SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Acting Registrar: Binta Mansaray

Date: 26 October 2009

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-A)

JUDGMENT

Office of the Prosecutor:
Christopher Staker
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The **APPEALS CHAMBER** of the Special Court for Sierra Leone ("Appeals Chamber") comprised of Hon. Justice Renate Winter, Presiding, Hon. Justice Jon Moadeh Kamanda, Hon. Justice George Gelaga King, Hon. Justice Emmanuel Ayoola and Hon. Justice Shireen Avis Fisher;

SEISED of appeals from the Judgment rendered by Trial Chamber I ("Trial Chamber") on 2 March 2009, in the case of *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T ("Trial Judgment");

HAVING CONSIDERED the written and oral submissions of the Parties and the Record on Appeal;

HEREBY RENDERS its Judgment.





I. INTRODUCTION

A. The Special Court for Sierra Leone

1. The Special Court for Sierra Leone ("Special Court") was established in 2002 by an agreement between the United Nations and the Government of Sierra Leone ("Special Court Agreement").[1] The mandate of the Special Court is to prosecute those persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[2]

2. The Statute of the Special Court ("Statute") empowers the Special Court to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, other serious violations of international humanitarian law and specified crimes under Sierra Leonean law.[3]

B. Procedural and Factual Background

1. The Armed Conflict

3. Sierra Leone gained independence from Britain on 27 April 1961.[4] It is comprised of the Western Area and the Northern, Eastern and Southern Provinces which are divided into districts and chiefdoms.[5] In the decades following independence, the country suffered several military coups and a one-party State was established in late 1978.[6]

4. The Revolutionary United Front ("RUF") was formed in the late 1980s with the aim of overthrowing the one-party rule of the All Peoples Congress ("APC") Government.[7] In March 1991 the RUF attacked Sierra Leone from Liberia through the Kailahun District.[8] Foday Saybana Sankoh, a former member of the Sierra Leone Army ("SLA"), was the leader of the RUF.[9] The

[1] Special Court Agreement.
[2] *See* Article 1 of the Special Court Agreement; Article 1.1 of the Statute.
[3] Articles 2-5 of the Statute.
[4] Trial Judgment, para. 7.
[5] Trial Judgment, para. 7.
[6] Trial Judgment, para. 8.
[7] Trial Judgment, para. 9.
[8] Trial Judgment, para. 12.
[9] Trial Judgment, para. 9.

RUF claimed to be fighting in order to realise the right of every Sierra Leonean to true democracy and fair governance.[10]

5. By the end of 1991, the RUF held consolidated positions in the east in Kailahun District and in parts of Pujehun District in the south.[11] In April 1992, the APC government of President Joseph Momoh was overthrown in a military coup by Captain Valentine Strasser who formed the National Provisional Ruling Council ("NPRC") and ruled until January 1996 when he was overthrown by his deputy, Brigadier Julius Maada Bio.[12]

6. By 1995, the RUF controlled the southern and eastern districts of Kailahun, Pujehun, Bo and Kenema.[13] The RUF also attacked areas in Port Loko District, Kambia District and the Western Area. From their south-eastern stronghold the RUF moved into Bonthe and Moyamba Districts and northwards into Kono District eventually occupying Koidu Town.[14] Local pro-Government militias emerged due to the RUF's success.[15] These militias were collectively known as the Civil Defence Forces ("CDF"), and were comprised of Kamajors, Donsos, Gbettis or Kapras and Tamaboros, who were traditional Sierra Leonean hunters.[16] From 1995 to 1996, the SLA with the assistance of the CDF and other pro-government forces was able to push back the RUF into the provinces and gained ground in many districts held by the RUF.[17] The RUF however maintained control of most of Kailahun District.[18]

7. In February 1996, democratic elections were held and Ahmad Tejan Kabbah, the head of the Sierra Leone People's Party, ("SLPP") was elected President of Sierra Leone.[19] Despite its professed commitment to democracy, the RUF boycotted the elections and continued active hostilities.[20] Tension between the SLA and the Government also began over the increased importance of the CDF.[21] In September 1996, Johnny Paul Koroma, an SLA officer, was alleged to have attempted a coup d'état and was put on trial.

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[10] Trial Judgment, para. 652.
[11] Trial Judgment, para. 12.
[12] Trial Judgment, para. 13.
[13] Trial Judgment, para. 15.
[14] Trial Judgment, para. 15.
[15] Trial Judgment, para. 16.
[16] Trial Judgment, para. 16.
[17] Trial Judgment, para. 17.
[18] Trial Judgment, para. 17.
[19] Trial Judgment, para. 18.
[20] Trial Judgment, para. 18.
[21] Trial Judgment, para. 18.

8. On 30 November 1996, President Kabbah and Foday Sankoh signed the Abidjan Peace Accord, which called for among other things a cease-fire, disarmament and demobilisation, with the Government extending amnesty to RUF members in return for peace.[22] However, in January 1997, hostilities erupted again between the Government and the RUF,[23] and Foday Sankoh was arrested in Nigeria for alleged weapons violations while returning to Sierra Leone from Côte d'Ivoire in February 1997.[24]

9. On 25 May 1997, members of the SLA overthrew the Government of President Kabbah in a coup d'état and released Johnny Paul Koroma from prison. He became the Chairman of the Armed Forces Revolutionary Council ("AFRC").[25] The AFRC suspended the 1991 Constitution of Sierra Leone, dissolved Parliament and banned all political parties.[26] Johnny Paul Koroma invited the RUF to join the AFRC and to form a governing alliance.[27] Under arrest in Nigeria, Foday Sankoh accepted the invitation and after his announcement by radio broadcast that they were joining forces with the AFRC, the RUF joined the AFRC in Freetown.[28] The governing body of the Junta regime included both AFRC and RUF members, and was known as the Supreme Council.[29]

10. Throughout 1997, the Junta regime seized control of major towns throughout the country including Freetown, Bo, Kenema, Koidu, Pujehun and Bonthe.[30] The addition of Kailahun District, which was controlled by the RUF, extended the Junta's control over the country.[31] The Junta also controlled the diamond mines in Tongo Fields in Kenema District, proceeds from which were used to finance the objectives of the Junta Government.[32]

11. On 14 February 1998, the ECOWAS Ceasefire Monitoring Group ("ECOMOG") and CDF forces attacked the AFRC/RUF contingent in Freetown taking control of the city, reinstating President Kabbah and eventually establishing control over two-thirds of Sierra Leone.[33] The AFRC/RUF Junta forces withdrew from Freetown eventually stationing themselves in parts of

[22] Trial Judgment, para. 19.
[23] Trial Judgment, para. 20.
[24] Trial Judgment, para. 20.
[25] Trial Judgment, para. 21.
[26] Trial Judgment, para. 21.
[27] Trial Judgment, para. 22.
[28] Trial Judgment, para. 22.
[29] Trial Judgment, para. 22.
[30] Trial judgment, para. 23.
[31] Trial Judgment, para. 23.
[32] Trial Judgment, para. 23.
[33] Trial Judgment, para. 28.

Kono District.[34] Following the attack on Freetown of 6 January 1999, the international community put pressure on President Kabbah to enter into a peace agreement with the armed opposition groups.[35] Negotiations began between the RUF and the Government and a ceasefire was entered into on 24 May 1999.[36] On 7 July 1999, the Lomé Peace Accord was signed, resulting in a power sharing arrangement between the Government of President Kabbah and the RUF, represented by Foday Sankoh.[37]

12. Hostilities resumed shortly after the signing of the Lomé Peace Accord and on 22 October 1999, the UN Security Council passed Resolution 1270 authorising the deployment of 6000 UN peacekeepers to Sierra Leone ("UNAMSIL").[38] However, several groups refused to disarm and hostilities recommenced shortly thereafter.[39] In May 2000, hundreds of UNAMSIL peacekeepers were abducted and detained by RUF units that had not yet disarmed.[40] A ceasefire agreement was signed in Abuja on 10 November 2000 and a final cessation of hostilities was declared by President Kabbah in January 2002.

2. The Indictment

13. Three persons, Issa Hassan Sesay, Morris Kallon and Augustine Gbao, members of the RUF, (the "Appellants") were charged in this case. The initial indictments against Sesay and Kallon were confirmed on 7 March 2003, and the initial indictment against Gbao was confirmed on 16 April 2003. The indictments were later consolidated, amended and corrected.[41]

14. The Corrected Amended and Consolidated Indictment ("Indictment") comprising a total of 18 Counts charged the Accused with:

(i) Eight Counts of crimes against humanity, pursuant to Article 2 of the Statute namely: extermination, murder, rape, sexual slavery, other inhumane acts and enslavement in Counts 3, 4, 6, 7, 8, 11, 13 and 16;

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[34] Trial Judgment, para. 30.
[35] Trial Judgment, para. 41.
[36] Trial Judgment, para. 41.
[37] Trial Judgment, para. 41.
[38] Trial Judgment, para. 43. Pursuant to its mandate, UNAMSIL was tasked to cooperate with the Government of Sierra Leone and the RUF in the implementation of the Lomé Peace Accord; to assist in the disarmament, demobilization and reintegration of combatants; to monitor adherence to the ceasefire; and to facilitate the delivery of humanitarian assistance: UN SC Res. 1270, para. 8.
[39] Trial Judgment, para. 44.
[40] Trial Judgment, para. 44.
[41] *Prosecutor* v. *Sesay et al*., SCSL-04-15-T, Corrected Amended Consolidated Indictment, 2 August 2006.

(ii) Eight Counts of violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3 of the Statute namely: violence to life, health and physical or mental well-being of persons in particular acts of terrorism, collective punishments, murder, outrages upon personal dignity, mutilation, pillage and taking of hostages in Counts 1, 2, 5, 9, 10, 14, 17 and 18; and

(iii) Two Counts of other serious violations of international humanitarian law, pursuant to Article 4 of the Statute namely: conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities and attacks against UNAMSIL peacekeepers in Counts 12 and 15.

15. The Indictment charged the Appellants with individual criminal responsibility pursuant to Articles 6(1) and 6(3) of the Statute,[42] alleging among other things:

> The RUF, including **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** and the AFRC, including ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU**,** shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.
>
> The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.[43]

3. Summary of the Trial Judgment

16. The trial commenced with the Prosecution's opening statement on 5 July 2004 and closing arguments were heard on 4 and 5 August 2008. The Trial Chamber delivered an oral summary of its Judgment on 25 February 2009 and filed its written Judgment on 2 March 2009.

17. The Trial Chamber found that attacks were directed against the civilian population of Sierra Leone from 30 November 1996 until at least the end of January 2000, that these attacks were both

[42] Indictment, paras 36, 38-39.
[43] Indictment, paras 36, 37.

widespread and systematic and that the perpetrators acted with the requisite intent within the meaning of Article 2 of the Statute.[44] The Trial Chamber also took judicial notice of the fact that there was an armed conflict in Sierra Leone from March 1991 until January 2002, and found that there was a nexus between alleged violations and the armed conflict within the meaning of Articles 3 and 4 of the Statute.[45]

18. The Trial Chamber further found that during the AFRC/RUF Junta period a joint criminal enterprise existed between senior leaders of the AFRC and RUF including the Accused,[46] and that Sesay, Kallon and Gbao participated in the joint criminal enterprise, with Justice Boutet dissenting with respect to Gbao's participation.[47]

4. The Verdict

19. The majority of the Trial Chamber found all three Appellants guilty under Counts 1 through 11 and 13 through 15 for extermination, murder, rape, sexual slavery, other inhumane acts (in particular forced marriages and physical violence) and enslavement pursuant to Article 2 of the Statute; and for violence to life, health and physical or mental well-being of persons (in particular acts of terrorism, collective punishments, murder, outrages upon personal dignity, mutilation, and pillage) pursuant to Article 3 of the Statute; and for intentionally directing attacks against peacekeepers pursuant to Article 4 of the Statute[48]

20. Justice Boutet partially dissented in respect of Gbao on the Counts for which he was found responsible pursuant to his participation in a joint criminal enterprise.[49] Justice Boutet however found Gbao responsible for planning enslavement under Count 13[50] and for aiding and abetting attacks against peacekeepers under Count 15.[51]

21. Sesay and Kallon were also found guilty under Count 12, for conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, pursuant to Article 4 of the Statute, and under Count 17 for violence to life, health and

[44] Trial Judgment, paras 942-963.
[45] Trial Judgment, paras 968, 990.
[46] Trial Judgment, paras 1985, 2054, 2072, 2159-2160.
[47] Trial Judgment, paras 2002, 2008, 2009, 2049, 2055-2056, 2057-2061, 2082-2091, 2093-2103, 2104-2110, 2161-2163, 2164-2172.
[48] Trial Judgment, Disposition pp. 677-687.
[49] Dissenting Opinion of Justice Pierre G. Boutet, para. 23.
[50] Dissenting Opinion of Justice Pierre G. Boutet, para. 23.
[51] Dissenting Opinion of Justice Pierre G. Boutet, para. 24.

physical or mental well-being of persons for the murder of UNAMSIL peacekeepers pursuant to Article 3 of the Statute. Sesay and Kallon were found not guilty under Counts 16 and 18. Gbao was found not guilty under Counts 12, 16, 17 and 18.[52]

5. The Sentences

22. The Sentencing Judgment was delivered on 8 April 2009. The Trial Chamber sentenced Sesay to a total term of imprisonment of fifty-two (52) years and Kallon to a total term of imprisonment of forty (40) years. The majority of the Trial Chamber sentenced Gbao to a total term of imprisonment of twenty-five (25) years, Justice Boutet dissenting.[53] The Trial Chamber ordered the sentences to run concurrently for all the Counts for which the Accused were found guilty,[54] and also ordered that credit be given for any time already served in custody.[55]

C. The Appeal

1. Notices of Appeal

23. The Prosecution and the Appellants filed Notices of Appeal on 28 April 2009.[56] Sesay filed forty-six (46) main Grounds of Appeal, Kallon filed thirty-one (31) main Grounds of Appeal, Gbao filed nineteen (19) main Grounds of Appeal and the Prosecution filed three (3) main Grounds of Appeal. In addition, Sesay, Kallon and Gbao filed thirty-nine (39), fourty-four (44) twenty-three (23) sub grounds of appeal respectively.

2. The Grounds of Appeal

(a) Common grounds of appeal

24. Many of the grounds raised by the Appellants are common. For the sake of expediency the Appeals Chamber has dealt with the grounds according to common issues, where applicable. Alleged defects in the Indictment were raised by Sesay in Grounds 6-8, 10-13, 44 (Sesay abandoned Ground 9); Kallon in Grounds 1, 3-6, 9-16, 19-30, and Gbao in Grounds 4 and 8(a). Issues pertaining to fair trial and the assessment of evidence were raised in Sesay's Grounds 1-5, 14-18,

[52] Trial Judgment, Disposition, pp. 677-687.
[53] Sentencing Judgment, Disposition, pp. 93-98.
[54] Sentencing Judgment, Disposition, p. 98.
[55] Sentencing Judgment, p. 98.
[56] Sesay Notice of Appeal; Kallon Notice of Appeal; Gbao Notice of Appeal; Prosecution Notice of Appeal.

20-22, 45; Kallon's Grounds 1 and 7, and Gbao's Grounds 2, 6, 8(a), 7 and 14 (Gbao abandoned Grounds 1, 3, 5, 13, 15). Alleged errors pertaining to the JCE were raised by Sesay in his Grounds 24-34 and 37; by Kallon in his Grounds 2, 8-11A and 15 and by Gbao in his Grounds 8(b)-(d), 8(e)-(m) and 8(o)-(s) (Gbao abandoned Ground 8(n)).

25. All three Accused raised issues pertaining to their liability for attacks on UNAMSIL peacekeepers, in particular, Sesay's Grounds 28 and 44; Kallon's Grounds 26-27, 29 and Gbao's Ground 16 (Gbao's Ground 17 was abandoned). The Prosecution appealed the Appellants' acquittals for the taking of UNAMSIL peacekeepers hostage in Ground 3 of its Appeal. Both Kallon and Gbao in Grounds 30 and Ground 19 respectively, appealed against their convictions for extermination and murder as crimes against humanity, for the same acts, as being impermissibly cumulative. All three Accused appealed against their sentences: Sesay's Ground 46, Kallon's Ground 31 and Gbao's Ground 18.

(b) Individual grounds of appeal

(i) Sesay

26. Under Grounds 23, 29-31 and 33, Sesay argued that he did not have the specific intent for the crimes of acts of terrorism and collective punishment pursuant to Article 3 Common to the Geneva Conventions. Sesay appeals his liability for the crime of enslavement under Grounds 32, 35, 36 and 40. In addition, he appealed his conviction for his role in the attacks directed at civilians in Kailahun (Ground 38), sexual violence crimes (Ground 39) and the use of child soldiers (Ground 43). The Appeals Chamber notes that Sesay abandoned Ground 19 (errors on adjudicated facts Rule 94), Ground 41 (acts of terror with respect to unlawful killing of 63 suspected Kamajors in Kailahun) and Ground 42 (acts of terror with respect to sexual slavery and forced marriages in Kailahun).

(ii) Kallon

27. Kallon appealed the following convictions: for instigating murder in Ground 12, as a superior for forced marriages in Ground 13, as a superior for enslavement in Ground 14, for acts of terrorism in Ground 16, for physical violence in Ground 19, for planning the use of child soldiers in Ground 20, for abductions and forced labour in Ground 21, for pillage in Ground 22, and lack of specific intent for Counts 15 and 17 in Ground 25.

(iii) Gbao

28. Gbao appealed his conviction for aiding and abetting murder in Kailahun District under Ground 9, the reliability of witnesses with respect to sexual violence in Ground 10, sexual violence as acts of terrorism in Ground 12, and for abductions and forced labour in Ground 11.

(iv) The Prosecution

29. The Prosecution complained in Ground 1 that the Trial Chamber erred in finding that the JCE did not continue after April 1998. In Ground 2, the Prosecution appealed Gbao's acquittal under Count 12 for conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities.[57]

[57] The Prosecution's Ground 3 is referred to in paragraph 25 above in the Grounds of Appeal pertaining to the Appellants responsibility for attacks on UNAMSIL peacekeepers.

II. APPELLATE REVIEW

A. Standard of Review on Appeal

30. Before the Appeals Chamber embarks on a detailed consideration of the Parties' Grounds of Appeal, it is expedient to recall at the threshold, albeit in general terms, some of the principles of appellate review that will guide it.[58]

31. **In regard to errors of law**: Where the appellant alleges an error of law pursuant to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence ("Rules"), only arguments relating to errors in law that invalidate the decision of the Trial Chamber would merit consideration. The appellant must provide details of the alleged error and state with precision how the legal error invalidates the decision.[59] In exceptional circumstances, the Appeals Chamber may consider legal issues raised by a party or *proprio motu* although they may not lead to the invalidation of the judgment, if they are nevertheless of general significance to the Special Court's jurisprudence.[60]

32. **In regard to errors of fact**: On appeal where errors of fact are alleged also pursuant to Article 20 of the Statute and Rule 106 of the Rules, the Appeals Chamber will not lightly overturn findings of fact reached by a Trial Chamber; the error of fact must have resulted in a miscarriage of justice.[61] The appellant must provide details of the alleged error and state with precision how the error of fact occasioned a miscarriage of justice. A miscarriage of justice is defined as "[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[62] For an error to be one that occasioned a miscarriage of justice it must have been "critical to the verdict reached."[63] Where it is alleged that the Trial Chamber committed an error of fact, the Appeals Chamber will give a margin of deference to the Trial Chamber that received the evidence at trial.[64] This is because it is the Trial Chamber that is best placed to assess the evidence, including the demeanour of witnesses.[65] The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same

[58] *See Fofana and Kondewa* Appeal Judgment, paras 32-36.
[59] *Norman et al.* Subpoena Decision, para. 7.
[60] *Fofana and Kondewa* Appeal Judgment, para. 32. *See* also *Galić* Appeal Judgment, para. 6; *Stakić* Appeal Judgment, para. 7; *Kupreškić et al.* Appeal Judgment, para. 22; *Tadić* Appeal Judgment, para. 247.
[61] *Fofana and Kondewa* Appeal Judgment, para. 33, *Kupreškić et al.* Appeal Judgment, para. 29.
[62] *Kupreškić et al.* Appeal Judgment, para. 29, *citing Furundzija* Appeal Judgment, para. 37.
[63] *Kupreškić et al.* Appeal Judgment, para. 29.
[64] *Fofana and Kondewa* Appeal Judgment, para. 33.
[65] *Fofana and Kondewa* Appeal Judgment, para. 33.

finding or where the finding is wholly erroneous.[66] The Appeals Chamber has adopted the statement of general principle contained in the ICTY Appeals Chamber decision in *Kupreškić et al.*, as follows:

> [T]he task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[67]

The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[68]

33. The same standard of reasonableness and deference to factual findings applies when the Prosecution appeals against an acquittal,[69] however, the Appeals Chamber endorses the view that:

> Considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated.[70]

34. **In regard to procedural errors**: Although not expressly so stated in Article 20 of the Statute, not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be waived or ignored (as immaterial or inconsequential) without injustice or prejudice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice.

35. **In regard to appellate review of the exercise of discretionary powers by the Trial Chamber**: The guiding principles can be stated succinctly. The Trial Chamber's exercise of

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[66] *Fofana and Kondewa* Appeal Judgment, para. 33; *Ntakirutimana* Appeal Judgment, para. 12; *Kupreškić et al.* Appeal Judgment, para. 30.
[67] *Fofana and Kondewa* Appeal Judgment, para. 34, *quoting Kupreškić et al.* Appeal Judgment, para. 30.
[68] *See Galić* Appeal Judgment, para. 9, fn. 21; *Stakić* Appeal Judgment, para. 219; *Čelebići* Appeal Judgment, para. 458. Similarly, the standard of proof at trial is the same regardless of the type of evidence, direct or circumstantial.
[69] *Muvunyi* Appeal Judgment, para. 10; *Mrkšić and Sljivančanin* Appeal Judgment, para. 15; *Martić* Appeal Judgment, para. 12.
[70] *Muvunyi* Appeal Judgment, para. 10; *Mrkšić and Sljivančanin* Appeal Judgment, para. 15; *Martić* Appeal Judgment, para. 12.

discretion will be overturned if the challenged decision was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The scope of appellate review of discretion is, thus, very limited: even if the Appeals Chamber does not agree with the impugned decision, it will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously.[71] Where the issue on appeal is whether the Trial Chamber correctly exercised its discretion in reaching its decision the Appeals Chamber will only disturb the decision if an appellant has demonstrated that the Trial Chamber made a discernible error in the exercise of discretion.[72] A Trial Chamber would have made a discernible error if it misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.[73] Provided therefore that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal even though the Appeals Chamber itself may have exercised the discretion differently.

B. Defective submissions

36. The Appeals Chamber has the inherent discretion to find that any of the Parties' submissions do not merit a reasoned opinion in writing and summarily dismiss arguments that are evidently unfounded. In particular, the Appeals Chamber cannot effectively and efficiently carry out its mandate without focused submissions by the Parties. In order for the Appeals Chamber to assess a Party's arguments, the Party is expected to set out its Grounds of Appeal clearly, logically and exhaustively.[74] Accordingly, submissions that are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies may be, on that basis, summarily dismissed without detailed reasoning.[75]

37. In the instant proceeding, the Appeals Chamber has identified the following seven types of deficiencies in the Parties' submissions.

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[71] *Norman* Subpoena Decision, para. 5, *citing Milošević* Decision on Appeal from Refusal to Order Joinder, para. 4; *Karemera* Decision on Leave to File Amended Indictment, para. 9.
[72] *Norman* Subpoena Decision, para. 5, *citing Milošević* Decision on Appeal from Refusal to Order Joinder, para. 4.
[73] *Norman* Subpoena Decision, para. 6, *citing Milošević* Decision on Appeal from Refusal to Order Joinder, para. 5.
[74] *Brima et al.* Appeal Judgment, para. 34.
[75] *See Krajišnik* Appeal Judgment, para. 16; *Martić* Appeal Judgment, para. 14; *Strugar* Appeal Judgment, para. 16; *Orić* Appeal Judgment, para. 14.

38. First, some submissions are vague. An appellant is expected to identify the challenged factual finding and put forward its factual arguments with specificity.[76] As a general rule, where an appellant's references to the Trial Judgment or the evidence are missing, vague or incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument.[77] The Appeals Chamber has summarily dismissed a number of the Parties' argument on this basis.[78]

39. Second, some submissions merely claim a failure to consider evidence. A Trial Chamber is not required to refer to the testimony of every witness and to every piece of evidence on the record, and failure to do so does not necessarily indicate lack of consideration.[79] This holds true as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. Such disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning."[80] Where the Appeals Chamber finds that an appellant merely asserts that the Trial Chamber failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the totality of the evidence, could have reached the same conclusion as the Trial Chamber did, or without showing that the Trial Chamber completely disregarded the evidence, it will, as a general rule, summarily dismiss that alleged error or argument.[81] The Appeals Chamber has summarily dismissed the arguments suffering from this type of deficiency.[82]

40. Third, some submissions merely seek to substitute alternative interpretations of the evidence. As a general rule, mere assertions that the Trial Chamber erred in its evaluation of the evidence, such as claims that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner, are liable to be summarily dismissed.[83] Similarly, where an appellant merely seeks to substitute its own evaluation of the evidence for that

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[76] *Martić* Appeal Judgment, para. 18; *Strugar* Appeal Judgment, para. 20. *See* also *Halilović* Appeal Judgment para. 13; *Blagojević and Jokić* Appeal Judgment, para. 11; *Brđanin* Appeal Judgment, para. 15; *Gacumbitsi* Appeal Judgment, para. 10.
[77] *Martić* Appeal Judgment, para. 18; *Strugar* Appeal Judgment, para. 20.
[78] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 80 (Sesay Ground 23 in its entirety), 149 (in Ground 29), 169 (in Ground 32), 276-279 (in Ground 35); Kallon Appeal, paras 77-85 (Kallon Ground 7 in its entirety), 98 (in Ground 9), 147 (in Ground 15), 194 (in Ground 20), 198 (in Ground 20), 203 (in Ground 20); Gbao Appeal, para. 163 (in Ground 8(m)).
[79] *Strugar* Appeal Judgment, para. 24; *Kvočka et al.* Appeal Judgment, para. 23; *Kupreškić et al.* Appeal Judgment, para. 458.
[80] *Strugar* Appeal Judgment, para. 24; *Limaj* Appeal Judgment, para. 86.
[81] *See Brđanin* Appeal Judgment, para. 24; *Galić* Appeal Judgment, paras 257-258.
[82] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 109 (in Ground 24), 113 (in Ground 24), 142 (in Ground 29), 169 (in Ground 31); Kallon Appeal, para. 142 (in Ground 13).
[83] *See Martić* Appeal Judgment, para. 19; *Strugar* Appeal Judgment, para. 21; *Brđanin* Appeal Judgment, para. 24.

of the Trial Chamber, such submissions may be dismissed without detailed reasoning. The same applies to claims that the Trial Chamber could not have inferred a certain conclusion from circumstantial evidence, without further explanation.[84] An appellant must address the evidence the Trial Chamber relied on and explain why no reasonable trier of fact, based on the evidence, could have evaluated the evidence as the Trial Chamber did, and the Appeals Chamber may summarily dismiss arguments that fail to make such a minimum pleading on appeal. The Appeals Chamber has summarily dismissed the arguments that fail to comply with this rule.[85]

41. Fourth, some submissions fail to identify the prejudice. Where the Appeals Chamber considers that an appellant fails to explain how the alleged factual error had an effect on the conclusions in the Trial Judgment, it will summarily dismiss that alleged error or argument. The arguments of the Parties suffering from this deficiency have been summarily dismissed.[86]

42. Fifth, some submissions are mere repetitions of arguments at trial. The Appeals Chamber will, as a general rule, summarily dismiss submissions that merely repeat arguments that did not succeed at trial unless it is shown that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber.[87] The Appeals Chamber emphasizes that an appellant must contest the Trial Chamber's findings and conclusions, and should not simply invite the Appeals Chamber to reconsider issues *de novo*. Submissions that merely put forward an appellant's position without addressing the Trial Chamber's allegedly erroneous finding or conclusion therefore fail to properly develop an issue for appeal. Some of the Parties' arguments have been summarily dismissed on this basis.[88]

43. Sixth, many submissions are otherwise incomplete. Submissions may be dismissed without detailed reasoning where an appellant makes factual claims or presents arguments that the Trial

[84] *Martić* Appeal Judgment, para. 19; *Strugar* Appeal Judgment, para. 21.
[85] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 164 (in Ground 31), 177-182 (in Ground 28), 196-203 (in Ground 33), 219 (in Ground 33), 221 (in Ground 33), 222 (in Ground 33), 240 (in Ground 34), 248 (in Ground 34), 309 (in Ground 40), 310 (in Ground 40), 334 (in Ground 43); Kallon Appeal, paras 168 (in Ground 16), 194 (in Ground 20), 196 (in Ground 20), 197 (in Ground 20), 199 (in Ground 20), 201 (in Ground 20), 202 (in Ground 20), 204 (in Ground 20), 209 (in Ground 20), 217 (in Ground 20), 218 (in Ground 20); Gbao Appeal, paras 405-415 (in Ground 18(c)).
[86] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 113 (in Ground 24), 169 (in Ground 32), 276-279 (in Ground 35), 292 (in Ground 38); Kallon Appeal, paras 41 (in Ground 2), 196-198 (in Ground 20), 201-203 (in Ground 20), 223 (in Ground 21); Gbao Appeal, para. 140 (in Ground 8(i)).
[87] *Martić* Appeal Judgment, para. 14; *Strugar* Appeal Judgment, para. 16; *Halilović* Appeal Judgment para. 12; *Blagojević and Jokić* Appeal Judgment, para. 10; *Brđanin* Appeal Judgment, para. 16; *Galić* Appeal Judgment, paras 10 and 303; *Simić* Appeal Judgment, para. 12; *Gacumbitsi* Appeal Judgment, para. 9.

Chamber should have reached a particular conclusion without advancing any evidence in support. Indeed, an appellant is expected to provide the Appeals Chamber with an exact reference to the parts of the trial record invoked in support of its arguments.[89] As a general rule, in instances where this is not done, the Appeals Chamber will summarily dismiss the alleged error or argument.[90] Similarly, the Appeals Chamber will, as a general rule, summarily dismiss undeveloped arguments and alleged errors, as well as submissions where the appellant fails to articulate the precise error committed by the Trial Chamber.[91] The Appeals Chamber has, therefore, summarily dismissed numerous arguments because they are unsupported,[92] undeveloped,[93] or fail to articulate the precise error alleged.[94]

44. Lastly, some submissions exceed the applicable page limit. The Parties are obliged to comply with the page limits for their appeal briefs set out in Article 6(E) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone, as amended, and to seek authorisation pursuant to Article 6(G) of the said Practice Direction before filing appeal briefs which exceed that page limit. In the present case, the Parties were granted extensions of pages for

[88] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 248 (in Ground 34), 339-346 (in Ground 44).
[89] *Martić* Appeal Judgment, para. 20; *Strugar* Appeal Judgment, para. 22. *See* also *Halilović* Appeal Judgment, para. 13; *Blagojević and Jokić* Appeal Judgment, para. 11; *Brđanin* Appeal Judgment, para. 15; *Gacumbitsi* Appeal Judgment, para. 10.
[90] *Martić* Appeal Judgment, para. 20.
[91] *Galić* Appeal Judgment, para. 297.
[92] These arguments are found in parts of the following paragraphs of the Parties' Appeals and Notices of Appeal: Sesay Appeal, paras 80 (Sesay Ground 23 in its entirety), 143 (in Ground 29), 150 (in Ground 29), 151 (in Ground 29), 182 (in Ground 28), 240 (in Ground 34), 307 (in Ground 40), 308 (in Ground 40), 311 (in Ground 40), 334 (in Ground 43), fn. 712 (in Ground 27); Kallon Appeal, paras 38 (in Ground 2), 48 (in Ground 2), 64 (in Ground 2), 147 (in Ground 15), 154 (in Ground 15), 168 (in Ground 16), 193 (in Ground 20), 194 (in Ground 20), 203 (in Ground 20), 209 (in Ground 20), 212 (in Ground 20), 216 (in Ground 20),331-334 (in Ground 31), fn. 263 (in Ground 9); Kallon Notice of Appeal, paras 10.15 (in Ground 9), 10.16 (in Ground 9), 10.18 (in Ground 9); Gbao Appeal, paras 24-26 (Gbao Ground 7 in its entirety).
[93] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 2-22 (in Grounds 1, 2, 3 and 14), 58 (Sesay Grounds 1, 2, 3, 14 and 15 in their entirety) 27-30 (in Ground 6), 33 (in Ground 6), 35-37 (in Ground 6), 46-48 (Sesay Ground 10 in its entirety), 80 (Sesay Ground 23 in its entirety), 142 (in Ground 29), 144 (in Ground 29), 145 (in Ground 29), 148 (in Ground 30), 150 (in Ground 29), 151 (in Ground 29), 164 (in Ground 31), 169 (in Ground 31), 182 (in Ground 28), 196-203 (in Ground 33), 288 (in Ground 38), 292 (in Ground 38), 296 (in Ground 39), 298 (in Ground 39), 301 (in Ground 39), 307 (in Ground 40), 308 (in Ground 40), 309 (in Ground 40), 310 (in Ground 40), 311 (in Ground 40), 334 (in Ground 43); Kallon Appeal, paras 1-22 (Kallon Ground 1 in its entirety), 28 (in Ground 2), 38 (in Ground 2), 42 (in Ground 2), 64 (in Ground 2), 68-69 (Kallon Ground 4 in its entirety), 77-85 (Kallon Ground 7 in its entirety), 147 (in Ground 15), 142 (in Ground 13), 154 (in Ground 15), 193 (in Ground 20), 194 (in Ground 20), 199-204 (in Ground 20), 209 (in Ground 20), 212 (in Ground 20), 216 (in Ground 20), 231 (in Ground 21), 331-334 (in Ground 31), fn. 263 (in Ground 9); Kallon Notice of Appeal, paras 5.2 (in Ground 4), 5.5 (in Ground 4), 9.4 (in Ground 8), 10.15 (in Ground 9), 10.16 (in Ground 9), 10.18 (in Ground 9). Gbao Appeal, paras 24-26 (Gbao Ground 7 in its entirety), 133 (in Ground 8(i)), 140 (in Ground 8(i)).
[94] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 189 (in Ground 28), 232 (in Ground 25, 27, 34, 36), 247 (in Ground 34); Kallon Appeal, paras 28 (in Ground 2), 42 (in Ground 2), 155 (in Ground 15), 193 (in Ground 20), 200 (in Ground 20), 203 (in Ground 20), 204 (in Ground 20).

their appeal and response briefs.[95] Additional arguments of the Parties presented in annexes to their Appeals in violation of the page limit thus imposed have been summarily dismissed.[96]

45. In addition to the abovementioned formal deficiencies in the pleadings, the Appeals Chamber observes that large parts of the Parties' Grounds of Appeal are, in general, poorly structured and organised. For instance, rather than making distinct challenges under separate grounds of appeal, the Parties arrange different parts of different grounds to support a variety of arguments without indicating which portion of each argument develops which ground of appeal. Similarly, in other instances the Parties group a range of disparate arguments, each concerning a substantial issue, under a single ground of appeal. The Parties also frequently raise the same argument in numerous grounds of appeal. Finally, the Parties have often used "sub-grounds" of appeal to designate apparently new grounds of appeal, rendering meaningless the practice of pleading distinct errors as distinct grounds of appeal. In the interests of justice, the Appeals Chamber has endeavoured to fully consider these problematic submissions, subject to the summary dismissals outlined above. We note, however, that the poorly structured and disorganized grounds of appeal failed to assist the Appeals Chamber in its consideration of the issues and arguments.

46. Finally, the Appeals Chamber observes that the tone and language of some submissions do not meet the standard expected of those appearing before the Special Court. Although zealous advocacy is encouraged, Counsel should nevertheless maintain a respectful and decorous tone in their submissions.

[95] Decision on "Kallon Defence Motion for Extension of Time to File Appeal and Extension of Page Limit", 4 May 2009, pp. 3, 4.
[96] This ruling applies to the arguments made in Annexes A, B, C1-C9, E, G, H, I, J to the Sesay Appeal, and Annexes III and V to the Gbao Appeal. The Appeals Chamber notes that Sesay refers to "Annex D" to his Appeal (*see e.g.* Sesay Appeal, paras 31, 48), but that no "Annex D" to his appeal was filed.





III. GROUNDS OF APPEAL RELATING TO THE INDICTMENT

A. Principles applicable to the pleading of an Indictment

1. Specificity

47. In order to guarantee a fair trial, the Prosecution is obliged to plead material facts with a sufficient degree of specificity.[97] The Appeals Chamber has on previous occasions set out the principles regarding the pleading of an indictment and hereafter reiterates these principles.

48. The question whether material facts are pleaded with the required degree of specificity depends on the context of the particular case.[98] In particular, the required degree of specificity varies according to the form of participation alleged against an accused.[99] Where direct participation is alleged, the Prosecution's obligation to provide particulars in an indictment must be adhered to fully.[100]

49. Where joint criminal enterprise ("JCE") is alleged, the Prosecution must plead the nature or purpose of the JCE, the time at which or the period over which the enterprise is said to have existed, the identity of those engaged in the enterprise so far as their identity is known, but at least by reference to their category or as a group, and the nature of the participation by the accused in that enterprise.[101]

50. Where superior responsibility is alleged, the liability of an accused depends on several material factors such as the relationship of the accused to his subordinates, notice of the crimes and that the accused failed to take necessary and reasonable measures to prevent the crimes or to punish his subordinates. These are material facts that must be pleaded with a sufficient degree of specificity.[102]

51. In considering the extent to which there is compliance with the specificity requirements in an indictment, the term specificity should be given its ordinary meaning as being specific in regard

[97] *Brima et al*. Appeal Judgment, para. 37.
[98] *Brima et al*. Appeal Judgment, para. 37.
[99] *Brima et al*. Appeal Judgment, para. 38.
[100] *Brima et al*. Appeal Judgment, para. 38.
[101] *Brima et al.* Appeal Judgment, fn. 146*; Taylor* Appeal Decision on JCE Pleading, para. 15.
[102] *Brima et al*. Appeal Judgment, para. 39.

to an object or subject matter. An object or subject matter that is particularly named or defined cannot be said to lack specificity.[103]

2. Exception to Specificity

52. The pleading principles that apply to indictments at international criminal tribunals differ from those in domestic jurisdictions because of the nature and scale of the crimes when compared with those in domestic jurisdictions. For this reason, there is a narrow exception to the specificity requirement for indictments at international criminal tribunals. In some cases, the widespread nature and sheer scale of the alleged crimes make it unnecessary and impracticable to require a high degree of specificity.[104]

B. Challenges to an Indictment on appeal

53. Challenges to the form of an indictment should be made at a relatively early stage of proceedings and usually at the pre-trial stage pursuant to Rule 72(B)(ii) of the Rules which provides that it should be made by a preliminary motion.[105] An accused, therefore, is in the ordinary course of events expected to challenge the form of an indictment prior to the rendering of the judgment or at the very least, challenge the admissibility of evidence of material facts not pleaded in an indictment by interposing a specific objection at the time the evidence is introduced.[106]

54. Failure to challenge the form of an indictment at trial is not, however, an absolute bar to raising such a challenge on appeal.[107] An accused may well choose not to interpose an objection when certain evidence is admitted or object to the form of an indictment, not as a means of exploiting a technical flaw, but rather because the accused is under the reasonable belief that such evidence is being introduced for purposes other than those that relate to the nature and cause of the charges against him.[108]

55. Where an accused fails to make specific challenges to the form of an indictment during the course of the trial or challenge the admissibility of evidence of material facts not pleaded in the

[103] *Brima et al*. Appeal Judgment, para. 40.
[104] *Brima et al*. Appeal Judgment, para. 41; *Kvočka* Form of the Indictment Decision, para. 17.
[105] *Brima et al*. Appeal Judgment, para. 42; Rule 72(B)(ii) expressly provides that preliminary motions by the accused include "[o]bjections based on defects in the form of the indictment."
[106] *Brima et al*. Appeal Judgment, para. 42; *Niyitegeka* Appeal Judgment, para. 199.
[107] *Brima et al*. Appeal Judgment, para. 43.
[108] *Brima et al*. Appeal Judgment, para. 43.

indictment, but instead raises it for the first time on appeal, it is for the Appeals Chamber to decide the appropriate response.[109] Where the Appeals Chamber holds that an indictment is defective, the options open to it are to find that the accused waived his right to challenge the form of an indictment, to reverse the conviction, or to find that no miscarriage of justice has resulted notwithstanding the defect.[110] In this regard, the Appeals Chamber may also find that any prejudice that may have been caused by a defective indictment was cured by timely, clear and consistent information provided to the accused by the Prosecution.[111]

56. The Appeals Chamber will ensure that a failure to pose a timely challenge to the form of the indictment did not render the trial unfair.[112] The primary concern at the appellate stage therefore, when faced with a challenge to the form of an indictment, is whether the accused was materially prejudiced.[113]

C. Sesay's Appeal

1. Exceptions to mandatory pleading requirements and notice of liability pursuant to Article 6(3) (Sesay Ground 6)

(a) Application of exceptions to mandatory pleading requirements

(i) Trial Chamber's findings

57. The Trial Chamber found that failure to plead the material facts underlying the offences in the Indictment would render it vague and unspecific, and in several instances defective.[114] It noted the narrow exception to pleading requirements[115] that in some cases, "the widespread nature and

[109] *Brima et al*. Appeal Judgment, para. 44.
[110] *Brima et al*. Appeal Judgment, para. 44; *Niyitegeka* Appeal Judgment, paras 195-200.
[111] *Brima et al*. Appeal Judgment, para. 44; *Kupreškić et al*. Appeal Judgment, para. 114 ("The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category."). *See* also *Ntakirutimana* Appeal Judgment, para. 27.
[112] *Brima et al*. Appeal Judgment, para. 45.
[113] *Brima et al*. Appeal Judgment, para. 45; *Kupreskic et al*. Appeal Judgment, para. 115.
[114] Trial Judgment, para. 329.
[115] *Brima et al.* Appeal Judgment, para. 41, *citing Kupreškić et al.* Appeal Judgment, para. 89.

sheer scale of the alleged crimes make it unnecessary and impracticable to require a high degree of specificity" (*i.e.* the "sheer scale" exception).[116] The Trial Chamber considered that:

> [T]he particular context in which the RUF trial unfolded is a pertinent factor to consider when determining the level of specificity with which it was practicable to expect the Prosecution to plead the allegations in the Indictment. The fact that the investigations and trials were intended to proceed as expeditiously as possible in an immediate post-conflict environment is particularly relevant.[117]
>
> Nevertheless, in an indictment, the Prosecution must 'indicate its best understanding of the case against the accused.' The Prosecution may not rely on weakness of its own investigation to justify its failure to plead material facts in an Indictment. Nor may the Prosecution omit aspects of its main allegations in an Indictment 'with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.' An Indictment must provide an accused with sufficient information to understand the nature of the charges against him and to prepare his defence. Therefore, a Chamber must balance practical considerations relating to the nature of the evidence against the need to ensure that an Indictment is sufficiently specific to allow an accused to fully present his defence.[118]

(ii) Submissions of the Parties

58. Sesay argues that the Trial Chamber erred in law in its application of the "sheer scale" exception to mandatory pleading requirements.[119] He argues that even when the exception applies, the Prosecution is required to plead all the material facts at its disposal, and in this case the omitted facts were available to the Prosecution and should have been in the Indictment.[120] Sesay argues that the "sheer scale" exception is designed to take account of "practical considerations relating to the *nature of the evidence* against the need to ensure that an Indictment is sufficiently specific to allow an accused to fully present his defence" and is limited to circumstances outside the control of the Prosecution.[121] Sesay further argues that the Trial Chamber erred in considering as a relevant factor that the trials were "intended to proceed as expeditiously as possible in an immediate post-conflict environment" because his right to know the case against him cannot be sacrificed because of the urgency of prosecution.[122]

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[116] Trial Judgment, para. 329, *quoting Brima et al.* Appeal Judgment, para. 41.
[117] Trial Judgment, para. 330.
[118] Trial Judgment, para. 331.
[119] Sesay Appeal, para. 31.
[120] Sesay Appeal, para. 31.
[121] Sesay Appeal, para. 32, *quoting* Trial Judgment, para. 331 (emphasis added in the Sesay Appeal).
[122] Sesay Appeal, para. 32, *quoting* Trial Judgment, para. 330.

59. The Prosecution submits that Sesay does not appear to address whether the Trial Chamber was "legitimately entitled to apply [the "sheer scale"] exception."[123] The Prosecution notes that in fact "the Trial Chamber *expressly* relied upon" this exception in the pre-trial *Sesay* Decision on Form of Indictment,[124] and that in light of the fact that the crimes in this case are manifest from a reading of the Trial Judgment, it was an "appropriate exercise of the Trial Chamber's discretion to apply the exception at the pre-trial stage."[125] It further submits that there is no legal basis for Sesay's argument that the exception does not apply "in circumstances where the Prosecution *could* have given more specificity than it did."[126] According to the Prosecution, the factor identified by the Trial Chamber and to which Sesay objects is "merely … one of the practical considerations to be weighed in [the] balancing exercise," and therefore the Trial Chamber did not err.[127] Sesay does not submit additional arguments in reply.

(iii) Discussion

60. Sesay argues that the Trial Chamber erred in considering that the trials were "intended to proceed as expeditiously as possible in an immediate post-conflict environment" as a "particularly relevant" factor when determining the Prosecution's pleading requirements.[128] In fact, the Trial Chamber held that the failure to plead the material facts underlying offences would render the Indictment vague and unspecific, and in many cases defective.[129] It recognised that the widespread nature or sheer scale of the alleged crimes may make it unnecessary and impracticable to require a high degree of specificity. It also observed that the intent that trials proceed as expeditiously as possible could affect the Prosecution's ability to plead with specificity; however, it expressly stated that "[*n*]*evertheless*, in an indictment, the Prosecution must 'indicate its best understanding of the case against the accused'"[130] and may not "rely on weaknesses of its own investigation to justify its failure to plead material facts in an Indictment."[131] In the Trial Chamber's view, it had to "balance practical considerations relating to the nature of the evidence against the need to ensure that an

[123] Prosecution Response, para. 2.26.
[124] Prosecution Response, para. 2.26, *citing Sesay* Decision on Form of Indictment, paras 7(xi), 8(iii), 9, 20, 22-24.
[125] Prosecution Response, para. 2.26.
[126] Prosecution Response, para. 2.27.
[127] Prosecution Response, para. 2.30.
[128] *See* Trial Judgment, para. 330.
[129] Trial Judgment, para. 329.
[130] Trial Judgment, para. 331, *quoting Kvočka et al.* Appeal Judgment, para. 30.
[131] Trial Judgment, para. 331.

Indictment is sufficiently specific to allow an accused to fully present his defence."[132] Sesay has not shown an error in the Trial Chamber's application of the law in this regard.

(b) Pleading of Sesay's liability for command responsibility

(i) Submissions of the Parties

61. Sesay argues that the Trial Chamber erred in finding that the pleading of command responsibility was sufficient. He contends that paragraph 39 of the Indictment did not plead his "precise relationship to his alleged subordinates, how he was alleged to know of the crimes, … nor, with any precision, his alleged *mens rea*."[133]

62. Sesay makes related arguments in his Grounds 13, 36 and 44. He argues that the Trial Chamber erred in finding that he had notice that he was alleged to have failed to prevent or punish the perpetrators of enslavement of civilians at the military base at Yengema.[134] In relation to this crime, he contends that he was unaware throughout the trial who his alleged subordinates were and what measures he was alleged to have failed to take to prevent or punish them.[135] Sesay also argues that the failure of notice caused the Trial Chamber to err in law in inconsistently finding "that recruits that had been captured in Kono District were trained at [Yengema] base" and "that recruits from Kono and Bunumbu base were trained at Yengema."[136] Sesay further argues in relation to the attacks against UNAMSIL peacekeepers, that the Trial Chamber failed to require the Prosecution to plead "the relationship of the accused to his subordinates, his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates with a sufficient degree of specificity."[137]

63. The Prosecution disputes Sesay's submission that it did not plead with sufficient specificity Sesay's relationship to his subordinates and his knowledge or reason to know of the crimes.[138] The Prosecution notes that the Trial Chamber found it sufficient that the Prosecution described the nature of the relationship between Sesay and his subordinates by reference to Sesay's command

[132] Trial Judgment, para. 331.
[133] Sesay Appeal, para. 34.
[134] Sesay Appeal, para. 281.
[135] Sesay Appeal, para. 281.
[136] Sesay Appeal, para. 281, *citing* Trial Judgment, paras 1262, 1646.
[137] Sesay Appeal, para. 338, *quoting Brima et al.* Appeal Judgment, para. 39 (interal quotation omitted).
[138] Prosecution Response, para. 2.48.

position.[139] The Prosecution further submits that the case law relied upon by Sesay "merely outlines the elements that must be proved beyond a reasonable doubt in order to establish superior responsibility,"[140] and that it is "illogical" to suggest that the Prosecution should plead precisely a fact that never occurred, that is, the measures that Sesay never took to prevent or punish subordinates.[141] Sesay offers no additional arguments in reply.

(ii) Discussion

64. The Trial Chamber, relying on the Appeals Chamber's statement of the law in the *Brima et al.* Appeal Judgment, considered the following material facts concerning liability pursuant to Article 6(3) of the Statute were required to be pleaded in the Indictment: (i) the relationship of the accused to his subordinates, (ii) his knowledge of the crimes[142] and (iii) the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.[143]

65. In relation to pleading *mens rea* for superior responsibility, the Trial Chamber found that because the "*mens rea* of the Accused for the liability as a superior is pleaded explicitly in paragraph 39 of the Indictment and incorporated into each Count by paragraph 40, ... [t]he Accused's knowledge of the crimes and his failure to prevent or punish those crimes, therefore, is adequately pleaded in the Indictment."[144]

66. Sesay challenges the pleading of (i) his relationship with his alleged subordinates, (ii) his *mens rea* with respect to the alleged crimes, and (iii) the necessary and reasonable measures that he failed to take. As a preliminary matter, the Appeals Chamber notes that Sesay was convicted of the following crimes pursuant to Article 6(3) of the Statute:

(i) Enslavement (Count 13) in relation to events in Yengema in Kono District;

(ii) Intentionally directing attacks against the UNAMSIL peacekeeping operations (Count 15) in relation to events in Bombali, Port Loko, Kono and Tonkolili Districts;

[139] Prosecution Response, para. 2.49, *citing* Trial Judgment, para. 408.
[140] Prosecution Response, para. 2.49.
[141] Prosecution Response, para. 2.50.
[142] Although the Appeals Chamber in *Brima et al.* expressed the requisite *mens rea* as knowledge, the requisite *mens rea* is "knew or had reason to know." *See e.g.*, *Blaškić* Appeal Judgment, para. 62; *Bagilishema* Appeal Judgment, para. 28; *Čelebići* Appeal Judgment, paras 216-241.
[143] Trial Judgment, para. 407, *citing Brima et al.* Appeal Judgment, para. 39.
[144] Trial Judgment, para. 409.

(iii) Violence to life, health and physical or mental well-being of persons, in particular murder, (Count 17) in relation to events involving UNAMSIL peacekeepers in Bombali and Tonkolili Districts.[145]

In the circumstances, the Appeals Chamber will only consider Sesay's submissions in relation to the pleading of crimes for which Sesay was convicted.

67. In relation to enslavement at Yengema in Kono District, the Trial Chamber found that "Sesay had actual knowledge of the enslavement of civilians at Yengema due to his visits to the base and the fact that he received reports pertaining to its operation. The Chamber therefore [found] that Sesay knew that an unknown number of civilians were enslaved there between December 1998 and January 2000."[146]

68. In relation to the attacks against peacekeepers, the Trial Chamber found that "Sesay knew of the attacks on 1 and 2 May 2000 in Makeni and Magburaka as he was specifically sent by Sankoh to investigate them."[147] It also found that the evidence established that he "knew of the abductions of peacekeepers on 3 May 2000, due to his personal interaction with the captive peacekeepers at Makeni and subsequently at Yengema."[148] In relation to the attack on the ZAMBATT peacekeepers at Lunsar on 3 May 2000 and the attacks on 7 and 9 May 2000, the Trial Chamber found that "given the effective functioning of the chain of command and the regular reporting of Commanders to Sesay on matters pertaining to UNAMSIL personnel, the only reasonable inference to be drawn is that Sesay was informed of these events."[149] The Trial Chamber therefore concluded that "Sesay had actual knowledge of the attacks on UNAMSIL personnel."[150]

69. The Trial Chamber found that Sesay's *mens rea* as a superior with respect to these crimes was "pleaded explicitly in paragraph 39 of the Indictment and incorporated into each Count by paragraph 40 [and therefore Sesay's] knowledge of the crimes and his failure to prevent or punish those crimes ... is adequately pleaded in the Indictment."[151] Paragraph 39 of the Indictment states:

[145] Trial Judgment, pp. 677-680.
[146] Trial Judgment, para. 2131; *see also* Trial Judgment, para. 2128 ("Sesay visited Yengema on several occasions and the training Commander there reported to him.").
[147] Trial Judgment, para. 2280.
[148] Trial Judgment, para. 2280.
[149] Trial Judgment, para. 2280.
[150] Trial Judgment, para. 2280.
[151] Trial Judgment, para. 309.

> In addition, or alternatively, pursuant to Article 6.3. of the Statute, ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, while holding positions of superior responsibility and exercising effective control over their subordinates, are individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. Each Accused is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[152]

70. The case law of the ICTY Appeals Chamber suggests that there are at least two ways in which the *mens rea* for superior responsibility can be adequately pleaded in an indictment.[153] In the *Blaškić* Appeal Judgment, the ICTY Appeals Chamber summarized these possible approaches as follows:

> With respect to the mens rea, there are two ways in which the relevant state of mind may be pleaded: (i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred, should be pleaded.[154]

71. The Appeals Chamber notes that the form of pleading in the Indictment is consistent with the first formulation, and endorses the view that this is sufficient in the circumstances of some cases. Sesay has not offered any argument that specific acts or conduct relied upon by the Trial Chamber to infer his *mens rea* constituted material facts that should have been pleaded in the Indictment. The facts relied upon by the Trial Chamber are related to the functions of the RUF command, the nature of which was sufficiently pleaded in the Indictment.[155] The Appeals Chamber therefore dismisses this part of Sesay's submissions.

72. In relation to enslavement of civilians at the military base at Yengema, Sesay argues that he lacked notice of the identity of his alleged subordinates and what measures he was alleged to have failed to take to prevent or punish them.[156] The Trial Chamber found that (i) "RUF rebels enslaved an unknown number of civilians at the military training base at Yengema between December 1998 and January 2000";[157] (ii) Sesay was a RUF superior Commander during this period, and that he exercised effective control over RUF subordinates at Yengema;[158] (iii) the training Commander at

[152] Indictment, para. 39.
[153] *Blaškić* Appeal Judgment, para. 219, *citing Brđanin & Talić* 26 June 2001 Decision, para. 33; *Mrkšić* Decision on Form of the Indictment, paras 11-12.
[154] *Blaškić* Appeal Judgment, para. 219.
[155] *See* Indictment, paras 20-23, 34, 39, 40.
[156] Sesay Appeal, para. 281.
[157] Trial Judgment, p. 611.
[158] Trial Judgment, paras 2126-2128.

Yengema reported to Sesay;[159] (iv) Sesay "had actual knowledge of the enslavement of civilians at Yengema due to his visits to the base and the fact that he received reports pertaining to its operation;"[160] (v) Sesay actively monitored the prolongation of the commission of enslavement; and (vi) there was no evidence that he attempted to prevent or punish it.[161]

73. Paragraphs 20-23 of the Indictment specify the command positions held by Sesay at the relevant times as follows:

> 20. At all times relevant to this Indictment, **ISSA HASSAN SESAY** was a senior officer and commander in the RUF, Junta and AFRC/RUF forces.
>
> 21. Between early 1993 and early 1997, **ISSA HASSAN SESAY** occupied the position of RUF Area Commander. Between about April 1997 and December 1999, **ISSA HASSAN SESAY** held the position of the Battle Group Commander of the RUF, subordinate only to the RUF Battle Field Commander, SAM BOCKARIE aka MOSQUITO aka MASKITA, the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC, JOHNNY PAUL KOROMA.
>
> 22. During the Junta regime, **ISSA HASSAN SESAY** was a member of the Junta governing body. From early 2000 to about August 2000, ISSA HASSAN SESAY served as the Battle Field Commander of the RUF, subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.
>
> 23. FODAY SAYBANA SANKOH has been incarcerated in the Republic of Sierra Leone from about May 2000 until about 29 July 2003. From about May 2000 until about 10 March 2003, by order of FODAY SAYBANA SANKOH, **ISSA HASSAN SESAY** directed all RUF activities in the Republic of Sierra Leone.

74. The above paragraphs, in addition to paragraphs 34, 39 and 44 of the Indictment indicate the subordinates subject to Sesay's command were fighters of the RUF and AFRC/RUF forces. Paragraph 34 provides that Sesay "exercised authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF forces." Paragraph 39 alleges that "while holding positions of superior responsibility and exercising effective control over [his] subordinates," Sesay is "individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute." It further alleges that he "is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Paragraph 44 provides that "[m]embers of the AFRC/RUF subordinate to

[159] Trial Judgment, para. 2128.
[160] Trial Judgment, para. 2131.
[161] Trial Judgment, para. 2132.

and/or acting in concert with **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO** committed the crimes set forth below in paragraphs 45 through 82 and charged in Counts 3 through 14."

75. In relation to the specific crimes at the military training camp at Yengema, paragraph 40 incorporates the previous paragraphs. Paragraph 71 particularises the charge of enslavement in relation to Kono District, and states:

> 71. Between about 14 February 1998 to January 2000, AFRC/RUF forces abducted hundreds of civilian men, women and children, and took them to various locations outside the District, or to locations within the District such as AFRC/RUF camps, Tombodu, Koidu, Wondedu, Tomendeh. At these locations the civilians were used as forced labour, including domestic labour and as diamond miners in the Tombodu area;
>
> By their acts or omissions in relation to these events, ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:
>
> Count 13: Enslavement, a CRIME AGAINST HUMANITY, punishable under Article 2.c. of the Statute.

76. These paragraphs demonstrate that Sesay's command position and his relationship with his subordinates were pleaded at all the relevant times. They further show that he was alleged not to have taken the necessary and reasonable measures to prevent or to punish the crimes alleged. The manner in which these material facts were to be proven was a matter of evidence and thus not for pleading. The Appeals Chamber, therefore, dismisses Sesay's sub-ground of appeal concerning the pleading of his relationship to his subordinates.

77. Sesay's contention that the failure of notice caused the Trial Chamber to commit an "error of law" such that it found, allegedly inconsistently, "that recruits [who] had been captured in Kono District were trained at [Yengema] base" and "that recruits from Kono and Bunumbu base were trained at Yengema"[162] appears to be an alleged error of fact rather than of law. Even so, his argument is misplaced. The Trial Chamber found that the RUF training base was moved in December 1998 from Bunumbu, Kailahun District to Yengema, Kono District and that civilians from both Bunumbu in Kailahun and from Kono were trained at Yengema.[163]

[162] Sesay Appeal, para. 281, *citing* Trial Judgment, paras 1262, 1646.
[163] *See* Trial Judgment, paras 1262, 1646.

78. In relation to the attacks against UNAMSIL peacekeepers, Sesay did not state which were the material facts that should have been pleaded in the Indictment. In the absence of such clarification, the Appeals Chamber is unable to address Sesay's submission on the merits.

(c) Conclusion

79. For the foregoing reasons, the Appeals Chamber dismisses Sesay's Ground 6 in its entirety.

2. Pleading of acts of burning as acts of terrorism in Count 1 and collective punishments in Count 2 (Sesay Grounds 7 and 8)

(a) Submissions of the Parties

80. In Grounds 7 and 8, Sesay challenges the pleading of acts of burning as acts of terrorism and collective punishments. He raises related arguments with respect to each offence. He argues that the Trial Chamber erred in law and in fact in concluding that the Indictment provided adequate notice that acts of terrorism and collective punishments, as pleaded in Counts 1 and 2 respectively, included "acts or threats of violence independent of whether such acts or threats of violence satisfy the elements of any other criminal offence."[164]

81. The Prosecution argues that paragraph 44 of the Indictment alleges that the Accused are individually responsible for the crimes charged under Counts 1 and 2 "[b]y their acts and omissions in relation to *these events*," where the phrase "these events" refers to "the crimes set forth … in paragraphs 45 through 82 and charged in Counts 3 through 14."[165] According to the Prosecution: "[e]ven if the conduct was ultimately held not to constitute any of the crimes charged in Counts 3 to 14, that did not alter the fact that it remained *charged* in relation to Counts 1 and 2."[166]

82. In reply, Sesay argues that "[i]t might well be that the interpretation advanced [by the Prosecution] … is one of the possible interpretations. However, the common sense interpretation of this charge was clear: conduct that was the subject of Counts 3-14 would thereafter be assessed in light of the specific *mens rea* requirements that distinguish Counts 1-2 to ascertain whether the Accused could, additionally, be held responsible for those crimes."[167]

[164] Sesay Appeal, para. 39, *quoting* Trial Judgment, para. 115.
[165] Prosecution Response, para. 2.77 (emphasis added), *quoting* Indictment, para. 44.
[166] Prosecution Response, para. 2.77.
[167] Sesay Reply, para. 22.

(b) Discussion

83. The Trial Chamber stated as a matter of law that conduct that was adequately pleaded in the Indictment would be considered under the offences of acts of terrorism and collective punishments, even if such conduct does not satisfy the elements of any other crimes charged in the Indictment.[168] In these grounds, Sesay does not contest the holding that, as a matter of law, acts not amounting to one of the offences listed in Counts 3-14 could be the basis of a conviction for acts of terrorism or collective punishments; rather, he contests the holding that the Indictment provided him with adequate notice that the acts of terrorism and collective punishments, as pleaded in Count 1 and Count 2, included such acts, and in particular acts of burning.

84. The Trial Chamber's finding that Counts 1 and 2 included acts of burning was based in part on the Appeals Chamber's decision in regard to the legal character of acts of terrorism and on the pleading of that crime in the *Fofana and Kondewa* Indictment.[169] The Appeals Chamber held that: (i) acts of terrorism need not involve acts that are otherwise criminal under international criminal law, (ii) whether the Trial Chamber should have considered acts of burning as acts of terrorism turned on the pleading in the Indictment, (iii) the material facts which supported Count 6 (acts of terrorism) of the indictment in that case were the material facts pleaded in relation to Counts 1 to 5 of the indictment, including "threats to kill, destroy and loot," and (iv) the Trial Chamber should have considered all conduct that was adequately pleaded in the Indictment, including acts of burning, irrespective of whether it satisfied the elements of any other crime.[170]

85. The material facts pleaded in relation to Counts 1 to 5 of the *Fofana and Kondewa* Indictment include "threats to kill, destroy and loot," and as a consequence of that pleading the Appeals Chamber found that the Trial Chamber erred in only considering crimes charged and found to have been committed as acts of terrorism.[171] It found that this error resulted from the *Fofana and Kondewa* Trial Chamber's exclusion of the phrase "threats to kill, destroy and loot" from its interpretation of the pleading of the count charging acts of terrorism. Since the holding in *Fofana and Kondewa* rested in part on the notice provided by the phrase "threats to kill, destroy and loot," and the Indictment in this case omits that phrase, it cannot be said that the Indictment has provided notice to the Accused in the same manner.

[168] Trial Judgment, para. 115 (acts of terrorism); Trial Judgment, para. 128 (collective punishments).
[169] Trial Judgment, para. 450-455.
[170] *Fofana and Kondewa* Appeal Judgment, para. 359-365.
[171] *Fofana and Kondewa* Appeal Judgment, para. 364.

86. It is undisputed that the Indictment in this case charged acts of burning as a crime under Count 14.[172] Whether the Indictment also provided notice that acts of burning were charged as acts of terrorism and collective punishments turns on a reading of the Indictment as a whole, and in particular the provisions relevant to the pleading of the material fact of acts of burning.[173]

87. Paragraph 44 of the Indictment states that the Accused "committed the crimes set forth below in paragraphs 45 through 82 and charged in Counts 3 through 14, as part of a campaign to terrorize the civilian population." In the text after paragraph 44, the Indictment refers to the conduct charged as "these events" and this phrasing is used in relation to each of the counts in the Indictment which each allege that the accused incurred individual criminal responsibility for their acts or omissions in relation to "these events ... for the crimes alleged below."[174] Use of the expression "these events" in this manner indicates that it does not refer to the "crimes" themselves, since this would result in an illogical construction. Rather, the phrase "these events" as used in paragraph 45 and elsewhere in the Indictment refers to the conduct alleged under the relevant Count.

88. The Indictment provides further notice to the accused that destruction and burning are charged as acts of terrorism and collective punishments. In paragraph 42, under the heading "Charges," the Indictment alleges that:

> attacks were carried out primarily to terrorise the civilian population, but also were used to punish the population for [their conduct.] ... The attacks included ... looting and destruction of civilian property. Many civilians saw these crimes committed; others returned to their homes or places of refuge to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property.

89. For these reasons, the Appeals Chamber is satisfied that the Indictment provided adequate notice to Sesay that acts of burning were charged as acts of terrorism and collective punishments.

(c) Conclusion

90. The Appeals Chamber dismisses Sesay's Grounds 7 and 8 in their entirety.

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[172] *See* Indictment, para. 37 ("The crimes alleged in this Indictment, includ[e] ... looting and burning of civilian structures."); Indictment, p. 20 ("Count 14: Looting and Burning"); Indictment, para. 77 ("At all times relevant to this Indictment, AFRC/RUF engaged in widespread unlawful taking and destruction of civilian property. This looting and burning included the following....")
[173] *Brima et al.* Appeal Judgment, para. 81.
[174] Indictment, pp. 12, 14, 16, 17, 19 and 21.

3. Notice of acts of forced labour which formed the basis for the convictions of enslavement (Sesay Ground 11)

(a) Submissions of the Parties

91. Sesay argues that the Trial Chamber erred in law and in fact in concluding that he was given adequate notice that he was charged for acts of enslavement other than "domestic labour and use as diamond miners" under Count 13 of the Indictment.[175] For relief, Sesay requests the Appeals Chamber to dismiss the charges under Count 13 concerning acts of forced military training, forced farming and forced carrying of loads.[176]

92. The Prosecution contends that it did not give an unequivocal notice that the only alleged acts of enslavement were domestic labour and use as diamond miners, and that the Indictment need not plead "all of the different tasks for which forced labour was used."[177]

(b) Discussion

93. Given the vagueness of Sesay's complaint, the Appeals Chamber will only answer the general question of whether Sesay lacked notice of the criminal acts that form the basis of his conviction for enslavement when it was only pleaded that he used forced labour as enslavement. The question on appeal is whether the particular acts of forced labour amount to "criminal acts which form the basis for a conviction" such that they are material facts and should have been pleaded in the Indictment, or if they are part of the evidence by which the Prosecution intended to prove the material fact of forced labour as enslavement. The Appeals Chamber notes that the offence charged under Count 13 is enslavement, not forced labour. In the present case, forced labour is the criminal act which the Prosecution alleges constituted enslavement. This pleading provided the particularisation that the forms of enslavement were limited to acts of forced labour amounting to the exercise of a power attaching to the right of ownership over a person. The Appeals Chamber holds that this pleading of the underlying acts of enslavement provided Sesay sufficient notice of the charge.

94. Our holding is supported by the fact that enslavement is not an umbrella crime, such as the broadly defined crimes of persecution or other inhumane acts, for which the Prosecution is required

[175] Sesay Appeal, para. 49.
[176] Sesay Appeal, para. 49.

to specify the conduct it will rely upon to prove the offence.[178] Forced labour is also not charged here as a violation of the law of armed conflict, in relation to which the ICTY Appeals Chamber has held that "the military character or purpose of the alleged incidents of forced labour also needed to be pleaded as a material fact."[179] In this case, as noted above, the charge is for enslavement as a crime against humanity, and the acts of forced labour must indicate the exercise of a power attaching to the right of ownership over a person. The Appeals Chamber therefore considers that the pleading of acts of forced labour as enslavement provided notice of the underlying criminal acts with sufficient specificity to enable Sesay to prepare his defence.

(c) Conclusion

95. The Appeals Chamber dismisses Sesay's Ground 11 in its entirety.

4. Notice of the nature of the Common Purpose of the JCE (Sesay Ground 12)

(a) Submissions of the Parties

96. Sesay submits that the Trial Chamber erred in law and in fact in finding that the pleading and subsequent Prosecution filings regarding JCE provided him adequate notice and did not prejudice his defence in violation of his right to a fair trial.[180] However, he alleges that the Trial Chamber erred in finding that he was not prejudiced by "the fluctuating notice provided" concerning the JCE.[181] He contends that by disregarding the Prosecution Notice Concerning JCE and reverting to the JCE pleaded in the Indictment, the Trial Chamber significantly broadened the scope of the JCE.[182] According to Sesay, this changing notice with respect to crimes that were alleged to be within the common purpose prejudiced his ability to rebut the allegation that there was such a purpose.[183]

[177] Prosecution Response, para. 2.90.
[178] *Kupreškić et al.* Trial Judgment, para. 626 (persecutions); *Fofana and Kondewa* Appeal Judgment, para. 442 (other inhumane act, cruel treatment); *Brima et al.* Appeal Judgment, para. 106 (any other form of sexual violence).
[179] *Naletilić and Martinović* Appeal Judgment, paras 30-32 (*Naletilić and Martinović* is distinguished from the present case because (i) the case there dealt with findings that Martinović was "personally responsible" for ordering the crime, and therefore the Prosecution "was required to set forth the details of the incident with precision" and (ii) the crime in question was forced labour as a war crime, therefore "the military character or purpose of the alleged incidents of forced labour also needed to be pleaded as a material fact.")
[180] Sesay Appeal, para. 50.
[181] Sesay Appeal, para. 51.
[182] Sesay Appeal, para. 53.
[183] Sesay Appeal, para. 54.

97. Further, Sesay submits that because the Trial Chamber determined that the Prosecution failed to give sufficient notice of allegations concerning a JCE 2,[184] and the Prosecution had submitted that forced mining and forced farming were "examples of the second form of JCE,"[185] Sesay considered that "enslavement was no longer part of the original JCE," as alleged.[186] According to Sesay, the Trial Chamber nonetheless found his principal participation in a JCE during the Junta period was planning the enslavement of civilians in Tongo.[187] For relief, Sesay requests the Appeals Chamber to reverse the Trial Chamber's finding that the pleading of JCE was proper, and to dismiss the charges of Sesay's liability pursuant to participation in a JCE.[188]

98. The Prosecution responds that Sesay was at all times charged with Counts 1 through 14 pursuant to JCE 1.[189] The Prosecution contends it consistently alleged that the crimes charged in Counts 1-14 were within the JCE and that, in the alternative, the crimes charged in Counts 1-14 were a reasonably foreseeable consequence of the JCE. The Prosecution argues that the adequacy of pleading in the Indictment was not affected by the Prosecution Notice Concerning JCE because the Prosecution Notice Concerning JCE "merely provided further specificity as to which crimes, in the alternative scenario, might be found to be foreseeable consequences of the crimes agreed upon."[190] Sesay offers no new arguments in reply.

(b) Discussion

99. The Special Court's jurisprudence and that of the other international criminal tribunals establishes that the following four elements must be present in an indictment charging an accused with JCE liability: (i) the nature or purpose of the JCE; (ii) the time at which or the period over which the enterprise is said to have existed; (iii) the identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category or as a group; and (iv) the nature of the participation by the accused in that enterprise.[191] The Trial Chamber's statement of the

[184] Sesay Appeal, para. 55, *citing* Trial Judgment, para. 383.
[185] Sesay Appeal, para. 55, *citing* Sesay Final Trial Brief, para. 202.
[186] Sesay Appeal, para. 55.
[187] Sesay Appeal, para. 55, *citing* Trial Judgment, para. 1997.
[188] Sesay Appeal, para. 50.
[189] Prosecution Response, para. 2.6.
[190] Prosecution Response, para. 2.6.
[191] *Brima et al.* Appeal Judgment, fn. 146*; Taylor* Appeal Decision on JCE Pleading, para. 15; *Simić* Appeal Judgment, para. 22; *Ntagerura et al.* Appeal Judgment, para. 24.

law with respect to pleading requirements is consistent with the Appeals Chamber's jurisprudence and the case law of other international tribunals, and is not contested on appeal.[192]

100. In relation to the pleading of the common purpose, the Trial Chamber found that the Indictment, the Prosecution Supplemental Pre-Trial Brief, the Opening Statement, the Rule 98 Skeleton Response and the Prosecution Final Trial Brief "all articulate the purpose of the joint criminal enterprise as a plan to take control of the Republic of Sierra Leone, and particularly the diamond mining activities, by any means, including unlawful means."[193]

101. Following the *Brima et al.* Trial Judgment, the Prosecution filed a Notice Concerning JCE, which stated in part:

> The Accused and others agreed upon and participated in a joint criminal enterprise to carry out a campaign of terror and collective punishments, as charged in the Corrected Amended Consolidated Indictment, in order to pillage the resources in Sierra Leone, particularly diamonds, and to control forcibly the population and territory of Sierra Leone.
>
> The crimes charged in Counts 1 through 14 of the Corrected Amended Consolidated Indictment were within the joint criminal enterprise. The Accused and the other participants intended the commission of the charged crimes.
>
> Alternatively, from 30 November 1996 through about 18 January 2002, the following crimes were within the joint criminal enterprise: collective punishments, acts of terrorism, the conscription or enlistment or use in active hostilities of children under the age of 15 years, enslavement and pillage. The crimes charged in Counts 3 through 11 of this indictment were the foreseeable consequences of the crimes agreed upon in the joint criminal enterprise.[194]

102. According to the Trial Chamber, the Prosecution Notice Concerning JCE "specified a two-fold purpose of the common plan: (1) to conduct a campaign of terror and collective punishments in order to pillage the resources of Sierra Leone, particularly diamonds, and (2) to control forcibly the population."[195] In the Trial Judgment, the Trial Chamber found that the "formulation of the common purpose in the [Prosecution Notice Concerning JCE] differs from that originally pleaded in

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[192] The Trial Chamber stated that "in order to give adequate notice to an accused of his alleged participation in a joint criminal enterprise, an indictment should include the following information: (i) The identity of those engaged in the joint criminal enterprise, to the extent known and at least by reference to the group to which they belong; (ii) The time period during which the joint criminal enterprise is alleged to have existed; (iii) The nature or purpose of the joint criminal enterprise; (iv) The category of joint criminal enterprise in which the accused is alleged to have participated; and (v) The role that the Accused is alleged to have played within the joint criminal enterprise." Trial Judgment, para. 352 (internal citations omitted).
[193] Trial Judgment, para. 372 (internal citations omitted).
[194] Prosecution Notice Concerning JCE, paras 6-8.
[195] Trial Judgment, para. 373, *citing* Prosecution Notice Concerning JCE, para. 6.

the Indictment."[196] At trial, only Gbao filed a motion seeking leave to challenge the form of the Indictment in light of the *Brima et al.* Trial Judgment and the Prosecution Notice Concerning JCE.[197] In its decision on Gbao's motion, the Trial Chamber considered "that in all the circumstances it would be more appropriate for the Trial Chamber to address any objections to the form of the Indictment at the end of the case rather than during the course of the trial."[198]

103. In the Trial Judgment, the Trial Chamber held that the Prosecution Notice Concerning JCE "made the conduct of a campaign of terror and collective punishment one of the explicit purposes of the joint criminal enterprise, rather than the means by which the objective of gaining control of Sierra Leone was to be achieved."[199] The Trial Chamber considered this amounted to a unilateral attempt to alter a material fact in the Indictment contrary to the procedure allowed under the Rules, and stated that it would not consider the filing for the purposes of adjudicating the common purpose of the JCE.[200] The Trial Chamber concluded:

> The Chamber, however, finds that the Indictment adequately put the Accused on notice that the purpose of the alleged joint criminal enterprise was to take control of Sierra Leone through criminal means, including through a campaign of terror and collective punishments. Throughout the trial, the Accused were on notice that they were alleged to have committed the crimes of collective punishment and acts of terrorism through their participation in a joint criminal enterprise. They were also notified of the fact that one of the alleged goals of their armed struggle was to gain control of Sierra Leone, and in particular, of the diamond mining areas. The Chamber does not consider that the ability of the Accused to present their defence was materially prejudiced by the alteration to the purpose of the common plan as alleged in the Prosecution Notice Concerning Joint Criminal Enterprise. The Chamber therefore dismisses this objection in its entirety.[201]

104. On appeal, Sesay submits that the shifting notice provided by the Prosecution Notice Concerning JCE prejudiced his defence because whereas originally "Counts 3-14 were within the criminal purpose or were a foreseeable consequence of it," the Prosecution Notice Concerning JCE "changed the agreement alleged and limited the crimes to those contained within counts 1, 2, 12, 13 and 14. [Thus, the] crimes charged in Counts 3 through 11 were newly alleged to be the foreseeable

[196] Trial Judgment, para. 374.
[197] Gbao Motion on Form of Indictment.
[198] Decision Gbao Motion on Form of Indictment, p. 2.
[199] Trial Judgment, para. 374.
[200] Trial Judgment, para. 374.
[201] Trial Judgment, para. 375

consequences" of the agreed crimes of the JCE, and "it was no longer being alleged that [Sesay] intended the crimes in Counts 3-11."[202]

105. In other words, Sesay's position is that, although the Trial Chamber in its judgment chose to rely on the Indictment instead of on the Prosecution Notice Concerning JCE, the fact that it did not inform Sesay of this choice until it rendered the Trial Judgment prejudiced Sesay because, in the period between the Prosecution Notice Concerning JCE and the Trial Judgment, he relied on the pleading of JCE in the Prosecution Notice Concerning JCE. The questions before the Appeals Chamber are, therefore, whether Sesay succeeds in showing a discrepancy between the Prosecution Notice Concerning JCE and the Indictment, and whether this discrepancy in notice, if found, prejudiced him to the extent that his trial was rendered unfair.

106. Contrary to Sesay's submissions, the Prosecution Notice Concerning JCE expressly stated that "[t]he crimes charged in Counts 1 through 14 of the [Indictment] were within the joint criminal enterprise" and that Sesay "intended the commission of the charged crimes."[203] The Appeals Chamber has previously ruled that the "purpose of the enterprise" comprises both the objective of the JCE and the means contemplated to achieve that objective.[204] Notice to the accused does not require the objective and the means to be separately pleaded in the indictment as long as the alleged criminality of the enterprise is made clear.[205] Regardless of whether a crime is the objective or the means, it is within the JCE. Here, the crimes charged in Counts 1 through 14 were consistently alleged to be within the JCE, and therefore the alleged criminality of the enterprise was clear.

107. Paragraph 37 of the Indictment stated in part:

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

108. Paragraph 7 of the Prosecution Notice Concerning JCE stated:

> The crimes charged in Counts 1 through 14 of the Corrected Amended Consolidated Indictment were within the joint criminal enterprise. The Accused and the other participants intended the commission of the charged crimes.

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[202] Sesay Appeal, para. 53.
[203] Prosecution Notice Concerning JCE, para. 7.
[204] *Taylor* Appeal Decision on JCE Pleading, para. 15; *Brima et al.* Appeal Judgment, para. 76 (holding that the ultimate objective of the JCE and the means to achieve that objective constitute the common plan, design or purpose of the JCE).
[205] *Taylor* Appeal Decision on JCE Pleading, para. 25.

109. The Prosecution Notice Concerning JCE also stated in the alternative that the crimes charged under Counts 1, 2, 12, 13 and 14 were within the JCE and the crimes charged in Counts 3-11 were foreseeable consequences.[206] Accordingly, the Prosecution Notice Concerning JCE maintained notice to the accused that the crimes charged under Counts 3-11 were *either* within the JCE *or* a foreseeable consequence of the crimes that were within the JCE. This notice reflects the formulation of the JCE as provided in paragraph 37 of the Indictment, quoted above. The Appeals Chamber has previously endorsed the finding that pleading the basic and extended forms of JCE in the alternative is a well-established practice in the international criminal tribunals.[207]

110. The Appeals Chamber, therefore, finds that Sesay has failed to establish any prejudice that could have resulted from the Trial Chamber's disregard of the Prosecution Notice Concerning JCE and its reliance on the pleading of the common purpose in the Indictment. Having come to this conclusion, the Appeals Chamber dismisses the remainder of Sesay's submissions.

(c) Conclusion

111. The Appeals Chamber dismisses Sesay's Ground 12 in its entirety.

D. Kallon's Grounds of Appeal relating to the Indictment

1. Notice of the nature of the common purpose of the JCE (Kallon Ground 3)

(a) Submissions of the Parties

112. Kallon argues that the Trial Chamber erred in holding that "[i]n the Chamber's considered opinion, … a joint criminal enterprise is divisible as to participants, time and location. It is also divisible as to the crimes charged as being within or the foreseeable consequence of the purpose of the joint enterprise."[208] According to Kallon, the Trial Chamber erred in law in holding that "JCE participants can change, or there can be different JCE time-periods, and changing locations."[209] Kallon submits that the Trial Chamber's statement that crimes may be within the JCE or the foreseeable consequence thereof demonstrates the Trial Chamber's fundamental confusion in

[206] Prosecution Notice Concerning JCE, para. 8.
[207] *Brima et al.* Appeal Judgment, para. 84 (and citations therein).
[208] Kallon Appeal, para. 70, *quoting* Trial Judgment, para. 354.
[209] Kallon Appeal, para. 70.

believing that it was not required to determine at the pleading or merits stage whether there was a JCE 1 or JCE 3.[210]

113. Kallon also argues that the Trial Chamber erred in law in finding that the Indictment adequately pleaded his personal participation in the JCE by stating that he "individually, or in concert with [others] … excercis[ed] authority, command and control over all RUF, Junta and AFRC forces."[211] He submits that the Trial Chamber erred when it concluded that the Indictment sufficiently pleaded his personal participation because it pleaded that he participated through his leadership role.[212] Kallon argues that the "capacity" in which he allegedly participated "is not the same as the 'material facts supporting' his participation," and that the Trial Chamber erred in law in finding "that his capacity and alleged presence sufficed to state the material facts constituting his participation."[213]

114. In response, the Prosecution relies upon its submissions in relation to Sesay's Ground 12, summarized above.[214] The Prosecution further submits that the "divisibility of the JCE" described by the Trial Chamber is supported by the references cited in the Trial Judgment[215] as well as by the Trial Chamber's analysis of the applicable law.[216] The Prosecution argues that Kallon has not explained how the Trial Chamber erred.[217] It submits that contrary to Kallon's assertion, pleading the basic and extended forms of JCE in the alternative is supported in the Appeals Chamber's jurisprudence and that of the other international criminal tribunals.[218] Regarding Kallon's role in the JCE, the Prosecution argues that Kallon merely restates assertions made at trial, and that the Trial Chamber did not err in rejecting the arguments.[219] According to the Prosecution, "Kallon was clearly on notice of his alleged role in the JCE."[220]

115. Kallon offers no new arguments in reply.

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[210] Kallon Appeal, para. 70.
[211] Kallon Appeal, para. 72, *quoting* Trial Judgment, para. 393.
[212] Kallon Appeal, para. 72, *citing* Trial Judgment, para. 393.
[213] Kallon Appeal, para. 72 (internal citations omitted).
[214] *See supra*, para. 98.
[215] Prosecution Response, para. 2.11, *citing* Trial Judgment, fns 685, 686.
[216] Prosecution Response, para. 2.11, *citing* Trial Judgment, paras 251-266.
[217] Prosecution Response, para. 2.11.
[218] Prosecution Response, para. 2.11.
[219] Prosecution Response, para. 2.12, *citing* Kallon Final Trial Brief, para. 650.
[220] Prosecution Response, para. 2.12.

(b) Discussion

116. Kallon's arguments are two-fold: first, that the Trial Chamber erred in law in finding the "divisibility" of the JCE as alleged; and second, that the Trial Chamber erred in considering the pleading of his leadership roles as sufficient notice of his participation in the JCE.

117. Concerning the divisibility of the JCE, the Trial Chamber found that "the identities of all participants and the continuing existence of the joint criminal enterprise over the entire time period alleged in the Indictment" do not need to be proven beyond reasonable doubt by the Prosecution because they are not elements of the *actus reus* of the JCE and therefore they "are not material facts upon which the conviction of the Accused would rest."[221] In effect, the Trial Chamber found that where JCE liability can be found in the evidence, and the members of the JCE and temporal scope are within the material facts that are pleaded, then the accused has not suffered material prejudice. The Trial Chamber's approach is consistent with case law that demonstrates that even if some of the material facts pleaded in an indictment are not established beyond reasonable doubt, a Trial Chamber may nonetheless enter a conviction provided that, having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts.[222] As a general matter, such an approach would not result in prejudice to the accused because he is on notice of all of the material facts that result in his conviction. Kallon, in fact, does not show what prejudice resulted, or could have resulted, from the Trial Chamber's findings on the divisibility of the pleading of JCE. His submission is therefore rejected.

