support to members of the VJ who perpetrated crimes in Kosovo, by sustaining the culture of impunity surrounding the forcible displacement of the Kosovo Albanian population, and by allowing the Commander of the 3rd Army to continue to order operations in Kosovo during which the forcible displacement took place.'[214] 'Through his acts and omissions, Ojdanić provided practical assistance, encouragement, and moral support to members of the VJ, who were involved in the commission of forcible transfer and deportation in the specific crime sites where it has been found that the VJ participated, that his conduct had a substantial effect on the commission of these crimes, that he was aware of the intentional commission of these crimes by the VJ in co-ordinated action with the MUP, and that he knew that his conduct assisted in the commission of these crimes.'[215]
Lazarevic	'Lazarević was aware of this campaign of forcible displacements that was conducted by the VJ and MUP throughout Kosovo during the NATO air campaign. During 1998 and the period leading up to the campaign, Lazarević was provided with information indicating that VJ and MUP personnel were responsible for serious criminal acts committed against ethnic Albanians within Kosovo. (...) Lazarević was aware of the fact that crimes were committed against civilians and civilian property during operations conducted by the VJ and the MUP in 1998 and early 1999. He was aware of the humanitarian catastrophe in Kosovo (...) and he was aware that the VJ were involved in burning the houses of Kosovo Albanians; (...) Lazarević's presence in the field, inspecting VJ units that were involved in the commission of crimes against Kosovo Albanians, was expressly noted to improve the morale of soldiers. Lazarević knew that the military courts were not effectively prosecuting VJ members for expelling Kosovo Albanians from their homes. Despite his knowledge of the campaign of forcible displacements occurring in Kosovo, he reported on 15 May 1999 that only one officer from the Priština Corps was charged with murder. (...) Lazarević knew that his failure to take adequate measures to secure the proper investigation of serious crimes committed by the VJ enabled the forces to continue their campaign of terror, violence, and displacement.'[216]

[213] *Id.* at para. 626.
[214] *Id.* at para. 627.
[215] *Id.* at para. 628.
[216] *Id.* at para. 923.

	'These acts and omissions provided a substantial contribution to the commission of the crimes that the Chamber has found to have been committed by VJ members, (...) as they provided assistance in terms of soldiers on the ground to carry out the acts, the organisation and equipping of VJ units, and the provision of weaponry, including tanks, to assist these acts. Furthermore, Lazarević's acts and omissions provided encouragement and moral support by granting authorisation within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes by VJ members. As the Commander of the Priština Corps, Lazarević knew that his conduct would assist the implementation of the campaign to forcibly displace Kosovo Albanians.'[217] 'Through his acts and omissions, Lazarević provided practical assistance, encouragement, and moral support to members of the VJ, who were involved in the commission of forcible transfer and deportation in the specific crime sites outlined above, which had a substantial effect on the commission of these crimes, that he was aware of the intentional commission of these crimes by the VJ in co-ordinated action with the MUP, and that he knew that his conduct assisted in the commission of these crimes.'[218]
Conviction(s)	
Ojdanovic	Aiding and abetting, the crimes in the following locations: deportation as a crime against humanity and other inhumane acts (forcible transfer) as a crime against humanity in more than 22 locations (towns/villages).[219]
Lazarevic	'Aiding and abetting the crimes in the following locations: (...) deportation as a crime against humanity and other inhumane acts (forcible transfer) as a crime against humanity in more than 22 locations.[220]
Aggravating/Mitigating Factors	
Gravity: hundreds of murders, several sexual assaults, and the forcible transfer and deportation of hundreds of thousands of people;[221] The Accused have all, save Milan Milutinović, been found guilty of committing or aiding and abetting the forcible displacement of hundreds of	

[217] *Id.* at para. 926.
[218] *Id.* at para. 927
[219] *Id.* at para. 630.
[220] *Id.* at para. 930.
[221] *Id.* at para. 1172.

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thousands of Kosovo Albanians, crimes were part of a widespread and systematic campaign of terror and violence over a period of just over two months.[222] Some of the victims were of a particularly vulnerable nature, such as young women, elderly people, and children.[223]
Aggravating: Ojdanovic: abuse of power;[224] *Lazarevic*: abuse of leadership position.[225]

Mitigating: (both) good behaviour in detention,[226] no criminal record and prior good character (limited weight).[227] *Odjanovic*: limited weight to the fact that he took measures to mitigate human suffering,[228] medical condition and advanced age;[229] *Lazarevic:* substantial cooperation with OTP,[230] family situation and severe illness,[231] surrender (1200).[232]

Sentence (No Detail):
Odjanovic: 15 years. Lazarevic: 15 years. Note that they were also convicted for direct commission of certain crimes.