118. Concerning the pleading of Kallon's participation in the JCE, the Appeals Chamber notes that Kallon does not allege which of his acts found by the Trial Chamber to constitute participation in the JCE should have been pleaded in the Indictment, nor does he allege that he lacked notice that the Prosecution would rely upon the proof of those acts to establish his liability pursuant to a JCE. He, therefore, fails to argue how the alleged error invalidates the decision. It would appear that he only challenges the pleading of his role in the RUF as part of his participation in the JCE. As the Trial Chamber observed, the Indictment pleads Kallon's positions in the RUF and in the joint AFRC/RUF forces at paragraphs 19 to 33, and in paragraph 34 it states that "in [his] respective

[221] Trial Judgment, para. 353.
[222] *See e.g., Ntagerura et al.* Appeal Judgment, para. 174, n. 356 ("The Appeals Chamber considers that the 'material facts' which have to be pleaded in the indictment to provide the accused with the information necessary to prepare his defence have to be distinguished from the facts which have to be proved beyond reasonable doubt.").

positions referred to above" Kallon "exercised authority, command and control over all RUF, Junta and AFRC/RUF forces." The Indictment, therefore, provided sufficient notice that Kallon exercised authority while in command positions in the RUF and AFRC/RUF forces. The fact that the Indictment did not expressly state that he did so in furtherance of the alleged JCE does not evince a defect, since the material facts regarding his participation now at issue were nonetheless pleaded. The Appeals Chamber has already ruled on the permissibility of alleging the same acts for liability under both Article 6(3) and, command responsibility, and Article 6(1), JCE.[223]

(c) Conclusion

119. Kallon's Ground 3 is dismissed in its entirety.

2. Curing of the defective pleading of liability for personal commission (Kallon Ground 5)

(a) Submissions of the Parties

120. Kallon submits that the Trial Chamber erred in finding that the material facts concerning his personal commission of crimes were adequately pleaded, or that any related defects were cured.[224] Kallon argues that the Trial Chamber correctly found that the Indictment failed to plead the material facts underlying allegations that he personally committed crimes charged in the Indictment, but incorrectly held that all such defects were cured.[225] Kallon argues that, by convicting him based on evidence of criminal acts entirely different from those particularised in the Indictment, the Trial Chamber allowed the Prosecution to amend its original allegations without seeking leave to amend the Indictment.[226]

121. Kallon therefore argues that all purported cures with respect to his personal commission of crimes must be rejected as either (i) radically transforming the charges in the Indictment, or (ii) failing to provide him clear, consistent and timely information.[227] According to Kallon, the Indictment and Prosecution Pre-Trial Brief are "completely silent"[228] as to which crimes he is alleged to have personally committed. Kallon submits that the Prosecution provided the most

[223] *Taylor* Appeal Decision on JCE Pleading, para. 23.
[224] Kallon Appeal, para. 73.
[225] Kallon Appeal, para. 73, *quoting* Trial Judgment, paras 399-400.
[226] Kallon Appeal, para. 73.
[227] Kallon Appeal, para. 74.
[228] Kallon Appeal, para. 75.

detailed information in its Opening Statement.[229] However, even brief references in the Opening Statement were neither discussed nor proven at trial, and were insufficient to provide notice to Kallon because they did not provide the material facts such as "the identity of the victim, the time and place of the events and the means by which the acts were committed."[230] Kallon argues that the acts of personal participation contested in Grounds 9 to 15 and Grounds 23 to 30 of his Appeal were not specifically pleaded in the Indictment.[231]

122. In response to Kallon's submissions, the Prosecution states that it relies in part upon its submissions in response to Sesay's Ground 6, summarised above.[232] The Prosecution further submits that Kallon's claim is properly understood as an assertion that the Indictment was insufficiently specific rather than that the charges in the Indictment were "changed."[233] The Prosecution argues that it is misleading to suggest that Kallon was convicted of conduct with which he was not charged in the Indictment.[234] The Prosecution submits that Kallon has not explained "how the charges were 'transformed' by the addition of 'new' crimes."[235]

123. The Prosecution notes that the Trial Chamber accepted Kallon's submission that the Indictment was defective in not pleading with specificity the crimes that Kallon was alleged to have personally committed, with a single exception concerning one of the Count 15 incidents, the attack on Salaheudin.[236]

124. Kallon does not offer new arguments in reply.

(b) Discussion

125. The Appeals Chamber only considers Kallon's submissions to the extent they challenge his conviction for personally committing the attack on the UNAMSIL peacekeeper Salaheudin at the Makump DDR camp on 1 May 2000 since this was his only conviction pursuant to this mode of liability.[237]

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[229] Kallon Appeal, para. 75, *quoting* Transcript, 5 July 2004, p. 46 (Prosecution Opening Statement).
[230] Kallon Appeal, para. 75, *quoting Kupreškić et al.* Appeal Judgment, para. 89.
[231] Kallon Appeal, para. 75.
[232] Prosecution Response, para. 2.39; *see supra*, para. 59.
[233] Prosecution Response, para. 2.40, *referring to* Kallon Appeal, para. 73.
[234] Prosecution Response, para. 2.40.
[235] Prosecution Response, para. 2.41, *quoting* Kallon Appeal, para. 74.
[236] Prosecution Response, para. 2.42, *referring to* Kallon Appeal, para. 75 *and citing* Trial Judgment, paras 2242-2246.
[237] *See* Trial Judgment, paras 2242-2246.

126. In relation to this allegation, the Trial Chamber considered that a witness statement disclosed on 26 May 2003 indicated that the witness would testify to the "direct participation of Kallon in physically assaulting a peacekeeper."[238] Notably, Kallon does not challenge this interpretation of the disclosure. In part, Kallon asserts that the Trial Chamber could not find cure based on the "mere service of statements";[239] however this assertion, even if it were correct, does not accurately describe the Trial Chamber's findings, which expressly stated that "[t]he Chamber is satisfied that the *Prosecution's Motion* constituted sufficient notice to the Defence of the material elements."[240] In the referenced motion the Prosecution petitioned the Chamber to add two witnesses for the purpose of testifying about Kallon's involvement in the attack on and abduction of peacekeepers.[241] The Trial Chamber's cautious approach, evidenced by the fact that it only found cure of defects in limited instances, and only examined witness statements for notice they might provide is consistent with the approaches followed at the ICTY and ICTR.[242] The Appeals Chamber has also previously recognised that it is possible for an accused to gain sufficient notice of a material fact through the disclosure of witness statements and testimony.[243]

(c) Conclusion

127. Kallon's Ground 5 is dismissed in its entirety.

3. Pleading of liability for command responsibility (Kallon Ground 6)

(a) Submissions of the Parties

128. In relation to the pleading of his superior responsibility pursuant to Article 6(3) of the Statute, Kallon submissions are four-fold: first, the Trial Chamber erred in finding that the identity of his subordinates and their victims was sufficiently pleaded;[244] second, he lacked notice of the allegations that (i) he was an operational commander who gave orders which were complied with by troops in Kono, (ii) he was assigned to an area known as Guinea Highway and (iii) he was

[238] Trial Judgment, para. 2244.
[239] Kallon Appeal, para. 253.
[240] Trial Judgment, para. 2245 (emphasis added).
[241] Trial Judgment, n. 3914.
[242] *Ntakirutimana* Appeal Judgment, para. 48 (holding that a witness statement, when taken together with "unambiguous information" contained in a Pre-Trial Brief and its annexes, was sufficient to cure a defect in an indictment); *Naletilić and Martinović* Appeal Judgment, para. 45 (holding that a chart of witnesses that set forth the facts to which each witness would testify was sufficient notice to cure a defect in the indictment).
[243] *Brima et al.* Appeal Judgment, paras 111, 115.
[244] Kallon Appeal, para. 76.

tasked with the particular responsibility of defending the Makeni-Kono Highway against advancing ECOMOG;[245] third, the Indictment did not sufficiently plead his superior responsibility for crimes at Kissi Town in Kono District;[246] and fourth, his subordinates at Kissi Town "were never sufficiently or at all particularized."[247]

129. In response, the Prosecution submits that this argument is raised for the first time on appeal and therefore Kallon has the burden of proof to demonstrate how his ability to prepare his defence was materially prejudiced.[248] The Prosecution submits that Kallon does not contend that these facts were never disclosed in pre-trial disclosures.[249] According to the Prosecution, "these facts were a matter of evidence that did not have to be specifically pleaded in the [I]ndictment and in any event no prejudice was caused as the facts were communicated through disclosures well in advance, in witness summaries contained in the Prosecution Supplemental Pre-trial Brief, witness statements and *AFRC* trial transcripts where they were relied upon by the [P]rosecution."[250]

130. In relation to forced marriages in Kono District, the Prosecution argues that Kallon generally misapplies the standard set out in the *Blaškić* Appeal Judgment.[251] The Prosecution contends that "it is sufficient to describe the appellant as a commander while referring to his particular military duties to establish his control."[252] The Prosecution further submits that the case law establishes that "if the [P]rosecution is unable to identify [the direct perpetrators] by name, it will be sufficient … to identify them at least by reference to their category (or their official position) as a group."[253] The Prosecution contends that it is not required to specify the "necessary and reasonable measures" that were not taken by Kallon, but rather the "conduct … by which [he] may be found to have failed."[254] The Prosecution similarly argues that it is the "conduct by which [Kallon] may be found to have known or had reason to know of the crimes, and the related conduct of the subordinates which must be pleaded."[255] According to the Prosecution, the relevant facts

[245] Kallon Appeal, para. 122; *see also* Kallon Appeal, para. 124; Kallon Appeal, para. 127.
[246] Kallon Appeal, para. 140.
[247] Kallon Appeal, para. 140.
[248] Prosecution Response, para. 3.41.
[249] Prosecution Response, para. 3.41.
[250] Prosecution Response, para. 3.41.
[251] Prosecution Response, para. 2.52.
[252] Prosecution Response, para. 2.52 (internal citations omitted).
[253] Prosecution Response, para. 2.52
[254] Prosecution Response, para. 2.52, *quoting Hadžihasanović and Kubura* Decision on Form of Indictment, paras 24-25; *Blaškić* Appeal Judgment, para. 218.
[255] Prosecution Response, para. 2.52, *citing Blaškić* Appeal Judgment, para. 218.

regarding the conduct of the subordinates will usually be stated with less precision because the details of those acts are often unknown.[256]

131. Kallon offers no additional arguments in reply.

(b) Discussion

132. Kallon challenges the pleading of his liability as a superior for crimes in Kono District. The Appeals Chamber notes that he was convicted pursuant to Article 6(3) of the Statute of the following crimes in Kono District:

(i) Acts of terrorism (Count 1), for sexual slavery in Kissi Town, Kono District;

(ii) Sexual slavery (Count 7) in Kissi Town, Kono District;

(iii) Other inhumane acts (forced marriage) (Count 8) in Kissi Town, Kono District;

(iv) Outrages upon personal dignity (Count 9) in Kissi Town, Kono District;

(v) Enslavement (Count 13) in relation to events in unspecified locations in Kono District;

133. Kallon makes general submissions that he lacked notice that he was alleged to have superior responsibility for crimes committed in Kono District, but he fails to provide substantiating arguments.[257] His submissions are at odds with a plain reading of the Indictment. It charges that Kallon "was a senior officer and Commander in the RUF, Junta and AFRC/RUF forces,"[258] and that when he was a "Battle Field Inspector, … he was subordinate only to the RUF Battle Group Commander, the Battlefield Commander, the leader of the RUF … and the leader of the AFRC."[259] Kallon was BFI at the times relevant to his convictions for crimes in Kono.[260] The Indictment further charges that in his position, Kallon "exercised authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF forces"[261] and that he "is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was

[256] Prosecution Response, para. 2.52.
[257] *See* Kallon Appeal, paras 140, 144.
[258] Indictment, para. 24.
[259] Indictment, para. 25.
[260] Trial Judgment, paras 2142-2143, 2146.
[261] Indictment, paras 34, 39.

about to commit such acts or had done so and … failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[262] The Indictment expressly lists locations in Kono District as those at which the crimes charged under Counts 6-9 and 13 were committed[263] and states that by his "acts or omissions in relation to these events, … MORRIS KALLON …, pursuant to … Article 6.3. of the Statute, [is] individually criminally responsible for" the crimes charged under Counts 6-9 and 13.[264]

134. In relation to sexual violence, forced marriages and acts of terrorism at Kissi Town in Kono District, Kallon additionally argues that his subordinates at Kissi Town "were never sufficiently or at all particularized."[265] The Appeals Chamber notes, however, that in addition to the pleading of Kallon's superior position, discussed above, the Indictment states that the crimes were committed by "members of AFRC/RUF" at "Kissi-town (or Kissi Town)… and AFRC/RUF camps such as … Kissi-town (or Kissi Town) camp."[266] The Indictment, therefore, puts Kallon on notice of the charge that ARFC/RUF members who were his subordinates at Kissi Town committed the crimes charged in Counts 6-9. Kallon fails to argue how this pleading did not sufficiently identify his subordinates.

(c) Conclusion

135. Kallon's Ground 6 is dismissed in its entirety.

4. Notice of liability for planning the use of child soldiers (Kallon Ground 20 (in part))

(a) Submissions of the Parties

136. Kallon argues that in light of the conduct for which he was convicted for planning the conscription and use of child soldiers within the RUF, the pleading requirements should have been consistent with those required for allegations of personal commission.[267] He argues that the Trial Chamber held that the pleading of personal commission of Count 12 was defective, but that it nonetheless erroneously found him guilty under Count 12 for planning crimes that "he [was]

[262] Indictment, para. 39.
[263] Indictment, paras 55, 71.
[264] Indictment, pp. 14, 19.
[265] Kallon Appeal, para. 140.
[266] Indictment, para. 55.
[267] Kallon Appeal, para. 185.

alleged to have personally committed."[268] Kallon submits that "[t]he Indictment provides no specific details regarding [his] role," and that this ambiguity is compounded by the expansive timeframe for the crime.[269] According to Kallon, this defect prejudiced his defence against charges under Count 12. Kallon contrasts the approach of the Trial Chamber with the ICTR Appeals Chamber's approach in *Prosecutor v. Niyitegeka* where it held that an indictment "must delve into particulars where possible" and required greater specificity about the time and place of alleged attacks in which the accused in that case personally participated.[270]

137. Kallon further argues that the defects in the Indictment in relation to Count 12 could not have been cured through the "mere service of witness statements."[271] Kallon submits that the Trial Chamber erroneously relied on the testimony of Prosecution Witnesses TF1-263, TF1-141, Dennis Koker, TF1-366, TF1-371, TF1-045, TF1-060 and Edwin Kasoma, who adduced evidence regarding incidents not pleaded in the Indictment.[272]

138. In response, the Prosecution states that it relies upon its submissions in relation to Kallon's Ground 5, summarized above.[273] Kallon makes no additional arguments in reply.

(b) Discussion

139. When alleging forms of liability pursuant to Article 6(1) other than personal commission, international criminal tribunals have required the Prosecution "to identify the 'particular acts' or 'the particular course of conduct' on the part of the accused which forms the basis for the charges in question."[274] Where possible, the Prosecution should specify "the *form* of participation, such as 'planning' *or* 'instigating' *or* 'ordering' etc."[275] Thus, it is required that the Indictment expressly alleges that Kallon incur liability for "planning" the crime under Count 12, and that the Indictment specify the material facts of his conduct relied upon to establish that liability.

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[268] Kallon Appeal, para. 186.
[269] Kallon Appeal, para. 179.
[270] Kallon Appeal, para. 181, *quoting Niyitegeka* Appeal Judgment, para. 217.
[271] Kallon Appeal, para. 183, *citing Niyitegeka* Appeal Judgment, para. 221.
[272] Kallon Appeal, para. 186.
[273] *See supra*, para. 122.
[274] *Ntagerura* Appeal Judgment, para. 25; *Naletilić and Martinović* Appeal Judgment, para. 24.
[275] *Blaškić* Appeal Judgment, para. 214; *Aleksovski* Appeal Judgment, fn. 319 (noting that the practice of the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and that it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged).

140. Paragraph 38 of the Indictment states that "Morris Kallon ..., by [his] acts or omissions, [is] individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Indictment, which crimes [he] *planned*." By operation of paragraph 40 of the Indictment, this allegation is incorporated into each of the Counts, including Count 12. The Indictment, therefore, expressly alleges that Kallon planned the crime under Count 12.

141. Kallon objects that the Indictment nonetheless provides no specific details regarding his role.[276] The Trial Chamber relied upon the following particular acts to find that Kallon planned the offence under Count 12:

(i) Kallon was a senior RUF Commander during the attack on Koidu Town in February 1998 in which children were abducted in large numbers to be sent to RUF camps;

(ii) he was the senior RUF Commander on 3 May 2000 at Moria near Makeni where child soldiers were used in the ambush of UNAMSIL forces;

(iii) he brought a group of children to Bunumbu for training in 1998; and [277]

(iv) he issued orders that "young boys" should be trained to become soldiers and handle weapons at Bunumbu on or about 9 June 1998.[278]

142. The Appeals Chamber must determine whether the Prosecution provided adequate notice of the "particular acts" or "the particular course of conduct" which formed the basis for Kallon's liability for planning the offence under Count 12 in relation to events in Kenema, Kailahun, Kono and Bombali Districts. The Indictment provides notice that Kallon incurred liability pursuant to each mode of liability, in part, as a result of his acts as a "senior officer and commander in the RUF, Junta and AFRC/RUF forces,"[279] his role "[b]etween about May 1996 and about April 1998, [as] a Deputy Area Commander,"[280] and that as a function of these positions "Kallon ... exercised authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF

[276] Kallon Appeal, para. 179.
[277] Trial Judgment, para. 1638.
[278] Trial Judgment, paras 1638, 2231-2232.
[279] Indictment, para. 24.
[280] Indictment, para. 25.

forces."[281] Kallon's conduct in these positions entailed the acts described in (i) and (ii) above, and thus the Indictment provided sufficient notice in respect of those acts.

143. In respect of (iii) and (iv) above, the Appeals Chamber recalls that a distinction is drawn between the material facts upon which the Prosecution relies and the evidence by which those material facts will be proved. Only the former must be pleaded.[282] In this case, Kallon, while acting in his capacity as a commander personally brought children to a training camp, and issued orders that children should be trained as combatants. In the view of the Appeals Chamber, these two facts constituted evidence of Kallon's conduct as an RUF Commander and his involvement in the execution of the plan to recruit and use child soldiers. The Trial Chamber did not find that this conduct amounted to planning itself, but it inferred Kallon's role in planning from this evidence. As such, these facts were evidence of his role in planning and they need not have been pleaded in the Indictment.

144. Kallon's submission that the Trial Chamber found that the defective pleading of Count 12 was cured through the mere service of witness statements is misconceived. Kallon was convicted of planning the use of children under the age of 15 years to participate actively in hostilities. The Trial Chamber did not find that the pleading of planning liability was defective; it needed no cure.

(c) Conclusion

145. The Appeals Chamber dismisses Kallon's Ground 20 in regard to the failure to provide notice of liability for planning the use of child soldiers.

5. Notice of liability for enslavement (Kallon Ground 21)

(a) Submissions of the Parties

146. Kallon argues that the Trial Chamber erroneously found that he abducted approximately 400 civilians in Makeni in Bombali District in 1999-2000 and sent them to Kono. He argues this event is outside the scope of the Indictment because (i) Makeni is in Bombali District, not Kono District; (ii) the Indictment limits the time-frame for abductions in Bombali District to "[b]etween about 1

[281] Indictment, para. 34. To the extent this paragraph of the Indictment pertains principally to liability pursuant to Article 6(3), the law does not preclude acts from forming both the basis for liability under Article 6(3) and modes of liability under Article 6(1). *See Taylor* Appeal Decision on JCE Pleading, para. 23.
[282] *See Naletilić and Martinović* Appeal Judgment, para. 23; *Kvočka et al*. Appeal Judgment, para. 27; *Kupreškić et al*. Appeal Judgment, para. 88; *Furundžija* Appeal Judgment, para. 147.

May 1998 and 31 November 1998"; and (iii) the dates of abduction are after the time-frame provided in the Supplemental Pre-Trial Brief for enslavement in Kono District.[283]

147. The Prosecution submits that Kallon was not convicted on the basis of the finding that from 1999-2000, pursuant to Sesay's orders, he gathered approximately 400 civilians who were jailed and taken daily to Kono, and therefore the Prosecution states it is uncertain of Kallon's argument and how Kallon could have suffered irreparable prejudice.[284]

148. Kallon offers no new arguments in reply.

(b) Discussion

149. Kallon submits, in part, that his convictions for enslavement in Kono District fall outside the timeframe for which he was provided notice in the Supplemental Pre-Trial Brief. The Appeals Chamber notes that paragraph 481 of the Supplemental Pre-Trial Brief states that AFRC/RUF forces abducted hundreds of civilians and took them to various locations, both within and outside Kono District, where they were used as forced labour "[b]etween 14 February 1998 and 30 June 1998," whereas paragraph 71 of the Indictment, to which paragraph 481 of the Supplemental Pre-Trial Brief expressly refers, alleges the crimes took place "[b]etween about 14 February 1998 to January 2000." The Appeals Chamber recalls that the "primary accusatory instrument" is the Indictment[285] and the crimes for which Kallon was convicted fall within the period alleged therein. The pre-trial brief serves the purpose of addressing the relevant factual and legal issues by developing the Prosecution strategy at trial. The pre-trial brief is relevant to the case only insofar as it develops such strategy in accordance with the Indictment.[286]

150. In light of the fact that the timeframe alleged in the Indictment includes the period of time during which the acts for which he was convicted were perpetrated, the Appeals Chamber finds that the Indictment was not defective in this regard and Kallon did not suffer prejudice.

151. Kallon further argues that the abductions found by the Trial Chamber to have been committed took place outside the timeframe pleaded in the Indictment. As Kallon notes, the Trial Chamber made the finding in the context of its findings of enslavement in Kono District. The

[283] Kallon Appeal, paras 232-233.
[284] Prosecution Response, para. 7.143.
[285] *See* Rules 47 to 53 of the Rules; s*ee also Ntagerura et al.* Appeal Judgment, para. 114.
[286] *See* Rule 73bis (B)(i).

captured civilians were gathered by Kallon from Makeni in Bombali District, jailed and then taken daily to Kono in trucks sent by Sesay.[287] Once in Kono, these civilians were forced to mine diamonds for the RUF,[288] and the forced labour formed the basis for Kallon's conviction for enslavement pursuant to his participation in the JCE within the timeframe of the Indictment.[289] Kallon has not demonstrated that the abductions themselves were the basis of a conviction and therefore he has not shown how an error, if any, invalidated the decision. His submission is therefore rejected.

(c) Conclusion

152. The Appeals Chamber dismisses Kallon's Ground 21 in regard to the alleged failure to provide notice of liability for enslavement.

6. Notice of looting money from Ibrahim Kamara in Bo (Kallon Ground 22 (in part))

(a) Submissions of the Parties

153. Kallon argues that the Trial Chamber erroneously convicted him for the looting 800,000 Leones from Ibrahim Kamara in June 1997 in Bo District. He argues this crime was not specifically pleaded in the Indictment and therefore Kallon did not have adequate notice of the charges against him.[290] Kallon further submits that this defect was not cured.[291]

154. In response to this ground of appeal, the Prosecution relies on its submissions on Kallon's JCE liability in Bo, summarised below.[292]

(b) Discussion

155. Kallon was convicted, pursuant to his participation in a JCE 1, for pillage in relation to the unlawful appropriation of 800,000 Leones by Bockarie from Ibrahim Kamara. The Trial Chamber found that Bockarie, who was also found to be a member of the JCE,[293] and his subordinates were the principal perpetrators of the crime. The Appeals Chamber recalls that the Indictment pleaded

[287] Trial Judgment, para. 1249.
[288] Trial Judgment, para. 1249.
[289] Trial Judgment, paras 1328-1330, 2102.
[290] Kallon Appeal, para. 242.
[291] Kallon Appeal, paras 242-243.
[292] Prosecution Response, para. 7.171.
[293] Trial Judgment, para. 1990.

that "Kallon and … Bockarie[, among others,] in concert with each other, … exercised command and control over subordinate members of the RUF, Junta and AFRC/RUF forces,"[294] pursuant to a "joint criminal enterprise … to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas,[295] through criminal means that included[296] "unlawful taking … of civilian property … include[ing]"[297] in Bo District, "[b]etween 1 June 1997 and 30 June 1997, AFRC/RUF forces [who] looted and burned an unknown number of civilian houses in Telu, Sembehun, Mamboma and Tikonko."[298] Thus, the act of pillage, a pleaded crime within the JCE, occurred in a named location, during the month pleaded in the Indictment, by a member of the JCE. This is adequate notice of Kallon's liability for the crime.

(c) Conclusion

156. The Appeals Chamber dismisses Kallon Ground 22 in regard to notice of looting money from Ibrahim Kamara in Bo.

7. Pleading of crimes under Count 15 and Count 17 concerning attacks against UNAMSIL peacekeepers (Kallon Grounds 23, 24 and 28)

(a) Submissions of the Parties

157. Kallon argues his Grounds 23, 24 and 28 of appeal together. Under these grounds, Kallon advances four arguments regarding the pleading of Counts 15 and 17 of the Indictment.

158. First, Kallon argues that the Indictment does not plead particulars of his acts or omissions for ordering, or the "elements" of his superior responsibility for the attacks against UNAMSIL peacekeepers which resulted in his convictions under Counts 15 and 17 of the Indictment.[299]

159. Second, Kallon argues that several attacks on peacekeepers were not pleaded in the Indictment and the defects were not cured, including the "attack on Maroa,"[300] the "abduction of Mendy and Gjellesdad,"[301] "[t]he abduction of Kasoma and ten peacekeepers" and that Kallon

[294] Indictment, para. 34.
[295] Indictment, para. 36.
[296] Indictment, para. 37.
[297] Indictment, para. 77.
[298] Indictment, para. 78.
[299] Kallon Appeal, para. 250.
[300] Kallon Appeal, para. 259.
[301] Kallon Appeal, para. 260.

ordered the attack against Kasoma's convoy of approximately 100 peacekeepers.[302] He further argues that he did not have adequate notice of the identities of the victims and the particulars of his responsibility for the murder of the victims.[303]

160. Third, Kallon argues that the Trial Chamber determined that the Indictment was defective for failing to plead particulars of his personal commission of crimes concerning attacks against UNAMSIL peacekeepers, but the Trial Chamber nonetheless undertook to determine whether those defects were cured.[304] Kallon argues that in light of the fact that he persistently objected to the pleading of his responsibility under Counts 15 and 17 of the Indictment, the Trial Chamber's analysis of cure was belated and prejudiced his defence.[305]

161. Fourth, Kallon argues that the Trial Chamber erred in finding that the defect in the Indictment could be cured.[306] Kallon submits that the Prosecution made no curing disclosures in its pre-trial briefs or opening statement, and that the Trial Chamber improperly relied upon witness statements to cure the defect.[307]

162. In response, the Prosecution argues that the Indictment "clearly alleged attacks against UNAMSIL peacekeepers by the AFRC/RUF, which included 'unlawful killings of UNAMSIL peacekeepers'."[308] The Prosecution submits that the allegation was reiterated in its Pre-Trial Brief, Supplemental Pre-Trial Brief, and "the material facts concerning the killing of UNAMSIL personnel were also made known to [Kallon] through disclosure of witness statements."[309] The Prosecution further states that it cannot respond to Kallon's unspecified allegation that the Indictment does not "plead any of the elements of 6.3 responsibility."[310]

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[302] Kallon Appeal, para. 263.
[303] Kallon Appeal, para. 287.
[304] Kallon Appeal, para. 252.
[305] Kallon Appeal, paras 251-252, *citing* Kallon Motion for Acquittal, pp. 50-60; Kallon Motion to exclude Evidence Outside the Scope of the Indictment (without citing any paragraphs); Kallon Final Trial Brief (without citing any paragraphs).
[306] Kallon Appeal, paras 252-253.
[307] Kallon Appeal, paras 253-256.
[308] Prosecution Response, para. 2.57, *quoting* Indictment, para. 83.
[309] Prosecution Response, para. 2.57.
[310] Prosecution Response, para. 2.58, *quoting* Kallon Appeal, para. 250.

(b) Discussion

163. The Appeals Chamber understands Kallon's first argument to pertain to the pleading of his conduct with respect to his liability for ordering or for incurring superior responsibility for the intentionally directed attacks against UNAMSIL peacekeepers.

164. Ordering involves a person in a position of authority instructing another person to commit an offence; a formal superior-subordinate relationship between the accused and the actual physical perpetrator is not required.[311] The Appeals Chamber finds that the very notion of "instructing" requires a positive action by the person in a position of authority.[312] Since ordering can be established by direct or circumstantial evidence,[313] the order itself need not be a material fact pleaded in the indictment since it is a matter for proof from the evidence adduced at trial. In the present case, Kallon's positions of authority were adequately pleaded in paragraphs 24 through 28 of the Indictment, and the charge that he ordered the crime under Count 15 was pleaded in paragraphs 38, 40, 41, 83 and page 21, which provide notice of the charge that (i) by his acts he is individually criminally responsible pursuant to Article 6(1) of the Statute for the crimes he ordered;[314] (ii) he conducted armed attacks in Bombali District targeting humanitarian assistance personnel and peacekeepers assigned to UNAMSIL;[315] (iii) the AFRC/RUF attacks against UNAMSIL peacekeepers and humanitarian assistance workers within Bombali District occurred between 15 April 2000 and about 15 September 2000;[316] (iv) these attacks included unlawful killings of UNAMSIL peacekeepers, abducting them and taking hostages;[317] and (v) and by his acts, Kallon was responsible pursuant to Article 6(1) for Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission, punishable under Article 4.b. of the Statute.[318]

165. The Appeals Chamber considers this pleading to have provided sufficient notice of the material facts that Kallon "ordered rebels under his command,"[319] and "used his position of

[311] *Kordić and Čerkez* Appeal Judgment, para. 28; *Semanza* Appeal Judgment, para. 361.
[312] *See Blaškić* Appeal Judgment, para. 660.
[313] *See e.g., Galić* Appeal Judgment, para. 178.
[314] Indictment, para. 38.
[315] Indictment, para. 41.
[316] Indictment, para. 83.
[317] Indictment, para. 83.
[318] Indictment, p. 21.
[319] Trial Judgment, para. 2249.

command and authority to direct his subordinates"[320] through "instructions"[321] to attack UNAMSIL peacekeepers in Bombali District on 1 May 2000 and 3 May 2000.[322] These attacks included the "attack on Maroa,"[323] the "abduction of Mendy and Gjellesdad,"[324] "[t]he abduction of Kasoma and ten peacekeepers" and the attack against Kasoma's convoy of approximately 100 peacekeepers[325] to which Kallon objects in his fourth argument in this sub-ground of his appeal.

166. In relation to the material facts of Kallon's superior responsibility for crimes charged under Counts 15 and 17, the Appeals Chamber notes that the Indictment provided notice that Kallon was the Battle Group Commander from "early 2000,"[326] that "while holding [this] position of superior responsibility and exercising effective control over … subordinates … [he] is responsible for the criminal acts of his subordinates,"[327] and that by his acts in relation to the attacks against UNAMSIL peacekeepers, Kallon, pursuant to Article 6(3) of the Statute, is individually criminally responsible for the crimes charged under Counts 15 and 17.[328] The Indictment also alleges that Kallon knew or had reason to know that his subordinates were about to commit the criminal acts for which Kallon was alleged to be responsible.[329] The Appeals Chamber considers that these facts are precisely the material facts underpinning Kallon's convictions for superior responsibility. We, therefore, find that Kallon had sufficient notice of these charges and reject his first and second arguments in this sub-ground of his appeal.

167. With regard to Kallon's third and fourth arguments concerning the defective pleading and cure of his liability for personal commission of the attack against Salahuedin, the Appeals Chamber notes that the Trial Chamber found that the pleading of personal commission lacked requisite specificity and therefore was defective.[330] Such defect may be cured by the provision of timely, clear and consistent information detailing the factual basis underpinning the charges against Kallon, which compensates for the failure of the indictment to give proper notice of the charges.[331] Contrary to Kallon's assertion, defective pleading of personal commission may be cured by the

[320] Trial Judgment, para. 2252.
[321] Trial Judgment, para. 2252; *see also* Trial Judgment, paras 2255, 2257 for similar findings.
[322] Trial Judgment, paras 2248, 2253, 2255, 2258.
[323] Kallon Appeal, para. 259.
[324] Kallon Appeal, para. 260.
[325] Kallon Appeal, para. 263.
[326] Indictment, para. 27.
[327] Indictment, para. 39.
[328] Indictment, para. 83 and p. 22.
[329] Indictment, para. 39.
[330] Trial Judgment, para. 399.
[331] *Brima et al.* Appeal Judgment, para. 44; *Kupreškić et al*. Appeal Judgment, para. 114.

Prosecution through witness statements and additional filings.[332] This has also been the practice at other international tribunals. For example, in *Gacumbitsi*, the ICTR Appeals Chamber relied upon one document which indicated the anticipated testimony of a prosecution witness to find that the defective pleading of personal commission of a killing was cured.[333] In *Ntakirutimana*, the ICTR Appeals Chamber relied upon a witness statement taken together with "unambiguous information" contained in the Pre-Trial Brief and its annexes to determine the defective pleading of personal commission was cured.[334] In *Naletilić and Martinović*, the ICTY Appeals Chamber found that the Prosecution had cured the indictment's failure to provide information about a beating through information provided by a chart of witnesses and the reiteration of those details by the Prosecution in its opening statement.[335]

168. In the present case, the Trial Chamber found that the Prosecution had disclosed on 26 May 2003 a witness statement indicating that "the witness would testify [about material particulars] including the direct participation of Kallon in physically assaulting a peacekeeper."[336] The Prosecution also filed a motion on 12 July 2004 indicating that another witness "would testify about the individual criminal responsibility of Kallon during the abduction of the UN peacekeepers."[337] The Appeals Chamber considers that these statements provided sufficient timely notice of Kallon's personal commission of the attack on Salahuedin, such that they cured the defect in the charge against Kallon under Article 6(1) of the Statute with respect to the attacks against UNAMSIL personnel.[338] Kallon's third and fourth arguments in this sub-ground of appeal are, therefore, dismissed.

(c) Conclusion

169. The Appeals Chamber dismisses Kallon Grounds 23, 24 and 28 in regard to the pleading of crimes under Counts 15 and 17 concerning attacks against UNAMSIL peacekeepers.

[332] *See Gacumbitsi* Appeal Judgment, para. 56; *Ntakirutimana* Appeal Judgment, para. 32.
[333] *Gacumbitsi* Appeal Judgment, paras 56, 58.
[334] *Ntakirutimana* Appeal Judgment, para. 48.
[335] *Naletilić and Martinović* Appeal Judgment, para. 45.
[336] Trial Judgment, para. 2244.
[337] Trial Judgment, para. 2244, fn 3914.
[338] Indictment, para. 83.

E. Gbao's Grounds of Appeal relating to the Indictment

1. Application of the "sheer scale" exception to mandatory pleading requirements (Gbao Ground 4)

(a) Submissions of the Parties

170. Gbao argues that the Trial Chamber erred in law in holding that "the fact that the investigations and trials were intended to proceed as expeditiously as possible in an immediate post-conflict environment is particularly relevant" to the degree of specificity with which the Prosecution is required to plead in the Indictment.[339] He further submits that this standard infringed Gbao's right to be adequately informed of the charges against him.[340] For relief, Gbao requests the Trial Chamber's findings on the specificity of the Indictment to be overturned and that the Appeals Chamber re-assess the specificity of the Indictment applying the correct legal standard.[341]

171. The Prosecution does not expressly respond to Gbao's submissions in Ground 4, but relies on its response to Sesay's similar submissions in Sesay's Ground 6, which is summarised above.[342] Gbao does not make additional arguments in reply.

(b) Discussion

172. Gbao argues that the Trial Chamber erred in considering that the trials were "intended to proceed as expeditiously as possible in an immediate post-conflict environment [as a] particularly relevant" factor when determining the Prosecution's pleading requirements.[343] His submissions do not add to the arguments already put forward by Sesay in his Ground 6. The Appeals Chamber, therefore, adopts its reasoning in dismissing Sesay Ground 6 and similarly dismisses Gbao Ground 4 in its entirety.

[339] Gbao Appeal, para. 16, *quoting* Trial Judgment, para. 330.
[340] Gbao Appeal, para. 18.
[341] Gbao Appeal, para. 18.
[342] Prosecution Response, para. 2.17. *See supra*, para. 59.
[343] Gbao Appeal, para. 16, *quoting* Trial Judgment, para. 330.

2. Pleading of Gbao's contribution to the JCE (Gbao Ground 8(a))

(a) Submissions of the Parties

173. Gbao contends that he was found to have participated in the JCE "through his role as 'The Ideologist' of the RUF" and that this finding constituted an error in law because the Indictment did not allege that he significantly contributed in this capacity.[344] He argues that the Trial Chamber's findings on his participation as the "RUF Ideologist" violated his right to a fair trial because he was never afforded an opportunity to confront those charges.[345] Gbao noted that the Dissenting Opinion of Justice Boutet considered "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."[346] He further cites Justice Boutet's dissenting opinion that the Trial Chamber's findings on his participation violated his right to a fair trial by basing his liability on an interpretation of the evidence "that was not advanced by the Prosecution as part of their pleadings" and that "Gbao did not receive adequate and sufficient notice of this interpretation at any time."[347]

174. He relies on Justice Boutet's opinion that he did not have an opportunity to defend himself against "the allegation that his commitment to the RUF ideology … constituted … a significant contribution" to the JCE.[348] He requests that his convictions based upon JCE liability, which he lists in his Appeal, be dismissed in their entirety.[349]

175. The Prosecution responds that "the Indictment adequately pleaded the nature of Gbao's participation in the JCE."[350] It submits that his senior positions are set out at paragraphs 29 to 33 of the Indictment, that paragraph 34 provides that in these positions he acted in concert with others, and that paragraphs 37 and 38 of the Indictment provide that Gbao, by his acts or omissions in relation to crimes as alleged in the Indictment, participated in the JCE[351]

176. The Prosecution further responds that "[i]t was not [its] theory that Gbao's function as RUF ideologist in itself constituted his substantial contribution to the JCE and hence this was not a

[344] Gbao Appeal, para. 32.
[345] Gbao Appeal, para. 33.
[346] Gbao Appeal, paras 36-37, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 5.
[347] Gbao Appeal, paras 38, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 6.
[348] Gbao Appeal, para. 39, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 6.
[349] Gbao Appeal, para. 41.
[350] Prosecution Response, para. 2.15.

material fact to be pleaded in the Indictment."[352] It also submits that the Trial Chamber did not find that "Gbao's function as RUF ideologist *in itself* constituted his substantial contribution to the JCE,"[353] but that this was an aspect of the evidence the Trial Chamber was entitled to and did take into account.[354]

177. In reply, Gbao disputes the Prosecution's characterisation of the extent to which the Trial Chamber relied on his purported role as the RUF ideologist, which Gbao contends was the "foundation" of the Trial Chamber's findings on his participation in the JCE.[355] He cites in particular the Trial Chamber's finding in the Sentencing Judgment that his "major contributions to the JCE can be characterised by his role as an ideology instructor and his planning and direct involvement in the enslavement of civilians on RUF government farms within Kailahun District."[356] Gbao further submits that it is significant that no reference was made to his role as Overall Security Commander in this context.[357] In support of his argument that the Trial Chamber clearly considered ideology to be an important element of the JCE, Gbao refers to the Trial Chamber's findings that the ideology was "a key element" of the revolution and that the revolution was a "product of the ideology."[358] Gbao further submits that not only was his role in relation to the ideology not a condition precedent to the Prosecution's case, as the Prosecution states, it was *never* the Prosecution's position that it was part of Gbao's contribution to the JCE.[359]

(b) Discussion

178. An indictment alleging JCE liability must plead, *inter alia*, the nature of the participation by the accused in that enterprise.[360] The relevant question in this sub-ground of appeal is whether the Indictment may be considered as having put Gbao on notice of the case he had to meet in regard to his role in the implementation and instruction of the RUF ideology and whether he was in a position to prepare adequately for trial.[361] This question in turn relies on a determination of whether the

[351] Prosecution Response, para. 2.15.
[352] Prosecution Response, para. 2.15.
[353] Prosecution Response, para. 2.15.
[354] Prosecution Response, para. 2.15.
[355] Gbao Reply, para. 25.
[356] Gbao Reply, para. 26, *quoting* Sentencing Judgment, para. 270.
[357] Gbao Reply, para. 28.
[358] Gbao Reply, para. 28, *quoting* Trial Judgment, para. 2032.
[359] Gbao Reply, para. 29.
[360] *Brima et al.* Appeal Judgment, para. 85, fn 146*; Taylor* Appeal Decision on JCE Pleading, para. 15; *Simić* Appeal Judgment, para. 22; *Ntagerura et al.* Appeal Judgment, para. 24.
[361] *See Kvočka et al*. Appeal Judgment, paras 28, 42-54 ; *Ntakirutimana* Appeal Judgment, para. 470.

Trial Chamber found that Gbao's role as an ideology instructor constituted his participation in the JCE, and whether, as such, it was a material fact which had to be pleaded in the Indictment.

179. The Prosecution conceded at the Appeal Hearing that it was not its case that Gbao contributed to the JCE as an ideology instructor, and that this allegation was therefore not contained in the Indictment,[362] and the Prosecution did not attempt to cure such defect.[363] Whether this omission rendered the Indictment defective turns on whether the ideology and Gbao's role in its implementation were material facts with respect to Gbao's participation in the JCE. The Trial Chamber's findings demonstrate that they were. In effect, it found that the ideology defined the "RUF movement":

> [the] ideology played a significant role in the RUF movement as it ensured not only the fighters' submission and compliance with the orders and instructions of the RUF leadership but also hardened their determination, their resolve and their commitment to fight to ensure the success and achievement of the ideology of the movement. It was in this spirit that the crimes alleged in the Indictment and for which the Accused are charged, were committed. Given this consideration, it is undeniable therefore, that the ideology played a central role in the objectives of the RUF.[364]

180. Further, it determined that although Gbao did not "directly participate in any of the crimes" committed in Bo, Kenema, and Kono,[365] Gbao nonetheless participated in the JCE through his connection to the RUF ideology:

> In making a determination on the participation of Gbao, the RUF ideology expert and instructor[,] under the rubric of the JCE, the Chamber deems it necessary to address, *inter alia*, issues relating to the ideology of the RUF and how its content and philosophy impacted on its Commanders and fighters in their operational activities vis-à-vis their relationship with the civilian population.[366]

The Trial Chamber therefore found it necessary to assess the significance of the RUF ideology to the RUF, and Gbao's role in implementing the ideology in order to find that Gbao participated in the JCE. The Trial Chamber devoted six pages of its discussion on Gbao's participation in the JCE to a detailed discussion of the RUF ideology and its impact on the conflict in general and the crimes

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[362] Appeal transcript, 3 September 2009, p. 170 ("Mr Staker: First of all, we agree it was not the Prosecution's theory that Gbao's function as RUF ideologist in itself constituted his substantial contribution to the JCE and, therefore, this was not a material fact that the Prosecution had to plead in the indictment.").
[363] Appeal transcript, 3 September 2009, p. 209 ("Mr Staker: Well, it wasn't the Prosecution case. The Defence have said this and that is true. It was not the Prosecution case so the Prosecution would not have seen that as a defect in the indictment. Justice Fisher: And there would have been no effort to try to cure it? Mr Staker: Well, as I say, if it wasn't the Prosecution case it would have been nothing to cure from a Prosecution perspective.").
[364] Trial Judgment, para. 2010.
[365] Trial Judgment, paras 2010, 2057, 2105.
[366] Trial Judgment, para. 2011.

charged in particular.[367] It concluded that "without the ideology there would have been no joint criminal enterprise" and "the revolution was the ideology in action."[368]

181. The ICTR Appeals Chamber has found that, before holding that an alleged fact is not material or that differences between the wording of the indictment and the evidence adduced are minor, a trial chamber should generally ensure that such a finding is not prejudicial to the accused.[369] An example of such prejudice would be vagueness capable of misleading the accused as to the nature of the criminal conduct with which he is charged.[370] In this case, no notice was provided to Gbao that he participated in the JCE by instructing others in the ideology or causing its implementation. Yet, these facts were found to be *necessary* to the determination of Gbao's participation in the JCE. The Appeals Chamber, therefore, considers that Gbao was denied notice of the material fact of his role in implementing and instructing the RUF ideology.

(c) Conclusion

182. The Appeals Chamber, therefore, disallows the findings of Gbao's significant contribution to the JCE through his role as an ideology expert and instructor.

[367] Trial Judgment, paras 2012-2032; Appeal transcript, 3 September 2009, p. 204 (Prosecution: "If you look at the judgment, the Trial Chamber extensively dealt with the question of ideology and the position of Gbao in relation to the ideology as the conduct that locates him as a member of the JCE.")
[368] Trial Judgment, para. 2032.
[369] *Rutaganda* Appeal Judgment, para. 303.
[370] *Rutaganda* Appeal Judgment, para. 303; *quoting Furundžija* Appeal Judgment, para. 61.

IV. COMMON GROUNDS OF APPEAL RELATING TO RIGHT TO FAIR TRIAL AND ASSESSMENT OF EVIDENCE

A. Sesay's Appeal

1. Alleged errors in the Trial Chamber's Rule 68 Decision on assistance to Witness Tarnue and its alleged disregard of motive of Prosecution witnesses (Sesay Grounds 4 and 5)

(a) Background and Trial Chamber's findings

183. On 1 November 2004, Sesay filed a motion Seeking Disclosure of the Relationship between the United States of America's Government, Administration, Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor.[371] The motion included a request for disclosure under Rule 68 of information which he outlined in six categories.[372] In its decision on the motion, dated 2 May 2005, the Trial Chamber dismissed the disclosure request in its entirety for lack of specificity.[373] Justice Boutet dissented in part.[374]

(b) Submissions of the Parties

184. In Ground 4, Sesay raises as error the dismissal of two of the six requests made in the Motion for Disclosure of the Relationship with the United Stated Government and asks the Appeals Chamber to reverse the reasoning in the Trial Chamber's decision as to those two Rule 68 requests.[375] Sesay also requests the Appeals Chamber to declare that the identified material should have been disclosed and immediately and independently review the Prosecution's previously undisclosed evidence to ensure that both categories of the Rule 68 material are considered in connection with the Appeal.[376] The two disclosure requests which are the basis for Ground 4 of Sesay's appeal concern: (i) the alleged material assistance offered and given to Witness John Tarnue by Prosecution Investigator Mr. White and other investigators and; (ii) information "in the

[371] Sesay Motion Seeking Disclosure of the Relationship between the United States of America's Government and/or Administration an/or Intelligence an/or Security Services and the Investigation department of the Office of the Prosecutor, 1 November 2004. [Sesay Motion for Disclosure of the Relationship with the United Stated Government]
[372] Sesay Motion for Disclosure of the Relationship with the United Stated Government, para. 14.
[373] Decision on Sesay Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United Stated of America and the Office of the Prosecutor, 2 May 2005, paras 49-52 [Decision on Sesay Motion for Disclosure of the Relationship with the United Stated Government].
[374] Partially Dissenting Opinion of Justice Pierre Boutet on Decision on Sesay Motion for Disclosure of the Relationship with the United States Government, 2 May 2005.
[375] Sesay Appeal, para. 23.
[376] Sesay Appeal, para. 24, *referencing* Sesay Notice of Appeal, para. 20.

possession of, or known to the [Prosecution], which discloses an unlawful and *ultra vires* attempt by the investigating arm of the OTP to arrest Benjamin Yeaten in Togo between 2000 and 2004."[377]

185. In Ground 5, Sesay contends that, because it denied the portion of his Motion for Disclosure of the Relationship with the United Stated Government as appealed in Ground 4, the Trial Chamber was not in a position to correctly assess the impact of this material either in its evaluation of the credibility of witnesses or to properly consider information he maintains "went to the heart of proof of *bona fides* of the whole Prosecution."[378] Sesay avers that the evidence adduced during the course of his trial and the Prosecution's case in the *Taylor* trial should have "put the Trial Chamber on notice that there was potential corruption infecting the investigative arm of the Prosecution, amounting to the bribery of critical witnesses and the deliberate tainting of evidence."[379] Sesay requests the Appeals Chamber to dismiss "the Trial Chamber's assessment of evidence, and substitute its own findings in relation to each charge."[380]

186. The Prosecution responds that Sesay's Grounds 4 and 5 should be summarily dismissed for failure to meet the formal requirements for pleading on appeal.[381] Alternatively, the Trial Chamber clearly and rationally explained its reasons for denying Sesay's Motion for Disclosure of the Relationship with the United Stated Government[382] and Sesay has not established an abuse of discretion.[383] The Prosecution avers that Sesay's Ground 5 is unfounded.[384]

(c) Discussion

187. The Appeals Chamber considers that Sesay's submissions under Grounds 4 and 5 do not add to those raised in his Motion for Disclosure of the Relationship with the United Stated Government and that they are imprecise and vague. However, in the interests of justice, the Appeals Chamber will consider the submissions.

188. Grounds 4 and 5 are interconnected in that Sesay maintains that the exculpatory material which the Trial Chamber failed to order disclosed (Ground 4) allegedly contains information which,

[377] Sesay Appeal, para. 23.
[378] Sesay Appeal, para. 26..
[379] Sesay Appeal, para. 26.
[380] Sesay Appeal, para. 26.
[381] Prosecution Response, para. 4.61.
[382] Prosecution Response, para. 4.63.
[383] Prosecution Response, para. 4.70.
[384] Prosecution Response, para. 4.75.

if disclosed and admitted into evidence, would have impacted on witness credibility and the *bona fides* of the Prosecution.[385] (Ground 5).

(i) Whether the Trial Chamber erred in failing to order disclosure of exculpatory material pursuant to Rule 68 (Sesay Ground 4)

189. In the Decision on Sesay Motion for Disclosure of the Relationship with the United Stated Government, the Trial Chamber dismissed Sesay's motion for lack of specificity as to the material sought to be disclosed under Rule 68(B) of the Rules.[386] It is settled jurisprudence, both at the Special Court and the ICTR and ICTY, that in order for the Defence to establish that the Prosecution has breached Rule 68, it must, *inter alia*, identify the targeted evidentiary material.[387] Failure by the Defence to duly identify the sought material is thus fatal to an application under Rule 68; the Rule does not "entitle the Defence to embark on a 'fishing expedition.'"[388]

190. As to Sesay's request regarding Benjamen Yeaten, the Appeals Chamber considers that the Trial Chamber reasonably found it was overly broad and vague. Sesay failed in his original motion and on appeal to offer any submission on which the Trial Chamber or the Appeals Chamber can make the analysis required by Rule 68. In addition, a review of the record does not show that Mr. Yeaten was a witness in the case or that he was connected with any evidence before the Trial Chamber. The Trial Chamber made no finding which mentions him. Sesay also fails to support or develop his assertion that "this information is relevant to investigative probity," establish that the information has any bearing on any issue in the case, or explain how it is exculpatory.

191. Sesay's request for disclosure of information regarding "the assistance offered and given to General Tarnue by Dr White and/or any other investigator," however, specified (i) the name of the Prosecution witness he suspected had been given assistance (Mr. Tarnue); (ii) the source of the assistance (the Chief Investigator of the Office of the Prosecution); and (iii) the approximate content of the material sought to be disclosed (the type of assistance). In contrast to the other material sought in the Motion for Disclosure of the Relationship with the United Stated Government, this request was not vague or open-ended. In addition, the Prosecution acknowledged

[385] Sesay Appeal, para. 26.
[386] Decision on Sesay Motion for Disclosure of the Relationship with the United Stated Government, para. 49.
[387] Decision on Sesay Motion for Disclosure of the Relationship with the United Stated Government, para. 36; Decision on Joint Application for the Exclusion of the Testimony, para. 24; *Taylor* Decision on Application for Disclosure of Documents, para. 5. *Karemera et al.* Decision on Motions for Disclosure, para. 9.
[388] *Nahimana et al*. Decision to Present Additional Evidence, para. 11.

during the Appeal Hearing that material assistance to Prosecution witnesses by or on behalf of the Prosecution constitute Rule 68 material, disclosure of which is required.[389]

192. Nevertheless, under the circumstances found by the Trial Chamber and supported by the record, Sesay failed – and continues to fail – to support with any degree of specificity what is in effect a request for *additional disclosure*. The trial record invoked on appeal demonstrates that the Prosecution disclosed to the Defence, on 30 June 2004, payments made by Mr. White in relation to assistance to witness Tarnue and his family.[390] These included payments of hotel bills in Ghana, assistance in relocation and maintenance for the witness and his family, and flight tickets to the relocation country.[391] In addition, the trial records show that Sesay was informed about Witnesses and Victims Section ["WVS"] payments made to the witness prior to the witness's appearance at trial.[392] It is clear from the testimony of the witness, which was not disputed by Sesay, that Tarnue's security was severely compromised, justifying his relocation.[393] The trial record further demonstrates that the disclosed information regarding material assistance provided to the witness by the Prosecution and the WVS was used at length to question Tarnue, in both direct and cross-examination, and testimony was elicited from him about various payments and/or benefits he received from the Chief of Investigation and the WVS.[394] This included questions and answers directed at assistance given by Mr. White,[395] and assistance received by him and his family specifically for relocation and associated benefits.[396] Sesay fails to proffer any basis for finding that the Trial Chamber erred in its conclusion that he failed to make a *prima facie* showing that Rule 68 material existed in addition to that already provided and used extensively before and during Tarnue's testimony.

193. The Prosecution thus disclosed the relevant information regarding benefits provided to Witness Tarnue, which put Sesay in a position to fully cross-examine the witness on the matter. The Appeals Chamber is not satisfied that any additional information regarding the assistance provided

[389] Appeal Transcript, 3 September 2009, p. 214-215.
[390] Transcript, John Tarnue, 7 October 2004, pp 27-28.
[391] Transcript, John Tarnue, 5 October 2004, pp. 164-169; Transcript, John Tarnue, 6 October 2004, pp. 9, 12-34 (closed session); Transcript, John Tarnue, 7 October 2004, pp. 27-28.
[392] Transcript, John Tarnue, 7 October 2004, pp 29-30 .
[393] Transcript, John Tarnue, 6 October 2004 (closed session), pp. 9, 21.
[394] Transcript, John Tarnue, 5 October 2004, pp. 164-169; Transcript, John Tarnue, 6 October 2004 (closed session), pp. 9, 12-34; Transcript, John Tarnue, 7 October 2004, pp. 27-28.
[395] Transcript, John Tarnue, 5 October 2004, pp. 164-169; Transcript, John Tarnue, 6 October 2004, pp. 9, 12-34 (closed session).
[396] Transcript, John Tarnue, 7 October 2004, pp. 27-28.

to Witness Tarnue was shown *prima facie* to exist, to be in the possession of the OTP, or to be exculpatory within the meaning of Rule 68.

(ii) Whether the Trial Chamber erroneously disregarded motives of Prosecution witnesses who received assistance from the Special Court (Sesay Ground 5)

194. In Ground 5, Sesay alleges that evidence from the two undisclosed categories of information, which was the basis of his Ground 4, would, had it been disclosed, provide additional material which, if admitted into evidence, would have assisted the Trial Chamber in evaluating the impact of WVS relocation benefits on witnesses.[397] However, as the information requested in Sesay's Motion for Disclosure of the Relationship with the United Stated Government, which is the subject of Ground 4, does not include a request for any information about WVS assistance and is limited to assistance provided to the witness by the Prosecution, the argument fails. Given that Sesay's Ground 4 has been dismissed, and that the only additional support, if any, for Ground 5 appears to be based on material outside the trial record,[398] the Appeals Chamber finds Ground 5 without foundation.

(d) Conclusion

195. For the foregoing reasons, Sesay's Grounds 4 and 5 are dismissed in their entirety.

2. Alleged errors in the Trial Chamber's decision on payment to Prosecution witnesses (Sesay Ground 16)

(a) Submissions of the Parties

196. In Ground 16, Sesay first submits that the Trial Chamber erred in law, fact and/or procedure in its Decision on Sesay Motion on Payment to Witnesses.[399] Referring next to paragraphs 523-526 of the Trial Judgment, he avers that the Trial Chamber committed various errors. First, Sesay contends, the Trial Chamber erred in limiting its examination of payments to witnesses generally rather than considering payment in conjunction with the credibility of the testimony of the relevant witnesses.[400] Second, he submits that the Trial Chamber erred in law by "failing to take into consideration" and "wrongly disregarding" payments to Prosecution witnesses made by the

[397] Sesay Appeal, para. 25.
[398] Sesay Appeal, para. 26 (referencing "evidence … from the *Taylor* case").
[399] Sesay Motion on Payment to Witnesses; Decision on Sesay Motion on Payment to Witnesses.

Prosecution.[401] He argues specifically that the Trial Chamber did not properly consider payments made to TF1-035, TF1-360, TF1-366, TF1-334, TF1-015, and TF1-362.[402] The Prosecution responds that Sesay's submission is unsubstantiated.[403]

(b) Discussion

197. In its Decision on Sesay Motion on Payment to Witnesses, the Trial Chamber dismissed Sesay's Motion to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payments to Witnesses.[404] This motion was made on 30 May 2008 after the conclusion of the Prosecution and Defence cases in chief. The motion alleged that Prosecution witnesses who had appeared at the RUF trial were given material assistance by the Office of the Prosecutor and that this came to light when the same witnesses testified in the *Taylor* trial.[405] In denying the motion, the Trial Chamber considered that Sesay: had the opportunity, in the course of cross-examination of witnesses called by the Prosecution, to put these questions to the witnesses, and exercised that right in respect to some of them; did not pursue this line of cross-examination with other witnesses called by the Prosecution; and did not attempt to introduce additional evidence of payments during the Prosecution case or his own case.[406] As Sesay neither contests this nor indicates what error of "law, fact and/or procedure" the Trial Chamber made in dismissing the motion, his submission is dismissed.[407]

198. Sesay's second assertion is equally unavailing. Sesay contends that the Trial Chamber failed to take into consideration payments by the Prosecution to witnesses.[408] However, in the Trial Judgment at paragraph 523, directly under the heading "Witness Incentives," the Trial Chamber considered the Defence allegations of improper inducement for witness testimony by the Prosecution and expressly recognised that "[t]his issue was raised in motions filed by the Defence, during the cross examination of several witnesses and in their Final Trial Briefs."[409] The "issue" to

[400] Sesay Appeal, para. 59.
[401] Sesay Appeal, para. 60.
[402] Sesay Appeal, para. 61.
[403] Prosecution Response, para. 4.46.
[404] Decision on Sesay Motion on Payment to Witnesses.
[405] Sesay Motion on Payment to Witnesses, para. 30.
[406] Decision on Sesay Motion on Payment to Witnesses, p. 2.
[407] *See supra*, para. 43.
[408] Sesay Appeal, para. 60.
[409] Trial Judgment, para. 523.

which the Trial Chamber refers is the payment by the Prosecution to Prosecution witnesses, and the Trial Chamber cited the relevant motions, testimony and sections of the briefs.[410]

199. Next Sesay relies on paragraphs 524-526 of the Trial Judgment to argue that the Trial Chamber found evidence of payments made by the Prosecutor "irrelevant" to the issue of witness credibility.[411] However, paragraphs 524-526 have nothing to do with the point raised in Ground 16 as they relate to the impact of evidence of payments made to both Defence and Prosecution witnesses by the Registry's WVS, not payments made by the Prosecution. The Trial Chamber recalled that the Practice Direction on Allowances for Witnesses and Expert Witnesses permits witnesses testifying before the Court to receive financial remuneration, and fair compensation for the time spent assisting the Court.[412] The Trial Chamber examined the disbursements made by the Witnesses and Victims Section to Prosecution witnesses TF1-263, TF1-367 and TF1-334, consisting principally of subsistence and attendance allowances, since that material had been tendered in evidence by Sesay.[413] The Trial Chamber considered that there is no evidence to justify the conclusion that witnesses came to testify due to the financial incentives paid by the Registry nor did this, in its view, negate their credibility.[414] It further drew "no adverse inferences from the fact that witnesses received compensation and d[id] not consider such compensation relevant in assessing the credibility of any particular witness."[415] As a general matter, the Appeals Chamber opines that allocation of payment, allowances or benefits may be relevant to assess the credibility of witnesses testifying before the Court.[416] In the instant case, the Trial Chamber's consideration must be read to mean that compensation of "such" kind as those provided by WVS to TF1-263, TF1-367 and TF1-334 would not affect the witnesses' credibility. The Appeals Chamber further notes that the Trial Chamber's assessment of the neutral impact of these Registry disbursements on credibility echoes Sesay's own comments in paragraph 10 of his Motion to Hear Evidence.[417] Paragraphs 524 – 526 do not support the proposition for which they were offered.

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[410] Trial Judgment, para. 523.
[411] Sesay Appeal, paras 60-61.
[412] Trial Judgment, para. 524.
[413] Trial Judgment, para. 525, *citing* Exhibit 22, WVS Payments Made to TF1-263, 11 April 2005; Exhibit 105, WVS Allowances to TF1-367, 22 June 2006; Exhibit 121, WVS Allowances to TF1-334, 6 July 2006.
[414] Trial Judgment, para. 525.
[415] Trial Judgment, para. 525.
[416] *Karemera* Decision to Dismiss for Abuse of Process, para. 7.
[417] Sesay Motion on Payment to Witnesses, para. 10 (stating: "The whole payment scheme, regulated by the aforementioned legislation and Practice Direction, is premised on ensuring that payments to witnesses do not emanate from a party to the proceedings. This makes good law. Payments to Prosecution witnesses, outside of the neutrality and equality proposed by the activities of the WVS, would violate Article l7(4)(e) of the Statute . . .")

200. Finally, as to Sesay's contention that the Trial Chamber neglected to properly consider and reason the credibility of witnesses because of its alleged failure to take into account evidence of Prosecution payments to witnesses specifically in connection with their credibility is misplaced.[418] The Trial Chamber thoroughly explained its analysis of the credibility of the witnesses. It expressly considered the evidence of Prosecution payments to witnesses.[419] It stated in particular that it had considered factors such "as any personal interest witnesses may have that may influence their motivation to tell the truth; and observational criteria such as the witnesses' demeanour, conduct and character."[420] In addition, the Trial Chamber provided individual assessment of the credibility of a number of Prosecution witnesses, including three of the six witnesses cited in this ground.[421] The Appeals Chamber recalls that the credibility of witnesses and the weight to be given the evidence is within the Trial Chamber's discretion.[422] In that regard, the Appeals Chamber finds that the Trial Chamber adequately reasoned its use of discretion and that this discretion has been properly exercised.

(c) Conclusion

201. For the foregoing reasons, Sesay's Ground 16 is dismissed in its entirety.

3. Alleged False Testimony of Prosecution Witness TF1-366 (Sesay Ground 17)

(a) Trial Chamber's findings

202. In a Decision of 25 July 2006, the Trial Chamber dismissed Sesay's Motion concerning the False Testimony of TF1-366.[423] In respect of each portion of TF1-366's evidence that Sesay alleged amounted to false testimony, the Trial Chamber considered that the inconsistency and contradiction in the witness's testimony did not amount to knowingly giving false testimony, and stated that the determination of the credibility, reliability and probative value of the witness's s evidence would be considered at the appropriate time.[424] In assessing the credibility of TF1-366 in the Trial Judgment, the Trial Chamber stated that it had "share[d] the concerns of Defence Counsel for the Accused that

[418] Sesay Appeal, para. 61.
[419] Trial Judgment, para. 523 and discussion above.
[420] Trial Judgment, para. 486.
[421] Trial Judgment, paras 544-546; 553-555; 562-564.
[422] *Nahimana et al.* Appeal Judgment, para. 194; *Kvočka et al*. Appeal Judgment, para. 659.
[423] Sesay Motion Concerning the False Testimony of TF1-366.
[424] Decision Concerning the False Testimony of TF1-366, para. 42.

the testimony of TF1-366 was often problematic,"[425] and that "[t]he testimony of this witness tended to over-implicate the Accused."[426] As a result, the Trial Chamber stated that it would not accept the testimony of TF1-366 as it relates to the acts and conduct of the Accused unless it was corroborated in some material aspect by a reliable witness.[427]

(b) Submissions of the Parties

203. Sesay alleges that the Trial Chamber erred in law, in fact and procedurally in dismissing the Sesay Motion Concerning the False Testimony of TF1-366.[428] He contends that TF1-366 provided evidence which a reasonable tribunal would have concluded was false,[429] and avers that the Trial Chamber's categorisation of the evidence as "problematic" confirms that there were objective grounds for believing the witness had given false testimony.[430] He further submits that the Trial Chamber erred in law in considering that the demonstration of inconsistencies, inaccuracies, or contradiction in the evidence of a witness as to his credibility is not enough to establish false testimony and that something further is required to establish the *mens rea* of the offence and avers that such conclusion "fails to recognise that … reliability and credibility are integrally linked to proof of false testimony."[431] For relief, Sesay requests the Appeals Chamber to "revers[e] the reasoning employed by the Trial Chamber" and grant the Motion.[432] He further seeks "the dismissal of TF1-366 evidence in totality and the substitution of the Appeal Chamber's findings in relation to the relevant charges."[433]

204. In response, the Prosecution submits that Sesay's appeal has no merit as the Trial Chamber properly dealt with the matter in Decision Concerning the False Testimony of TF1-366.[434] The Prosecution also avers that the Trial Chamber was not required to dismiss his evidence in totality.[435]

(c) Discussion

205. Rule 91(B) of the Rules, headed 'False Testimony under Solemn Declaration' states:

[425] Trial Judgment, para. 546.
[426] Trial Judgment, para. 546.
[427] Trial Judgment, para. 546.
[428] Sesay Appeal, para. 62.
[429] Sesay Appeal, para. 63.
[430] Sesay Appeal, para. 63.
[431] Sesay Appeal, para. 64.
[432] Sesay Appeal, para. 64.
[433] Sesay Appeal, para. 64.
[434] Prosecution Response, para. 4.33.
[435] Prosecution Response, para. 4.33.

> If a Chamber has strong grounds for believing that a witness may have knowingly and wilfully given false testimony, the Chamber may follow the procedure, as applicable, in Rule 77.

206. The constituent elements of the offence of giving false testimony are: (i) the witness must make a solemn declaration; (ii) the false statement must be contrary to the solemn declaration; (iii) the witness must believe at the time the statement was made that it was false, and; (iv) there must be a relevant relationship between the statement and a material matter within the case.[436] False testimony has been defined as a "deliberate offence, which presupposes wilful intent on the part of the perpetrator to mislead the Judges and thus to cause harm, and a miscarriage of justice."[437]

207. Sesay's first contention is that the Trial Chamber erred in law in respect of the legal requirement to ascertain the *mens rea* of the offence of false testimony. In the *Sesay* Decision Concerning the False Testimony of TF1-366, the Trial Chamber held:

> [T]he demonstration of inconsistencies, inaccuracies, or contradictions in the evidence of a witness that raise doubt as to his or her credibility is not enough to establish that he or she made a false statement. We opine that such factors are issues to be considered by the Court in its assessment of the credibility and the reliability of the witness' evidence, but something further is required to establish the *mens rea* of the offence of false testimony.[438]

208. In Sesay's submission, the Trial Chamber "fail[ed] to recognise that reliability and credibility are integrally linked to proof of false testimony."[439] The Appeals Chamber however sees no legal error in the Trial Chamber's holding, which reflects the applicable standards. It is settled jurisprudence that false testimony must be distinguished from questions of credibility that may arise from a witness's contradictory or inconsistent testimony. As stated by the ICTR Appeals Chamber:

> [I]naccurate statements cannot, on their own, constitute false testimony; an element of wilful intent to give false testimony must exist… [T]here is an important distinction between testimony that is incredible and testimony which constitutes false testimony. The testimony of a witness may, for one reason or another, lack credibility even if it does not amount to false testimony within the meaning of Rule 91.[440]

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[436] *Akayesu* Decision on False Testimony of Witness R; *Bagosora et al.* Decision on Alleged False Testimony of Witness DO, para. 8; *Rutaganda* Decision on False Testimony of Witness 'E', p. 3; *Baglishema* Decision on False Testimony, p. 2; *Nahimana* Decision on False Testimony by Witness 'AEN,' para. 4.
[437] *Musema* Appeal Judgment, para. 54.
[438] Decision Concerning the False Testimony of TF1-366, para. 29.
[439] Sesay Appeal, para. 64.
[440] Musema Appeals Judgment, para. 54. *See also*, *Rutaganda* Trial Judgment, para. 20; *Rutaganda* Decision on False Testimony of Witness 'E'.

Accordingly, while a credibility determination may be based, but does not necessarily depend, on a judicial finding that a witness has given false testimony, the testimony of a witness may lack credibility even if it does not amount to false testimony.[441]

209. Therefore, an investigation for false testimony is ancillary to the proceedings and does not impact on the accused's right to a fair trial.[442] In this respect, the Appeals Chamber opines that the Trial Chamber is responsible for safeguarding the integrity of its own proceedings. The Trial Chamber has the inherent power to decide whether an invocation of contempt procedure under Rule 77 of the Rules is required. Such decision lies upon the Trial Chamber's conviction that the witness may have knowingly and wilfully given false testimony, in accordance with Rule 91(B).

210. In the instant case, in respect to the three aspects of the TF1-366's testimony that Sesay alleges amounted to false testimony, the Trial Chamber considered that the witness's evidence revealed inconsistencies and contradictions, although those did not demonstrate that the witness may have knowingly and wilfully given false testimony.[443] In arguing that "[t]he witness provided evidence which a reasonable tribunal would have concluded was false," and that "[t]here was ample evidence to conclude that there were 'strong grounds for believing' that the witness had given false testimony,"[444] Sesay has failed to substantiate a claim of an abuse of discretion from the Trial Chamber's determination that the *mens rea* element for invocation of Rule 91(B) of the Rules was lacking.

(d) Conclusion

211. For the foregoing reasons, Sesay's Ground 17 is dismissed in its entirety.

4. Witness TF1-108's alleged attempt to pervert the course of justice (Sesay Ground 18)

(a) Trial Chamber's findings

212. Prosecution witness TF1-108 testified that his wife had been raped by RUF soldiers in 1998 and that she died within a week.[445] On 15 January 2008, the Sesay Defence notified the Prosecution that he would be calling DIS-255, allegedly the wife who TF1-108 testified had died. For the

[441] *Rutaganda* Appeal Decision on False Testimony of Witness 'E', para. 28.
[442] *Rutaganda* Appeal Decision on False Testimony of Witness 'E', para. 28.
[443] Decision Concerning the False Testimony of TF1-366, paras 42, 44, 48.
[444] Sesay Appeal, para. 63.
[445] Transcript, TF1-108, 8 March 2006, pp. 50-51.

purpose of investigating the matter, the Prosecution took statements from TF1-108 and TF1-330 on 25 January 2008. Those statements were disclosed by the Prosecution to the Defence on 5 February 2008 pursuant to Rule 68 of the Rules.

213. On 6 February 2008, Sesay filed a Motion requesting the Trial Chamber to, among other things, sanction the Prosecution for deliberately concealing Rule 68 material.[446] In the Decision on Sesay Motion for Various Relief, the Trial Chamber dismissed Sesay's Motion in its entirety considering that the Defence had failed to demonstrate that the Prosecution's disclosure of the statements were in violation of Rule 68 of the Rules.[447]

214. In the Trial Judgment, the Trial Chamber stated that, in light of TF1-108's misleading evidence concerning the death of his wife, it had approached the witness's evidence with caution and had accepted portion of his testimony insofar as it was corroborated by reliable evidence.[448]

(b) Submissions of the Parties

215. Sesay contends that the Trial Chamber erred in law, in fact and procedurally in dismissing the Sesay Motion for Various Relief, alleging that the Trial Chamber abused its discretion in declining to enquire into the Prosecution's concealment of Rule 68 material.[449] He also submits that the Trial Chamber erred in finding that TF1-108's testimony could be relied upon with corroboration,[450] and in disregarding that TF1-108 was the sole source for findings on Counts 12 (training of young girls at Bunumbu)[451] and 13 (forced labour in RUF Farms)[452] of the Indictment.

216. The Prosecution responds that the Trial Chamber dealt with the credibility of TF1-108,[453] was entitled to rely on his evidence regarding forced labour in RUF farms,[454] and that other witnesses apart from TF1-108 gave evidence on forced labour in RUF farms.[455] Sesay replies that

[446] Decision on Sesay Motion for Various Relief
[447] Decision on Sesay Motion for Various Relief, para. 19.
[448] Trial Judgment, para. 597.
[449] Sesay Appeal, paras 65, 68.
[450] Sesay Appeal, para. 68, *citing* Trial Judgment, para. 597.
[451] Sesay Appeal, para. 69, *citing* Trial Judgment, para. 1435.
[452] Sesay Appeal, para. 69, *citing* Trial Judgment, paras 1422, 1426.
[453] Prosecution Response, para. 4.32, *citing* Trial Judgment, paras 595-597.
[454] Prosecution Response, para. 4.32.
[455] Prosecution Response, para. 4.32, *citing* Trial Judgment, paras 1417-1425.

TF1-108's testimony was the sole basis for the finding of two RUF farms in Giema in 1996 and 1998 where about 300 civilians were forced to work.[456]

(c) Discussion

217. Although Sesay alleges errors in the Decision on his Motion for Various Relief and in the Trial Judgment as regards the assessment of TF1-108's credibility and the reliance on TF1-108's evidence, the Appeal Chamber only addresses the latter because Sesay has not shown any prejudice from the alleged errors in the Trial Chamber's Decision on Sesay Motion for Various Relief.

218. Sesay's challenges the Trial Chamber's assessment of TF1-108's credibility and the use of the witness's evidence for its findings. Assessing the credibility and reliability of TF1-108's evidence, the Trial Chamber stated:

> In assessing the veracity of TF1-108's testimony, the Chamber shares the concerns of the Defence, and doubts the credibility of this witness, particularly in light of his misleading evidence concerning the death of his wife. The Chamber, while exercising caution with regard to the evidence given by TF1-108, has accepted portions of his testimony that are corroborated by a reliable source when such evidence dealt with the acts and conduct of the Accused, as well as his general descriptions of events. The Chamber has accordingly rejected his testimony on the raping to death of his wife as fallacious. We however, have found and accepted his testimony 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, 'forced marriages' and inhumane treatment of civilians.[457]

Sesay contends that "it was not within the reasonable exercise of discretion to assess TF1-108's credibility as requiring corroboration only."[458]

219. The Appeals Chamber notes that neither the Rules nor the relevant international jurisprudence require a Chamber to exclude in its entirety a witness's evidence because the witness is found to have lied when giving testimony. While some Trial Chambers have found evidence of witnesses who have lied not to be credible and rejected it in whole,[459] others have elected to accept portions of the witness's testimony, approaching it with caution and/or requiring corroboration.[460]

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[456] Sesay Reply, para. 42, *citing* Trial Judgment, para. 1422.
[457] Trial Judgment, para. 597.
[458] Sesay Appeal, para. 68.
[459] *Seromba* Trial Judgment, para. 92 (finding one witness not credible "as he admits having lied before the Chamber."); *Nahimana* Trial Judgment, para. 551 (finding that a witness "lied repeatedly" and rejecting her testimony in its entirety), upheld on appeal, *Nahimana* Appeal Judgment, para. 820.
[460] *Nshogoza* Trial Judgment, paras 65-67 (Where the Trial Chamber considered a witness' evidence with particular care,in view of his prior criminal record and that he admitted to lying under oath before the Appeals Chamber.;

The effect given to a witness's false testimony upon his overall credibility is thus to be assessed on a case-by-case basis. As a matter of law, the Trial Chamber was not required to reject TF1-108's evidence in its entirety on the basis that he provided fallacious evidence in relation to his wife. Rather, the credibility and reliability of this evidence, as any other permissible evidence, was a matter for the Trial Chamber to assess in view of the circumstances of the case. The Trial Chamber duly took into consideration the fact that TF1-108 made fallacious allegations and as a result required corroboration of the entirety of his evidence. In view of the caution displayed by the Trial Chamber, the Appeals Chamber considers that Sesay fails to demonstrate that no reasonable trier of fact could have assessed TF1-108's credibility as the Trial Chamber did. This prong of Sesay's present appeal is therefore dismissed.

220. The Appeals Chamber now turns to Sesay's claim that the Trial Chamber erred in law and in fact in relying on TF1-108's testimony as the only support for various allegations which resulted in convictions for the crimes charged in Counts 12 and 13 of the Indictment.

221. As a preliminary matter, the Appeals Chamber holds that a Trial Chamber enjoys discretion to use uncorroborated evidence, to decide whether corroboration is necessary in the circumstances,[461] and to rely on uncorroborated, but otherwise credible, witness testimony.[462] Any appeal based on the absence of corroboration must therefore necessarily be against the weight attached by the Trial Chamber to the evidence in question.[463] Nonetheless, should a Chamber consider that a witness's evidence is to be approached with caution and/or require corroboration by other reliable evidence, it is bound to abide itself by the required caution or corroboration.[464]

Zigiranyirazo Trial Judgment, paras 337-344 (where the Trial Chamber declined to accept his uncorroborated testimony who acknowledged to have given false testimony to the Rwandan authorities."); *Kordić and Čerkez* Trial Judgment, paras 629-630, upheld on appeal: *Kordić and Čerkez* Appeal Judgment, paras 254-267; *Naletilić and Martinović* Appeal Judgment, para. 175 ("In the Appeals Chamber's view, the fact that, at trial, Witness […] admitted to having lied on the two aforementioned occasions and to having committed the crimes mentioned above fails to demonstrate that the Trial Chamber erred in its assessment of the overall credibility of the witness in spite of these admissions."); *Limaj* Trial Judgment para. 26.

[461] *Karera* Appeals Judgment, para. 45, *citing Muhimana* Appeal Judgment, para. 49; *Kajelijeli* Appeal Judgment, para. 170, *Niyitegeka* Appeal Judgment, para. 92; *Rutaganda* Appeal Judgment, para. 29.

[462] *Karera* Appeals Judgment, para. 45, citing *Muvunyi* Appeal Judgment, para. 128; *Muhimana* Appeal Judgment, paras 101, 120, 159, 207; *Nahimana et al.* Appeal Judgment, paras 547, 633, 810.

[463] *Karera* Appeals Judgment, para. 45, *citing Kordić and Čerkez* Appeal Judgment, para. 274.

[464] *See Karera* Appeal Judgment, paras 203-204 (where the Appeals Chamber noted that the Trial Chamber decided to consider one witness with caution in view of the fact that he may have been influenced by a wish to positively affect the criminal proceeding. It found that that no reasonable trier of fact could have accepted this witness's uncorroborated hearsay testimony about one alleged event.)

222. Turning to the instant case, in relation to Count 12 of the Indictment, Sesay refers to the Trial Chamber's finding that "girls as young as 6 years old were trained to fight at Bunumbu" Training base,[465] in support of which the Trial Chamber only referred to the testimony of TF1-108.[466] However, the factual and legal findings of the Trial Chamber that children, including girls,[467] under the age of fifteen were trained at Bunumbu Training Base (Camp Lion) were based on the testimony of numerous witnesses,[468] and an exhibit.[469] Sesay therefore fails to demonstrate any error in the Trial Chamber's assessment of the evidence.

223. In relation to Count 13 of the Indictment, Sesay refers to the Trial Chamber's findings of two "government" farms in Giema which were organised and managed by the RUF with approximately 300 civilians working on these farms,[470] that civilians working on these farms could not refuse to farm because armed men were observing and supervising them while they were working,[471] and that civilians working on Gbao's farm in Giema were guarded by Gbao's bodyguard, Korpomeh.[472] The Appeals Chamber notes that in relation to parts of its findings on the existence in 1996 and 1998 of two big "government" farms in Giema, which were organised and managed by the RUF and where approximately 300 civilians were forced to work, the Trial Chamber only cited the evidence of TF1-108.[473] However, the Trial Chamber also relied on the testimony of TF1-330 for its finding that "[f]rom 1996 to 2001, farming occurred at RUF farms located in Giema, Talia, Sembehun, Bandajuma and Sandialu."[474] Sesay does not make any submissions as to how the testimony of TF1-330 fails to corroborate TF1-108's evidence. Sesay's only submissions concerning TF1-330 in this ground of appeal pertain to his allegation that TF1-

[465] Sesay Appeal, para. 69. Although Sesay refers to paragraph 1435 of the Trial Judgment, the relevant paragraph of the Trial Chamber's findings related to training of children at Bunumbu Training base is contained at paragraph 1438.
[466] Trial Judgment, para. 1438, *citing* Transcript, TF1-108, 8 March 2006, pp. 43 46, 47 and Transcript, TF1-330, 14 March 2006, p. 51 (closed session). The Appeals Chamber notes that, as correctly pointed out by Sesay, TF1-330's testimony does not include statement regarding training of children under the age of fifteen at Bunumbu Training base but rather at Bayama Training base (*see*, Transcript, TF1-330, 14 March 2006, p. 51.)
[467] Trial Judgment, para. 1636, based on the testimony of TF1-141; Trial Judgment, para. 1635 (finding the existence of Small Girls Unit in Camp Lion) based on the testimony of TF1-362, TF1-036; Trial Judgment, para. 1438 (finding the existence in Camp Lion of a Women's Auxiliary Corps for girls where children were trained to become bodyguards of senior commanders), based on the testimony of TF1-113, TF1-168.
[468] Trial Judgment, paras 1438 (TF1-168), 1438 (TF1-113), 1438 (TF1-114), 1439 (TF1-263), 1440, 1636, 1640-1645 (TF1-141), 1635 (TF1-362), 1638 (TF1-366), 1640 (TF1-036).
[469] Trial Judgment, para. 1635, *citing* Exhibit 25, Report from Camp Lion Training Base Training Commandant Buedu to G-1 Commander at Buedu on Recruits, 21 May 1998.
[470] Sesay Appeal, para. 69, *citing* Trial Judgment, para. 1422.
[471] Sesay Appeal, para. 69, *citing* Trial Judgment, para. 1422.
[472] Sesay Appeal, para. 69, *citing* Trial Judgment, para. 1426.
[473] Trial Judgment, paras 1422.
[474] Trial Judgment, para. 1422, *citing* Transcript, TF1-330, 14 March 2006, pp 24-31 (closed session).

108 tried to influence him in respect of the evidence related to the alleged death of his wife.[475] Sesay does not argue that the evidence of TF1-330 concerning the RUF farms in Giema was tainted by his contact with TF1-108. The Appeals Chamber further recalls it has dismissed the related challenges to TF1-108's allegedly uncorroborated testimony in Gbao's Ground 11.[476]

(d) Conclusion

224. In view of the above, the Appeals Chamber dismisses Sesay's Ground 18 in its entirety.

5. Alleged error relating to admission of evidence under Rule 92*bis* (Sesay Ground 20)

(a) Trial Chamber's findings

225. At trial, Sesay filed four motions[477] requesting the admission of a total of 23 witness statements under Rule 92*bis* in lieu of their examination-in-chief and without cross examination.[478] The Trial Chamber decided the motions in a single decision on 15 May 2008.[479] The Trial Chamber found that the statements of 17 witnesses were repetitive of other witness statements and of the *viva voce* testimony already heard by the Trial Chamber,[480] and that admission of these witness statements would result in duplicating evidence and would cause unnecessary delay in the proceedings.[481] It therefore dismissed the request to admit these 17 witness statements under Rule 92*bis*.[482] The Trial Chamber considered that six of the 23 witness statements contained admissible evidence under Rule 92*bis* and were non-repetitive.[483] It therefore admitted those six statements.[484]

(b) Submissions of the Parties

226. In Ground 20, Sesay submits that the Trial Chamber erred in dismissing 18 Rule 92*bis* and Rule 92*ter* witness statements.[485] He contends that the "the reasons proffered for rejecting the statements were demonstrably flawed," that the "evidence would not have been repetitive" and

[475] Sesay Appeal, paras 67, 70.
[476] *See infra*, paras 1098 (Gbao Ground 11), 745 (Sesay Ground 40).
[477] Sesay Motion for Admission of Written Evidence; Sesay First Application for Admission of Written Statements; Sesay Second Application for Admission of Written Statements; Sesay Third Application for Admission of Written Evidence.
[478] Decision on Admission of 23 Witness Statements.
[479] Decision on Admission of 23 Witness Statements, para. 21.
[480] Decision on Admission of 23 Witness Statements, para. 47.
[481] Decision on Admission of 23 Witness Statements, para. 48.
[482] Decision on Admission of 23 Witness Statements, Disposition, paras 1-3.
[483] Decision on Admission of 23 Witness Statements, para. 49.
[484] Decision on Admission of 23 Witness Statements, Disposition, paras 1-3.

"would not have resulted in an unnecessary consumption of valuable Court time."[486] He contends the Trial Chamber failed to identify the probative value of the statements "noting only that some of the statements were relevant in establishing the social and economic background information on the everyday life conditions of the inhabitants of the respective areas."[487] He asserts that evidence from the statements are relevant and probative of his innocence with respect to the Trial Chamber's findings that he arranged for the forcible transfer of civilian miners from Makeni and Magburaka to mine against their will in Kono District; that civilians were forced to train at the RUF base in Yengema; and that children were used to participate actively in hostilities in Bombali District from 1999 to September 2000.[488] No request for relief is stated in his Appeal. However, in his Notice of Appeal Sesay requests the Appeals Chamber to reverse the reasoning employed by the Trial Chamber, reassess the evidence and reverse his convictions.[489]

227. The Prosecution responds that Sesay failed to demonstrate that the Trial Chamber abused its discretion or that the alleged error invalidates the Trial Chamber's findings.[490]

(c) Discussion

228. As a preliminary matter, the Appeals Chamber notes that in the Decision on Sesay Rule 92*bis* Motions, the Trial Chamber dismissed the witness statements of 17 witnesses rather that 18 witnesses as Sesay submits.[491] Sesay also invokes Rule 92*ter* of the Rules in his Appeal; however, at trial he only sought to admit the witness statements pursuant to Rule 92*bis*. Therefore, the Appeals Chamber will not consider his submissions in relation to Rule 92*ter*.

229. Trial Chambers have wide discretion in the conduct of the proceedings before them, including in deciding on issues of admissibility of evidence.[492] The Trial Chamber is afforded deference in such decisions based on the circumstances of the case before it.[493] The Appeals Chamber will only intervene on appeal where the Trial Chamber's exercise of discretion was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.

[485] Sesay Appeal, para. 72.
[486] Sesay Appeal, para. 73.
[487] Sesay Appeal, para. 72 (internal quotation omitted).
[488] Sesay Appeal, paras 72, 74.
[489] Sesay Notice of Appeal, para. 42.
[490] Prosecution Response, para. 4.9.
[491] Decision on Admission of 23 Witness Statements, Disposition, paras 1-3.
[492] Rule 89(C) of the Rules.

Under Rule 92*bis,* a Trial Chamber "may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused."[494] The purpose of Rule 92*bis* is to expedite proceedings within the parameters of the right of the accused to a fair trial.[495] Thus, while Rule 92*bis* confers on the Trial Chamber wide discretion to admit such evidence, it requires the Trial Chamber to balance the interest of an expeditious trial with the rights of the accused within the context of a fair trial.

230. Evidence is admissible under Rule 92*bis*, if (i) it does not go to proof of the acts and conduct of the accused, (ii) it is relevant for the purpose for which its admission is sought and (iii) its reliability is susceptible of confirmation.[496] Proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course.[497] Evidence will not be admitted if its prejudicial effect manifestly outweighs its probative value.[498] The primary task of balancing the particular degree of probative value of the evidence against the unfairness which would result if the evidence were admitted rests with the Trial Chamber.[499]

231. Sesay originally sought to admit 23 witness statements on the basis that "they provide social and economic background information on the everyday life conditions of the inhabitants of the various areas."[500] He argued in the Motion that the witness statements were probative of his innocence.[501] The Trial Chamber found that although some of the witness statements were relevant to the stated purpose concerning the everyday life conditions,[502] the majority were unduly repetitive of each other and of the *viva voce* witnesses already cross-examined by the Prosecution.[503] Specifically, the Trial Chamber found that:

> [O]f the twenty three witness statements, nine described the conditions of daily life in a single town in Bombali District during the same time period, a further five provided information about conditions in Kono District within the same time period and the

[493] *Čelibići* Appeal Judgment, para. 533.
[494] Rule 92*bis* (A) of the Rules.
[495] See *Prlić* Appeal Decision on Admission of Transcript, para. 43 *citing Galić* Decision on Rule 92*bis*, paras 28-30.
[496] *Norman* Rule 92*bis* Decision, para. 26; see also, Decision on Rule 92*bis* Motion, para. 25.
[497] *Norman* Rule 92*bis* Decision, p. 5.
[498] Decision on Gbao Application to Exclude Evidence of Dennis Koker, paras, 7-8.
[499] *Čelibići* Appeal Judgment, para. 289.
[500] Motion for Admission of Written Evidence, para. 8; Second Application for Admission of Written Statements, para. 8, Third Application for Admission of Written Evidence, para. 8. *See also*, Motion for Admission of Written Evidence, paras 5, 28.
[501] Decision on Admission of 23 Witness Statements, para. 17.
[502] Decision on Admission of 23 Witness Statements, para. 28.
[503] Decision on Admission of 23 Witness Statements, para. 47. *See* also *ibid.*, para. 40.

remaining nine related to a number of towns in Tonkolili District and described the same events during the same time period."[504]

232. The Trial Chamber reasoned that admission of all 23 statements would "result in duplicating evidence … and delay the proceedings by unnecessarily increasing the size of the case."[505] The Appeals Chamber finds that this ruling was properly within the discretion of the Trial Chamber. As stated above, the decision on whether to admit the witness statements is a discretionary one. In this case, the Trial Chamber dismissed the witness statements because they were duplicative and would cause delay in the proceedings. Rule 90(F)(ii) of the Rules permits a Trial Chamber to control the manner of interrogating witnesses and presenting evidence to avoid the wasting of time.[506] Similarly, case law indicates that "the purpose of Rule 92*bis* is to promote efficiency and expedite the presentation of evidence while adhering to the requirements of a fair trial, not to encourage duplication of testimony which would unnecessarily delay proceedings."[507] The Appeals Chamber therefore considers that the Trial Chamber permissibly considered the purpose of avoiding redundancy as a reason to exclude the evidence. The Appeals Chamber notes that although Sesay contests the Trial Chamber's finding that the evidence was redundant, he has not made any submissions to show how the Trial Chamber erred in reaching that finding.

233. The Appeals Chamber therefore considers that Sesay has failed to convincingly demonstrate any error in the Trial Chamber's exercise of discretion.

(d) Conclusion

234. For the foregoing reasons, Sesay's Ground 20 is dismissed in its entirety.

6. Alleged errors in the approach to evidence of the acts and conduct of the accused and to victim witnesses (Sesay Grounds 21 and 22)

(a) Submissions of the Parties

235. Sesay alleges that the Trial Chamber erred in law and in fact by defining and approaching Prosecution evidence which went to the "acts and conduct of the accused" as uniformly distinct

[504] Decision on Admission of 23 Witness Statements, para. 47.
[505] Decision on Admission of 23 Witness Statements, para. 48.
[506] Rule 90(F)(ii) of the Rules.
[507] *Stakić* Appeal Judgment, para. 198.

from evidence which was more general or related to the witness's "own experience."[508] He further alleges that the Trial Chamber erred in law and in fact by identifying an inviolable category of Prosecution "victim witnesses" and "former child combatants."[509] He contends this "impermissible presumption" was employed in relation to accomplice witnesses TF1-371, TF1-366, TF1-141, TF1-263, TF1-117, TF1-314 and TF1-093.[510] First, he submits that there is no basis in law for taking an approach that does not examine all evidence with the same critical evaluation.[511] Second, he contends that, given the mandatory requirement to approach accomplice witnesses' testimony with caution, it violates the right to a fair trial for the Trial Chamber to find an accomplice unreliable, but nonetheless elevate part of the witness's evidence to an "inviolable status."[512] Third, he avers that the evidence of TF1-141, TF1-093, TF1-263, and TF1-314 was critical to proof of essential elements of crime and proof of responsibility and accordingly submits that the distinction of the Trial Chamber between personal experience and acts and conduct was unsustainable.[513] He argues that the evidence of these witnesses in relation to their victim status and their general experience was used to prove that he committed the crimes, and participated in the Joint Criminal Enterprise, with the requisite intent.[514]

236. The Prosecution responds that the testimony of victims and child combatants was individually evaluated in the same way as other witnesses, and that the Trial Chamber gave specific considerations to the evaluation of the testimony of former child soldiers.[515] The Prosecution contends that while there may be issues common to the evaluation of different witnesses in respect of a class of witnesses, the ultimate evaluation of each witness's testimony is individual to that witness regardless of whether it is general or goes to the acts and conduct.[516]

(b) Discussion

237. Sesay takes issues with the Trial Chamber's general observation in relation to its evaluation of the evidence of Prosecution witnesses falling within the category of "victim witnesses" and "former child combatants," arguing that the Trial Chamber impermissibly identified an "inviolable

[508] Sesay Appeal, para. 75.
[509] Sesay Appeal, para. 75.
[510] Sesay Appeal, para. 76.
[511] Sesay Appeal, para. 77.
[512] Sesay Appeal, para. 78.
[513] Sesay Appeal, para. 79.
[514] Sesay Appeal, para. 79.
[515] Prosecution Response, para. 4.27.
[516] Prosecution Response, para. 4.28.

category" of witnesses. The Appeals Chamber however finds that Sesay misrepresents the Trial Chamber's findings. The Trial Chamber considered that witnesses who had been themselves the victims of brutal crimes or were eye-witnesses to the commission of such crimes against relatives and friends were emotional when testifying and were sometimes unable to provide every detail of their experience. As a result, minor inconsistencies in their testimony are to be expected.[517] The Trial Chamber did not treat those witnesses as an "inviolable category." It considered instead that minor inconsistencies in their testimony may be attributed to their traumatic experience, thereby taking due account of the impact of trauma of the victim witnesses upon their testimony, for the purpose of evaluating their credibility.

238. The Appeals Chamber sees no error in the Trial Chamber's reasoning, and considers it a sound practice to bear in mind the likely distorting effect of trauma upon a witness's testimony and to accordingly consider the suffering he or she has experienced when evaluating his/her overall credibility.[518] The Appeals Chamber agrees with the observation of the ICTY Appeals Chamber that traumatic experiences often generate minor inconsistencies in a witness's testimony, but this fact should not impugn the witness's credibility.[519] On the other hand, the evident trauma suffered by a witness does not provide a guarantee that their testimony is reliable.[520]

239. Sesay complains that the Trial Chamber found the evidence of "victim witnesses" and "former child soldiers" reliable merely because it related to their own experience. In fact, the Trial Chamber found those witnesses credible "especially as [their] testimony relates to personal accounts of witnesses experiencing the crimes charged"[521] and "especially as it relates to their own experiences," respectively.[522] Sesay fails to show how it was an abuse of the Trial Chamber's discretion to consider that the witnesses testified credibly about their personal experiences.

240. Sesay provides scant support for his assertion that the Trial Chamber did not assess the credibility of witnesses individually. It is true that the Trial Chamber made general observations on the overall reliability of evidence of "victim witnesses" and "former child soldiers;" however, Sesay fails to argue why their partly similar circumstances did not warrant partly similar consideration by

[517] Trial Judgment, para. 533.
[518] *Rutaganda* Appeal Judgment, para. 216; *Musema* Appeal Judgment, para. 63; *Čelibići* Appeal Judgment, para. 485; *Kalijeli* Appeal Judgment, para. 13; *Kunarac et al.* Appeal Judgment, para. 267; *Furundžija* Appeal Judgment, para. 122.
[519] *Furundžija* Appeal Judgment, para. 122; *Furundžija* Trial Judgment, para. 109.
[520] *Rutaganda* Appeal Judgment, para. 216.
[521] Trial Judgment, para. 536.

the Trial Chamber. It is also clear that the Trial Chamber considered the credibility of witnesses within the categories on an individual basis. For example, in relation to TF1-141,[523] TF1-263,[524] TF1-117,[525] and TF1-314,[526] all of whom were former child soldiers, the Trial Chamber reasoned differently regarding the credibility of their evidence, taking into account factors such as the demeanour of the witness,[527] inconsistencies in their statements,[528] or whether the evidence of the witness was useful and compelling.[529]

241. Sesay further submits that the Trial Chamber distinguished between evidence related to the witnesses' own experience, which it found generally reliable, and evidence that goes to the "acts and conduct of the accused," which it found to require corroboration. The distinction, Sesay contends, was unsustainable given that the use of the evidence of the concerned witnesses in relation to their own experience was "critical to proof of essential elements of crime and proof of responsibility."[530] Sesay, however, does not substantiate this argument at all in this ground. Instead he directs the Appeals Chamber to "[s]ee Grounds 25, 32, 36, 37, 39, 40, 42 and 43,"[531] and cites without explanation or argument decisions under Rule 92*bis* from this Court and the other international tribunals.[532]

242. His reference in this relation to case law that applies the term of art "acts and conduct" of the accused in the context of Rule 92*bis* is misguided. There is no suggestion in the Trial Judgment that the Trial Chamber applied the term "acts and conduct of the accused" in the context of Rule 92*bis* when discussing the credibility of the witnesses.

(c) Conclusion

243. In view of the above, the Appeals Chamber dismisses Sesay's Grounds 21 and 22 in their entirety.

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[522] Trial Judgment, para. 579.
[523] Trial Judgment, paras 580-583.
[524] Trial Judgment, paras 584-587.
[525] Trial Judgment, paras 588-590.
[526] Trial Judgment, paras 591-594.
[527] Trial Judgment, para. 583 (noting that TF1-141, although diagnosed with PTSD, was able to give truthful testimony, and that he appeared as a "candid witness").
[528] Trial Judgment, para. 587 (TF1-263); para. 594 (TF1-314).
[529] Trial Judgment, para. 590.
[530] Sesay Appeal, para. 79.
[531] Sesay Appeal, para. 79, fn. 206.
[532] Sesay Appeal, para. 79, fn. 207, *citing* Decision on Admission of 23 Witness Statements, para. 33; *Galić* Decision on Rule 92bis, para. 10.

7. Appeal Decision on Protective Measures (Sesay Ground 45)

244. Sesay states that the "Defence will request a reconsideration of the Appeals Chamber's dismissal of the Defence 'Decision on the Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses'" and that "[t]he Defence will submit that the Appeals Chamber erred in law and fact in by [*sic*] misdirecting itself as to the legal principle in determining that the Appellant's right to a fair trial, pursuant to Article 17(2), could be qualified by measures ordered by the Trial Chamber for the protection of victims and witnesses."[533]

245. As regards the incompetence of the Ground, the Appeals Chamber recalls that it has had occasion to refer in *Prosecutor v. Norman, Fofana and Kondewa*[534] to the opinion of the ICTY that it has inherent jurisdiction to reconsider its own decision. However, the Appeals Chamber has not had occasion to pronounce on the issue. The exercise of the inherent jurisdiction of the Appeals Chamber to reconsider and set aside its own previous decision can neither be invoked by way of a ground of appeal in an appeal from a decision of the Trial Chamber in which the appellate jurisdiction of the Appeals Chamber is invoked nor by an appeal from its own decision as the Appeals Chamber does not exercise an appellate jurisdiction over itself.

246. The Appeals Chamber opines, however, were it to exercise a review jurisdiction and such jurisdiction is properly invoked, that the request must, evidently, be supported by cogent grounds showing what injustice is sought to be corrected. This will not be done, as in this Ground, by merely stating that the decision is erroneous.

247. The conclusion seems inescapable that Ground 45 of the Sesay Appeal is manifestly incompetent and verges on an abuse of the process of the Court.

248. The Appeals Chamber is constrained to comment on this frivolous ground at this length merely because of the need to emphasise to counsel appearing before it that by raising a palpably frivolous and incompetent ground of appeal, the impression is created, as in this case, that such ground which is incapable of invalidating the decision of the Trial Chamber, was raised merely to

[533] Sesay Notice of Appeal, para. 94.
[534] *Norman* Decision on Prosecution Appeal Against Refusal of Leave to File an Interlocutory Appeal, paras 34, *citing Delić et al*. Judgment on Sentence Appeal, para. 48.

abuse the process of the Court. The Appeals Chamber considers that such practice, apart from being an abuse of process, is unbecoming and tends to trivialize the appellate process.

249. The Appeals Chamber, Justice Fisher dissenting, rejects Ground 45 as incompetent.

B. Gbao's Appeal

1. Alleged error in relying on expert evidence to determine ultimate issues (Gbao Ground 2)

(a) Submissions of the Parties

250. In Ground 2, Gbao submits that the Trial Chamber erred in fact by relying on the expert report of Witness TF1-369 as support for establishing "ultimate issues" in the case.[535] Gbao submits that the Trial Chamber impermissibly relied on Witness TF1-369's expert evidence to make findings about his intent and his alleged contribution to the JCE in relation to sexual violence in Kailahun District.[536] He asserts that the findings of the Trial Chamber in paragraphs 1409, 1412, 1413, 1474 and 1475 of the Trial Judgment[537] went to prove his "acts and conducts" and therefore ought to be set aside.[538] He claims that the Trial Chamber relied partly on Witness TF1-369's expert evidence to arrive at its findings in paragraphs 1409, 1412 and 1413 of the Trial Judgment; and ultimately, at the conclusion that he shared the requisite intent for rape within the context of forced marriage in order to further the goals of the JCE in Kailahun District.[539] Gbao further claims that the Trial Chamber relied on TF1-369's evidence alone to find in paragraphs 1474-1475 of the Trial Judgment 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."[540] He avers that the Trial Chamber convicted him for outrages upon personal dignity in Kailahun District as charged in Count 9 of the Indictment, on the basis of

[535] Gbao Appeal, para. 5. Gbao made similar submissions in Ground 1 of his Notice of Appeal concerning United Nations and Non Governmental Organizations reports; however, in his Appeal he submits that due to page limitations he did not pursue Ground 1 except where the arguments are incorporated in other grounds.
[536] Gbao Appeal, para. 5.
[537] Gbao Appeal, para. 10.
[538] Gbao Appeal, paras 5, 14.
[539] Gbao Appeal, paras 11-12.
[540] Gbao Appeal, para. 13.





this finding alone.[541] Gbao submits that his conviction for crimes under Count 9 in Kailahun District should be overturned.[542]

251. The Prosecution agrees that the "ultimate issue" of whether an accused is guilty of a particular crime is for the Trial Chamber to determine, and not for a witness.[543] It argues however, that contrary to Gbao's contention, expert witnesses can give opinions on matters that "go to the acts or conduct of the accused"; provided that the opinion relates to an issue that is within their expertise.[544] The Prosecution argues that contrary to Gbao's submissions, paragraphs 1409, 1412, 1413, 1474 and 1475 respectively of the Trial Judgment contain general findings on forced marriage in Kailahun District, and neither relate to Gbao's acts or conduct, nor to his criminal liability.[545]

(b) Discussion

252. The thrust of Gbao's contention centers on the evidence of Expert Witness TF1-369. Gbao does not challenge Witness TF1-369's qualification as an "expert" or the Trial Chamber's analysis of the Witness's expert evidence. Rather, Gbao challenges his conviction for sexual violence in Kailahun District on the ground that the Trial Chamber's findings of guilt were erroneously based on the evidence of Expert Witness TF1-369.

253. Gbao's appeal however is misconceived. The paragraphs in the Trial Judgment which he identifies state the following:

> 1409. The Trial Chamber heard evidence from insider witnesses and witnesses who had been "bush wives" who testified to the widespread rebel practice of abducting women and forcing them to act as "wives" in Kailahun District. Many of the women interviewed by expert witness TF1-369, who authored Exhibit 138, the *Expert Report on Forced Marriages*, were school children and petty traders who were abducted from Koinadugu, Tonkolili, Pujehun, Kono, Bonthe, Bo, Freetown and Kenema and taken to Kailahun.
>
> …
>
> 1412. A woman's status as a married woman was no bar to abduction as married women were forced to leave their legitimate husbands and become "bush wives" to the RUF rebels. The thousands of young women thus captured had no option but to submit to a

[541] Gbao Appeal, para. 13.
[542] Gbao Appeal, para. 13.
[543] Prosecution Response, para. 4.92.
[544] Prosecution Response, paras 4.93-4.94.
[545] Prosecution Response, para. 4.96.

> "husband" as they were in no position to negotiate their freedom. The abducted women could not escape for fear of being killed.
>
> …
>
> 1413. A rebel "wife" was expected to carry out certain functions for her "husband" in return for his protection. These functions included carrying the rebel's possessions when he was deployed, engaging in sexual intercourse on demand, performing domestic chores and showing undying loyalty to the rebel in return for his 'protection'. If the women refused sexual intercourse with their "husbands", they were sent to the front line. Many "wives" bore children to their rebel "husbands."
>
> …
>
> 1474. The Chamber is satisfied that the acts of sexual violence in respect of which findings were made under Counts 6 to 8 resulted in humiliation, degradation and violation of the dignity of the victims. The Chamber is 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 under difficult and coercive circumstances. Due to the social stigma attached to them by virtue of their former status as 'bush wives' and the effects of the prolonged forced conjugal relationships to which they were subjected, these women and girls were too ashamed or too afraid to return to their communities after the conflict. Accordingly, many victims were displaced from their home towns and support networks.
>
> 1475. The Chamber finds that these violations were serious and that the perpetrators were aware of their degrading effect. We accordingly find that TF1-093, TF1-314 and an unknown number of other women were subjected to outrages upon their personal dignity in Kailahun District as charged in Count 9 of the Indictment.[546]

254. In his appeal, Gbao fails to cite any of the actual testimony that he claims violates the ultimate issue rule. It is not sufficient to merely note that the Trial Chamber reached a finding on an ultimate issue based on the evidence of an expert witness. The ultimate issue rule does not prevent a Trial Chamber from drawing conclusions; that is, making findings of fact concerning the acts and conducts of an accused based on an expert's testimony. It merely prevents an expert from drawing the conclusions for the Chamber.[547] Gbao makes no submission that the expert witness testified to Gbao's guilt or innocence. In addition, the impugned findings were findings of fact relating to sexual violence and forced marriage in Kailahun District, not Gbao's individual criminal responsibility for those crimes. None of the impugned findings mentions Gbao or even touches upon his acts and conduct in relation to crimes. Moreover, the Trial Chamber specifically stated that

[546] Trial Judgment, paras 1409, 1412-1413, 1474-1475 (internal citations omitted).
[547] *Ndindiliyimana* Decision on Expert Evidence, para. 13; *Bizimungu et al.* Decision on Expert Testimony, para. 12; *Hadžihasanović and Kubura* Decision on Expert Report, p. 4; *Martić* Decision on Expert Reports, p. 5

it accepted the evidence of Expert Witness TF1-369 only "insofar as it relates to [her] area of expertise and does not make conclusions on the acts and conduct of the Accused."[548]

255. Gbao's argument that his conviction for outrages upon personal dignity in Kailahun District was improperly based on the evidence of Witness TF1-369 as relied upon by the Trial Chamber in paragraphs 1474 to 1475 of the Judgment is also unfounded. The findings in paragraphs 1474 to 1475 of the Trial Judgment led the Trial Chamber to conclude only that "RUF fighters" committed acts of sexual violence in Kailahun District between 14 February 1998 and 15 September 2000.[549] In particular, the Trial Chamber relied on the testimony of Witness TF1-314[550] and Witness TF1-093[551] to establish Gbao's criminal responsibility under Article 6(1) for committing pursuant to a JCE, acts of sexual violence in Kailahun District. The Appeals Chamber is consequently unable to conclude that the Trial Chamber erred as alleged.

(c) Conclusion

256. In view of the above, Gbao's Ground 2 is dismissed in its entirety.

2. Alleged errors in respect of witnesses who allegedly lied under oath (Gbao Grounds 6)

(a) Submissions of the Parties

257. Gbao alleges that 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."[552] He contends that the Trial Chamber abused its discretion in failing to disregard completely the testimony of the impugned witnesses and in relying on these witnesses to make findings on his individual criminal responsibility.[553] He refers specifically to TF1-108, TF1-113, TF1-314 and TF1-366 and avers that "the gravity of the 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."[554]

[548] Trial Judgment, para. 538.
[549] Trial Judgment, para. 2156 sub-para. 5.1.2.
[550] Trial Judgment, paras 1460-1461.
[551] Trial Judgment, paras 1462-1464.
[552] Gbao Appeal, para. 20.
[553] Gbao Appeal, para. 20.
[554] Gbao Appeal, para. 23.

258. The Prosecution responds that the testimony of a witness who lies need not necessarily be discarded in its entirety and that the Trial Chamber has discretion to accept parts of a witness's evidence even when knowing that other part of the evidence has been dishonest.[555]

(b) Discussion

259. In relation to Gbao's submission that evidence of a witness who admits to lying under oath should be disregarded in its entirety, the Appeals Chamber recalls its previous holding that, as a matter of law, a Trial Chamber is not required to reject the entirety of the evidence of witness should it be apparent that the witness lied while testifying under solemn declaration.[556] While a Trial Chamber may decide, in its exercise of discretion, to entirely disregard the evidence of a witness deemed unworthy of belief,[557] it may also find portions of the testimony believable and decide to rely on the evidence it determines to be credible, using necessary caution.[558] The effect of untruthful testimony on the evaluation of a witness's overall credibility, and the reliability of all of other evidence adduced from that witness must be assessed on a witness by witness basis by the trier of fact.

260. In relation to Prosecution Witness TF1-108, the Appeals Chamber has previously determined that the Trial Chamber did not abuse its discretion in accepting portions of the witness's evidence that are corroborated by other reliable evidence.[559]

261. In relation to Prosecution Witness TF1-366, the Appeals Chamber already stated that it saw no abuse of discretion in the Trial Chamber's Decision on Sesay Motion concerning the False Testimony of TF1-366.[560] In this Decision, the Trial Chamber stated that the inconsistencies and contradictions in the witness's testimony would be addressed at its final determination of the credibility, reliability and probative value of TF1-366 in light of all the evidence adduced by the Prosecution and the Defence.[561] In the Trial Judgment, the Trial Chamber stated that it was required

[555] Prosecution Response, para. 4.36.
[556] *See supra*, paras 217-219.
[557] *Seromba* Trial Judgment, para. 92; *Nahimana et al.* Trial Judgment, para. 551; *Nahimana et al.* Appeals Judgment, para. 820
[558] *Nshogoza* Trial Judgment, paras 65-67; *Zigiranyirazo* Trial Judgment, paras 337-344; *Kordić and Čerkez* Trial Judgment, paras 629-630; *Kordić and Čerkez* Appeal Judgment, paras 254-267, 292-293; *Naletilić and Martinović* Appeal Judgment, para. 175; *Limaj et al.* Trial Judgment para. 26.
[559] *See supra*, paras 220-223.
[560] *See supra*, paras 207-211.
[561] Sesay Decision on False Testimony of TF1-366, paras 42, 48.

to exercise "extreme caution when examining the credibility of accomplice evidence."[562] In respect specifically to TF1-366, who falls within this category of witnesses, it held:

> The Chamber shares the concerns of Defence Counsel for the Accused that the testimony of TF1-366 was often problematic. The testimony of this witness tended to over-implicate the Accused, particularly Sesay and Kallon, in a way that went beyond the general story as related by other witnesses. The Chamber has therefore been cautious, and has not accepted the testimony of TF1-366 as it relates to the acts and conduct of the Accused unless it was corroborated in some material aspect by a reliable witness. However, where TF1-366 has given more general evidence, or has testified about his own experiences, the Chamber has accepted his evidence without corroboration.[563]

262. In his submissions on appeal concerning TF1-366, Gbao referred to arguments made in his Final Trial Brief.[564] Notwithstanding the fact that an appellant should not merely repeat arguments made at trial, Gbao identified in his Final Trial Brief a category of witnesses whose evidence should be disregarded in their entirety and in respect to TF1-366, who was not included in this category, Gbao submitted that "[t]he evidence of TF1-336 ... should … be viewed with extreme caution."[565] It is clear from the Trial Chamber's assessment of TF1-366's credibility that it appreciated the necessity to approach his evidence with caution and, as a result, "has not accepted [his] testimony as … it relates to the acts and conduct of the Accused unless it was corroborated in some material aspect by a reliable witness."[566] Gbao has not demonstrated that the Trial Chamber abused its discretion in so holding.

263. Turning to Prosecution Witness TF1-314, Gbao stresses that the witness "even admitted in Court to lying under oath,"[567] in support of his submission that her evidence should be entirely disregarded. He refers to his Motion filed pursuant to Rule 115 of the Rules to admit as additional evidence portions of the testimony of the witness from the *Taylor* trial,[568] "for the sole purpose of further challenging the credibility of this witness."[569] In a Decision of 5 August 2009, the Pre-Hearing Judge of the Appeals Chamber dismissed the Motion,[570] on the ground, in particular, that further evidence of TF1-314's contrary statement would not necessarily have had any effect on the

[562] Trial Judgment, para. 540.
[563] Trial Judgment, para. 546.
[564] Gbao Appeal, para. 22.
[565] Gbao Final Trial Brief, para. 280.
[566] Trial Judgment, para. 546.
[567] Gbao Appeal, para. 21.
[568] Gbao Appeal, para. 21.
[569] Gbao Motion to Admit Additional Evidence pusuant to Rule 115, 29 June 2009, para. 10.
[570] Decision on Gbao's Motion to Admit Additional Evidence Pursuant to Rule 115.

Trial Chamber's treatment of the witness's evidence.[571] The Appeals Chamber notes in that regard that the additional evidence sought to be adduced by Gbao only goes to substantiate the unreliability of a portion of the witness's evidence which the Trial Chamber itself found to be unreliable because "the witness provided unsubstantiated evidence concerning certain events which will not be accepted by the Chamber."[572] In assessing the credibility of TF1-314, the Trial Chamber further stated:

> Overall, the Chamber opines that the evidence of TF1-314 is largely credible. The Chamber is of the considered view that slight variations between TF1-314's prior statements and those made at trial are immaterial to a credibility determination of this witness's overall evidence. However, the Chamber will require corroboration of any evidence which relates to the acts and conduct of any of the three Accused.[573]

264. The Appeals Chamber sees no abuse of discretion in the Trial Chamber's acceptance of part of the witness's evidence in spite of the discrepancies and vagueness in her testimony,[574] and does not see in the impugned portions of the witness's testimony discrepancies that would have required a reasonable Trial Chamber to reject the witness's evidence in whole. The Appeals Chamber further notes that the portions of the witness's evidence specifically challenged by Gbao[575] were not relied upon in the Trial Judgment.[576] Rather, the testimony relied upon by the Trial Chamber concerned the witness's personal account of her abduction, her forced marriage[577] and her experience as part of a Small Girl Unit.[578] The fact that the witness extended her testimony beyond her personal knowledge does not render evidence related to her own experience unreliable. Gbao has failed to demonstrate an error of the Trial Chamber in its assessment of TF1-314's credibility.

265. In relation to TF1-113, the Trial Chamber stated:

> The Chamber has examined the concerns raised by the Sesay and Gbao Defence. The Chamber notes that while TF1-113 tended to misstate the facts during certain portions of her testimony, it remains unconvinced that this is sufficient reason to consider the whole of her evidence unreliable. The Chamber has, however, before considering the use of

[571] Decision on Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, para. 23.
[572] Trial Judgment, para. 593, *citing* Transcript, TF1-314, 7 November 2005, pp. 13-14 (closed session).
[573] Trial Judgment, para. 594.
[574] *See* Transcript, TF1-314, 2 November 2005, pp. 60-61; Transcript of 7 November 2005, pp. 3-4
[575] *See* Transcript of 7 November 2005, p. 14, 37.
[576] Trial Judgment, para. 1743, fn. 3336.
[577] Trial Judgment, paras 1406, 1460, 1412, 2156.
[578] Trial Judgment, paras 1618, 1660.

> TF1-113's evidence, exercised extreme caution and often found it necessary to seek other corroborative evidence.[579]

Gbao argues that the Trial Chamber erred in failing to reject the entirety of the evidence of TF1-113 who "even admitted in Court to lying under oath."[580] The Appeals Chamber has examined the relevant portions of the transcripts of TF1-113 and is not persuaded that the alleged falsehood in her testimony renders her evidence unreliable commanding a reasonable trier of fact to reject it in whole. Considering that the Trial Chamber was fully aware of the discrepancies in the witness's testimony and accordingly directed itself to approach her evidence with "extreme caution," and noting further that the evidence of TF1-113 was corroborated by other reliable evidence, the Appeals Chamber finds no error in the Trial Chamber's approach to the witness's testimony.

(c) Conclusion

266. In view of the foregoing, Gbao's Ground 6 is dismissed in its entirety.

3. Appeal against the Trial Chamber's Decision on Gbao's Motion on Abuse of Process (Gbao Ground 14)

(a) Trial Chamber's findings

267. On 21 June 2004, the Prosecution took a written statement from a Kenyan Major who was among the peacekeepers abducted at the DDR Camp in Makump, on 1 May 2000. On 20 October 2006 that is, four days after the Prosecution closed its case, the Prosecution disclosed the Kenyan Major's redacted statement to Gbao pursuant to Rule 68 of the Rules.

268. On 9 June 2008, Gbao filed a "Motion Requesting the Trial Chamber to stay trial proceedings of Counts 15-18 against the Third Accused For Prosecution Violation's of Rule 68 and Abuse of Process." He contended that the Prosecution had abused the process of the Court by holding a highly exculpatory document for the entirety of its case,[581] and that the late disclosure had caused material prejudice by depriving him of an opportunity to cross-examine several critical Prosecution witnesses.[582]

[579] Trial Judgment, para. 600.
[580] Gbao Appeal, para. 21, *citing* Transcript of 6 March 2006, TF1-113, pp. 105-106.
[581] Gbao Motion on Abuse of Process, para. 42.
[582] Gbao Motion on Abuse of Process, para. 13.

269. In an oral decision of 16 June 2008, the Trial Chamber dismissed Gbao Motion on Abuse of Process.[583] In its written Decision dated 22 July 2008, the Trial Chamber found that the delayed disclosure of the exculpatory statement was done in breach of the Prosecution's disclosure obligation under Rule 68.[584] The Trial Chamber however observed that Gbao had in his possession the statement for a period of over 20 months before he filed his Motion on Abuse of Process and further found that he had not shown due diligence in deciding not to list or call the Kenyan Major as a witness.[585] The Trial Chamber considered that if the prejudice claimed from the late disclosure was the absence of the statement for the cross-examination of Prosecution witnesses Jaganathan and Ngondi, an application for the recall of the witness or for some other relief should have been made at the time of disclosure or as soon as practicable;[586] the Trial Chamber accordingly stated that available remedies existed for Gbao to remove or mitigate any such prejudice.[587] Further, "in light of its determination that there was no material prejudice caused by the Prosecution's breach of its Rule 68 obligation," the Trial Chamber stated that "it was not inclined to address fully the issue, judicially or legally of the respective allegation of abuse of process."[588]

(b) Submissions of the Parties

270. In Ground 14, Gbao challenges the Trial Chamber Decision on Gbao's Motion on Abuse of Process. His submissions are two-fold. First, he contends that the Trial Chamber erred in law by confusing the role of prejudice in the determination of a violation of Rule 68 with the requirement to demonstrate an abuse of process as prejudicial.[589] Gbao requests the Appeals Chamber to reverse the requirement that the Defence need to show material prejudice in order to establish abuse of process and subsequently go on to consider whether the Prosecution abused the court process by disclosing the statement after its case had concluded.[590] Second, and in the alternative, Gbao submits that the Trial Chamber erred in fact and in law in finding that no material prejudice was imported in this case.[591] He contends that the timely disclosure of the statement may have led to a dismissal of the case against Gbao, that "much could have been challenged" had the statement been available at the cross-examination of witnesses Jaganathan and Ngondi, and that the Gbao defence

[583] Transcripts, 16 June 2008, pp. 52-55.
[584] Decision on Gbao Motion on Abuse of Process, para. 53.
[585] Decision on Gbao Motion on Abuse of Process, para. 57.
[586] Decision on Gbao Motion on Abuse of Process, para. 59.
[587] Decision on Gbao Motion on Abuse of Process, para. 62.
[588] Decision on Gbao Motion on Abuse of Process, para. 64.
[589] Gbao Appeal, paras 299, 301-303, 310.
[590] Gbao Appeal, para. 304.

strategy in relation to the UNAMSIL allegations may have been different.[592] Gbao requests the Appeals Chamber to find that the Prosecution perpetrated an abuse of process and to dismiss the UNAMSIL-related conviction against Gbao as it is the only appropriate remedy in view of the gravity of the Prosecution's conduct.[593]

271. In response, the Prosecution first argues that application of abuse of process doctrine is a matter of discretion.[594] Further, the Prosecution contends that an absence of prejudice or minimal prejudice rules out the basis of an abuse of process[595] and, alternatively, that prejudice should be considered by a trier of fact as evidence of alleged abuse of process.[596] The Prosecution however concedes that even in the absence of material prejudice, a Trial Chamber may still, for other reasons, consider that a remedy is appropriate.[597] In relation to Gbao's challenge against the Trial Chamber's finding that there was no material prejudice, the Prosecution argues that Gbao's claim that there "may have" been other outcomes if certain material had been disclosed cannot be sufficient to establish prejudice.[598] The Prosecution also points out that the Trial Chamber's decision rested on the Gbao's delay in raising the issue.[599] In addition, the Prosecution avers that Gbao has failed to show how the alleged error in the impugned Decision invalidates the final verdict or results in a miscarriage of justice.[600]

(c) Discussion

272. In his motion at trial, Gbao alleged both a violation of Rule 68 of the Rules and an abuse of process based on the same alleged facts and sought the identical remedy under both claims.[601] The remedy he sought was a stay of the proceedings under Counts 15 through 18.[602]

273. A remedy under Rule 68 requires an accused to show material prejudice. An accused may not be required, as a matter of law, to show material prejudice in order to establish an abuse of process. However, the remedy Gbao sought is one that international criminal tribunals and domestic

[591] *See* Gbao Appeal, para. 307.
[592] Gbao Appeal, para. 307.
[593] Gbao Appeal, para. 311.
[594] Prosecution Response, para. 4.77
[595] Prosecution Response, para. 4.79.
[596] Prosecution Response, para. 4.79.
[597] Appeal transcripts, 3 September 2009, p. 218.
[598] Prosecution Response, para. 4.83.
[599] Prosecution Response, para. 4.83.
[600] Prosecution Response, para. 4.85.
[601] Gbao Motion on Abuse of Process, paras 13, 39-44, 48-50.
[602] Gbao Motion on Abuse of Process, paras 48, 50.

courts have considered to require a showing of material prejudice.[603] Thus, in order to obtain the remedy he sought under each claim, Gbao was required to show material prejudice.

274. The Trial Chamber found that Gbao failed in this regard. In its Decision, the Trial Chamber first considered Gbao's claim under Rule 68 and determined that although there was a clear breach of Rule 68 by the Prosecutor "there was no resulting material prejudice" from that breach.[604] Having so found, the Trial Chamber stated that "it was not inclined to address fully the issue, judicially or legally of the respective allegation of abuse of process."[605] The Appeals Chamber does not consider that the Trial Chamber thereby required prejudice as an element of abuse of process. Rather that it determined that the only relief requested by Gbao in the Rule 68 claim, identical to the relief requested in the motion for abuse of process, was not warranted in the absence of material prejudice. There is, therefore, no merit to Gbao's argument that the Trial Chamber erred in law by requiring a showing of prejudice as an element for demonstrating an abuse of process.[606]

275. Turning to Gbao's alternative argument that the Trial Chamber erred in fact by failing to find material prejudice,[607] the Appeals Chamber recalls that for this argument to succeed, Gbao must show that the Trial Chamber's decision was based on a patently incorrect conclusion of fact or that the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[608]

276. Gbao fails to meet this burden. In part, Gbao asserts that he was prejudiced in his ability to cross-examine witnesses Jaganathan and Ngondi on the information in the belatedly disclosed statement of major Maroa, but he fails to explain how the Trial Chamber erred in its consideration of these submissions.[609] In his Motion on Abuse of Process[610] and on appeal,[611] Gbao contended

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[603] *Akayesu* Appeal Judgment, para. 340; *See also Karemera et al.* Decision on Motion To Dismiss for Abuse of Process, para. 3 ("if an accused claims that an abuse of process has occurred, it is important that he show that he has suffered prejudice."); *R. v. Caster*, British Columbia Court of Appeal, Judgment, 25 October 2001, 2001 B.C.A.C. LEXIS 566, *citing R. v. Carosella*, [1997] 1 S.C.R. 80; 207 N.R. 321; 98 O.A.C. 81, *R. v. Finta*, [1993] 1 S.C.R. 1138. *R v. Johnson (T.A.) and Dwyer (A.F)*, Newfoundland Supreme Court, Court of Appeal, Judgment, 29 September 1994, 1994 Nfld. & P.E.I.R. LEXIS 1330, para. 20; *R. v. O'Connor*, British Columbia Court of Appeal, Judgment, 30 March 1994, 1994 B.C.A.C LEXIS 4406, para. 138; *R. v. Birmingham and others*, (1992) Crim. L.R. 117; *DPP v Meakin* [2006] EWHC 1067; *Regina v Feltham Magistrates Court, Ex parte Ebrahim, Mouat v Director of Public Prosecutions*, 21 February 2000, [2001] 2 Cr App. R. 23.
[604] Decision on Gbao Motion on Abuse of Process, para. 62.
[605] Decision on Gbao Motion on Abuse of Process, para. 64.
[606] Gbao Appeal, para. 299.
[607] Gbao Appeal, para. 300.
[608] *Taylor* Appeal Decision on Motion on Commencement of Defence Case, para. 13.
[609] Decision on Gbao Motion on Abuse of Process, paras 58-59; Gbao Appeal, para. 307(ii).
[610] Gbao Motion on Abuse of Process, para. 37.

that the prejudice suffered consisted in the unavailability of the statement during his cross-examination of Prosecution witnesses Jaganathan and Ngondi. As the Trial Chamber rightly noted, the prejudice could have been effectively cured, had Gbao sought these witnesses to be recalled.[612]

277. At the time the material was disclosed to Gbao, on 20 October 2006, appropriate remedies existed to cure the prejudice arising from the late disclosure. The Appeals Chamber, therefore, rejects as misplaced Gbao's argument that "even if [he] had become aware of the existence of that statement and its content in October 2006, there is nothing [he] could have done anyway. The Prosecution's case was already over."[613] In situations where Rule 68 material was disclosed by the Prosecution either after the Prosecution's case, or even after the Defence case, the ICTY Chambers have allowed the proceedings to be reopened to enable the prejudice suffered by the Defence to be remedied by, *inter alia*, allowing the Defence to re-call or re-examine any Prosecution witness, on issues arising from the material which was subject to the late disclosure.[614]

278. The Appeals Chamber further rejects Gbao's contention that he "would have been precluded from pursuing alternative remedies during trial, including calling the Kenyan Major or recalling Jaganathan and Ngondi," alleging that he "would not have been permitted as the Trial Chamber persistently forbade testimony from Gbao defence witnesses that might have implicated a co-accused."[615] The Appeals Chamber finds Gbao's contention speculative since he never made any such application before the Trial Chamber.

279. Lastly, Gbao claims that had the Prosecution properly disclosed the material under Rule 68 that may have led to a dismissal of Counts 15 through 18 in light of the exculpatory nature of the material.[616] He also claims that his defence strategy may have been different, but he fails to explain in what respect.[617] As he fails to develop or support these submission, they are summarily dismissed.

280. The Appeals Chamber finds no error of law or of fact in the Trial Chamber's Decision on Stay of the Proceedings for Abuse of Process.

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[611] Appeal Transcripts, 2 September 2009, p. 134.
[612] Decision on Gbao Motion on Abuse of Process, para. 62.
[613] Appeal Transcripts, 3 September 2009, p. 300.
[614] *Furundžija* Decision, para. 21; *see* also *Stakić* Appeal Judgment paras 185, 192; *Brđanin* Decision for Sanction under Rule 68, para. 26.
[615] Gbao Appeal, para. 308.
[616] Gbao Appeal, para. 307(i).
[617] Gbao Appeal, para. 307(iii).

(d) Conclusion

281. For the foregoing reasons, the Appeals Chamber dismisses Gbao's Ground 14 in its entirety.

V. COMMON GROUNDS OF APPEAL RELATING TO JOINT CRIMINAL ENTERPRISE

A. Alleged errors in defining the common criminal purpose (Sesay Ground 24 (in part), Kallon Ground 2 (in part) and Gbao Sub-Ground 8(f))

282. All three Appellants allege that the Trial Chamber erred in defining the common purpose of the JCE. Sesay in Ground 24, and Kallon in Ground 2, submit that the Trial Chamber found that the common purpose was not criminal and that various errors arise from this finding.[618] Gbao submits under Sub-Ground 8(f) that the Trial Chamber erroneously found multifarious common purposes and confused the common purpose with the criminal means to achieve it.[619] The present section addresses these submissions together.

1. Trial Chamber's findings

283. The Trial Chamber found that following the 25 May 1997 coup, high ranking AFRC members and the RUF leadership agreed to form a joint government in order "to control the territory of Sierra Leone."[620] The Trial Chamber considered that "such an objective in and of itself is not criminal and therefore does not amount to a common purpose within the meaning of the law of [JCE]."[621] However, it held that "where the taking of power and control over State territory is intended to be implemented through the commission of crimes within the Statute, this may amount to a common criminal purpose."[622] The Trial Chamber concluded that "the crimes charged under Counts 1 to 14 were within the [JCE] and intended by the participants to further the common purpose to take power and control over Sierra Leone."[623]

2. Submissions of the Parties

(a) Sesay Ground 24 (in part)

284. Sesay submits that the Trial Chamber's conclusion that the common purpose was to "take power and control over the territory of Sierra Leone" is erroneous because that common purpose

[618] Sesay Appeal, para. 82; Kallon Appeal, para. 36.
[619] Gbao Appeal, paras 88-95.
[620] Trial Judgment, para. 1979.
[621] Trial Judgment, para. 1979.
[622] Trial Judgment, para. 1979.
[623] Trial Judgment, paras 1982, 1985.

was not reflective of a crime under the Statute.[624] This error, Sesay argues, caused the Trial Chamber to examine his contribution to the (non-criminal) common purpose of taking power and control over Sierra Leone, rather than his contribution to the crimes through which that purpose may have been implemented.[625] The error also meant that the Trial Chamber never addressed whether there was a plurality of persons acting in concert to pursue a criminal plan, assuming instead that all violence committed by those involved in the war to take power and control over Sierra Leone was part of a criminal plan.[626] However, Sesay asserts that power and control can be taken without committing crimes, and that crimes committed in pursuance of such a goal can be committed without joint control, by groups or individuals alike, or inadvertently.[627] According to Sesay, the Trial Chamber's error in defining the criminal purpose as taking power and control gave rise to a failure to assess whether there was a "discernable pattern" to the crimes indicative of the alleged criminal plan, or whether they were committed in a "random and un-orchestrated manner."[628]

285. As for his *mens rea*, Sesay avers that because the Trial Chamber found that the non-criminal objective of taking power over state territory was intended to be implemented through crimes, "it followed that [he], by joining that non-criminal purpose, must have intended the crimes."[629] Moreover, Sesay claims that the Trial Chamber presumed his awareness of the crimes and his criminal intent, as it found that participation in an armed rebellion necessarily implied "the resolve and determination to … commit the crimes for which the Accused are indicted."[630] Sesay contends that under this "group intention", which excludes the possibility that an accused furthered the taking of power and control over Sierra Leone without criminal intent, the intention to take over Sierra Leone evinced the intention to commit crimes.[631] Sesay avers that the Trial Chamber's erroneous approach to his contribution and intent is akin to criminalising membership in an organisation, which violates his rights under the Statute and the *nullum crimen sine lege* principle.[632]

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[624] Sesay Notice of Appeal, para. 47; Sesay Appeal, paras 82, 191, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 16 and *citing* Trial Judgment, para. 1979.
[625] Sesay Notice of Appeal, para. 47; Sesay Appeal, para. 82.
[626] Sesay Appeal, paras 103, 119.
[627] Sesay Appeal, paras 104, 119, 120.
[628] Sesay Appeal, para. 120.
[629] Sesay Appeal, paras 83, 88.
[630] Sesay Appeal, paras 83, 101, *quoting* Trial Judgment, para. 2016, *citing* Trial Judgment, paras 2018, 2019.
[631] Sesay Appeal, para. 88.
[632] Sesay Appeal, para. 84.

286. Sesay argues that the Trial Chamber's error partly originated from an incomplete interpretation of the *Brima et al*. Appeal Judgment, which, he argues, "conflate[ed] objective and means" and asserts that only if a non-criminal objective is "inextricably and necessarily" linked to the commission of specified crimes can the accused's participation in a non-criminal objective evidence his criminal participation and intent.[633]

287. Sesay also relies on the ICTY cases of *Kvočka et al*., *Martić*, *Simić* and *Krajišnik*, all of which, he says, adjudged the accused's JCE liability by reference to their furtherance of a common criminal purpose, and not their involvement in non-criminal aims.[634]

288. The Prosecution responds that the Trial Chamber did not define the objective of taking power and control over Sierra Leone as criminal in itself by virtue of the criminal means used to achieve it.[635] Rather, the Trial Chamber properly characterised the objective and the means in accordance with the *Brima et al*. Appeal Judgment and the *Martić* Appeal Judgment.[636] In its view, the Trial Chamber correctly held that the objective to "control the territory of Sierra Leone" did not amount to a common purpose within the meaning of the law on JCE, and then went on to find that the crimes charged under Counts 1 to 14 were within the JCE and intended by the participants to further the common purpose to take power and control over Sierra Leone.[637] Thus, the Prosecution asserts, the common purpose was the taking of power and control over Sierra Leone (the objective) through the crimes charged under Counts 1 to 14 (the means).[638] Also, the Trial Chamber's findings demonstrate that it was satisfied that the violence was not random.[639] The Prosecution further responds that the Trial Chamber did not presume criminal intent from the involvement in the pursuit of a non-criminal objective; it found that Sesay intended both to take power and control over Sierra Leone and that he shared the requisite intent for the criminal means of the JCE.[640]

289. Sesay replies that the Prosecution's description of the common purpose is tautological, as it asserts that "the common purpose was the taking of power and control through the crimes charged

[633] Sesay Appeal, paras 90, 91.
[634] Sesay Appeal, paras 93-96.
[635] Prosecution Response, para. 5.4.
[636] Prosecution Response, paras 5.4-5.10.
[637] Prosecution Response, paras 5.8, 5.9.
[638] Prosecution Response, paras 5.9, 5.14.
[639] Prosecution Response, para. 5.16.
[640] Prosecution Response, para. 5.14.

and the means by which this common purpose was to be achieved was through the crimes charged."[641]

(b) Kallon Ground 2 (in part)

290. Kallon submits that the Trial Chamber found that the common purpose was not inherently criminal[642] and that various errors arise from this finding. First, he avers that this finding eliminated the requirement of a guilty mind in the context of JCE 3.[643] Second, Kallon asserts that by accepting an inherently non-criminal common purpose, the Trial Chamber allowed for JCE liability on the basis of any contribution by an accused to the non-criminal purpose, regardless of the affiliation between the accused and the perpetrator.[644] According to Kallon, "mere membership of the RUF and participation in the civil war would make an individual liable for any acts committed by any other RUF member (or agent thereof)."[645] Third, Kallon contends that even if criminal means are adopted to effect an otherwise non-criminal purpose, that only alters the *actus reus*, and leaves out a "culpable *mens rea*" because the common purpose is not inherently criminal.[646]

291. The Prosecution proffers the same arguments in response as those presented above under Sesay's Ground 24,[647] adding that Kallon fails to show an error in the Trial Chamber's application of JCE 3 and that he, in any event, was convicted exclusively under JCE 1.[648] Kallon does not offer additional arguments in reply.

(c) Gbao Ground 8(f)

292. Gbao submits that the Trial Chamber erred in finding several different common purposes or in routinely re-characterising the common purpose and the means to achieve it.[649] First, Gbao submits that the Trial Chamber re-characterised the means to achieve the common purpose in paragraphs 1980 and 1981 of the Trial Judgment. He argues that the Trial Chamber found at paragraph 1980 of the Trial Judgment that "the strategy of the Junta was … to maintain its power over Sierra Leone and to subject the civilian population to AFRC/RUF rule by violent means", and

[641] Sesay Reply, para. 48.
[642] Kallon Appeal, paras 27, 36, 39, 40.
[643] Kallon Appeal, paras 35, 36.
[644] Kallon Appeal, paras 39, 42.
[645] Kallon Appeal, para. 39.
[646] Kallon Appeal, para. 40.
[647] Prosecution Response, fn. 416.
[648] Prosecution Response, para. 5.29.
[649] Gbao Notice of Appeal, para. 43; Gbao Appeal, para. 88.

that the means "entailed massive human rights abuses and violence against and mistreatment of the civilian population and enemy forces."[650] In paragraph 1981, however, Gbao argues that the purpose of the AFRC/RUF alliance was found to have been achieved "through the spread of extreme fear and punishment to dominate and subdue the civilian population in order to exercise power and control over captured territory."[651] Second, Gbao submits that, by holding in paragraphs 1982 and 1985 that the means to terrorise the civilian population comprised all crimes charged in Counts 2-14 of the Indictment, the Trial Chamber appeared to have found that the common purpose was to terrorise the civilian population, rather than to take over the country.[652] Third, Gbao submits that the finding in paragraph 1982 of the Trial Judgment that "the crimes charged under Counts 1 to 14 were within the [JCE]" further confuses the criminal means for achieving the common purpose with the common purpose itself.[653] Lastly, Gbao avers that the Trial Chamber found that the common purpose to which Gbao adhered was in fact the RUF ideology to create a revolution, referring to paragraphs 2013, 2029 and 2032 of the Trial Judgment.[654] Gbao requests that the Appeals Chamber quash his convictions under JCE.[655]

293. The Prosecution proffers the same arguments in response as those presented above under Sesay's Ground 24 and Kallon's Ground 2.[656] It also responds that the Trial Chamber did not confuse the criminal means with the common purpose because the two had to be taken together.[657] As to the findings on the RUF ideology, the Prosecution argues that they were linked to Gbao's individual liability and the ideology provided a nexus to the JCE.[658] Gbao offers no additional arguments in reply.

3. Discussion

294. The Appellants' present submissions essentially turn on whether the Trial Chamber found the common purpose of the JCE to be criminal or non-criminal. At the outset, the Appeals Chamber recalls its holding in the *Brima et al*. Appeal Judgment that "the common purpose" of a JCE

[650] Gbao Appeal, para. 89, *quoting* Trial Judgment, para. 1980.
[651] Gbao Appeal, para. 90, *quoting* Trial Judgment, para. 1981.
[652] Gbao Appeal, para. 91.
[653] Gbao Appeal, para. 92, *quoting* Trial Judgment, para. 1982.
[654] Gbao Appeal, paras 93, 94.
[655] Gbao Appeal, para. 95.
[656] Prosecution Response, fn. 416.
[657] Prosecution Response, para. 5.11.
[658] Prosecution Response, para. 5.11.

comprises both the objective of the JCE and the means contemplated to achieve that objective.[659] In order to determine the present submissions within the proper legal framework, it is appropriate to address, as a preliminary matter, Sesay's submissions regarding the interpretation of *Brima et al*. and the relationship between the objective and the means in cases where the objective itself does not amount to a crime within the Statute.

(a) Preliminary legal matter

295. In the *Brima et al*. Appeal Judgment, the Appeals Chamber held that "[t]he objective and the means to achieve the objective constitute the common design or plan."[660] Contrary to Sesay's claim, this holding neither "conflate[s] objective and means" nor sets out a legal requirement that they be "inextricably and necessarily" linked.[661] Rather, as the Appeals Chamber clarified, it signifies that the criminal nature of a common purpose can derive from the means contemplated to achieve the objective of the common purpose.[662] That was also the basis for the holding of *Brima et al*. that the Trial Chamber relied on,[663] which stated that a common purpose can be inherently criminal where it "contemplate[s] crimes within the Statute as the means of achieving its objective."[664] In such cases, the objective and the means to achieve the objective constitute the common criminal purpose.

296. Sesay's reference to the *Martić* case does not sustain his claim.[665] While in that case the implementation of the non-criminal objective of creating a united Serb state "necessitated" the forcible removal of non-Serb population,[666] nowhere did the *Martić* Appeals Chamber suggest that such necessity was a legal requirement for a common criminal purpose to exist. Rather, the *Martić* Trial Chamber found that, as a factual matter, the necessary relationship arose from "the prevailing circumstances" of the case, and was buttressed by the employment of criminal means to further the non-criminal objective.[667] As to the law, the *Martić* Appeals Chamber was content to observe that, while the objective itself did not constitute a common criminal purpose, it may still amount to such

[659] *Brima et al*. Appeal Judgment, para. 76; *Taylor* Appeal Decision on JCE Pleading, paras 15, 25.
[660] *Brima et al*. Appeal Judgment, para. 76; Sesay Appeal, para. 89.
[661] Sesay Appeal, paras 89-91.
[662] *Brima et al*. Appeal Judgment, para. 76.
[663] Trial Judgment, para. 260.
[664] *Brima et al*. Appeal Judgment, para. 80.
[665] Sesay Appeal, paras 89, 97, 98.
[666] *Martić* Appeal Judgment, paras 92, 123.
[667] *Martić* Appeal Judgment, para. 92.

where it "is intended to be implemented through the commission of crimes within the Statute."[668] This is consistent with the *Kvočka et al*., *Krajišnik* and *Tadić* Appeal Judgments, all of which require as a matter of law only that the common purpose "amounts to or involves" the commission of a crime provided for in the ICTY Statute.[669] It is also consistent with *Brima et al*., which, rather than stipulating a necessary relationship between the objective of a common purpose and its criminal means, only requires that the latter are "contemplated to achieve" the former.[670]

297. For these reasons, the Appeals Chamber rejects Sesay's submission that where the objective does not itself amount to a crime under the Statute, the objective and the means to achieve it must be "conflated" or "inextricably and necessarily" linked in order to constitute a common criminal purpose.[671] Against this backdrop, the Appeals Chamber now proceeds to determine whether the Trial Chamber found the common purpose of the JCE in the present case to be criminal or non-criminal.

(b) Did the Trial Chamber find that the common purpose was not criminal?

298. The Trial Chamber's findings that the objective of the JCE was "to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas" and that this objective in and of itself was not criminal under the Statute are undisputed.[672] Rather, Sesay and Kallon posit that the error of the Trial Chamber lies in finding that the non-criminal objective constituted the common purpose of the JCE,[673] whereas Gbao contends that the definition of the common purpose is unclear.[674]

299. The position of Sesay and Kallon is directly contradicted by the Trial Chamber's finding that the objective to control the territory of Sierra Leone "does not amount to a common purpose within the meaning of the law of [JCE]."[675] Beyond their references to the finding that the *objective*

[668] *Martić* Appeal Judgment, para. 123, *quoting Martić* Trial Judgment, para. 442.
[669] *Krajišnik* Appeal Judgment, para. 704; *Kvočka et al*. Appeal Judgment, para. 81; *Tadić* Appeal Judgment, para. 227 (ii). *See* also *Tadić* Appeal Judgment, para. 198, *quoting Trial of Franz Schonfeld and others,* British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, p. 68 (summing up of the Judge Advocate) ("if several persons combine for *an unlawful purpose or for a lawful purpose to be effected by unlawful means*, and one of them in carrying out that purpose, kills a man, it is murder in all who are present […] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.") [emphasis added].
[670] *Brima et al*. Appeal Judgment, paras 76, 80.
[671] Sesay Appeal, paras 89-96.
[672] Trial Judgment, paras 1979, 1985.
[673] Sesay Appeal, para. 82; Kallon Appeal, paras 27, 36, 39, 40.
[674] Gbao Appeal, para. 88.
[675] Trial Judgment, para. 1979.

was not criminal,[676] and a finding regarding Gbao's participation in the JCE,[677] neither Sesay nor Kallon points to other findings of the Trial Chamber to support their claim. Sesay refers to the statement in the Dissenting Opinion of Justice Boutet that "the purpose is such that it is not even reflective of a crime … under the jurisdiction of this Court."[678] Reference to the Dissenting Opinion is misguided since it does not underpin any of the findings that resulted in Sesay's conviction.

300. The Appeals Chamber therefore dismisses Sesay's and Kallon's submissions that the Trial Chamber found the objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, constituted the common purpose of the JCE. Having thus found, the next question for determination is what common purpose the Trial Chamber found, and whether such purpose was criminal. The Trial Chamber considered that the non-criminal objective to control the territory of Sierra Leone "may amount to a common criminal purpose" where it "is intended to be implemented through the commission of crimes within the Statute."[679] This statement is legally correct,[680] and contrary to Kallon's submission,[681] it does not allow for JCE liability based on a non-criminal common purpose or absent the requisite *mens rea*.

301. The Trial Chamber proceeded to find in paragraph 1980 of the Trial Judgment that the Junta aimed "to subject the civilian population to AFRC/RUF rule by violent means", which "entailed massive human rights abuses and violence against and mistreatment of the civilian population", and in paragraph 1981 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 captured territory." Contrary to Gbao's argument,[682] these two findings do not characterise the means differently; both are general findings showing that the means to achieve the objective of controlling the territory of Sierra Leone included the commission of crimes against the civilian population.

302. Paragraph 1982 of the Trial Judgment specifies what those criminal means were. Its wording leaves no room for Gbao's claim that the Trial Chamber wavered in its definition of the common purpose by finding that terrorism (Count 1) might have been the objective of the common

[676] Sesay Appeal, paras 82, 88; Kallon Appeal, paras 27, 40.
[677] Kallon Appeal, para. 36, *citing* Trial Judgment, para. 2013.
[678] Sesay Appeal, para. 82, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 16.
[679] Trial Judgment, para. 1979.
[680] *Brima et al*. Appeal Judgment, para. 80; *Martić* Appeal Judgment, para. 123.
[681] Kallon Appeal, para. 40.
[682] Gbao Appeal, paras 89, 90.

purpose, rather than a means.[683] The statement that "[t]he means to terrorise the civilian population" included the crimes under Counts 3 to 11 refers to the fact that the underlying acts of terrorism partly comprised conduct also charged under Counts 3 to 11.[684] Furthermore, the statement is immediately followed by the finding that "[a]dditional means to achieve the common purpose" included the crimes charged under Counts 2 and 12 to 14, which clarifies that the acts of terrorism (and the underlying conduct) were found to be among the means to achieve the common purpose. Against this background, the conclusive finding in paragraph 1982, partly repeated in paragraph 1985, that "the crimes charged under Counts 1 to 14 were within the [JCE] and intended by the participants to further the common purpose" makes it abundantly clear that all those crimes were found to constitute means.[685]

303. Contrary to Sesay's submission, the Trial Chamber considered whether these crimes were committed in a "random and un-orchestrated manner."[686] It found that the "AFRC/RUF forces cooperated on armed operations in which crimes against civilians were committed" and that the "conduct of the operations" demonstrated the wholly disproportionate means by which the Junta intended to suppress all opposition.[687] It further took into account "the entirety of the evidence and in particular the widespread and systematic nature of the crimes committed" and found the existence of a common criminal purpose and that its participants used the perpetrators to commit crimes in furtherance of it.[688] Sesay's claim that the Trial Chamber failed to assess whether there was a "discernable pattern" to the crimes indicative of a common criminal purpose, and Kallon's present argument that the Trial Chamber allowed for JCE liability regardless of the affiliation between the accused and the perpetrator, thus lack merit.[689]

304. Gbao argues that the common purpose in actual fact consisted of the RUF ideology.[690] The Appeals Chamber disagrees. The paragraphs Gbao invokes concern his intent and participation in the JCE, which the Trial Chamber examined only after it had reached its findings on the existence and nature of the common purpose.[691] Indeed, the mention in paragraph 2013 of "a criminal nexus between such an ideology and the crimes charged" was immediately followed by reference to an

[683] Gbao Appeal, para. 91.
[684] Trial Judgment, para. 110.
[685] Contrary to Gbao's claim. Gbao Appeal, para. 92.
[686] *See* Sesay Appeal, para. 120. *See* also *infra*, paras 340-350.
[687] Trial Judgment, paras 1980, 1981.
[688] Trial Judgment, para. 1992.
[689] Sesay Appeal, para. 120; Kallon Appeal, para. 39. *See* also *infra*, paras 393-455.
[690] Gbao Appeal, para. 93.

ICTY case in which the accused's *participation* in a JCE consisted of providing the legal, political and social framework in which the participants of the JCE worked and from which they profited.[692] The end of paragraph 2013 sets out the legal requirements necessary to establish the *mens rea* of Gbao in particular. Similarly, the findings that the crimes "were in application and furtherance of the goals stipulated in the ideology of taking power and control of Sierra Leone" and that "the revolution was the ideology in action", in paragraphs 2029 and 2032, respectively, signify that the ideology imparted by Gbao[693] "played a key and central role in pursuing the objectives of the RUF" and was a "propelling dynamic behind the commission" of the crimes.[694] As such, the RUF ideology was in the Trial Chamber's view conducive to the commission of crimes and furthered the means of the common purpose. However, it was not itself found to have constituted the common purpose. Instead, Gbao's connection to the ideology was one factor that evidenced his participation and intent. This is reconcilable with the finding that the criminal purpose of the JCE was common to both the RUF and AFRC.[695]

305. For these reasons, the Appeals Chamber concludes that the Trial Chamber found a common criminal purpose. It consisted of the objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and the crimes as charged under Counts 1 to 14 as means of achieving that objective ("Common Criminal Purpose").[696] Gbao's Sub-Ground 8(f) is therefore dismissed in its entirety.

306. The remaining submissions of Sesay and Kallon are premised on the assertion that the Trial Chamber found the common purpose to be non-criminal.[697] Because the Appeals Chamber has dismissed this assertion above, holding that the Trial Chamber properly found a common criminal purpose, there is no basis for these remaining submissions.

4. Conclusion

307. The Appeals Chamber dismisses the above parts of Sesay's Ground 24 and Kallon's Ground 2. Gbao's Sub-Ground 8(f) is dismissed in its entirety.

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[691] Trial Judgment, paras 2009-2049.
[692] Trial Judgment, para. 2013, *citing Simić* Trial Judgment, para. 992.
[693] Trial Judgment, paras 2010, 2011, 2035.
[694] Trial Judgment, para. 2031.
[695] *See* Gbao Appeal, para. 94.
[696] Trial Judgment, paras 1979-1985.
[697] Sesay Appeal, paras 82, 83, 88, 103. *See* also Kallon Appeal, paras 36, 39.

B. Alleged errors in finding the existence of a common criminal purpose (Sesay Grounds 24 (in part) and 26-33 (in part), Kallon Ground 2 (in part) and Gbao Grounds 8(e), (g) and (h))

308. The Appellants submit that the Trial Chamber erred in various regards in finding that a common criminal purpose existed. At the outset, Kallon makes two legal challenges to the Trial Chamber's application of the JCE theory. Along with Sesay, he then challenges the Trial Chamber's factual findings that the leaders of the AFRC and RUF acted in concert. Finally, Sesay and Gbao impugn the Trial Chamber's findings on the criminal means to achieve the objective of the JCE. These submissions are addressed in turn below.

1. Preliminary legal issues (Kallon Ground 2 (in part))

(a) Submissions of the Parties

309. First, Kallon submits that his convictions under JCE violate the principle *nulla poene sine culpa*.[698] He argues that the Trial Chamber exceeded the legal boundaries of JCE by holding that the plurality of persons need not be defined, the common purpose need neither be fixed nor criminal, and the accused's acts may be limited in scope as long as he is aware of the wider common purpose.[699] Referring to his Grounds 8 to 15, Kallon claims that he was found individually criminally liable for crimes which he (i) was not personally involved in; (ii) did not share the intent to commit; (iii) did not commit, order, instigate, aid and abet or "command" in the sense of command responsibility; and (iv) may not even have been aware were perpetrated.[700]

310. Second, Kallon seeks a withdrawal of his JCE convictions on the basis that he was erroneously convicted under an "unprecedented" massive and over-expansive JCE amounting to guilt by association.[701] Relying on the United States law concerning conspiracy, Kallon argues that the massive criminal enterprise found by the Trial Chamber has a grave potential for prejudice in that it may unfairly include persons in "the ever-growing web of liability."[702]

311. In response to the alleged violation of the principle *nulla poene sine culpa*, the Prosecution submits that the Trial Chamber observed that this was not a trial of the RUF organisation, that JCE is not guilt by association, and that the Trial Chamber must be assumed to have been conscious of

[698] Kallon Notice of Appeal, para. 3.2; Kallon Appeal, paras 25-29.
[699] Kallon Appeal, para. 27, *citing* Trial Judgment, paras 259, 260, 262, 1979.
[700] Kallon Appeal, paras 28, 29.
[701] Kallon Notice of Appeal, para. 3.11; Kallon Appeal, paras 30-34.

the strict requirements of the JCE doctrine.[703] As to whether the JCE was over-expansive, it responds that the Trial Chamber appropriately relied on international criminal jurisprudence in preference to United States cases concerning the distinct inchoate offence of conspiracy, and avers that there is no limit in the jurisprudence to the scope of a JCE.[704] Kallon offers no additional arguments in reply.

(b) Discussion

(i) Principle of *nulla poene sine culpa*

312. The Appeals Chamber has previously noted that "the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."[705] Kallon relies on the Trial Chamber's legal findings as to the plurality of persons, the nature of the common purpose and the accused's participation to support his claim that this principle was breached.

313. The Appeals Chamber is not persuaded that these findings, as a general matter, expanded JCE beyond the limits of personal culpability. Whereas the Trial Chamber noted that the plurality of persons "may change" as participants enter or withdraw from the JCE, it firmly required that the accused be a participant of the JCE in order to be held criminally responsible under this form of liability.[706] As regards the nature of the common purpose, the Trial Chamber held that a JCE may be "fluid" in its criminal means, but only to the extent its participants so accept.[707] It did not allow for JCE liability pursuant to a non-criminal common purpose.[708] As to the accused's participation, the Trial Chamber held that it may be geographically more limited than the JCE itself provided he had knowledge of the wider purpose of the common design.[709] Yet it required that the accused's participation "made a significant contribution to the crimes for which he is held responsible."[710] While it is not necessarily correct that "knowledge of the wider purpose of the common design"

[702] Kallon Appeal, paras 30, 31.
[703] Prosecution Response, para. 5.2.
[704] Prosecution Response, para. 5.3.
[705] *Brima et al*. Appeal Judgment, para. 72, *quoting Tadić* Appeal Judgment, para. 186.
[706] Trial Judgment, para. 262.
[707] Trial Judgment, para. 259.
[708] Trial Judgment, paras 260, 1979.
[709] Trial Judgment, para. 262.
[710] Trial Judgment, para. 261.

would suffice to establish the intent requirement for JCE liability[711] nothing in the Trial Judgment otherwise suggests that the Trial Chamber departed from its unambiguous holding that JCE liability requires that the accused intended to participate in a common criminal purpose.[712]

314. The Appeals Chamber therefore finds that Kallon fails to demonstrate a violation of the principle *nulla poene sine culpa* based on the Trial Chamber's findings on the law of JCE. In remaining parts, Kallon's submission hinges on the success of his Grounds 8 and 15 and, as such, do not provide independent support for his present challenge.

315. This submission is rejected.

(ii) Massive and over-expansive JCE

316. Contrary to Kallon's submission, the Appeals Chambers observes that his JCE liability is not of an "unprecedented" scope. The Trial Chamber found that Kallon incurred JCE liability for crimes committed in Bo, Kono, Kenema and Kailahun Districts between 25 May 1997 and April 1998.[713] The scope of this liability is no broader than that pronounced in certain post-World War II cases, from which the contemporary notion of JCE is partly derived,[714] which concerned liability for participation in a criminal plan amounting to a "nation wide government-organized system of cruelty and injustice."[715] Likewise, in the *Brđanin* case, the ICTY concluded that JCE liability could apply to crimes committed in the entire Autonomous Region of Krajina,[716] and the accused in the *Krajišnik* case incurred JCE liability for crimes committed throughout the Bosnian Serb Republic.[717] Importantly, adjudicating a challenge similar to that of Kallon, the *Krajišnik* Appeals Chamber held that it is "wrong to speak about an 'expansion' of JCE to cases such as the one of Krajišnik" because "although *Tadić* concerned a relatively low-level accused, the legal

[711] The *Tadić* Appeal Judgment, para. 199 relied on by the Trial Chamber for its finding (Trial Judgment, fn. 462), did not hold that knowledge alone would suffice for JCE liability. Rather, the *Tadić* Appeals Chamber found that all three categories of JCE require intent to participate in and further a common criminal purpose. *Tadić* Appeal Judgment, para. 228.
[712] Trial Judgment, paras 265, 266.
[713] Trial Judgment, paras 2008, 2056, 2102, 2103, 2163.
[714] *See Tadić* Appeal Judgment, para. 202; *Rwamakuba* JCE Decision, paras 22, 24, 25.
[715] *Justice* Case, p. 985. *See* also *Einsatzgruppen* Case, pp. 427-433. The Einsatzgruppen is estimated to have been responsible for the deaths of more than one million people across an area of Europe stretching from Estonia to Crimea. *Brđanin* Appeal Judgment, fn. 900.
[716] *Brđanin* Appeal Judgment, para. 422. *See* also *Tadić* Appeal Judgment, para. 204 (speaking of a common purpose relating to a "region").
[717] *See Krajišnik* Appeal Judgment, paras 283, 797, 800.

elements of JCE set out in that case remain the same in a case where JCE is applied to a high-level accused."[718]

317. Against this backdrop, the Appeals Chamber agrees with the ICTR Appeals Chamber that "an accused's liability under a 'common purpose' mode of commission may be as narrow or as broad as the plan in which he willingly participated."[719] This does not imply, however, that JCE liability lapses into guilt by association. As persuasively explained by the *Brđanin* Appeals Chamber:

> Where all [the] requirements for JCE liability are met beyond a reasonable doubt, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission.[720]

318. On this basis, the Appeals Chamber is satisfied that "JCE is not an open-ended concept that permits convictions based on guilt by association."[721] As Kallon's submission can be satisfactorily determined based on these sources of international criminal law, there is no need to resort to the specific domestic jurisprudence of the United States on the inchoate offence of conspiracy, which is legally distinct from the mode of liability of JCE.[722]

319. Kallon's present submission is rejected.

2. Did the leaders of the AFRC and RUF act in concert?

(a) Trial Chamber's findings

320. The Trial Chamber found that following the 25 May 1997 coup, high ranking AFRC members and the RUF leadership agreed to form a joint "government" in order to control the territory of Sierra Leone.[723] The highest decision-making body in the Junta regime was the Supreme Council,[724] which included, among others, Johnny Paul Koroma as Chairman, Foday

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[718] *Krajišnik* Appeal Judgment, para. 671. *See* also *Brđanin* Appeal Judgment, para. 425 (holding that the Trial Chamber erred in concluding that JCE was not applicable in light of, *inter alia*, the "exceedingly broad" geographical scope of the case).
[719] *Rwamakuba* JCE Decision, para. 25.
[720] *Brđanin* Appeal Judgment, para. 431; *Martić* Appeal Judgment, para. 172.
[721] *Brđanin* Appeal Judgment, para. 428. *See* also *ibid*., para. 424. *See* further *Milutinović et al*. Decision on Jurisdiction – JCE, para. 26.
[722] *Krajišnik* Appeal Judgment, para. 659; *Milutinović et al*. Decision on Jurisdiction – JCE, paras 23, 25, 26. *See infra*, para. 397.
[723] Trial Judgment, para. 1979.
[724] Trial Judgment, para. 754, 1980.

Sankoh as Deputy Chairman, Gullit, Bazzy, Bockarie, Sesay and Kallon.[725] The Trial Chamber further found that despite the change of circumstances following the 14 February 1998 ECOMOG Intervention, the leading members of the AFRC and RUF maintained the purpose to take power and control over Sierra Leone, until late April 1998.[726]

(b) Submissions of the Parties

321. Sesay, in his Ground 24, and Kallon, in his Ground 2, both submit that the Trial Chamber erred in fact in finding that during the JCE period, senior members of the AFRC and RUF shared a common criminal purpose and acted in concert.

(i) Sesay Ground 24 (in part)

322. Sesay submits that there was no basis for inferring the existence of a criminal purpose considering the actions of the alleged JCE members in the first months of the Junta.[727] In support, he refers to the following findings:[728] (i) key members of the RUF, including Sesay and Kallon, only attended Supreme Council meetings from August 1997;[729] (ii) Gbao did not communicate with the Junta leaders during the Junta period[730] and did not share the intent of the plurality;[731] (iii) Sankoh was in prison at the relevant time;[732] and (iv) the Trial Judgment is silent on the actions of Koroma, Eldred Collins and Gibril Massaquoi in the first few months of the Junta.[733] Sesay also avers that the Trial Chamber provided no proper basis for disregarding Witness TF1-371's testimony that Sesay could not vote in the Supreme Council's decision-making, including decisions on the control of the military and the implementation of crime prevention mechanisms.[734] He also argues that the *Brima et al*. Trial Judgment and the adjudicated facts in *Taylor* confirm that the Supreme Council did not control the military.[735]

[725] Trial Judgment, paras 755, 1986.
[726] Trial Judgment, paras 2067, 2072, 2076.
[727] Sesay Appeal, paras 105, 108-120.
[728] Sesay Appeal, para. 108.
[729] Trial Judgment, paras 772, 774.
[730] Trial Judgment, para. 775.
[731] Trial Judgment, para. 2042.
[732] Trial Judgment, para. 20.
[733] *See* Trial Judgment, para. 755.
[734] Sesay Appeal, para. 112.
[735] Sesay Appeal, para. 112.

323. The Prosecution refers to the Trial Chamber's findings on the common objective and the criminal means to achieve it, which started soon after the coup in May 1997[736] and argues that the Trial Chamber was entitled to consider the role of the Supreme Council in the context of the pattern of atrocities to draw the necessary inferences.[737] Sesay offers no additional arguments in reply.

(ii) Kallon Ground 2 (in part)

324. Kallon submits that the Trial Chamber erred in finding that there was a common plan between senior RUF and AFRC leaders.[738] In support of his claim that the two groups were not acting together, he refers to the findings that:[739] (i) SAJ Musa withdrew from the JCE;[740] (ii) by early September 1997 Bockarie had become disillusioned with the RUF's limited role in the AFRC government;[741] (iii) the failure to integrate the two military organisations into a unitary command structure led to misunderstandings and conflicts;[742] (iv) while some AFRC fighters obeyed orders from RUF Commanders, others would not, and lower-ranking AFRC fighters disobeyed orders from their senior officers;[743] (v) the AFRC received more senior positions in the government;[744] and (vi) this caused Bockarie to relocate from Freetown to Kenema in August 1997 as he was dissatisfied with Koroma's management of the government and also feared for his life.[745] Kallon argues that the inference that there was no single common plan is further buttressed by the findings in paragraph 2067 of the Trial Judgment.[746] He submits that by the time of the Intervention, any alliance had collapsed to the extent that subsequent rifts between the RUF and AFRC manifested the break in their relationship rather than caused it.[747]

325. The Prosecution responds that "[h]armony between members of a JCE is not a legal requirement of JCE responsibility."[748] Kallon offers no additional submissions in reply.

[736] Prosecution Response, para. 5.16, *citing* Trial Judgment, paras 7-27, 743-775, 1980-1981, 1983, 1984.
[737] Prosecution Response, para. 5.16.
[738] Kallon Notice of Appeal, para. 3.1; Kallon Appeal, para. 52.
[739] Kallon Appeal, paras 31, 52. *See* Kallon Notice of Appeal, para. 3.1.
[740] Trial Judgment, paras 2077-2079.
[741] Trial Judgment, para. 764.
[742] Trial Judgment, para. 763.
[743] Trial Judgment, para. 763.
[744] Trial Judgment, para. 22.
[745] Trial Judgment, para. 24.
[746] Kallon Appeal, paras 52, 53.
[747] Kallon Appeal, para. 53.
[748] Prosecution Response, para. 5.15.

(c) Discussion

326. For the reasons that follow, the Appeals Chamber finds that Sesay and Kallon fail to show an error in the Trial Chamber's conclusion that senior leaders of the AFRC and RUF acted in concert.[749]

327. Contrary to Sesay's claim, the Trial Judgment is not at all silent on the acts of Johnny Paul Koroma, Eldred Collins or Gibril Massaquoi in the first months of the Junta.[750] Sesay further points to the finding that he and Kallon only attended Supreme Council meetings from August 1997 onwards.[751] However, they were nonetheless both found to have been members of this body with other senior RUF and AFRC members.[752] Moreover, Sesay travelled to Freetown to join the Junta already in the second week of June 1997.[753] The Trial Chamber did not, as asserted by Sesay, ignore the testimony of TF1-371 regarding Sesay's power to vote in the Supreme Council[754] and Sesay fails to explain how its assessment was an error. Whether the Supreme Council controlled the military[755] neither renders unreasonable the findings on the Council's membership nor the finding that it was the highest decision-making body in the Junta regime and the sole executive and legislative authority in Sierra Leone during the Junta period.[756]

328. It is true, as Kallon argues, that the unification of the AFRC's and RUF's military organisations led to conflicts and that orders between the two groups were not always obeyed.[757] Yet, the Trial Chamber found, members of the two groups managed together to control much of Kailahun District,[758] parts of Bo District,[759] and to set up a joint administration in Kenema Town.[760] Kallon does not challenge these findings. Similarly, he refers to the finding that the AFRC received the more senior positions in the Junta government,[761] without accounting for the finding

[749] Trial Judgment, paras 1979, 1990.
[750] Trial Judgment, paras 21, 747-749, 751, 755, 1990.
[751] Trial Judgment, paras 772, 774.
[752] Trial Judgment, paras 755, 1986.
[753] Trial Judgment, paras 772, 1986
[754] Trial Judgment, para. 756.
[755] *See Taylor* Decision on Adjudicated Facts 23 March 2009, para. 48 (taking judicial notice of the following fact, found in the *Brima et al*. Trial Judgment, para. 1656: "The Supreme Council did not have the collective ability to effectively control the military, as the military retained its own distinct chain of command and organisational structure.").
[756] Trial Judgment, paras 754, 755, 1986.
[757] Trial Judgment, para. 763.
[758] Trial Judgment, paras 765, 766.
[759] Trial Judgment, para. 767.
[760] Trial Judgment, para. 769.
[761] Trial Judgment, para. 22.

that the appointments of RUF members to deputy positions were approved by Bockarie and Sesay as part of a proposal to integrate the RUF into the AFRC regime.[762]

329. Kallon also selectively refers to the findings that SAJ Musa withdrew from the JCE in February 1998 and that by September 1997 Bockarie, who had become disillusioned with the RUF's limited role in the government and feared assassination, relocated from Freetown to Kenema.[763] However, he does not mention the findings that the majority of AFRC leaders and troops elected to remain allied with the RUF when SAJ Musa broke away[764] and that Bockarie by radio communication from Kenema ensured that the AFRC/RUF cooperation continued.[765]

330. Kallon's reliance on the findings in paragraph 2067 of the Trial Judgment as to the consequences for the AFRC/RUF alliance of the 14 February 1998 ECOMOG intervention is similarly unavailing.[766] He disregards the findings on subsequent joint AFRC/RUF military action in and control over Kono District under the direction of, *inter alia*, Koroma, Sesay, Superman, Bazzy and Five-Five.[767] The findings on Kallon's own conduct of executing two AFRC soldiers and preventing AFRC muster parades in Kono in April 1998 are immaterial for present purposes as they formed part of the basis on which the Trial Chamber found that the JCE ended.[768] Kallon further fails to explain how the fact that the Trial Chamber was unable to ascertain with certainty the date on which the split between the AFRC and RUF occurred[769] sustain that members of the two groups were not acting in concert.

331. In light of the above, the Appeals Chamber is satisfied that the Trial Chamber's findings on Gbao's lack of communication with the Junta leaders and lack of intent[770] do not render unreasonable the Trial Chamber's finding that senior leaders of the AFRC and RUF acted in concert. Sesay's and Kallon's present challenges to that conclusion are dismissed.

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[762] Trial Judgment, para. 758.
[763] Trial Judgment, paras 792, 793.
[764] Trial Judgment, paras 793-816 (including findings that Koroma, Bazzy and Five-Five remained part of the AFRC/RUF command structure).
[765] Trial Judgment, para. 1989.
[766] Trial Judgment, para. 2067.
[767] Trial Judgment, paras 794-814, 2070.
[768] Trial Judgment, paras 817, 2073.
[769] Trial Judgment, para. 820.
[770] Trial Judgment, paras 775, 2042.

3. Did the leaders of the AFRC and RUF contemplate criminal means to achieve their objective?

332. This section deals with Gbao's claim that the Trial Chamber failed to provide a reasoned opinion for its conclusion that the AFRC and RUF contemplated crimes to achieve its objective and Sesay's related claim that certain crimes could not form part of the Common Criminal Purpose because they were not found to be committed with certain intent. This analysis is confined to an interpretation of the Trial Chamber's findings, assuming that they are factually correct. Where these claims fail, the Appeals Chamber will proceed to address Gbao's and Sesay's factual challenges to the Trial Chamber's conclusion that senior members of the AFRC/RUF contemplated crimes to achieve their objective of controlling the territory of Sierra Leone.

(a) Trial Chamber's findings

333. The Trial Chamber held that the crimes charged under Counts 1 to 14 constituted the criminal means of furthering the Common Criminal Purpose.[771] The crimes to maintain power over the territory of Sierra Leone commenced "soon after the coup in May 1997."[772]

(b) Submissions of the Parties

(i) Sesay Grounds 24 (in part) and 27-33 (in part)

334. Under Ground 24, Sesay submits that there was no concerted action between the AFRC and RUF in furtherance of crime.[773] First, Sesay submits that the actions of the alleged JCE members who were on the Supreme Council[774] show that no common criminal purpose existed in the first months of the Junta.[775]

335. Second, Sesay contends that crimes were not discussed in the Supreme Council (except enslavement in Tongo Field which did not start until August 1997).[776] Moreover, there was no evidence that the terror attacks in Bo in June 1997 were planned by the Supreme Council.[777] Sesay

[771] Trial Judgment, para. 1982. *See* also *supra*, para. 305.
[772] Trial Judgment, para. 1983.
[773] Sesay Appeal, para. 108.
[774] Sesay Appeal, para. 110, *citing* Trial Judgment, paras 755, 1990.
[775] Sesay Appeal, para. 110.
[776] Sesay Appeal, paras 113, 114.
[777] Sesay Appeal, para. 114.

further submits that the finding that the crimes must have been initiated by the Supreme Council is unsupported by evidence.[778]

336. Third, Sesay submits that there was no evidence that the means to suppress opposition were actually conducted at the outset of the Junta period and that they were carried out pursuant to a plan agreed on by the JCE members.[779] According to him, the only crimes of terror and collective punishment between May and August 1997 were the attacks in Bo in June 1997; the first other relevant acts of terror were those in Kenema at Cyborg Pit in August 1997.[780] The findings on the crimes of terror (sexual violence) between May 1997 and February 1998 in Kailahun, he argues, are contradicted by the Trial Chamber's finding that the evidence failed to show acts of terror in Kailahun, which contradiction Sesay argues should be resolved in his favour.[781] Furthermore, as the victims of these alleged acts of terror were captured before the Indictment period, the acts do not evidence a plurality of RUF and AFRC Commanders acting in concert.[782]

337. Fourth, Sesay asserts that Witnesses TF1-371, TF1-045 and TF1-334 testified that the Junta was involved in anti-crime measures and ensuring good governance.[783] Lastly, Sesay argues that the evidence was insufficient to support four specific findings.[784]

338. In various parts of his Grounds 27-33, Sesay further submits that certain crimes could not be part of the Common Criminal Purpose because they were not found to have been committed with intent to (i) take control over Sierra Leone;[785] or (ii) to spread terror or collectively punish.[786]

339. The Prosecution responds that any gap between the point when the AFRC and RUF joined forces and the point when the criminal means started does not constitute an error as the Appellants were convicted only for these criminal means.[787] Sesay offers no additional arguments in reply.

(ii) Gbao Grounds 8(e), 8(g) and 8(h)

[778] Sesay Appeal, para. 108, *quoting* Trial Judgment, para. 2004.
[779] Sesay Appeal, para. 115.
[780] Sesay Appeal, para. 117.
[781] Sesay Appeal, para. 118.
[782] Sesay Appeal, para. 118.
[783] Sesay Appeal, paras 110, 111.
[784] Sesay Appeal, paras 115, 116.
[785] Sesay Appeal, paras 139 (Kenema), 205 (Kono).
[786] Sesay Appeal, para. 125, fn. 314 (Bo), paras 129, 138, 154 (Kenema), 204, 214 (Kono), 227 (Kailahun). *See* also Sesay Reply, para. 65.
[787] Prosecution Response, para. 5.16.

340. Under his Sub-Ground 8(e), Gbao submits that the Trial Chamber provided an insufficiently detailed analysis to conclude that the Common Criminal Purpose involved the commission of crimes.[788] Rather than explaining the relationship between the common goal to control Sierra Leone and the commission of crimes, Gbao avers that the Trial Chamber "merely stat[ed]" that the Junta intended crimes to be committed to reach their goal.[789] In particular, he argues that the Trial Chamber did not explain why "resorting to arms to secure a total redemption and using them to topple a government which the RUF characterized as corrupt necessarily implies the resolve and determination to … commit the crimes" charged.[790] According to Gbao, the Trial Chamber appeared to find that, as the AFRC/RUF aimed at taking control over Sierra Leone and as their members committed crimes, all members of the RUF must have intended to commit crimes to achieve that aim.[791] He also asserts that the conclusion that the AFRC/RUF intended to use violent means against the civilian population was not the only reasonable inference the Trial Chamber may have drawn.[792]

341. Under his consolidated[793] Sub-Grounds 8(g) and 8(h), Gbao submits that the Trial Chamber erred in failing to explain why the alleged criminal acts committed by the AFRC/RUF served as a means to further their alleged goal of taking and maintaining power of Sierra Leone, and why the AFRC/RUF intended the crimes to further the Common Criminal Purpose.[794] Gbao argues that the Trial Chamber's analysis, in "two paragraphs" of the Trial Judgment which simply listed the crimes and found them to constitute means to achieve the Common Criminal Purpose, stands in stark contrast to the detailed examination of the same issue in three ICTY judgments.[795] Gbao further submits that the Trial Chamber 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 a means to achieve their objective."[796]

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[788] Gbao Notice of Appeal, para. 41; Gbao Appeal, paras 76-87, *citing* Trial Judgment, paras 1980, 1981, 2016, 2019, 2020.
[789] Gbao Appeal, paras 80, 82.
[790] Gbao Appeal, para. 80, *quoting* Trial Judgment, para. 2016.
[791] Gbao Appeal, para. 84.
[792] Gbao Appeal, para. 78.
[793] Gbao Appeal, fn. 112.
[794] Gbao Notice of Appeal, para. 45; Gbao Appeal, paras 96, 99, 100, 102.2.
[795] Gbao Appeal, paras 101, 102, *citing Martić* Trial Judgment, paras 442, 443, 445; *Krajišnik* Trial Judgment, paras 1089-1119; *Milutinović et al.* Trial Judgment, Vol. III, paras 21-88.
[796] Gbao Appeal, para. 102.2.

342. The Prosecution responds that there is little to distinguish the Trial Chamber's overall approach from that taken in *Martić*.[797] Gbao makes no additional submissions in reply.

(c) Discussion

(i) Did the Trial Chamber fail to explain how the Common Criminal Purpose involved crimes?

343. Gbao's key argument—under both Ground 8(e) and consolidated Grounds 8(g)/(h)—is that the Trial Chamber failed to provide a sufficiently reasoned opinion for its conclusion that the Common Criminal Purpose involved the commission of the crimes charged. Sesay's submission under his Ground 24 that certain crimes could not form part of the Common Criminal Purpose because the Trial Chamber found that they were not committed with the intent to take control of Sierra Leone or to terrorise and collectively punish civilians similarly turns on the Trial Chamber's own reasoning.