Martinovic and Naletilic Case
(Martinovic)
Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-T, Judgement (TC), 31 March 2003.
Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-A, Judgement (AC), 3 May 2006.

Crimes Aided and Abetted

Murder and wilful killing of Nenad Harmandzic
'Nenad Harmandzic was killed by a gunshot wound through his cheek at or near Martinovic's base'[233]

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[222] *Id.*
[223] *Id.* at para. 1173.
[224] *Id.* at para. 1185.
[225] *Id.* at para. 1195.
[226] *Id.* at para. 1178.
[227] *Id.* at para. 1179.
[228] *Id.* at para. 1187.
[229] *Id.* at para. 1188.
[230] *Id.* at para. 1198.
[231] *Id.* at para. 1199.
[232] *Id.* at para. 1200.
[233] *Martinovic and Naletilic* Appeal Judgement, para. 491.

'This exhumation team exhumed a body in Liska Park on 30 March 1998 which was identified as that of Nenad Harmandzic. The autopsy report (...) stated that the cause of death was a bullet but that prior to death the victim had been severely beaten with several fractures and injuries as a result. It stated that the injuries to the body were of such scale and seriousness that, in the absence of a fatal bullet injury to the head, they could lead to a traumatic shock, which might eventually lead to death.'[234]
'Nenad Harmandzic, a police officer before the war, was specifically targeted by Martinovic and that Martinovic brought him to his base in order to take revenge on him.'[235]

Position of the Accused

When the conflict against the Serb-Montenegrin forces began in Mostar in 1992, Martinovic joined the Croatian Defence Forces ("HOS") and became a commander. At least from mid-May 1993 onward, Martinovic was the commander of a group of soldiers who held positions at a confrontation line in Mostar. Martinovic was the commander of the Vinko skrobo anti terrorist group ('ATG'), which the Trial Chamber found was part of the KB (a military group called convicts battalion) [236,237]

Description of the Aiding and Abetting

'First, he encouraged his soldiers to mistreat Nenad Harmandzic in the most brutal way at his base. He designated him as "game" that could be mistreated and humiliated by his soldiers at random. He then practically assisted the murder by preventing Nenad Harmandzic from returning to the Heliodrom in the group of prisoners. He further practically assisted the murder when he instructed the co-detainees of Nenad Harmandzic to not tell anybody about what they had witnessed at the base and, in particular, when he instructed the driver to give false information about the whereabouts of Nenad Harmandzic to the Heliodrom administration. By doing so, Vinko Martinovic made sure that nobody would interfere with his personal plans for Nenad Harmandzic and that, in particular, the Heliodrom administration would not start wondering about a missing prisoner. Vinko Martinovic also rendered a substantial contribution to the murder when it came to the disposition of the corpse. He gave direct orders with regard to the burial of the body, thereby initiating and substantially contributing to the covering up of the murder of Nenad Harmandzic.'[238]

[234] *Id.* at para. 492, quoting the Trial Judgement.
[235] *Id.*
[236] *Martinovic and Naletilic* Trial Judgement, para. 2.
[237] *Martinovic and Naletilic* Appeal Judgement, para. 5.
[238] *Martinovic and Naletilic* Trial Judgement, para. 507.

Conviction(s)
Aiding and abetting murder as a crime against humanity. Aiding and abetting wilful killing as a grave breach of the Geneva Conventions. Article 7(1) (other than aiding and abctting): Persecutions on political, racial and religious grounds as a crime against humanity; inhumane acts as a crimc against humanity; inhuman treatment as a grave breach of the Geneva Conventions; wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions; and unlawful transfer of a civilian as a grave breach of the Geneva Conventions. Article 7(1) and 7(3): Unlawful labour as a violation of the laws or customs of war and of plunder of public or private property as a violation of the laws or customs of war under Article 3(e). Only convictions for aiding and abetting Murder crime against humanity and wilful killing because of issue of cumulative convictions.[239]
Aggravating/Mitigating Factors
Gravity: Most heinous crimes.[240] *Aggravating:* grave significancc of his conduct: he was a commander, permitted eommission of atrocities and participated in crimes directly.[241] *Mitigating:* limited weight to the fact that Martinovic facilitated his transfer to the tribunal.[242]
Sentcnce: 18 years.

[239] *Id.* at paras. 735, 767,
[240] *Id.* at para. 758.
[241] *Id.* at para. 758.
[242] *Martinovic and Naletilic* Appeal Judgement, para. 601.

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