344. The fair trial requirements of the Statute include the right of the accused to a reasoned opinion by the Trial Chamber under Article 18 of the Statute and Rule 88(C) of the Rules. The Appeals Chamber finds the well-established jurisprudence of the ICTY and ICTR which interpret their identical provisions[798] persuasive as to the law in this regard.[799] As recently held by the ICTY Appeals Chamber:

> A reasoned opinion ensures that the accused can exercise his or her right of appeal and that the Appeals Chamber can carry out its statutory duty under Article 25 to review these appeals. The reasoned opinion requirement, however, relates to a Trial Chamber's Judgment rather than to each and every submission made at trial.[800]

345. As a general rule, a Trial Chamber is required only to make findings on those facts which are "essential to the determination of guilt in relation to a particular Count";[801] it "is not required to

[797] Prosecution Response, para. 5.10.
[798] Article 23 of the ICTY Statute; Article 22 of the ICTR Statute; Rule 98*ter*(C) of the Rules of Procedure and Evidence of the ICTY; Rule 88(C) of the Rules of Procedure and Evidence of the ICTR.
[799] *See* Article 20(3) of the Statute.
[800] *Krajišnik* Appeal Judgment, para. 139, *quoting Limaj et al.* Appeal Judgment, para. 81 [references omitted]. *See* also *Hadžihasanović and Kubura* Appeal Judgment, para. 13; *Naletilić and Martinović* Appeal Judgment, para. 603; *Kvočka et al.* Appeal Judgment, paras 23 and 288.
[801] *Brima et al*. Appeal Judgment, para. 268; *Krajišnik* Appeal Judgment, para. 139; *Hadžihasanović and Kubura* Appeal Judgment, para. 13.

articulate every step of its reasoning for each particular finding it makes"[802] nor is it "required to set out in detail why it accepted or rejected a particular testimony."[803] However, the requirements to be met by the Trial Chamber may be higher in certain cases.[804] It is "necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision."[805]

346. Turning to the present case, the Appeals Chamber considers at the outset that Gbao's comparison between the length of parts of the Trial Judgment and the corresponding parts of other trial judgments in different cases is unhelpful,[806] as "general observations on the length of the Trial Judgment, or of particular parts of the Trial Judgment, usually do not suffice to show an error of law because of a lack of reasoned opinion."[807]

347. The Appeals Chamber is not persuaded that the findings now at issue fall short of this threshold. Contrary to Gbao's claim, the Trial Chamber did not "merely state" that the Junta intended crimes to reach its objective without reference to any "explicit or implicit agreement" nor did it fail to consider whether the crimes were simply "committed in the midst of the conflict."[808] In particular, the Trial Chamber specified what the criminal means of the JCE were, and how they actually furthered the AFRC/RUF's objective of controlling the territory of Sierra Leone. The "spread of extreme fear"—that is, acts of terrorism—was intended to "subdue the civilian population in order to exercise power and control over captured territory."[809] These acts included unlawful killings, sexual violence and physical violence.[810] Collective punishments were employed to subdue the civilian population to the same end.[811] Recruitment of child soldiers served to re-enforce the AFRC/RUF military forces in order to assist in specific military operations.[812] Enslavement of civilians was perpetrated to perform farming, logistical chores or diamond

[802] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 18. *See* also *Brđanin* Appeal Judgment, para. 39.
[803] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 20.
[804] *Krajišnik* Appeal Judgment, para. 139; *Kvočka et al.* Appeal Judgment, para. 24.
[805] *Krajišnik* Appeal Judgment, para. 139; *Kvočka et al.* Appeal Judgment, para. 25 [reference omitted]. *See* also *Halilović* Appeal Judgment, para. 7; *Brđanin* Appeal Judgment, para. 9.
[806] Gbao Appeal, paras 101, 102.
[807] *Krajišnik* Appeal Judgment, para. 134; *Kvočka et al.* Appeal Judgment, para. 25.
[808] Gbao Appeal, paras 80, 82, 102.1, 102.2; Trial Judgment, paras 257, 1980, 1981.
[809] Trial Judgment, para. 1981.
[810] Trial Judgment, para. 1982.
[811] Trial Judgment, paras 1981, 1982.
[812] Trial Judgment, para. 1982.

mining.[813] Pillage served as compensation to satisfy the fighters and ensure their willingness to fight.[814]

348. Sesay submits that some of these crimes could not be part of the Common Criminal Purpose because they were not found to have been committed with intent to (i) take control over Sierra Leone;[815] or (ii) to spread terror or collectively punish.[816] His first argument fails, because the Trial Chamber found that the JCE participants, in particular Sesay,[817] contemplated all the crimes charged under Counts 1 to 14 as the means to achieve the objective of gaining and exercising political power and control over the territory of Sierra Leone, in particular the diamond mining areas.[818] It was not required that the persons who perpetrated the crimes shared the same intent.[819] Sesay's second argument is wrong insofar as it states that the means to achieve the objective were limited to acts of terrorism and collective punishment (Counts 1 and 2).[820] As explained, the means also included the crimes charged under Counts 3 to 14. In this regard, the Appeals Chamber notes that the Trial Chamber did not explicitly find that those acts of unlawful killing (Counts 3 to 5), sexual violence (Counts 6 to 9) and physical violence (Counts 10 and 11) which did not amount to terrorism were also means to achieve the objective of controlling the territory of Sierra Leone. However, it is evident that these acts were also found to be means to that end, given the Trial Chamber's conclusion that "the crimes charged under Counts 1 to 14 were within the [JCE] and intended to further the common purpose."[821]

349. Gbao posits that the Trial Chamber equated JCE liability with collective responsibility because it found, without explanation, that all members of the RUF must have intended to commit the above crimes to control Sierra Leone.[822] This contention is not true.[823] The Appeals Chamber therefore need not consider Gbao's argument that the Majority's holding, made in respect of his

[813] Trial Judgment, para. 1982.
[814] Trial Judgment, para. 1982.
[815] Sesay Appeal, paras 139 (Kenema), 205 (Kono). *See* Prosecution Response, para. 5.9.
[816] Sesay Appeal, fn. 314 (Bo), paras 129, 138, 154 (Kenema), 204, 214 (Kono), 227 (Kailahun). *See* also *ibid*., para. 191; Sesay Reply, para. 65.
[817] Trial Judgment, paras 2002, 2056, 2092, 2163.
[818] Trial Judgment, para. 1982, 1985.
[819] *Brđanin* Appeal Judgment, para. 410, endorsed *infra* 398-400.
[820] Trial Judgment, para. 1982.
[821] Trial Judgment, para. 1982.
[822] Gbao Appeal, paras 84, 85.
[823] Trial Judgment, para. 1992.

participation in the JCE, that "resorting to arms to secure a total redemption … necessarily implies the resolve and determination to … commit the crimes" charged was insufficiently reasoned.[824]

350. The Appeals Chamber finds that the Trial Chamber provided a sufficiently reasoned opinion for its conclusion that the Common Criminal Purpose involved the commission of the crimes charged. Sesay's Ground 24 and Gbao's Grounds 8(e) and 8(g)/(h) are dismissed in present parts.

(ii) Did the Trial Chamber err in concluding that the Common Criminal Purpose involved crimes?

351. Sesay essentially makes four submissions to argue that the Trial Chamber erred in finding that the AFRC/RUF Common Criminal Purpose involved crimes.[825]

352. First, Sesay challenges three specific findings of the Trial Chamber, namely, that (i) the strategy of the Junta from its establishment was "to maintain its power over Sierra Leone and to subject the civilian population to AFRC/RUF rule by violent means;"[826] (ii) the "AFRC/RUF forces cooperated on armed operations in which crimes against civilians were committed";[827] and (iii) "these operations demonstrate that the Junta intended, through wholly disproportionate means, to suppress all opposition to their regime."[828] Sesay submits that the sources cited by the Trial Chamber in support—Exhibit 181,[829] the testimony of George Johnson, and its previous findings concerning "Operation Pay Yourself" and the re-mobilisation to Sierra Leone of AFRC troops—constitute an insufficient basis for these findings.[830] The Appeals Chamber notes that the cited part of George Johnson's testimony does not directly sustain the entirety of the three impugned findings because it is confined to the identity of the participants in the May 1997 coup.[831] The findings regarding "Operation Pay Yourself" and the mobilisation of AFRC troops concern events following the Intervention in February 1998,[832] which took place almost nine months after the date the Trial

[824] Gbao Appeal, para. 80, *citing* Trial Judgment, para. 2016.
[825] Trial Judgment, paras 1980-1985.
[826] Trial Judgment, para. 1980.
[827] Trial Judgment, para. 1980.
[828] Trial Judgment, para. 1981.
[829] Exhibit 181 is a document prepared by the organisation No Peace Without Justice, entitled "Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law from 1991 to 2002," dated 10 March 2004.
[830] Sesay Appeal, para. 115.
[831] Transcript, George Johnson, 14 October 2004, pp. 23, 24.
[832] Trial Judgment, paras 782-786, 1400, 1401.

Chamber found that the JCE came into existence.[833] As such, they also provide limited support for the impugned findings.

353. Notwithstanding the above, the Appeals Chamber is not satisfied that a miscarriage of justice resulted. It was still open to the Trial Chamber to arrive at the three impugned findings on the basis of the evidence as a whole. The Trial Chamber considered that Exhibit 181, the credibility of which Sesay does not challenge as such,[834] showed that the "AFRC/RUF soon began suppressing political dissent" in Freetown including torturing, killing or detaining demonstrators and journalists.[835] Also, the Trial Chamber found the existence of a "joint AFRC/RUF campaign to strengthen their 'government' through brutal suppression of perceived opposition by killing and beating civilians"[836] and a "concerted campaign against civilians" by AFRC/RUF rebels.[837] Furthermore, the vast majority of the perpetrators of the crimes found to have been committed were "AFRC/RUF" fighters.[838] Sesay's present submissions do not address these findings.[839]

354. Second, Sesay submits that the Trial Chamber erred in finding that the Supreme Council was involved in crimes.[840] In support, he refers to selected findings on particular law-abiding conduct of certain Supreme Council members.[841] The Appeals Chamber considers that the Trial Chamber's findings that these individuals acted legally in some respects do not necessarily render unreasonable the Trial Chamber's findings that they acted illegally in others. First, that Kallon's participation in concerted joint action between the AFRC and RUF (including his cooperation with the AFRC at Teko Barracks in Bo District) "did not directly involve the commission of crimes" is legally irrelevant to and does not detract from his contribution to the JCE, which he lent both through his involvement in the Supreme Council and through direct involvement in other crimes.[842] Second, Isaac Mongor's position in the Junta Government of being responsible for preventing looting in Freetown[843] does not contradict his membership in the Supreme Council[844] nor does it

[833] *See* Trial Judgment, paras 1979-1985.
[834] *See* Sesay Appeal, para. 115.
[835] Trial Judgment, fn. 3707.
[836] Trial Judgment, para. 946.
[837] Trial Judgment, para. 956.
[838] Trial Judgment, paras 1974, 1975, 2050, 2063, 2064.
[839] *See* also Sesay Appeal, para. 116.
[840] Trial Judgment, paras 1997, 2004.
[841] Sesay Appeal, paras 108, 110.
[842] *Krajišnik* Appeal Judgment, para. 695; Trial Judgment, paras 2004-2007.
[843] Trial Judgment, para. 759.
[844] Trial Judgment, para. 755.

render unreasonable the inference that the Supreme Council initiated crimes.[845] Third, given that SAJ Musa was also a member of the Supreme Council,[846] it is not determinative for present purposes whether the forced mining, for which he was responsible in the Junta government,[847] commenced in August 1997.

355. Sesay also disputes that the Supreme Council itself was involved in crime. The Appeals Chamber notes that, while the Supreme Council "discussed … the security of the Junta; revenue generation; the resolution of conflicts between the AFRC and the RUF; and harassment of civilians,"[848] the Trial Chamber also inferred from the "widespread and systematic nature of the crimes, in particular the attacks on Bo and the forced labour in Kenema District" that such conduct "was a deliberate policy of the ARFC/RUF" that must have been "initiated by the Supreme Council."[849] Contrary to Sesay's claim,[850] the basis for that inference was sufficiently supported by evidence.[851]

356. Indeed, Sesay himself recognises the finding that the Supreme Council was involved in the planning and organisation of the enslavement at Tongo Fields in Kenema from August 1997. However, he argues, the only crimes committed before that point in time were the terror attacks in Bo in June 1997, and so there were no crimes on the basis of which the Trial Chamber could infer the existence of a JCE.[852] However, although the enslavement at Tongo Fields commenced in August 1997,[853] it is evident from the Trial Chamber's findings that the "planned and … systematic policy of the Junta" which devised the large scale enslavement and implemented it "pursuant to a centralised system" must have started much earlier.[854] Indeed, "[w]ithin a week of the coup of

[845] Trial Judgment, para. 2004.
[846] Trial Judgment, para. 755.
[847] Trial Judgment, para. 760.
[848] Trial Judgment, para. 756. Sesay's argument, in a footnote in his Appeal, that the Trial Chamber "inadvertently" failed to mention that the Supreme Council was also involved in "the prevention of" looting and harassment fails to explain why the Trial Chamber's omission was unintended based on all the evidence it relied on, which Sesay does not address. Sesay Appeal, fn. 279; Trial Judgment, para. 756, fn. 1452.
[849] Trial Judgment, para. 2004.
[850] Sesay Appeal, paras 110, 114.
[851] *E.g.* Trial Judgment, paras 754 (the Supreme Council "was the highest decision-making body in the Junta regime and the sole *de facto* executive and legislative authority within Sierra Leone during the Junta period"), 993-1005, 1006-1009, 1010-1014, 1984 (June 1997 attacks in Bo), 1088-1095 (forced mining in Kenema).
[852] Sesay Appeal, paras 113, 117, *citing* Trial Judgment, para. 1997. Appeal transcript, 2 September 2009, pp. 26, 27. Sesay's challenges to the link between the Bo attacks and the Junta have been dismissed elsewhere. *See infra*, paras 360-369.
[853] Trial Judgment, paras 1089, 2051.
[854] Trial Judgment, paras 1089, 1997.

25 May 1997, RUF rebels and the military Junta were in full control of" Kenema Town.[855] Moreover, whether or not it amounted to acts of terrorism,[856] sexual violence in Kailahun was a means to achieve the AFRC/RUF objective throughout the Junta period.[857] The fact that the victims of the forced marriages were initially captured before the Indictment period does not detract from the finding that these crimes were "for the benefit … of the Junta" throughout their continuous commission.[858]

357. Third, Sesay invokes parts of the testimonies of TF1-371, TF1-045 and TF1-334 to argue that the Junta was involved in anti-crime measures and good governance.[859] The Appeals Chamber recalls that evidence indicating that the members of the Junta acted within the law in some respects does not necessarily render unreasonable the Trial Chamber's findings that they acted illegally in others. The Appeals Chamber is not satisfied that the evidence Sesay invokes renders unreasonable the Trial Chamber's conclusion that the AFRC/RUF alliance involved crimes.[860] In relevant parts,[861] TF1-371 testified that Johnny Paul Koroma sought to impose decrees preventing raping, looting and harassment of civilians, but also that "obviously" not everyone obeyed them.[862] TF1-371 further stated that Koroma had some SLA soldiers executed for murder and robbery,[863] but this was in order to stop the negative international publicity resulting from the particular incident when the Iranian Embassy was looted.[864] The relevant parts of TF1-334's testimony concern the witness's knowledge of the investigation of a specific fight between two police officers.[865] TF1-045 testified in cross-examination that two Supreme Council meetings gave "piece of advice" that commanders should control their men so as to stop harassment of civilians, which the commanders present agreed on, and that the witness heard that the Supreme Council set up nightly security patrols in Freetown to stop looting and harassment.[866] However, this hearsay evidence only refers to "piece of advice" by the Supreme Council, limits the security patrols to Freetown, and does not speak to their

[855] Trial Judgment, para. 1043.
[856] *See supra*, para. 348; Sesay Appeal, para. 118.
[857] Trial Judgment, paras 2156 (section 5.1.2), 2158, 2159.
[858] Trial Judgment, para. 2159. *See infra*, paras 860-861.
[859] Sesay Appeal, paras 110, 111, *citing* Transcript, TF1-371, 1 August 2006, p. 30; Transcript, TF1-371, 28 July 2006, pp. 56-61; Transcipt, TF1-045, 22 November 2005, pp. 84-86; Transcript, TF1-334, 16 May 2005, pp. 57-59, 75-77.
[860] Trial Judgment, paras 1980-1985.
[861] Transcript, TF1-371, 1 August 2006, p. 30 (closed session). This reference is irrelevant to the present issue.
[862] Transcript, TF1-371, 28 July 2006, pp. 58, 59 (closed session).
[863] Transcript, TF1-371, 28 July 2006, p. 60 (closed session).
[864] *See* Trial Judgment, para. 773; Transcript, TF1-371, 28 July 2006, pp. 56, 60 (closed session).
[865] Transcipt, TF1-334, 16 May 2005, pp. 53, 58, 59 (closed session). Transcipt, TF1-334, 16 May 2005, pp. 75-77 (closed session) are irrelevant to the present issue.
[866] Transcript, TF1-045, 22 November 2005, pp. 84-86.

efficiency. As such, it does not show an error in the Trial Chamber's reliance on TF1-045's testimony-in-chief to find that the Supreme Council merely "discussed" the harassment of civilians.[867] In any event, Sesay does not address the other evidence the Trial Chamber relied on to make that finding.

358. For the foregoing reasons, the Appeals Chamber finds that the above parts of Sesay's Ground 24 fail to show an error in the Trial Chamber's finding that the AFRC/RUF Common Criminal Purpose involved crimes.

359. Turning to the errors of fact alleged by Gbao, the Appeals Chamber notes that his argument that no evidence was adduced as to the relationship between the AFRC/RUF's ultimate goal and the crimes committed is based on his erroneous position that the Trial Chamber failed to provide a sufficient reasoning regarding that relationship.[868] As such it is unfounded and dismissed. The Appeals Chamber similarly dismisses Gbao's bare assertion that the Trial Chamber failed to provide evidence in support of its finding that senior members of the AFRC and RUF intended to use violent means against the civilian population.[869] As already noted in relation to Sesay's challenge to the same finding, the Trial Chamber did not err in making this finding.[870]

4. Did the Trial Chamber err in finding that the crimes committed were means to achieve the objective?

360. In this section, the Appeals Chamber will consider Sesay's related claims that the Trial Chamber erred in finding that the crimes committed were in furtherance of the Common Criminal Purpose. For each District where the Trial Chamber found crimes were committed in furtherance of the Common Criminal Purpose, Sesay submits various arguments challenging that conclusion.

(a) Bo District

(i) Trial Chamber's findings

361. The Trial Chamber found that the Common Criminal Purpose of the JCE was furthered in Bo District through (i) forced mining activity; (ii) the use by the AFRC and RUF of the levers of

[867] Trial Judgment, para. 756, fn. 1452.
[868] Gbao Appeal, para. 86.
[869] Gbao Appeal, para. 78.
[870] *See supra,* para. 353.





State power in an attempt to destroy any support within the civilian population for the Kamajors; and (iii) attacks in June 1997 on Tikonko, Sembehun and Gerihun.[871]

(ii) Submissions of the Parties (Sesay Ground 26)

362. Under his Ground 26 as presented in his Appeal Brief, Sesay challenges the Trial Chamber's findings on the means found to have been employed to further the JCE in Bo District. First, he submits that, as the mining did not start until August 1997, it could not have furthered the Common Criminal Purpose in Bo.[872] Second, Sesay argues, the finding that "[t]he AFRC and RUF used the levers of State power in an attempt to destroy any support within the civilian population for the Kamajors" is "meaningless" without linking it to the crimes in Bo, and his own alleged use of State levers in Kenema in October 1997 is irrelevant.[873] Third, Sesay contends that there are no findings on whether or how anyone but the immediate participants had planned or organised the attacks on Tikonko, Sembehun and Gerihun, and no evidence that the plurality of the alleged JCE had planned them.[874] To the contrary, TF1-054's testimony, disregarded by the Trial Chamber, raised the inference that a delegation sent to Gerihun to talk the residents into joining the Junta was responsible for the attack which occurred after their invitation to join the Junta was declined.[875] In addition, Sesay avers that the Trial Chamber erred in finding that Bockarie, who was found to have led the attack on Sembehun, acted in pursuance of a common plan.[876]

363. The Prosecution responds that the Trial Chamber reasonably assessed the evidence and carefully assessed the role of Bockarie, Sesay and other senior RUF members in these crimes as participants in the JCE.[877] Sesay replies that the Prosecution fails to provide any rebuttal.[878]

(iii) Discussion

364. The forced mining found by the Trial Chamber to have furthered the Common Criminal Purpose in Bo District consisted of the alluvial diamond mining in Kenema and Kono Districts.[879] Sesay does not dispute that this activity, once it commenced, did further the Common Criminal

[871] Trial Judgment, para. 1984.
[872] Sesay Appeal, para. 121, *citing* Trial Judgment, paras 1094, 1974, 1975, 1984.
[873] Sesay Appeal, para. 121.
[874] Sesay Appeal, para. 124.
[875] Sesay Appeal, para. 124, *citing* Transcript, TF1-054, 8 December 2005, pp. 23-27.
[876] Sesay Appeal, para. 125.
[877] Prosecution Response, para. 5.33, *citing* Trial Judgment, paras 1982-2002.
[878] Sesay Reply, para. 56.
[879] Trial Judgment, para. 1984(i), *citing ibid*., para. 1088.

Purpose in Bo. His position is that it could not have done so before August 1997. However, the Trial Chamber did not find otherwise. In particular, no conviction was entered against Sesay based on these forced mining activities before August 1997.[880] On its own, the finding that diamond mining in Tongo Field in Kenema District did not commence until August 1997 does not render unreasonable the Trial Chamber's conclusion that the JCE included Kenema District from the inception of the JCE.[881] Sesay thus fails to show an error.

365. The Trial Chamber did not expressly link its finding regarding the AFRC/RUF's use of "the levers of State power" to any particular attempt to destroy civilian support for the Kamajors in Bo District.[882] Yet Sesay's present argument neither disputes the veracity of this finding nor does he explain how the alleged fact that it is "meaningless" constitutes an error leading to a miscarriage of justice.[883] His argument is therefore rejected.

366. Turning to the attacks on Tikonko, Sembehun and Gerihun in June 1997, the Appeals Chamber notes that the Trial Chamber did not explicitly find that they were planned by members of the JCE. However, the basis on which the Trial Chamber found that crimes committed during these attacks were committed in furtherance of the Common Criminal Purpose is clear from other parts of the Trial Judgment, for instance, the following finding:

> The temporal and geographic proximity of the various attacks [including those on Tikonko, Sembehun and Gerihun], and their similar *modus operandi*, with civilians raped and killed, houses razed to the ground and property looted, establishes that these were not isolated incidents but rather a central feature of a concerted campaign against civilians.[884]

367. Although made in relation to the *chapeau* requirements of crimes against humanity, these findings are equally important to the Trial Chamber's findings regarding the JCE. Indeed, in those latter findings, it held that "the conduct of [AFRC/RUF joint] operations demonstrates that the Junta intended, through wholly disproportionate means, to suppress all opposition to their regime"[885] and that the "widespread and systematic nature of the crimes, in particular the attacks on Bo and the forced labour in Kenema District, in which the RUF was engaged indicate that such conduct was a deliberate policy of the AFRC/RUF."[886] Moreover, "the AFRC/RUF alliance intended through the

[880] *See* Trial Judgment, paras 2051, 2063 (section 4.1.1.4).
[881] *See* Trial Judgment, para. 2054.
[882] *See* Trial Judgment, para. 1984(i).
[883] Sesay Appeal, para. 121.
[884] Trial Judgment, para. 956.
[885] Trial Judgment, para. 1981.
[886] Trial Judgment, para. 2004.

spread of extreme fear … to dominate and subdue the civilian population in order to exercise power and control over captured territory."[887] The attacks on Tikonko, Sembehun and Gerihun in June 1997, all of which included acts intended to spread extreme fear among the civilian population,[888] fall squarely within this finding. The parts of Witness TF1-054's testimony Sesay invokes for his claim to the contrary neither support his allegation that a delegation was sent to Gerihun before the attack,[889] nor render unreasonable the Trial Chamber's reliance on other parts of TF1-054's testimony for its findings on this attack.[890]

368. In addition, the Trial Chamber found that Bockarie, himself a JCE member,[891] led the attack on Sembehun.[892] Sesay's assertion that Bockarie acted on his own volition in this regard is unpersuasive.[893] First, while claiming an absence of findings on Bockarie's interaction with other JCE members at this time, Sesay fails to account for the Trial Chamber's holdings that it was Bockarie who instructed Superman to move with his troops to Freetown after Sankoh's public order to unite with the AFRC after the coup[894] and that Bockarie became a member of the Supreme Council, the highest decision-making body in the Junta regime.[895] Second, Sesay refers to TF1-008's testimony that Bockarie "said that he was the one who has captured this place, that this place was under his control."[896] Simply citing this evidence, Sesay fails to show how the Trial Chamber's assessment thereof was erroneous,[897] in particular given that Bockarie when entering Sembehun "identified himself as a member of the RUF."[898] Third, the fact that Bockarie pillaged Le 800,000 in Sembehun[899] supports rather than refutes that such conduct was contemplated as a means by the JCE members to further the Common Criminal Purpose.[900] Bockarie himself being a JCE member, it is not determinative whether the money stayed with him. Lastly, because pillage (Count 14) constituted a means to further the Common Criminal Purpose notwithstanding whether it amounted to terrorism, Sesay's argument that this incident fell beyond the Common Criminal Purpose fails.

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[887] Trial Judgment, para. 1981.
[888] Trial Judgment, para. 1037. *See* Trial Judgment, para. 117; *Fofana and Kondewa* Appeal Judgment, para. 352.
[889] Transcript, TF1-054, 8 December 2005, pp. 23-27.
[890] Trial Judgment, paras 1011-1014.
[891] Trial Judgment, para. 1990.
[892] Trial Judgment, paras 1006.
[893] Sesay Appeal, paras 124, 125.
[894] Trial Judgment, paras 748, 751.
[895] Trial Judgment, para. 755.
[896] Transcript, TF1-008, 8 December 2005, p. 36.
[897] Trial Judgment, fns 1966, 1968.
[898] Trial Judgment, para. 1006.
[899] Trial Judgment, paras 1007, 1029.
[900] *See* Trial Judgment, para. 956.

369. The Appeals Chamber therefore finds that Sesay's Ground 26 fails to demonstrate an error in the Trial Chamber's findings on the means employed to achieve the objective of the JCE in Bo District. Sesay's Ground 26 is dismissed in its entirety.

(b) Kenema District

(i) Trial Chamber's findings

370. The Trial Chamber found that acts of unlawful killings, physical violence and enslavement were committed in Kenema District, some of which amounted to terror and collective punishment.[901] It found that these crimes fell within time period of the Junta and that the common plan and plurality of person remained the same.[902]

(ii) Submissions of the Parties (Sesay Grounds 27-32 (in part))

371. Under parts of Grounds 27-32 as set out in his Appeal Brief, Sesay brings essentially three challenges to the Trial Chamber findings on the criminal means to further to Common Criminal Purpose in Kenema.

372. First, Sesay submits that no criminal purpose existed in Kenema District between 25 May 1997 and 11 August 1997, because the only crime found to have been committed there in that period was the killing of Bonnie Wailer and his accomplices.[903] He also avers that no criminal purpose which encompassed Kenema Town existed between 25 May 1997 and late January 1998, because only two crimes were found to have occurred in Kenema Town during that period.[904] Second, Sesay submits that the Trial Chamber erred in concluding that "Bockarie's actions in Kenema Town" were in pursuance of a criminal plan shared by any AFRC-JCE member.[905] According to Sesay, Bockarie operated his own regime, and no evidence supported the finding that his relocation to Kenema did not impact on the Common Criminal Purpose.[906] Third, Sesay submits that the operations at Tongo Field do not show the existence of a common criminal purpose, because the "government" mining was not designed and executed jointly by the AFRC *and* RUF.[907]

[901] Trial Judgment, paras 2050, 2051.
[902] Trial Judgment, para. 2054.
[903] Sesay Appeal, para. 129, *citing* Trial Judgment, paras 1061-1063. *See* also Sesay Appeal, para. 192.
[904] Sesay Appeal, para. 130, *citing* Trial Judgment, paras 1048, 1061. *See* also Sesay Appeal, para. 192.
[905] Sesay Appeal, para. 131. *See* also *ibid*., para. 190.
[906] Sesay Appeal, para. 131, *citing* Trial Judgment, para. 1989.
[907] Sesay Appeal, para. 135.

373. The Prosecution responds that there was a joint AFRC/RUF administration in Kenema Town within a week of the coup, where Bockarie lived and had radio communication with RUF forces around the country to ensure continued co-operation.[908] Sesay offers no additional arguments in reply.

(iii) Discussion

a. Did a low number of crimes committed in Kenema negate the JCE's existence there?

374. In his first argument, Sesay essentially submits that the low number of crimes committed in furtherance of the Common Criminal Purpose in Kenema District between 25 May 1997 and 11 August 1997 and in Kenema Town between 25 May 1997 and late January 1998 negates the existence of a JCE covering these areas.[909]

375. The Appeals Chamber notes that the Trial Chamber could not determine the specific dates of each crime committed in Kenema Town during the Junta period.[910] It therefore remains unclear whether Sesay is correct that a low number of crimes were committed in Kenema from the onset of the Junta on 25 May 1997 until the commencement of the forced mining activities in August 1997. However, even assuming that Sesay is correct in that regard, the Appeals Chamber is not persuaded that this renders unreasonable the Trial Chamber's finding that a JCE existed which encompassed "the territory of Sierra Leone", *i.e.* also Kenema District.[911] While evidence of the number of crimes committed in a certain area may be relevant to the assessment of whether a JCE existed, it is not determinative thereof. The Trial Chamber was entitled to consider, as it did, factors such as the geographic proximity of various crimes, including those in Kenema, their similar *modus operandi*[912] and their widespread and systematic nature[913] in its assessment of that question. Sesay's present submission does not challenge this assessment. In addition, the Appeals Chamber recalls that although the forced mining in Tongo Fields did not commence until August 1997,[914] it is clear from the Trial Chamber's findings that the planned and systematic policy of the Junta and

[908] Prosecution Response, para. 7.34, *citing* Trial Judgment, paras 1987, 1989.
[909] Sesay Appeal, paras 129, 130.
[910] Trial Judgment, para. 1045.
[911] Trial Judgment, para. 1985.
[912] Trial Judgment, paras 956, 1981.
[913] Trial Judgment, para. 2004.
[914] Trial Judgment, paras 1118, 1121.

the centralised system pursuant to which this large scale enslavement was implemented must have been devised much earlier.[915] Indeed, "[w]ithin a week of the coup of 25 May 1997, RUF rebels and the military Junta were in full control of" Kenema Town.[916]

376. The Appeals Chamber therefore finds that Sesay fails to demonstrate that no reasonable trier of fact could have found that the JCE extended to Kenema District from the onset of the Junta.

b. Did Bockarie act in furtherance of the Common Criminal Purpose in Kenema?

377. Sesay argues that "Bockarie's actions in Kenema Town" were erroneously found to be in pursuance of the Common Criminal Purpose.[917] Sesay's submission primarily concerns the period of time after early September 1997, when Bockarie left Freetown for Kenema.[918]

378. The Appeals Chamber notes that, contrary to Sesay's assertion,[919] the finding that Bockarie's relocation from Freetown to Kenema did not impact on the Common Criminal Purpose and that the cooperation between the leadership continued, was supported by evidence.[920] While Sesay argues that the Trial Chamber "downplayed" the evidence concerning Bockarie's departure, in support he merely restates evidence already assessed by the Trial Chamber without explaining why such assessment was unreasonable.[921] Sesay invokes[922] evidence suggesting that Bockarie became an "outlaw," refused to take orders from Koroma[923] and, due to his dissatisfaction with the AFRC, felt that the RUF should withdraw from Freetown.[924] However, he fails to acknowledge that the same evidence also shows that the AFRC and RUF "fought together on all the battlefronts until [they] pulled out of Freetown"[925] and that the RUF remained in Freetown until February 1998.[926]

379. This evidence therefore does not render unreasonable the Trial Chamber's balanced conclusion that, even though Bockarie was "disillusioned with the RUF's limited role in the AFRC government" and left for Kenema, and even though "this strained the relationship between the two

[915] *See supra*, para. 356; *see* also Trial Judgment, paras 1089, 1997.
[916] Trial Judgment, para. 1043.
[917] Sesay Appeal, para. 131.
[918] *See* Trial Judgment, para. 764.
[919] Sesay Appeal, para. 131.
[920] Trial Judgment, fns 3722-3725.
[921] Sesay Appeal, para. 132; Trial Judgment, fns 1467, 1468.
[922] Sesay Appeal, para. 133.
[923] Transcript, George Johnson, 18 October 2005, p. 109.
[924] Transcript, TF1-071, 19 January 2005, p. 23.
[925] Transcript, George Johnson, 18 October 2005, p. 112.

factions," the cooperation between the ARFC and RUF leadership continued.[927] As to Bockarie's own continued cooperation with members of the JCE, the Trial Chamber found that he was involved in the diamond mining in Tongo Field in Kenema, where the AFRC/RUF Secretariat, headed by Gullit and Sergeant Junior, reported directly to him.[928] Gullit was SAJ Musa's representative at the mines.[929] The proceeds from the diamonds, one of the AFRC/RUF regime's major sources of income, were delivered to Bockarie.[930] Sesay's challenges to these findings have been dismissed elsewhere.[931] His additional reference to temporally unspecific and vague evidence that "things were going beyond control" as a result of unequal weapons distribution between the AFRC and RUF fails to support his claim that Bockarie withdrew cooperation with the AFRC for that reason.[932]

380. Sesay refers to evidence that the AFRC and RUF kept separate command structures in Kenema.[933] This evidence, which was cited by the Trial Chamber in its analysis of the AFRC/RUF organisation in Kenema,[934] does not detract from the finding that the two groups collaborated in Kenema.[935] Moreover, in none of these arguments does Sesay juxtapose the evidence he invokes with the evidence the Trial Chamber relied on, or otherwise attempt to demonstrate why the Trial Chamber could not reasonably have preferred the latter evidence over that which he proffers.

381. Sesay challenges the finding that "Bockarie communicated over radio with RUF forces throughout the country and ensured that the AFRC/RUF cooperation continued."[936] Sesay's assertions that this communication was limited to the RUF and that the AFRC and RUF had separate radio systems, even if accepted, do not make it unreasonable to conclude that Bockarie, using the available channels of radio communication, ensured that the cooperation between the two groups continued. Indeed, the Trial Chamber found that Sesay, himself a member of the Supreme Council together with leaders of the AFRC, received orders from Bockarie over the radio after Bockarie's departure.[937] Sesay further invokes evidence suggesting that Bockarie ordered the RUF

[926] Transcript, TF1-071, 19 January 2005, p. 24.
[927] Trial Judgment, paras 764, 1989.
[928] Trial Judgment, paras 771, 1090.
[929] Trial Judgment, para. 1088.
[930] Trial Judgment, paras 1088, 1090.
[931] *See infra*, paras 383-385.
[932] Transcript, TF1-045, 22 November 2005, pp. 70, 71; Sesay Appeal, para. 133.
[933] Sesay Appeal, para. 133; Transcript, TF1-371, 28 July 2006, p. 50.
[934] Trial Judgment, fn. 1486.
[935] Trial Judgment, para. 769; Transcript, TF1-125, 12 May 2005, pp. 97, 98.
[936] Trial Judgment, para. 1989 [internal reference omitted]; Sesay Appeal, para. 134.
[937] Trial Judgment, paras 772, 773.

not to take up ministerial positions,[938] yet fails to address the finding and evidence that both Bockarie and Sesay approved appointments of RUF members to the Junta government "as part of a proposal to integrate the RUF into the AFRC regime."[939]

382. Furthermore, that Bockarie ensured continued cooperation from Kenema is buttressed by the finding that the forced mining activities, which included acts of terrorism,[940] were jointly conducted and controlled by the AFRC and RUF.[941] The Appeals Chamber now turns to Sesay's challenges to this finding.

c. Were the operations in Tongo Field part of the JCE between the AFRC and RUF?

383. Sesay submits that the AFRC and RUF operated separate forced mining operations in Tongo Field and therefore that these operations do not evidence a common criminal purpose between the two groups.[942] In support of this submission Sesay relies on the evidence given by TF1-045 and TF1-371, but, save for one exception, he either merely offers an alternative reading of this evidence without explaining why the Trial Chamber's assessment thereof was unreasonable, or ignores other evidence relied on by the Trial Chamber.

384. The one exception concerns the Trial Chamber's reliance on TF1-371's testimony to find that the Supreme Council decided to appoint senior members to supervise alluvial mining in Kono and Kenema.[943] Sesay argues that TF1-371 testified that Koroma, and not the Supreme Council, took this decision.[944] The Appeals Chamber notes that, while TF1-371 did testify as argued,[945] this evidence is not necessarily inconsistent with the impugned finding, because Koroma was the Chairman of the Supreme Council and significant decisions were made by himself, SAJ Musa and certain "other Honourables."[946] More importantly, the fact that Koroma made the decision in question does not detract from other evidence, for example, that the forced mining in Kenema was

[938] Transcript, TF1-045, 22 November 2005, pp. 62, 63; Sesay Appeal, para. 134.
[939] Trial Judgment, para. 758.
[940] *See* Sesay Appeal, para. 134.
[941] Trial Judgment, paras 1089, 1090, 1989, 2051.
[942] Sesay Appeal, paras 135-137.
[943] Trial Judgment, para. 1088.
[944] Sesay Appeal, para. 136.
[945] Transcript, TF1-371, 20 July 2006, p. 36.
[946] Trial Judgment, para. 756.

planned and organised in the Supreme Council,[947] on which the Trial Chamber relied to find that the RUF and the AFRC cooperated in respect of Tongo Fields.[948] Because Sesay's present argument does not address this evidence he fails to demonstrate an error.

385. The Appeals Chamber therefore finds that Sesay does not show an error in the Trial Chamber's findings regarding the criminal means employed to achieve the objective in Kenema District.

(c) Kailahun District

(i) Trial Chamber's findings

386. The Trial Chamber found that the RUF sustained a widespread and systematic pattern of conduct in Kailahun which included military training, child recruitment, enslavement of civilians and sexual slavery.[949] These crimes were for the benefit of the RUF and the Junta in furthering their ultimate goal of taking political, economic and territorial control over Sierra Leone.[950]

(ii) Submissions of the Parties (Sesay Ground 28 (in part))

387. Sesay submits that the evidence concerning Kailahun District supports that no common criminal purpose existed during the Junta period.[951] He argues that paragraph 2047 of the Trial Judgment appeared to conclude that the RUF and AFRC forces did not act jointly in Kailahun.[952] Furthermore, there was no evidence that AFRC/RUF commanders were involved in Kailahun or that any RUF member committed or used others to commit acts of terror and collective punishment there during the Junta period.[953] No additional arguments are offered, either in response or reply.

(iii) Discussion

388. The Appeals Chamber is not persuaded by Sesay's submission. The Trial Chamber made extensive findings on RUF members and Commanders, including Superman,[954] committing acts of

[947] Trial Judgment, para. 1997.
[948] Trial Judgment, paras 1089-1091, 1094, 1997, 2004.
[949] Trial Judgment, paras 2158.
[950] Trial Judgment, para. 2159.
[951] Sesay Appeal, para. 187.
[952] Sesay Appeal, para. 187, *citing* Trial Judgment, para. 2047; Partially Dissenting Opinion of Justice Boutet, para. 13.
[953] Sesay Appeal, para. 188, *citing* Trial Judgment, paras 2040, 2060, 2156, 2157.
[954] Trial Judgment, para. 1463.

sexual slavery and forced marriage[955] as well as enslavement[956] in Kailahun District. Whereas only the former two crimes also amounted to acts of terrorism,[957] the Appeals Chamber recalls that it was not required that the crimes constituted either such acts or collective punishment in order to fall within the Common Criminal Purpose.[958]

389. As to whether the AFRC and RUF acted in concert in Kailahun, the Appeals Chamber notes that the relevant part of paragraph 2047 of the Trial Judgment reads:

> The Junta Government exercised control over most of Sierra Leone, and the RUF forces acted jointly with the AFRC forces in relation to other locations [than Kailahun] in the country during the period in question.

This finding by a Majority of the Trial Chamber neither affirms nor rejects that the AFRC and RUF acted jointly in Kailahun.

390. However, whether the leaders of the AFRC and RUF acted in concert in the specific geographical area of Kailahun District was not determinative for the Trial Chamber's conclusion that they shared a common criminal purpose which encompassed that District. Rather, what mattered for the Trial Chamber was whether the two groups acted in concert on a country-wide level:

> The[] widespread and systematic crimes [by the RUF in Kailahun[959]] were for the benefit of the RUF and the Junta in furthering their ultimate goal of taking political, economic and territorial control over Sierra Leone. We find it was only through their joint action that the AFRC and RUF were able to control the entire country, because the RUF needed the AFRC to access Kenema and Bo Districts, while the AFRC could not bring Kailahun within the sphere of the Junta Government control without cooperation from the RUF. Thus, RUF activities in Kailahun furthered the ultimate goal of joint political, economical and territorial control.[960]

391. Sesay does not argue that these findings are erroneous, either in law or in fact. His submission is therefore rejected.

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[955] Trial Judgment, paras 1406-1413, 1460-1473.
[956] Trial Judgment, paras 1414-1443, 1478-1488.
[957] Trial Judgment, para. 1493.
[958] *See supra*, para. 348.
[959] Trial Judgment, para. 2158.
[960] Trial Judgment, para. 2159.

5. Conclusion

392. For the foregoing reasons, the Appeals Chamber dismisses Sesay's Grounds 24 and 26 to 33 and Kallon's Ground 2 in present parts. Gbao's Grounds 8(e), 8(g) and 8(h) are dismissed in their entirety.

C. Alleged errors regarding the use of principal perpetrators to commit crimes (Sesay Grounds 24, 25, 27, 30, 33, 34, 37 (in part), Kallon Ground 2 (in part) and Gbao Ground 8(d))

393. All Appellants submit that the Trial Chamber erred in concluding that they incurred JCE liability for crimes committed by persons who were found not to be members of the JCE, but who were used as "tools" by one or more JCE members to commit crimes in furtherance of the JCE. They argue that the Trial Chamber failed to make the necessary findings, or made erroneous findings, to arrive at this conclusion. Kallon additionally avers that the "tool" theory is wrong in law. The Appeals Chamber will address this preliminary legal challenge before proceeding to the remainder of the submissions.

1. Did the Trial Chamber err in law in finding that JCE liability can attach for crimes committed by non-members of the JCE?

(a) Trial Chamber's findings

394. The Trial Chamber held that to establish the liability of JCE members, the principal perpetrator of the crime need not be a member of the JCE, but may be used as a tool by one of the JCE members.[961]

(b) Submissions of the Parties (Kallon Ground 2 (in part))

395. Kallon challenges this holding in law.[962] He argues that the "tool" theory undermines the requirements that the principal perpetrator be a JCE member and that he share a common intention with the accused.[963] He also invokes United States case-law rejecting an "agency" theory of conspiracy liability.[964] Moreover, Kallon posits that the "tool" theory should only apply where the accused has participated "causally" in at least one element of the *actus reus* by the principal

[961] Trial Judgment, paras 263, 266.
[962] Kallon Appeal, para. 44.
[963] Kallon Appeal, paras 44, 45.
[964] Kallon Appeal, para. 45.

perpetrator.[965] In any event, Kallon contends that the *Brđanin* Appeal Judgment suggests that both the principal perpetrator and the accused must have a culpable *mens rea*.[966]

396. The Prosecution responds that it is well-established law that members of a JCE can incur liability for crimes committed by principal perpetrators who were non-members of the JCE.[967] Kallon offers no further arguments in reply.

(c) Discussion

397. At the outset, the Appeals Chamber does not consider Kallon's references to United States conspiracy law helpful because conspiracy and JCE are legally distinct concepts. Most obviously, conspiracy is an inchoate offence whereas JCE is a mode of liability. As explained by the ICTY Appeals Chamber on two occasions:

> Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, proof that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.[968]

398. In *Brđanin*, the ICTY Appeals Chamber examined both post-World War II jurisprudence[969] and ICTY case-law[970] which it found persuasive as to the ascertainment of the contours of JCE liability in customary international law.[971] On that basis it concluded that:

> [W]hat matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose. In cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose. In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that the person in question knows of the existence of the JCE – without it being established that he or she shares the *mens rea* necessary to become a member of the JCE – may be a factor to be taken into account when determining whether the crime forms part of the common criminal purpose.

[965] Kallon Appeal, para. 48, *citing Milutinović* Decision on Jurisdiction: Indirect Co-perpetratorship, Separate Opinion of Judge Iain Bonomy.
[966] Kallon Appeal, para. 45, *citing Brđanin* Appeal Judgment, paras 430, 431.
[967] Prosecution Response, para. 5.21.
[968] *Milutinović et al*. Decision on Jurisdiction – JCE, para. 23, *affirmed in Krajišnik* Appeal Judgment, para. 659.
[969] *Brđanin* Appeal Judgment, paras 393-404.
[970] *Brđanin* Appeal Judgment, paras 405-409.
[971] *Brđanin* Appeal Judgment, para. 410.

> However, this is not a *sine qua non* for imputing liability for the crime to that member of the JCE.[972]

With respect to the third category of JCE, the ICTY Appeals Chamber held:

> When the accused, or any other member of the JCE, in order to further the common criminal purpose, uses persons who, in addition to (or instead of) carrying out the *actus reus* of the crimes forming part of the common purpose, commit crimes going beyond that purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.[973]

399. The ICTY Appeals Chamber went on to find that:

> [T]o hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.[974]

400. Based on the legal authorities and reasoning provided for these holdings, and considering that they have been consistently affirmed by the subsequent jurisprudence of both the ICTY and the ICTR,[975] the Appeals Chamber is satisfied that the holdings reflect customary international law at the time the crimes in the present case were committed, and on that basis endorses them. Kallon's submission that JCE liability cannot attach for crimes committed by principal perpetrators who are not proven to be members of the JCE is therefore dismissed.

401. Kallon fails to develop whether, and if so how, the above holdings in *Brđanin* are contrary to his position that the accused must be shown to have participated "causally" in at least one element of the *actus reus* by the principal perpetrator.[976] Although the accused's participation in the JCE need not be a *sine qua non*, without which the crimes could or would not have been committed,[977] it must at least be a significant contribution to the crimes for which the accused is to

[972] *Brđanin* Appeal Judgment, para. 410.
[973] *Brđanin* Appeal Judgment, para. 411.
[974] *Brđanin* Appeal Judgment, para. 413. *See* also *Brđanin* Appeal Judgment, para. 430.
[975] *Martić* Appeal Judgment, paras 168-169; *Limaj et al*. Appeal Judgment, para. 120; *Krajišnik* Appeal Judgment, paras 225-226; *Milutinović et al*. Trial Judgment, Vol. I, paras 98, 99; *Zigiranyirazo* Trial Judgment, para. 384.
[976] Kallon Appeal, para. 48.
[977] *Kvočka et al*. Appeal Judgment, para. 98; *Tadić* Appeal Judgment paras 191, 199.

be found responsible.[978] As *Brđanin* makes clear, this standard applies also where the accused participates in the JCE by way of using non-JCE members to commit crimes in furtherance of the common purpose.[979]

402. Lastly, Kallon's submission that the *Brđanin* holdings are inapplicable in the present case is based on the premise that the Common Criminal Purpose found by the Trial Chamber was not inherently criminal. As that premise is erroneous, this submission fails.[980]

2. Did the Trial Chamber err in finding that JCE members used principal perpetrators to commit crimes in furtherance of the Common Criminal Purpose?

(a) Trial Chamber's findings

403. The Trial Chamber found there was 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 members of the JCE.[981] However, taking into account the entirety of the evidence, in particular the widespread and systematic nature of the crimes committed, it was satisfied that these individuals were used by the JCE members to commit crimes that were either within or a natural and foreseeable consequence of the implementation of the Common Criminal Purpose.[982] The Trial Chamber found that the non-JCE members who committed the crimes were sufficiently closely connected to one or more JCE members acting in furtherance of the Common Criminal Purpose that such crimes could be imputed to all members of the JCE.[983]

404. In the period between 14 February 1998 and the beginning of May 1998, the Trial Chamber found that CO Rocky, Rambo RUF, AFRC Commander Savage and his deputy, Staff Sergeant Alhaji, were not members of the JCE, but that they were directly subordinate to and used by JCE members to commit crimes that were either within or a natural and foreseeable consequence of the Common Criminal Purpose.[984]

[978] *Krajišnik* Appeal Judgment, para. 675; *Brđanin* Appeal Judgment, para. 430.
[979] *Brđanin* Appeal Judgment, para. 430.
[980] *See supra*, para. 305.
[981] Trial Judgment, para. 1992.
[982] Trial Judgment, para. 1992.
[983] Trial Judgment, para. 1992.
[984] Trial Judgment, para. 2080.

(b) Submissions of the Parties

(i) Sesay Grounds 24, 25, 27, 30, 33, 34, 37 (in part)

405. Under Ground 24, Sesay submits that the Trial Chamber's "global" finding that the non-JCE perpetrators were "closely connected" to the JCE members abandoned the requirement that the crimes be committed in furtherance of the Common Criminal Purpose.[985] In his view, the Trial Chamber had to be satisfied that "each crime" was committed for that purpose.[986] In an introductory section to Grounds 25, 27, 34 and 37, Sesay reiterates that the Trial Chamber failed to conduct the essential analysis that would have determined whether the direct perpetrators were linked to the JCE members.[987] Under Ground 30, Sesay alleges a failure by the Trial Chamber to assess whether the crimes in Kenema could be imputed to a JCE member acting pursuant to the Common Criminal Purpose.[988]

406. Under Ground 33, Sesay submits that the Trial Chamber failed to conduct the requisite analysis that would have allowed it to conclude that 21 specific instances of crimes in Kono could be imputed to a JCE member and that this JCE member was acting in accordance with the common objective.[989] Sesay further makes seven detailed challenges in respect of some of these crimes.[990] Further under his Ground 33, Sesay contends that the Trial Chamber failed to identify the perpetrators or the victims of the forced marriages in Kailahun and to identify the necessary link between the direct perpetrators and the JCE members.[991] Sesay submits that the Trial Chamber's failure to make the relevant findings as alleged above negates his convictions under JCE.[992]

407. The Prosecution responds that, while "more reasoning could have been provided by the Trial Chamber" the absence of such does not invalidate the Trial Judgment which, on a reading of the Trial Judgment as a whole, makes clear that the crimes could be imputed to the JCE.[993] Sesay replies that the required link between the specific crime and a specific JCE member is not, as argued by the Prosecution, shown simply by generic evidence that non-JCE members committed

[985] Sesay Appeal, paras 105, 106.
[986] Sesay Appeal, para. 106.
[987] Sesay Appeal, para. 235.
[988] Sesay Appeal, para. 153.
[989] Sesay Appeal, para. 206.
[990] *See* also Sesay Appeal, paras 207-224.
[991] Sesay Appeal, para. 230.
[992] Sesay Appeal, para. 231.
[993] Prosecution Response, paras 5.20, 5.22, 5.24, 7.33.

other crimes or that they had a chain of command to JCE members; rather, the JCE member must "procure the *specific* crime."[994]

(ii) Kallon Ground 2 (in part)

408. Kallon submits that the Trial Chamber failed to make the proper findings necessary to impute the crimes committed by non-JCE members to him or any other alleged member of the JCE.[995] Relying on the *Martić* Appeal Judgment, Kallon asserts that such imputation requires evidence that a JCE member had "control and influence" as to each incident and group of non-JCE members at issue.[996] The Prosecution makes the same arguments in response as those proffered under Sesay's grounds above.[997] Kallon offers no new arguments in reply.[998]

(iii) Gbao Ground 8(d)

409. Gbao submits that the Trial Chamber erred in failing to detail, through factual findings, the methods by which the JCE members "used" non-members of the JCE to commit crimes in furtherance of the Common Criminal Purpose.[999] He avers that the Trial Chamber was obliged, but failed, to find a link between the JCE members and the non-JCE principal perpetrators in Bo, Kenema, Kono and Kailahun Districts.[1000] In Gbao's opinion, it did not discuss at all whether these principal perpetrators acted pursuant to orders or reported to JCE members in relation to their crimes, whether they were under any direct or operational control of a JCE member, or whether any other link existed which would have allowed their crimes to be imputed to the JCE.[1001] Gbao lists all the crimes for which the Trial Chamber failed to make this linkage in Annex II to his Appeal Brief.[1002] In addition, Gbao submits that the Trial Chamber failed to detail whether the crimes of the non-JCE principal perpetrators were committed in furtherance of the Common Criminal Purpose.[1003] It therefore remains unclear whether the crimes, in particular those for which the perpetrators are not identified, were committed for other reasons, by persons wholly unrelated to the

[994] Sesay Reply, para. 51.
[995] Kallon Notice of Appeal, para. 3.13; Kallon Appeal, paras 33, 47, 55, 56, 119.
[996] Kallon Appeal, paras 55, 56, *citing Martić* Appeal Judgment, paras 181-213.
[997] Prosecution Response, fn. 472.
[998] Kallon Reply, para. 47, *citing* Trial Judgment, paras 1225-1231.
[999] Gbao Notice of Appeal, para. 39; Gbao Appeal, para. 63.
[1000] Gbao Appeal, paras 64-67.
[1001] Gbao Appeal, para. 67.
[1002] Gbao Appeal, para. 68.
[1003] Gbao Appeal, paras 69, 70.

RUF and AFRC.[1004] According to Gbao, there was thus a reasonable doubt as to whether the crimes were committed in the furtherance of the JCE.[1005] Annex II lists the crimes to which this failure applies.[1006] Gbao argues that absent a link between the non-JCE members' crimes and the JCE members, he risks being held responsible "for any crime committed by any RUF/AFRC during the Junta period."[1007]

410. The Prosecution repeats its arguments above[1008] and adds that it is clear from the findings as a whole that the Trial Chamber was satisfied that the crimes were not committed by independent criminals pursuing their own agenda rather than AFRC/RUF fighters whose crimes could be imputed to the JCE.[1009] In reply, Gbao disputes the Prosecution's reliance on the evidence as a whole, arguing that specific findings are required and that the ICTY Appeals Chamber in *Krajišnik* reversed several of the JCE findings of the ICTY Trial Chamber due to their failure to link the principal perpetrators with a JCE member.[1010]

(c) Discussion

(i) Preliminary remarks

411. Before turning to the merits of these grounds of appeal, the Appeals Chamber deems it useful to make three preliminary remarks. The first is that the Appellants allege both an error of law and errors of fact. Their primary challenge is that the Trial Chamber failed to make sufficiently detailed factual findings to arrive at the conclusion that members of the JCE used principal perpetrators to commit crimes in furtherance of the Common Criminal Purpose.[1011] In other words, they assert a failure to provide a reasoned opinion. If shown, such failure would constitute an error of law.[1012] Additionally, Sesay and Kallon assert that certain findings underpinning said conclusion by the Trial Chamber cannot be supported by the evidence. In this regard, errors of fact are alleged. The Appeals Chamber will address both types of error in its subsequent analysis.

[1004] Gbao Appeal, paras 70, 75.
[1005] Gbao Appeal, paras 70, 75.
[1006] Gbao Appeal, para. 71.
[1007] Gbao Appeal, para. 72.
[1008] Prosecution Response, fn. 472.
[1009] Prosecution Response, para. 5.24.
[1010] Gbao Reply, para. 53, *citing Krajišnik* Appeal Judgment, paras 237, 249, 283, 284.
[1011] Trial Judgment, paras 1992, 2080.
[1012] *See Brđanin* Appeal Judgment, para. 9; *Kvočka et al*. Appeal Judgment, para. 25.

412. Second, the Appeals Chamber considers that the Appellants' sweeping allegations claiming a general lack of findings on the links between the principal perpetrators and a JCE member or that such absence of findings gives rise to a reasonable doubt fall short of the required standard for pleadings on appeal.[1013] An appellant must provide details of the alleged legal or factual error and state with precision how it invalidates the decision or occasioned a miscarriage of justice, as the case may be.[1014] The Appellants are thus required to identify which crimes were insufficiently linked to the JCE and why, and to specify how that impacted on the Trial Judgment.[1015] The Appeals Chamber's analysis will be limited to the submissions which meet this standard. The remainder of the present grounds of appeal are summarily dismissed. The Appeals Chamber further notes that some of the crimes which Gbao argues were insufficiently linked to a member JCE are set out in Annex II to his Appeal. Whereas, as a general rule, an appellant should argue the grounds of appeal exhaustively in the main text of his Appeal,[1016] Annex II does not contain arguments additional to those set out in the Gbao Appeal itself. The Appeals Chamber will therefore take Annex II into account in its analysis.

413. Third, the Appeals Chamber notes that the Trial Chamber did not make an explicit finding that the "mid- and low-level RUF and AFRC Commanders" and "rank-and-file fighters" who carried out the *actus reus* of many of the crimes now at issue were not members of the JCE. It merely found "insufficient evidence to conclude" that these individuals were JCE members.[1017] Therefore, the Appeals Chamber considers it inappropriate to refer to these persons as "non-JCE members." Instead, the Appeals Chamber will refer to them as "principal perpetrators" or "persons who carried out the *actus reus* of the crime" when considering the facts of this case.

[1013] *See e.g.* Kallon Appeal, para. 47; Sesay Appeal, para. 106; Gbao Appeal, paras 66, 70, 75.
[1014] *See supra*, para. 31-32.
[1015] *See* also *Brđanin* Appeal Judgment, para. 9 ("It is necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments, which the appellant submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.").
[1016] *See Galić* Appeal Judgment, para. 250 ("Further, a large number of Galić's arguments on appeal, especially in this ground, have been made in the footnotes to the main text. In light of the great length granted to Galić for his appeal, there is no reason why all substantive arguments could not have been expressed in the main text, with the footnotes used for citation and clarification only. The Appeals Chamber ruled in *Prosecutor v. Kordić and Čerkez* that grounds of appeal must be dealt with in the main text, not the footnotes. Therefore, where a new argument is made in a footnote, the Appeals Chamber will ordinarily not address that argument. For similar reasons, the Appeals Chamber will not look at the Defence Notice of Appeal or at Judge Nieto-Navia's Dissent when Galić tries to incorporate arguments by reference to them; the arguments should have been made in the appeal." [internal references omitted]), *citing Kordić and Čerkez* Order to File Amended Grounds of Appeal, p. 3.
[1017] Trial Judgment, para. 1992.

(ii) Applicable law

414. The link between the crimes of the principal perpetrators and a member of the JCE, required to impute those crimes to the latter, is a matter to be assessed on a case-by-case basis.[1018] Previous jurisprudence shows that factors indicative of such a link include, but are not limited to, evidence that the JCE member closely cooperated with the physical perpetrator or intermediary perpetrator in order to further the common criminal purpose,[1019] explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged or otherwise availed himself of the non-JCE member to commit the crime.[1020] It may also be relevant whether the crimes at issue were committed by forces under the control of JCE members,[1021] or acting in coordination with forces under the control of JCE members.[1022] The Appeals Chamber notes, then, that Kallon's claim that the link requires evidence that a JCE member had "control and influence" as to each incident and group of non-JCE members at issue[1023] does not accurately reflect the law. Similarly, Sesay is incorrect to imply that a trier of fact is prevented, as a matter of law, from taking into account the widespread or systematic nature of the crimes in inferring whether non-members of the JCE were used by the JCE members.[1024] The Appeals Chamber observes, however, that the term "widespread or systematic" as employed in this context may denote facts different from those meeting the *chapeau* requirements of crimes against humanity.

415. The assessment of whether the Trial Chamber failed to make the findings as alleged must be made on a reading of the Trial Judgment as a whole,[1025] and allow for the fact that the Trial Chamber was required only to make findings on those facts which are essential to the determination of guilt on a particular count.[1026] The Trial Chamber was not required to articulate every step of its reasoning for each particular finding it made.[1027] Therefore, while Sesay and Gbao are correct that the Trial Chamber had to be satisfied that all the perpetrators whose crimes were imputed to the

[1018] *See supra*, paras 398-402; *Krajišnik* Appeal Judgment, paras 225, 226; *Brđanin* Appeal Judgment, para. 413. *See* also *Brđanin* Appeal Judgment, para. 430.
[1019] *Brđanin* Appeal Judgment, para. 410; *Martić* Appeal Judgment, para. 438; *Milutinović et al*. Trial Judgment, Vol. 1, para. 101.
[1020] *Krajišnik* Appeal Judgment, para. 226.
[1021] *Martić* Appeal Judgment, para. 169, *citing Stakić* Appeal Judgment, paras 79-85.
[1022] *See Martić* Appeal Judgment, paras 195, 205.
[1023] Kallon Appeal, paras 55, 56.
[1024] Appeal transcript, 2 September 2009, pp. 28, 29.
[1025] *Orić* Appeal Judgment, para. 38; *Naletilić and Martinović* Appeal Judgment, para. 435; *Stakić* Appeal Judgment, para. 344.
[1026] *Brima et al*. Appeal Judgment, para. 268; *Krajišnik* Appeal Judgment, para. 139; *Kvočka et al*. Appeal Judgment, para. 23.
[1027] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 18.

JCE members were used by the latter in furtherance of the Common Criminal Purpose, it was not obliged to set out in detail every step of its reasoning which led it to that conclusion.[1028]

(iii) Analysis of the Trial Chamber's findings

a. Bo District

416. Gbao alleges that the Trial Chamber provided insufficient reasons for why the principal perpetrators of the unlawful killings during the 15 June 1997 attack on Tikonko and the 26 June 1997 attack on Gerihun (Counts 1 and 3 to 5) were used by a JCE member in furtherance of the Common Criminal Purpose.[1029] Gbao argues no factual errors in the crime-base findings to which he refers.

417. The Appeals Chamber notes that the Trial Chamber gave some indication as to how the perpetrators of the crimes during the Tikonko and Gerihun attacks were used by JCE members, by finding that they were "AFRC/RUF fighters."[1030] This finding must moreover be read together with the holdings regarding the context in which the attacks occurred. In that regard, the Trial Chamber found that "the Junta regime did not enjoy consolidated territorial power over Bo District from the outset"[1031] and that "[a]t the end of May 1997, rumours abounded that the AFRC/RUF Junta suspected that Kamajors were hiding in Tikonko and that the AFRC/RUF were planning to attack the town and its civilians."[1032] In June 1997 that attack was carried out.[1033] Shortly thereafter AFRC/RUF fighters also attacked Sembehun and Gerihun.[1034] All three attacks followed the same *modus operandi* as other attacks in terms of the crimes committed in their midst, which, the Trial Chamber reasoned, showed that they "were not isolated incidents but rather a central feature of a concerted campaign against civilians."[1035] Indeed, among the perpetrators in the Gerihun attack

[1028] Sesay Appeal, para. 106; Sesay Reply, paras 51, 61; Gbao Reply, para. 53.
[1029] Gbao Appeal, paras 67, 68, 70, 71; Gbao Appeal, Annex II, p. 1.
[1030] Trial Judgment, para. 1974 (section 2.1.1).
[1031] Trial Judgment, para. 767.
[1032] Trial Judgment, para. 993.
[1033] Trial Judgment, paras 994, 995.
[1034] Trial Judgment, paras 1006, 1010.
[1035] Trial Judgment, para. 956. *See Krajišnik* Appeal Judgment, para. 248 (considering the existence of a similar *modus operandi* in during attacks in determining whether the Trial Chamber had made sufficient findings on JCE members' use of non-JCE members committing crimes).

were the heads of the AFRC Secretariat in Bo Town, Secretary of State AF Kamara and Brigade Commander Boysie Palmer.[1036]

418. The Appeals Chamber is satisfied that these findings provide sufficient reasoning as to how the unlawful killings in Tikonko and Gerihun fitted into the "widespread and systematic nature of the crimes" and how the perpetrators "were sufficiently closely connected" to JCE members acting in furtherance of the Common Criminal Purpose, which was the Trial Chamber's basis for imputing these crimes to one or more JCE members.[1037] Gbao's submission is therefore untenable.

b. Kenema District

419. Both Sesay and Gbao submit that the Trial Chamber made insufficient findings on the links between the principal perpetrators of certain crimes in Kenema and the JCE members.[1038] In order to assess their submissions on the proper factual basis, it is necessary to first address another argument by Sesay relating to the Trial Chamber's crime-base findings regarding Kenema.

420. Sesay argues that the finding in paragraph 1100 of the Trial Judgment created a presumption that the crimes in Kenema were committed for personal reasons rather than in pursuance of a common criminal purpose.[1039] The relevant part of paragraph 1100 reads:

> The Chamber is further satisfied that a nexus existed between the killing and the armed conflict, as the control exercised by the AFRC and RUF over Kenema Town during the Junta period created a permissive environment in which the fighters could commit crimes with impunity.

This finding is silent on the fighters' own reasons for committing crimes in Kenema Town. It only says that the permissive environment created by the AFRC and RUF there permitted them to do so with impunity. The presumption that Sesay reads into this finding is thus his own, and not one the Trial Chamber made. This argument fails.

421. The Appeals Chamber now turns to the alleged failures to make sufficient findings. Sesay and Gbao first submit that no link was shown between the JCE members and the persons who carried out the *actus reus* of the following crimes in Kenema Town: (i) the beating of TF1-122; (ii)

[1036] Trial Judgment, para. 767, 1012.
[1037] Trial Judgment, para. 1992.
[1038] Sesay Appeal, para. 154; Gbao Appeal, Annex II, p. 2.
[1039] Sesay Appeal, para. 153.

the killing of Mr. Dowi; and (iii) the killing of an alleged Kamajor boss. TF1-122 was beaten by AFRC/RUF rebels at the Junta Secretariat in Kenema Town for having requested them to cease removing property from a woman.[1040] This incident was part of the so-called "flag trick:" It was common practice for those near the Junta Secretariat in Kenema Town to stand still during the raising and lowering of the Sierra Leonean flag; AFRC/RUF fighters would raise and lower the flag at irregular times and harass individuals who did not stand still and seise whatever property the latter were carrying.[1041] As to Mr. Dowi, he was killed by AFRC/RUF rebels when trying to prevent them from looting his freezer at his home in Kenema Town.[1042] Both crimes were found to have taken place in the context of the permissive environment created by the control exercised by the AFRC and RUF over Kenema Town wherein their fighters could commit crimes with impunity.[1043]

422. The fact, as noted, that this finding is silent on the perpetrators' own reasons for beating TF1-122 and killing Mr. Dowi is not determinative for whether the Trial Chamber found that they were used by the JCE members to commit these crimes in furtherance of the Common Criminal Purpose.[1044] Of greater relevance for that issue is the finding that the "control exercised" by the AFRC/RUF over Kenema Town "created" an environment which permitted the beating and the killing.[1045] That control, the Trial Chamber found, was exercised by the Junta: "Within one week of the coup of 25 May 1997, RUF rebels and the military Junta were in full control of [Kenema] town."[1046] Indeed, the beating of TF1-122 was found to have taken place while he was in custody at the Junta's own Secretariat building in Kenema Town.[1047] At the head of the Junta were most of the JCE members, who shared the intent to employ beatings and killings, such as those now at issue, as a means to control the territory of Sierra Leone, including Kenema Town.[1048] The Appeals Chamber is satisfied that these findings suffice to show how the perpetrators of the crimes in

[1040] Trial Judgment, paras 1047, 1110.
[1041] Trial Judgment, para. 1046.
[1042] Trial Judgment, para. 1100.
[1043] Trial Judgment, para. 1100. *See* Trial Judgment, paras 1046 (stating that the beating of TF1-122 occurred in Kenema Town "[w]hile the AFRC/RUF controlled Kenema"), 1100 (stating that the permissive environment existed in Kenema Town "during the Junta period").
[1044] *See Brđanin* Appeal Judgment, para. 410.
[1045] Trial Judgment, para. 1100.
[1046] Trial Judgment, paras 769, 1043.
[1047] Trial Judgment, paras 1046, 1047, 1110.
[1048] Trial Judgment, paras 1979, 1982, 1986, 1990.

question were used by JCE members acting in furtherance of the Common Criminal Purpose.[1049] Sesay's and Gbao's submissions to the contrary fail.

423. The alleged Kamajor boss was killed by AFRC/RUF fighters during "Operation No Living Thing," which had been launched by the RUF and AFRC as a pre-emptive measure due to rumours of an impending Kamajor attack.[1050] "Operation No Living Thing" did not refer to a particular military campaign, but it "described a set of brutal and merciless tactics which AFRC/RUF fighters were encouraged to adopt in combat."[1051] The killing also formed part of the AFRC/RUF's "deliberate strategy to terrorise the civilian population and prevent any support for their opponents."[1052] Seen against the background that the AFRC/RUF Junta, headed by most JCE members, controlled Kenema Town,[1053] the Appeals Chamber is satisfied that these findings suffice to explain the Trial Chamber's reasons why the killing was imputed to the JCE members. Sesay's and Gbao's claims to the contrary fail.

424. Next, Sesay and Gbao allege a lack of findings on the links between the JCE members and the perpetrators of the killings in Tongo Field of (i) a civilian at Lamin Street;[1054] and (ii) a Limba man.[1055] The Trial Chamber found that the killing at Lamin Street was perpetrated by AFRC/RUF fighters in a crowd of civilians publicly protesting against the fighters' raping women.[1056] It found that "the perpetrators intended to impart a clear public message that such protests would be met with violence."[1057] This conduct falls squarely within the finding that the "Junta 'government' brutally suppressed opposition", including through public executions, in order to control captured territory.[1058] These findings explain how the Trial Chamber found that the killing at Lamin Street, among others, evidenced a "systematic nature" of the crimes, which lead it to conclude that the

[1049] Trial Judgment, para. 1992.
[1050] Trial Judgment, paras 1065, 1101.
[1051] Trial Judgment, paras 865, 866.
[1052] Trial Judgment, paras 1102, 1124, 1125.
[1053] Trial Judgment, paras 769, 1043, 1979, 1986, 1990.
[1054] Sesay's challenge is limited to this incident. Sesay Appeal, para. 165.
[1055] Trial Judgment, paras 1080, 1081, 2050. In Trial Judgment, para. 2050, the Trial Chamber refers to the Lamin Street killing as happening in Kenema Town. However, it is apparent from the evidence cited in Trial Judgment, para. 1080 that this killing occurred in Tongo Field. As no error has been alleged in this regard, the Appeals Chamber need not pursue the matter further.
[1056] Trial Judgment, paras 1080, 1127.
[1057] Trial Judgment, para. 1127.
[1058] Trial Judgment, paras 958, 1981.

perpetrators were used by one or more JCE members acting in furtherance of the Common Criminal Purpose.[1059] Sesay's and Gbao's claims of insufficient reasoning as regards this incident fail.

425. The Trial Chamber found that the Limba man was killed in Tongo Field by an AFRC/RUF fighter for refusing to give him palm wine.[1060] This crime was neither related to the AFRC/RUF forced mining activities in Tongo Field nor was it committed within the "permissive environment," which was limited to Kenema Town. In fact, the Trial Chamber held that the killing was "apparently [an] isolated crime."[1061] The proposition that the perpetrator was used in furtherance of the Common Criminal Purpose is further contradicted by the finding that "Captain Yamao Kati ordered that as the fighter had used his hand to fire a gun at a civilian, the fighter should also be shot in the hand."[1062] In view of these findings, the mere fact that the perpetrator was "an AFRC/RUF fighter" is an insufficient reason for imputing this killing to a JCE member. The Trial Chamber therefore erred in law in so doing. Absent a valid conclusion in this regard, the Appellants' convictions under JCE for the killing of a Limba man in Tongo Field fall. Gbao's submissions are granted insofar they relate to the killing of a Limba man in Tongo Field.

426. As a result, none of the Appeallants could be held liable under the JCE mode of liability for this crime. The Appellants' remaining challenges to the Trial Chamber's findings on the links between the perpetrators of the crimes in Kenema District and the JCE members fail.

c. Kono District

427. Sesay and Gbao allege that the Trial Chamber failed to make sufficiently specific findings to conclude that certain crimes in Kono could be imputed to one or more JCE members.[1063] In addition, Sesay argues that no reasonable trier of fact could have so imputed.[1064] Kallon claims a lack of evidence that the Appellants had any control over CO Rocky, Rambo RUF, AFRC Commander Savage and his deputy, Staff Alhaji, whom the Trial Chamber was not satisfied were

[1059] Trial Judgment, para. 1992.
[1060] Trial Judgment, para. 1081.
[1061] Trial Judgment, para. 1128.
[1062] Trial Judgment, paras 1081, 1128.
[1063] Sesay Appeal, paras 206-224; Gbao Appeal, Annex II, pp. 3-7.
[1064] Sesay Appeal, paras 206-224.

members of the JCE.[1065] The Appeals Chamber will address Sesay's and Kallon's factual challenges as they arise in the analysis of whether the Trial Chamber made sufficient findings.

428. As an introductory remark, the Appeals Chamber notes that the crimes in Kono District were found to have been committed after the ECOMOG intervention on 14 February 1998 ousted the AFRC/RUF Junta from Freetown. The Trial Chamber found that AFRC/RUF troops launched a failed attack on Kono District in the second half of February, but that around 1 March 1998 they managed to capture Koidu Town.[1066] After this successful attack, the AFRC and RUF were found to have organised an integrated command structure in Koidu Town, which included the JCE members Johnny Paul Koroma, Sesay, Superman and Bazzy.[1067] The Trial Chamber found that in early April 1998 ECOMOG troops forced the AFRC/RUF to retreat from Koidu Town.[1068]

i. Unlawful killings

429. Sesay and Gbao allege that the Trial Chamber erred in imputing to members of the JCE[1069] the killings between February and March 1998 in Tombodu ordered by Savage and Staff Alhaji,[1070] the six killings in Yardu (and the subsequent amputation of TF1-197),[1071] and the killings of at least 29 civilians in Penduma on orders of Staff Alhaji in April 1998.[1072] Sesay further argues that the Trial Chamber erred in fact in imputing the killings of 30 to 40 captive civilians by Rocky in Koidu in April 1998,[1073] and the killing of Sata Sesay's family in Wendedu.[1074] In addition, Gbao contends that the Trial Chamber failed to explain why it imputed the killing of Chief Sogbeh in Tombodu at sometime between February/March 1998 to the JCE members.[1075]

430. With regard to the unlawful killings committed or ordered by Rocky, Savage or Staff Alhaji, the Appeals Chamber is satisfied that the Trial Chamber's finding that these individuals, together

[1065] Kallon Appeal, paras 58, 60.
[1066] Trial Judgment, paras 794-796.
[1067] Trial Judgment, paras 797, 807-812, 2084.
[1068] Trial Judgment, paras 813, 1138.
[1069] Sesay Appeal, paras 206-211, 218; Gbao Appeal, Annex II, pp. 3-5.
[1070] Trial Judgment, para. 2063 (section 4.1.1.1 (iii)-(vii))).
[1071] Trial Judgment, para. 2063 (section 4.1.1.1 (xi)). As these killings occurred during the same incident as TF1-197's amputation, the two crimes will be considered together.
[1072] Trial Judgment, para. 2063 (section 4.1.1.1 (xii)).
[1073] Trial Judgment, para. 2063 (section 4.1.1.1 (viii)).
[1074] Sesay Appeal, paras 207, 208, 211, 217.
[1075] Trial Judgment, para. 2063 (section 4.1.1.1 (ii)); Gbao Appeal, Annex II, pp. 3-5.

with Rambo RUF, "were directly subordinate to and used by members of the [JCE]" sufficiently explains how the Trial Chamber imputed their crimes to the JCE members.[1076]

431. Kallon challenges this finding.[1077] However, he does not address the evidence the Trial Chamber relied on to make it.[1078] He also fails to point to any parts of the record in support for his assertion that Rocky, Rambo, Savage and Staff Alhaji were not under the control of the Appellants. For his part, Sesay argues that the crimes of Savage, Staff Alhaji and their men did not fall within the Common Criminal Purpose because the finding that the rapes, killings and amputations in Penduma in April 1998 were committed "in a bid to disempower President Kabbah and to 'topple' his 'selfish and corrupt' regime" was "insufficient" to make such a finding.[1079] However, Sesay neither explains why that finding is insufficient, nor does he attempt to support his assertion with any reference to the evidence. Due to these flaws, Kallon's and Sesay's arguments are dismissed. The Appeals Chamber now turns to the specific killing incidents.

432. As to the killings by Rocky, Sesay argues that they were not part of the Common Criminal Purpose because Bockarie recalled Superman, Kallon and Rocky to Buedu for punishment when he heard of them.[1080] However, the finding he relies on does not sustain his claim that Superman, Kallon and Rocky were recalled "for punishment," as the Trial Chamber only found that they were summoned.[1081] Moreover, contrary to Sesay's claim, the fact that Rambo was not happy that one of the captive civilians (TF1-015) was still alive does not refute that the killings were committed in furtherance of the Common Criminal Purpose.[1082] To the contrary, Rocky's own admonition to the captives before the massacre suggests that it was committed in furtherance of the Common Criminal Purpose:

> Those of you who were clapping today, let me tell you now … We are Junta rebels … As you see in Kono now, we are now in control. We own this place now … We are coming to send you to Tejan Kabbah for you to tell him that we own here.[1083]

In addition, the Trial Chamber found that in March 1998 members of the JCE had ordered the commission of crimes against civilians, including killings in Koidu Town, to punish them for being

[1076] Trial Judgment, para. 2080.
[1077] Kallon Appeal, paras 58, 60.
[1078] Trial Judgment, paras 797, 807-812, 2084.
[1079] Sesay Appeal, para. 211, *quoting* Trial Judgment, para. 1202.
[1080] Sesay Appeal, paras 207, 208.
[1081] Trial Judgment, para. 1151.
[1082] Trial Judgment, para. 1150.
[1083] Trial Judgment, para. 1147.

traitors and for failing to support the Junta.[1084] Sesay points to no part of the record in support for his additional claim that Rocky acted for personal reasons or pursuant to a "localised order from Rambo," nor is that claim borne out by the Trial Chamber findings he refers to, in particular seeing as Kallon was one of the fifteen Commanders assembled after the massacre who voted that TF1-015 should be killed.[1085] This submission fails.

433. With respect to the killings ordered by Savage and Staff Alhaji in Tombodu between February and March 1998, Sesay submits that they were committed for twisted self-gratification and independently from the AFRC/RUF, but he neither points to any evidence in support nor does he address the evidence the Trial Chamber relied on for its findings on these killings.[1086] In particular, he does not challenge the findings that the execution of about 200 civilians on Savage's orders was committed because the victims were cheering for ECOMOG troops[1087] and that the "scale and gruesome nature" of the killings in Tombodu during this period "guaranteed their notoriety, as reflected by the evidence of several witnesses that the killings were reported to and discussed by Commanders in other locations."[1088] These submissions therefore fail as well.

434. Regarding the six killings in Yardu, Sesay submits that TF1-197 was unable to identify the perpetrators, or even their grouping.[1089] However, in the parts of TF1-197's testimony he invokes, the witness testified that the "RUF and AFRC" amputated his hand and that "those two groups … were the only two groups that were in Kono."[1090] Consequently, in the witness's mind, the "rebels" who captured him and the other six civilians, and who killed those six civilians before proceeding to amputate his hand, belonged to the AFRC/RUF.[1091] The Trial Chamber therefore did not err in finding that the perpetrators were "AFRC/RUF rebels."[1092] Because the witness's alleged failure to identify the perpetrators is the only basis for Sesay's submission that the killings were wrongly imputed, his submission is rejected. The Appeals Chamber is further satisfied that the Trial Chamber sufficiently explained how the JCE members availed themselves of the perpetrators of the killings. It held that the killings were part of a "polic[y] that promoted violence [and] targeted

[1084] Trial Judgment, paras 799, 1141, 2084.
[1085] *See* Trial Judgment, paras 1147, 1150.
[1086] Sesay Appeal, paras 209, 210; Trial Judgment, paras 1165-1169.
[1087] Trial Judgment, para. 1165.
[1088] Trial Judgment, para. 1275.
[1089] Sesay Appeal, para. 218, *citing* Trial Judgment, paras 1186, 1279, 1341-1343; Transcript, TF1-197, 22 October 2004, pp. 8-16.
[1090] Transcript, TF1-197, 22 October 2004, pp. 14, 15.
[1091] Transcript, TF1-197, 22 October 2004, pp. 9, 13.
[1092] Trial Judgment, para. 2063 (section 4.1.1.1 (xi)).

civilians"[1093] and that the "widespread commission by RUF and AFRC fighters"[1094] of unlawful killings such as the ones at issue demonstrated that the Common Criminal Purpose contemplated the commission of crimes as a means to control the territory of Sierra Leone. Sesay's and Gbao's allegations of a failure to provide a reasoned opinion in respect of this incident lack substance.

435. Sesay and Gbao submit that the Trial Chamber provided insufficient reasons as to why it imputed the killings of at least 29 civilians in Penduma in April 1998 to the JCE members. It is undisputed that these killings were carried out on orders of Staff Alhaji. The Appeals Chamber has already found that the Trial Chamber provided sufficient reasoning as to why Staff Alhaji's crimes were imputed to the JCE members. As Sesay and Gbao do not allege any error of fact in that reasoning, let alone with respect to the specific killings now at issue, their arguments are dismissed.

436. Gbao argues that the Trial Chamber failed to explain why the killing of Town Chief Sogbeh was imputed to the JCE members. The Appeals Chamber notes that this crime was committed on the orders of Officer Med at the Tombodu Bridge mining site sometime in February/March 1998.[1095] Sogbeh was killed for refusing an order to mine, and the rebels warned the civilians at the mine that the same fate awaited anyone who refused to work.[1096] Officer Med was the mining Commander at Tombodu Bridge[1097] and, as such, reported directly to Sesay.[1098] These findings show how the Trial Chamber imputed the killing to members of the JCE. Gbao's argument is dismissed.

437. Lastly, with respect to the killing of Sata Sesay's family, Sesay fails to explain how the alleged error in imputing this crime to the JCE led to a miscarriage of justice,[1099] seeing as the Trial Chamber did not enter a conviction under JCE for this crime.[1100] This submission is accordingly dismissed.

438. For these reasons, the Appellants' submissions that the Trial Chamber erred in failing to provide sufficient reasons for its conclusion that the unlawful killings in

[1093] Trial Judgment, para. 1342.
[1094] Trial Judgment, para. 2070.
[1095] Trial Judgment, para. 1170.
[1096] Trial Judgment, para. 1170.
[1097] Trial Judgment, para. 1674.
[1098] Trial Judgment, para. 2086. *See* also Trial Judgment, paras 1240, 1241; *see infra*, paras 699-705.
[1099] Sesay Appeal, paras 211, 217.
[1100] Trial Judgment, paras 2065 (section 4.1.2.1 (iv), 2076, 2091, 2102, 2110).

Kono District could be imputed to the members of the JCE. The Appeals Chamber also dismisses the Appellants' submissions that the Trial Chamber erred in fact in so concluding.

ii. Sexual violence

439. Sesay and Gbao submit that the Trial Chamber failed to explain how it imputed to the JCE members the following crimes of sexual violence committed in Kono District:[1101] (i) the rapes and outrages on personal dignity in Bumpeh on or about March 1998;[1102] (ii) the rape of a woman in Tombodu by Staff Alhaji in April 1998;[1103] (iii) the rapes of TF1-127's wife and of an unknown number of women in Penduma in April 1998;[1104] (iv) the rapes and genital mutilations in Bomboafuidu;[1105] (v) the rapes of TF1-195 and of five other women in Sawao between February and April 1998;[1106] and (vi) the forcible marriage of an unknown number of women in the civilian camp at Wendedu on or about April 1998.[1107]

440. The Appeals Chamber notes the Trial Chamber's finding that the rapes in Kono District "were not intended merely for personal satisfaction or [as] a means of sexual gratification for the fighter."[1108] Rather, these acts were committed "in order to break the will of the population and ensure their submission to AFRC/RUF control."[1109] The Trial Chamber further found that the rebel forces "systematically engage[ed] in sexual violence in order to demonstrate that the communities were unable to protect their own wives, daughters, mothers, and sisters."[1110] It also held that "countless women of all ages were routinely" subjected to the practice of forced marriage and sexual slavery.[1111] "[T]he pattern of sexual enslavement employed by the RUF was a deliberate system."[1112] These findings are reflected in the Trial Chamber's findings on the JCE in Kono District, where it held that the "widespread commission by RUF and AFRC fighters of [*inter alia*] rapes, sexual slavery, 'forced marriages' … demonstrates that the common purpose agreed to by the

[1101] Sesay Appeal, paras 206, 219-222; Gbao Appeal, Annex II, pp. 4, 5.
[1102] Trial Judgment, para. 2063 (section 4.1.1.2 (iii), (iv)).
[1103] Trial Judgment, para. 2063 (section 4.1.1.2 (v)).
[1104] Trial Judgment, para. 2063 (section 4.1.1.2 (vi)).
[1105] Trial Judgment, para. 2063 (section 4.1.1.2 (vii)-(ix)).
[1106] Trial Judgment, para. 2063 (section 4.1.1.2 (x)).
[1107] Trial Judgment, para. 2063 (section 4.1.1.2 (xi)).
[1108] Trial Judgment, para. 1348.
[1109] Trial Judgment, para. 1348.
[1110] Trial Judgment, para. 1350.
[1111] Trial Judgment, para. 1351.
[1112] Trial Judgment, para. 1351.

AFRC and RUF leadership continued to contemplate the commission of crimes within the Statute as a means of increasing its exercise of power and control over the territory of Sierra Leone."[1113]

441. In other words, the AFRC/RUF leadership, which included most of the JCE members,[1114] availed themselves[1115] of their fighters to commit sexual violence, including forced marriages, in Kono District in order to achieve the objective of controlling the territory of Sierra Leone. Although not expressed in those exact terms, the Trial Chamber's reasons why it imputed these crimes to the JCE members are nonetheless clear. Sesay's and Gbao's submissions that the Trial Chamber failed to provide a reasoned opinion in this regard are therefore dismissed.

442. Sesay also challenges the imputation of the rapes and genital mutilations in Bomboafuidu on the basis that the perpetrators were unidentified.[1116] However, as he does not point to the evidence to contest the Trial Chamber's finding that the perpetrators were "AFRC/RUF rebels,"[1117] his argument is rejected.

iii. Physical violence

443. Sesay and Gbao submit that the Trial Chamber provided insufficient reasoning to impute the following crimes of physical violence in Kono District to the JCE members:[1118] (i) the beating of TF1-197 on one occasion between February and March 1998 near Tombodu (including the pillaging of property from him);[1119] (ii) the act of knocking TF1-015's teeth out in the Wendedu camp;[1120] (iii) the amputation of the hands of three civilians by rebels led by Staff Alhaji in Tombodu in April 1998;[1121] (iv) the amputations of the hands of at least three men in Penduma in April 1998;[1122] (v) the amputation of the hands of five civilian men in Sawao between February and

[1113] Trial Judgment, para. 2070.
[1114] Trial Judgment, para. 2081.
[1115] *See Krajišnik* Appeal Judgment, para. 226.
[1116] Sesay Appeal, para. 220, *citing* Trial Judgment, paras 1207, 1208, 1307-1309.
[1117] Trial Judgment, para. 2063 (section 4.1.1.2 (vii)-(ix)). The Appeals Chamber notes that, while the Trial Chamber referred to the perpetrators of one of the rapes simply as "rebels", it is clear from the Trial Chamber's findings as a whole that it found the perpetrators of this rape, just as the ones committing the other acts of sexual violence in Bomboafuidu, to be "AFRC/RUF rebels." *See* Trial Judgment, paras 1207, 1208, 1346, 1348, 2063.
[1118] Sesay Appeal, paras 206, 212, 221, 223, 224; Gbao Appeal, Annex II, pp. 5, 7.
[1119] Trial Judgment, para. 2063 (section 4.1.1.3 (i)); Trial Judgment, para. 2063 (section 4.1.1.5 (i)). These crimes occurred during the same incident, and will therefore be considered together.
[1120] Trial Judgment, para. 2063 (section 4.1.1.3 (ii)).
[1121] Trial Judgment, para. 2063 (section 4.1.1.3 (iii)).
[1122] Trial Judgment, para. 2063 (section 4.1.1.3 (iv)).

April 1998;[1123] (vi) the flogging of TF1-197 and his brother by rebels under the command of Staff Alhaji;[1124] (vii) the beating of an unknown number of civilian men with sticks and the butts of guns in Sawao between February and April 1998;[1125] and (viii) the carving of "AFRC" and/or "RUF" on the bodies of 18 civilians in Kayima between February and April 1998.[1126] Sesay also submits that the Trial Chamber erred in fact in imputing these crimes to the JCE members. The Appeals Chamber will consider each crime incident in turn and, in so doing, address the alleged errors of fact and the alleged failure to provide a reasoned opinion together.

444. With regard to the beating of TF1-197 between February and March 1998, Sesay submits that TF1-197's testimony that the witness was told that the leader of the rebels who beat him and pillaged[1127] items from him, named Musa, reported to Staff Alhaji is insufficient to impute this crime to the JCE members.[1128] However, Sesay does not dispute TF1-197's testimony as such, nor does he account for the finding that Staff Alhaji was "directly subordinated" to members of the JCE.[1129] For his part, Gbao refers to the finding that "[o]ne of the rebels referred to his boss as Commando," but fails to explain how this is relevant to the evidence that the rebels' leader, whether he was called "Musa" or "Commando," reported to Staff Alhaji.[1130] In addition, the Appeals Chamber notes that beatings such as the one in question were "regularly" committed by AFRC/RUF rebels in the area between February and March 1998 as part of their looting civilian property,[1131] and that "Operation Pay Yourself," ordered by Koroma in February 1998,[1132] was endorsed by Superman who was the overall Commander for Kono District.[1133] For these reasons, Sesay's submission that the Trial Chamber erred in fact in imputing this crime, as well as his and Gbao's submissions that the Trial Chamber provided insufficient reasons for so doing, are rejected.

445. As regards the knocking out of TF1-015's teeth, Sesay submits that the Trial Chamber found it to be "a capricious punishment instilled on [TF1-015] by Captain Banya."[1134] However, Sesay does not account for the Trial Chamber's finding that this beating took place at the Wendedu camp,

[1123] Trial Judgment, para. 2063 (section 4.1.1.3 (viii)).
[1124] Trial Judgment, para. 2063 (section 4.1.1.3 (vi)).
[1125] Trial Judgment, para. 2063 (section 4.1.1.3 (ix)).
[1126] Trial Judgment, para. 2063 (section 4.1.1.3 (vii)).
[1127] *See* Trial Judgment, para. 1335.
[1128] Sesay Appeal, para. 212.
[1129] Trial Judgment, para. 2080.
[1130] Gbao Appeal, Annex II, p. 5; Trial Judgment, para. 1164.
[1131] Trial Judgment, paras 1161-1164.
[1132] Trial Judgment, paras 783, 961.
[1133] Trial Judgment, paras 783, 807.
[1134] Sesay Appeal, para. 223, *citing* Trial Judgment, paras 1177, 1314, 1358.

to which TF1-015 had been brought by Rocky.[1135] Wendedu camp was one of many camps "established in Kono District by the RUF" in which civilians were rounded up and forced to reside.[1136] Kallon in particular was involved in organising the Wendedu camp.[1137] Given the Trial Chamber's findings on the general coercive environment in these camps, which included beatings,[1138] the Appeals Chamber finds that it was open to a reasonable trier of fact to impute Captain Banya's mistreatment of TF1-015 to the members of the JCE. Sesay's submission that the Trial Chamber erred in fact in imputing this crime, as well as his and Gbao's submissions that the Trial Chamber provided insufficient reasons for so doing, are dismissed.

446. Sesay argues that there is "no evidence" to support that the rebels, led by Staff Alhaji, who (i) amputated the hands of three civilians in Tombodu in April 1998; and (ii) flogged TF1-197 and his brother were used by members of the JCE.[1139] However, Sesay fails to demonstrate an error as he does not challenge the Trial Chamber's explicit finding that Staff Alhaji was "directly subordinated to and used by" JCE members to commit crimes in furtherance of the Common Criminal Purpose.[1140] That finding also sufficiently explains how the Trial Chamber imputed these crimes to the JCE members. Sesay's and Gbao's submissions therefore fail.

447. Sesay submits that there is "no evidence" that the perpetrators of the following crimes were used by members of the JCE: (i) the amputation of the hands of five civilian men in Sawao between February and April 1998; (ii) the beating of an unknown number of civilian men with sticks and the butts of guns in Sawao between February and April 1998; and (iii) the carving of "AFRC" and/or "RUF" on the bodies of 18 civilians in Kayima between February and April 1998.[1141] Sesay and Gbao also argue that the Trial Chamber gave insufficient reasons for imputing the amputations of the hands of at least three men in Penduma in April 1998 to the JCE members.

448. However, neither Sesay nor Gbao addresses the Trial Chamber's finding, made in respect of these very crimes, that "[t]he amputations and carvings practised by the AFRC/RUF were notorious. These crimes served as a permanent, visible and terrifying reminder to all civilians of the

[1135] Trial Judgment, para. 1177.
[1136] Trial Judgment, para. 1218.
[1137] Trial Judgment, paras 1232, 2098.
[1138] Trial Judgment, para. 1218.
[1139] Sesay Appeal, paras 213, 214.
[1140] Trial Judgment, para. 2080.
[1141] Sesay Appeal, paras 221, 224.

power and propensity to violence of the AFRC and RUF."[1142] With respect to the mistreatment in Sawao, Sesay also fails to acknowledge the finding that, shortly before being amputated and beaten, the victims were brought before a rebel leader in Sawao who stated: "My instructions are if you capture [civilians], kill them and leave them there."[1143]

449. These findings are examples of the "widespread commission" of these types of crimes, which demonstrated that the AFRC/RUF leadership contemplated the commission of crimes as a means to control the territory of Sierra Leone.[1144] Similar to the crimes of sexual violence, the Trial Chamber thus found that the JCE members availed themselves of the perpetrators to commit these crimes in furtherance of the Common Criminal Purpose. Indeed, the amputations of the three men in Penduma in April 1998 were committed by rebels led by Staff Alhaji, who was explicitly found to have been used by the JCE members in furtherance of the Common Criminal Purpose.[1145] Staff Alhaji's address to one of the victims of this incident is telling: "go to Tejan Kabbah for him to give you a hand because he has brought ten containers load [*sic*] of arms. Now that you say you don't want our military rule, then go to your civilian rule."[1146] Sesay's and Gbao's submissions as to these crimes are rejected.

450. For these reasons, the Appeals Chamber dismisses the Appellants' submissions that the Trial Chamber erred in failing to provide sufficient reasons for its conclusion that the physical violence in Kono District could be imputed to the members of the JCE. The Appeals Chamber also dismisses the Appellants' submissions that the Trial Chamber erred in fact in so concluding.

iv. Enslavement and pillage

451. Sesay argues that the Trial Chamber provided insufficient reasoning for imputing the following crimes in Kono District to members of the JCE:[1147] (i) the enslavement, by using civilians for forced labour, between February and April 1998 (Count 13);[1148] (ii) the acts of pillage during the February/March 1998 attack on Koidu;[1149] and (iii) the looting of funds from the Tankoro bank

[1142] Trial Judgment, para. 1357.
[1143] Trial Judgment, para. 1182.
[1144] Trial Judgment, para. 2070.
[1145] Trial Judgment, paras 1197-1199.
[1146] Trial Judgment, para. 1199.
[1147] Sesay Appeal, para. 206.
[1148] Trial Judgment, para. 2063 (section 4.1.1.4).
[1149] Trial Judgment, para. 2063 (section 4.1.1.5 (ii)).

in Koidu on or about March 1998.[1150] This submission is dismissed on the basis that Sesay fails to address any of the numerous findings on which the Trial Chamber relied to impute these crimes of enslavement[1151] and pillage[1152] to the JCE members.

v. Burning of civilian homes (acts of terrorism)

452. Sesay submits that the Trial Chamber erred in imputing to members of the JCE the burning of civilian houses in Tombodu between February and April 1998 ordered by Staff Alhaji.[1153] In support, Sesay challenges the Trial Chamber's reliance on TF1-012's testimony, yet without explaining why the impugned findings are unreasonable in light of all the evidence on which the Trial Chamber relied, which was not limited to TF1-012's testimony.[1154] Sesay also challenges the finding that the burning in question amounted to acts of terrorism. He refers to the Trial Chamber's finding that the burning:

> [W]as intended to punish civilians for failing to support the AFRC/RUF and to prevent civilians from remaining in these towns. The Chamber accordingly finds that the perpetrators directed these acts of violence against civilian property with the intent of spreading terror among the civilian population as charged in Count 1.[1155]

While Sesay is correct that acts of terrorism and acts of collective punishment require proof of different intentions, it does not follow, as he appears to suggest, that the two cannot be established on the same evidentiary basis.[1156] Beyond that erroneous assertion, Sesay does not challenge the finding that the burning amounted to acts of terrorism. The fact that the Trial Chamber provided sufficient reasons for imputing Staff Alhaji's crimes to the JCE members has already been established.[1157] Sesay's submissions are therefore disallowed.

[1150] Trial Judgment, para. 2063 (section 4.1.1.5 (iii)).
[1151] *See e.g.,* Trial Judgment, paras 1322 ("AFRC/RUF fighters, following daily orders, abducted civilians from several villages in Kono District with the intent to use them as forced labour"), 1324 ("the RUF had a planned and organised system in which civilians were intentionally forced to engage in various forms of forced labour throughout the District"), 2070.
[1152] *See e.g.,* Trial Judgment, paras 783 ("Operation Pay Yourself was announced by Johnny Paul Koroma … Superman then endorsed the Operation"), 784 ("Bockarie reiterated Koroma's order for Operation Pay Yourself … from this point onwards, looting was a systemic feature of AFRC and RUF operations") 1336 ("AFRC/RUF fighters engaged in a systematic campaign of looting upon their arrival in Koidu, marking the continuation of Operation Pay Yourself") 2070, 2071, 2082. *See* also Trial Judgment, para. 1145 ("Superman took some of the stolen funds [from the Tankoro bank looting] and gave the rest to TF1-371 to take to Bockarie.").
[1153] Trial Judgment, para. 2064(ii).
[1154] Sesay Appeal, paras 215, 216; Trial Judgment, para. 1159.
[1155] Trial Judgment, para. 1361.
[1156] Sesay Appeal, para. 215.
[1157] Trial Judgment, para. 2080.

d. Kailahun District

453. Sesay contends that the Trial Chamber failed to identify the perpetrators or the victims of the forced marriages in Kailahun, and to identify the necessary link between the direct perpetrators and the JCE members.[1158]

454. The Trial Chamber considered that its findings on the acts of sexual violence and forced marriage in Kono District apply also to the forced marriages in Kailahun District now at issue.[1159] Those findings, which have been set out above, clarify how the perpetrators of these crimes were used by members of the JCE.[1160] Furthermore, with respect to Kailahun District specifically, the Trial Chamber held that the "widespread and systematic pattern" of crimes such as forced marriages "were for the benefit of the RUF and the Junta in furthering their ultimate goal of taking political, economic and territorial control over Sierra Leone."[1161] Sesay's argument that the Trial Chamber failed to identify the link between the perpetrators of the forced marriages in Kailahun and JCE members acting in furtherance of the Common Criminal Purpose therefore fails. Given the widespread and systematic pattern of these crimes, the fact that some of the victims were unidentified, or that the perpetrators were identified only as "RUF fighters,"[1162] does not render the Trial Chamber's finding on that link unreasonable. In addition, the Appeals Chamber notes that Superman, himself a JCE member,[1163] committed one of the forced marriages in Kailahun District,[1164] and that Bockarie also had a captured "wife."[1165] Sesay's submission is therefore rejected.

3. Conclusion

455. The Appeals Chamber grants Gbao's Ground 8(d) in part and finds that the Trial Chamber erred in holding the Appellants liable under JCE for the killing of a Limba man in Tongo Field. The remaining parts of Gbao's 8(d) and the present parts of Sesay's Grounds 24, 25, 27, 30, 33, 34 and 37 and Kallon's Ground 2 are dismissed.

[1158] Sesay Appeal, para. 230; Trial Judgment, para. 2156 (section 5.1.2 (i)-(iii)).
[1159] Trial Judgment, para. 1493.
[1160] *See supra*, para. 441.
[1161] Trial Judgment, paras 1465, 2159.
[1162] Trial Judgment, para. 2156 (section 5.1.2 (i)-(iii).
[1163] Trial Judgment, paras 1990, 2081.
[1164] Trial Judgment, paras 1408, 1463, 1464, 2156 (section 5.1.2 (ii)).
[1165] Trial Judgment, para. 1411.

D. Alleged errors regarding the temporal scope of the JCE (Sesay Ground 33 (in part) and Kallon Ground 11 (in part))

1. Trial Chamber's findings

456. The Trial Chamber found that, after being expelled from Freetown following the 6 to 14 February 1998 ECOMOG intervention, the leading members of the AFRC and RUF maintained their Common Criminal Purpose,[1166] but that a major rift occurred between the AFRC and RUF in April 1998.[1167] The rift led to the departure of the majority of the AFRC fighters from Kono, after which the Trial Chamber found the JCE ended in late April 1998.[1168]

2. Submissions of the Parties

(a) Sesay Ground 33 (in part)

457. Sesay submits that the Trial Chamber erred in concluding that the JCE continued until the end of April 1998. In his view, no reasonable trier of fact could have concluded that the JCE continued beyond March 1998.[1169] In response, the Prosecution refers to its own Ground 1, and adds that deference should be given to the Trial Chamber's evaluation of the evidence.[1170] Sesay replies that the issue of deference does not arise as there was no evidence to sustain the Trial Chamber's finding.[1171]

(b) Kallon Ground 11 (in part)

458. Kallon submits that, on the evidence, the alleged common plan between the AFRC and RUF ceased to exist after the retreat from Freetown following the ECOMOG Intervention on 6 to 14 February 1998,[1172] and that he did not participate in the common plan thereafter.[1173] In a related submission, Kallon argues that the Trial Chamber erred in finding him guilty of crimes committed in Kono in "May 1998", because it acknowledged that the JCE ended in April 1998.[1174]

[1166] Trial Judgment, paras 2067-2072.
[1167] Trial Judgment, paras 820, 2073.
[1168] Trial Judgment, paras 820, 2073, 2076.
[1169] Sesay Appeal, para. 193.
[1170] Prosecution Response, para. 5.18.
[1171] Sesay Reply, para. 69.
[1172] Kallon Appeal, para. 115.
[1173] Kallon Notice of Appeal, para. 12.2; Kallon Appeal, para. 115, *citing* Trial Judgment, para. 790.
[1174] Kallon Appeal, para. 63.

459. The Prosecution proffers the same arguments in response as those under Sesay's Ground 33, above,[1175] adding that it is irrelevant whether the Trial Chamber referred to "April/May 1998" because the Appellants' responsibility for crimes in Kono from May 1998 was determined under other modes of liability.[1176] Kallon offers no additional arguments in reply.

3. Discussion

460. The Appeals Chamber will first consider Kallon's submission.

(a) Did the Trial Chamber err in not finding that the JCE ended with the ECOMOG intervention?

461. The Appeals Chamber finds that Kallon selectively refers to the Trial Chamber's findings in support of his position that the alliance between AFRC and RUF leaders collapsed after the ECOMOG intervention. A reading of the relevant findings in context reveals a conflicting picture of the situation after the ECOMOG intervention. The Trial Chamber's findings show that, while the AFRC/RUF withdrawal from Freetown was "chaotic" and "the status of the AFRC/RUF alliance drastically changed" thereafter,[1177] the leaders of the two factions, including Superman, SAJ Musa, Bockarie and Koroma, nonetheless agreed to mount a joint attack on Koidu Town.[1178] After a failed joint attack in the second half of February 1998,[1179] AFRC/RUF forces, urged on by Sesay,[1180] managed to capture Koidu on or about 1 March 1998.[1181] The AFRC and RUF then set up an integrated command structure in Kono District under the direction of, *inter alia*, Johnny Paul Koroma, Sesay, Superman, Bazzy and Five-Five.[1182] Coupled with its findings on the continued commission of crimes to achieve their objective,[1183] it was reasonable for the Trial Chamber to find on this basis that the leaders of the AFRC and RUF persisted in their Common Criminal Purpose after the ECOMOG intervention on 6 to 14 February 1998.[1184] The findings on the arrest of Koroma and Gullit and the dispossession of their diamonds that Kallon additionally refers to were

[1175] Prosecution Response, fn. 465.
[1176] Prosecution Response, para. 5.17, *citing* Trial Judgment, paras 2117-2120, 2134.
[1177] Trial Judgment, paras 778, 2067.
[1178] Trial Judgment, para. 790.
[1179] Trial Judgment, para. 794.
[1180] Trial Judgment, para. 794.
[1181] Trial Judgment, para. 796.
[1182] Trial Judgment, paras 794-814, 2070.
[1183] Trial Judgment, paras 2063, 2064, 2070, 2071.
[1184] Trial Judgment, para. 2072.

taken into account by the Trial Chamber for its conclusion that the JCE ended, and so do not detract from the abovementioned findings.[1185]

462. Kallon also challenges the finding that he participated in the continued Common Criminal Purpose on the basis that he was not involved in the plan to attack Koidu Town.[1186] By contrast, he argues, SAJ Musa, who was involved in that plan, was not found to be a JCE member in Kono.[1187] The Appeals Chamber notes that whether Kallon participated in planning the attack on Koidu is not determinative of whether he continued to participate in the JCE after the ECOMOG intervention on 6 to 14 February 1998, because the Trial Chamber found that he participated in the JCE in numerous other ways. For instance, he actively participated in the attack against Koidu Town during which civilians were killed, and he endorsed the instructions issued by Sesay and Koroma after the attack that civilians in Kono should be killed and their homes burned.[1188] By contrast, SAJ Musa did not wish to work with and be subordinated to the RUF, whom he did not respect because they were not professional soldiers, and left before the AFRC/RUF forces proceeded on the Kono attack.[1189] SAJ Musa neither communicated with the joint AFRC/RUF forces nor cooperated with them in any way thereafter.[1190] Kallon does not address these findings. Kallon's present submissions regarding his participation are accordingly rejected.

463. Lastly, Kallon complains that the Trial Chamber failed to specify when the JCE ended and that he was erroneously convicted for crimes in Kono in "May 1998."[1191] The Trial Chamber was "unable to ascertain with certainty" the date on which the split occurred between the AFRC and RUF forces which caused the end of the JCE.[1192] However, it found that it occurred "in late April 1998."[1193] Kallon does not explain how this finding was in error. As to his own JCE liability, the Trial Chamber found that, because the JCE ended in late April 1998, "at that time no responsibility can be imputed to … Kallon … for criminal acts committed by any AFRC fighter under the mode of a [JCE]."[1194] The Trial Chamber's findings in relation to Kallon's participation in the JCE suggest that he incurred JCE liability for the crimes in Kono between 14 February and

[1185] Trial Judgment, paras 801-805, 819, 2073.
[1186] Kallon Appeal, para. 115.
[1187] Kallon Notice of Appeal, para. 12.2.
[1188] Trial Judgment, paras 2093-2101.
[1189] Trial Judgment, paras 792, 793, 2079.
[1190] Trial Judgment, paras 793, 2079.
[1191] Kallon Appeal, paras 63, 118.
[1192] Trial Judgment, paras 820, 2075, 2076.
[1193] Trial Judgment, para. 2076.
[1194] Trial Judgment, para. 2076.

"April/May 1998."[1195] However, this phrasing is merely imprecise and does not represent an error that invalidates a verdict, because its findings elsewhere, which are discussed above, indicate that the Trial Chamber understood the date to be "late April 1998." The Appeals Chamber rejects this submission.

(b) Did the Trial Chamber err finding that the JCE continued beyond March 1998?

464. Sesay essentially submits that the split between the AFRC and RUF occurred, not after, but during the ECOMOG attack on their positions in Koidu town in early April 1998. However, in support he simply refers to a number of excerpts or summaries of various testimonies compiled in Annex F to his Appeal, selected parts of TF1-334's testimony, and a list of testimonies allegedly supporting that the crimes in RUF camps fell outside the JCE.[1196] He makes no mention in his Appeal of why or how no reasonable trier of fact could have relied on the evidence the Trial Chamber referenced for its findings regarding the AFRC/RUF split, let alone how any such error occasioned a miscarriage of justice.[1197] The Appeals Chamber recalls that it is for an appellant, not the Appeals Chamber, to clearly articulate the errors alleged to have been committed by the Trial Chamber. Undeveloped assertions such the one now at issue, which merely requests the Appeals Chamber to assess selected parts of the evidence *de novo*, will be summarily dismissed by the Appeals Chamber.

465. This part of Sesay's Ground 33 is rejected.

4. Conclusion

466. For the foregoing reasons, and recalling its prior conclusions with respect to other arguments raised in Sesay's Ground 33,[1198] the Appeals Chamber dismisses Sesay's Ground 33 in its entirety. The Appeals Chamber dismisses Kallon's Ground 11 in part.

[1195] Trial Judgment, para. 2102.
[1196] Sesay Appeal, para. 194.
[1197] Trial Judgment, paras 817-820, 2073.
[1198] *See supra*, para. 455. The Appeals Chamber also rejects the submissions in paragraphs 225-230 of Sesay's Appeal because they are outside the scope of Ground 33 in his Notice of Appeal.

E. Alleged errors regarding the category of the JCE (Kallon Ground 2 (in part) and Gbao Grounds 8(j), (k))

1. Trial Chamber's findings

467. The Trial Chamber found that "the crimes charged under Counts 1 to 14 were within the [JCE] and intended by the participants to further the common purpose."[1199] As previously noted, the Common Criminal Purpose found by the Trial Chamber consisted of the non-criminal objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and the crimes as charged under Counts 1 to 14 as means of achieving that objective.[1200] It further held that mid- and low-level RUF and AFRC Commanders and rank-and-file fighters were used by JCE members to commit crimes that "were either intended by the members to further the common purpose, or were a natural and foreseeable consequence of the implementation of the common purpose."[1201] The Trial Chamber held that it would not consider the Appellant's liability pursuant to JCE 2.[1202]

468. The Trial Chamber concluded that Kallon "shared with the other participants in the [JCE] the requisite intent to commit" the crimes in Bo, Kenema, Kono and Kailahun Districts.[1203] In terms of Gbao's *mens rea*, the Trial Chamber found that he did not intend the crimes committed in Bo, Kenema and Kono Districts as a means of achieving the Common Criminal Purpose.[1204] Instead, the Trial Chamber found that Gbao knew that the crimes in these Districts were being committed by RUF fighters, continued to pursue the Common Criminal Purpose of the joint criminal enterprise,[1205] and "willingly took the risk that the crimes charged and proved … might be committed by other members of the joint criminal enterprise or persons under their control."[1206] The Trial Chamber found that Gbao shared with the other JCE members the intent to commit the crimes in Kailahun District.[1207]

[1199] Trial Judgment, paras 1982, 1985.
[1200] Trial Judgment, paras 1979-1985.
[1201] Trial Judgment, para. 1992.
[1202] Trial Judgment, paras 384, 385.
[1203] Trial Judgment, paras 2008, 2056, 2103, 2163.
[1204] Trial Judgment, paras 2048, 2060, 2109.
[1205] Trial Judgment, paras 2046, 2058, 2108.
[1206] Trial Judgment, paras 2048, 2060, 2109.
[1207] Trial Judgment, para. 2172.

2. Submissions of the Parties

(a) Kallon Ground 2 (in part)

469. Kallon makes three submissions related to the category of JCE applied by the Trial Chamber. First, he submits that the Trial Chamber erred in failing to determine whether a JCE 1 or JCE 3 existed[1208] and instead made the impermissible finding in the alternative, that the crimes fell either under JCE 1 or JCE 3.[1209] Also, the Trial Chamber failed to specify as to each crime location whether the crimes were part of the common plan or a natural and foreseeable consequence of it.[1210] Second, Kallon submits that the Trial Chamber erred in convicting him under JCE 2.[1211] Third, he argues that, although the Trial Chamber "primarily appears to suggest" that he had the *mens rea* for JCE 1, it is not the only reasonable inference on the evidence[1212] and that the Trial Chamber failed to make any findings on his *mens rea* for JCE 3.[1213]

470. The Prosecution responds that certain crimes can be an intended part of the common purpose, while others are a natural and foreseeable consequence of its implementation.[1214] All of Kallon's convictions under JCE were based on findings that the crimes were intended to be within the Common Criminal Purpose, and none of Kallon's convictions were entered under JCE 3.[1215] Kallon offers no additional arguments in reply.

(b) Gbao Ground 8(j) and (k)

471. Under Ground 8(j), Gbao submits that, because the crimes in all Districts were found to have been intended by the members of the JCE, the Trial Chamber had to find that he too intended to commit these crimes and to participate in a common plan before it could convict him pursuant to his participation in the JCE.[1216] Instead, the Trial Chamber found that he "willingly took the risk" that the crimes in Bo, Kenema and Kono Districts might be committed, which is the *mens rea* for

[1208] Kallon Notice of Appeal, para. 3.12; Kallon Appeal, para. 54.
[1209] Kallon Appeal, paras 54, 60, *quoting* Trial Judgment, paras 1992, 2080, and *citing Ndindabahizi* Appeal Judgment, para. 122.
[1210] Kallon Appeal, para. 59. *See* also *ibid*., paras 108, 110.
[1211] Kallon Notice of Appeal, para. 3.12, *citing* Trial Judgment, paras 1351, 1480, 1992, 1997, 2004, 2006, 2070, 2080; Kallon Appeal, para. 65, *citing* Trial Judgment, paras 387-389, 784, 2004, 2071.
[1212] Kallon Appeal, para. 64.
[1213] Kallon Appeal, para. 64. *See* Kallon Notice of Appeal, para. 3.12.
[1214] Prosecution Response, para. 5.31, *citing Stakić* Appeal Judgment, paras 91-98; *Martić* Appeal Judgment, para. 3.
[1215] Prosecution Response, para. 5.31.
[1216] Gbao Appeal, paras 145, 147.

JCE 3.[1217] In his view, it is impossible for members of the same JCE to incur different types of JCE liability for the same crime.[1218] Gbao adds that the fact that the Trial Chamber was unable to find that he shared the criminal intent of all the JCE members is that he was not part of the JCE.[1219] Gbao requests that the Appeal Chamber overturn his convictions and sentences under JCE in Bo, Kenema, and Kono Districts.[1220]

472. Under Ground 8(k), Gbao submits Trial Chamber erred in finding him responsible for the crimes in Bo, Kenema and Kono Districts because he did not share the intent with other members of the JCE.[1221] Gbao argues that the intent to commit the crimes must be shared by all participants in the JCE,[1222] and when this *mens rea* element is not met, as in his case, no conviction under JCE can result.[1223] Gbao concludes that this error requires a dismissal of all his convictions and sentences in relation to crimes in Bo, Kenema, and Kono District.[1224]

473. The Prosecution responds that the Trial Chamber correctly evaluated the Appellants' roles in the JCE by location and held that liability under a broad JCE can attach even if the accused's contributions are limited to a smaller geographical area provided he knows of the wider purpose of the common design.[1225] Therefore, and given the findings on Gbao's JCE 1 liability in Kailahun, where the requisite intent under the basic form of JCE was satisfied for the relevant crimes,[1226] the Trial Chamber did not err in considering whether Gbao had knowledge of the wider purpose of the common design in Bo, Kenema, and Kono.[1227] Alternatively, the Prosecution argues that the Trial Chamber permissibly applied the *mens rea* of the extended form of JCE to some members and not to others[1228] as this form of liability arises when the additional crime was a natural and foreseeable

[1217] Gbao Appeal, paras 146, 147.
[1218] Gbao Appeal, para. 148. *See* also Gbao Reply, paras 69, 70.
[1219] Gbao Appeal, para. 148.
[1220] Gbao Appeal, para. 149.
[1221] Gbao Notice of Appeal, para. 55; Gbao Appeal, para 150.
[1222] Gbao Appeal, para 151, *citing* Trial Judgment, para. 265; *Fofana and Kondewa* Trial Judgment, para. 218; *Tadić* Appeal Judgment, para. 228; *Ntakirutimana* Appeal Judgment, para. 467; *Kvočka et al*. Appeal Judgment, para. 110; *Krnojelac* Appeal Judgment, para. 84; *Vasiljević* Appeal Judgment, para. 101.
[1223] Gbao Appeal, para 155.
[1224] Gbao Notice of Appeal, para. 56; Gbao Appeal, para 156.
[1225] Prosecution Response, para. 5.72. *See* Prosecution Response, paras 5.75, 5.76.
[1226] Prosecution Response, para. 5.73, *citing* Trial Judgment, paras 2164-2173.
[1227] Prosecution Response, para. 5.73, *citing* Trial Judgment, paras 2106-2108.
[1228] Prosecution Response, para. 5.74.

consequence to the Accused in particular.[1229] Gbao replies that the Trial Chamber's findings extend JCE beyond its logical limits and fairness to the accused.[1230]

3. Discussion

(a) Applicable law

474. The *actus reus* is essentially common to all three categories of JCE.[1231] What primarily distinguishes them from each other is the *mens rea* required.[1232] As found by the ICTY Appeals Chamber in *Tadić*:[1233]

> With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). ["JCE 1"]
>
> With regard to the second category (which … is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. ["JCE 2"]
>
> With regard to the third category, what is required is 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 or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only 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*.[1234] ["JCE 3"]

475. At issue here are primarily the *mens rea* elements for JCE 1 and JCE 3. Under JCE 1, also known as the "basic" form of JCE, liability attaches where the accused intended the commission of the crime in question and intended to participate in a common plan aimed at its commission.[1235] In other words, JCE 1 liability attaches to crimes within the common criminal purpose.[1236] By contrast, JCE 3 liability attaches to crimes which are *not* part of the common criminal purpose.[1237] That is why it is often referred to as the "extended" form of JCE.[1238] However, before an accused

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[1229] Prosecution Response, para. 5.74, *citing* Trial Judgment, para. 266.
[1230] Gbao Reply, paras 68, 72, 73.
[1231] *Brima et al*. Appeal Judgment, para. 75; *Milutinović et al*. Trial Judgment, Vol 1, para. 107. *See* also *e.g. Vasiljević* Appeal Judgment, para. 100.
[1232] *Milutinović et al*. Trial Judgment, Vol 1, para. 107.
[1233] *Tadić* Appeal Judgment, paras 195, 220.
[1234] *Tadić* Appeal Judgment, para. 228.
[1235] *Brđanin* Appeal Judgment, para. 365.
[1236] *Brđanin* Appeal Judgment, para. 418; *Martić* Appeal Judgment, para. 82.
[1237] *See e.g., Stakić* Appeal Judgment, para. 87.
[1238] *See e.g., Kvočka et al.* Appeal Judgment, para. 83.

person can incur JCE 3 liability, he must be shown to have possessed "the *intention* to participate in and further the criminal activity or the criminal purpose of a group."[1239] Therefore, both JCE 1 and JCE 3 require the existence of a common criminal purpose which must be shared by the members of the JCE, including in particular the accused.[1240] Where that initial requirement is met, JCE 3 liability can attach to crimes outside the common criminal purpose committed by members of the JCE or by non-JCE perpetrators used by members of the JCE if it was reasonably foreseeable to the accused that a crime outside the common criminal purpose might be perpetrated by other members of the group in the execution of the common criminal purpose and that the accused willingly took that risk (*dolus eventualis*).[1241]

(b) Did the Trial Chamber err in failing to specify which category of JCE it applied?

476. The Appeals Chamber is not persuaded by Kallon's submissions that the Trial Chamber failed to find whether JCE 1 or JCE 3 liability applied in respect of the crimes and that it instead made its finding in the alternative, that crimes were either within or a foreseeable consequence of the JCE.[1242]

477. The question of which category of JCE applies depends first and foremost on the particular *mens rea* of the accused. Before turning to the Appellants' *mens rea*, the Trial Chamber found that non-JCE perpetrators were used by JCE members to commit crimes "that were either intended by the members to further the common purpose, or were a natural and foreseeable consequence of the implementation of the common purpose."[1243] Whether this alternative finding was in error is of no consequence because on the critical question of whether *Kallon* possessed the *mens rea* required for either of the JCE categories the Trial Chamber's findings are unequivocal. In particular, it found that Kallon intended all the crimes for which he incurred JCE liability, thereby finding him liable under JCE 1.[1244]

[1239] *Tadić* Appeal Judgment, para. 228.
[1240] *See e.g., Stakić* Appeal Judgment, paras 85, 86 (establishing that a common criminal purpose existed and that the accused shared its intent and participated in it, before moving on to assess whether the accused could be held liable under JCE 3 for "crimes beyond the scope of that enterprise").
[1241] *Brđanin* Appeal Judgment, para. 365; *Stakić* Appeal Judgment, para. 87; *Tadić* Appeal Judgment, para. 228; *Kvočka et al.* Appeal Judgment, para. 83. The Appeals Chamber recalls that it is not decisive whether these fellow JCE members carried out the *actus reus* of the crimes themselves or used principal perpetrators who did not share the common purpose. *See supra*, paras 393-455.
[1242] Kallon Appeal, paras 54, 59, 60, 108, 110.
[1243] Trial Judgment, paras 1992, 2080.
[1244] Trial Judgment, paras 2008, 2056, 2103, 2163.

478. Kallon's additional argument that the Trial Chamber erroneously convicted him under JCE 2 is also without merit.[1245] He references only two findings in support, which state that after "Operation Pay Yourself" was announced "looting was a systemic feature of AFRC and RUF operations"[1246] and that criminal conduct was initiated pursuant to a "deliberate policy" by the Supreme Council.[1247] These two findings are wholly insufficient to show that the Trial Chamber departed from its express holding that it would not consider the Appellants' liability under JCE 2.[1248]

479. Kallon's submissions therefore fail.

(c) Did the Trial Chamber err in convicting Gbao under JCE?

480. Justices Winter and Fisher dissent from the Majority's holdings in relation to Gbao's sub-grounds 8(j) and 8(k).

481. In answering this question, it is pertinent to recall that apart from Ground 8, Gbao filed a further 19 so-called "sub-grounds," 8(a) to 8(s), of which sub-grounds 8(j) and 8(k) that we are now considering, are a part.

Ground 8 reads: *The Majority of the Trial Chamber erred in law and in fact in finding the existence of a Joint Criminal Enterprise and in finding Gbao a member of the Joint Criminal Enterprise.*

Sub-grounds 8(j) and (k) read:

8(j): The Majority of 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.

8(k): Gbao did not share the intent with other members of the Joint Criminal Enterprise in Bo, Kenema and Kono.

The three purported grounds are obviously vague, disjointed, imprecise and unclear. They do not fulfil the minimum and basic requirements of pleading Grounds of Appeal which the Appeals

[1245] Kallon Appeal, para. 65.
[1246] Trial Judgment, paras 784, 2071.
[1247] Trial Judgment, para. 2004.
[1248] Trial Judgment, para. 385.

Chamber has highlighted, inter alia, in paragraphs 31 and 32 supra. The appellant has not provided any details of the alleged error of law and/or of fact and has not even attempted to state how the alleged error of fact occasioned a miscarriage of justice. The Appeals Chamber would be fully justified in summarily dismissing the grounds were it not for the fact that it is opportune for the Chamber to adumbrate on the developing concept of Joint Criminal Enterprise liability in International Humanitarian Law.

482. In support of Ground 8(j) Gbao states in paragraph 144 of his Appeal Brief: "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 *mens rea* 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." He cites paragraph 1985 of the Trial Judgement in support. A perusal of the whole paragraph shows that the Trial Chamber made no such finding. Paragraph 1985 states:

> The Chamber finds that during the Junta regime, high ranking AFRC and RUF members shared a common plan which was to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The Chamber finds that crimes were contemplated by the participants of the joint criminal enterprise to be within the common purpose. The Chamber further finds that the AFRC/RUF forces targeted civilians in a widespread and systematic attack designed to terrorise the population into submission through collective punishment, unlawful killings, sexual violence and physical violence. In addition the joint AFRC/RUF forces continued to rely on forced labour of civilians to generate revenue, used children under the age of 15 years as fighters and generally accepted pillage as a means to gratify the fighters.

Nowhere in that paragraph did the Majority of the Trial Chamber make the finding alleged by Gbao. It is not proper for Gbao to put words into the mouth of the Trial Chamber for the apparent purpose of manufacturing a case that bears no semblance to reality. The Ground is without merit and the Appeals Chamber, Justices Winter and Fisher dissenting, dismisses it in this short shrift.

483. However, taking the opportunity to adumbrate on JCE, the Appeals Chamber recalls that it has held that pleading the basic and extended forms of JCE in the alternative is now a well-established practice of International criminal tribunals.[1249] In the basic and systemic categories of JCE, all members of the JCE may be found criminally liable for all crimes committed that fall within the common design. The extended form of JCE involves criminal acts that fall outside the

[1249] *See Brima et al.* Appeal Judgment, para 85.

common design. An Accused who intends to participate in a common design may be found guilty of acts outside that design if such acts are a "natural and foreseeable consequence of the effecting of that criminal purpose."[1250]

484. The Trial Chamber found

> **that following the 25 May 1997 coup, high ranking AFRC members and the RUF leadership agreed to form a joint 'government' in order to control the territory of Sierra Leone. The Chamber considers that such an objective in and of itself is not criminal and therefore does not amount to a common purpose within the meaning of the law of joint criminal enterprise pursuant to Article 6(1) of the Statute. However, where the taking of power and control over State territory is intended to be implemented through the commission of crimes within the Statute, this may amount to a common criminal purpose.**[1251]

We opine that this is a correct statement of the law.

485. The Trial Chamber defined the Common Criminal Purpose of the JCE as consisting of the objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and the crimes as charged under Counts 1 to 14 as the means of achieving that objective.[1252] The Trial Chamber further found that Gbao was "a participant" in the JCE.[1253] The Appeals Chamber, Justices Winter and Fisher dissenting, considers that in consequence Gbao, as with the other participants of the JCE, would be liable for all crimes which were a natural and foreseeable consequence of putting into effect that criminal purpose.

486. In paragraph 1990 of the Trial Judgment, the Trial Chamber found that the RUF, including in particular Sesay, Kallon, Sankoh, Bockarie, Superman, Eldred Collins, Mike Lamin, Isaac Mongor, Gibril Massaquoi and other RUF Commanders began working in concert with the AFRC, including at least Johnny Paul Koromah, Alex Tamba Brima, Bazzy Kamara, Santigie Borbor KIanu, SAJ Musa Zagalo, Eddie Kanneh and others to hold power in Sierra Leone on or shortly after 25 May 1997. The Majority found that Gbao was a participant in the JCE. As stated in paragraph 1985, Gbao shared the common plan which was to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and that Gbao contemplated the commission of crimes:

[1250] *Tadić* Appeal Judgment, para. 204.
[1251] Trial Judgment, para. 1979 (emphasis added).
[1252] Trial Judgment, paras 1979-1985; *see supra*, para. 305.
[1253] Trial Judgment, para. 1990.

487. The Trial Chamber further found, with respect to Gbao, that

> The Accused person does not need to have been present at the time of the crime.[1254] Therefore, the distance of Gbao to many of the crimes is not a reason for denying his participation under the basic form. What matters is that he intended or that it was foreseeable that he would further the joint criminal enterprise.[1255]

The Appeals Chamber agrees.

488. As to the crimes in Bo District, the Trial Chamber found in paragraph 2040 of the Trial Judgment that

> Gbao did not share the intent of the **principal perpetrators** to commit the crimes committed against civilians under Counts 3 to 5 (unlawful killings), and Count 14 (pillage) in Bo District in furtherance of the joint criminal enterprise.

It is important to note here that the 'principal perpetrators' are those persons who personally and physically committed the crimes alleged and may be persons who are not members of the joint criminal enterprise.

489. Further in regard to the crimes in Bo District, the Trial Chamber concluded in paragraph 2048 of the Trial Judgment that although Gbao did not share the intent of the principal perpetrators as aforesaid,

> [T]he Prosecution has proved beyond reasonable doubt that **Gbao willingly took the risk** that the crimes charged and proved under unlawful killings (Count 3 to 5) and pillage (Count 14), which he did not intend as a means of achieving the common purpose, might be committed by other members of the joint criminal enterprise or persons under their control.

490. In respect of the crimes committed in Kenema District, the Trial Chamber found in paragraph 2060 of the Trial Judgment that

> [T]he Prosecution has proved beyond reasonable doubt that **Gbao willingly took the risk** that the crimes charged and proved under Counts 3 to 5 (unlawful killings), Count 11 (physical violence) and Count 13 (enslavement) which he did not intend as a means of achieving the common purpose, might be committed by other members of the joint criminal enterprise or persons under their control.

491. Finally, with regard to the crimes committed in Kono District, the Trial Chamber held in paragraph 2109 of the Trial Judgment that

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[1254] *Tadić* Appeal Judgment, paras 991-992.
[1255] Trial Judgment, para. 1990.

> [T]he Prosecution has proven beyond reasonable doubt that **Gbao willingly took the risk** that the crimes charged and proved under Counts 3 to 5, 6 to 9, 10 and 11, 13 and 14 which he did not intend as a means of achieving the common purpose, might be committed by other members of the joint criminal enterprise or persons under their control. (Emphasis supplied)

492. The Appeals Chamber holds that so long as Gbao agreed to the Common Criminal Purpose and was, therefore, a member of the JCE as the Trial Chamber found,[1256] he is responsible for all crimes that he either intended, or were naturally foreseeable would be committed by members of the JCE or persons under their control. This is consistent with the pleading of the crimes in the Indictment (which must be read in its entirety) and which pleaded each of the crimes in Counts 1 to 14 as either within the JCE or as a reasonably foreseeable consequence of the JCE.[1257]

493. The Appeals Chamber agrees with the Prosecution's submission during the Appeal Hearing that Gbao "shared the intent for the crimes to be committed in Kailahun District, so he was a participant in the joint criminal enterprise."[1258] Gbao it must be recalled was at all material times the senior RUF Commander stationed in Kailahun. It follows that, since Gbao was a member of the JCE, so long as it was reasonably foreseeable that some of the members of the JCE or persons under their control would commit crimes, Gbao would be criminally liable for the commission of those crimes.[1259] As the Trial Chamber found that the crimes in Bo, Kenema and Kono Districts, which were within the Common Criminal Purpose, were reasonably foreseeable, it follows that the Trial Chamber did not err. Gbao's Ground 8 is accordingly dismissed.

494. Sub-Ground 8(k), supra, is obviously not a ground of appeal, by any stretch of the imagination, and is summarily dismissed.

4. Conclusion

495. The Appeals Chamber dismisses Kallon's Ground 2 in present parts and dismisses, Justices Winter and Fisher dissenting, Gbao's Grounds 8(j) and (k).

[1256] Trial Judgment, para. 1990.
[1257] *See supra,* para. 483; *see* also Indictment, para. 37; *Brima et al.* Appeal Judgment, para. 85.
[1258] Transcript, Appeal Hearing, (Dr. Christopher Staker), 3 September 2009, p. 194.
[1259] Transcript, Appeal Hearing, 3 September 2009, pp. 194-197.

VI. GROUNDS OF APPEAL RELATING TO UNAMSIL PERSONNEL

A. Errors relating to Crimes against UNAMSIL Personnel (Sesay Ground 44)

1. Submissions of the Parties

496. Sesay submits that the Trial Chamber erred in holding him liable under Article 6(3) of the Statute for failing to prevent or punish his subordinates for directing 14 attacks against UNAMSIL personnel and for killing four UNAMSIL personnel in May 2000[1260] and puts forward two arguments in support of his submission. First, Sesay argues that the Trial Chamber erred in fact and in law in concluding that, as he was "effectively the overall military Commander of the RUF on the ground," he was in effective control over all the perpetrators.[1261] Second, Sesay makes three principal challenges to the Trial Chamber's conclusions on his failure to prevent or punish the attacks.

(i) The duty to prevent "arises when the commander acquires actual knowledge or has reasonable grounds to suspect that a crime is being or is about to be committed" and that he was put on notice of the relevant attacks on 3 May 2000.[1262]

(ii) The findings that he made no attempt to prevent the relevant attacks is wrong[1263] because he "did what he could to contain the violence and [] the control he had (or lack thereof) meant that he could not stop it;" the Trial Chamber "demanded the impossible..[1264] Sesay's removal of UNAMSIL personnel from danger, holding them as prisoners of war and releasing them as soon as the opportunity arose were "effective steps to prevent the attacks."[1265]

(iii) The finding that he failed to punish the perpetrators of the attacks is wrong because the RUF was a fractious movement with some factions opposed to his leadership[1266] and "the Prosecution failed to prove what the Appellant could have done."[1267]

[1260] Trial Judgment, para. 2284.
[1261] Sesay Appeal, para. 339, *quoting* Trial Judgment, para. 2268.
[1262] Sesay Appeal, para. 347, *quoting Halilović* Trial Judgment, paras 72, 79, 90.
[1263] Sesay Appeal, para. 348.
[1264] Sesay Appeal, para. 348.
[1265] Sesay Appeal, para. 348.
[1266] Sesay Appeal, para. 350.
[1267] Sesay Appeal, para. 351.

497. The Prosecution responds that many of Sesay's contentions are unsubstantiated and that the Trial Chamber made numerous findings as to his effective control over the perpetrators of the attacks.[1268] Whether Sankoh had command responsibility is irrelevant to Sesay's command responsibility and acting pursuant to orders is not a valid defence.[1269] In the Prosecution's view, "it was open to the Trial Chamber to conclude that Sesay did not only fail to prevent or punish criminal acts but also that he *gave unequivocal orders to commit* them."[1270] Sesay makes no additional submissions in reply.

2. Discussion

(a) Sesay's effective control

498. The only substantive argument that Sesay puts forward in support of his first argument relates to Sankoh's authority over RUF fighters.[1271] Any authority that Sankoh may have had over RUF fighters is only relevant to the extent that it impacts upon Sesay's authority over said fighters. Sesay's argument presupposes that Sankoh's control over RUF fighters was mutually exclusive to his own. However, the Appeals Chamber notes that there is no indication that the Trial Chamber disregarded whether Sankoh's authority impacted on that of Sesay. The Appeals Chamber considers that Sesay has not shown that the Trial Chamber applied an incorrect standard or erred in applying the requisite standard.

(b) Failure to prevent or punish the attacks on UNAMSIL personnel

(i) Notice of attacks

499. Turning to Sesay's second argument, the Appeals Chamber notes that the first cluster of submissions relate to the date on which Sesay became aware of the attacks on UNAMSIL personnel. Sesay himself notes that he was put on notice of the attacks on 3 May 2000.[1272] He submits that:

> the Trial Chamber erred in law and/or fact in finding the Appellant guilty beyond a reasonable doubt under Article 6(3) of the Statute for failing to prevent the attacks on UNAMSIL peacekeepers [on] 1 and 2 May 2000 and 3 and 4 May 2000 under Count 15

[1268] Prosecution Response, paras 7.186-7.190.
[1269] Prosecution Response, para. 7.188.
[1270] Prosecution Response, para. 7.191.
[1271] Sesay Appeal, paras 341, 343.
[1272] Sesay Appeal, para. 347.

as well as the unlawful killings of UNAMSIL peacekeepers on 1 and 2 May 2000 under Count 17.[1273]

In fact, the Trial Chamber found liability on the part of Sesay "under Article 6(3) of the Statute for failing to prevent or punish his subordinates for directing 14 attacks against UNAMSIL personnel and killing four UNAMSIL personnel in May 2000, as charged in Counts 15 and 17."[1274] The above-quoted passage contains no error for it makes clear that Sesay was found liable for failing to *prevent or punish* his subordinates for the attacks and killings of UNAMSIL personnel. In so far as the attacks and killings of 1 and 2 May 2000 are concerned, Sesay's argument does not contest liability for failing to *punish* the relevant perpetrators. The Appeals Chamber affirms the Trial Chamber's statement of the law that "[t]he duty to prevent arises from the time a superior acquires knowledge, or has reason to know that a crime is being or is about to be committed, while the duty to punish arises after the superior acquires knowledge of the commission of the crime."[1275] Sesay's liability under Article 6(3) of the Statute relates to the failure to punish his subordinates for the 14 relevant attacks of May 2000 and the failure to prevent his subordinates from carrying out the attacks commencing on 3 May 2000. Further, it does not follow that because Sesay was put on notice of the attacks on 3 May 2000, he may not be held liable for failing to prevent attacks that took place subsequent to that time.

(ii) Prevention of attacks

500. Sesay's principal argument in his second cluster of submissions is that his order to treat the detained UNAMSIL personnel as prisoners of war was evidence of his preventing further attacks, rather than as a prolongation of the attack, which was the view of the Trial Chamber. Sesay's submissions are premised on a misconception of what constitutes an "attack," which is defined for the purposes of international humanitarian law as an "act of violence."[1276] Such violence may be directed at the body or liberty of the individual.[1277] Accordingly, as the Trial Chamber correctly noted, an attack is not limited to a physical assault but includes the unlawful deprivation of liberty.[1278] The Trial Chamber reasonably found that to order the continued detention of UNAMSIL

[1273] Sesay Appeal, para. 347.
[1274] Trial Judgment, para. 2284.
[1275] Trial Judgment, para. 314, *citing Limaj et al.* Trial Judgment, para. 527; *Blaškić* Appeal Judgment, para. 83; *Kordić and Čerkez* Trial Judgment, paras 445-446.
[1276] Additional Protocol I, Article 49(1). This definition of an attack also applies to armed conflicts not of an international character. *See* ICRC Commentary on the Additional Protocols, para. 4783 and fn. 19.
[1277] *See e.g.*, Convention on the Safety of United Nations and Associated Personnel, Article 9(1)(a).
[1278] Trial Judgment, paras 1889, 1897.

personnel in the circumstances, as Sesay did, constituted an unlawful deprivation of liberty such as to amount to a continuation of the attack upon them. Sesay thus ordered the very attacks he was required to seek to prevent.[1279]

501. The Appeals Chamber further finds Sesay's arguments in this regard to be disingenuous. He portrays his actions as benevolent — removing the troops from danger, keeping them safe and releasing them as soon as the occasion arose.[1280] However, this description is belied by the findings of the Trial Chamber, *inter alia*, that Sesay "collected the peacekeepers' passports and money" and "instructed that they should be kept in strict confinement as 'prisoners of war'."[1281]

(iii) Punishment of subordinate offenders

502. Much of the last cluster relies upon Sesay's testimony as its sole basis for support. Sesay fails to explain why the Trial Chamber erred in choosing not to rely upon relevant parts of his testimony. Sesay puts forward only one substantive argument in this sub-ground, namely that the onus is on the Prosecution to establish what he should have done. As a matter of law, the Prosecution is under an obligation to prove that a superior failed to take the necessary and reasonable measures to punish perpetrators of a crime.[1282] In the Prosecution's Final Trial Brief, it quotes from a passage in the *Strugar* Trial Judgment to establish that a superior's duty to punish includes, at the very least, "an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities."[1283] Accordingly, contrary to the contention of Sesay, the Prosecution did set out what it considered was required of Sesay by law. The Prosecution argued that the requisite measures were not instituted; rather, Sesay, together with his co-accused, were alleged to have participated directly in the attacks. In the view of the Prosecution, this direct participation rendered any lengthy submissions on the necessary and reasonable measures unnecessary.[1284]

503. In its section on the applicable law, the Trial Chamber held that:

> the duty imposed on a superior to punish subordinate offenders includes the obligation to investigate the crime or to have the matter investigated to establish the facts in order to

[1279] *See* also Trial Judgment, paras 1840, 1844, 1851, 1864.
[1280] Sesay Appeal, para. 348.
[1281] Trial Judgment, para. 1864.
[1282] *See*, for example, *Gacumbitsi* Appeal Judgment, para. 143; *Kordić and Čerkez* Appeal Judgment, para. 827; Trial Judgment, para. 285.
[1283] Prosecution Final Trial, para. 186, *quoting Strugar* Trial Judgment, para. 376.
[1284] Prosecution Final Trial, para. 1225.

> assist in the determination of the proper course of conduct to be adopted. The superior has the obligation to take active steps to ensure that the offender will be punished. The Chamber further takes the view that, in order to discharge this obligation, the superior may exercise his own powers of sanction, or if he lacks such powers, report the offender to the competent authorities.[1285]

When it came to determining the liability of the accused under Article 6(3) of the Statute, the Trial Chamber found that:

> Sesay made no attempt to prevent or punish the attacks against UNAMSIL peacekeepers. Although Sesay was sent to Makeni by Sankoh specifically in response to the attacks on 1 and 2 May 2000, there is no evidence that Sesay issued orders for the attacks to stop or instigated investigations among his troops. To the contrary, the Chamber recalls that Sesay actively prolonged the attacks on the captured peacekeepers at Yengema by ordering that they be kept as "prisoners of war."[1286]

504. As these two passages reveal, the Trial Chamber found that the requisite investigations were not undertaken or instigated. Indeed, the Trial Chamber found that, far from taking the reasonable and necessary measures to punish the perpetrators of the attacks, Sesay participated in the attacks.

505. The Appeals Chamber affirms the view that it need not be the superior who undertakes the actual investigation or institutes the punishment; however, the superior must at least ensure the matter is in fact investigated.[1287] This may be established through referral of the matter to the competent authorities.[1288] Seen in this light, even if the RUF were a fractious movement as Sesay contends, and even if the attacks did involve thousands of men including key commanders, that would not relieve Sesay of his obligation to investigate the matter himself, or, in the alternative, to refer the matter to the competent authorities for investigation.

3. Conclusion

506. The Appeals Chamber therefore dismisses Sesay's Ground 44 in its entirety.

[1285] Trial Judgment, para. 317.
[1286] Trial Judgment, para. 2283.
[1287] *Kvočka* Trial Judgment, para. 316; *Halilović* Trial Judgment, paras 97, 100.
[1288] *Hadžihasanović and Kubura* Appeal Judgment, para. 154; *Halilović* Trial Judgment, para. 97.

B. Alleged errors in failing to make a finding on specific intent for Count 15 (Kallon Ground 25)

1. Trial Chamber's findings

507. The Trial Chamber found 14 separate attacks were intentionally directed against peacekeepers.[1289] Kallon incurred Article 6(1) responsibility for committing an attack on peacekeepers with regard to the assault of Salahuedin,[1290] and Article 6(1) responsibility for ordering the abduction of Jaganathan,[1291] the attack on Maroa and three peacekeepers,[1292] the abduction of Mendy and Gjellesdad,[1293] the abduction of Kasoma and ten peacekeepers[1294] and the abduction of Kasoma's convoy.[1295]

508. The Trial Chamber found Kallon liable under Article 6(3) of the Statute[1296] for the abduction of Odhiambo's group,[1297] the abduction of Rono and three other peacekeepers,[1298] the Makump DDR Camp attack resulting in the death of Private Yusif and Wanyama,[1299] the Waterworks DDR Camp attack resulting in the death of two peacekeepers,[1300] the attack on the KENBATT base at Magburaka Islamic Centre,[1301] the attack on ZAMBATT peacekeepers in Lunsar,[1302] the attack on UNAMSIL personnel in Makeni on 7 May 2000[1303] and the attack on UNAMSIL personnel between Mile 91 and Magburaka on 9 May 2000.[1304]

2. Submissions of the Parties

509. Kallon submits that the Trial Chamber erred in law in failing to make any findings on his *mens rea* for ordering the attacks on UNAMSIL personnel.[1305] Kallon recalls that the Trial Chamber found that one of the elements of attacks on peacekeepers is that the accused intended the

[1289] Trial Judgment, paras 1888-1900.
[1290] Trial Judgment, paras 2242-2246.
[1291] Trial Judgment, para. 2248.
[1292] Trial Judgment, para. 2250.
[1293] Trial Judgment, para. 2253.
[1294] Trial Judgment, para. 2255.
[1295] Trial Judgment, para. 2258.
[1296] *See* Trial Judgment, para. 2292.
[1297] Trial Judgment, para. 1807.
[1298] Trial Judgment, paras 1809, 1810.
[1299] Trial Judgment, paras 1823-1827.
[1300] Trial Judgment, para. 1829.
[1301] Trial Judgment, paras 1828, 1830.
[1302] Trial Judgment, para. 1843.
[1303] Trial Judgment, para. 1859.
[1304] Trial Judgment, paras 1860-1862.

protected personnel be the primary object of the attack, making the crime one of specific intent.[1306] Kallon submits that instead of considering whether he had the requisite intent for ordering under Article 6(1), the Trial Chamber considered "how he used his subordinates to commit the offences through an Article 6(3) mode."[1307] Kallon illustrates this submission by reference to the Trial Chamber's findings on the assault and abduction of Jaganathan in which it held that "Kallon used his position as senior RUF Commander and BGC to compel his subordinates to commit the offence" and that he "intended his orders to be obeyed."[1308] He considers the same to be true of the Trial Chamber's findings on his directing an attack against Maroa, his abduction of Mendy and Gjellesdad, his abduction of Kasoma and ten peacekeepers and his ordering an attack against Kasoma's convoy of about 100 peacekeepers.[1309]

510. The Prosecution responds that the Trial Chamber correctly stated the *mens rea* requirement for superior responsibility under Article 6(3) of the Statute that "the Prosecution must only prove that the superior knew or had reason to know that his subordinate was about to commit or had committed such crimes."[1310] Kallon makes no additional submissions in reply.

3. Discussion

511. As a preliminary matter, the Appeals Chamber notes that the Parties do not contend the Trial Chamber erred in defining the legal elements of the crime charged under Count 15, in particular that it requires "a specific intent *mens rea*."[1311] Instead, the present ground of appeal raises the issue of whether the Trial Chamber made the factual finding required for the elements of the crime as it had defined them. The Appeals Chamber confines its analysis to the issue of whether the Trial Chamber's findings supported its conclusion that Kallon had the requisite *mens rea*.

512. Kallon incurred Article 6(1) liability for ordering the abduction of Jaganathan,[1312] the attack on Maroa and three peacekeepers,[1313] the abduction of Mendy and Gjellesdad,[1314] the abduction of

[1305] Kallon Appeal, paras 290, 291.
[1306] Kallon Appeal, para. 290, *citing* Trial Judgment, paras 219, 232.
[1307] Kallon Appeal, para. 291.
[1308] Kallon Appeal, para. 291, *quoting* Trial Judgment, para. 2248
[1309] Kallon Appeal, para. 291.
[1310] Prosecution Response, para. 7.211, *citing* Trial Judgment, para. 308.
[1311] Trial Judgment, para. 232.
[1312] Trial Judgment, para. 2248.
[1313] Trial Judgment, para. 2250.
[1314] Trial Judgment, para. 2253.

Kasoma and ten peacekeepers[1315] and the abduction of Kasoma's convoy.[1316] The Trial Chamber found that "ordering involves a person who is in a position of authority using that position to compel another to commit an offence."[1317] Accordingly, the Trial Chamber explained how Kallon used his position of authority in the RUF to compel subordinate RUF fighters to commit the attacks on peacekeepers in order to establish the basis for Article 6(1) liability.[1318] While the Trial Chamber did not make a separate finding specific to Kallon, the Trial Chamber did find that RUF fighters, "including Gbao, Kallon and Sesay" specifically targeted UNAMSIL peacekeepers and that the "RUF intended to make UNAMSIL peacekeepers the object of each of the 14 attacks."[1319] The Trial Chamber in this way found that Kallon had the intent it required for the crimes involving attacks on UNAMSIL personnel.[1320]

513. For these reasons, Kallon fails to establish that the Trial Chamber did not make any findings as to his specific intent for Count 15 or that it used Article 6(3) analysis to find Article 6(1) liability.

4. Conclusion

514. In light of the foregoing, the Appeals Chamber dismisses Kallon's Ground 25 in its entirety.

C. Errors related to identification of Kallon (Kallon Ground 26)

1. Trial Chamber's findings

515. The Trial Chamber found that Kallon intentionally directed an attack against Salahuedin and ordered the attack on Jaganathan, both on 1 May 2000 at the Makump DDR camp.[1321] It also held that Kallon ordered the attacks on Mendy and Gjellesdad on 1 May 2000, on Kasoma and 10 peacekeepers and on Kasoma's convoy of approximately 100 peacekeepers on 3 May 2000.[1322]

2. Submissions of the Parties

516. Kallon alleges that the Trial Chamber erred in its consideration of evidence identifying him as the author of these incidents. First, Kallon submits that "he was not sufficiently identified as the

[1315] Trial Judgment, para. 2255.
[1316] Trial Judgment, para. 2258.
[1317] Trial Judgment, para. 273, *citing Kordić and Čerkez* Appeal Judgment, para. 28.
[1318] Trial Judgment, paras 2242-2258.
[1319] Trial Judgment, paras 1901-1905.
[1320] *See* Trial Judgment, paras 1901-1905.
[1321] Trial Judgment, paras 2242, 2247-2248.

person who attacked Salahuedin and abducted Jaganathan."[1323] Second, Kallon contests his identification in the abduction of Mendy and Gjellesdad.[1324] Third, Kallon submits that the Trial Chamber erred in finding him involved in the abduction of Kasoma and 10 ZAMBATT peacekeepers at Moria.[1325] Kallon argues that a reasonable trier of fact would have concluded that the RUF commander in question was someone other than Kallon.[1326] Fourth, Kallon submits that the Trial Chamber erred in "failing to exercise caution in the assessment of the uncorroborated identification of the Appellant under uncertain and difficult circumstances provided by a lone witness."[1327] Kallon submits that the Trial Chamber failed to apply the relevant standards on identification evidence.[1328]

517. In response, the Prosecution points to the Trial Chamber's discussion on "Identification Evidence", and submits that Kallon fails to show an error in the Trial Chamber's evaluation of the evidence.[1329] It also contends that Kallon's submission on hearsay is unsubstantiated and that any difficulties Jaganathan had with his recollections on other matters were immaterial to the issue at hand.[1330]

3. Discussion

518. The Appeals Chamber will consider each of the purported errors in turn. First, regarding the identification of Kallon as being involved in the attacks on Salahuedin and Jaganathan, the Trial Chamber found that Jaganathan identified Kallon as being involved in the attack upon him. Jaganathan indicated in his testimony that, prior to the attack, he had not seen Kallon but that Major Maroa of the Kenyan Battalion informed him that it was he.[1331] The Appeals Chamber sees no error in this finding. It is well accepted that hearsay evidence may be admitted.[1332] Care needs to be taken when relying upon such evidence; however, the Trial Chamber was well aware of this.[1333] The Appeals Chamber also finds Kallon's argument misplaced. The testimony of Ngondi indicates that

[1322] Trial Judgment, paras 2251-2253, 2254-2255, 2256-2258.
[1323] Kallon Appeal, para. 258.
[1324] Kallon Appeal, para. 261.
[1325] Kallon Appeal, para. 265.
[1326] Kallon Appeal, para. 265, *citing* Trial Judgment, para. 1840.
[1327] Kallon Appeal, para. 267.
[1328] Kallon Appeal, para. 269, *citing Kupreškić et al.* Appeal Judgment, paras 32-41.
[1329] Prosecution Response, para. 7.195, *citing* Trial Judgment, paras 492-494.
[1330] Prosecution Response, para. 7.196.
[1331] Trial Judgment, fn. 3429; Transcript, Ganese Jaganathan, 20 June 2006, pp 24-25.
[1332] *Fofana* Appeal Decision Refusing Bail, para. 29.
[1333] *See* Trial Judgment, paras 495-496.

Maroa told him that Kallon assaulted Jaganathan; the testimony of Jaganathan indicates that both he and Salahuedin were assaulted by Kallon.[1334] Accordingly, no material inconsistency arises.

519. Turning to the second alleged error, Kallon seeks to impugn Mendy's testimony as to the identification of Kallon by noting his failure to recall other events in the same period.[1335] This line of reasoning is unconvincing since a witness may well recollect certain events while not recalling others; such inability to recall does not make those recollections inherently unreliable.[1336] Moreover, Kallon does not seek to challenge other evidence – including documentary evidence – that puts him at the scene.[1337] Instead, he simply asserts that the Trial Chamber failed to consider the testimony of other witnesses without explaining why their testimony is to be preferred over that which was cited by the Trial Chamber. The Appeals Chamber will normally uphold a Trial Chamber's findings on issues of credibility, including its resolution of inconsistent evidence and will only find that an error of fact occurred when it determines that no reasonable tribunal could have made the impugned finding.[1338]

520. As to Kallon's third alleged error, he fails to show that no reasonable trier of fact could have reached the conclusion of the Trial Chamber. The Appeals Chamber notes that Kallon's argument rests on two bases. First, he argues that the finding of the Trial Chamber that "[t]he RUF Commander took Kasoma and the ZAMBATT soldiers to the MP Office in Makeni, where he introduced Kasoma as the Commander of ZAMBATT to Sesay. Kallon was present at this time" reveals that Kallon was not the RUF Commander.[1339] Second, he submits that this is supported by the testimony of Sesay, DMK-161 and DMK-087.[1340]

521. The Appeals Chamber is of the view that the relevant part of the Trial Judgment reveals no error. The phrase "RUF Commander" is used in different places, by different witnesses, to refer to different individuals. For example, paragraph 1835 of the Trial Judgment, referring to the testimony of Edwin Kasoma, notes that "Kasoma was taken by several officers, including one man with a

[1334] Transcript, Leonard Ngondi, 29 March 2006, p. 29; Transcript Transcript, Ganese Jaganathan, 20 June 2006, pp 25-26.
[1335] Kallon Appeal, para. 261.
[1336] *See e.g. Kupreškić et al.* Appeal Judgment, para. 332 ("It is of course open to a Trial Chamber, and indeed any tribunal of fact, to reject part of a witness' testimony and accept the rest. It is clearly possible for a witness to be correct in her assessment of certain facts and incorrect about others.")
[1337] Transcript, Mohammed Abdulahi Garbah, 19 May 2008, pp 124-125 (closed session); Exhibit 109, Report on the RUF Rebel Attack on UNAMSIL Officers in Makeni Team Site, dated 27 November 2000.
[1338] *Brima et al.* Appeal Judgment, para. 120.
[1339] Kallon Appeal, para. 265, *citing* Trial Judgment, para. 1840.
[1340] Kallon Appeal, para. 266, fn. 595.

limp, to a small shelter to meet the RUF Commander." Paragraph 1838 of the Trial Judgment, referring to the testimony of DIS-310, reads "[t]he RUF Commander giving orders at the scene was a short person with a limp." That different witnesses refer to different individuals as the "RUF Commander" explains why the Trial Chamber sometimes refers to the RUF Commander and sometimes Kallon. It does not follow that because Kallon was not the individual described as the "RUF Commander" at one point in time, he was not the individual described as the "RUF Commander" at another point in time. Furthermore, the Appeals Chamber notes that the testimony of Kasoma was relied upon extensively by the Trial Chamber and it is unambiguous on point.[1341] The Appeals Chamber further notes that Kallon proffers no real reasons for why the evidence of the witnesses he cites is to be preferred over that used by the Trial Chamber, including that of Kasoma.

522. The Appeals Chamber finds that the arguments related to the fourth alleged error remain at the level of mere assertion. That the Trial Chamber exercised caution in relying on identification evidence of a lone witness is abundantly clear from the Trial Judgment, which notes the practice of the Trial Chamber "to examine evidence from a lone witness very carefully, in light of the overall evidence adduced, and to guard against the exercise of an underlying motive on the part of the witness, before placing any reliance on it."[1342] Kallon's argument that the Trial Chamber failed to apply the requisite standards on identification evidence is not backed by any reasoning and is unsupported on the facts. In any event, the Appeals Chamber has itself held that "there is no bar to the Trial Chamber relying on a limited number of witnesses or even a single witness, provided it took into consideration all the evidence on the record."[1343] Accordingly, Kallon has not demonstrated any error on the part of the Trial Chamber.

4. Conclusion

523. For these reasons, the Appeals Chamber dismisses Kallon's Ground 26 in its entirety.

[1341] Transcript, Edwin Kasoma, 22 March 2006, pp. 17-40; *see* Trial Judgment, fns 3539-3545.
[1342] *See e.g.*, Trial Judgment, para. 500.
[1343] *Brima et al.* Appeal Judgment, para. 147.

D. Error relating to civilian status of UNAMSIL personnel (Kallon Ground 27)

1. Trial Chamber's findings

524. Count 15 of the Indictment charges the Accused with intentionally directing attacks against personnel involved in a humanitarian or peacekeeping mission.[1344] The Trial Chamber held that one of the elements of this offence is that the relevant "personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict."[1345]

2. Submissions of the Parties

525. Kallon submits that the UNAMSIL leadership "acted in a belligerent manner" when dealing with the RUF, "hence stripping itself of any international protection accorded [to] civilians or peacekeepers."[1346] In support, Kallon argues that Major-General Garba, the deputy force commander of UNAMSIL, took the view that "dialogue should have prevailed over the use of force but the force commander opted for belligerence" and that Garba was not expecting an attack to be launched against the RUF.[1347] Kallon also refers to the testimony of General Mulinge, the Brigadier Commander of UNAMSIL, who took the view that "the problem between UNAMSIL and the RUF could have been resolved through dialogue" but that the force commander ignored advice to this effect.[1348] Kallon contends that Brigadier Ngondi, a Prosecution Witness, gave similar testimony.[1349]

526. The Prosecution responds that "it is not possible to answer such an unsubstantiated submission" and refers to the "elaborate legal analysis" of the Trial Chamber on point.[1350]

3. Discussion

527. The Trial Chamber held that, as a matter of common sense, peacekeepers are considered to be civilians to the extent that they fall within the definition of civilians in international humanitarian law. Accordingly, the Trial Chamber found they are "entitled to protection as long as they are not

[1344] Indictment, Count 15, p. 21.
[1345] Trial Judgment, para. 219.
[1346] Kallon Appeal, para. 293.
[1347] Kallon Appeal, Annex III.
[1348] Kallon Appeal, Annex III.
[1349] Kallon Appeal, Annex III.
[1350] Prosecution Response, para. 7.212, *citing* Trial Judgment, paras 1906-1924, 1925-1936, 1937.

taking a direct part in the hostilities … at the time of the alleged offence."[1351] In essence, Kallon alleges that UNAMSIL personnel were taking a direct part in hostilities, thereby losing the protection afforded to them as civilians. However, Kallon does not point to any evidence to support this proposition. Rather, Kallon refers to testimony of UNAMSIL personnel to the effect that negotiations were to be preferred over the use of force.

528. At most, the testimony proffered by Kallon in support of his argument shows that certain UNAMSIL personnel took the view that there was a danger of inflaming the situation.[1352] However, taken in context, these could not support a finding that UNAMSIL personnel were taking a direct part in hostilities.

529. In determining whether peacekeepers are entitled to the protection afforded to civilians, the Trial Chamber rightly held that it must consider "the totality of the circumstances existing at the time of the alleged offence."[1353] This includes, *inter alia*:

> the relevant Security Council resolutions for the operation, the specific operational mandates, the role and practices actually adopted by the peacekeeping mission during the particular conflict, their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force, the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between peacekeeping force and the parties in the conflict, the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.[1354]

The Appeals Chamber notes that, of these factors, the most important are those that relate to the facts on the ground, in particular, any use of force by the peacekeeping mission.

530. The Trial Chamber found that UNAMSIL was a peacekeeping mission that was authorised to use force in certain exceptional circumstances,[1355] a finding confirmed by UNAMSIL's Rules of Engagement.[1356] The Trial Chamber also found that, prior to 1 May 2000, UNAMSIL peacekeepers

[1351] Trial Judgment, para. 233. *See also ibid.*, para. 1906.
[1352] Transcript, Leonard Ngondi, 30 March 2006, p. 103; *see also* Transcript, Mohammed Abdulahi Garbah, 19 May 2008, pp 48-50 (closed session).
[1353] Trial Judgment, para. 234.
[1354] Trial Judgment, para. 234.
[1355] *See* Trial Judgment, paras 1907-1911; Trial Judgment, para. 1908 ("In paragraph 14 of Resolution 1270, the Security Council empowered UNAMSIL pursuant to Chapter VII of the UN Charter to take 'necessary action' to ensure the security of its personnel and the freedom of movement of its personnel and to protect civilians under threat of physical violence.").
[1356] Trial Judgment, paras 1912-1917.

did not engage in any hostilities with the RUF or any other group,[1357] and that the peacekeepers were only lightly armed, while the military observers ("MILOBs") were not armed at all.[1358]

531. On the particular issue of the use of force by UNAMSIL personnel, the Trial Chamber found that in a number of instances, no force was used despite the abductions of, or attacks on, peacekeepers.[1359] At other times, force was used, but only in self-defence.[1360] Kallon does not challenge these findings. The Appeals Chamber notes that it is settled law that peacekeepers – like civilians – are entitled to use force in self-defence; such use does not constitute taking a direct part in hostilities.[1361] The Appeals Chamber, therefore, finds no error in the Trial Chamber's conclusion that, at all pertinent times, UNAMSIL personnel benefited from the protections afforded to civilians.

4. Conclusion

532. For these reasons, the Appeals Chamber dismisses Kallon's Ground 27 in its entirety.

E. Errors in finding Gbao aided and abetted attacks on peacekeepers (Gbao Ground 16)

1. Trial Chamber's findings

533. The Trial Chamber found Gbao liable under Article 6(1) of the Statute for aiding and abetting the attacks on Salahuedin and Jaganathan at the Makump DDR camp in Bombali District on 1 May 2000, charged in Count 15 of the Indictment.[1362]

2. Submissions of the Parties

534. Gbao submits that the Trial Chamber erred in finding that he tacitly approved of and encouraged the assaults on Salahuedin and Jaganathan and he challenges his conviction for aiding and abetting those assaults. Gbao contends that he neither committed the *actus reus* of, nor possessed the *mens rea* for, aiding and abetting.[1363] He argues that in order for the Trial Chamber to

[1357] Trial Judgment, paras 1918-1923.
[1358] Trial Judgment, para. 1924.
[1359] Trial Judgment, paras 1926-1927, 1931.
[1360] Trial Judgment, paras 1928, 1929, 1932, 1933.
[1361] *See e.g.*, Trial Judgment, para. 233; *Bagosora et al.* Trial Judgment, paras 2175, 2239; Dörmann, *Elements of War Crimes* 455-456.
[1362] Trial Judgment, para. 2265.
[1363] Gbao Appeal, para. 313.

reach its finding of tacit approval, the Trial Chamber must have established that he was present at the scene and that:

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

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

(iii) The substantial contribution had a "significant legitimising or encouraging effect on the principal perpetrator"; and

(iv) He knew that by his acts he would assist the commission of the crime being committed by Kallon and his men.[1364]

535. As to the superior authority, Gbao argues that he did not have control over Kallon and Kallon's men and that the only reason given by the Trial Chamber for its finding to the contrary was that Kallon and Gbao "knew each other well."[1365] However, Gbao submits that he and Kallon were rarely in the same location during the preceding 10 years and that the transcripts do not provide any indication of a close relationship.[1366]

536. On the issue of substantial contribution, Gbao argues that his actions could not have had any such effect. Gbao submits that prior to the arrival of Kallon, he had not entered the DDR camp, had not issued any orders to his fighters and remained unarmed.[1367] Gbao further contends that the Trial Chamber erred in finding that he "deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation."[1368] Gbao further submits that, upon Kallon's arrival, Gbao first sought to placate him and then remained outside while the assaults were committed and the abduction ordered.[1369]

537. Gbao further argues that, the acts that the Trial Chamber considered to constitute tacit approval and encouragement – namely his taking up of an AK-47 and his passive presence at the

[1364] Gbao Appeal, para. 331 (internal citations omitted).
[1365] Gbao Appeal, paras 333-334.
[1366] Gbao Appeal, para. 334.
[1367] Gbao Appeal, paras 336-337.
[1368] Gbao Appeal, para. 339.
[1369] Gbao Appeal, paras 324, 328, 337, 342.

scene, not responding to an attempt by Jaganathan to speak to him – took place after the assaults were committed.[1370] Gbao contends that, in such instances, the law on aiding and abetting requires there to be a pre-existing agreement between the principal and the aider and abettor and that no such agreement was found by the Trial Chamber.[1371]

538. On the issue of the *mens rea*, Gbao makes three principal submissions. First, he argues that no findings were made to the effect that he knew or believed his presence would be seen as encouraging the commission of the offences.[1372] Second, Gbao contests the Trial Chamber's description of events, arguing that rather than "not respond[ing] when Jaganthan attempted to speak to him", as the Trial Chamber found, Gbao "sobered up", "just froze" and stood "statue-like", in the words of Jaganathan himself.[1373] Third, Gbao contends that his post-assault actions cannot be taken to evidence the necessary *mens rea* for the very reason that they took place subsequent to the attacks.[1374]

539. The Prosecution makes three principal submissions in response: First, the Prosecution challenges Gbao's submissions on his views on disarmament (the last two alleged errors of fact noted above).[1375] Second, the Prosecution submits that Gbao's aiding and abetting was not ex post facto. The Prosecution argues that Gbao incorrectly focuses on one single moment in time rather than looking at the crime as a whole: "the crime, which consisted not only of the physical assault, but also of the abduction of the peacekeeper, *started* with these acts and lasted for several weeks, until the UNAMSIL personnel were released."[1376] Third, concerning Gbao's *mens rea*, the Prosecution submits that the relevant standard is that the aider and abettor knew that his acts would assist the commission of the principal's crime and that the knowledge may be inferred from the circumstances.[1377] Accordingly, the Prosecution takes the view that "it was open to the Trial Chamber to infer this requisite knowledge: Gbao as a member of the RUF high Command knew about Kallon's actions and supported them."[1378]

[1370] Gbao Appeal, para. 326.
[1371] Gbao Appeal, paras 326-327, 343.
[1372] Gbao Appeal, para. 338.
[1373] Gbao Appeal, paras 347-348, *quoting* Trial Judgment, para. 2261; Transcript, Jaganathan, 21 June 2006, p.25; Gbao Reply, para. 123.
[1374] Gbao Appeal, paras 328-330, 345-346.
[1375] Prosecution Response, para. 7.214.
[1376] Prosecution Response, para. 7.218.
[1377] Prosecution Response, para. 7.227, *citing* Trial Judgment, para. 280.
[1378] Prosecution Response, para. 7.227.

540. In his Reply, Gbao argues that the pertinent period in time at which his criminal responsibility should be assessed is "the moment Gbao stood by while Kallon and his men arrested Jaganthan."[1379] In Gbao's view, prior to that moment, he had committed no crime and in the period after that moment, he is largely absent from the Trial Chamber's findings.[1380]

3. Discussion

541. Gbao's argument that he did not posses the requisite superior authority or effective control over Kallon and Kallon's men is misconstrued. In the context of aiding and abetting by tacit approval and encouragement, the aider and abettor need not be a "superior authority" or have "effective control" over the principal perpetrator. Rather, cases typically involve an accused who holds a position of authority and is physically present at the scene of the crime, such that his non-intervention provides tacit encouragement to the principal perpetrator.[1381] As a Trial Chamber of the ICTY has put it, "an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity."[1382] It may be that, in practice, the aider and abettor will be superior to, or have control over, the principal perpetrator; however, this is not a condition required by law. The findings of the Trial Chamber accordingly should be read in this light.

542. Turning to Gbao's arguments on his substantial contribution to the crime, the Appeals Chamber considers that he has not shown it was unreasonable for the Trial Chamber to conclude that Gbao "deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation." Gbao's submissions that, prior to Kallon's arrival, he remained outside the camp, did not issue any orders to his fighters and remained unarmed reflect facts considered by the Trial Chamber, which noted that "Gbao was not armed", that Gbao tried to "cool down Kallon" and that Gbao remained outside the camp when Kallon entered.[1383] However, the Trial Chamber also found it established that Gbao told Jaganathan, "[g]ive me back my five men and their weapons, otherwise I will not move an inch from here," that "Gbao did not appear willing to enter into discussions" and that no progress was made in resolving the problem either with Jaganathan or Odhiambo.[1384] Given that at the relevant time, Gbao was facing the entrance to the camp, standing with RUF fighters who

[1379] Gbao Reply, para. 120.
[1380] Gbao Reply, para. 120.
[1381] *See e.g., Brđanin* Appeal Judgment, para. 273; *Kayeshima and Ruzindana* Appeal Judgment, paras 201-202.
[1382] *Furundžija* Trial Judgment, para. 207.
[1383] Trial Judgment, paras 1786, 1790 and 1791, respectively.

were armed with RPGs, AK47s and M3 rifles, these findings are not as innocent as they may otherwise seem.[1385] Furthermore, when Maroa arrived at the camp, he reported back to Ngondi:

> Gbao was very wild … and he was demanding that we must give them their ten combatants and their ten rifles because that was RUF territory. He was demanding to a certain extent to close down the entire exercise and even the camp. And he was calling more combatants who were assembled within the DDR camp.[1386]

Accordingly, the Appeals Chamber holds that, the Trial Chamber committed no error in finding that Gbao "deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation."[1387]

543. As to the requisite *mens rea*, Trial Chamber held that, "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 so doing he intended to assist Kallon in their commission."[1388] As to Gbao's challenge to the Trial Chamber's characterisation of the facts, Gbao simply seeks to substitute his interpretation of Jaganathan's testimony for that of the Trial Chamber. Further, testimony that is critical for Gbao's argument to succeed does not in fact support his contention. The crucial passage of Jaganthan's testimony reads:

> As I approached the pink Mercedes Benz, I saw Colonel Gbao now all of a sudden sobered up, and he was now holding an AK47. I tried telling him, to explain why I was here and what were my intentions, to which he just throws [*sic*] and stood statue-like.[1389]

From this and other pertinent testimony, the Trial Chamber deduced:

> Gbao was not initially armed but … 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.[1390]

Accordingly, rather than constituting "a grossly misleading interpretation of Jaganathan's actual testimony, which cast Gbao's disposition in a wholly different light",[1391] as Gbao contends, the Trial Chamber's holding is a reasonable deduction from Jaganathan's testimony.

[1384] Trial Judgment, paras 1786, 1787.
[1385] Trial Judgment, paras 1785, 1786.
[1386] Trial Judgment, para. 1789, *quoting* Transcript, Leonard Ngondi, 29 March 2006, p. 28.
[1387] Trial Judgment, para. 2263.
[1388] Trial Judgment, para. 2264.
[1389] Transcript, Ganese Jaganathan, 20 June 2006, p. 26.
[1390] Trial Judgment, para. 2261.
[1391] Gbao Appeal, para. 348.

544. The Appeals Chamber notes that all that remains is Gbao's argument that the actions on which the Trial Chamber based its findings as to his *actus reus* and *mens rea* took place after the crimes were committed. It is helpful to reproduce, at the outset, the key findings of the Trial Chamber:

> 2263. … the Chamber finds that Gbao deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation at the Makump DDR camp and that Gbao's actions in arming himself with an AK-47 amounted to tacit approval of Kallon's conduct. We therefore find that Gbao's conduct before and during the attacks on Salahuedin and Jaganathan had a substantial effect on their perpetration.
>
> 2264. The Chamber further finds that 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 so doing he intended to assist Kallon in their commission.[1392]

545. In relation to both the *actus reus* and the *mens rea*, the actions of Gbao considered crucial by the Trial Chamber are his taking up of arms and his standing passively by. The taking up of arms took place at some point during the period in which Kallon was inside the camp, as did the start of Gbao's passive behaviour; the exact moment has not been determined. Given that Kallon proceeded to enter the camp after an exchange with Gbao, Kallon would have been aware of Gbao's presence outside the camp. However, there is no indication that Kallon was aware of Gbao having taken up arms until after he left the camp. The question is, then, whether Gbao's presence outside the camp can be said to have had a substantial effect on the perpetration of the crime. The Appeals Chamber takes the view that it is within the discretion of a reasonable trier of fact to hold that such presence did have a substantial effect on the perpetration of the offence.

546. The Appeals Chamber recalls that the *mens rea* for aiding and abetting is that:

> the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed.[1393]

547. The Appeals Chamber notes that there is no indication in the Trial Judgment that, prior to Kallon's entry into the camp, Gbao knew that any attacks might take place or any crimes might be committed by Kallon or Kallon's forces. It does not follow from Gbao's knowledge of Kallon's

[1392] Trial Judgment, paras 2263, 2264.

enraged state of mind and Kallon's firing of shots into the ground that Gbao knew or was aware that Kallon was going to commit a crime upon his entry into the camp. The Prosecution seeks to prove that Gbao had the requisite knowledge through his leadership position and that he "knew about Kallon's actions and supported them."[1394] As is evident from that passage, the Prosecution argues that Kallon had the requisite knowledge merely by assertion. In the case of the attack on Salahuedin, which took place wholly inside the camp,[1395] Gbao did not act with the necessary *mens rea*.

548. These same considerations do not apply to the attack on Jaganathan. That attack comprises a series of composite acts, committed partly inside and partly outside the camp. Jaganathan was "hit … with rifle butts and kicked and punched"; a pistol was put to his head accompanied by the words "you are a dead man"; he was dragged outside the camp; "pushed into the rear seat" of a car, which subsequently drove off, escorted by "two escorts, one armed with an RPG and another with an AK47 [who] sat on either side of him"; and once again threatened with being killed.[1396] It is evident that the attack comprised physical assaults, threats of death as well as Jaganathan's abduction. While Gbao may not have had the relevant *mens rea* during the initial assault of Jaganathan, which took place inside the DDR camp, as soon as Jaganathan was dragged out of the camp and towards the car – behind which Gbao was standing, armed with an AK47[1397] – Gbao had the relevant *mens rea*. Indeed, Gbao does not dispute the findings of the Trial Chamber in respect of what happened to Jaganathan or the Trial Chamber's findings that Gbao took up arms and did not respond to Jaganathan's attempt at communication.

4. Conclusion

549. The Appeals Chamber finds that the Trial Chamber erred in holding that Gbao aided and abetted the attack against Salahuedin and allows Gbao's Ground 16 in this respect. The Appeals Chamber dismisses Gbao's Ground 16 in relation to the attack against Jaganathan.

[1393] *Brima et al.* Appeal Judgment, paras 242, 243; *Fofana and Kondewa* Appeal Judgment, para. 366.
[1394] Prosecution Response, para. 7.227.
[1395] Trial Judgment, para. 1791.
[1396] Trial Judgment, paras 1791-1793.
[1397] Trial Judgment, para. 1792.

F. Acquittals of Sesay, Kallon and Gbao on Count 18 (Prosecution Ground 3)

1. Trial Chamber's findings

550. The Indictment charged the Appellants under Count 18 with the taking of hostages.[1398] The Trial Chamber held that the prohibition against the taking of hostages was a war crime entailing individual criminal responsibility at all relevant times alleged in the Indictment.[1399] The Trial Chamber further held that, in addition to the *chapeau* requirements for war crimes, the elements of the offence of the taking of hostages are:

> (i) The accused seized, detained, or otherwise held hostage one or more persons;
>
> (ii) The accused threatened to kill, injure or continue to detain such person(s); and
>
> (iii) The accused intended to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person(s).[1400]

551. The Trial Chamber found that, on the basis of the evidence before it, the general requirements for other serious violations of international humanitarian law pursuant to Article 4 of the Statute had been established.[1401] The Trial Chamber also found that "RUF fighters seized hundreds of UNAMSIL peacekeepers in eight attacks and detained them" at various locations, thereby satisfying the first element of the crime of hostage-taking.[1402] The Trial Chamber also found that there was "evidence that RUF fighters threatened to kill, injure or detain captured UNAMSIL peacekeepers."[1403] In the view of the Trial Chamber, however, the second and third elements of the crime were not proven. In this regard, the Trial Chamber held that, "[t]he offence of hostage taking requires the threat to be communicated to a third party, with the intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the captives."[1404] The Trial Chamber found that there was no evidence that the RUF stated to a third party "that the safety or release of the peacekeepers was contingent on a particular action nor

[1398] Indictment, p. 22.
[1399] Trial Judgment, para. 239.
[1400] Trial Judgment, para. 240.
[1401] Trial Judgment, para. 1961.
[1402] Trial Judgment, para. 1962.
[1403] Trial Judgment, para. 1963.
[1404] Trial Judgment, para. 1964.

abstention" and equally, that there was no evidence of an implicit threat that the peacekeepers would be harmed or communication of an implicit condition for the safety or release of the peacekeepers.[1405]

552. The Trial Chamber therefore found that the crime of hostage-taking, Count 18 had not been established beyond reasonable doubt.[1406]

2. Submissions of the Parties

(a) The Prosecution's Appeal

553. The Prosecution contends that the Trial Chamber erred in law in finding that "the offence of hostage-taking requires the threat to be communicated to a third party, with the intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the captives."[1407] It argues that communication of the threat to a third party is not a requirement of the offence.[1408] In its view, this error led the Trial Chamber to conclude that the Prosecution had failed to prove an essential element of the crime.[1409]

554. In the view of the Prosecution, "on the basis of the findings of the Trial Chamber and the evidence before it, the only conclusion open to any reasonable trier of fact is that the RUF in general and the Appellants in particular intended to compel third parties and that this intent can be implied from their acts and behaviour prior to and during the attacks."[1410] The Prosecution contends the intent in the present case was two-fold. First, "to compel the Government of Sierra Leone as well as the UN to refrain from continuing the Disarmament, Demobilisation and Reintegration (DDR) process, or to continue this process according to conditions set by the RUF as an explicit or implicit condition for the safety or the release of the UNAMSIL personnel." Second, to utilise the detention of the peacekeepers as leverage for the release of Sankoh.[1411]

555. The Prosecution concludes that, on the basis of the findings of the Trial Chamber and in light of the evidence in the case, the only conclusion open to any reasonable trier of fact is that the

[1405] Trial Judgment, para. 1965.
[1406] Trial Judgment, para. 1969.
[1407] Prosecution Appeal, para. 4.8, *quoting* Trial Judgment, para. 1964.
[1408] Prosecution Appeal, para. 4.8.
[1409] Prosecution Appeal, para. 4.8.
[1410] Prosecution Appeal, para. 4.9.
[1411] Prosecution Appeal, paras 4.56-4.75.

Appellants are individually criminally responsible for the taking of hostages under Count 18.[1412] Even if the Appeals Chamber would not be inclined to enter an additional conviction under Count 18, the Prosecution submits that the question of whether the communication of a threat to a third party is an element of the crime of hostage-taking that should be addressed as an issue of general significance to the jurisprudence of the Special Court and to international law generally.[1413]

556. With respect to Sesay's responsibility, the Prosecution contends that certain of the findings of the Trial Chamber in relation to Sesay's liability under Article 6(3) of the Statute for failing to prevent or punish his subordinates for directing attacks against UNAMSIL personnel apply *mutatis mutandis* to the offence of hostage-taking.[1414] The Prosecution submits that Sesay and Kallon were well informed about the DDR program and its implementation, as well as the mandate and role of UNAMSIL in the DDR process.[1415] In the view of the Prosecution, the hostage-taking was the "logical consequence" of Sesay's "intent to compel the UN and/or the Sierra Leonean Government to stop the disarmament process or, at least, to continue the DDR program according to the terms set by the RUF."[1416] The Prosecution also points to Sesay's role in the negotiations with UNAMSIL in Monrovia that led to the release of the detainees. It submits that, during the course of those negotiations, on 17 May 2000, Sankoh was arrested in Freetown and that, "[t]here are clear indications that the hostages were used as leverage for Sankoh's release, and the resulting threats were uttered by Sesay's subordinates."[1417]

557. On the basis of the above, the Prosecution contends that, at the very least, Sesay is responsible under Article 6(3) of the Statute for failing to prevent or punish his subordinates for the taking of hostages. The Prosecution further argues that Sesay is also responsible under Article 6(1) of the Statute on the basis that he planned, ordered, instigated or aided and abetted the taking of hostages.[1418]

558. The Prosecution contends that Kallon was hostile to the DDR process.[1419] It points to the Trial Chamber's findings that Sankoh ordered Kallon that there should be no disarmament for now and to act accordingly; that Kallon criticised the conditions at the Makump DDR Camp, stating that

[1412] Prosecution Appeal, para. 4.10.
[1413] Prosecution Appeal, paras 4.120, 4.121.
[1414] Prosecution Appeal, para. 4.78, *citing* Trial Judgment, paras 2267-2284.
[1415] Prosecution Appeal, paras 4.79, 4.96.
[1416] Prosecution Appeal, para. 4.82.
[1417] Prosecution Appeal, para. 4.89.
[1418] Prosecution Appeal, para. 4.90.

the camp "was not meant for pigs but for human beings" and informing the camp commander that "[t]he tents that you have made for the ex-combatants will be pulled down within 72 hours"; that Kallon later returned to the camp and fired shots on the ground towards UNAMSIL peacekeepers, punched Salahuedin in the face and abducted Jaganathan while issuing serious threats.[1420] According to the Prosecution, "Kallon's intent to use Jaganathan as leverage must be inferred from his radio communication" in which he stated "[t]he UN have seriously attacked our position and taken five of our men and their weapons, but I have one"; "[a]ll stations, red alert, red alert, red alert."[1421] The Prosecution submits that the reactions of the UNAMSIL command – for example in sending peacekeepers to transmit a message to the RUF High Command – show that they viewed the abduction of Jaganathan as an instance of hostage-taking.[1422] The Prosecution further contends that certain of the findings of the Trial Chamber in relation to Kallon's liability under Article 6(3) of the Statute for failing to prevent or punish his subordinates for directing attacks against UNAMSIL personnel apply here *mutatis mutandis*.[1423]

559. With respect to Gbao's responsibility, the Prosecution submits that in light of his role and position, Gbao "must have known about the intent of the main perpetrators to take UNAMSIL personnel as hostages to compel the UN, the Sierra Leonean Government as well as the international community to refrain to continue the disarmament, if the RUF demands were not met."[1424]

(b) Sesay's Response

560. Sesay argues that the third requirement of the offence – that the accused intended to compel a third party to act or refrain from acting as an explicit or implicit condition for the safety or release of the detainees – contains an *actus reus* as well as a *mens rea* requirement.[1425] Sesay argues that this is evident from the inclusion of the words "explicit or implicit condition," for, if the condition related to the *mens rea* alone, it would be superfluous to include the implicit element.[1426] Sesay contends that the Prosecution misreads the Lambert commentary, confusing the requirement that the threat be communicated with the explicit or implicit nature of that communication. Sesay considers

[1419] Prosecution Appeal, para. 4.97.
[1420] Prosecution Appeal, para. 4.97, *quoting* Trial Judgment, para. 1781.
[1421] Prosecution Appeal, para. 4.97 and fn. 762, *quoting* Trial Judgment, para. 1798.
[1422] Prosecution Appeal, para. 4.98.
[1423] Prosecution Appeal, para. 4.102, *citing* Trial Judgment, paras 2285-2292.
[1424] Prosecution Appeal, para. 4.108.
[1425] Sesay Response, paras 144, 165.

that the Lambert commentary supports its view that the communication of the threat is "a vital element" of the crime.[1427]

561. Sesay contends that the Prosecution is mistaken in suggesting that the jurisprudence of the ICTY is inconsistent with the Hostages Convention. According to Sesay, there is little difference between the various sources and any difference that there is reflects their differing status.[1428] In particular, Sesay asserts that the use of a threat concerning detainees "*so as to* obtain a concession or gain an advantage", "*in order to* obtain a concession or gain an advantage" and "*in order to compel a third party*", in the words of the ICTY Appeals Chamber, an ICTY Trial Chamber, and the Hostages Convention, respectively, do not simply refer to intention but to the wider concept of purpose.[1429] According to Sesay, purpose is an issue that relates both to the *mens rea* and to the *actus reus*.[1430]

562. Sesay challenges the Prosecution's argument that the vast majority of domestic legislation does not require the communication of the threat. Sesay argues that the legislation cited can be categorised into three types: (i) jurisdictions that explicitly state that the recipient of the threat is to be the detained individual; (ii) jurisdictions that explicitly state that the recipient of the threat is to be the third party; and (iii) jurisdictions that do not explicitly state any audience but which provide a purpose for the threat.[1431] Sesay argues that the legislation that falls within category (i), that of a few States, provides only an illusory basis for the Prosecution's position; that the legislation that falls within category (ii), only one State, contradicts the Prosecution's position; and that the legislation that falls within category (iii), the vast majority, is "best viewed as demanding communication of the threat to the third party."[1432] As to (iii), Sesay argues that "given the additional requirement that the threat is made with an intention to coerce, the threat must be actually made – i.e., communicated to the third party."[1433] In Sesay's view, therefore, there is "no real difference" between categories (ii) and (iii), for the laws of category (iii) effectively require "(a) that a threat must be made; (b) that the purpose of the threat must be to coerce a third party; and (c)

[1426] Sesay Response, para. 165.
[1427] Sesay Response, para. 166. *See* also para. 167.
[1428] Sesay Response, paras 150-152.
[1429] Sesay Response, paras 154-156, *quoting Blaškić* Appeal Judgment, para. 639; *Blaškić* Trial Judgment, para. 158; Hostages Convention, Article 1(1).
[1430] Sesay Response, paras 156, 168-169.
[1431] Sesay Response, para. 158.
[1432] Sesay Response, para. 158.
[1433] Sesay Response, para. 158. *See* also paras 159-160.

but which do not name the audience of the threat explicitly."[1434] Sesay also contends that *Pinochet (No 3)* supports its position.[1435]

563. In the alternative, Sesay submits even if the requirement is considered to be one of *mens rea* it "can only be made out through evidence of the communication of the threat." Again, in the alternative, Sesay contends that in the event that the *mens rea* can be made out without proof of such communication, the *mens rea* was not made out on the facts of the present case.[1436]

564. Sesay avers that the Prosecution fails to prove that the Trial Chamber's findings on the lack of intent with respect to disrupting the DDR process were unreasonable.[1437] Sesay contends that the Prosecution's submissions simply establish the existence of grievances and that mere grievance, without more, "is of little probative value … evidence of the existence of a grievance can not be dispositive of an intention to compel."[1438]

565. With respect to the Prosecution's assertions on the relationship between intent and the arrest of Sankoh, Sesay argues that the notion of "using as leverage" does not fall within the requirement of compulsion; that an intention to use as leverage does not equate to an intention to compel.[1439] Sesay submits that only one person, who was left in charge of the peacekeepers, acted unreasonably and in a threatening manner and the Trial Chamber was right to attach little weight to this.[1440] Sesay also submits that in situations in which the requisite *mens rea* is not present at the beginning of the detention but alleged to come about at a later time, there must be "cogent evidence of this new scenario" and "tribunals must be particularly exigent in their demand for clear evidence of this change."[1441]

(c) Kallon's Response

566. In relation to the alleged error of law, Kallon submits that the Trial Chamber was correct in noting that the offence of hostage-taking "requires the threat to be communicated to a third party, with the intent of compelling the third party to act or refrain from acting as a condition for the

[1434] Sesay Response, para. 160. *See* also paras 161-162.
[1435] Sesay Response, paras 163-164, *quoting* from *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL 17.
[1436] Sesay Response, paras 144, 171-172.
[1437] Sesay Response, paras 120, 126.
[1438] Sesay Response, para. 121. *See* also paras 120, 122.
[1439] Sesay Response, para. 134.
[1440] Sesay Response, para. 137.
[1441] Sesay Response, para. 139.

safety or release of the captives."[1442] Kallon suggests that it is precisely such a requirement that distinguishes hostage-taking from other crimes, such as abduction or lawful detention.[1443] Kallon also argues that the requirement is in accordance with the jurisprudence of the ICTY,[1444] and is consistent with the principle of specificity.[1445]

567. On the intention relating to the DDR, Kallon submits that another perfectly reasonable conclusion is that the RUF considered that UNAMSIL personnel were enemy fighters and detained them as prisoners of war.[1446] Kallon contends that the environment was so full of suspicion and aggression that the RUF considered UNAMSIL an enemy force in need of neutralisation and that the eventual holding of the peacekeepers amounted to self-defence.[1447]

568. With respect to the intention and the arrest of Sankoh, Kallon argues that, while it is true that the Trial Chamber found that the detainees were told that they may be killed and that their fates were dependent on Sankoh's release, it is equally true that the Trial Chamber found that some peacekeepers were released shortly after his arrest.[1448] In Kallon's view, there is nothing in the manner in which the detained personnel were released that indicates that the RUF negotiated with UNAMSIL as leverage for releasing Sankoh, or intended to compel UNAMSIL to do as the RUF wished in the circumstances.[1449]

569. Kallon argues that the Prosecution has not demonstrated that Kallon had the *mens rea* required for a conviction for hostage-taking. Kallon notes that the intention must be personal to the accused, but that the Prosecution's submissions reveal a conflation between the intention of the RUF and the intention of the individual, as demonstrated in the Prosecution's Appeal, which refers to the intention of the *RUF* in key passages.[1450] In the view of Kallon, the radio communication referred to by the Prosecution indicates that he was concerned with the safety of his soldiers and obligated to provide status reports to his superiors.[1451]

[1442] Kallon Response, para. 110, *quoting* Trial Judgment, para. 1964.
[1443] Kallon Response, paras 110, 112.
[1444] Kallon Response, paras 110, 111.
[1445] Kallon Response, para. 113.
[1446] Kallon Response, para. 136.
[1447] Kallon Response, paras 141, 142.
[1448] Kallon Response, para. 169, *quoting* Trial Judgment, paras 1963, 1872.
[1449] Kallon Response, paras 170, 171.
[1450] Kallon Response, paras 115-117, 156, 157, *citing* Prosecution Appeal, para. 4.58.
[1451] Kallon Response, paras 159, 160.

(d) Gbao's Response

570. In relation to the alleged error of law, Gbao submits that communication of a threat to a third party is inherent in the taking of hostages and that, accordingly, the Trial Chamber did not err in law in so requiring.[1452] Gbao argues that the *Blaškić* and *Kordić and Čerkez* cases do not discuss whether specific threats were made as such threats were inherent in the finding that individuals were in fact hostages.[1453] Gbao further argues that the Prosecution, in its discussion of the Lambert Commentary, acknowledges the relevance of communication to a third party when it stated that "the compulsion must be directed towards a third party" and concludes that the Prosecution's own analysis supports the Trial Chamber's conclusion.[1454]

571. Regarding the alleged error of fact, Gbao submits that the Prosecution is incorrect in its assertion that the Trial Chamber erred in finding that the *actus reus* and the *mens rea* necessary for Count 18 were not fulfilled.[1455] With regard to the intent related to the DDR process, Gbao makes three principal submissions. First, Gbao submits that the findings relied upon by the Prosecution "do not meet the standard required to reverse factual findings on prosecutorial appeals."[1456] Secondly, Gbao submits that the Prosecution impermissibly used "Exhibit 190 to show that Gbao was opposed to disarmament, thereby demonstrating his *mens rea* under Count 18."[1457] Gbao argues that the exhibit was only introduced to provide context to the cross-examination of Jaganathan, and thus the Prosecution may not use it to provide evidence of Gbao's acts and conduct.[1458] Gbao avers that the Trial Chamber confirmed that it will not make use of documentary evidence "where it goes to prove the acts and conduct charged against the Appellants if there is no opportunity for cross-examination."[1459] Accordingly, Gbao concludes that the Appeals Chamber should not consider Exhibit 190 as used by the Prosecution.[1460] Thirdly, Gbao submits that the testimony given by TF1-071 to the effect that "any RUF fighter found disarming secretly would face execution" is unreliable.[1461] In Gbao's view, the witness may not have known who Gbao was

[1452] Gbao Response, paras 157, 160.
[1453] Gbao Response, para. 161.
[1454] Gbao Response, para. 161, *quoting* Prosecution Appeal, para. 4.32.
[1455] Gbao Response, paras 162, 163. Gbao incorporates by reference his arguments made in Ground 15 of his Appeal. Gbao Response, para. 163.
[1456] Gbao Response, para. 167. *See* also paras 168-169.
[1457] Gbao Response, para. 174.
[1458] Gbao Response, paras 171, 174.
[1459] Gbao Response, para. 173, *quoting* Trial Judgment, para. 513.
[1460] Gbao Response, para. 174.
[1461] Gbao Response, paras 179, 180.

in early 2000 and therefore would not have been aware of his attitude toward disarmament, and the witness's other testimony is also unreliable.[1462]

572. Gbao argues that he cannot be held responsible for abductions in the period following the arrest of Jaganathan as he was not metioned in any findings regarding the subsequent abductions.[1463]

(e) Prosecution's Reply

573. The Prosecution argues that the position of Sesay on the alleged error of law is essentially that expressions such as "so as to" and "in order to" imply that the threat must be communicated to a third party when, as a linguistic matter and a matter of logic, they do not.[1464] The Prosecution considers it sufficient that the threat be communicated to the victim but recognises that the victim's detention must be undertaken with the intent of compelling a third party. The Prosecution also considers the authorities considered by Sesay to support its position.[1465]

574. The Prosecution "confirms that it does not rely, in relation to *Gbao*, on a contention that he had the intent that detained UNAMSIL peacekeepers would be used as leverage to secure the release [of] Sankoh."[1466]

3. Discussion

(a) Alleged Error of Law: Communication of the Threat

575. In its section on the Applicable Law, the Trial Chamber held that, in addition to the chapeau requirements for war crimes, the elements of the offence of the taking of hostages are:

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

(ii) The accused threatened to kill, injure or continue to detain such person(s); and

[1462] Gbao Response, para. 180, *citing* Transcript, TF1-071, 24 January 2005, pp. 10-14, 62.
[1463] Gbao Response, para. 184.
[1464] Prosecution Reply, para. 4.15.
[1465] Prosecution Reply, paras 4.16, 4.17.
[1466] Prosecution Reply, para. 4.57.

(iii) The accused intended to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person(s).[1467]

Upon considering the facts, the Trial Chamber found the first and second elements of the offence to have been proven.[1468]

576. The Trial Chamber held that, "[t]he offence of hostage taking requires the threat to be communicated to a third party, with the intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the captives."[1469] This purported "fourth element" of the offence, or addition to the second element, has been challenged by the Prosecution, which argues that the threat need not have been communicated to a third party. It is thus necessary to consider whether such communication is indeed a requirement of the crime and if so whether it has been established on the facts.

577. The Appeals Chamber notes that the principal provisions of international humanitarian law applicable in internal armed conflict that relate to hostage-taking reference "the taking of hostages" without more.[1470] The international humanitarian law of international armed conflict is no more helpful, the relevant provisions being equally sparse.[1471] The same is true of the Statutes of the ICTY, the ICTR and the International Criminal Court. Although the offence of the taking of hostages appears in each, little guidance is forthcoming.[1472] Accordingly, these provisions neither lend support to, nor take away from, the argument of the Prosecution.

578. The Elements of Crimes of the International Criminal Court, do, however, set out the elements of the offence.[1473] These mirror, in all salient respects, the elements as first set out by the Trial Chamber, suggesting that communication of the threat to a third party is not an element of the offence. The ICC Elements of Crimes are designed to "assist the [ICC] in the interpretation and application" of the crimes.[1474] Before this Court, they are instructive, comprising, as they do, a

[1467] Trial Judgment, para. 240.
[1468] Trial Judgment, paras 1962, 1963.
[1469] Trial Judgment, para. 1964.
[1470] *See* Geneva Convention (I)-(IV),Common Article 3; Additional Protocol II, Article 4(2)(c).
[1471] *See* Geneva Convention (IV), Article 34; Additional Protocol I, Article 75(2)(c).
[1472] *See* ICTY Statute, Article 2(h) ("taking civilians as hostages"); ICTR Statute, Article 4(c); ICC Statute, Articles 8(2)(a)(viii) and 8(2)(c)(iii).
[1473] ICC Elements of Crimes, Article 8(2)(c)(iii).
[1474] ICC Statute, Article 9(1).

useful interpretational tool; however, they are neither binding nor do they represent the state of customary international law in each and every instance.[1475]

579. The relevant elements of the ICC Elements of Crimes are "largely taken from" the definition contained in the Hostages Convention.[1476] Analysis of that Convention may, then, prove useful. Article 1(1) of the Convention provides:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

580. As the Lambert Commentary on the Hostages Convention notes:

> [T]he words "in order to compel" seem to relate to the motivation of the hostage-taker, rather than to any physical acts which he might take. Thus, while the seizure and threat will usually be accompanied or followed by a demand that a third party act in a certain way, there is no actual requirement that a demand be uttered. Thus, if there is a detention and threat, yet no demands, there will still be a hostage-taking if the offender is seeking to compel a third party.[1477]

Sesay focuses on the word "uttered" in the second sentence of this quotation to suggest that the passage goes to the *mode of expression* of the demands. However, as the subsequent sentence indicates, the passage in fact goes to the *very existence* of demands. This is made even clearer in a footnote to this passage, which observes: "In this connexion it might be noted that many kidnappings and hostage-takings do not involve any demands.… Incidents wherein demands are not made will not necessarily fall outside the scope of this Convention, however, in such cases the intent to compel will be difficult to discern."[1478] The communication of the threat to a third party is, then, a means by which to evidence an element of the offence, but does not comprise an element itself in need of proof.

581. This view has been followed by at least one domestic court. In the case of *Simpson v. Libya*, the D.C. Circuit of the United States Court of Appeals had occasion to consider the definition of "hostage-taking" in the Foreign Sovereign Immunities Act, a definition which, for present purposes,

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[1475] That this is true of the ICC Statute is well-accepted: *see e.g.*, R Cryer et al. International Criminal Law and Procedure, pp 125-126. It has even greater resonance when said of the Elements of Crimes.
[1476] K Dörmann, 'Article 8', in O Triffterer (ed.), Commentary on the Rome Statute, p.321.
[1477] Lambert Commentary, p. 85.
[1478] Lambert Commentary, p. 85 fn. 30.

is identical to that contained in the Hostages Convention. The Court opined: "a plaintiff need not allege that the hostage taker had communicated [his] intended purpose to the outside world," "plaintiffs need not demonstrate that a third party was aware of the hostage taking" and "'demands' are not required to establish the element of hostage taking."[1479] The Court also held that "the intentionality requirement focused on the *mens rea* of the hostage taker" rather than on the *actus reus*.[1480]

582. A review of domestic legislation also leads to the conclusion that the communication of the threat to a third party is not an element of the offence. A large number of States' legislation does not include communication of the threat to a third party as an element of the offence; others explicitly state or implicitly suggest that no such requirement need be proven.[1481] Only the odd State imposes such a requirement.[1482] Sesay misreads the import of this domestic legislation. It does not follow from a requirement that the threat be made with an intention to coerce that the threat be communicated to the third party as Sesay asserts.[1483] Thus, the Appeals Chamber takes the view that there is a very real difference between Sesay's categories (ii) and (iii).[1484]

583. As the Parties note, of the limited international jurisprudence that exists, three cases are particularly pertinent. In the *Blaskić* case, an ICTY Trial Chamber held that it must be proven that "the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage."[1485] This is the key element of the offence – "the use of a threat concerning detainees so as to obtain a concession or gain an advantage"[1486] – for it is this that distinguishes the detention (whether lawful or unlawful) from hostage-taking. As put by an ICTY Trial Chamber in *Kordić and Čerkez*:

> [t]he additional element that must be proved to establish the crime of unlawfully taking civilians hostage is the issuance of a conditional threat in respect of the physical and mental wellbeing of civilians who are unlawfully detained.… In the Chamber's view,

[1479] *Simpson v Libya,* p. 360.
[1480] *Simpson v Libya*, p. 360.
[1481] *See* Prosecution Appeal, Appendix B.
[1482] Canadian Criminal Code, Article 279.1, reproduced in Prosecution Appeal, Appendix B.
[1483] Sesay Appeal, paras 158-160.
[1484] Category (ii) refers to those jurisdictions that explicitly state that the recipient of the threat is to be the third party; category (iii) to those jurisdictions that do not explicitly state any audience but which provide a purpose for the threat. *See supra*, para. 562.
[1485] *Blaškić* Trial Judgment, para. 158; s*ee* also *Kordić and Čerkez* Trial Judgment, para. 314.
[1486] *Blaškić* Appeal Judgment, para. 639.

> such a threat must be intended as a coercive measure to achieve the fulfilment of a condition.[1487]

This passage usefully reveals that a threat must be issued and that the threat must be intended as a coercive measure; the former relates to the *actus reus* and the latter to the *mens rea*. There is no requirement in the jurisprudence of the ICTY that the threat has to be communicated to a third party. It suffices that the threat be communicated to the detained individual.

584. In the third case, the *Hostages* case before the United States Military Tribunal at Nuremberg, the Tribunal espoused a requirement for a communication to a third party:

> It is essential to a lawful taking of hostages under customary law that proclamation be made, giving the name and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason that the hostages will be shot.[1488]

585. However, the context of the quote illustrates the necessity for the requirement. In certain instances, the taking and execution of hostages was considered lawful, as a last resort, to guarantee the obedience of the civilian population of occupied territories. In order for such a rationale to make sense, there was necessarily a requirement that the threat be communicated to a third party. This comes through from another passage of the Tribunal:

> An examination of the available evidence on the subject convinces us that hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot. … The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may, only as a last resort, take and execute hostages.[1489]

With the change in the law and rendering of the taking of hostages unlawful, the requirement of communication falls away. The logic that applied at the time of the lawful taking of hostages is now moot.

586. Accordingly, the Trial Chamber erred in introducing into the elements of the crime a requirement that the threat must have been communicated to a third party.

[1487] *Kordić and Čerkez* Trial Judgment, para. 313.
[1488] *Trial of List* in *Law Reports of War Crimnals,* p. 62.
[1489] *Trial of List* in *Law Reports of War Criminals*, p. 61.

(b) Alleged error of fact: the requisite intent

(i) Intent relating to DDR

587. Having found legal error in the Trial Chamber's requirement that a threat be communicated to a third party, the Appeals Chamber will examine the Prosecution's arguments that the Trial Chamber erred in fact in failing to find the requisite intent for the offence.

588. The Appeals Chamber considers the Prosecution's submission that the Trial Chamber erred in finding that it had not been established that "the RUF detained the peacekeepers with the intention of compelling the Government of Sierra Leone and the UN to halt the disarmament process or to continue it according to conditions set by them."[1490]

589. A number of the Prosecution's arguments submitted under this head are little more than speculation. In relation to the Prosecution's first supporting argument, the Appeals Chamber notes there is much evidence to support its submissions that armed RUF units disarmed and detained UNAMSIL personnel and that disarmament continued upon the release of the peacekeepers.[1491] However, this alone does not suffice to establish that the only reasonable inference was that the peacekeepers were abducted with the intention of conditioning their safety or release on the halting of the DDR process or the continuation of that process on terms set by the RUF. It is equally possible, for example, that they were abducted and detained by reason of their being the principal actor in the disarmament process; the intention to compel being absent.

590. Similarly, in respect of the Prosecution's fourth supporting argument, the Appeals Chamber is of the opinion that the Prosecution reads too much into the fact that the detained personnel were not killed. That individuals are kept alive upon capture does not automatically mean that they are to be used as leverage. Such a proposition, though plausible, remains unsupported by the evidence invoked by the Prosecution.

591. In the view of the Appeals Chamber, the final supporting argument of the Prosecution, namely that the involvement of the RUF leadership in the negotiations for the release of the peacekeepers is "a strong indication" that the peacekeepers were used to obtain concessions is also mere speculation. As the Prosecution itself notes, the content of the discussions at the negotiations

[1490] Trial Judgment, para. 1968.
[1491] *See e.g.*, Trial Judgment, paras 44, 1784, 1843.

is "unknown."[1492] Accordingly, it is going too far to say that "it is reasonable to infer that the RUF did seek certain concessions in exchange for the release of the peacekeepers."[1493] Even if it could be so inferred, the Appeals Chamber would have to make a further leap and infer that the accused or the perpetrators intended the abductions to gain concessions. The Prosecution offers no reasoning to warrant such a leap or to substantiate these propositions.

592. The Appeals Chamber further observes that the "taking of hostages" is a term of art, the legal definition of which witnesses are unlikely to know. Accordingly, any general perception on the part of witnesses that the actions of the RUF constituted hostage-taking,[1494] though perhaps indicative of the characterisation of the situation, is inconclusive and such perceptions certainly cannot be considered definitive. Therefore, the Prosecution's third supporting argument on point is not compelling.

593. All that remain are the Prosecution's second and fifth arguments, which may be usefully considered together. It will be recalled that the crux of those arguments is that the requisite intent can be discerned from the threats that preceded the attacks, threats that revealed the unhappiness of the RUF with the DDR process and the hostility of the RUF towards UNAMSIL personnel.[1495] In particular, the Prosecution points to: Gbao's demands in the Reception Centre in Makeni on 17 April 2000 that if the peacekeepers did not dismantle all the tents, he would burn them with the peacekeepers inside; Sesay's ordering that the disarmament be stopped at Sanguema on 20 April 2000; Kallon's statements in the Makump DDR camp on 28 April 2000 that the camp "was not meant for pigs, but for human beings" and that "[t]he tents you have made for the ex-combatants will be pulled down within 72 hours"; Gbao's demands on 1 May 2000 at the Makump DDR camp to "[g]ive me back my five men and their weapons, otherwise I will not move an inch from here"; Kallon's repeated threats that the UN peacekeepers were causing trouble; and Kallon's message to RUF radio stations on 1 May 2000 that "[t]he UN have seriously attacked our position and taken five of our men and their weapons, but I have one" and "[a]ll stations, red alert, red alert, red alert."[1496]

[1492] Prosecution Appeal, para. 4.70.
[1493] Prosecution Appeal, para. 4.70.
[1494] Prosecution Appeal, paras 4.64-4.66, especially at fn. 675.
[1495] Prosecution Appeal, paras 4.60-4.63, 4.69.
[1496] Prosecution Appeal, para. 4.69.

594. These incidents noted by the Prosecution – all findings of the Trial Chamber – clearly demonstrate that the RUF had serious grievances with the DDR process and with the role of UNAMSIL therein. The findings also evidence the increasing threats and hostility on the part of the RUF towards UNAMSIL personnel in the period prior to the alleged hostage-taking. However, in the view of the Appeals Chamber, they do not adequately demonstrate the missing element, that which the Prosecution is alleging, namely that the peacekeepers were detained with the intention of compelling the Government of Sierra Leone and the UN to refrain from carrying out the DDR process or to carry out the DDR process on terms dictated by the RUF as a condition for the safety or the release of the detained peacekeepers. As previously noted, among the other reasonable inferences is that they were abducted and detained by reason of their being the principal actor in the disarmament process, in order to hamper that process.

595. The detention has been amply evidenced, as has the unhappiness of the RUF with the DDR process. That the peacekeepers were being detained because of their role in the DDR process is similarly beyond question. However, the Prosecution is essentially inviting the Appeals Chamber to infer that the detention took place with the intention of compelling a third party to act in a particular manner *as a condition for the safe release of those detained*. The Prosecution has not established that it was the only reasonable inference to be drawn from the evidence on the part of the Trial Chamber,[1497] thereby demonstrating that no reasonable trier of fact could have come to the conclusion reached by the Trial Chamber. In particular, the Appeals Chamber notes the dearth of submissions on the part of the Prosecution in relation to this "conditional" element, namely that the safety or release of the detained peacekeepers hinged upon the workings of the DDR process.

(ii) Intent relating to the arrest of Sankoh

596. The Appeals Chamber turns next to the Prosecution's second submission on intent, namely that the Trial Chamber erred in finding that the RUF did not abduct the peacekeepers in order to utilise their detention as leverage for the release of Sankoh.[1498] The Trial Chamber found that, after the arrest of Sankoh on 17 May 2000, the conditions of detention of ZAMBATT detainees at Yengema deteriorated, but concluded that the RUF did not "abduct the peacekeepers in order to utilise their detention as leverage for Sankoh's release, as the peacekeepers were already being

[1497] *See e.g.*, *Fofana and Kondewa* Appeal Judgment, para. 200.
[1498] Prosecution Appeal, para. 4.71.

detained at the time of his arrest."[1499] The Prosecution challenges this latter conclusion, arguing that the requisite intent may be formed at a time subsequent to the initial abduction.[1500]

597. The Appeals Chamber concurs with this view. As a matter of law, the requisite intent may be present at the moment the individual is first detained or may be formed at some time thereafter while the persons were held. In the former instance, the offence is complete at the time of the initial detention (assuming all the other elements of the crime are satisfied); in the latter, the situation is transformed into the offence of hostage-taking the moment the intent crystallises (again, assuming the other elements of the crime are satisfied).

598. The Appeals Chamber notes that it could not be otherwise, for it would mean that the crime of hostage-taking could never arise out of an initially lawful detention; similarly, an unlawful abduction could never be transformed into a case of hostage taking. Yet the precise means by which the individual falls into the hands of the perpetrator is not the defining characteristic of the offence; it is, rather, a secondary feature. As the Trial Chamber found, the first element of the crime is that an individual was "seized, detained, *or otherwise held* hostage."[1501] For its part, the ICRC Commentary on Additional Protocol II defines a hostage as "persons who are in the power of a party to the conflict or its agent, willingly or unwillingly."[1502] The ICTY has shown that the key feature of the offence is the threat coupled with the compulsion.[1503] In the view of the Appeals Chamber, to exclude from the scope of the crime the individual who possesses the *mens rea* at a period subsequent to the initial confinement fails to recognize the continuing nature of the offence.

599. Accordingly, the Trial Chamber erred in law in concluding that the prior detention of the peacekeepers automatically negated their utilisation as leverage for Sankoh's release. The question then becomes whether the Appeals Chamber, in light of the correct legal standard, is itself convinced beyond reasonable doubt as to the finding challenged by the Prosecution.

600. In making this determination, it is first incumbent upon the Appeals Chamber to establish whether the requisite intent was present at a time subsequent to the initial detention, namely upon the arrest of Sankoh on 17 May 2000, as the Prosecution alleges. In this regard, the Appeals Chamber notes that the Trial Chamber found that:

[1499] Trial Judgment, para. 1966.
[1500] Prosecution Appeal, para. 4.55.
[1501] Trial Judgment, para. 240 (emphasis added); *see also* ICC Elements of Crimes, Article 8(2)(c)(iii).

> After Sankoh was arrested in Freetown on 17 May 2000, the treatment of the remaining UNAMSIL captives worsened. The RUF leadership within the Yengema area threatened that the prisoners could be killed at any time. Pearson told Kasoma that as long as Sankoh remained in detention, anything could happen to the UNAMSIL captives.
>
> About two weeks after their arrival at Yengema, a further 40 to 50 peacekeepers were released, leaving Kasoma and one other peacekeeper as the only captives at Yengema. Pearson indicated to them that their fate hinged on the release of Sankoh, and that they could face execution if he was not released.[1504]

601. Accordingly, the Appeals Chamber finds it established that RUF members intended to compel a third party to act in a particular manner as a condition for the safety or release of the captured UNAMSIL personnel. In so concluding, the Appeals Chamber has found that all the elements of the offence of the taking of hostages have been found to be present. The Appeals Chamber therefore turns to a consideration of the individual criminal responsibly of the accused.

(c) Criminal responsibility of the Appellants

(i) Responsibility of Sesay

602. In relation to Sesay, the Prosecution submits that, at the very least, Sesay is responsible under Article 6(3) of the Statute for failing to prevent or punish his subordinates for hostage-taking. The Prosecution also contends that Sesay is liable under Article 6(1) of the Statute for planning, ordering, instigating or aiding and abetting the hostage-taking.

603. The Appeals Chamber notes that the only submissions that are put forward on the part of the Prosecution relate to Sesay's knowledge of, and involvement in, the general attacks on UNAMSIL personnel and not the holding of UNAMSIL personnel as hostages. For example, the Prosecution makes submissions on the unhappiness of Sesay with the DDR program and the involvement of Sesay in the abduction of peacekeepers.[1505] However, the matter before the Appeals Chamber relates to the question of the taking of hostages and not, more generally, to the attacks on UNAMSIL personnel; Sesay has already been convicted for the latter. Thus, the Appeals Chamber is of the view that the Prosecution has not established that Sesay possessed the requisite *mens rea* for any of the forms of liability for which he is alleged to be guilty.

[1502] ICRC Commentary on the Additional Protocols, p. 1375.
[1503] *Blaškić* Appeal Judgment, para. 639; *Kordić and Čerkez* Trial Judgment, para. 314.
[1504] Trial Judgment, paras 1871-1872.
[1505] Prosecution Appeal, paras 4.80-4.84.

604. The Trial Chamber found that, any threats to, and mistreatment of, peacekeepers in the period after Sankoh's arrest "were personal reactions of the RUF fighters to the arrest of Sankoh and did not form part of a concerted plan of action to secure his release."[1506] The precise wording of the Trial Chamber may have been unfortunate, for no concerted plan is in fact required, but the salient point remains intact. In particular, it has not been shown that Sesay had any knowledge or awareness of these "personal reactions." The Prosecution has not shown that the Trial Chamber erred in so finding.

(ii) Responsibility of Kallon

605. The Prosecution's principal contention regarding Kallon's *mens rea* for ordering the hostage-taking is that it can be discerned from the radio communication in which he states: "[t]he UN have seriously attacked our position and taken five of our men and their weapons, but I have one"; "[a]ll stations, red alert, red alert, red alert."[1507] The Prosecution reads the communication as Kallon effectively stating that "[t]he UN have attacked us *but* I have one of them" and takes that to mean that "the captured UN peacekeeper was envisaged as being useful in addressing the fact of the UN attack."[1508] This may well be a reasonable inference to be drawn from the communication; however, it is not the only reasonable inference that may be drawn. Another reasonable inference is that Kallon was simply providing a description of the events that had taken place. Accordingly, the Prosecution has not established beyond reasonable doubt that Kallon ordered that the UNAMSIL peacekeepers be held hostage.

606. The Prosecution further submits that Kallon is responsible under Article 6(3) of the Statute for failing to prevent or punish his subordinates for taking hostages. However, the Prosecution offers no support for its proposition that Kallon had the requisite knowledge or awareness of the hostage-taking, as opposed to, and distinct from, his knowledge and awareness surrounding the attacks. Indeed, the only arguments adduced by the Prosecution relate in their entirety to the findings of the Trial Chamber on the attacks against UNAMSIL personnel and the Prosecution simply invites the Appeals Chamber to transpose these findings *mutatis mutandis* to the crime of the taking of hostages.[1509]

[1506] Trial Judgment, para. 1967.
[1507] Prosecution Appeal, para. 4.97 fn. 762.
[1508] Prosecution Appeal, para. 4.69.
[1509] Prosecution Appeal, paras 4.102-4.104.

607. As with Sesay,[1510] it has not been shown that Kallon had any knowledge or awareness of the "personal reactions of the RUF fighters to the arrest of Sankoh."

(iii) Responsibility of Gbao

608. The Appeals Chamber recalls that the Prosecution confirmed that it does not seek to establish any linkage between the intention of Gbao in the detention of UNAMSIL personnel and the release of Sankoh. Rather, it submits that Gbao had the requisite intent related to the DDR process. The Appeals Chamber has already found the Prosecution's arguments insufficient to establish error with respect to the intent related to the DDR process,[1511] and therefore dismisses the Prosecution's submissions concerning Gbao's responsibility.

4. Conclusion

609. For the foregoing reasons, the Appeals Chamber grants the Prosecution's Ground 3 in part, holds that the communication of a threat to a third party is not a requirement of the offence of the taking of hostages, holds that the requisite *mens rea* may arise at a period subsequent to the initial seizure or detention, and finds that some RUF fighters committed the offence of the taking of hostages with the intent to condition the safety or release of the captured UNAMSIL personnel on the release of Sankoh. The Appeals Chamber, however, finds that the Prosecution has failed to establish that the Appellants possessed the requisite *mens rea* to be held individually criminally responsible for the offence, and therefore dismisses the remainder of the ground.

[1510] *See supra*, para. 604.
[1511] *See supra*, paras 587-589.

VII. SESAY'S APPEAL

A. Errors relating to Sesay's participation in and shared intent of the JCE (Sesay Grounds 25, 27 (in part), 34 and 37)

610. Under these grounds, Sesay challenges the Trial Chamber's findings on his participation in the JCE in Bo, Kenema, Kono and Kailahun Districts. Sesay seeks a reversal of all his convictions under JCE liability.[1512]

611. The Appeals Chamber notes that JCE liability does not require that the accused performed any part of the *actus reus* of the perpetrated crime.[1513] Rather, what is required is that the accused participated in the common criminal purpose and thereby lent "a significant contribution to the crimes for which the accused is to be found responsible."[1514] The Trial Chamber applied this standard as it concluded that Sesay, by his participation in the furtherance of the Common Criminal Purpose,[1515] "significantly contributed" to the crimes for which he incurred JCE liability.[1516]

1. Bo District (Sesay Ground 25)

(a) Trial Chamber's findings

612. The Trial Chamber found that Sesay actively participated in the furtherance of the Common Criminal Purpose and thereby significantly contributed to the acts of terrorism (Count 1), unlawful killings (Counts 3 to 5), and pillage (Count 14) found to have been committed in Bo District between 1 June 1997 and 30 June 1997.[1517] It held that he shared the intent with the other JCE members to commit these crimes.[1518]

[1512] Sesay Appeal, para. 250.
[1513] *Brđanin* Appeal Judgment, para. 427 ("[T]he accused need not have performed any part of the *actus reus* of the perpetrated crime"); *Kvočka et al.* Appeal Judgment, para. 99 ("A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met."); *Vasiljević* Appeal Judgment, para. 100 ("[T]he participation of the accused in the common purpose is required, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose"); *see also ibid.*, para. 119; *Tadić* Appeal Judgment, paras 196, 227.
[1514] *Krajišnik* Appeal Judgment, para. 695; *Brđanin* Appeal Judgment, paras 427, 430.
[1515] *See supra*, paras 282-307.
[1516] Trial Judgment, paras 2002, 2056, 2091, 2163.
[1517] Trial Judgment, para. 2002.
[1518] Trial Judgment, para. 2002.

(b) Submissions of the Parties

613. Sesay challenges these findings, contending first that the Trial Chamber's reference to his alleged use of "the levers of State power" is vague and "hyperbolic," unsupported by evidence, and that the only relevant finding on such use by him refers to his arrest of a suspected Kamajor supporter in Kenema on 27 October 1997.[1519] Second, Sesay disputes the Trial Chamber's reliance on his involvement in forced mining.[1520] He contends that the forced mining, which only started in August 1997, was not connected to the crimes in Bo between 1 and 30 June 1997.[1521] The Prosecution offers no arguments in response.

(c) Discussion

614. Both of Sesay's arguments under his present ground of appeal seek to suggest that the Trial Chamber did not find that he participated in the JCE between 1 June 1997 and 30 June 1997 when the crimes for which he incurred JCE liability were committed in Bo District.[1522] This is incorrect. The Trial Chamber found that Sesay significantly contributed to the JCE, *inter alia*, through his "close relationship and cooperation with Bockarie" from the outset of the JCE on 25 May 1997.[1523] Bockarie, himself a JCE member,[1524] led the attack on Sembehun in Bo District in June 1997[1525] during which AFRC/RUF fighters committed unlawful killings, pillage and acts of terrorism.[1526]

615. As to the Trial Chamber's conclusion on Sesay's use of "the levers of State power," the Appeals Chamber notes that this conclusion was supported by evidence, and that Sesay himself recognises the factual findings underpinning it.[1527] Those factual findings were that Sesay, while he was a member of the Supreme Council,[1528] used "his power and authority to compel his subordinates to arrest a suspected Kamajor supporter."[1529] He "used police officers, AFRC and RUF fighters to arrest and detain suspected Kamajor sympathisers and collaborators in Kenema Town. In certain instances, such individuals were detained without charges and seriously mistreated

[1519] Sesay Appeal, para. 236, *citing* Trial Judgment, paras 1048, 1999.
[1520] *See* Trial Judgment, paras 1984, 1997.
[1521] Sesay Appeal, para. 236, *citing* Trial Judgment, paras 1094, 1984.
[1522] Trial Judgment, paras 1974, 1975.
[1523] Trial Judgment, paras 1993-1996.
[1524] Trial Judgment, para. 1990.
[1525] Trial Judgment, paras 1006.
[1526] Trial Judgment, paras 1974, 1975.
[1527] Trial Judgment, paras 1048-1053; Sesay Appeal, para. 239.
[1528] Trial Judgment, paras 755, 1994.
[1529] Trial Judgment, para. 1999.

by Sesay."[1530] On this basis, the Trial Chamber concluded that "Sesay used the levers of State power in an attempt to destroy civilian support for the Kamajors."[1531] Sesay's "use of the levers of State power" accordingly referred to his use of police officers and AFRC/RUF fighters to arrest suspected Kamajor collaborators, sometimes without charges and subjected to serious mistreatment. Thus qualified, the Appeals Chamber is not persuaded that the conclusion on Sesay's "use of the levers of State power" was "hyperbolic." Whether Sesay's mistreatment of the detainees in itself amounted to a crime under the Statute is not determinative of whether his conduct contributed to the JCE.[1532]

616. The Appeals Chamber therefore dismisses Sesay's Ground 25 in its entirety.

2. Kenema District (Sesay Ground 27 (in part))

(a) Trial Chamber's findings

617. The Trial Chamber found that Sesay actively participated in the furtherance of the Common Criminal Purpose and thereby significantly contributed to the acts of terrorism (Count 1), collective punishments (Count 2), unlawful killings (Counts 3 to 5), physical violence (Count 11), enslavement (Count 13) and pillage (Count 14) found to have been committed in Kenema District between 25 May 1997 and 19 February 1998.[1533]

(b) Submissions of the Parties

618. In support of his challenge to these findings, Sesay argues he did not participate in the JCE by giving orders for civilians to be captured and taken to Bunumbu, because the Trial Chamber's findings and the evidence show that the Bunumbu training camp was not opened during the Junta period.[1534] Sesay also submits that the Trial Chamber erred in finding that he intended to cause terror in respect of his alleged involvement in the enslavement in Tongo Fields.[1535] The Prosecution responds that the conclusion that Sesay gave orders from 1997 onwards for civilians to be captured and taken to Bunumbu is consistent with the Trial Chamber's findings and TF1-362's testimony.[1536]

[1530] Trial Judgment, para. 1999.
[1531] Trial Judgment, para. 1999.
[1532] *Brđanin* Appeal Judgment, para. 427; *Kvočka et al.* Appeal Judgment, para. 99; *Vasiljević* Appeal Judgment, paras 100, 119; *Tadić* Appeal Judgment, paras 196, 227.
[1533] Trial Judgment, para. 2056.
[1534] Sesay Appeal, para. 237, *citing* Trial Judgment, paras 1435, 1436, 2000.
[1535] Sesay Appeal, paras 237, 238.
[1536] Prosecution Response, para. 5.40, *citing* Trial Judgment, para. 1437; Transcript, TF1-362, 20 April 2005, pp. 32, 38.

Sesay replies that the Trial Chamber itself found that the Bunumbu training camp was not opened during the Junta period.[1537]

(c) Discussion

619. Sesay's first challenge to his participation in the JCE in Kenema District concerns the Trial Chamber's finding that, "on Sesay's orders, from 1997 onwards, captured civilians were taken to Bunumbu for military training."[1538] The Trial Chamber found that the Bunumbu training camp was established in 1998[1539] and that the AFRC/RUF Junta was ousted from power by the ECOMOG intervention on 14 February 1998.[1540] It did not say whether the Bunumbu training camp was established before or after 14 February 1998, but the testimony of TF1-362, relied on by the Trial Chamber for the impugned finding and invoked by Sesay and the Prosecution on appeal, suggests that the camp was established shortly after the ECOMOG intervention.[1541] Sesay thus appears to be correct that the Bunumbu training camp did not open until after the Junta period.

620. However, it does not follow that his orders in question did not constitute a participation in the JCE, because the JCE continued beyond the Junta period, until late April 1998.[1542] Sesay does not address the question of whether he issued any orders between the opening of the Bunumbu training camp sometime in February 1998 and late April 1998. The extent that these orders contributed to the crimes in Kenema District, which occurred between 25 May 1997 and 19 February 1998,[1543] would have been limited to the period of temporal overlap, but this fact alone does not render unreasonable the Trial Chamber's conclusion that Sesay lent a significant contribution to those crimes, particularly in light of his other forms of participation in the JCE in Kenema. The Appeals Chamber therefore dismisses Sesay's present argument, and proceeds to consider his challenges to the findings on his other forms of participation in Kenema.

621. Sesay contests the finding that he participated in the JCE through his involvement in the planning and organising of the forced mining in Kenema District. His first argument, that this

[1537] Sesay Reply, para. 73.
[1538] Trial Judgment, paras 1437, 2000.
[1539] Trial Judgment, para. 1436.
[1540] Trial Judgment, paras 776, 2067.
[1541] Transcript, TF1-362, 20 April 2005, pp. 39-42; Trial Judgment, para. 2067.
[1542] Trial Judgment, para. 2076.
[1543] Trial Judgment, paras 2050, 2056.

involvement was not carried out with the intent to cause terror,[1544] is dismissed because it is based on the erroneous premise that the common criminal purpose of the JCE was to cause terror.[1545]

622. Second, Sesay contends that the finding in paragraph 1091 of the Trial Judgment that "[d]iamonds were then either given to RUF Commanders including Bockarie, Sesay and Mike Lamin" was an insufficient basis for the Trial Chamber to conclude in paragraph 1997 that "the forced mining was a planned and a systematic policy of the Junta Government devised at the highest level" and that he "as a member of the Supreme Council, was involved in the planning and organisation of the forced mining in Kenema District."[1546] However, Sesay only selectively quotes paragraph 1091 in support of his claim. The full finding states that many civilians dug for diamonds in Tongo Field and

> [T]he diamonds found would be taken to the Secretariat to be valued. Diamonds were then either given to RUF Commanders including Bockarie, Sesay and Mike Lamin, or taken by AFRC Commanders to senior AFRC official Eddie Kanneh in Kenema. Eddie Kanneh was known to arrange for diamonds to be sold abroad to finance the acquisition of arms and ammunition.[1547]

Also, Sesay does not challenge the finding in paragraph 1997 that "the government mining in Tongo Field provided an important source of revenue for the Junta Government and that this topic was discussed in AFRC Supreme Council meetings when Sesay was present." Rather, Sesay refers to TF1-371's testimony to argue that the issue of force was not discussed and that the Supreme Council would replace the commander if civilians were harassed while mining in his area.[1548] However, he does not explain how it was unreasonable for the Trial Chamber to disregard this evidence given "[t]he sheer scale of the enslavement in Kenema District."[1549] Further, merely invoking the finding that "significant decisions were made by Koroma, SAJ Musa and certain other Honourables,"[1550] Sesay fails to show that the Trial Chamber's finding concerning his participation was unreasonable.

623. The Appeals Chamber therefore rejects the arguments in Sesay's Ground 27 that he did not participate in the JCE in Kenema District.

[1544] Sesay Appeal, para. 237.
[1545] *See supra*, para. 305.
[1546] Sesay Appeal, para. 237, *quoting* Trial Judgment, para. 1091, 1097.
[1547] Trial Judgment, para. 1091 (internal references omitted).
[1548] Sesay Appeal, para. 238.
[1549] Trial Judgment, para. 1997.
[1550] Appeal Transcript, 2 September 2009, p. 30; Trial Judgment, para. 756.

3. Kono District (Sesay Ground 34)

(a) Trial Chamber's findings

624. The Trial Chamber found that Sesay actively participated in the furtherance of the Common Criminal Purpose and thereby significantly contributed to the acts of terrorism (Count 1), collective punishment (Count 2), unlawful killings (Counts 3 to 5), sexual violence (Counts 6 to 9), physical violence (Count 11), enslavement (Count 13) and pillage (Count 14) found to have been committed in Kono District between 14 February 1998 and April/May 1998.[1551] It held that he shared the intent with the other JCE members to commit these crimes.[1552]

(b) Submissions of the Parties

625. Sesay makes five submissions to challenge the findings on his participation and intent regarding Kono District, arguing that: (i) he did not tacitly endorse looting, or plan the attack on Koidu;[1553] (ii) he did not endorse Johnny Paul Koroma's instructions to burn houses and kill civilians in Koidu in March 1998;[1554] (iii) his involvement in mining activities or with the Yengema training base could not constitute participation in the JCE, because he was not found to have been involved in mining in Kono until December 1998,[1555] and Yengema did not start operating until late 1998 or early 1999;[1556] (iv) his participation in the forced military training at the Bunumbu training camp in Kailahun did not contribute to terror and collective punishment in Kono;[1557] and (v) he did not receive regular radio reports.[1558]

626. The Prosecution responds, in particular, that the Trial Chamber found that forced mining "continued throughout 1998" and "intensified" in December 1998[1559] and that the reference to

[1551] Trial Judgment, para. 2091.
[1552] Trial Judgment, para. 2092.
[1553] Sesay Appeal, para. 241, *citing* Trial Judgment, paras 2082, 2083.
[1554] Sesay Appeal, para. 242, *citing* Trial Judgment, paras 799, 1141-1144, 2084, 2092.
[1555] Sesay Appeal, para. 245, *citing* Trial Judgment, paras 1240-1259, 2086.
[1556] Sesay Appeal, para. 246, *citing* Trial Judgment, paras 2000, 2087, 2088, 2092; Transcript, TF1-362, 22 April 2005, p. 16.
[1557] Sesay Appeal, para. 247, *citing* Trial Judgment, 2064.
[1558] Sesay Appeal, para. 248, *citing* Trial Judgment, para. 827.
[1559] Prosecution Response, para. 5.43. *quoting* Trial Judgment, para. 1242.

Yengema relates to involvement in the planning and creation of the base.[1560] Sesay offers no material additional arguments in reply.[1561]

(c) Discussion

627. The Appeals Chamber addresses Sesay's five challenges in turn. First, Sesay challenges his participation in respect of the attack on Koidu Town and his tacit endorsement and encouragement of the looting during Operation Pay Yourself.[1562] He argues that, "[e]ven if the Trial Chamber's conclusion that Sesay planned [the Koidu] attack was correct," no evidence showed that such planning also involved planning the crimes of terror and collective punishment committed during the attack.[1563] The Appeals Chamber observes, however, that it was not required that Sesay planned the crimes committed during the attack in order to significantly contribute to them. As to the looting, Sesay merely repeats the fact, noted by the Trial Chamber, that he was not actively engaged in the attack on Koidu Town as he was still recovering from the injury he had sustained during the attack on Bo Town.[1564] However, Sesay fails to account for the finding that, even though Sesay was injured, the Commander of the attack (Superman) was subordinate to him during the attack.[1565] Sesay therefore fails to demonstrate that, on the evidence as a whole, no reasonable trier of fact could have found that he tacitly endorsed and encouraged the looting. These arguments are rejected.

628. Second, Sesay disputes the Trial Chamber's finding that he endorsed Johnny Paul Koroma's instructions to burn houses and kill civilians in Koidu in March 1998.[1566] This challenge turns on the quality of Witness TF1-334's testimony, on which the impugned finding relies.[1567] Sesay claims that TF1-334, contrary to the Trial Chamber's finding, did not testify that the meeting at which Sesay endorsed Koroma's instructions took place at Kimberlite, yet he fails to address the other evidence relied upon by the Trial Chamber when it found that the meeting was held at Kimberlite.[1568] In any event, he fails to explain how such a mistake as to location would render unreasonable the finding that the meeting took place and that Sesay endorsed Koroma's instructions.

[1560] Prosecution Response, para. 5.43, *citing* Trial Judgment, para. 2088.
[1561] *See* Sesay Reply, paras 77-80.
[1562] Trial Judgment, paras 2082, 2083.
[1563] Sesay Appeal, para. 241.
[1564] Trial Judgment, paras 795, 2083.
[1565] Trial Judgment, para. 2083.
[1566] Sesay Appeal, para. 242, *citing* Trial Judgment, paras 799, 1141-1144, 2084, 2092.
[1567] Trial Judgment, paras 1141, fn. 2192, 2084, fn. 3806.
[1568] Trial Judgment, fn 2191.

629. Sesay further argues that the Trial Chamber failed to explain why it accepted TF1-334's testimony in spite of the fact that the witness was an accomplice, was released from prison during his involvement with the Prosecution, sought relocation, obtained unexplained payments from the Prosecution, and gave evidence in court which differed from a previous interview.[1569] This is not true. The Trial Chamber noted TF1-334 among the "insider" witnesses who may be considered accomplices, and "cautioned itself on the risk and danger of accepting uncorroborated evidence from an insider witness as credible."[1570] The Trial Chamber also considered that "[t]he Defence has alleged that some of the Prosecution evidence is unreliable because the witnesses were provided with financial incentives to testify, or were aided in some other way such as their relocation to another country."[1571] It noted the forms of remuneration to which individuals testifying before the Special Court may be entitled, and that the payments received by certain witnesses were disclosed and admitted as evidence.[1572] Further, Sesay neither provides any reference to the alleged earlier interview of TF1-334, nor does he explain why it was unreasonable for the Trial Chamber to prefer the witness's *viva voce* evidence instead of the interview.[1573] Sesay's challenges to the quality of TF1-334's testimony are accordingly dismissed.

630. Third, Sesay disputes that he was involved in the forced mining in Kono before December 1998, and argues that his involvement with the Yengema training base could not constitute participation in the JCE because the base did not start operating until late 1998 or early 1999.[1574] Both arguments are based on the Trial Chamber's findings. The Appeals Chamber notes that the Trial Chamber found that Sesay participated in the forced labour in diamond mines in Kono "between 14 February and May 1998" in order to further the Common Criminal Purpose.[1575] While the Trial Chamber provided more detailed findings on Sesay's involvement in the mining in Kono after December 1998[1576]—and appears to have erroneously relied on some of this later involvement for its finding on Sesay's participation in the JCE[1577]—the Appeals Chamber is satisfied it was

[1569] Sesay Appeal, paras 242-244.
[1570] Trial Judgment, para. 539.
[1571] Trial Judgment, paras 523-525.
[1572] Trial Judgment, paras 524, 525. *See supra*, paras 196-201.
[1573] *See* also Appeal transcript, 2 September 2009, p. 34.
[1574] Sesay Appeal, paras 245, 246.
[1575] Trial Judgment, para. 2086.
[1576] *See* Trial Judgment, paras 1249, 1252, 1254, 1255, 1257, 1259.
[1577] *Compare* Trial Judgment, para. 2086 (considering that Sesay "visited the mines to collect diamonds, signed-off on the mining log-books and transported diamonds to Bockarie" as a basis for concluding that Sesay participated in the forced mining in Kono between 14 February and May 1998) *with* Trial Judgment, paras 1252, 1254 (holding that Sesay "would at times visit the mining site" and "came to collect diamonds" at Tombodu Bridge in Kono after around

nonetheless open to a reasonable trier of fact to conclude that Sesay participated in the JCE by being involved in forced mining in Kono between 14 February and May 1998. The Trial Chamber found that "[a]s early as August 1997 the AFRC/RUF Junta forced civilians to conduct alluvial diamond mining throughout Kono District"[1578] and that the practice of forced mining in Kono "continued throughout 1998."[1579] During the period of joint AFRC/RUF control over Kono District between February/March 1998 and late April 1998, there was a "widespread commission by RUF and AFRC fighters of … enslavement."[1580] Sesay organised the integrated AFRC/RUF command structure in Koidu Town and appointed Superman overall Commander in Kono District;[1581] it was Superman who on 30 March 1998 issued a written order to Commanders to hand over all civilians for mining.[1582] The Appeals Chamber therefore dismisses Sesay's challenge to his participation in the JCE insofar as it pertains to the forced mining in Kono District.

631. As to the Yengema training base, the Appeals Chamber notes that the Trial Chamber found that it was established after Kono had been recaptured by the RUF in December 1998, that is, at least seven months after the JCE ended.[1583] The Prosecution argues that the "reference to Yengema must also be seen in its context as a reference to involvement in the planning and creation of the base."[1584] However, the Appeals Chamber fails to see how the fact that Sesay was involved in planning and creating a training base which started operating seven months after the crimes for which he allegedly incurred JCE liability were committed could have significantly contributed to those crimes, and any contribution under these circumstances is not explained by Trial Chamber. Such a conclusion was not open to any reasonable trier of fact. The Trial Chamber therefore erred in finding that Sesay participated in the JCE by ordering the establishment, and being involved in the planning and creation of the Yengema training base.[1585] The Appeals Chamber will determine whether this error occasioned a miscarriage of justice after having considered Sesay's remaining challenges to his participation in the JCE in Kono District.[1586]

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16 December 1998). *See* also Trial Judgment, para. 828 (finding that, in May 1998, "Bockarie sent Sesay to Taylor in Monrovia with a package of diamonds to purchase ammunition for the RUF").
[1578] Trial Judgment, para. 1240.
[1579] Trial Judgment, para. 1242.
[1580] Trial Judgment, paras 796, 814, 820, 2070.
[1581] Trial Judgment, para. 2084.
[1582] Trial Judgment, para. 1241.
[1583] Trial Judgment, paras 1261, 2067.
[1584] Prosecution Response, para. 5.43.
[1585] Trial Judgment, para. 2088.
[1586] *See infra*, para. 634.

632. Fourth, Sesay's speculation that the fact that 500 people were trained at Bunumbu during its operation is insufficient to constitute a significant contribution to the maintenance of military manpower, operations or territory as well as terror and collective punishment[1587] is unsupported and fails to account for the other ways in which he contributed in Kono District.[1588] This submission is dismissed.[1589]

633. Sesay's last challenge concerns his knowledge of events in Kono. He submits that the Trial Chamber erred in relying exclusively on TF1-361 to find that, after he departed Koidu Town for Buedu in Kailahun District, he received regular radio reports from Kono District, including reports of crimes committed by RUF and AFRC fighters.[1590] His first argument, that "there is not a single reference" in the Trial Judgment to any of his objections to TF1-361's testimony,[1591] is wholly unfounded.[1592] Sesay's second argument is that TF1-361's testimony was "nonsensical" because the witness stated that radio messages to Bockarie's house would first be taken to Sesay whether or not Bockarie was home.[1593] However, the Trial Chamber made no such finding; it merely found that "messages were sent to Sesay as BFC, who would pass them to Sam Bockarie."[1594] Sesay's description of the testimony, even if accepted, is not such that it would render this finding unreasonable. Finally, the fact that the Trial Chamber accepted Sesay's testimony that he heard about the killings by Savage in Tombodu in September 1998 does not render unreasonable its conclusion that he received regular radio reports from Kono District, including reports of crimes committed by RUF and AFRC fighters.[1595] Whether Bockarie was informed about Rocky's crimes in April or May 1998 is irrelevant to this finding. These submissions are dismissed. Consequently, the Appeals Chamber need not address Sesay's challenge to the finding that Kallon reported to Sesay as BFC, and in any event, this argument is improperly raised for the first time in Sesay's Reply.[1596]

[1587] Sesay Appeal, para. 247.
[1588] *See* Trial Judgment, paras 2082-2087, 2089, 2090.
[1589] At the Appeal Hearing, Sesay further challenged the Trial Chamber's finding that he ordered that all civilians be trained and that the SBUs be armed with small firearms, on the basis that TF1-314's testimony, which the Trial Chamber relied on, is unrelated to the impugned finding. Trial Judgment, para. 2087; Appeal Transcript, 2 September 2009, p. 36. This argument is summarily dismissed because it was raised for the first time during the Appeal Hearing and is unsupported with references to the record.
[1590] Trial Judgment, paras 827, 2085; Sesay Appeal, para. 248.
[1591] Sesay Appeal, para. 248, *citing* Sesay Final Trial Brief, paras 806-844.
[1592] Trial Judgment, paras 539, 540, 548, 549, fn.1010, *citing* Sesay Final Trial Brief, para. 843.
[1593] Sesay Appeal, para. 248.
[1594] Trial Judgment, para. 827.
[1595] Trial Judgment, paras 827, 2085; Sesay Appeal, para. 248.
[1596] Sesay Reply, para. 80, *citing* Trial Judgment, para. 806.

634. The Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that Sesay participated in the JCE by ordering the establishment and being involved in the planning and creation of the Yengema training base.[1597] In light of the extensive findings on Sesay's participation in the JCE in Kono District, which we have upheld,[1598] and those which have not been challenged,[1599] we do not find that the error in relation to the Yengema training base occasioned a miscarriage of justice. For these reasons, the Appeals Chamber dismisses Sesay's Ground 34 in its entirety.

4. Kailahun District (Sesay Ground 37)

635. Sesay relies on Grounds 24-34 to challenge the findings on his participation and intent regarding Kailahun District.[1600] Ground 37 is accordingly also dismissed.

5. Conclusion

636. The Appeals Chamber dismisses Sesay's Grounds 25, 34 and 37 in their entirety and Ground 27 in present parts.

B. Existence of a widespread or systematic attack in Kenema (Sesay's Ground 28)

1. Trial Chamber's findings

637. The Trial Chamber found that there was a widespread and systematic attack against the civilian population in several districts during the junta period of May 1997 to February 1998.[1601]

2. Submissions of the Parties

638. Sesay argues that the Trial Chamber erred in finding that there was an attack directed against the civilian population in Kenema Town during the period May 1997 through to February 1998 and similarly erred in finding an attack directed against the civilian population in Tongo Fields during that same period.[1602]

[1597] Trial Judgment, para. 2088.
[1598] *See supra*, paras 627-633.
[1599] Trial Judgment, paras 796, 814, 820, 1240-1242, 2070, 2084.
[1600] Sesay Notice of Appeal, paras 76, 77; Sesay Appeal, para. 249.
[1601] Trial Judgment, paras 956-958.
[1602] Sesay Notice of Appeal, para. 57; Sesay Appeal, paras 177-186.

639. Sesay argues that the Trial Chamber failed to establish whether the acts were directed against the civilian population and whether they were committed as part of an attack rather than for personal reasons.[1603] Sesay contends that the only period in which crimes were found to have been committed was that of "late January 1998", the exception being "the killing of Bunnie Wailer and two accomplices in the early months of the Junta."[1604] However, in Sesay's view, that incident did not form part of the attack as the Trial Chamber found that it took place to "promote their (the AFRC/RUF) image as the law enforcement authorities active at that time."[1605]

640. The Prosecution responds that Sesay merely repeats arguments made at trial and submits that those arguments were disregarded.[1606] The Prosecution further submits that the term "'attack against the civilian population' does not mean that the entire population of the geographical entity in which the attack is taking place must have been the subject of that attack."[1607] In the view of the Prosecution, the Trial Chamber was of the considered view that the crimes committed in Kenema Town were "neither isolated, nor few, nor committed for personalized reasons."[1608]

641. Sesay offers no new arguments in reply.[1609]

3. Discussion

642. The Appeals Chamber only addresses the arguments Sesay sets out in sufficient detail. He contends that because all the crimes found to have been committed took place in or after "late January" 1998 it suggest that there was no evidence of a concerted attack from 25 May 1997 until that time.[1610] The Appeals Chamber recalls that the Trial Chamber observed that it had "heard evidence of numerous incidents of beatings and killings in Kenema Town during the Junta period."[1611] The Trial Judgment also states that, although the exact dates on which some of the incidents took place are unknown, the Trial Chamber was satisfied that they occurred within the

[1603] Sesay Appeal, paras 178, 182.
[1604] Sesay Appeal, para. 183.
[1605] Sesay Appeal, para. 183.
[1606] Prosecution Response para. 7.3.
[1607] Prosecution Response, para. 7.3.
[1608] Prosecution Response, para. 7.3.
[1609] Sesay Reply, para. 58.
[1610] Sesay Appeal, para. 183.
[1611] Trial Judgment, para. 1045.

Junta period, namely between 25 May 1997 and about 19 February 1998.[1612] Sesay fails to show that no reasonable trier of fact could have come to the conclusion reached by the Trial Chamber.

643. The Trial Chamber made numerous findings in relation to Kenema Town during the pertinent period. The Trial Judgment indicates that throughout the Junta period, individuals were harassed and their property confiscated.[1613] At unspecified times during the Junta period, numerous individuals were killed.[1614] Specifically, in late January and early February 1998, several individuals were detained, beaten and subsequently killed.[1615] Furthermore, the crimes as found by the Trial Chamber were not limited to that period. In October 1997, an individual was beaten and detained;[1616] and in the "early months" of the Junta regime, still others were killed.[1617] The fact that some of these individuals may have been killed to promote the image of the AFRC/RUF forces as the law enforcement authorities of the area does not mean that they necessarily fall outside the scope of the attack. Indeed, as the Trial Chamber put it, "these killings demonstrated the reckless disregard for civilian life characteristic of the widespread and systematic attack on the civilian population."[1618] The Trial Chamber also found that numerous other crimes were committed in the relevant period.[1619]

644. In relation to Sesay's arguments concerning Tongo Fields, the Appeals Chamber notes that a semblance of law and order therein does not preclude the existence of an attack against a civilian population; the two may well co-exist as long as the civilian population is the primary object of the attack as opposed to a limited and randomly selected number of individuals.[1620] Thus, even if Sesay's arguments under this sub-ground were made out, it would not establish that the Trial Chamber erred in finding the existence of an armed attack in Tongo Fields during the period in question.

[1612] Trial Judgment, para. 1045.
[1613] Trial Judgment, para. 1046.
[1614] Trial Judgment, paras 1058-1059, 1060, 1064, 1065.
[1615] Trial Judgment, paras 1066-1079.
[1616] Trial Judgment, paras 1048-1053.
[1617] Trial Judgment, paras 1061-1063.
[1618] Trial Judgment, para. 1104.
[1619] Trial Judgment, paras 956-958, 2050.
[1620] *E.g., Blaškić* Appeal Judgment, paras 105, 106; *Kunarac et al*. Appeal Judgment, paras 90, 91.

4. Conclusion

645. For these reasons, and recalling the finding above,[1621] the Appeals Chamber dismiss Sesay's Ground 28 in its entirety.

C. Alleged error in finding specific intent for acts of terrorism in Kenema Town (Sesay Ground 29)

1. Trial Chamber's findings

646. The Trial Chamber found that six acts of unlawful killings and physical violence committed in Kenema Town constituted acts of terrorism.[1622] The Trial Chamber found that "a number of the victims were prominent members of civil society and were targeted on this account."[1623] It further found that AFRC/RUF fighters publicised these crimes.[1624] The Trial Chamber concluded that these crimes "were intended to illustrate the gruesome repercussions of collaborating or being perceived to collaborate with enemies of the RUF and so to terrorise and subdue the population",[1625] and thus were committed with the specific intent to terrorise the civilian population.[1626]

2. Submissions of the Parties

647. Sesay claims that the Trial Chamber erred in law and fact in concluding that the six acts in Kenema District were committed with the specific intent to terrorise the civilian population.[1627] The error of law[1628] was committed by "reversing the burden of proof" by using the finding that "the AFRC/RUF regularly killed civilians accused of being Kamajors as a deliberate strategy to terrorise the civilian population and prevent support for their opponents" as proof that the perpetrators in Kenema Town had that specific intent.[1629] He contends that whether the perpetrators had the specific intent to cause extreme fear has to "be judged on a case-by-case basis,"[1630] and shown for

[1621] *See supra*, para. 348.
[1622] Trial Judgment, paras 1123-1126.
[1623] Trial Judgment, para. 1124.
[1624] Trial Judgment, para. 1124.
[1625] Trial Judgment, para. 1125.
[1626] Trial Judgment, para. 1125.
[1627] Sesay Notice of Appeal, para. 58.
[1628] Sesay Appeal, paras 140-142.
[1629] Sesay Appeal, para. 141, *citing* Trial Judgment, para. 1102..
[1630] Sesay Appeal, para. 140, *citing* Trial Judgment, para. 117.

"*each* individual crime."[1631] Sesay further submits specific factual errors in the six findings on the acts of terrorism found to have been committed in Kenema Town.[1632]

648. Sesay argues that the Trial Chamber was required to make findings as to the "specific intent of *each* individual crime," and failed to do so.[1633] Sesay avers that the Trial Chamber instead erroneously inferred that the persons who carried out the *actus reus* of the crime acted with the specific intent to spread fear from its findings on the existence of a deliberate strategy to commit terror and on an amalgam of different crimes.[1634] Sesay further contends that the Trial Chamber could not infer the specific intent of unidentified perpetrators,[1635] and also argues that the Trial Chamber could not attribute the acts of other persons who abused the bodies of the deceased victims to the physical perpetrators of the killings when inferring the specific intent of the perpetrators.[1636]

649. The Prosecution responds that the Trial Chamber was entitled to conclude that some of the acts of violence found "were part of a campaign of terror which the RUF used to control and subdue the civilian population" and to "hold that all of the crimes found to be committed as part of that campaign had the purpose of spreading terror."[1637] Further, "[i]n cases where the direct perpetrator is not a JCE-member but a tool of the JCE, it is not necessary to prove that the direct perpetrator had the intent to terrorise the civilian population, but only that members of the JCE shared this common purpose," which was satisfied here.[1638] Sesay replies that the link between the crime and a member of the JCE can only be established upon proof that the direct perpetrator acted with the intent to commit the crime of acts of terrorism.[1639] Sesay further cites the ICTY Appeals Chamber's finding in *Limaj et al.* that the targeting of Serb civilians and perceived Kosovo Albanian collaborators was part of the *actus reus* of the systemic JCE pleaded in that indictment.[1640]

[1631] Sesay Appeal, para. 140.
[1632] Sesay Appeal, paras 145-151.
[1633] Sesay Appeal, paras 140-142.
[1634] Sesay Appeal, paras 141, 142.
[1635] Sesay Appeal, paras 144, 145, 147, 148.
[1636] Sesay Appeal, para. 144.
[1637] Prosecution Response, para. 7.16.
[1638] Prosecution Response, para. 7.39.
[1639] Sesay Reply, para. 65.
[1640] Sesay Reply, para. 66, *citing Limaj et al.* Appeal Judgment, para. 110.

3. Discussion

650. As Sesay was convicted for the acts of terrorism in question under JCE 1 liability,[1641] and as the Trial Chamber found that one or more members of the JCE used the non-members who carried out the *actus reus* to commit the crime of acts of terrorism,[1642] his arguments turn on the initial proposition that the Trial Chamber was required to find that the non-members of the JCE who carried out the *actus reus* had the specific intent for those crimes.

651. The Appeals Chamber notes as an initial matter that the *mens rea* of those who carry out the *actus reus* of the crime is not among the elements of JCE 1 liability as set out in *Tadić*.[1643] While "participants in a basic or systemic form of joint criminal enterprise must be shown to share the required intent of the principal perpetrators,"[1644] this holding only reinforces that the members of the JCE must share the intent to commit the crime for which they are held to be responsible under JCE 1 and JCE 2, and does not imply that non-members used by a JCE member to carry out the *actus reus* of the crime must share the intent with the members of the JCE.

652. Further, the Appeals Chamber agrees "that what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose."[1645] As persuasively explained by the ICTY Appeals Chamber, the persons who carry out the *actus reus* of the crime need not share the common purpose of the JCE in order for liability for their acts to attach to members of the JCE.[1646] To the contrary, the primary question for the purposes of JCE liability is whether the acts of non-members who carried out the *actus reus* of the crimes can be imputed to the members of the JCE.[1647] So long as it is established that a member of the JCE used the non-member to commit a crime within the common purpose of the JCE, there is no need to show that the non-member

[1641] Trial Judgment, para. 2056.
[1642] Trial Judgment, para. 1992. *See* also *supra*, paras 403-455.
[1643] *Tadić* Appeal Judgment, paras 227, 228.
[1644] *Kvočka et al.* Appeal Judgment, para. 110.
[1645] *Brđanin* Appeal Judgment, para. 410. *See* also *Krajišnik* Appeal Judgment, para. 226; *Martić* Appeal Judgment, para. 168.
[1646] *Brđanin* Appeal Judgment, paras 410-414; *Krajišnik* Appeal Judgment, para. 225; *Martić* Appeal Judgment, para. 168.
[1647] *See supra*, para. 400; *see* also *Brđanin* Appeal Judgment, paras 413, 430; *Krajišnik* Appeal Judgment, para. 225; *Milutinović et al*. Trial Judgment Vol. I, para. 99.

intended to further the common purpose of the JCE or indeed even knew of that common purpose.[1648]

653. For the purposes of determining the liability of JCE members for the acts of non-members who carry out the *actus reus* of the crime, the critical inquiry is not the *mens rea* of the non-member, but rather the acts and mental state of the JCE member, who uses the non-member to commit a crime within and in furtherance of the common purpose.[1649] As the *mens rea* element of JCE 1 liability relates solely to the shared intent of the members of the JCE, and as the persons who carry out the *actus reus* of the crime need not be members of the JCE, the *mens rea* of non-members who carry out the *actus reus* of the crime is not a legal element of JCE 1 liability.[1650]

654. The Appeals Chamber does not consider that the finding of the ICTY Appeals Chamber in *Limaj et al.*, cited by Sesay, is relevant to the present issue, as the Appeals Chamber there was concerned with the scope of the common purpose as pleaded in the indictment, a distinct issue from the present question.[1651]

655. Accordingly, the Appeals Chamber concludes that under JCE 1 liability, the Trial Chamber was not required to find, as an element of the liability of JCE members, that non-members who carried out the *actus reus* of the crime had the requisite *mens rea* for the crime of acts of terrorism. Rather, in addition to finding that the members of the JCE shared the intent to commit the crime and finding that the acts of the non-members who carried out the *actus reus* of the crimes could be imputed to a member of the JCE, the Trial Chamber was only required to find that the acts of the non-members satisfied the *actus reus* of the offence.

656. While the Trial Chamber did find that those who carried out the *actus reus* of the crime acted with the specific intent to spread terror,[1652] such a finding is only relevant as a matter of evidence to the other findings that the Trial Chamber was required to make. The Appeals Chamber finds that Trial Chamber's alleged errors with respect to the *mens rea* of the non-members who carried out the *actus reus* of the crimes,[1653] even if accepted *arguendo*, would not render those

[1648] *Brđanin* Appeal Judgment, para. 410; *Krajišnik* Appeal Judgment, para. 226.
[1649] *See supra*, para. 400; *see* also *Brđanin* Appeal Judgment, para. 413; *Martić* Appeal Judgment, para. 168.
[1650] *See Milutinović et al*. Trial Judgment Vol. I, para. 98, fn. 145 (concluding same and citing *Brđanin* Appeal Judgment, para. 410).
[1651] *Limaj et al.* Appeal Judgment, para. 110.
[1652] Trial Judgment, paras 1124, 1125.
[1653] Sesay Appeal, paras 145-151.

findings unreasonable. Sesay challenges related to the *mens rea* of non-members who carried out the *actus reus* of the crimes are dismissed.

657. Sesay further challenges the Trial Chamber's findings that Bockarie, as the perpetrator and member of the JCE, acted with the requisite *mens rea* for acts of terrorism. Sesay fails to show an error[1654] in the Trial Chamber's findings regarding the killing of the man at the NIC Building.[1655] Sesay neither explains how the Trial Chamber's finding that Bockarie acted with the requisite intent would be erroneous even if it were accepted that the victim was a Kamajor who was *hors de combat*, nor explains how Bockarie's desire to "do away with all the Kamajors"[1656] is inconsistent with or renders unreasonable the Trial Chamber's finding. This claim is therefore dismissed.

658. Sesay fails to establish that the Trial Chamber erred in finding that the beating of TF1-129 was committed with the specific intent to spread terror.[1657] Contrary to Sesay's claim, the Trial Chamber did not need to find a "single, all-encompassing intention" among all those who participated in the beating of TF1-129,[1658] as the Trial Chamber's findings show that it found that Sesay and Bockarie used those who carried out the beatings to commit the crime.[1659] In particular, the Appeals Chamber notes the following findings: (i) Sesay ordered his bodyguard to molest TF1-129 during his arrest;[1660] (ii) Sesay's bodyguard further injured TF1-129 when he was to be taken to the Secretariat building;[1661] (iii) Sesay instructed a small boy to guard TF1-129 and kill him if he moved;[1662] (iv) TF1-129 was beaten while being taken to Bockarie and Sesay;[1663] (v) Bockarie and Sesay ordered TF1-129 to be taken to the "dungeon", and TF1-129 was beaten on the way to and from the "dungeon".[1664]

659. In addition, Sesay argues that there was no evidence that he sought to publicise the beating,[1665] and that the Trial Chamber therefore erred in finding that he and Bockarie used the non-

[1654] Sesay Appeal, para. 146.
[1655] Trial Judgment, paras 1059, 1123.
[1656] Trial Judgment, para. 1059.
[1657] Sesay Appeal, paras 150, 151.
[1658] Sesay Appeal, para. 151.
[1659] Trial Judgment, paras 1048-1053.
[1660] Trial Judgment, para. 1048.
[1661] Trial Judgment, para. 1050.
[1662] Trial Judgment, para. 1051.
[1663] Trial Judgment, para. 1052.
[1664] Trial Judgment, para. 1052.
[1665] Sesay Appeal, para. 151.

members who carried out the *actus reus* of the crimes to commit an act of terrorism.[1666] In this respect, the Appeals Chamber recalls the Trial Chamber's findings that acts of terrorism were within the Common Criminal Purpose of the JCE,[1667] and therefore that the intent to commit acts of terrorism was shared by the members of the JCE, including Sesay and Bockarie. The Trial Chamber further found that the six acts of violence in Kenema Town,[1668] including the beating of TF1-129, targeted prominent members of civil society and were publicised.[1669] The Trial Chamber accordingly reasoned that the six acts of violence were "intended to illustrate the gruesome repercussions of collaborating or being perceived to collaborate with enemies of the RUF and so to terrorise and subdue the population," and therefore were committed with the specific intent to terrorise the civilian population.[1670] The Appeals Chamber also recalls the Trial Chamber's finding "that during the conflict in Sierra Leone, the AFRC/RUF regularly killed civilians accused of being Kamajors as a deliberate strategy to terrorise the civilian population and prevent any support for their opponents."[1671] Finally, the Trial Chamber found that Bockarie targeted alleged Kamajors on a number of occasions[1672] and publicly expressed his intent to target alleged Kamajors.[1673]

660. In light of the above findings, whether or not the Trial Chamber found that Sesay or others sought to publicise the beating directly, the Trial Chamber did find that TF1-129 was targeted because he was considered to be prominent[1674] and a "chief Kamajor."[1675] Sesay fails to show that no reasonable trier of fact could have concluded on that basis that he and Bockarie used the non-members who carried out the *actus reus* of the crimes to commit acts of terrorism. Sesay further argues that as TF1-129 was a suspected Kamajor ally, "an aggravated Bockarie" ordered his arrest, and therefore, any crimes committed during TF1-129's arrest were not committed with the primary intent of spreading terror.[1676] Although the Trial Chamber found that certain acts of violence did not constitute acts of terror because the acts were committed in response to conduct that aggravated the

[1666] *Krajišnik* Appeal Judgment, para. 226 (under JCE 1, "the JCE member [must use] the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose"). *See* also *Brđanin* Appeal Judgment, paras 410, 411, 413; *Martić* Appeal Judgment, para. 168
[1667] Trial Judgment, paras 1982 (generally), 2056 (Kenema District).
[1668] Trial Judgment, para. 1123.
[1669] Trial Judgment, para. 1124.
[1670] Trial Judgment, para. 1125.
[1671] Trial Judgment, para. 1102.
[1672] Trial Judgment, paras 1057, 1059, 1066, 1076.
[1673] Trial Judgment, paras 1059, 1070.
[1674] Trial Judgment, paras 1052, 1053, 1124.
[1675] Trial Judgment, para. 1051.
[1676] Sesay Appeal, para. 151.

perpetrators,[1677] Sesay misinterprets that finding and ignores the evidence as a whole as relied on by the Trial Chamber, in particular the findings noted above. Accordingly, Sesay fails to establish that the Trial Chamber erred in finding that he and Bockarie acted with the specific intent to spread terror.

4. Conclusion

661. The Appeals Chamber dismisses Sesay's Ground 29 in its entirety.

D. Alleged error in finding unlawful killings and acts of terrorism at Tongo Field in Kenema District (Sesay Ground 31)

1. Trial Chamber's findings

662. The Trial Chamber found that the following acts at Tongo Field constituted unlawful killings: (i) the killing of a civilian at Lamin Street,[1678] (ii) the killing of a Limba man,[1679] and (iii) the killing of 63 civilians at Cyborg Pit.[1680] In regard to the killing of 63 civilians at Cyborg Pit, the Trial Chamber found that "on three separate occasions, SBUs under the command of AFRC/RUF fighters killed over 20 civilians; 25 civilians; and 15 civilians at Cyborg Pit."[1681] On a fourth occasion at Cyborg Pit, "three civilians and two fighters were killed by the AFRC/RUF."[1682] It further found that the killing at Lamin Street and the killings at Cyborg Pit constituted acts of terrorism.[1683]

2. Submissions of the Parties

663. Sesay submits generally that the Trial Chamber erred in finding that the deaths at Cyborg Pit were unlawful killings[1684] because evidence that the deaths resulted from the collapse of the pit raised reasonable doubt that the deaths were unlawful.[1685] With respect to the first three incidents at

[1677] Trial Judgment, para. 1126.
[1678] Trial Judgment, paras 1080, 1105.
[1679] This unlawful killing is not challenged in this ground of appeal. *See* Sesay Appeal, paras 156-165. The Appeals Chamber previously concluded that the Trial Chamber erred in finding that the members of the JCE used to principal perpetrator of this crime to commit the killing and reversed Sesay's and Kallon's convictions on that basis. *See supra*, para. 425.
[1680] Trial Judgment, paras 1106-1108.
[1681] Trial Judgment, paras 1106, 1082-1086.
[1682] Trial Judgment, paras 1106, 1087.
[1683] Trial Judgment, paras 1127, 1129.
[1684] Sesay Notice of Appeal, para. 63; Sesay Appeal, para. 156, *citing* Sesay Final Trial Brief, paras 634-638.
[1685] Sesay Appeal, para. 157.

Cyborg Pit, he further argues that the Trial Chamber erred in relying on the uncorroborated hearsay testimony of a single witness, TF1-035,[1686] given the evidence of Witnesses TF1-045[1687] and TF1-060, neither of whom testified to the killings.[1688] Regarding the fourth incident at Cyborg Pit, Sesay submits that the Trial Chamber erred in relying on the uncorroborated testimony of TF1-045, as TF1-035 and TF1-060 were present at the time and did not testify to it.[1689]

664. Sesay further submits that, even if unlawful killings were committed, they were not intended to spread terror and therefore not within the Common Criminal Purpose.[1690] With respect to the killings at Cyborg Pit, Sesay argues that the Trial Chamber's finding that the unlawful killings were committed to foster absolute obedience demonstrates that the primary intent was to enslave the civilian population, not spread terror.[1691]

665. The Prosecution responds that Sesay has not established that no reasonable trier of fact could have found that the deaths at Cyborg Pit constituted unlawful killings.[1692] It further responds that actual terrorisation of the civilian population is not an element of the crime of acts of terrorism and whether the acts of violence spread terror in fact is therefore irrelevant.[1693] Sesay replies that actual terrorisation is relevant and may be highly probative in these circumstances.[1694]

3. Discussion

666. The Appeals Chamber recalls its conclusion that the Trial Chamber was not required to find that those who carried out the *actus reus* of the crimes had the requisite *mens rea* for acts of terrorism.[1695] Sesay's claims will be addressed in light of that conclusion. In that respect, the Appeals Chamber notes the Trial Chamber's findings that acts of terrorism were within the Common Criminal Purpose of the JCE,[1696] and that, with respect to Kenema District, Sesay intended the commission of acts of terrorism and "shared, with the other participants, in the joint

[1686] Sesay Appeal, paras 158, 160.
[1687] Sesay Appeal, para. 158, *citing* Trial Judgment, para. 561; .
[1688] Sesay Appeal, para. 159.
[1689] Sesay Appeal, para. 161, *citing* Transcript, TF1-045, 18 November 2005, p. 79; Transcript, TF1-060, 29 April 2005, p. 65.
[1690] Sesay Notice of Appeal, paras 64-65; Sesay Appeal, para. 162.
[1691] Sesay Appeal, para. 162, *citing* Trial Judgment, para. 121.
[1692] Prosecution Response, para. 7.38.
[1693] Prosecution Response, para. 7.19.
[1694] Sesay Reply, para. 63.
[1695] *See supra*, para. 655.
[1696] Trial Judgment, para. 1982.

criminal enterprise the requisite intent to commit these crimes."[1697] The Trial Chamber further found that one or more members of the JCE used the non-members who carried out the *actus reus* of the crimes to commit the crime of acts of terrorism.[1698]

667. In arguing that the Trial Chamber erred in finding that the deaths at Cyborg Pit constituted unlawful killings,[1699] Sesay merely reargues his position at trial without addressing the evidence relied on by the Trial Chamber. In particular, by only referencing the absence of corroborating testimony from other witnesses, Sesay fails to establish that no reasonable trier of fact could have preferred the affirmative testimonies of witnesses TF1-035 and TF1-045. This claim is therefore dismissed.

668. Contrary to Sesay's claim,[1700] the fact that the acts of violence were intended to serve a further goal, such as the enslavement of the civilian population, does not show that the intent to spread terror was not the principal purpose of those acts.[1701] Simply, it need not be shown that the intent was to spread terror only for its own sake.[1702] Rather, the requirement that the principal purpose be to spread terror serves to distinguish "terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful."[1703] Accordingly, whether the goal of the acts of terrorism was to further the enslavement of the civilian population, or further the Common Criminal Purpose of taking control of the territory of Sierra Leone by criminal means, the fact that the acts of terrorism were committed to further another objective would not show that the intent to spread terror was not the principal purpose of the acts of violence.

669. The Appeals Chamber considers that the facts highlighted by Sesay do not establish that the killings did not spread terror in fact.[1704] Moreover, even if the Trial Chamber had been satisfied that the killings did not have that effect, the actual terrorisation of the civilian populations is not an element of the crime,[1705] but is only an evidentiary consideration to be assessed in light of the

[1697] Trial Judgment, para. 2056.
[1698] Trial Judgment, para. 1992; *see supra*, para. 650. The Appeals Chamber has found that the Trial Chamber erred in finding that the perpetrators of the killing of a Limba man were used by the JCE members in furtherance of the Common Purpose, but that crime incident is not appealed here. *See supra*, paras 425-426, 455.
[1699] Sesay Appeal, paras 156-161.
[1700] Sesay Appeal, para. 162.
[1701] *See Fofana and Kondewa* Appeal Judgment, para. 357; *Galić* Appeal Judgment, para. 104.
[1702] *Fofana and Kondewa* Appeal Judgment, para. 357.
[1703] *Galić* Appeal Judgment, para. 103, *citing* Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), Vol. XV, p. 274.
[1704] Sesay Appeal, para. 163.
[1705] *Fofana and Kondewa* Appeal Judgment, para. 352; *Galić* Appeal Judgment, para. 104.

circumstances as a whole. Sesay fails to address the other considerations the Trial Chamber relied on, and fails to establish that the Trial Chamber's conclusion was unreasonable.

4. Conclusion

670. For the foregoing reasons, and recalling its prior conclusions with respect to other arguments raised in Sesay's Ground 31,[1706] the Appeals Chamber dismisses Sesay's Ground 31 in its entirety.

E. Enslavement and acts of terrorism (forced mining) at Cyborg Pit in Kenema (Sesay Ground 32)

1. Trial Chamber's findings

671. The Trial Chamber found that AFRC/RUF rebels forced an unknown number of civilians to mine for diamonds at Cyborg Pit in Tongo Field, Kenema District between about 1 August 1997 and about 31 January 1998, and found that this constituted enslavement and an act of terrorism.[1707] It held that Sesay incurred JCE liability for these crimes.[1708]

2. Submissions of the Parties

672. Sesay submits that the Trial Chamber erred in finding that members of the AFRC/RUF forced civilians to mine diamonds at Cyborg Pit and finding that this constituted enslavement and acts of terror.[1709] First, he argues that the Trial Chamber disregarded exculpatory evidence by TF1-035 and TF1-045 showing that the civilians were not enslaved.[1710] Second, Sesay submits that the Trial Chamber disregarded evidence that civilians were "only forced [to mine] in any sort of organised way" on the first three days "upon the RUF and AFRC's entry" and an additional day, six to nine days later.[1711] Sesay also claims a lack of evidence on how many civilians were forced to mine at Cyborg Pit.[1712] Third, Sesay argues that the Trial Chamber was not entitled to rely on the fact that the killings at Cyborg Pit were acts of terror in respect of whether the mining also

[1706] *See supra*, paras 39, 43.
[1707] Trial Judgment, para. 2051.
[1708] Trial Judgment, para. 2056.
[1709] Sesay Notice of Appeal, para. 66.
[1710] Sesay Appeal, paras 166-171.
[1711] Sesay Appeal, para. 172, 173, *citing* Trial Judgment, para. 1094.
[1712] Sesay Appeal, para. 173, *citing* Trial Judgment, para. 1118.

constituted terror.[1713] In his view, there is nothing to distinguish the facts of the enslavement in Kono, where terror was found to be a mere "side-effect" of the forced mining, from those relating to Cyborg Pit.[1714] Additionally, civilians remained in Tongo Field despite being free to leave, could approach the authorities to report theft, and some of them were mining freely.[1715] Sesay adds that the evidence did not support the "sheer scale" of the enslavement from which the Trial Chamber inferred that it was a planned and systematic policy of the Junta government, and that, conversely, the evidence showed that it was not planned at the Supreme Council.[1716]

673. The Prosecution responds that the Trial Chamber considered evidence concerning duress, maltreatment and restriction of movement, did not exclude the possibility that some civilians were mining voluntarily and did not accept evidence that no civilians were forced to mine in Kenema District.[1717] It avers that Sesay fails to show an error in the Trial Chamber's distinction between enslavement which spread terror as a "side-effect" and enslavement which was committed with the specific intent to spread terror.[1718] Sesay offers no additional arguments in reply.[1719]

3. Discussion

(a) Did the Trial Chamber wrongly disregard exculpatory evidence?

674. Sesay submits that the Trial Chamber erred in disregarding certain exculpatory evidence.[1720] He essentially argues that this evidence was exculpatory because it demonstrated that the mining in Tongo Field was not forced. This is a mere reiteration of Sesay's position at trial, which the Trial Chamber, contrary to his assertion, expressly considered. In fact, the Trial Chamber "[did] not discount the possibility raised by the Sesay Defence that there may have been civilians who mined voluntarily."[1721] However, the Trial Chamber did "not accept as credible evidence that no civilians

[1713] Sesay Appeal, para. 174, fn. 491.
[1714] Sesay Appeal, paras 174, 175, *citing* Trial Judgment, paras 1359, 1360.
[1715] Sesay Appeal, para. 175.
[1716] Sesay Appeal, para. 176.
[1717] Prosecution Response, para. 7.138.
[1718] Prosecution Response, para. 7.20.
[1719] *See* Sesay Reply, para. 68, *citing* Prosecution Response, paras 4.7, 7.16 which respond to paragraphs 156 (Ground 31) and 141-151 (Ground 29), respectively.
[1720] Sesay Appeal, paras 166-171.
[1721] Trial Judgment, para. 1120.

were forced to mine in Kenema District."[1722] That finding was underpinned by numerous findings of fact.[1723]

675. In his Appeal, Sesay he argues that "every" civilian went on strike following a shooting at Cyborg Pit, and not merely "a group" of them, as found by the Trial Chamber, adding that Bockarie "requested forgiveness" and "begged" that the mining continue.[1724] This argument, even if true, does not by itself exclude a finding of enslavement or account for the Trial Chamber's finding that the civilians were detained and beaten during the strike and that another massacre followed some days later, and therefore fails to show that the labour was not forced.[1725]

(b) Did the Trial Chamber err in its finding on the length of the enslavement and the number of victims?

676. The Appeals Chamber is not satisfied that Sesay's references to the testimonies of TF1-035 and TF1-045 establish that no reasonable trier of fact could have found that the AFRC/RUF engaged in forced mining in Tongo Field from August to December 1997.[1726] While TF1-035 testified about forced mining at Cyborg Pit in the days after the AFRC/RUF arrived in Tongo Field in August 1997 as argued by Sesay, the witness also testified that the AFRC/RUF remained in Tongo Field until December 1997.[1727] Sesay does not account for this latter part of the testimony. As for TF1-045, Sesay is correct that the witness left Tongo Field for Freetown in August/September 1997,[1728] but fails to acknowledge that the witness was sent back to Tongo Field in December 1997 in order to mine diamonds.[1729] Sesay's submission is dismissed.

677. Turning to Sesay's challenge to the number of victims,[1730] the Appeals Chamber notes that, although the Trial Chamber found that "up to 500 civilians in Tongo Field" worked in the mining sites between August and December 1997, it actually convicted him for the enslavement of "an unknown number of civilians" forced to mine for diamonds at Cyborg Pit in Tongo Field.[1731] Sesay fails to allege how an error in finding that "500 civilians," as opposed to 200, 300 or 400 as

[1722] Trial Judgment, para. 1120.
[1723] Trial Judgment, paras 1088-1095, 1119. *See* also Trial Judgment, paras 1082-1087 (killings at Cyborg Pit).
[1724] Sesay Appeal, paras 166, 168.
[1725] Trial Judgment, paras 1083, 1084.
[1726] Trial Judgment, para. 1094; Sesay Appeal, paras 172, 173.
[1727] Transcript, TF1-035, 5 July 2005, p. 97.
[1728] Transcript, TF1-045, 18 November 2005, pp. 79, 80.
[1729] Transcript, TF1-045, 18 November 2005, pp. 93, 94.
[1730] Sesay Appeal, para. 173.
[1731] Trial Judgment, paras 2051, 2056.

allegedly testified by the witnesses he refers to, were enslaved in Tongo Fields invalidates this conviction. This submission is dismissed.

(c) Did the Trial Chamber err in finding that the enslavement amounted to an act of terrorism?

678. Sesay first argues that the Trial Chamber was not entitled to rely on the fact that the killings at Cyborg Pit amounted to acts of terrorism to conclude that the enslavement also constituted an act of terrorism because the perpetrators of the two crimes were different.[1732] The Appeals Chamber notes that the Trial Chamber considered "the massive scale, of the enslavement, the indiscriminate manner in which civilians were enslaved and the brutal treatment of the victims" in concluding that the enslavement at Cyborg Pit amounted to an act of terrorism.[1733] To the extent that the Trial Chamber had in mind the killings at Cyborg Pit when referring to "the brutal treatment of the victims," it did not err. It was not unreasonable for the Trial Chamber to consider that the intent of the perpetrators of these killings to spread terror, among other mistreatment,[1734] was part of the "brutal treatment" of the victims of the enslavement, which treatment was one of the factors leading the Trial Chamber to infer that the enslavement also constituted an act of terror.

679. Sesay's second argument is that the Trial Chamber should have found that the enslavement at Cyborg Pit was not specifically intended to spread terror among the civilian population, but, instead, that terror was a mere "side-effect" of the enslavement, as it found in respect of the enslavement in Kono District.[1735] Contrary to Sesay's position, however, the circumstances of the enslavement in Kono District were distinguishable from those prevailing at Cyborg Pit.[1736] For example, while the Trial Chamber found that the enslavement in Kono District was "widespread," the enslavement at Cyborg Pit was of "a massive scale."[1737] Similarly, while the civilians forced to mine in Kono District were mistreated,[1738] the civilians at Cyborg Pit were enslaved in an "indiscriminate manner" and subjected to "brutal mistreatment."[1739] Therefore, although the mistreatment at both locations was grave, it was reasonably open to the Trial Chamber to infer that

[1732] Sesay Appeal, para. 174, fn. 491.
[1733] Trial Judgment, para. 1130.
[1734] Trial Judgment, paras 1094 ("Civilians were forcefully captured from the surrounding villages and taken to the sites.… Civilians who attempted to escape were detained, stripped and left naked so that they would not be able to hide. The civilians were treated badly almost all of them were haggard and shabbily dressed."), 1095 ("Anyone who violated the rules was severely punished, and some civilians were killed.")
[1735] Trial Judgment, para. 1359, 1360.
[1736] Sesay Appeal, paras 175, 176.
[1737] Trial Judgment, paras 1130, 1359.
[1738] Trial Judgment, para. 1328.
[1739] Trial Judgment, para. 1130.

the enslavement at Cyborg Pit was committed with the specific intent to spread terror among the civilian population, whereas terror was a "side-effect" of the enslavement in Kono District.[1740] Sesay's argument is dismissed.[1741]

4. Conclusion

680. The Appeals Chamber dismisses Sesay's Ground 32 in its entirety.

F. Sesay's responsibility for planning enslavement (forced mining) in Kono (Sesay Ground 35 (in part))

1. Trial Chamber's findings

681. The Trial Chamber found Sesay criminally responsible for planning the enslavement of hundreds of civilians to work in mines at Tombodu and throughout Kono District between December 1998 and January 2000.[1742]

2. Submissions of the Parties

682. Sesay makes six challenges to this finding.[1743] First, he disputes the Trial Chamber's reliance on Witnesses TF1-077 and TF1-304 to find that the mining in Tombodu began in December 1998.[1744] He argues that the Trial Chamber disregarded TF1-304's evidence in cross-examination that there was no mining in Tombodu in 1999 and that it started between March and April 2000.[1745] Sesay also argues that the Trial Chamber erred in finding that TF1-077, who testified to being captured in December 1999, was "mistaken about the year, since the recapture of Koidu by the RUF occurred in December 1998."[1746] In Sesay's view, TF1-077's pre-trial statement stated he was captured in December 1999, the Prosecution led the witness on the year because it was not in dispute, and a fair appraisal of the witness's evidence shows that he testified to being

[1740] Trial Judgment, para. 1359.
[1741] Sesay's additional submissions that some of the civilians were mining freely and that the enslavement was not planned at the Supreme Council have already been dismissed. Sesay Appeal, paras 175, 176; *See supra*, paras 351-358, 674- 675.
[1742] Trial Judgment, para. 2116.
[1743] Sesay Appeal, paras 251, 280.
[1744] Sesay Appeal, paras 253, 254. Sesay also disputes the Trial Chamber's reliance on TF1-199's testimony, because it concerns events in Port Loko District unrelated to diamond mining, but avers that the Trial Chamber's reference to this evidence appears to be a clerical error. Sesay Appeal, para. 255. Since Sesay does not allege an impact on the Trial Judgment of this clerical error, the Appeals Chamber need not address it any further. *See* Prosecution Response, para. 7.96.
[1745] Sesay Appeal, paras 255, 256.

captured in December 1999.[1747] On the last point, TF1-077 testified that Officer Med was among his capturers and that it was undisputed that Officer Med arrived in Tombodu in 2000.[1748] Also, TF1-077 testified that he was in Koidu throughout 1999, mined in Tombodu for six months after his arrest in December 1999 and then disarmament commenced, while the Trial Chamber's findings show that the RUF did not begin disarming in Kono during 1999.[1749] Sesay adds that this evidence was corroborated by the testimonies of TF1-012 and TF1-071, both of whom placed the mining in Tombodu in 2000.[1750]

683. Second, Sesay alleges that that Trial Chamber failed to provide a sufficiently reasoned opinion, arguing, *inter alia*, that whereas the Trial Chamber found enslavement in Tombodu only, it convicted him for enslavement at Tombodu "and throughout Kono District."[1751] Third, Sesay submits that the Trial Chamber erred in disregarding that TF1-367, an accomplice witness, lied during his testimony to implicate Sesay and had motives for doing so.[1752] Fourth, Sesay submits that the Trial Chamber erred in law by, instead of requiring proof that he "substantially" contributed to the enslavement, finding that his conduct was "a significant contributory factor" to the crime.[1753]

684. Fifth, Sesay refers to a number of findings on his actions pre-December 1998 to show that he was not involved at the design phase of the enslavement.[1754] At best, he argues, the Trial Chamber found that he designed the jailing of 400 civilians in Makeni to be forcibly transferred to mine in Kono, but this finding is wrong because no other perpetrator than Sesay and Kallon was named, and the Trial Chamber failed to explain the inconsistencies in TF1-041's testimony on which it relied.[1755] Sesay further invokes several pieces of evidence in support of his alleged lack of involvement in the execution phase.[1756]

685. The Prosecution responds that the findings that civilians were forced to mine and the Senior Mining Commander reported to Sesay who at times would visit the mine, were reasonable on the

[1746] Sesay Appeal, para. 257, *citing* Trial Judgment, fn. 2404.
[1747] Sesay Appeal, para. 257.
[1748] Sesay Appeal, para. 258.
[1749] Sesay Appeal, para. 258.
[1750] Sesay Appeal, para. 258.
[1751] Sesay Appeal, paras 259-265, 279, *citing* Trial Judgment, paras 1247, 1248.
[1752] Sesay Appeal, paras 262, 279.
[1753] Sesay Appeal, paras 266, 267, *quoting* Trial Judgment, paras 268, 2115.
[1754] Sesay Appeal, paras 267-269.
[1755] Sesay Appeal, para. 270.
[1756] Sesay Appeal, paras 271-275, 280.

totality of the evidence.[1757] With respect to the commencement of the mining, the Prosecution submits that there is a presumption that the Trial Chamber evaluated all the evidence[1758] and that TF1-304 and TF1-077 had obvious problems recalling exact years.[1759] As to the Trial Chamber's alleged failure to provide a reasoned opinion, the Prosecution argues that Sesay's submissions are unclear and unsupported.[1760] It also submits that Sesay fails to establish any material difference in meaning between "significant" and "substantial" contribution in the context of this case.[1761] Further, his submissions on pre-December 1998 mining in Kono are immaterial because he incurred liability for planning enslavement between December 1998 and January 2000.[1762] Sesay replies that the Prosecution appears to tacitly acknowledge that the evidence was equivocal as to when the enslavement started.[1763]

3. Discussion

686. The Appeals Chamber will first consider the alleged error of law, and then address Sesay's challenges to the Trial Chamber's factual findings in turn.

(a) Did the Trial Chamber apply the wrong legal test for planning?

687. The Appeals Chamber recalls that the *actus reus* of this mode of liability requires that the planning was a factor "substantially contributing" to the criminal conduct for which the accused is to be held responsible.[1764] The Trial Chamber correctly set out this legal requirement when pronouncing on the legal elements of planning.[1765] However, when applying the legal test for planning to the facts now at issue, it found Sesay liable for planning on the basis that his conduct was a "significant" contributory factor to the perpetration of enslavement.[1766]

[1757] Prosecution Response, para. 7.95.
[1758] Prosecution Response, paras 7.96, 7.97.
[1759] Prosecution Response, paras 7.98, 7.99.
[1760] Prosecution Response, paras 7.100-7.106.
[1761] Prosecution Response, para. 7.109.
[1762] Prosecution Response, para. 7.111.
[1763] Sesay Reply, para. 84.
[1764] *Brima et al*. Appeal Judgment, para. 301; *Kordić and Čerkez* Appeal Judgment, para. 26.
[1765] Trial Judgment, para. 268.
[1766] Trial Judgment, para. 2115.

688. An accused's "significant" contribution may denote a lesser degree of impact on the crime than "substantial" contribution.[1767] Having set out the proper legal standard for planning, which requires "substantial" contribution, the Trial Chamber proceeded to make findings on Sesay's involvement in the enslavement in Kono District between the recapture of the District by RUF troops under his command in December 1998, and January 2000[1768] which demonstrate a "substantial" contribution on his part. For example, the Mining Commander reported to Sesay, and in 2000, Sesay himself appointed a new Overall Mining Commander.[1769] Sesay visited Kono District and collected diamonds and kept a house in Koidu Town where he received mining Commanders for this purpose.[1770] He visited the mines and ordered that civilians be captured from other Districts and arranged for transportation of the captured civilians to the mines.[1771] The Trial Chamber further found that, as the illicit sale of diamonds was the RUF's primary means of financing, the mining system in Kono was designed and supervised at the highest levels, and Sesay, as the BFC and subordinate to Bockarie at that time, was actively and intimately involved in the forced mining operations and its processes in Kono District.[1772]

689. The Appeals Chamber therefore holds that the Trial Chamber did not apply the wrong legal test for planning.

(b) Did the Trial Chamber err in finding that the mining in Tombodu started in December 1998?

690. The Trial Chamber found Sesay liable for planning the enslavement of hundreds of civilians to work in mines in Tombodu and throughout Kono District between December 1998 and January 2000.[1773] The Trial Chamber relied primarily on Witnesses TF1-077 and TF1-304 for its findings on the mining in Tombodu.[1774]

691. Sesay's first argues that the Trial Chamber disregarded TF1-304's evidence that the mining in Tombodu did not start in 1999, but instead, that it started between March and April 2000.[1775] He

[1767] *See Brđanin* Appeal Judgment, para. 430 (distinguishing between "substantial" and "significant" contribution in the context of JCE, holding that "although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible").
[1768] Trial Judgment, paras 2111-2114.
[1769] Trial Judgment, paras 2112, 2113.
[1770] Trial Judgment, para. 2113.
[1771] Trial Judgment, para. 2113.
[1772] Trial Judgment, para. 2114.
[1773] Trial Judgment, para. 2116.
[1774] Trial Judgment, paras 1251-1258.
[1775] Sesay Appeal, paras 255, 256.

specifically impugns the findings at paragraph 1255 of the Trial Judgment, which concern events relating to mining in Tombodu that, the Trial Chamber found, took place "in April 1999." The Trial Chamber relied on TF1-304's testimony-in-chief for these findings.[1776] Sesay correctly notes that, when cross-examined on when the mining commenced, the witness repeatedly stated it started in 2000.[1777] The latter evidence, if accepted, would place the mining in Tombodu largely outside the timeframe pleaded for the relevant charges in the Indictment.[1778]

692. The Appeals Chamber, however, is not satisfied that it was unreasonable for the Trial Chamber to rely on TF1-304's testimony-in-chief to find that the mining activities described in paragraph 1255 of the Trial Judgment took place in April 1999. The reason is that a comparison of other parts of TF1-304's testimony with key events in the case demonstrates that TF1-304's chronological description of events corresponds with other findings of the Trial Chamber. TF1-304 testified that Junta forces attacked Tombodu in March 1998,[1779] which is consistent with the finding that the AFRC/RUF attacked Kono on or about March 1998.[1780] After the RUF attack on Tombodu, TF1-304 fled for Guinea and returned to Tombodu in February 1999, at which point in time the RUF was in Tombodu.[1781] This evidence corresponds with the Trial Chamber's finding that, after the RUF re-captured Koidu Town on 16 December 1998,[1782] Kono District remained largely under RUF control throughout the Indictment period.[1783] While in Tombodu, TF1-304 continued, around March 1999 he was forced by the rebels to retrieve vehicles from the bush,[1784] and carried luggage for them and performed other tasks.[1785] TF1-304 testified that "when we ceased carrying the luggages [*sic*]" diamond mining began when Officer Med came in April 1999.[1786] Sesay's reference to the testimony of TF1-071 does not support his contention that Officer Med first arrived in Tombodu in 2000; at most, this evidence merely places Officer Med in Tombodu at that time, but it is silent on when he arrived.[1787] His additional reference to the testimony of TF1-012 is equally

[1776] Trial Judgment, fn. 2415; Transcript, TF1-304, 13 January 2005, pp. 17-31.
[1777] Transcript, TF1-304, 13 January 2005, pp. 94-97; Transcript, TF1-304, 14 January 2005, pp. 65, 66.
[1778] The Indictment alleged that the acts constituting enslavement, including forced diamond mining in Tombodu, were committed between February 1998 and January 2000. Trial Judgment, para. 1321; Indictment, para. 71.
[1779] Transcript, TF1-304, 12 January 2004, pp. 21, 22.
[1780] Trial Judgment, para. 796.
[1781] Transcript, TF1-304, 12 January 2004, pp. 21, 27, 38-40.
[1782] Trial Judgment, para. 868.
[1783] Trial Judgment, para. 1139.
[1784] Transcript, TF1-304, 13 January 2004, pp. 4-6.
[1785] Transcript, TF1-304, 13 January 2004, pp. 15-17.
[1786] Transcript, TF1-304, 13 January 2004, pp. 17, 18.
[1787] Transcript, TF1-071, 25 January 2005, p. 79.

unpersuasive.[1788] Sesay's challenge to the Trial Chamber's reliance on TF1-304 in paragraph 1255 is therefore rejected.

693. Next, Sesay challenges the Trial Chamber's assessment of TF1-077. The Trial Chamber found that TF1-077 was "mistaken about the year" when testifying to being captured in Koidu Town in December 1999 and then sent to Tombodu to mine, since the witness testified that this incident occurred during the recapture of Koidu, which took place in December 1998.[1789] Sesay essentially argues that the Trial Chamber's interpretation is contrary to TF1-077's pre-trial statement, that the witness testified that Officer Med, who allegedly arrived in Tombodu in 2000, was among his capturers, and that the witness mined until disarmament, which did not occur in Kono during 1999.[1790] The Appeals Chamber is not persuaded by Sesay's arguments. First, Sesay does not address why the Trial Chamber was unreasonable to rely on the witness's reference to the recapture of Koidu, as opposed to other events, to find that the witness was mistaken about the year. Second, as already noted, TF1-071 did not testify when Officer Med arrived in Tombodu in 2000. In fact, TF1-071 indicated that diamond mining by hand occurred in Tombodu from 1998.[1791] Third, the Trial Chamber's interpretation that TF1-077 was mistaken about the year is consistent with TF1-304's testimony in examination-in-chief that the mining in Tombodu began in 1999. The Appeals Chamber is satisfied on this basis that the Trial Chamber's impugned finding was reasonable. Sesay's argument is rejected.

(c) Did the Trial Chamber fail to provide a reasoned opinion?

694. Sesay correctly notes that while the Trial Chamber limited its legal findings on Count 13 in Kono District between December 1998 and January 2000 to holding that enslavement was committed in Tombodu,[1792] it nonetheless held him responsible for planning enslavement in mines in "Tombodu *and throughout Kono District*."[1793] It provided no reasons for this addition to the scope of Sesay's liability. The Appeals Chamber finds that this constitutes an error of law. The error invalidates the verdict insofar as Sesay was convicted for planning enslavement between December 1998 and January 2000 in parts of Kono District other than Tombodu. This part of

[1788] Sesay Appeal, para. 285; Transcript, TF1-012, 4 February 2005, pp. 8 (closed session), 46.
[1789] Trial Judgment, fn. 2404.
[1790] Sesay Appeal, paras 257, 258.
[1791] Transcript, TF1-071, 21 January 2005, pp. 106-108 (closed session); Transcript, TF1-071, 25 January 2005, p. 79.
[1792] Trial Judgment, para. 1330.
[1793] Trial Judgment, para. 2116 [emphasis added].

Sesay's appeal is granted. The Appeals Chamber will consider any implications of this finding on sentence.

695. In remaining parts, Sesay's complaint about a lack of reasoned opinion is confined to the Trial Chamber's introductory findings providing an "overview" of the mining process in Kono District between December 1998 and January 2000 and its findings on "government" mining sites in Kono.[1794] He does not, however, address the Trial Chamber's findings on the mining in Tombodu, which he was convicted for having planned and which is challenged under his present ground of appeal.[1795] In this respect, the Appeals Chamber recalls that the Trial Chamber was required only to make findings on those facts which were essential to the determination of Sesay's guilt on Count 13.[1796]

696. Moreover, Sesay attempts to support his position by an incomplete and selective reading of the findings and alleges contradictions therein where there are none. For instance, he avers that the Trial Chamber failed to address his "real defence" that there was no organised system of enslavement in Kono, but ignores its findings showing precisely such a system.[1797] That the Trial Chamber found there was such a system in spite of his position that there was none, does not establish that the Trial Chamber failed to address his "real defence." He also argues without support that the Trial Chamber's finding that "[c]ivilians would go to the surrounding villages on the weekends to find food and would then return to work" contradicts the findings that "[c]ivilians who refused to mine were beaten" and "were constantly supervised by armed men [and so] there was no possibility of escape."[1798] Similarly, he fails to explain how the finding indicating that some civilians may have been "willing volunteers" detracts from the findings that other civilians were "captured and brought forcefully to mining sites … and forced to work at gunpoint."[1799] The findings that Sesay points to are neither legally contradictory in view of the law of enslavement nor factually contradictory in the context of the Trial Chamber's findings as a whole. Contrary to Sesay's contention, then, the Trial Chamber did not err in failing to explain these "contradictions."

[1794] Sesay Appeal, para. 259, fn. 773, *citing* Trial Judgment, paras 1240-1250.
[1795] Trial Judgment, paras 1251-1258, 1328-1330, 2111-2116.
[1796] *Brima et al*. Appeal Judgment, para. 268; *Krajišnik* Appeal Judgment, para. 139; *Kvočka et al*. Appeal Judgment, para. 23.
[1797] *E.g.* Trial Judgment, paras 1240-1245, 1328 ("from December 1998 until January 2000 … hundreds of civilians were abducted and forced to work in mining sites in Tombodu and throughout Kono District") 2114 ("the nature and magnitude of the forced mining in Kono District required extensive planning on an ongoing basis"); Sesay Appeal, para. 259.
[1798] Trial Judgment, para. 1248; Sesay Appeal, paras 260,263, 264.
[1799] Trial Judgment, para. 1247; Sesay Appeal, para. 264.

In this regard, Sesay alleges an error of fact, arguing that TF1-367 testified that some of the 200 to 300 civilians captured and forced to work at Kaisambo volunteered and that the civilians were not forced to return, but fails to avert to the evidence supporting the finding that civilians who refused to mine were beaten.[1800] Further relevant indicia of enslavement is found in the holdings that the "conditions for the hundreds of civilians forced to mine were poor; they were neither paid nor given adequate housing, food or medical treatment" and "they were constantly supervised by armed men."[1801]

697. Except for the error of law found above, the Appeals Chamber finds that the Trial Chamber did not fail to provide a reasoned opinion.

(d) Did the Trial Chamber err in relying on Witness TF1-367?

698. The Appeals Chamber notes that Sesay's claims regarding TF1-367's "lies" are in effect submissions that TF1-367's testimony contradicts other evidence.[1802] Sesay does not explain how, or in what respects, these contradictions caused the Trial Chamber to err. As to TF1-367's alleged motives to implicate Sesay, the Appeals Chamber is not satisfied that the evidence Sesay invokes[1803] precluded a reasonable trier of fact from finding, as the Trial Chamber did, that the witness was "generally credible."[1804] Sesay's submission is dismissed.

(e) Did the Trial Chamber err in finding that Sesay was involved in the design and execution phases of the enslavement?

699. The Appeals Chamber recalls that "[w]hile there must be a sufficient link between the planning of a crime both at the preparatory and the execution phases, it is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct."[1805] The Appeals Chamber considers that Sesay's actions both before and after December 1998 are relevant in this regard. In particular, contrary to the Prosecution's argument,[1806] Sesay's conduct pre-December 1998 is relevant to whether a reasonable trier of fact could have found that he planned the enslavement which ensued thereafter.

[1800] Trial Judgment, para. 1248; Sesay Appeal, para. 265.
[1801] Trial Judgment, paras 1247, 1248.
[1802] Sesay Appeal, paras 262, 279.
[1803] Transcript, TF1-367, 22 June 2006, pp. 45-46, 88 (closed session). Sesay also invokes Exhibit 105, but without explaining whether the Trial Chamber erred in its consideration of that exhibit. Trial Judgment, paras 525, 526.
[1804] Trial Judgment, para. 552.

700. As to his conduct before December 1998, Sesay essentially relies on the findings underlying the conclusion that he was not in a superior-subordinate relationship with RUF fighters in Kono from May to the end of November 1998.[1807] The Appeals Chamber is not satisfied that these findings alone show that it was unreasonable for the Trial Chamber to find that he planned the enslavement from December 1998 onward. The following findings provided a basis for a reasonable trier of fact to find that Sesay was involved in the preparatory phase of planning the enslavement: (i) the RUF continued conducting mining operations in parts of Kono District after having been forced to retreat from Koidu Town in early April 1998;[1808] (ii) he led and commanded the RUF troops who re-captured Koidu Town on 16 December 1998, although the Trial Chamber could not specifically determine Sesay's involvement in Kono District between August and November 1998;[1809] and (iii) after Koidu Town was retaken, RUF mining in Kono District "intensified significantly,"[1810] and "mining operations expanded" to different areas in Kono District, in particular Tombodu.[1811] These findings must be read together with those on Sesay's involvement in mining in Kono after December 1998. In particular, the Trial Chamber found that the Mining Commander reported to Sesay,[1812] that Sesay visited the mining site at Tombodu and collected diamonds (for which purpose he maintained a house in Koidu),[1813] and that he ordered that civilians be captured from other Districts and arranged for transportation of the captured civilians to the mines in Kono.[1814]

701. Sesay's reference to evidence that Bockarie was in control of the mining,[1815] or other evidence allegedly showing that Sesay "had nothing to do with the mining,"[1816] fails to address the evidence on which the Trial Chamber based its findings. Moreover, the Trial Chamber recognised that Sesay was "subordinate to Bockarie at the time," but that since the illicit sale of diamonds was the RUF's primary means of financing its operations, "the mining system in Kono District was designed and supervised at the highest levels" and "Sesay, as the BFC … was actively and

[1805] *Brima et al*. Appeal Judgment, para. 301 (internal quotation omitted).
[1806] Prosecution Response, para. 7.111.
[1807] Trial Judgment, paras 2124, 2125; Sesay Appeal, para. 268.
[1808] Trial Judgment, paras 813, 1241.
[1809] Trial Judgment, para. 2124.
[1810] Trial Judgment, paras 1240-1242.
[1811] Trial Judgment, para. 1246.
[1812] Trial Judgment, paras 1252, 2113.
[1813] Trial Judgment, paras 1252, 1254, 1255, 2113.
[1814] Trial Judgment, paras 1249, 2113.
[1815] Sesay Appeal, paras 268, 271, 273, 274, 275.
[1816] Sesay Appeal, paras 271, 280.

intimately involved in the forced mining operations" in Kono.[1817] The fact that Sesay was subordinate to Bockarie does not exclude that Sesay was involved in planning the enslavement. Sesay's arguments regarding Bockarie's control over the diamond mining in Kono, and Sesay's general lack thereof, are therefore rejected.

702. Other parts of Sesay's submission, however, challenge the evidence on which the Trial Chamber found that he collected diamonds and that he ordered civilians to be captured for mining. As to the former finding, Sesay avers that the Trial Chamber should have relied on TF1-071's evidence in cross-examination instead of that given during examination-in-chief, but fails to explain why the Trial Chamber's assessment of the testimony was unreasonable.[1818] He also argues that the Trial Chamber erred in relying on TF1-371, as the witness had no knowledge of pre-2000 mining operations, but fails to explain why the Trial Chamber could not reasonably rely on TF1-367 and TF1-366.[1819] This challenge is rejected.

703. Regarding Sesay's order that civilians be captured for mining, the Trial Chamber, relying on TF1-041's testimony, found that Sesay sent a message to Kallon in Makeni requiring civilians to be gathered and sent to Kono for mining. Approximately 400 civilians were gathered by Kallon, jailed and then taken daily to Kono in trucks sent by Sesay.[1820] Sesay fails to explain why the fact that none of the persons who executed the order, other than Kallon, were mentioned by the Trial Chamber renders the finding unreasonable. The alleged inconsistencies in TF1-041's testimony Sesay refers to were not such that the Trial Chamber erred in failing to explain expressly how it resolved them.[1821] Sesay's challenge to this finding is thus rejected.

[1817] Trial Judgment, para. 2114.
[1818] Sesay Appeal, para. 273; Trial Judgment, fn. 2379.
[1819] Sesay Appeal, para. 273; Trial Judgment, fn. 2379.
[1820] Trial Judgment, para. 1249.
[1821] Sesay Appeal, para. 270, stating these inconsistencies as follows [internal reference omitted]:

i) the inconsistency between TF1-041's in-court testimony and his statements to the Prosecution which indicate that 100 miners went from Makeni to Kono to mine on a two-pile system in which civilians would receive a benefit from their labour (i.e., no force);
ii) the inconsistency between TF1-041's direct-examination in which civilians were jailed and his cross-examination in which there is no reference to anyone being jailed;
iii) how this forcible transfer could have occurred while, according to TF1-041, civilians were moving voluntarily between Makeni and Kono (i.e., Koidu and Koakoyima where the purported forced mining purportedly occurred) to trade;
iv) how this forcible transfer could have occurred in the context of the admitted Defence evidence in which civilians were voluntarily moving to Kono to mine on a non-forced two-pile system; and
v) how this forcible transfer could have occurred in the context of the non-admitted Defence evidence in which civilians were voluntarily moving to Kono to mine on a non-forced two-pile system

704. In light of the foregoing, the Appeals Chamber finds that Sesay fails to establish that, on the basis of its factual findings as a whole, the Trial Chamber erred in finding him responsible for planning the enslavement in Tombodu in Kono District between December 1998 and January 2000. Having thus found, the Appeals Chamber need not address Sesay's argument that the Trial Chamber erred in relying on Exhibits 41 and 42 (RUF diamond productions records from Kono), as that challenge is premised on the success of the other arguments under this part of his appeal.[1822]

4. Conclusion

705. The Appeals Chamber grants Sesay's Ground 35 insofar as it alleges that the Trial Chamber erroneously convicted him for planning enslavement in the form of forced mining between December 1998 and January 2000 in parts of Kono District other than Tombodu. The remaining submissions under Ground 35 addressed here are rejected.

G. Sesay's superior responsibility for enslavement (forced military training) in Kono District (Sesay Ground 36 (in part))

1. Trial Chamber's findings

706. The Trial Chamber found Sesay liable under superior responsibility for the enslavement of an unknown number of civilians at Yengema training base in Kono District between December 1998 and about 30 January 2000.[1823]

2. Submissions of the Parties

707. Sesay makes three challenges to this finding.[1824] First, he submits that the Trial Chamber erred in finding that enslavement occurred at the Yengema base.[1825] Second, Sesay argues that the Trial Chamber erred in relying on TF1-362 to find that recruits were killed at the Yengema base.[1826] Third, Sesay claims that the Trial Chamber erred in finding that he exercised effective control over the RUF rebels at the Yengema base.[1827]

[1822] Sesay Appeal, para. 269.
[1823] Trial Judgment, para. 2133.
[1824] Sesay Appeal, paras 281-286. Sesay's claim of lack of adequate notice under Ground 36 has been addressed elsewhere. Sesay Appeal, para. 281; Prosecution Response, para. 7.116. *See supra*, paras 93-95.
[1825] Sesay Appeal, paras 282-283.
[1826] Sesay Appeal, para. 284.
[1827] Sesay Appeal, paras 285, 286.

708. The Prosecution responds that the Trial Chamber made numerous findings, based on a number of different witnesses, on who was captured and brought to Yengema, who was in charge of the camp and how the forced recruits were trained, punished and prepared for combat.[1828] It further submits that TF1-362's testimony regarding the killings is irrelevant since Sesay was not convicted for these killings, adding that it was one factor in establishing the crime of enslavement.[1829] Lastly, the Trial Chamber did not base its conclusion on Sesay's effective control solely on his *de jure* status.[1830] Sesay makes no additional arguments which are material in reply.[1831]

3. Discussion

709. Sesay complains about a lack of sufficiently specific findings.[1832] The Appeals Chamber recalls that the Trial Chamber was required only to make findings on those facts which were essential to the determination of guilt on a particular count.[1833] In the present instance, Sesay does not explain how the Trial Chamber's identification of his culpable subordinates as "RUF rebels" at the Yengema base,[1834] the victims as "[c]ivilians who had been captured in Kono,"[1835] or the duration of their captivity as "from 1998 until disarmament"[1836] were insufficiently reasoned so as to undermine the Trial Chamber's determination of Sesay's guilt under superior responsibility.

710. However, the Appeals Chamber notes *proprio motu* that the Trial Chamber's findings are insufficient in another respect, namely, in that the Trial Chamber never made a legal finding on whether the forced military training at the Yengema base between December 1998 and January 2000 met the legal elements of enslavement. Whereas the Trial Chamber made factual findings on the events at the Yengema base,[1837] the Trial Judgment is silent on whether these events amounted to the crime of enslavement.[1838] The forced military training at the Yengema base is not mentioned among the underlying acts that the Trial Chamber found constituted enslavement in Kono District. Rather, those underlying acts are limited to: (i) forced labour of civilians, including

[1828] Prosecution Response, para. 7.117, *citing* Trial Judgment, paras 1260-1265, 1646.
[1829] Prosecution Response, para. 7.120.
[1830] Prosecution Response, para. 7.121, *citing* Trial Judgment, paras 2127, 2128.
[1831] *See* Sesay Reply, paras 94, 95.
[1832] Sesay Appeal, paras 281, 282.
[1833] *Brima et al*. Appeal Judgment, para. 268; *Krajišnik* Appeal Judgment, para. 139; *Kvočka et al*. Appeal Judgment, para. 23.
[1834] Trial Judgment, para. 2130.
[1835] Trial Judgment, para. 1262.
[1836] Trial Judgment, para. 1262.
[1837] Trial Judgment, paras 1260-1265.
[1838] *See* Trial Judgment, Section 5.2 "Legal Findings on Crimes in Kono District," in particular paras 1321-1330.

carrying loads, food-finding missions and domestic labour;[1839] (ii) various forms of forced labour of civilians detained in RUF camps (as distinct from camps for forced military training);[1840] and (iii) forced mining.[1841]

711. The Trial Chamber's failure to make a finding on the fundamental issue whether the events at the Yengema base fulfil the legal elements of the crime charged cannot reasonably be deemed to have resulted from mere oversight. This is buttressed by the fact that, when considering whether the enslavement in Kono District amounted to acts of terrorism, the Trial Chamber recalled its prior legal findings on which acts constituted enslavement, without making any reference to forced military training.[1842]

712. In the absence of a finding as to whether the forced military training at the Yengema base amounted to the crime of enslavement, there was no legal basis on which the Trial Chamber could find that Sesay incurred superior responsibility for this crime at the Yengema base. The Trial Chamber therefore erred in law in so finding.[1843] This error invalidates Sesay's conviction under Article 6.3 of the Statute insofar as it relates to enslavement at the Yengema training base between December 1998 and about 30 January 2000.[1844] Any implications of this finding will be considered in sentence. Having thus found, the Appeals Chamber need not consider the remainder of Sesay's present ground of appeal.

4. Conclusion

713. The Appeals Chamber finds, *proprio motu*, that the Trial Chamber erred in holding Sesay liable under Article 6(3) of the Statute for the crime of enslavement at the Yengema training base between December 1998 and about 30 January 2000.

[1839] Trial Judgment, paras 1215-1217, 1322, 1323.
[1840] Trial Judgment, paras 1218-1239, 1324-1327.
[1841] Trial Judgment, paras 1251-1259, 1328-1330.
[1842] Trial Judgment, para. 1359.
[1843] Trial Judgment, para. 2133.
[1844] Trial Judgment, para. 2133.

H. Alleged error in finding an attack against the civilian population in Kailahun District (Sesay Ground 38)

1. Trial Chamber's findings

714. In its holdings on the *chapeau* requirements of crimes against humanity, the Trial Chamber found that the AFRC/RUF directed an attack against the civilian population of Sierra Leone from 30 November 1996 until at least the end of January 2000.[1845]

2. Submissions of the Parties

715. Sesay submits that the Trial Chamber erred in finding the existence of an attack directed against the civilian population in Kailahun District.[1846] In support, he argues first that there was insufficient evidence for this finding as only few crimes occurred in Kailahun District.[1847] Second, Sesay contends that the Trial Chamber disregarded evidence that transgressions were few and civilians supported the RUF at least from 1993, as buttressed in part by the findings in paragraph 650 of the Trial Judgment.[1848] He further asserts that evidence of crimes in other Districts, specifically amputations, mutilations and rapes could not establish an attack in Kailahun District because these crimes were not found to have occurred in Kailahun District.[1849]

716. Third, Sesay submits that the Trial Chamber failed to apply its findings in paragraph 953 of the Trial Judgment to its finding, in paragraph 955, that "mistreatment of civilians was … a well organised and permanent feature of RUF operations, sanctioned at the highest levels."[1850] He further argues that the Trial Chamber disregarded the presence and nature of RUF institutions, the provision of indiscriminate medical care, protection and education, and the role of the G5 in protecting and monitoring civilians' welfare.[1851]

717. Lastly, Sesay contends that the Trial Chamber erroneously disregarded the strict codes of behavior regarding the treatment of civilians in the RUF ideology, which it found was a key factor

[1845] Trial Judgment, paras 944-951.
[1846] Sesay Appeal, para. 287. Sesay combines Grounds 41 and 38 in his Appeal, but subsequently abandons Ground 41 in his Reply Brief. Sesay Reply, para. 106.
[1847] Sesay Appeal, para. 287 *citing Haradinaj et al*. Trial Judgment, para. 118.
[1848] Sesay Appeal, para. 288, *quoting* para. 650 of the Trial Judgment.
[1849] Sesay Appeal, para. 288, *citing* Trial Judgment, paras 1445, 950, 2156.
[1850] Sesay Appeal, para. 289, *quoting* Trial Judgment, para. 955.
[1851] Sesay Appeal, para. 289, *citing* Trial Judgment, paras 531, 692-695, 953-955.

in shaping RUF action.[1852] He also cites the Trial Chamber's findings that transgressions against civilians were punished through "systematic discipline"[1853] and that "some crimes were punished in areas under RUF control and where no hostilities were taking place."[1854]

718. In response, the Prosecution recalls the Trial Chamber's factual findings on crimes in Kailahun[1855] and argues that the absence of certain crimes or the existence of some normal or near normal conditions or the existence of RUF laws in the District do not negate the existence of an attack directed against the civilian population.[1856]

3. Discussion

(a) Alleged occurrence of "few crimes" in Kailahun District

719. The Appeals Chamber understands Sesay's argument to mean that the occurrence of "few crimes" in Kailahun District negated the third requirement of crimes against humanity; that "the attack must be directed against any civilian population." The Appeals Chamber rejects this proposition. First, nothing in the Trial Judgment suggests that only "few crimes" were committed in Kailahun District; numerous crimes were found to have been committed by RUF fighters there.[1857] Second, as correctly noted by the Trial Chamber, the use of the word "population" does not mean that the entire population of the geographic entity in which the attack is taking place must have been subjected to that attack.[1858] It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the trier of fact that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.[1859] In this respect, Sesay refers to the *Haradinaj et al*. Trial Judgment[1860] but fails to explain how the facts of that case[1861] are so similar to those of the present case that any reasonable trier of fact, based on the evidence here, would reach the same conclusion as the *Haradinaj et al*. Trial Chamber. Sesay's argument therefore fails.

[1852] Sesay Appeal, para. 290, *citing* Trial Judgment, paras 705, 2021.
[1853] Sesay Appeal, para. 290, *citing* Trial Judgment, para. 707.
[1854] Sesay Appeal, para. 290, *quoting* Trial Judgment, para. 712.
[1855] Prosecution Response, para. 7.5 *citing* Trial Judgment, paras 954, 1380-1443.
[1856] Prosecution Response, para. 7.5.
[1857] Trial Judgment, paras 958, 1446-1475, 1483, 1484.
[1858] Trial Judgment, para. 85 *citing Kunarac et al*. Appeal Judgment, para. 90; *Blaškić* Appeal Judgment, para. 105.
[1859] Trial Judgment, para. 85 *citing Kunarac et al*. Appeal Judgment, para. 90.
[1860] Sesay Appeal, para. 287 *citing Haradinaj et al*. Trial Judgment, para. 118
[1861] In *Haradinaj et al*. the Trial Chamber found that evidence that Serbs left their homes out of fear of being attacked by the KLA or being caught up in the armed conflict between Serbian forces and KLA forces was insufficient to establish that there was an attack directed against the civilian population. *Haradinaj et al*. Trial Judgment, para. 120.

(b) Alleged disregard of evidence by the Trial Chamber

720. Contrary to Sesay's assertion, paragraph 650 of the Trial Judgment does not buttress the claim that the RUF committed only few crimes in Kailahun District or that civilians supported the RUF.[1862] The Appeals Chamber further fails to see how the fact that amputations, mutilations and rapes were not committed in Kailahun District detracts from the Trial Chamber's reliance on the crimes which were committed in the District to conclude that the attack against the civilian population of Sierra Leone extended to Kailahun District. This submission is rejected.

(c) The Trial Chamber's findings in paragraphs 953 and 955 of the Trial Judgment

721. The Appeals Chamber considers that the Trial Chamber's conclusion in paragraph 955 of the Trial Judgment that "mistreatment of civilians was … a well organised and permanent feature of RUF operations, sanctioned at the highest level"[1863] emanated from several findings of the Trial Chamber including its finding in paragraph 953 of the Trial Judgment. While paragraph 953 is silent on any crimes against the civilian population, the Trial Chamber also found that during the relevant period that the RUF controlled Kailahun District, civilians were forced to work on farms owned by members of the RUF High Command including Bockarie, Sesay and Gbao;[1864] an unknown number of women and young girls entered into forced marriages with RUF rebels; and civilians were abducted and forced to act as porters, sex slaves and fighters.[1865] On that basis, the Trial Chamber reached the impugned conclusion in paragraph 955. Sesay does not demonstrate this conclusion to be unreasonable.

722. Contrary to Sesay's claim,[1866] the Trial Chamber considered the nature of RUF institutions in Kailahun District[1867] and the role and activities of the G5 unit[1868] in reaching its conclusion that an attack was directed at the civilian population in Kailahun District. It found, however, that the RUF continued to commit crimes against civilians in Kailahun District despite the fact that the RUF and some parts of the civilian population in Kailahun District generally cohabited and may have been relatively integrated.[1869] Similarly, while some of the activities of the G5 included monitoring

[1862] Sesay Appeal, para. 288.
[1863] Trial Judgment, para. 955.
[1864] Trial Judgment, para. 954.
[1865] Trial Judgment, para. 954.
[1866] Sesay Appeal, para. 289.
[1867] Trial Judgment, para. 1384.
[1868] Trial Judgment, paras 692-696, 954.
[1869] Trial Judgment, para. 1385.

the welfare of civilians, issuing travel passes and settling dispute between civilians and fighters,[1870] it also found that the G5 managed farms on which hundreds of civilians were engaged in forced labour as enslavement.[1871] Simply repeating the findings on the limited benign behavior of the RUF in Kailahun District without explaining how the Trial Chamber erred in its assessment thereof when compared to the crimes committed against the civilian population, Sesay fails to show an error. His argument therefore fails.

(d) Whether the norms of the RUF ideology negate the existence of an attack directed against the civilian population

723. The Trial Chamber found that the RUF ideology contained some ideal, attractive and virtuous norms in that they prohibited members of the RUF from raping and looting without the authorisation of Commanders and from killing or molesting "liberated" civilians and also provided punishments for violations.[1872] However, the Trial Chamber reasoned that the RUF found certain criminal conduct acceptable and permissible in certain situations, such as the practice of using civilians as forced labour, women as bush wives and children to participate in active hostilities.[1873] Accordingly, the Trial Chamber found that the RUF system of discipline was "highly selective"[1874] and that some crimes were punished in RUF-controlled areas and where no hostilities were taking place in order to appease the population who reacted to a particular situation.[1875] Additionally, the Trial Chamber found that the declared norms of the RUF prohibiting rape, unauthorised looting, killings or molestation of "liberated" civilians, were "… a mere farce intended to camouflage the planned enormity and gruesomeness of the ruthless brutality that characterised the actions of the RUF Commanders and their subordinates in the operational pursuance of the objectives of their 'broad-based' armed struggle ideology."[1876] While Sesay refers to evidence he posits buttressed the virtuous norms in the RUF ideology, he fails to explain why no reasonable trier of fact, based on other evidence could have arrived at these findings.[1877]

[1870] Trial Judgment, paras 692-693.
[1871] Trial Judgment, paras 954, 1414-1429.
[1872] Trial Judgment, para. 2021.
[1873] Trial Judgment, paras 708-710.
[1874] Trial Judgment, para. 711.
[1875] Trial Judgment, para. 712.
[1876] Trial Judgment, paras 2021-2022.
[1877] Sesay Appeal, para. 290.

724. These findings, coupled with the Trial Chamber's findings on the crimes in Kailahun District,[1878] contrary to Sesay's submission,[1879] are consistent with the Trial Chamber's holding that "the mistreatment of civilians was particularly frequent and endemic in Kailahun District"[1880] and that the "attack" involved mistreatment of civilians by fighters throughout the Indictment period.[1881] Consequently, Sesay's submission fails.

4. Conclusion

725. The Appeals Chamber dismisses Sesay's Ground 38 in its entirety.

I. Convictions for sexual violence and forced marriage in Kailahun District (Sesay Ground 39)

1. Trial Chamber's findings

726. The Trial Chamber convicted Sesay for committing sexual slavery (Count 7), "other inhumane acts" (forced marriage, Count 8) and outrages upon personal dignity (Count 9) against Witnesses TF1-093 and TF1-314, and "an unknown number" of other women in Kailahun District.[1882]

2. Submissions of the Parties

727. Sesay contends that no reasonable trial chamber could have found him responsible for the crimes charged under Counts 7 to 9 in Kailahun District.[1883] He advances six arguments in support of this contention.[1884]

728. First, he contends that no reasonable tribunal could have relied on the evidence of TF1-369 as an expert in forced marriage.[1885] Second, he contends the Trial Chamber erred by considering evidence of conditions prior to the Indictment period as evidence that there was force during the Indictment period without assessing whether the "continued 'unions'" became consensual during

[1878] *See supra*, para. 719.
[1879] Sesay Appeal, para. 291.
[1880] Sesay Appeal, para. 291, *citing* Trial Judgment, para. 945.
[1881] Sesay Appeal, para. 291, *citing* Trial Judgment, paras 945-947.
[1882] Trial Judgment, para. 2156.
[1883] Sesay Appeal, para. 293.
[1884] Sesay's arguments concerning the pleading of the offences in Kailahun District have been addressed elsewhere. *See supra*, fn. 93.
[1885] Sesay Appeal, para. 299.

the Indictment period.[1886] Third, the Trial Chamber erred in law and in fact in considering the circumstances *within* a forced marriage as a relevant factor to determine whether there was consent *to* the forced marriage.[1887]

729. Fourth, the Trial Chamber erred in law and in fact in holding that "there should be a presumption of absence of genuine consent to having sexual relations or contracting marriages with the said RUF fighters."[1888] He contends that no reasonable tribunal "would have concluded that the facts triggered this presumption on the basis of the evidence adduced."[1889] He further contends that the Trial Chamber's conclusion that Kailahun was more stable contradicts the finding the presumption of an absence of consent.[1890]

730. Fifth, he claims the Trial Chamber erred in law in removing the burden of proof of consent from the Prosecution entirely.[1891] He claims the Prosecution was required to prove "indicia" of circumstances that would have negated consent, such as "threats, intimidation, extortion and other forms of duress which may prey on fear or desperation and may constitute coercion."[1892] Sixth, the Trial Chamber failed to consider that the coercive circumstances "emanated from outside agencies including, in large part, the Kamajors … and from government forces."[1893]

731. In response to Sesay's contentions about the Trial Chamber's presumption of the absence of consent, the Prosecution submits that the Trial Chamber rightly held that consent is not an element of the crime of sexual slavery.[1894] The Prosecution submits the Trial Chamber found that the facts of this case amounted to "circumstances which render it impossible to express consent [which] would be sufficient to presume the absence of consent."[1895] The Prosecution also submits that consent is not an element of the crime of forced marriage as an other inhuman act because the Trial Chamber found the same coercive circumstances as sexual slavery.[1896] Finally, the Prosecution

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[1886] Sesay Appeal, para. 304.
[1887] Sesay Appeal, para. 300.
[1888] Sesay Appeal, para. 302.
[1889] Sesay Appeal, para. 302.
[1890] Sesay Appeal, para. 302.
[1891] Sesay Appeal, para. 303.
[1892] Sesay Appeal, para. 303, fn. 980, *citing Akayesu* Trial Judgment, para. 688.
[1893] Sesay Appeal, para. 305.
[1894] Prosecution Response, para. 7.55, *citing* Trial Judgment, para. 163, *citing Kunarac et al.* Appeal Judgment, para. 120.
[1895] Prosecution Response, para. 7.55 *citing* Trial Judgment, para. 163, *citing Kunarac et al.* Appeal Judgment, para. 120. *See* also *Brima et al.* Trial Judgment, para. 709, *citing Kunarac et al.* Trial Judgment, para. 542, and *Kunarac et al.* Appeal Judgment, paras 129-131.
[1896] Prosecution Response, para. 7.55.

contests Sesay's assertions that there was no coercive environment in Kailahun District since fighting and violence are not requirements for a hostile and coercive environment.[1897]

3. Discussion

732. Sesay raises several arguments concerning the Trial Chamber's consideration of coercive circumstances and the absence of the victim's consent to the acts. He contends, in part, that the Trial Chamber erred in law in presuming the absence of consent of an unknown number of women.

733. In paragraphs 1465 through 1473 of the Trial Judgment, the Trial Chamber found that the circumstances surrounding the sexual relations and marriages included that (i) the women and girls were "forcefully captured and abducted" from "throughout Sierra Leone" and taken to Kailahun District,[1898] (ii) that these abductions took place "in the context of a hostile and coercive war environment,"[1899] (iii) that the women and girls could not leave for fear of being killed or sent into armed conflict,[1900] and (iv) that women and girls were subjected to "threats, intimidation, manipulation and other forms of duress which were predicated on the victims' fear and their desperate situation."[1901] The Trial Chamber found that the hostile and coercive circumstances were such that "*genuine consent was not possible*,"[1902] and it concluded that "[i]n light of the foregoing and given the violent, hostile and coercive environment in which these women suddenly found themselves … the sexual relations with the rebels … *was*, in [the] circumstances, *not consensual* because of the state of uncertainty and subjugation in which they lived in captivity."[1903]

734. The Trial Chamber's reasoning led to a finding of the exercise of rights of ownership and of the force, threats of force and coercion used to compel victims. In part, the reasoning results in a finding of the absence of consent, not a presumption thereof, however, the absence of consent is neither an element of sexual slavery nor of forced marriage. Sexual slavery, a form of enslavement,[1904] "flows from claimed rights of ownership"[1905] to which consent is impossible.

[1897] Prosecution Response, para. 7.57.
[1898] Trial Judgment, para. 1465.
[1899] Trial Judgment, para. 1466.
[1900] Trial Judgment, para. 1467.
[1901] Trial Judgment, para. 1468.
[1902] Trial Judgment, para. 1466 (emphasis added).
[1903] Trial Judgment, para. 1470.
[1904] *Brima et al.* Appeal Judgment, para. 102.
[1905] *Kunarac et al.* Appeal Judgment, para. 120.

735. With respect to forced marriage, the Appeals Chamber recalls that the offence "describes a situation in which the perpetrator[,] … compels a person by force, threat of force, or coercion to serve as a conjugal partner."[1906] The conduct must constitute an "other inhumane act," which entails that the perpetrator: (i) inflict great suffering, or serious injury to body or to mental or physical health; (ii) sufficiently similar in gravity to the acts referred to in Article 2.a through Article 2.h of the Statute; and that (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act.[1907] As a crime against humanity, the offence also requires that the acts of the accused formed part of a widespread or systematic attack against the civilian population, and that the accused knew that his crimes were so related.[1908]

736. The Appeals Chamber considers that where the Prosecution has proved the legal requirements of the offence, that is, that an accused, by force, threat of force, or coercion, or by taking advantage of coercive circumstances, causes one or more persons to serve as a conjugal partner, and the perpetrator's acts are knowingly part of a widespread or systematic attack against a civilian population and amount to the infliction of great suffering, or serious injury to body or to mental or physical health sufficiently similar in gravity to the enumerated crimes against humanity, then consent is impossible[1909] and therefore is not a relevant consideration. As found by the Trial Chamber, "given the violent, hostile and coercive environment in which these women suddenly found themselves … the sexual relations with the rebels … could not [be], and was, in [the] circumstances, not consensual because of the state of uncertainty and subjugation in which they lived in captivity."[1910] Such captivity in itself would have vitiated consent in the circumstances under consideration.[1911]

737. After finding the absence of consent, the Trial Chamber went on to opine generally that, in circumstances such as the ones it had just found, "there *should be* a presumption of absence of genuine consent to having sexual relations or contracting marriages with the said RUF fighters."[1912] This additional statement did not provide the framework for its analysis and nothing suggests that it informed its findings on the elements of the offences. Rather, it is precatory, conditional, and

[1906] *Brima et al.* Appeal Judgment, para. 196.
[1907] *Brima et al.* Appeal Judgment, para. 198.
[1908] *Fofana and Kondewa* Appeal Judgment, paras 310-312, 314, 319-310; *see also Tadić* Appeal Judgment, para. 271.
[1909] *See Kunarac et al.* Appeal Judgment, para. 132; *Gacumbitsi* Appeal Judgment, para. 155.
[1910] Trial Judgment, para. 1470 (emphasis added).
[1911] *See e.g., Furundžija* Trial Judgment, para. 271 ("any form of captivity vitiates consent"); *see also Kunarac et al.* Appeal Judgment, para. 132; *Gacumbitsi* Appeal Judgment, para. 155.
[1912] Trial Judgment, para. 1471.

follows the Trial Chamber's analysis of the circumstances that eliminated the possibility of genuine consent. The impugned statement is therefore an *obiter dicta*. The Appeals Chamber finds no error of law in the Trial Chamber's approach.

738. Sesay also contends the Trial Chamber erred in fact in finding that there was an absence of consent. He made similar submissions at trial, and these arguments were expressly rejected.[1913] On appeal, Sesay fails to show that the Trial Chamber could not reasonably have found the absence of consent on the basis of its findings of fact. He fails to show that any of the women and girls found to have been the victims of sexual slavery were not in fact subjected to the forms of violence and coercion that were the basis of the Trial Chamber's findings on the absence of consent. Accordingly, his submissions fail to demonstrate the Trial Chamber's finding was unreasonable.

739. Sesay further contends that, based on the evidence, the absence of consent should not have been found with respect to all sexual relations and "marriages" in Kailahun.[1914] The Trial Chamber made no such finding regarding *all marriages* in Kailahun. Instead, the Trial Chamber confined its analysis to situations in which women and girls were forced into "marriages." It found that TF1-314 was raped twice before being "married" to an RUF commander.[1915] The Trial Chamber also accepted the testimony of TF1-314 that other girls between 10 and 15 years of age were taken as "wives" by rebels in Buedu.[1916] The Trial Chamber found that TF1-093 became Superman's "wife" because she feared she would have been killed.[1917] A senior RUF Commander testified that when a Commander conquered a particular territory young girls would be abducted. These girls would find it extremely difficult to escape.[1918] Denis Koker, the MP Adjutant in Kailahun District between 1998 and 1999, testified that it was regular practice for women to be *forcibly* taken as "wives" and some commanders had five or six "wives."[1919] The Trial Chamber found that the women and girls were abducted from various locations throughout Sierra Leone and subjected to hostile and coercive circumstances in which "genuine consent was not possible."[1920]

[1913] Trial Judgment, para. 1469.
[1914] Sesay Appeal, para. 302.
[1915] Trial Judgment, para. 1460. Although this incident occurred before the Indictment period, forced marriage is a continuing crime.
[1916] Trial Judgment, para 1407.
[1917] Trial Judgment, para. 1463.
[1918] Trial Judgment, para. 1410.
[1919] Trial Judgment, para. 1411 (emphasis added).
[1920] Trial Judgment, para. 1466.

740. The Trial Chamber's findings were sufficient to establish the *actus reas* of sexual slavery and forced marriage. Having thus found, *inter alia*, that the victims were subject to enslavement, force and coercion, the Trial Chamber did not have to examine the issue of consent, and in particular to have assessed whether every victim did not consent. Sesay's argument is thus without merit. The Appeals Chamber also rejects Sesay's speculative contention that the coercive circumstances were created in part by "outside forces" rather than by the RUF/AFRC forces that perpetrated the crimes.

4. Conclusion

741. For the foregoing reasons, the Appeals Chamber dismisses Sesay Ground 39 in its entirety.

J. Enslavement (forced farming) in Kailahun (Sesay Ground 40)

1. Trial Chamber's findings

742. The Trial Chamber found that an unknown number of civilians were forced to work on RUF "government" farms and farms owned by Commanders in Kailahun District from 30 November 1996 to about 15 September 2000, and that this constituted enslavement.[1921] It held that Sesay incurred JCE liability for this crime.[1922]

2. Submissions of the Parties

743. Sesay submits that the Trial Chamber erred in finding that the RUF was responsible for acts of enslavement in Kailahun District.[1923] First, Sesay challenges the testimonies of TF1-108 and TF1-330.[1924] Second, Sesay argues that the Trial Chamber erred in respect of whether the workers were remunerated.[1925]

744. The Prosecution responds that the Trial Chamber relied on at least twenty witnesses other than TF1-330 and TF1-108 for its findings on forced labour and enslavement in Kailahun.[1926] In respect of the alleged remuneration, the Prosecution submits that most, if not all, of the indicia of

[1921] Trial Judgment, paras 1482, 2156 (section 5.1.3(i).
[1922] Trial Judgment, para. 2163.
[1923] Sesay Appeal, para. 306.
[1924] Sesay Appeal, para. 311.
[1925] Sesay Appeal, paras 313-318.
[1926] Prosecution Response, para. 7.124, *citing* Trial Judgment, paras 1414-1443.

enslavement were established in the Trial Chamber's findings.[1927] Also, even if some civilians were remunerated, this does not detract from the finding that the majority of civilians in Kailahun were forced to work for the RUF.[1928] Sesay offers no additional arguments in reply.

3. Discussion

(a) Did the Trial Chamber err in relying on the testimonies of TF1-330 and TF1-108?

745. Sesay's arguments that TF1-330's testimony was limited as to the geographical scope of the enslavement and the number of victims, and that Exhibits 81 to 84 showed cooperation and food in exchange for work,[1929] fail to address the other evidence the Trial Chamber relied on to arrive at its findings on the geographical scope[1930] and the number of victims[1931] of the enslavement, the forced nature of the work,[1932] and the lack of food provided.[1933] Sesay's additional argument that TF1-330 was motivated to give "partisan testimony" is not borne out by the cited testimony.[1934] These allegations are therefore dismissed. His additional challenges to Witness TF1-108 have been addressed elsewhere.[1935]

(b) Did the Trial Chamber err as to whether the labour was remunerated?

746. Sesay contends that the Trial Chamber contradicted itself by finding that the civilians received no rewards, and at the same time recognising that the "government" farms were "organised to support the fighters and civilians."[1936] The Appeals Chamber is not satisfied that the finding that the "RUF established 'government' farms which were organised to support the fighters and civilians"[1937] detracts from all the other findings showing that the civilian labour on the RUF farms, both of the "government" and private commanders, was forced.[1938] The Appeals Chamber recalls that the finding that members of the RUF might have acted legally in some respects does not

[1927] Prosecution Response, paras 7.128-7.132, *citing* Trial Judgment, paras 1414-1443, 1476-1489.
[1928] Prosecution Response, para. 7.133.
[1929] Sesay Appeal, para. 311.
[1930] Trial Judgment, paras 1415, 1417, 1423, 1424.
[1931] Trial Judgment, para. 1417, fn. 2644.
[1932] *E.g.* Trial Judgment, paras 1415, 1416, 1421.
[1933] Trial Judgment, para. 1420. *See supra*, para. 1095.
[1934] Sesay Appeal, para. 311; Transcript, TF1-330, 16 March 2006, pp. 55, 56 (closed session).
[1935] *See supra*, paras 217-224.
[1936] Sesay Appeal, para. 313, *quoting* Trial Judgment, para. 1417.
[1937] Trial Judgment, para. 1417.
[1938] *E.g.* Trial Judgment, paras 1415, 1416, 1418, 1421, 1425.

necessarily render unreasonable the finding that they acted illegally in others. Sesay's argument in this regard is dismissed.

747. Sesay further misrepresents the Trial Chamber's findings in arguing that it placed undue emphasis on financial remuneration as opposed to payment in kind.[1939] First, the Trial Chamber found that the workers were not given adequate food.[1940] Sesay ignores the evidence in support of this finding. Second, it found that medical and other services provided to some part of the population "cannot be exculpatory or excusatory for the forced labour and coercive conditions that the civilian population endured."[1941] Sesay's challenge to this finding is both unsupported and undeveloped.[1942] Third, the Trial Chamber considered several other indicia of enslavement,[1943] such as control of movement,[1944] abuse,[1945] and forced labour.[1946] Ignoring the evidence the Trial Chamber relied on for these findings and instead simply proffering other evidence he argues supports his position that the civilians and RUF cooperated or that the former were remunerated in kind, Sesay fails to show an error in these findings.[1947] His argument is therefore untenable.

4. Conclusion

748. The Appeals Chamber dismisses Sesay's Ground 40 in its entirety.

K. Alleged error in convicting Sesay of planning the use of persons under the age of 15 to participate actively in hostilities (Sesay Ground 43)

1. Trial Chamber's findings

749. The Trial Chamber found that the RUF routinely used persons under the age of 15 to actively participate in hostilities between November 1996 and September 2000 in Kailahun, Kono, Bombali and Kenema Districts.[1948] The Trial Chamber held that the execution of this system of

[1939] Sesay Appeal, para. 314.
[1940] Trial Judgment, paras 1420, 1424.
[1941] Trial Judgment, para. 1421.
[1942] Sesay Appeal, para. 314. *See infra*, paras 1082-1085.
[1943] *See Kunarac et al*. Appeal Judgment, para. 119.
[1944] Trial Judgment, paras 1416, 1423, 1480.
[1945] Trial Judgment, paras 1419, 1420, 1425, 1480.
[1946] *E.g.* Trial Judgment, paras 1415, 1416, 1418, 1421, 1425, 1480, 1482.
[1947] Sesay Appeal, paras 315-318.
[1948] Trial Judgment, para, 2220.

conscription required a substantial degree of planning, and that this planning was conducted at the highest levels of the RUF organisation.[1949]

750. The Trial Chamber also found that Sesay, as one of the most senior RUF Commanders, made a substantial contribution to the planning of this system of conscription.[1950] It, therefore, convicted him under Article 6(1) for planning the "use of persons under the age of 15 to participate actively in hostilities in Kailahun, Kenema, Kono and Bombali Districts between 1997 and September 2000, as charged in Count 12."[1951]

2. Submissions of the Parties

751. Sesay submits that the Trial Chamber erred in convicting him of planning the use of child soldiers. Sesay advances eight principal arguments in support of his submission: (i) the Trial Chamber failed to make "any or adequate findings as to whether use or conscription by others of child soldiers was within the framework of any plan made by Sesay;"[1952] (ii) the Trial Chamber erred in law and in fact in concluding that his acts constituted "planning";[1953] (iii) the Trial Chamber erred in law and in fact in finding that he gave orders that "young boys" should be trained at Bunumbu and that such order constitutes planning the conscription or use of child soldiers;[1954] (iv) the Trial Chamber's finding that "reports from Bunumbu were hand delivered or communicated to [him] and delivery confirmation [was] communicated back to the base" is unreasonable because it is based solely on the uncorroborated evidence of Witness TF1-362;[1955] (iv) the Trial Chamber erred in finding that receipt of reports substantially contributed to the crime of child conscription or use;[1956] (vi) the Trial Chamber erred in the exercise of its discretion in relying on the evidence of Witness TF1-141;[1957] (vii) no reasonable tribunal could have concluded on the basis of the evidence adduced that "in December 1998, [he] visited RUF fighters including children under the age of 15 who were preparing to conduct an attack on Daru" and that he "distributed drugs as 'morale

[1949] Trial Judgment, para. 2225.
[1950] Trial Judgment, para. 2226.
[1951] Trial Judgment, paras 2230; *see* also Corrigendum to Trial Judgment, 7 April 2009, pp. 5-6.
[1952] Sesay Appeal, para. 321.
[1953] Sesay Appeal, para. 326. Sesay identifies these "acts" to include giving orders, receiving reports and giving speeches at training camps, personal use of child soldiers as bodyguards, distribution of drugs as "morale boosters" as well as anything resulting from being "one of the most senior RUF Commanders." Sesay Appeal, fn. 1024, *citing* Trial Judgment, paras 2226-2227.
[1954] Sesay Appeal, para. 327, *citing* Trial Judgment, para. 2227.
[1955] Sesay Appeal, para. 328.
[1956] Sesay Appeal, para. 330.
[1957] Sesay Appeal, para. 331, *comparing* Transcript, TF1-141, 12 April 2005, pp 30-33 and Transcript, TF1-141, 15 April 2005, p. 93.

boosters' for these fighters;"[1958] (viii) the Trial Chamber erred in finding that his bodyguards, including persons under the age of 15, "participated with [him] in an attack on Koidu in December 1998 and accompanied him as security at Yengema in May 2000."[1959]

752. The Prosecution responds that the crime of conscription and use of child soldiers was part of the common plan pursued by the JCE in which Sesay was found to be a participant.[1960] The Prosecution interprets Sesay's submission to imply that the act of planning requires proof that "Sesay made a plan" or that the plan was "Sesay's design."[1961] It submits that this is not a legal requirement of planning.[1962] Rather, the *actus reus* of planning requires that Sesay "contributed substantially to the planning of an operation in which it is intended that crimes will be committed."[1963] In addition, the Prosecution submits that it is unnecessary and also impossible for the Trial Chamber to make a finding of the exact number of victims of a large scale and systematic crime.[1964] The Prosecution posits that the Trial Chamber's ultimate finding was based on the evidence as a whole and not the individual acts of the Accused.[1965]

753. Sesay replies that the design identified by the Trial Chamber as part of the JCE to take power and control over the country is a large scheme which lacks the specificity envisaged for a finding that he is responsible for planning conscription and use of child soldiers.[1966] The Trial Chamber failed to address the narrower issue of whether he substantially contributed to the design of use of child soldiers and whether the crime was committed in the framework of that design.[1967] Similarly, the Prosecution's citations to global findings that the use of child soldiers was part of the common plan of the JCE do not address whether he planned such use.[1968] Sesay submits that "it is these nebulous conclusions that demonstrate that the Trial Chamber erred in law and fact in concluding that Sesay planned this crime. He further submits that the Trial Chamber was unable to identify the design or the scheme in sufficient detail to properly impute the crime to Sesay."[1969] Sesay further replies that the Trial Chamber's findings do not support a conclusion that he

[1958] Sesay Appeal, para. 332, *quoting* Trial Judgment, para. 2227.
[1959] Sesay Appeal, paras 333-334, *citing* Trial Judgment, paras 1671, 1735, 2227.
[1960] Prosecution Response, para. 7.69.
[1961] Prosecution Response, para. 7.69.
[1962] Prosecution Response, para. 7.69.
[1963] Prosecution Response, para. 7.69.
[1964] Prosecution Response, para. 7.70.
[1965] Prosecution Response, para. 7.74.
[1966] Sesay Reply, para. 110.
[1967] Sesay Reply, para. 110.
[1968] Sesay Reply, para. 111, *citing* Prosecution Response, para. 7.69.
[1969] Sesay Reply, para. 111.

contributed to either the preparation or execution of any design and that this precludes a conviction for planning or for aiding or abetting.[1970]

3. Discussion

754. The Appeals Chamber will first address Sesay's submissions regarding the specific findings of the Trial Chamber before turning to his arguments relating to the Trial Chamber's conclusion that he planned the use of child soldiers.

(a) Sesay ordered that "young boys" should be trained at Bunumbu

755. The Trial Chamber found that Sesay contributed to the planning of the offence under Count 12 by issuing orders that "young boys" should be trained at Bunumbu.[1971] Sesay contends that the Trial Chamber found that these "young boys" were in fact 15 years of age and above.[1972] However, Sesay misinterprets the Trial Chamber's findings which referred to "young boys" to include persons of at least 15 years of age as well as SBUs comprising children as young as 9 to 11 years of age.[1973]

756. Sesay further submits that "in any event, the Trial Chamber cites only one piece of valid evidence for this finding: the evidence of Witness TF1-366," and that the testimonies of Witnesses TF1-199 and TF1-371, also cited by the Trial Chamber in further support, do not in fact support the finding.[1974] The Trial Chamber provided no citations for its finding that Sesay issued the orders in June 1998, however, it cited the testimony of TF1-366, TF1-199 and TF1-371 for its findings that SBUs were children tasked with carrying weapons for the RUF. Witness TF1-366's testimony most closely supports both findings of the Trial Chamber, including that Sesay issued orders. He testified directly that Kallon and Superman issued orders and Sesay "sent messages" that young boys should be brought to be trained at Bunumbu.[1975] He stated that some of the "young boys" were 15 years of age, but that many were SBUs comprising children ages 9 to 11 years and smaller boys.[1976] Witness TF1-199 testified that SBUs were "really small boys" and because he was a small boy of 12 years of age, he was called an SBU.[1977] However, he did not mention Sesay in his testimony or testify to

[1970] Sesay Reply, para. 112.
[1971] Trial Judgment, paras 2226-2227.
[1972] Sesay Appeal, para. 327, *citing* Trial Judgment, para. 1638.
[1973] Trial Judgment, paras 1621, 1638, 2226, 2227.
[1974] Sesay Appeal, para. 327 *citing* Transcript, TF1-199, 20 July 2004, p. 37; Transcript, TF1-371, 21 July 2006, pp. 63-64.
[1975] Transcript, TF1-366, 8 November 2005, pp. 65-68.
[1976] Transcript, TF1-366, 8 November 2005, pp. 65-68.
[1977] Transcript, TF1-199, 20 July 2004, p. 37.

anyone giving orders. Witness TF1-371 testified that children between the ages of 12 and 18 years were classified as SBUs, and that Sesay had SBUs, one of whom was around 15 years and the other around the age of 16.[1978] Importantly, of the testimony cited by the Trial Chamber, only TF1-366 supports the finding that Sesay issued orders for "young boys" to be trained at Bunumbu in June 1998.

757. This testimony is consistent with the testimony of TF1-362, relied on by the Trial Chamber to find that civilians captured on the highway to Freetown from 1997 onward, as well as people from Daru and the SLA, were brought to Bunumbu training base at the command of Issa Sesay.[1979] Importantly, although Sesay challenges the Trial Chamber's reliance on TF1-362 in other contexts, he does not impugn these findings.[1980]

758. Trial Chambers enjoy broad discretion in their assessment of evidence and determination of the weight to accord testimony. In general, a Trial Chamber may in the exercise of its discretion rely on a single witness for support of its factual findings. With respect to TF1-366, the Trial Chamber stated that it "has not accepted the testimony of TF1-366 as it relates to the acts and conduct of the Accused unless it was corroborated in some material aspect by a reliable witness."[1981]

759. The Appeals Chamber considers that the testimony of TF1-366 was corroborated "in some material aspect" by the testimony of TF1-199 and TF1-362, whose evidence was found credible by the Trial Chamber.[1982] The Trial Chamber's failure to explicitly cite TF1-362's testimony for the impugned finding is unfortunate, but in the circumstances caused no error.

(b) Whether the Trial Chamber erred in relying on Witness TF1-362

760. Sesay contends that the Trial Chamber erred in finding, on the basis of testimony of TF1-362, that he personally communicated reports to Bunumbu and ordered that the training camp be moved from Bunumbu to Yengema.[1983] Sesay, however, fails to demonstrate that the Trial Chamber could not reasonably rely on TF1-362 for these findings. As Sesay does not show an error in the

[1978] Transcript, TF1-371, 21 July 2006, p. 63 (closed session).
[1979] Trial Judgment, para. 1437, *citing* Transcript, TF1-362, 20 April 2005, pp. 32, 43.
[1980] *See* Sesay Appeal, para. 328.
[1981] Trial Judgment, para. 546.
[1982] *See* Trial Judgment, paras 553-555, 1621-1624.
[1983] Sesay Appeal, para. 329, *citing* Trial Judgment, paras 1646-1647 and Transcript, TF1-362, 22 April 2005, p. 16 (closed session).

Trial Chamber's exercise of its discretion to assess the witness's credibility or determine the weight it attached to his testimony, this part of Sesay's argument fails.

761. Sesay further submits that the Trial Chamber unreasonably relied upon Witnesses TF1-114 and TF1-108[1984] to support its finding that children were forcibly trained,[1985] but disregarded their testimony that, Sesay contends, "contradicted TF1-362's account of Sesay's involvement in the training base." However, Sesay fails to demonstrate how the testimony of TF1-114 and TF1-108 contradicts the testimony relied upon by the Trial Chamber, and the Appeals Chamber is unable to infer his argument. The Appeals Chamber recalls that "[w]hile it is preferable for the Trial Chamber to state its reasons for accepting the evidence of one witness over that of another when they are contradictory, the Trial Chamber is not obliged to refer to every piece of evidence on the trial record."[1986] Sesay fails to show error in the Trial Chamber's finding.

(c) Whether receipt of reports substantially contributed to crimes

762. The Trial Chamber found that Sesay, as one of the most senior RUF commanders, made a substantial contribution to the planning of the RUF system of child use by, *inter alia*, receiving reports on training at Bunumbu and subsequently at Yengema.[1987] Specifically, the Trial Chamber found that the adjutant at the base drew up a list of recruits including their names, ages and other personal data.[1988] Sesay submits that the Trial Chamber erred in finding that receipt of reports substantially contributed to the crime of child conscription or use.[1989] He posits that the alleged planning must be found to have actually led to the commission of specific crimes.[1990]

763. Reports on the trainees were compiled by the adjutant and sent to the deputy at the training base and then to the training commandant who would forward the reports to an advisor.[1991] Next, the reports were either delivered by hand or communicated via radio to Sesay and finally to Bockarie;[1992] and Sesay would confirm delivery of the report back to the base.[1993] The Trial Chamber found that "[e]very such report was either hand-delivered or communicated via radio to

[1984] Sesay Appeal, fn. 1040.
[1985] Sesay Appeal, para. 328, *citing* Trial Judgment, fn. 2723-2729 (Witnesses TF1-114 and TF1-108).
[1986] *Brima et al.* Appeal Judgment, para. 268.
[1987] Trial Judgment, para. 2226.
[1988] Trial Judgment, para. 1639 *citing* Transcript, TF1-362, 22 April 2005, pp. 6-12 (closed session).
[1989] Sesay Appeal, para. 330.
[1990] Sesay Appeal, para. 330, *citing Brđanin* Trial Judgment, para. 358.
[1991] Trial Judgment, para. 1639 *citing* Transcript, TF1-362, 22 April 2005, pp. 6-12 (closed session).
[1992] Trial Judgment, para. 1639 *citing* Transcript, TF1-362, 22 April 2005, pp. 6-12 (closed session).
[1993] Trial Judgment, para. 1639 *citing* Transcript, TF1-362, 22 April 2005, pp. 6-12 (closed session).

Sesay."[1994] The Trial Chamber also found that the training commander at Yengema reported directly through Sesay to Bockarie, until Bockarie left the RUF in December 1999, after which she reported to Sesay only.[1995] According to the Trial Chamber, records were kept of the ages of SBUs and SGUs trained at Bunumbu and Yengema, from which it could be inferred that the fighters who conducted the training knew or had reason to know that certain trainees were under the age of 15.[1996]

764. The Appeals Chamber considers that Sesay's receipt of reports is relevant circumstantial evidence supporting the findings that "the execution of this system of conscription [of child soldiers] required a substantial degree of planning"[1997] and that "this planning was conducted at the highest levels of the RUF organization,"[1998] including Sesay.[1999] That reports on the training of child soldiers were transmitted to RUF headquarters signifies that the conscription of child soldiers was highly organised, and that the RUF leadership was responsible for that organisation. Moreover, the creation and transmission of training reports represents a mechanism through which the RUF headquarters could monitor the implementation of the planned conscription of child soldiers. Sesay's receipt of such reports was indicative that he had participated in that planning process. Accordingly, contrary to Sesay's contention, the Trial Chamber did not consider that he substantially contributed to the planning by merely receiving reports, but that his receipt of such reports was part of the evidence taken into consideration in coming to the conclusion that he had participated in the planning at both the preparatory and execution phases.

(d) Whether the Trial Chamber erred in relying on Witness TF1-141

765. Sesay contends that the Trial Chamber's reliance on TF1-141 to find that he participated in the training bases by giving speeches at Bunumbu training camp, passing and receiving messages and threatening to execute those child soldiers who attempted to leave[2000] is "wholly unreasonable given [the witness's] frailties" and the numerous and significant contradictions in the witness's testimony.[2001]

[1994] Trial Judgment, para. 1639, *citing* Transcript, TF1-362, 22 April 2005, p. 12 (closed session).
[1995] Trial Judgment, paras 1639, 1647, *citing* Transcript, TF1-362, 22 April 2005, pp. 16-17 (closed session).
[1996] Trial Judgment, para. 1702.
[1997] Trial Judgment, para. 2225.
[1998] Trial Judgment, para. 2225.
[1999] Trial Judgment, para. 2226.
[2000] Sesay Appeal, paras 330-331.
[2001] Sesay Appeal, para. 331.

766. The Trial Chamber acknowledged the "concerns" raised by the Defence,[2002] and indicated that it was "uneasy with portions of TF1-141's testimony that appear[ed] to be fanciful and thus implausible."[2003] The Trial Chamber noted that the witness was captured by the RUF in 1998 and remained with the group until 2000, when he was demobilised.[2004] The Trial Chamber considered that although the witness was diagnosed with Post-Traumatic Stress Disorder as a result of his experience as a child soldier with the RUF, he was nonetheless able to give truthful testimony.[2005] The Trial Chamber concluded that, after seeing the witness in court, hearing his testimony and observing him under cross-examination, he "came across as a candid witness." The Trial Chamber, therefore, "generally accepted his testimony, especially as it relates to his own experiences as a child combatant."[2006]

767. Sesay contends the witness was "constantly contradicting himself," and that the Trial Chamber disregarded a "significant contradiction" in the witness's testimony, but he only points to one purported contradiction, which, even if a contradiction, was not material to the findings Sesay contests here.[2007] Sesay further fails to show what portions of the witness's testimony contain discrepancies that made the Trial Chamber's assessment of the witness's credibility unreasonable. Seasy thus fails to establish that the Trial Chamber erred in accepting parts of the witness's evidence.

(e) Whether the Trial Chamber erred in finding Sesay liable for planning

768. Taking into account the foregoing discussion, the Appeals Chamber will now consider Sesay's broader claim that the Trial Chamber erred in finding him liable for planning the use of child soldiers.

[2002] Trial Judgment, para. 581.
[2003] Trial Judgment, para. 582.
[2004] Trial Judgment, para. 580.
[2005] Trial Judgment, para. 583 (noting that a psychologist report submitted prior to the witness giving testimony indicated that he was able to testify in court proceedings).
[2006] Trial Judgment, para. 583.
[2007] Sesay Appeal, para. 331, fn. 1048 (citing transcript pages which show counsel's and witness's mutual confusion over the uses of the term "morale booster".). Transcript, TF1-141, 12 April 2005, pp. 30-33; Transcipt, TF1-141, 15 April 2005, p. 93.

(i) Whether Sesay's conduct constitutes the *actus reus* for planning

769. Sesay argues that the Trial Chamber erred in law and in fact in concluding that his acts amounted to "planning."[2008] The Appeals Chamber considers that whether particular acts amount to a substantial contribution to the crime for the purposes of planning liability is to be assessed on a case-by-case basis in light of the evidence as a whole. In concluding that Sesay's cumulative conduct fulfilled the *actus reas* of planning, the Trial Chamber relied on its findings that: (i) Sesay gave orders in June 1998 that "young boys" should be trained at Bunumbu and that he received reports on training in Bunumbu and subsequently at Yengema;[2009] (ii) he visited Camp Lion where he addressed the recruits and told them that they would be sent to the battlefield; and that if they failed to comply with orders they would be executed;[2010] (iii) he visited RUF fighters including children under the age of 15 who were preparing to conduct an attack on Daru and distributed drugs as "morale boosters" for these fighters;[2011] and (iv) he participated in an attack on Koidu in December 1998 together with his bodyguards, including children under the age of 15.[2012]

770. Sesay fails to explain how no reasonable trier of fact could have found that he performed the *actus reus* of planning. His contention appears to be centred on the notion that none of his acts as found by the Trial Chamber constitute the "planning" or "designing" of the crimes *per se*. However, Sesay does not explain why a reasonable trier of fact could not have inferred from these findings and other evidence that he had substantially contributed to designing the criminal conduct. In this regard, the Appeals Chamber notes in particular the Trial Chamber's findings that Sesay ordered the training of child soldiers, received reports on such training and personally visited the Camp Lion training camp, addressing and threatening the child soldier conscripts there. Therefore, in inferring that Sesay contributed to the planning of the crimes, the Trial Chamber did not rely solely on Sesay's command role, as Sesay suggests.[2013] Rather, the Trial Chamber further considered Sesay's personal and direct participation in the conscription and training process. Specifically, the acts relied on by the Trial Chamber evince that Sesay participated in all stages of that process, from ordering the training of child soldiers to monitoring the implementation of the training to monitoring the use of child soldiers. In addition, although not referenced in its reasoning, the Trial

[2008] Sesay Appeal, para. 326.
[2009] Trial Judgment, para. 2226.
[2010] Trial Judgment, para. 2226.
[2011] Trial Judgment, para. 2227.
[2012] Trial Judgment, para. 2227.
[2013] Sesay Appeal, para. 326.

Chamber found that Bockarie and Sesay "issued orders to move the RUF training base from Bunumbu to Yengema in Kono District," and that "Sesay personally discussed the creation of the new Yengema base with the training commander."[2014] Finally, as noted above, the Trial Chamber found that the highly organised character of the conscription process was such as to demand a substantial degree of prior planning by the RUF leadership.[2015] It was on the basis of these findings as a whole that the Trial Chamber found that Sesay substantially contributed to the planning of the crimes. Sesay fails to show that the Trial Chamber's finding, on the basis of the evidence as a whole, was unreasonable. Sesay's submission is dismissed.

(ii) Whether the conscription and use of child soldiers by others fell within Sesay's plan

771. Sesay further submits a number of related challenges to the scope of his liability as found by the Trial Chamber. Sesay argues first that by failing to identify the victims and by failing to require a specimen count, the Trial Chamber was unable to "identify a representative sample of child soldiers" and therefore could not make proper findings as to whether "the use/conscription of any such child was within the framework of Sesay's design."[2016] Second, Sesay argues that the Trial Chamber erred in fact in convicting him for child conscription and use in Bombali and Kenema Districts, as its findings on his responsibility do not refer to acts outside Kailahun and Kono Districts.[2017] Finally, Sesay contends that the Trial Chamber's failure to approximate the number of child soldiers used pursuant to his plan invalidates any finding that the crimes committed were within the framework of his design.[2018] During the oral hearings, Sesay further argued that the Trial Chamber made no findings as to his criminal liability for planning the use of child soldiers in 1997, and that "from 1997 to February 1998 there is simply no evidence of [his] involve[ment] in any type of activity which could amount to planning."[2019]

772. However, Sesay again fails to explain how no reasonable trier of fact, on the basis of the Trial Chamber's findings, could have concluded that he substantially contributed to the planning of the crimes for which he was held liable. Although Sesay argues that the Trial Chamber's findings with respect to Bunumbu are "simply insufficient,"[2020] and points to the absence of findings

[2014] Trial Judgment, para. 1646.
[2015] Trial Judgment, para. 2225.
[2016] Sesay Appeal, paras 322, 323.
[2017] Sesay Appeal, para. 324 *citing* Trial Judgment, paras 2224 - 2228.
[2018] Sesay Appeal, para. 325.
[2019] Appeal Transcript, 2 September 2009, p. 40.
[2020] Appeal Transcript, 2 September 2009, p. 40.

regarding his acts with respect to the conscription and use of child soldiers in Kenema and Bombali Districts[2021] and before February 1998,[2022] he does not explain how the Trial Chamber's conclusion was accordingly unreasonable. In particular, Sesay does not show that no reasonable trier of fact could infer from the Trial Chamber's findings regarding his acts, in combination with other findings such as those concerning the nature of the conscription and use of child soldiers, that he substantially contributed to the planning of crimes committed in other locations as well. In merely submitting that the Trial Chamber's findings with respect to Bunumbu are insufficient to ground his liability for planning the other instances of the crime, Sesay fails to explain why this is so. Sesay further fails to point to other findings or evidence to show that the crimes in Kenema and Bombali Districts were unique or distinct from the crimes in Kailahun and Kono Districts. While Sesay correctly submits that he can only be held liable for those crimes he substantially contributed to the planning of, he does not show how no reasonable trier of fact could infer, on the basis of his acts with respect to Bunumbu and Yengema in particular, that he substantially contributed as well to the planning of the other crimes for which he was held liable.

773. Sesay further fails to explain why the manner in which the Trial Chamber evaluated the evidence precluded it from finding that he substantially contributed to the planning of the specific crimes for which he was held liable.[2023] Sesay cites no authority for his position that the Trial Chamber could only make such a finding on the basis of the identity of the victims, or that the Trial Chamber was required to demand a specimen count here. In this respect, the Appeals Chamber considers that the Trial Chamber found that the crimes committed were those that Sesay substantially contributed to the planning of on the basis of the identity of the perpetrators and the manner in which the crimes were committed. Sesay fails to address the Trial Chamber's approach and to explain how it was erroneous.

774. Finally, the Appeals Chamber does not consider Sesay's citation to the ICTY Trial Chamber's findings in *Brđanin* to be determinative of the issue here.[2024] That the accused in that proceeding was not found liable for planning crimes is not particularly probative as to whether the Trial Chamber here erred, because the facts of the two cases are too distinct for a meaningful analogy to be made. Moreover, Sesay fails to show that no reasonable trier of fact could have found

[2021] Sesay Appeal, para. 324.
[2022] Appeal Transcript, 2 September 2009, p. 40-41.
[2023] *See* Sesay Appeal, paras 322, 323.
[2024] Sesay Appeal, paras 321-322, *quoting Brđanin* Trial Judgment, para. 358.

that he planned the specific crimes for which he was held liable, and he does not argue that the Trial Chamber's reasoning and conclusion evince that it misapplied the law.

775. Sesay's contention that the Trial Chamber erred in law in finding him responsible for the offence in Bombali when it had specifically held that he could not be liable for crimes committed in Bombali District[2025] is misconceived. The Trial Chamber held that Sesay was not liable for crimes in Bombali District in relation to crimes attributable to AFRC forces under the control of Gullit after the cessation of the JCE.[2026] In contrast, Sesay was found to have planned an RUF system of use of child soldiers.[2027]

4. Conclusion

776. For the foregoing reasons, the Appeals Chamber dismisses Sesay's Ground 43 in its entirety.

[2025] Sesay Appeal, para. 324, *citing* Trial Judgment para. 1692.
[2026] Trial Judgment, paras 1507, 1509, 1692.
[2027] Trial Judgment, para. 2228.

VIII. KALLON'S APPEAL

A. Errors relating to Kallon's participation in and shared intent of the JCE (Kallon Grounds 2 (in part), 8, 9, 10, 11 (in part) and 15)

777. In these grounds, Kallon challenges the Trial Chamber's findings that he participated in and shared the intent of the JCE in Bo, Kenema, Kono and Kailahun Districts. The parts of Grounds 2 and 8 which allege general errors in the findings on Kallon's contribution to the JCE and position, respectively, are addressed first, followed by Grounds 9, 10, 11 and 15, which concern his contribution in respect of the individual Districts.

1. General issues regarding Kallon's position and contribution

778. In Ground 2, Kallon advances three arguments of general applicability to his contribution to the JCE. First, he challenges the Trial Chamber's holding that an accused can incur JCE liability even if his significant contributions occurred only in a smaller geographical area, provided he had knowledge of the wider common purpose,[2028] arguing it infringes the requirement that the accused share the purpose of the JCE.[2029] Second, Kallon submits that the Trial Chamber erroneously tried him for the conduct of the RUF as an organisation.[2030] Third, Kallon submits that the evidence showed him acting benignly toward civilians.[2031] The Prosecution responds that participation in a JCE does not require a significant contribution in all geographical areas covered by the JCE[2032] and that the Trial Chamber observed that "this trial is not a trial of the RUF organisation."[2033] Kallon replies that the Prosecution ignores that the JCE covered different crimes involving different participants, victims and circumstances.[2034]

779. The Appeals Chamber is not persuaded by Kallon's first submission. Kallon fails to explain how, in his view, the Trial Chamber's error in holding that an accused's contribution to the JCE may be more limited in geographical scope than the JCE itself if the accused knew of the wider common purpose, invalidates the decision. In particular, he ignores the Trial Chamber's findings that an accused must have made a significant contribution to the crimes for which he is to be held

[2028] Kallon Appeal, para. 43, *citing* Trial Judgment, para. 262.
[2029] Kallon Appeal, para. 43.
[2030] Kallon Appeal, paras 49, 50, 65. *See* Kallon Notice of Appeal, paras 3.1, 3.4, 3.11.
[2031] Kallon Appeal, fn. 109.
[2032] Prosecution Response, para. 5.32.
[2033] Prosecution Response, para. 5.2, *citing* Trial Judgment, para. 4.
[2034] Kallon Reply, para. 49.

responsible, and that Kallon intended and contributed to all of the crimes in all the Districts for which he incurred JCE liability.[2035] Moreover, contrary to Kallon's arguments, the Trial Chamber did not rely on his contribution to the JCE in Kono in order to establish his contribution in Kenema,[2036] and JCE liability does not require that the accused ordered or was responsible as a superior for the crime. Kallon's submissions relating to his contribution in respect of Kono and the link between him as a JCE member and non-JCE perpetrators are addressed elsewhere.[2037] This submission is therefore rejected.

780. The Appeals Chamber notes that, contrary to Kallon's submission, the Trial Chamber did not convict him based on "mere membership" in the Supreme Council or in the RUF. Rather, it inferred from the widespread and systematic nature of the crimes, in particular the attacks on Bo and the forced labour in Kenema District, that such conduct was a "deliberate policy" which must have been initiated by the members of the Supreme Council, of which he was one.[2038] Moreover, Kallon's contribution to the JCE did not consist solely of his actions on the Supreme Council.[2039] These submissions are rejected.

781. Lastly, the Appeals Chamber is not satisfied that the finding that Kallon "on one occasion" advised Rocky that the rebels "should not be 'hostile' with the civilians"[2040] and the evidence on Kallon's allegedly benign behaviour described in a witness statement by TF1-122 read out to the witness in cross-examination,[2041] render unreasonable the Trial Chamber's conclusion, based on numerous pieces of evidence, that he participated in the JCE. The fact that Kallon did not incur responsibility for personal commission for any of the crimes for which he incurred JCE liability[2042] is not dispositive of whether he could be held responsible for them under this form of responsibility.[2043] This submission is rejected.

[2035] Trial Judgment, paras 261, 2008, 2056, 2102, 2103, 2163.
[2036] Trial Judgment, paras 2003-2008, 2055 (Kallon's contribution in relation to Kenema), 2093-2101 (Kallon's contribution in relation to Kono).
[2037] *See supra*, para. 431.
[2038] Trial Judgment, paras 755, 2004.
[2039] *See* Trial Judgment, paras 2005-2007, 2093-2101.
[2040] Trial Judgment, para. 1231.
[2041] Transcript, TF1-122, 8 July 2005, pp. 93, 94
[2042] Trial Judgment, paras 1976, 2053, 2066, 2157.
[2043] *Brđanin* Appeal Judgment, para. 427; *Kvočka et al.* Appeal Judgment, para. 99; *Tadić* Appeal Judgment, para. 227(iii); *Milutonivić et al*. Trial Judgment Vol. I, para. 103; Trial Judgment, para. 2004.

(a) Kallon's membership in the Supreme Council and his seniority (Kallon Grounds 2 (in part) and 8)

(i) Trial Chamber's findings

782. The Trial Chamber was satisfied that Kallon's involvement as a member of the Supreme Council, the governing body of the Junta, contributed to the JCE, as this body was involved in the decision-making processes through which the Junta regime determined how best to secure power and maintain control over Sierra Leone.[2044] The widespread and systematic nature of the crimes in which the RUF was engaged indicate that such conduct was a deliberate policy of the AFRC/RUF that the Trial Chamber found "must have been" initiated by the Supreme Council, of which Kallon was a member.[2045]

(ii) Submissions of the Parties

783. Under Ground 8, Kallon first submits that the Trial Chamber erred in equating the "Supreme Council" with the "Armed Forces Revolutionary Council (AFRC)" and in finding that he was a member of the former.[2046] Second, Kallon submits that his alleged membership in the Supreme Council is insufficient to incur JCE liability, because the Supreme Council was not inherently criminal and he was not involved in any decision-making processes amounting to criminal activity.[2047] Under Ground 2, Kallon makes the related argument that the Supreme Council was not found to have been a criminal body or to have planned or executed criminal policies to his knowledge or with his participation.[2048]

784. The Prosecution responds that the Trial Chamber reasonably concluded that the "Supreme Council" and the "AFRC Council" referred to the same body.[2049] It further avers that Kallon fails to show that the finding that by his membership in the Supreme Council Kallon was involved in decisions or policy-making by the Supreme Council was unreasonable.[2050] Kallon replies that the

[2044] Trial Judgment, para. 2004.
[2045] Trial Judgment, para. 2004.
[2046] Kallon Notice of Appeal, p. 30; Kallon Appeal, paras 87, 88, 90.
[2047] Kallon Notice of Appeal, paras 9.1-9.3; Kallon Appeal, para. 89.
[2048] Kallon Appeal, para. 50.
[2049] Prosecution Response, para. 5.46.
[2050] Prosecution Response, para. 5.47.

Prosecution fails to demonstrate how, absent criminalising mere membership in the Supreme Council, he could have shared the intent of the physical perpetrators.[2051]

(iii) Discussion

785. The Appeals Chamber understands Kallon to be making a four-pronged argument, such that: (i) the Trial Chamber confused the Supreme Council with the AFRC; (ii) if it did not, the Supreme Council was not involved in crimes; (iii) even if the Supreme Council were involved in crimes, Kallon was not a member of it; and (iv) if Kallon was a member, he did not participate in criminal activity on the Supreme Council.

786. The Appeals Chamber finds Kallon's first argument to be internally inconsistent. While some of his submissions appear to suggest that the two bodies were indistinct, others refer to evidence which, on Kallon's own submission, shows the existence of the Supreme Council as distinct from the AFRC. The Appeals Chamber need not address so ambiguous an argument. Kallon's argument is therefore rejected.

787. The next prong of Kallon's appeal is that the Supreme Council was not itself inherently criminal or involved in planning or executing criminal policies. In support, he invokes the finding in paragraph 756 of the Trial Judgment that the major issues discussed by the Supreme Council were "the security of the Junta; revenue generation; the resolution of conflicts between the AFRC and the RUF; and harassment of civilians", and Exhibit 224, which form part of the evidentiary basis for this finding.[2052] The Appeals Chamber has already considered and dismissed a similar claim under Sesay's Ground 24[2053] because the finding in paragraph 756 does not detract from the Trial Chamber's inference, based on the "widespread and systematic nature of the crimes, in particular the attacks on Bo and the forced labour in Kenema District," that such conduct "was a deliberate policy of the AFRC/RUF" that must have been "initiated by the Supreme Council."[2054] Since Kallon does not address the evidence relied on by the Trial Chamber to draw that inference,[2055] his argument is rejected.

[2051] Kallon Reply, para. 50.
[2052] Kallon Appeal, para. 88.
[2053] *See supra*, paras 351-358.
[2054] Trial Judgment, para. 2004.
[2055] *E.g.* Trial Judgment, paras 754 (the Supreme Council "was the highest decision-making body in the Junta regime and the sole *de facto* executive and legislative authority within Sierra Leone during the Junta period"), 993-1005, 1006-1009, 1010-1014, 1984 (June 1997 attacks in Bo), 1088-1095 (forced mining in Kenema).

788. Next, Kallon argues that he was not a member of the Supreme Council. This position is contradicted by Exhibit 224, which Kallon himself invokes. He further relies on Exhibit 6 to suggest that he was not a member at the time of the meeting referenced in Exhibit 224 (11 August 1997), but fails to acknowledge that although in relevant parts they are dated 3 September 1997, both Exhibits 6 and 150 list Kallon as a member of the Supreme Council "with effect from the 25th day of May, 1997." Kallon further posits that TF1-167 did not know where Kallon was assigned during the Junta period and that the witness was not an AFRC member, that Kallon had difficulty travelling to Freetown and that Exhibit 39 does not mention him. However, Kallon does not address any of the evidence the Trial Chamber relied on to conclude that he attended Supreme Council meetings on a reasonably regular basis from August 1997 onwards, notwithstanding that Kamajor attacks often made it difficult for him to travel to Freetown.[2056] The mere fact that Exhibit 39, considered by the Trial Chamber in its findings on the Supreme Council,[2057] does not mention Kallon or that TF1-167 did not know where Kallon was assigned does not render unreasonable the Trial Chamber's conclusion, based on a multitude of evidence which Kallon fails to address, that he was a member of the Supreme Council.[2058] His argument therefore fails.

789. Kallon's last submission is that he did not participate in criminal activity by his involvement with the Supreme Council. The Trial Chamber inferred that Kallon, by his membership in the Supreme Council, was involved in decisions or policy-making by the Supreme Council.[2059] Contrary to Kallon's claim,[2060] the Trial Chamber based this finding on evidence that he was one of the few RUF Commanders to be a member of the Supreme Council, which was a privileged position in the Junta governing body, and that he attended Supreme Council meetings on a fairly regular basis.[2061] Similarly, the inference that Kallon cooperated with the AFRC at Teko Barracks was reasonable based on evidence that he was received by former SLA when he arrived there on 3 June 1997 and that he was based at Teko Barracks until August 1997.[2062] Kallon's additional

[2056] Trial Judgment, para. 774.
[2057] Trial Judgment, fn. 1445. (Exhibit 39 contains a document entitled "Proposal for the Tentative Integration of the People's Army into the National Army and the Political Circle", dated 13 August 1997, addressed to Johnny Paul Koroma from Sam Bockarie.).
[2058] Trial Judgment, para. 755.
[2059] Trial Judgment, para. 2004.
[2060] Kallon Appeal, para. 90.
[2061] Trial Judgment, paras 774, 2004, fns 3739, 3740.
[2062] Trial Judgment, paras 774, 1987, fn. 3716.

claim that he was not involved in any of the national diamond mining programmes is but a bare assertion which he acknowledges will be addressed under other grounds of appeal.[2063]

790. Kallon therefore fails to show an error in the Trial Chamber's inference that he contributed to the JCE through his involvement on the Supreme Council. The Appeals Chamber rejects Kallon's Ground 2 in present parts, and dismisses his Ground 8 in its entirety.

2. Kallon's participation in the JCE in respect of Bo, Kenema, Kono and Kailahun Districts

(a) Bo District (Kallon Ground 9)

(i) Trial Chamber's findings

791. The Trial Chamber found that Kallon incurred JCE liability for the crimes, including unlawful killings, committed in Bo District between 1 June 1997 and 30 June 1997.[2064] It held that Kallon participated in the furtherance of the Common Criminal Purpose and thereby significantly contributed to the commission of these crimes, and that he shared the intent to commit the crimes with the other JCE members.[2065]

(ii) Submissions of the Parties

792. Under his Ground 9, Kallon first argues that the Trial Chamber erred in finding that he substantially contributed to the crimes in Bo District committed between 1 June 1997 and 30 June 1997, because it had previously found that he only became a member of the Supreme Council in August 1997, was based at Kangari Hills until June 1997 and moved to Bo in August 1997.[2066] Second, Kallon submits that he did not personally commit any crimes in Bo and that there was no showing as to how, when and where the common design or shared intent occurred.[2067]

793. The Prosecution responds that Kallon's submissions rest on the erroneous premise that he must have made a substantial contribution to each crime in each location, whereas it sufficed that he substantially contributed to the JCE.[2068] Kallon offers no additional arguments in reply.

[2063] Kallon Appeal, para. 90, fn. 249.
[2064] *See* Trial Judgment, para. 2008.
[2065] Trial Judgment, para. 2008.
[2066] Kallon Appeal, paras 91, 92, *citing* Trial Judgment, paras 741, 774, 1974.
[2067] Kallon Appeal, para. 92, *citing* Trial Judgment, paras 1974-1976. *See* Kallon Notice of Appeal, para. 10.3.
[2068] Prosecution Response, para. 5.49.

(iii) Discussion

794. The Appeals Chamber notes as a preliminary matter that it was not required that Kallon performed any part of the *actus reus* of the crimes in Bo District for him to incur JCE liability for these crimes.[2069] Rather, as far as his *actus reus* is concerned, it sufficed that Kallon's participation in the JCE, whether or not physically carried out in Bo District, significantly contributed to the crimes there.[2070]

795. The Appeals Chamber finds that Kallon's two arguments lack merit, for the following reasons. His first argument is based on the erroneous assertion that the Trial Chamber found that he did not become a member of the Supreme Council until August 1997. Rather, the Trial Chamber found that he started attending Supreme Council meetings on a reasonably regular basis from that time onwards.[2071] Contrary to Kallon's claim,[2072] there is no contradiction between this finding and the finding that it "was often" difficult for him to travel to Freetown due to Kamajor attacks.[2073] As noted, the Trial Chamber also relied on evidence that Kallon was a member of the Supreme Council "with effect from" 25 May 1997 in establishing his membership in that body.[2074] Furthermore, the Trial Chamber did not, as Kallon argues, "ignore" that he was not posted in Bo until August 1997;[2075] it explicitly recognised this fact.[2076] However, it was not required that Kallon was physically present in Bo in order to contribute to the crimes there through his participation in the JCE. Kallon fails to explain how his absence precluded a reasonable trier of fact from finding that he incurred JCE liability for the crimes in Bo in June 1997.[2077] This argument is rejected.

796. Kallon's second argument is also unavailing. The fact that he did not personally commit any of the crimes did not, as the Trial Chamber correctly noted, exclude JCE liability on his part.[2078] Contrary to Kallon's claim, the Trial Chamber further specified that the common criminal purpose of the JCE crystallised shortly after the coup on 25 May 1997, and explained how the JCE came

[2069] *Brđanin* Appeal Judgment, para. 427; *Kvočka et al.* Appeal Judgment, para. 99; *Vasiljević* Appeal Judgment, paras 100, 119; *Tadić* Appeal Judgment, paras 196, 227.
[2070] *Krajišnik* Appeal Judgment, para. 695; *Brđanin* Appeal Judgment, paras 427, 430.
[2071] Trial Judgment, para. 774.
[2072] Kallon Notice of Appeal, para. 10.7; Kallon Appeal, fn. 256, *citing* Trial Judgment, para. 774.
[2073] Trial Judgment, para. 774.
[2074] Trial Judgment, para. 755, fn. 1450, *citing* Exhibit 6.
[2075] Kallon Appeal, para. 97.
[2076] Trial Judgment, para. 774.
[2077] *Krnojelac* Appeal Judgment, para. 81; *Milutinović et al*. Trial Judgment Vol. I, para. 103.
[2078] *Brđanin* Appeal Judgment, para. 427; *Kvočka et al.* Appeal Judgment, para. 99; *Tadić* Appeal Judgment, para. 227(iii); *Milutonivić et al*. Trial Judgment Vol. I, para. 103; Trial Judgment, para. 2004.

into existence.[2079] The fact that Bo District was only partly under joint AFRC/RUF control by June 1997 does not, as previously explained, render unreasonable the finding that the crimes there, namely, those committed during the attacks on Tikonko, Sembehun and Gerihun, formed part of the common criminal purpose.[2080] This argument is rejected.

797. The Appeals Chamber dismisses Kallon's Ground 9 in its entirety.

(b) Kenema District (Kallon Ground 10)

(i) Trial Chamber's findings

798. The Trial Chamber held that its previous findings, described in its JCE findings on Bo District, regarding Kallon's participation and significant contribution "apply *mutatis mutandis* to the crimes committed in Kenema District."[2081] It therefore concluded that Kallon participated in the furtherance of the Common Criminal Purpose and thereby significantly contributed to the crimes found to have been committed in Kenema.[2082] It held that Kallon shared with the other JCE members the requisite intent to commit these crimes.[2083]

(ii) Submissions of the Parties

799. Kallon first argues that the Trial Chamber erroneously applied its findings on his contribution in Bo District *mutatis mutandis* to events in Kenema District[2084] because both the evidence on which he was convicted and the crimes themselves were different in the two Districts.[2085] Second, Kallon submits that the Trial Chamber failed to show that he contributed to the JCE in Kenema and shared the intent for the crimes there, as Bockarie and Eddie Kanneh were in control of Kenema under the Junta administration.[2086] Third, Kallon claims that the Trial Chamber erred in finding that he substantially contributed to the unlawful killings in Kenema, because he was absent from Kenema, in particular Tongo Field, at the time of the crimes.[2087] On the

[2079] Trial Judgment, paras 1979-1990.
[2080] *See supra*, paras 336-337.
[2081] Trial Judgment, para. 2055.
[2082] Trial Judgment, para. 2056.
[2083] Trial Judgment, para. 2056.
[2084] Kallon Notice of Appeal, para. 11.2; Kallon Appeal, para. 103, *citing* Trial Judgment, para. 2055. *See* also Kallon Notice of Appeal, para. 10.2.
[2085] Kallon Appeal, para. 103.
[2086] Kallon Appeal, paras 104, 106, *citing* Trial Judgment, paras 769-771.
[2087] Kallon Notice of Appeal, para. 11.10, 11.11; Kallon Appeal, paras 108, 110, 111.

basis of these arguments, Kallon also challenges his convictions for physical violence[2088] and enslavement[2089] in Kenema.

800. In response, the Prosecution relies on the arguments it presents in response to Kallon's Ground 9.[2090] Kallon offers no additional arguments in reply.

(iii) Discussion

801. As to the Trial Chamber's application of its findings on Kallon's contribution in Bo District *mutatis mutandis* to its findings on events in Kenema District, the Appeals Chamber recalls that Kallon's challenges to the former findings have been dismissed.[2091] In remaining parts, Kallon's argument relies on the assertion that the evidence supporting both his conviction and the existence of the crimes in Kenema was different from that pertaining to Bo. This is correct insofar as the crime incidents in the two Districts were not the same. However, Kallon does not point to any examples in the evidence to sustain that, inasmuch as his own participation is concerned, no reasonable trier of fact could have found, as the Trial Chamber did, that his contribution was such that it contributed to both the crimes in Bo and the crimes in Kenema. Kallon therefore fails to demonstrate an error and accordingly his argument is rejected.

802. Second, Kallon contends that he did not contribute to or share the intent for the JCE in Kenema because he "featured nowhere in [the] power equation" between Bockarie and Eddie Kanneh, who were in control of the District.[2092] The Appeals Chamber notes that Kallon's contribution and intent in respect of Kenema did not turn on whether he was in any particular position of control together with Bockarie and Kanneh there. Rather, the Trial Chamber inferred that he contributed to and intended, in particular, the "forced labour in Kenema District" through his involvement on the Supreme Council.[2093] The Appeals Chamber has already dismissed Kallon's challenge to that inference.[2094] Moreover, as also previously noted, whether Kallon personally

[2088] Kallon Notice of Appeal, paras 11.21-11.27; Kallon Appeal, para. 112.
[2089] Kallon Notice of Appeal, paras 11.28-11.33; Kallon Appeal, para. 113.
[2090] Prosecution Response, para. 5.51.
[2091] *See supra*, paras 794-797.
[2092] Kallon Appeal, para. 104.
[2093] Trial Judgment, para. 2004.
[2094] *See supra*, paras 785-790.

committed any crimes in Kenema is not determinative for his JCE liability.[2095] This argument is rejected.

803. Third, Kallon argues that he was absent from Kenema and Tongo Field at the time the unlawful killings there were committed.[2096] His reference in support to the testimonies of TF1-071, TF1-125, TF1-367 and DMK-047 is but a mere restatement of this evidence as presented before the Trial Chamber in support of his alibi for Kenema District.[2097] The Trial Chamber assessed this evidence, but was not convinced that there was any reasonable possibility that his alibi was true.[2098] Simply repeating this evidence on appeal, Kallon fails to demonstrate that the Trial Chamber's assessment thereof was unreasonable.

804. For its finding that Kallon was present during two of the killings at Tongo Field in August 1997, the Trial Chamber relied on Witness TF1-035's testimony.[2099] Kallon challenges this evidence, arguing first that it conflicts with the testimony of DIS-069 that Kallon was not present during the "attack against Tongo in August 1997"[2100] and the evidence given by DIS-157 that between June 1997 and February 1998 he did not receive any information that Kallon was involved in any killings in Tongo.[2101] However, the Trial Chamber found both witnesses to be generally unreliable.[2102] Kallon's additional three challenges to TF1-035's testimony as such are, as Kallon himself points out, reiterations of arguments made in his Final Trial Brief.[2103] As such, they are insufficient to show an error in the Trial Chamber's assessment of this testimony. These arguments are rejected.

805. The Appeals Chamber therefore dismisses Kallon's Ground 10 in its entirety.

[2095] *Brđanin* Appeal Judgment, para. 427; *Kvočka et al.* Appeal Judgment, para. 99; *Tadić* Appeal Judgment, para. 227(iii); *Milutonivić et al*. Trial Judgment Vol. I, para. 103; Trial Judgment, para. 2004.
[2096] Kallon Appeal, paras 110, 111.
[2097] Trial Judgment, para. 618.
[2098] Trial Judgment, para. 636.
[2099] Trial Judgment, paras 1084, 1085.
[2100] Transcript, DIS-069, 23 October 2007, p. 22.
[2101] Transcript, DIS-157, 25 January 2008, pp. 21-22; Kallon Appeal, para. 111.
[2102] Trial Judgment, paras 566, 570.
[2103] Kallon Appeal, para. 111.

(c) Kono District (Kallon Ground 11 (in part))

(i) Trial Chamber's findings

806. Analysing Kallon's participation in the JCE in Kono District, the Trial Chamber held, *inter alia*, that Kallon held a high ranking position, was able to give orders to troops that were obeyed and commanded troops within his area of responsibility of laying ambushes.[2104] He was assigned to an area known as Guinea Highway, and responsible for mounting ambushes against ECOMOG troops along the Makeni-Kono Highway.[2105] In the joint AFRC/RUF hierarchy in Kono District, Kallon was an important and influential Commander who enjoyed considerable respect, power, authority and prestige.[2106] Kallon agreed to and endorsed Sesay's and Koroma's instructions to unlawfully kill civilians and burn their houses.[2107]

(ii) Submissions of the Parties

807. Under Ground 11, Kallon advances six arguments to support the contention that the Trial Chamber erred in failing to consider that he did not occupy any position of responsibility in the AFRC/RUF command structure in Kono at the relevant time, and that he thus could not contribute to the Common Criminal Purpose.[2108] First, he argues that the Trial Chamber pointed to no significant position of responsibility he occupied and made no finding on his positions alleged in the Indictment.[2109] Second, Kallon submits that the Trial Chamber contradicted itself regarding his authority.[2110] Third, Kallon submits that the finding that he would instruct commanders to conduct ambush missions on orders from Superman is unsupported by evidence and does not evince his "overall command authority," and that there was no evidence that these fighters committed the crimes for which he was found liable.[2111] Fourth, Kallon submits that the Trial Chamber erred in relying on Witness TF1-141.[2112] Fifth, he challenges the Trial Chamber's reliance on Witness TF1-361 to find that Kallon supervised the burning of homes in Kono during April 1998 and that he had

[2104] Trial Judgment, paras 835, 2093, 2094.
[2105] Trial Judgment, paras 835, 2094.
[2106] Trial Judgment, para. 2094.
[2107] Trial Judgment, para. 2093.
[2108] Kallon Notice of Appeal, para. 12.12; Kallon Appeal, para. 121.
[2109] Kallon Appeal, para. 121, *citing* Trial Judgment, paras 733, 741.
[2110] Kallon Notice of Appeal, para. 12.20; Kallon Appeal, paras 121, 122, *citing* Trial Judgment, paras 833-835, 2135, 2149.
[2111] Kallon Notice of Appeal, para. 12.20; Kallon Appeal, para. 125.
[2112] Kallon Notice of Appeal, para. 12.22; Kallon Appeal, para. 123.

effective control over all fighters in Kono.[2113] Lastly, Kallon submits that the Trial Chamber erred in finding that merely being a Vanguard afforded him "power and engendered respect."[2114]

808. Kallon further alleges errors related to the specific crimes found to have been committed in Kono District.[2115]

809. The Prosecution relies on the arguments it presents in response to Kallon's Grounds 2 and 9,[2116] adding that a particular type of authoritative position is not a prerequisite for JCE liability[2117] and that TF1-141's testimony was not relied on without corroboration.[2118] Kallon offers no additional arguments in reply.

(iii) Discussion

810. Kallon's argument that the Trial Chamber failed to point to any significant position of responsibility he had is wrong. Indeed, Kallon himself recognises the findings on his authority in his subsequent challenges which are addressed below.[2119] He also fails to explain what allegations of authority in the Indictment were left undecided by the Trial Chamber and how that prejudiced him. This argument is rejected.

811. Kallon's second submission is that the Trial Chamber contradicted itself as to his authority. The Trial Chamber found that, after the February/March 1998 attack on Koidu, Kallon remained in Kono District "and reported to Superman."[2120] He was one of several RUF Commanders who were "not directly within the control hierarchy of Superman and did not have discrete combat units or forces assigned to their command."[2121] The Appeals Chamber fails to see how these findings prevented any reasonable trier of fact from finding that Kallon nonetheless "was an operational Commander who gave orders which were complied with by troops" and entrusted with the assignments given to Kallon.[2122] The finding that Kallon "did not occupy a formal position within the operational command structure of the RUF" and that "it is therefore unclear to what extent he

[2113] Kallon Appeal, para. 126, *citing* Trial Judgment, para. 836.
[2114] Kallon Notice of Appeal, para. 12.23; Kallon Appeal, para. 127, *citing* Trial Judgment, paras 2093-2095.
[2115] Kallon Appeal, paras 128-133.
[2116] Prosecution Response, para. 5.53.
[2117] Prosecution Response, para. 5.53.
[2118] Prosecution Response, para. 5.53, *citing* Trial Judgment, paras 835, 1175, fns 1636, 1637.
[2119] Kallon Appeal, paras 122, 125, *citing* Trial Judgment, paras 835, 2135.
[2120] Trial Judgment, para. 833.
[2121] Trial Judgment, para. 834.
[2122] Trial Judgment, para. 835.

received reports on the actions of troops throughout Kono District"[2123] pertains to Kallon's superior responsibility for mutilations in Tomandu in Kono in May 1998, that is, after the JCE had ended as found by the Trial Chamber,[2124] and so do not detract from the Appeals Chamber's conclusion. This argument is rejected.

812. Third, Kallon argues that the Trial Chamber's finding that he "would instruct Commanders to undertake ambush laying missions on the basis of orders from Superman" is unsupported by evidence.[2125] The Appeals Chamber notes that this finding is not followed by any reference to the evidence. However, the two findings immediately preceding it, namely, that Kallon could give orders which were complied with by troops and that he was entrusted with defending the Makeni-Kono Highway, were both based on evidence, including the testimony of George Johnson.[2126] The passage of his testimony relied on by the Trial Chamber for these two findings support the impugned finding that Kallon instructed Commanders to lay ambushes.[2127] The remaining part of the impugned finding (that Kallon issued those instructions on the orders of Superman) was not relied on by the Trial Chamber in its relevant findings on Kallon's participation in the JCE,[2128] and Kallon does not say whether and if so how it affects his position of authority in Kono as found by the Trial Chamber. Therefore, although the Trial Chamber did not cite evidence for its impugned finding, that did not amount to an error. Kallon's additional claims that his posting at the Makeni-Kono Highway did not vest him with "overall command authority" and that the fighters he instructed did not commit the crimes charged are irrelevant as the Trial Chamber made no such findings,[2129] nor was it obliged to do so in order to find him liable under the JCE theory. This submission is rejected.

813. Fourth, Kallon submits that the Trial Chamber erred in relying on the uncorroborated testimony of TF1-141 to find that he "gave orders to fighters at daily muster parades in the Guinea Highway area"[2130] and that he "enjoyed privileges only afforded to senior RUF Commanders, such

[2123] Trial Judgment, para. 2149.
[2124] Trial Judgment, para. 2076.
[2125] Trial Judgment, para. 835; Kallon Appeal, para. 125.
[2126] Trial Judgment, para. 835, fns 1636, 1637.
[2127] Transcript, George Johnson, 20 October 2004, p. 6 ("He was assigned at the highway – the highway between Makeni to Kono to create obstacles, and he has his own troops that he will command and control. And he was called Brigadier General Morris Kallon.").
[2128] Trial Judgment, para. 2094.
[2129] *See* Trial Judgment, para. 2094 (finding that "in the joint AFRC/RUF hierarchy in Kono District, … Kallon was an important and influential Commander who enjoyed considerable, respect, power, authority and prestige.")
[2130] Trial Judgment, para. 836.

as personal bodyguards."[2131] The Appeals Chamber finds that the Trial Chamber did not rely exclusively on TF1-141 for these two findings, which concern the acts and conduct of Kallon, because it made other similar findings based on other evidence.[2132] This submission is rejected.

814. Fifth, Kallon challenges the reliability of TF1-361, the testimony of which the Trial Chamber relied on to find that "Kallon supervised the burning of homes on the orders of Superman" during the retreat from Kono during the April 1998 ECOMOG attack.[2133] However, in support Kallon simply invites the Appeals Chamber to reassess the witness's evidence, arguing without more that the witness's testimony in cross-examination should be preferred over that relied on by the Trial Chamber. In any event, the Appeals Chamber notes that the parts of TF1-361's testimony Kallon invokes are not inconsistent with the impugned finding.[2134] This submission is rejected.

815. Lastly, Kallon's challenge to the finding that being a Vanguard afforded him "power and engendered respect," is dismissed because Kallon addresses none of the findings or evidence the Trial Chamber relied on to reach this conclusion.[2135]

816. The Appeals Chamber rejects the above arguments of Kallon. As he makes no separate submissions to support his challenges to the specific crimes found to have been committed in Kono District these challenges are also rejected.

(d) Kailahun District (Kallon Ground 15)

(i) Trial Chamber's findings

817. Determining Kallon's JCE liability, the Trial Chamber held that his participation in the JCE as "set out above" furthered the JCE and significantly contributed to the crimes in Kailahun District.[2136] It found that Kallon contributed to the JCE "by securing revenues, territory and manpower for the Junta Government, and by aiming to reduce or eliminate civilian opposition to

[2131] Trial Judgment, para. 838; Kallon Appeal, paras 123, 124.
[2132] Trial Judgment, paras 671 (having bodyguards was indicative of high rank within the RUF), 835 (Kallon was able to give orders in Kono which were complied with by troops and was assigned to the Guinea Highway area), 1092 (Kallon had bodyguards). The fact that the latter finding pertains to Kenema District during the Junta period, that is, before Kallon's JCE liability for the crimes in Kono, is irrelevant as nothing indicates that Kallon's privileges decreased after the Junta was ousted and the AFRC/RUF moved to Kono. Trial Judgment, paras 833-838. *See* also Trial Judgment, para. 1654.
[2133] Trial Judgment, para. 836; Kallon Appeal, para. 126.
[2134] Transcript, TF1-361, 19 July 2005, p. 28 (closed session).
[2135] Trial Judgment, paras 667-669; Kallon Appeal, para. 127.
[2136] Trial Judgment, paras 2161, 2163.

Junta rule."[2137] By his participation in the JCE Kallon significantly contributed to the crimes in Kailahun District, and he shared with the other participants in the JCE the requisite intent to commit these crimes.[2138]

(ii) Submissions of the Parties

818. Kallon first argues that the Trial Chamber erred in finding that the unlawful killings in Kailahun were committed to secure revenues, territory and manpower for the Junta government and to reduce civilian opposition to Junta rule, because there was no Junta in place at the time of these killings.[2139] He adds that he was not present in Kailahun District when the killings committed and ordered by Bockarie were carried out and that he did not share the *mens rea* for these killings.[2140] Second, Kallon challenges his conviction for sexual violence and enslavement in Kailahun.[2141] Third, Kallon submits that the Trial Chamber erred in concluding that he shared a criminal intent with the other JCE participants.[2142] Fourth, he avers that the Trial Chamber erroneously convicted him for crimes outside of the JCE's time frame.[2143] Fifth, Kallon submits that the Trial Chamber erred in (i) applying findings from other Districts *mutatis mutandis* to the crimes in Kailahun;[2144] (ii) failing to specify under which form of JCE he incurred liability for the Bockarie killings;[2145] (iii) conflating JCE liability with command responsibility;[2146] and (iv) finding that Bockarie was a fighter under Kallon.[2147]

819. The Prosecution relies on the arguments it presents in response to Kallon's Grounds 2 and 9.[2148] Kallon offers no additional arguments in reply.

(iii) Discussion

820. The Appeals Chamber notes that Kallon correctly states that the unlawful killings in Kailahun were committed on 19 February 1998, which was after the Junta was ousted from power

[2137] Trial Judgment, para. 2162.
[2138] Trial Judgment, paras 2162, 2163.
[2139] Kallon Notice of Appeal, paras 16.3, 16.5; Kallon Appeal, para. 152, *citing* Trial Judgment, paras 2161, 2162.
[2140] Kallon Appeal, para. 153
[2141] Kallon Notice of Appeal, paras 16.13-16.19; Kallon Appeal, paras 155, 156.
[2142] Kallon Notice of Appeal, para. 16.7; Kallon Appeal, paras 148, 154, *citing* Trial Judgment, para. 2163.
[2143] Kallon Notice of Appeal, paras 16.16, 16.23; Kallon Appeal, para. 155, *citing* Trial Judgment, para. 2156.
[2144] Kallon Notice of Appeal, para. 16.9; Kallon Appeal, para. 154, *citing* Trial Judgment, para. 2161.
[2145] Kallon Notice of Appeal, para. 16.10; Kallon Appeal, para. 154, *citing* Trial Judgment, paras 2163, 2170, 2171.
[2146] Kallon Notice of Appeal, para. 16.11; Kallon Appeal, para. 154, *citing* Trial Judgment, paras 2170, 2171.
[2147] Kallon Notice of Appeal, para. 16.12; Kallon Appeal, para. 154, *citing* Trial Judgment, para. 2170.
[2148] Prosecution Response, para. 5.54.

on 14 February 1998.[2149] The Trial Chamber found that Kallon's participation in the JCE in Kailahun consisted of "securing revenues, territory and manpower *for the Junta government*, and by aiming to reduce or eliminate civilian opposition to *Junta rule*."[2150] However, the JCE which existed between members of the AFRC and the RUF during the Junta period continued after the Junta government had been ousted.[2151] In particular, their Common Criminal Purpose continued to contemplate crimes "as a means of increasing [their] exercise of power and control over the territory of Sierra Leone."[2152] Accordingly, the unlawful killings now at issue "served to further consolidate RUF power over Kailahun District at a time when the joint AFRC/RUF forces were weakened after the fall of Freetown."[2153] Both Bockarie, who committed and ordered the killings, and Kallon continued to be members of the JCE after 14 February 1998.[2154] As such, the Trial Chamber's findings must be understood to mean that the determinative question is not whether Kallon contributed to the killings by assisting the Junta government *per se*, but, instead, whether he lent such contribution by his participation in the Common Criminal Purpose of the JCE.[2155] In that regard, the Appeals Chamber fails to see how it was unreasonable for the Trial Chamber to rely on Kallon's contribution by way of securing revenues, territory and manpower to achieve the Common Criminal Purpose of the JCE during the Junta period in determining whether he also contributed to the JCE after the Junta was ousted from power. Kallon fails to show that the AFRC/RUF Common Criminal Purpose would not have continued to benefit from such contributions even after the alliance was ousted from government power.

821. Kallon's claim that the Trial Chamber erred in finding that he so contributed is unsupported, particularly as it was not required that he was present in Kailahun when the killings were carried out.[2156] Also, the "link"—to use Kallon's term—between the killings and the continued JCE, as well as the "nexus" between Kallon and Bockarie's intent to rid Kailahun of possible Kamajors among the civilian population, were both established by the Trial Chamber's finding that the

[2149] Trial Judgment, paras 2067, 2156 (section 5.1.1); Kallon Appeal, para. 152.
[2150] Trial Judgmentm para, 2162 [emphasis added].
[2151] Trial Judgment, para. 2072.
[2152] Trial Judgment, para. 2070.
[2153] Trial Judgment, para. 2165.
[2154] Trial Judgment, para. 2081.
[2155] *See* Trial Judgment, paras 2161, 2162.
[2156] *See Krnojelac* Appeal Judgment, para. 81; *Milutinović et al*. Trial Judgment Vol. I, para. 103; Kallon Appeal, para. 153.

killings were committed in furtherance of the Common Criminal Purpose which Kallon and Bockarie shared.[2157] Kallon's submission is therefore rejected.

822. Kallon's challenges to his conviction for the crimes of sexual violence and enslavement in Kailahun, provide no arguments in support in addition to those already considered and dismissed in this ground of appeal.[2158]

823. Kallon's submission that he did not share the intent with the other JCE participants, is based on the premise that the Trial Chamber failed to state who they were, what role they had in the crimes, and how he shared their intent.[2159] However, the Trial Chamber made findings on these issues.[2160] Having concluded, *inter alia*, on the basis of these findings,[2161] that Kallon shared the intent to commit the crimes in Kailahun in furtherance of the Common Criminal Purpose,[2162] the Trial Chamber was not, contrary to Kallon's suggestion,[2163] required to establish that he, in addition, knew of the specific crimes committed there.[2164] Kallon's submission is therefore rejected.

824. Kallon's argument that the Trial Chamber erred in convicting him for crimes outside the JCE's time frame[2165] is dismissed, because the Trial Chamber explicitly held that he could not incur JCE liability after the JCE ended in late April 1998.[2166] Accordingly, it held Kallon responsible under this form of liability for crimes "committed in Kailahun District between 25 May 1997 and April 1998."[2167] Kallon's last set of arguments do not extend beyond repetitions of claims which

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[2157] Trial Judgment, paras 2081, 2163, 2165; Kallon Appeal, para. 153.
[2158] Kallon Appeal, paras 155, 156.
[2159] Kallon Appeal, paras 148, 154.
[2160] Trial Judgment, paras 1990, 2081 (identifying the participants of the JCE by name), 2006 (finding that Kallon "endorsed the enslavement and the killing of civilians in order to control and exploit natural resources"), 2099 (finding that Kallon voted to kill TF1-015 in a mock vote on the witness' life and that he endorsed and encouraged criminal activity such as rape by civilian women by RUF fighters during food-finding missions ordered by him to further the goals of the common purpose), 2156 (specifying that the unlawful killings in Kailahun were committed or ordered by Bockarie), 2162-2164 (finding that Sesay significantly contributed to the killings as well as to the sexual violence and enslavement). *See* also Trial Judgment, para. 2107 (finding that forced marriage was important to the RUF both as a tactic of war and means of obtaining unpaid logistical support for troops).
[2161] *See* Trial Judgment, para. 2161, 2163.
[2162] Trial Judgment, para. 2163.
[2163] Kallon Appeal, para. 148.
[2164] *See Rwamakuba* JCE Decision, para. 19, *quoting Justice* Case ("The pattern and plan of racial persecution has been made clear. General knowledge of the broad outlines thereof in all its immensity has been brought home to the defendants. The remaining question is whether or not the evidence proves beyond a reasonable doubt in the case of the individual defendants that they each consciously participated in the plan or took a consenting part therein.").
[2165] Kallon Appeal, para. 155.
[2166] Trial Judgment, para. 2076.
[2167] Trial Judgment, para. 2163.

have been previously dismissed.[2168] For these reasons, the Appeals Chamber dismisses Kallon's Ground 15 in its entirety.

3. Conclusion

825. The Appeals Chamber dismisses the present parts of Kallon's Grounds 2 and 11. Kallon's Grounds 8, 9, 10 and 15 are dismissed in their entirety.

B. Alleged errors relating to Kallon's conviction for instigation in Kono District (Kallon Ground 12)

1. Trial Chamber's findings

826. The Trial Chamber found that Waiyoh, a Nigerian female who resided in the civilian camp at Wendedu and had lived in Kono District for twenty years was killed on the orders of Rocky, an RUF Commander in May 1998.[2169] It found that this crime constituted an unlawful killing as charged in Counts 4 and 5 of the Indictment.[2170] It further found that Kallon was liable under Article 6 (1) of the Statute for its instigation.[2171] The Trial Chamber found that although Wendedu was not named as a location of murder in the Indictment, the pleading of locations in Counts 4 and 5 was nonexhaustive and sufficiently specific in light of the cataclysmic nature of the alleged crimes.[2172]

2. Submissions of the Parties

827. Kallon challenges his conviction for instigating the murder of Waiyoh in Wendedu in Kono District and advances three arguments under this ground of appeal. First, Kallon contends that the Indictment neither pleaded Wendedu as a location for murder, nor his personal involvement in the killing.[2173] He submits two additional arguments in the alternative.[2174]

[2168] Kallon Appeal, para. 154. *See supra*, paras 43, 476-479, 801.
[2169] Trial Judgment, para. 1174.
[2170] Trial Judgment, para. 1277.
[2171] Trial Judgment, paras 2117, 2120.
[2172] Trial Judgment, para. 422, *citing Sesay* Decision on Form of Indictment, para. 23.
[2173] Kallon Appeal, para. 134.
[2174] Kallon Appeal, paras 134-137

3. Discussion

828. The Indictment particularises the charge of murder under Counts 4 and 5 in relation to Kono District as follows:

> About mid February 1998, AFRC/RUF fleeing from Freetown arrived in Kono District. Between about 14 February 1998 and 30 June 1998, members of AFRC/RUF unlawfully killed several hundred civilians in various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Biaya.[2175]

829. The relevant question on appeal is whether the pleading of locations of murder in Kono District as "various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Biaya" without naming Wendedu, is sufficiently specific to allow Kallon to prepare his defence to the charge of instigating murder in Wendedu.

830. As a general matter, the location of the crimes alleged to have been committed should be specified in an indictment.[2176] However, the degree of specificity required will depend on the nature of the Prosecution's case.[2177] The specificity required for the pleading of the location of an alleged crime will depend on factors such as: the form of accused's participation in the crime;[2178] the proximity of the accused person to the events at the location for which he is alleged to be criminally responsible;[2179] the nature of the crime itself, such as whether the crime is characterized by the movement of the victim; whether the victim's identity provides specificity; and whether the crime was committed at numerous locations within a defined geographic area that was pleaded.

831. As the form of the accused's participation in the crime is relevant to the specificity required, the material facts to be pleaded will vary according to the particular form of Article 6(1) liability averred. For example, the Appeals Chamber has indicated that the material facts for pleading

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[2175] Indictment, para. 48.
[2176] *Bagasora et al.*, Appeal Decision on Ntabakuze Appeal on Questions of Law.
[2177] *See Kupreškić et al*. Appeal Judgment, para. 89; *Krnojelac* Appeal Judgment, para. 132; *Blaškić* Appeal Judgment, paras 210, 212-213, 216-218; *Kvočka et al*. Appeal Judgment, para. 28; *Naletilić & Martinović* Appeal Judgment, para. 24; *Ntagerura et al*. Appeal Judgment, paras 23-26.
[2178] *Brima et al*. Appeal Judgment, para. 38; *Krnojelac* Form of the Indictment Decision, para. 18.
[2179] *Kvočka et al.* Appeal Judgment, para. 65 ("As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him."), *citing Galić* Decision on Leave to Appeal, para. 15.

personal commission are distinct from those pleaded for JCE liability.[2180] As stated by the ICTR Appeals Chamber, there may well be "situations in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations. In cases concerning physical acts of violence perpetrated by the accused personally, however, location can be very important."[2181]

832. This distinction between the specificity requirements for the pleading of locations in relation to different modes of liability is consistent with our holding in the *Brima et al.* Appeal Judgment. There, we held that the Trial Chamber's decision to reconsider an earlier form of indictment decision was a proper exercise of its discretion in the interests of justice.[2182] The *Brima et al.* Trial Chamber held that the indictment had not pleaded locations with sufficient specificity and they therefore declined to find the accused liable for crimes committed at unnamed locations. Similar to Kallon's present conviction, the accused in *Brima et al.* were not convicted pursuant to their participation in a JCE, but rather they were convicted of more direct forms of participation, such as, *inter alia*, personal commission and instigation.

833. An accused's proximity to the events at the location for which he is alleged to be criminally responsible is also a factor in determining the pleading specificity required. In the present case, Kallon's liability for instigating the murder of Waiyoh in Wendedu stems directly from his conduct in Wendedu. In May 1998, Waiyoh was being held at an RUF civilian camp in Wendedu. Kallon visited the camp and questioned CO Rocky about Waiyoh, "stating that he considered her a threat."[2183] On a subsequent visit to the camp in Wendedu, Kallon asked CO Rocky if he was "still keeping 'enemies' of the RUF in the camp."[2184] Kallon's bodyguards later visited the camp to enquire about Waiyoh again and Rocky then ordered that she be killed.[2185]

834. In view of the mode of Kallon's liability for the crime and that his culpable conduct occurred at the location, the location of the murder as having occurred at Wendedu was a material

[2180] *See supra*, paras 48, 49; *Kupreškić et al.* Appeal Judgment, para. 89 (requiring detailed pleading of personal commission) *cf. Brđanin* Decision on Form of Further Amended Indictment, paras 21, 22 (material facts for JCE liability).
[2181] *Ntakirutimana* Appeal Judgment, para. 75.
[2182] *Brima et al.* Appeal Judgment, para. 64.
[2183] Trial Judgment, para. 1174.
[2184] Trial Judgment, para. 1174.
[2185] Trial Judgment, para. 1175.

fact that must have been pleaded in the Indictment to inform Kallon clearly of the charges against him so that he could prepare a defence.[2186]

835. The Prosecution's failure to plead Wendedu as a location in the Indictment rendered the Indictment defective with respect to the pleading of Kallon's instigation of murder at Wendedu. As Kallon objected at trial to the pleading of a nonexhaustive list of locations,[2187] the Prosecution bears the burden of showing on appeal that the defect in the Indictment did not prejudice Kallon's ability to prepare his defence. The Prosecution has not offered any submissions that Kallon had notice of the charge as a result of timely, clear and consistent information detailing the factual underpinnings of the charge.[2188]

836. The Appeals Chamber, therefore, finds that Kallon was not put on notice of the charge that he instigated murder at Wendedu. The trial against Kallon was thereby rendered unfair, and as a result he should not have been found responsible for the killing of Waiyoh.

837. For the foregoing reasons, the Appeals Chamber grants Kallon's Ground 12.

C. Superior responsibility for the forced marriages of TF1-016 and her daughter in Kissi Town, Kono District, between May and June 1998 (Kallon Ground 13)

1. Trial Chamber's findings

838. The Trial Chamber found that approximately three months after the Intervention in February 1998, TF1-016 and her eleven year old daughter were captured together with twelve other civilians in Tomandu, Kono District, by fighters who identified themselves as belonging to the RUF.[2189] It found that TF1-016 and her daughter were among those given as "wives" to the rebels, with TF1-016 given to "Kotor" a member of the RUF, and that she was forced to reside with him in the house of the armed rebel leader Alpha.[2190] It consequently found that RUF members forcibly married TF1-016 and her daughter in Kissi Town, Kono District between May and June 1998.[2191]

[2186] *See Kupreškić et al.* Appeal Judgment, para. 88.
[2187] *See* Trial Judgment, para. 420.
[2188] The Prosecution was invited to do so at the Appeal Hearing, however it declined to expand on its submissions on appeal, which do not address possible curing information. Appeal Transcript, 3 September 2009, pp. 234, 244.
[2189] Trial Judgment, para. 1209.
[2190] Trial Judgment, para. 1212.
[2191] Trial Judgment, paras 1209-1214, 2065.

839. The Trial Chamber further found that a superior-subordinate relationship existed between Kallon and the RUF members who forcibly married TF1-016 and her eleven year old daughter in Kissi Town, Kono District and that he had effective control over them.[2192] It also found that Kallon had "reason to know of the fighters who committed this crime at Kissi Town" due to the widespread nature of the crime in Kono District and throughout Sierra Leone.[2193] It further found that Kallon failed to prevent or punish the commission of the crime by his subordinates in Kono District. The Trial Chamber consequently held Kallon liable under Article 6(3) of the Statute for the forced marriage of TF1-016 and her daughter in Kissi Town, Kono District between May and June 1998.[2194]

2. Submissions of the Parties

840. Kallon submits that the Trial Chamber erred in law and fact in finding him responsible as a superior for the forced marriage of TF1-016 and her daughter in Kissi Town, Kono District between May and June 1998.[2195] He first submits that the elements of superior responsibility were not satisfied in respect of his conviction for the alleged crimes in Kissi Town.[2196] He notes specifically that the Trial Chamber failed to establish the existence of a superior-subordinate relationship between him and the perpetrators of the crimes against TF1-016 and her daughter;[2197] and that the Trial Chamber erred in finding that he "had reason to know of the fighters who committed the crime of forced marriage at Kissi Town in Kono District."[2198] Kallon's second argument alleges that the Trial Chamber erred in its evaluation of the evidence.[2199]

3. Discussion

(a) The Trial Chamber's evaluation of the evidence

841. Addressing Kallon's second argument first, the Appeals Chamber concludes that Kallon's submission that the Trial Chamber "ignored vital exculpatory evidence during cross-examination of Prosecution witness TF1-016"[2200] is without merit. The Trial Chamber was able to determine from

[2192] Trial Judgment, para. 2146.
[2193] Trial Judgment, para. 2148.
[2194] Trial Judgment, paras 2150, 2151.`
[2195] Kallon Appeal, para. 138.
[2196] Kallon Appeal, paras 140, 141.
[2197] Kallon Appeal, para. 141.
[2198] Kallon Appeal, para. 140, *quoting* Trial Judgment, para. 2148.
[2199] Kallon Appeal, para. 141.
[2200] Kallon Appeal, para. 141.

the testimony and other undisputed evidence that the crime began in April/May 1998, a fact with which Kallon does not disagree.[2201] In addition, the Trial Chamber considered the fact that Kortor did not personally carry a gun;[2202] explained its findings on the relationship between Kortor and Witness TF1-016 in light of all the evidence, including the fact that Kotor took her out of Kissi Town to "Njagbema, where she continued working for him and he continued to force her to have intercourse with him";[2203] and accepted that she was ultimately released on the orders of the rebel Commander who announced the cease fire.[2204] As the Trial Chamber in fact considered the evidence referred to by Kallon he must demonstrate that no reasonable trier of fact could have assessed the evidence as the Trial Chamber did. Kallon fails to do so, but instead only offers an alternative interpretation of the evidence, thereby seeking to substitute his own evaluation of the evidence for that of the Trial Chamber.

(b) The Trial Chamber's application of command responsibility

842. To establish Kallon's liability under the principle of command responsibility, Article 6(3) of the Statute, the Trial Chamber properly recalled that the following three elements must be shown: (i) the existence of a superior-subordinate relationship between the superior and the offender of the criminal act; (ii) that the superior knew or had reason to know that his subordinate was about to commit a crime or had done so; and (iii) that the superior failed to take the necessary and reasonable measures to prevent his subordinate's criminal act or punish his subordinate.[2205] Kallon does not dispute the correctness of the Trial Chamber's formulation of the law. Rather Kallon's argument is that the Trial Chamber erred in finding that: (1) he had a superior-subordinate relationship with the principal perpetrators of these crimes; and (2) that he had reason to know of the commission of the crimes.

(i) Superior-subordinate relationship: Effective Control

843. Kallon submits that the Trial Chamber failed to establish the existence of a superior-subordinate relationship between him and the perpetrators of the crimes against TF1-016 and her daughter, and that there is nothing in the evidence to show that he had effective control of RUF

[2201] Kallon Appeal, para. 141
[2202] Trial Judgment, para. 1212
[2203] Trial Judgment, para. 1213
[2204] Trial Judgment, para. 1214.

troops in Kissi Town.[2206] He argues that the Trial Chamber's findings to the contrary are inconsistent with its findings that during the relevant timeframe he was based at the Guinea Highway "on the military mission of laying ambushes … to impede ECOMOG's movement;" that he "did not have discrete combat units or forces assigned to his command;" and that he was subordinate to Superman in Kono District and was either equal to or lesser in rank and authority to other commanders in Kono District.[2207]

844. The Appeals Chamber disagrees that these findings directly contradict the Trial Chamber's conclusion that he exercised the requisite effective control over the principal perpetrators in Kissi Town in Kono District. First, as to the geographic scope of his authority, his duties during this time on the Guinea Highway did not preclude him from exercising effective control throughout Kono District between February and May 1998. The trial Judgment attests to the fact that he travelled throughout Kono District. The Trial Chamber found that during this time, in addition to being present on the Guinea Highway,[2208] he was also expressly found to be present in Koidu Town, at the Sunna Mosque,[2209] and the Kaidu and Wendudu camps.[2210] That he "did not have discreet combat units or forces assigned to his command" in fact reinforces the Trial Chamber's findings that his authority was District-wide, as evidenced by his role as an intermediary between the Battalion Commanders throughout Kono District, and Superman. Kallon was one of those very few senior commanders who were connected by radio contact with both field officers and those in the highest positions of the RUF Command.

845. The Trial Chamber found that Kallon, as a Vanguard, was "recognised as senior officer,"[2211] and that "Vanguards, due to their status, were accorded at all times respect and authority within the RUF organisation, particularly by the Junior Commanders."[2212] As a Vanguard and Senior Commander in Kono, Kallon "had personal bodyguards, access to a radio set and subordinates who forced civilians to mine for him personally."[2213] Kallon's position in Kono was

[2205] Trial Judgment, para 285, in accord: *Orić* Appeal Judgment, para. 18; *Gacumbitsi* Appeal Judgment, para. 143; *Kordić and Čerkez* Appeal Judgment, para. 827; *Blaškić* Appeal Judgment, para. 484; *Aleksovski* Appeal Judgment, para. 72.
[2206] Kallon Appeal, para. 139.
[2207] Kallon Appeal, para. 139.
[2208] Trial Judgment, para. 835, 1157.
[2209] Trial Judgment, para. 1150.
[2210] Trial Judgment, paras 2117-2120, 2137.
[2211] Trial Judgment, para. 667.
[2212] Trial Judgment, para. 669.
[2213] Trial Judgment, para. 2135.

sufficiently senior that he was even able to give orders to CO Rocky, a fellow Vanguard, on issues concerning the treatment of civilians.

846. Second, as to the level of his authority in Kono at the operative time, the Trial Chamber found, *inter alia*, that he was "an operational commander"[2214] and that he "was able to give orders to troops that were obeyed."[2215] Specifically, he is found to have commanded troops who were laying ambushes;[2216] gave orders to fighters at muster parades "about the daily missions to be undertaken and appointed Commanders to lead various patrols pursuant to his instructions."[2217] Most importantly the Trial Chamber found that Kallon "enjoyed a high profile among the troops" and "was known to be a strict disciplinarian" who was feared by RUF fighters in Kono District and that he "killed both AFRC and RUF fighters whom he deemed to be acting contrary to orders."[2218]

847. With respect to the oversight over RUF fighters responsible for civilians in Kono District the Trial Chamber's findings establish that Kallon had a "supervisory role."[2219] The Trial Chamber found that only Kallon could issue permission to civilians to travel outside designated civilian camp areas;[2220] and that it was Kallon who ordered the RUF forces to move the civilians when the camps became too close to the frontlines.[2221] That Kallon had authority to order the manner of treatment of the civilians, and have that order followed, was demonstrated by his order to Captain Rocky that the rebels at one particular time "should not be 'hostile' to the civilians" in the Kaidu camp.[2222] This order was implemented the following day by Rocky who assembled civilians to explain the "rules" of the camp which, if followed, would offer some personal security for the civilians, but if broken would result in execution of the rule breaker.[2223]

848. The Appeals Chamber considers that these findings of the Trial Chamber which Kallon does not address in his present ground of appeal, allowed a reasonable trier of fact to conclude that he had the material ability to prevent or punish criminal conduct by the perpetrators in Kono District. That he personally could and did administer punishment to fighters in the most extreme ways was found by the Trial Chamber, which noted that "he was referred to as Bilai Karim, which referred to

[2214] Trial Judgment, para. 835.
[2215] Trial Judgment, para. 2094.
[2216] Trial Judgment, para. 2135.
[2217] Trial Judgment, para. 836.
[2218] Trial Judgment, para. 2136.
[2219] Trial Judgment, para. 2137.
[2220] Trial Judgment, para. 1228.
[2221] Trial Judgment, para. 1232.
[2222] Trial Judgment, para. 1231.

his ability to punish people for committing crimes."[2224] That in addition he was in a position to report misconduct of troops to superiors for punishment was remarked upon by the Trial Chamber which found that he acted as an intermediary between Superman and Battalion Commanders in Kono District.[2225] The Trial Chamber reasonably concluded, based on its findings, that not only was Kallon able to issue orders to RUF troops and Commanders, but that those orders were actually followed and that he had the power to punish RUF perpetrators of alleged criminal conduct in Kono District.[2226] This is the essence of effective control.

849. The Appeals Chamber further determines that, based on these general findings on Kallon's authority over RUF troops in Kono District, it was reasonable for the Trial Chamber to find that Kallon also had effective control over the specific perpetrators who committed the crime of forced marriage against witness TF1-016 and her daughter. The Appeals Chamber recalls that the necessity of proving that the principal perpetrator was the subordinate of the Accused "does not require direct or formal subordination" as long as the Accused is "by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrators."[2227] The Trial Chamber's description of Kotor and his RUF local leader, Alpha, and other RUF rebels in Kissi Town who committed the crimes against Witness TF1-016 and her eleven year old daughter, is sufficient to establish that Kallon held a senior position to them in Kono at the operative time. The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that a superior-subordinate relationship existed between Kallon and the RUF members who committed forced marriage against TF1-016 and her daughter in Kissi Town, Kono District.

(ii) Superior knew or had reason to know

850. The Trial Chamber found that Kallon had "reason to know of the fighters who committed" the crime of forced marriage in Kissi Town due to the widespread nature of this crime in Kono District.[2228] Kallon submits that the Trial Chamber erred in reaching this finding; that its reasoning, is "vague, baseless and fails to meet the requisite standard for knowledge by a superior;" and that it

[2223] Trial Judgment, para. 1231.
[2224] Trial Judgment, para. 838.
[2225] This evidence may be relevant to determining whether he inquired about and otherwise assumed investigative functions regarding the possible commission of crimes.
[2226] Trial Judgment, paras 835, 838, 2136.
[2227] *Halilović* Appeal Judgment, para. 59.
[2228] Trial Judgment, para. 2148.

contradicts the Trial Chamber's own articulation of the applicable law on superior responsibility.[2229]

851. Kallon relies on the Trial Chamber's articulation of the *mens rea* for superior responsibility set out in paragraphs 308 to 312 of the Trial Judgment. He submits that by failing to require that Kallon must have knowledge of the specific identity of the principal perpetrators, the Trial Chamber disregarded its own earlier statement that "the superior must have knowledge of the alleged criminal conduct of his subordinates and not simply knowledge of the occurrence of the crimes themselves."[2230] Kallon both misunderstands and misuses this statement from the Trial Chamber's findings. First, this statement stands for the proposition that the superior must know that persons subordinate to him were involved in the commission of the crimes, and that mere knowledge that the crimes were committed is not sufficient. It does not, as the Appellant suggests, require that the actual identity of the subordinates be known to the superior. Second, this statement appears in the Trial Chamber's explanation of actual knowledge which expressly is not the standard which the Trial Chamber applied to Kallon in finding that he had "reason to know."

852. Kallon further submits that the Trial Chamber erred by failing to find that Kallon was "put on notice of the crimes by his alleged subordinates in Kissi Town" or that he knew of the criminal conduct and intent of sufficiently identified subordinates, as opposed to mere knowledge of crimes by RUF fighters generally.[2231]

853. The Trial Chamber correctly articulated the requirements for establishing that the superior had reason to know. Neither Party takes issue with this articulation of the law. Of particular note is the requirement that this "standard will only be satisfied if information was available to the superior which would have put him on notice of the offences committed by his subordinates or about to be committed by his subordinates."[2232] The Trial Chamber was therefore required to consider whether in fact Kallon had information which put him on notice of crimes involving those who were subordinate to him in Kono District.

854. As recited above, the scope of Kallon's effective control in Kono, which he exercised during the timeframe relevant to this incident, extended to the RUF members of lower status than himself.

[2229] Kallon Appeal, para. 140.
[2230] Trial Judgment, para. 309.
[2231] Kallon Appeal, para. 140.

Kallon was a Vanguard and a Senior Commander in Kono District, with particular responsibility for overseeing the treatment of civilians. There is no question that Kotor and his local RUF commander Alpha, were of lower status than Kallon and within the RUF in the Kono District.

855. Where a commander receives information of the alleged commission of crimes by his subordinates, he may not remain wilfully blind to those reports.[2233] Had Kallon exercised responsible command and investigated the crime of forced marriage in Kono District which the Trial Chamber found he had reason to know was being committed by his subordinates, he could have had actual knowledge of the identity of the perpetrators. The Trial Chamber found that he took no action to prevent or punish these crimes.[2234] He cannot now claim that it was not proven that he had knowledge of the identities of the subordinates or the victims involved in these specific crimes.

856. The Appeals Chamber notes that in reaching its conclusion that Kallon had reason to know of the commission of the crimes by RUF subordinates, in Kissi Town, the Trial Chamber relied on the facts that established "that the commission of the crime of 'forced marriage' was widespread in Kono District and indeed throughout Sierra Leone."[2235] The failure of the Trial Chamber to repeat each of the findings that supported that conclusion does not render the conclusion either unsupported by the over all findings or unreasonable. The Appeals Chamber recalls in this regard, the Trial Chamber's findings that there was "ample evidence that the AFRC/RUF waged an attack encompassing horrific violence and mistreatment against the civilian population of Sierra Leone, which evolved through three distinct stages."[2236] From the very first stage, November 1996 to May 1997, the Trial Chamber found that mistreatment of civilians by RUF forces was "endemic in Kailhun District" and included subjecting "women and young girls to rapes and 'forced marriages'."[2237] By the third stage, (beginning in February 1998) the Trial Chamber further found:

> The enslavement and 'forced marriages' of civilians in Kailahun District persisted as before, and these practices spread to Kono District, Bombali District, Koinadugu District, Freetown and the Western Area and Port Loko District as troops moved through these areas.[2238]

[2232] Trial Judgment, para. 310, citing *Čelebići* Appeal Judgment, para. 241; subsequently followed in *Krnojelac* Appeal Judgment, para. 154; *Blaškić* Appeal Judgment, para. 62; *Galić* Appeal Judgment, para. 184.
[2233] *Strugar* Trial Judgment, para. 376; *Kordić and Čerkez* Trial Judgment, para. 446; *Halilović* Trial Judgment, paras 97-100.
[2234] Trial Judgment, para. 2150.
[2235] Trial Judgment, para. 2148.
[2236] Trial Judgment, para. 944.
[2237] Trial Judgment, para. 945.
[2238] Trial Judgment, para. 947.

857. With particular regard to Kono District, the Trial Chamber also found that an unknown number of women were taken as "wives" by AFRC/RUF fighters in Koidu in February and March 1998.[2239]

858. Kallon was present in Kono during this time, and particularly in Koidu and on the Guinea Highway in February and March.[2240] The Trial Chamber found that on the Highway in February and March 1998 "women and girls from villages along the road were forcibly abducted by fighters. Some women were forced into marriage, used as domestics to do cooking or housework, and others were raped."[2241] In Koidu, also in February and March, the Trial Chamber found that women were forcibly taken from their husbands and families: "Some were raped and others, especially the beautiful ones, became the wives of the Commanders. These women were under the control of the Commanders and were responsible for cooking for them and 'serving them as their wives', meaning the rebels used the women for sexual purposes."[2242]

859. In Wendedu camp, which Kallon was found to have frequently visited after its establishment in April,[2243] this crime was found to have continued on a widespread basis and "an unknown number of women were forcibly kept as 'wives' by RUF fighters in the civilian camp."[2244] This was not done secretly or surreptitiously and was obvious to the witnesses who testified at trial.[2245] Also obvious was the screaming of women at night at the Wendedu camp. The Trial Chamber found women were heard by witnesses to be screaming "leave me, leave me, leave me alone. You did not bring me for this. I'm not your wife."[2246]

860. In order to demonstrate that a superior had reason to know of crimes committed or about to be committed by his subordinates, for purposes of establishing liability under Article 6(3) of the Statute, it must be established whether, in the circumstances of the case,[2247] he possessed

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[2239] Trial Judgment, para. 1291.
[2240] Trial Judgment, paras 835-836.
[2241] Trial Judgment, para 1154.
[2242] Trial Judgment, para. 1155.
[2243] Trial Judgment, paras 1174, 1232.
[2244] Trial Judgment, para. 1291.
[2245] *See e.g.,* Trial Judgment, paras 1155 (Witness TF1-071), 1178 (Witness TF1-217).
[2246] Trial Judgment, para. 1179.
[2247] The Appeals Chamber in *Čelebići* held that "an assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question." (*Čelebići* Appeal Judgment, para. 239). *See* also the ILC comment on Article 6 of the ILC Draft Code of Crimes against the Peace and Security of Mankind: "Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or had reason to know *in the circumstances at the time* that a subordinate was committing

information sufficiently alarming to justify further inquiry.[2248] From the continuous and pervasive nature of the crime of forced marriage found to have been committed by RUF members coupled with the obvious commission of the crime in Kono District in places where the Trial Chamber found Kallon to have been specifically present at the time these crimes were occurring, the Trial Chamber was reasonable in concluding that Kallon, had he intended to exercise responsible command, had "information sufficiently alarming to justify further inquiry" into whether his subordinates in Kono, including Kissi Town, were committing these crimes against civilians.

861. Having reasonably found that RUF fighters throughout Sierra Leone and specifically in Kono District were committing the crime of forced marriage the Trial Chamber was correct in concluding that the commission of the crime was so widespread and obvious, that Kallon was on notice of the risk that similar crimes would be carried out by RUF members over whom he exercised effective control in Kono District, including Kissi Town.[2249] The Appeals Chamber holds therefore, that Kallon has not demonstrated an error of law invalidating the Trial Chamber's conclusions on the *mens rea* for his superior responsibility for the crime of forced marriage committed in Kissi Town, Kono District.

4. Conclusion

862. Based on the foregoing, the Appeals Chamber dismisses Ground 13 of Kallon's appeal in its entirety.

D. Superior responsibility for the enslavement of hundreds of civilians in camps throughout Kono District between February and December 1998 (Kallon Ground 14)

1. Trial Chamber's findings

863. The Trial Chamber found that "civilians were forced to work by AFRC/RUF fighters and to carry loads to and from different areas of Kono District" between February and March 1998, and that these acts satisfied the elements of enslavement under Count 13.[2250] The Trial Chamber further

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or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime…. In the second situation, he has *sufficient relevant information to enable him to conclude under the circumstances at the time* that his subordinates are committing or are about to commit a crime." (ILC Report, pp 37-38, quoted in *Čelebići* Appeal Judgment, para. 234).

[2248] *Hadžihasanović and Kubura* Appeal Judgment, para. 28.

[2249] *Krnojelac* Appeal Judgment, paras 154, 171, 175-177.

[2250] Trial Judgment, para. 1323.

found that the detention of hundreds of civilians in RUF camps throughout Kono District between February and December 1998 satisfied the elements of enslavement under Count 13.[2251]

864. The Trial Chamber found Kallon liable under Article 6(3) of the Statute for the enslavement of hundreds of civilians in camps throughout Kono District between February and December 1998.[2252] The Trial Chamber found, however, that Kallon was in a superior-subordinate relationship with RUF fighters in Kono District only until August 1998, because it considered that the Prosecution had failed to establish his position in Kono District after the failed "Fiti-Fata" mission which was found to have occurred in August 1998.[2253] It further found that because the crime of enslavement was "of a continuous nature" it considered it "immaterial to Kallon's responsibility for its commission that he departed Kono District in August 1998."[2254]

2. Submissions of the Parties

865. Kallon challenges the Trial Chamber's finding that he was liable under Article 6(3) for the enslavement of hundreds of civilians in camps throughout Kono District between February and December 1998 as charged under Count 13.[2255] He submits that the Trial Chamber's conclusion that he had effective control over RUF troops in Kono District between February and December 1998 lacked any evidential basis and that its conclusion that he had liability under Article 6(3) for crimes committed by these troops after August 1998 constitutes an error of law.[2256] In addition, he complains that the Trial Chamber could not reasonably have found that he had a superior-subordinate relationship with the RUF fighters in Kono at any of the times in question because others in the chain of command including Rocky, Superman and Bockarie had such a relationship.[2257]

866. On the *mens rea* element for superior responsibility, Kallon submits that the Trial Chamber erred in failing to distinguish "between general knowledge and specific knowledge that

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[2251] Trial Judgment, para. 1327. The Trial Chamber found that civilian camps were established in Kono District after the Intervention in 1998 and that these camps remained in existence until disarmament in 2001. It found that these civilian camps existed at locations including PC Ground, Banya Ground near Kissi Town, Superman Ground, Kaidu, Wendedu and Kunduma.
[2252] Trial Judgment, para. 2151.
[2253] Trial Judgment, para. 2141.
[2254] Trial Judgment, para. 2146.
[2255] His submissions on alleged defects in the pleading of his superior responsibility for the crime are addressed elsewere. *See supra*, paras 132-133.
[2256] Kallon Appeal, para. 144.
[2257] Kallon Appeal, para. 145.

sufficiently identified subordinates had committed crimes."[2258] He submits that the Trial Chamber's finding that he possessed "actual knowledge of the enslavement of civilians" in RUF Camps because he had a supervisory role over them was made without any reference to his knowledge of the commission of the crime by his subordinates.[2259]

867. Kallon's additional challenges are to the Trial Chamber's findings on the crime of enslavement in Kono District, and the Appeals Chamber addresses these submissions elsewhere.[2260]

3. Discussion

(a) Did the Trial Chamber err in finding a superior-subordinate relationship?

868. In reaching its findings on the existence of a superior-subordinate relationship between Kallon and RUF fighters in Kono District, the Trial Chamber relied in part on its findings on Kallon's command role within the RUF organisation in Kono District from February 1998.[2261] With respect to his authority in civilian camps in particular, the Trial Chamber further found that: (i) Kallon visited Kaidu and Wendedu several times and that he was superior to Rocky who was the Commander of these camps;[2262] (ii) civilians were required to see Kallon in order to obtain permission to travel outside the Kaidu area, as Rocky did not have the authority to issue travel passes;[2263] (iii) Kallon gave orders to move the civilians when the camps became too close to the frontlines;[2264] and (iv) Kallon assigned Rocky on one occasion to lead a mission to Bumpeh.[2265] The Trial Chamber found that Kallon had a supervisory role over the civilian camps in Kono district even though their Commanders were directly subordinate to Superman, and that it was established beyond reasonable doubt that Kallon was able to exercise effective control over Rocky as the Commander of the camps.[2266] Based on his relationship to Rocky together with his status as a Vanguard, and Senior Commander in Kono, the Trial Chamber consequently found that Kallon was

[2258] Kallon Appeal, para. 146.
[2259] Kallon Appeal, para. 146.
[2260] *See supra*, paras 931-934.
[2261] Trial Judgment, para. 2135, *referring* to Trial Judgment, paras 833-839. *See* also *supra*, paras 842-862.
[2262] Trial Judgment, para. 2137.
[2263] Trial Judgment, para. 1228.
[2264] Trial Judgment, para. 2137.
[2265] Trial Judgment, para. 2137.
[2266] Trial Judgment, para. 2137, 2138..

also able to exercise effective control over the RUF fighters who enslaved hundreds of civilians in camps throughout Kono District between February and December 1998.[2267]

869. Kallon argues that the Trial Chamber failed to properly consider evidence that others besides him exercised control over the troops in Kono District.[2268] The Appeals Chamber reiterates that the Trial Chamber found that even though RUF Commanders in Kono District reported to Superman who was the overall commander in Kono District, as Bockarie remained in Buedu, Kallon nonetheless exercised effective control over Rocky as the Commander of the civilian camps. The Appeals Chamber considers that the indications that Bockarie exercised control over the RUF troops in Kono District at the relevant time do not exclude the conclusion that Kallon exercised effective control over Rocky and the RUF fighters who enslaved civilians in camps in Kono District. The Appeals Chamber has repeatedly maintained that the concurrent authority of other superiors does not diminish the criminal liability of an Accused under Article 6(3) when the accused is found to have possessed effective control over the same subordinates.[2269]

870. The Appeals Chamber concludes that Kallon has not established that, based on the evidence, no reasonable trier of fact could have concluded that a superior-subordinate relationship existed and that he exercised effective control over Rocky as the Commander of the civilian camps, and the RUF fighters who enslaved civilians in those camps in 1998.

(b) Did the Trial Chamber err in law as to Kallon's *mens rea*?

871. Kallon submits that the Trial Chamber erred in failing to distinguish "between general knowledge and specific knowledge that sufficiently identified subordinates had committed crimes."[2270] He avers that the Trial Chamber "simply concludes that since [he] occupied a supervisory role with respect to the civilian camps, he had *actual knowledge of the enslavement of civilians there.*" The alleged error of law on the part of the Trial Chamber, he asserts, is in finding that his knowledge was sufficient, without finding that he possessed the knowledge of specific crimes perpetrated by specifically identified persons. Kallon overlooks the Trial Chamber's findings regarding Kallon's actual presence in the camps and the manner in which he exercised his supervisory role. In addition, he gives neither reasoning nor authority for his position that "actual

[2267] Trial Judgment, para. 2146.
[2268] Kallon Appeal, para. 145.
[2269] *Brima et al*, Appeal Judgment, para. 262. *Halilović* Trial Judgment, para. 63. *See* also *Orić* Trial Judgment, paras 310, 311.

knowledge" requires a greater degree of specificity than that set out by the Trial Chamber in its findings. Those findings are consistent with its pronouncement of the applicable law, with which Kallon does not disagree. His argument fails.

(c) Did the Trial Chamber err in law in finding that Kallon's superior responsibility extended beyond the date on which he ceased to exercise effective control?

872. The Appeals Chamber considers that the Trial Chamber reasonably found that Kallon exercised effective control for the period between February and the end of August 1998. Thereafter, the Trial Chamber found that there was insufficient evidence to establish Kallon's position and command role in Kono District after the failed "Fiti-Fata" mission.[2271] The Trial Chamber accordingly found that "Kallon was in a superior-subordinate relationship with RUF fighters in Kono District until August 1998 only."[2272] However, it nonetheless held that because of the "continuous nature" of the crime of enslavement "throughout Kono District between February and December 1998," Kallon was liable for its commission for the entire period under Article 6(3) of the Statute.[2273]

873. The Appeals Chamber agrees with Kallon's contention that the findings are insufficient as a matter of law to find him liable under Article 6(3) for enslavement in Kono District after August 1998. The Trial Chamber decided that the evidence failed to establish that he had effective control over RUF forces after that date. The Appeals Chamber recalls that customary international law recognises three essential elements in order for a superior to be found guilty for a crime under command responsibility.[2274] One of those elements is the existence of a superior-subordinate relationship, by virtue of which the superior exercises effective control over the subordinate. During the existence of that relationship, superiors can be found guilty of the underlying crime of the subordinate if they knew or had reason to know of the crime and if they failed to prevent the crime or punish the perpetrator.

874. The Trial Chamber recognised the need for the coextensive existence of these three elements.[2275] In addition, the Trial Chamber reasoned in *obiter dicta* that if the crime is committed

[2270] Kallon Appeal, para. 146.
[2271] Trial Judgment, para. 2141.
[2272] Trial Judgment, para. 2141.
[2273] Trial Judgment, para. 2146.
[2274] *See supra*, para. 842.
[2275] Trial Judgment, paras 285, 299.

prior to the formation of the superior-subordinate relationship, but a superior subsequently gains effective control over the subordinate who committed the crime and the superior has notice of the previously committed crime and fails to punish the subordinate, the superior is still, in the opinion of the Trial Chamber, liable for the crime inasmuch as his duty to punish under responsible command existed simultaneously with effective control and notice.[2276] However, such situation described by the Trial Chamber did not arise at all on the facts as found by it in this case. More particularly, it is not the situation presented by the facts on which the Trial Chamber found Kallon liable, under Article 6(3), for the months the Trial Chamber found there was no evidence that he continued in a superior-subordinate relationship with the principal perpetrators of the enslavement in Kono District. Beyond the statement that enslavement was a "continuing crime" the Trial Chamber did not reason any facts that permitted a conclusion that Kallon had criminal liability under Article 6(3) for crimes committed by subordinates after he ceased to have effective control and the ability to prevent or punish. Neither did the Trial Chamber offer any explanation as to why this apparent extension of liability under command responsibility was consistent with customary international law in effect at the time of the commission of the crimes.

875. Kallon is responsible for his failure to prevent the crime of enslavement up to and including the last day on which he was found to have exercised effective control over Rocky and the RUF troops who detained civilians in camps in Kono District. Thereafter, the consequent harm caused by the continuation of the crime of enslavement, which he is found to have failed to prevent at the time when he had the ability to do so, continues to be relevant to sentencing and properly reflected in findings on the gravity of his offence.[2277] However, the Trial Chamber has failed to support, either by findings of facts or reasoning of applicable law, its conclusion that Kallon is criminally liable under Article 6(3) for the crimes of enslavement in Kono District found to have been committed, after August 1998.

4. Conclusion

876. For the foregoing reasons, the Appeals Chamber holds that the Trial Chamber erred in law in finding Kallon liable under Article 6(3) for the crime of enslavement committed in Kono District from the end of August to December 1998.

[2276] Trial Judgment, paras 299, 305, 306.
[2277] *Čelebići* Appeal Judgment, para. 732.

E. Errors relating to Count 1: Terrorising the Civilian Population (Kallon Ground 16)

1. Trial Chamber's findings

877. The Trial Chamber found that acts of terrorism were committed in Bo,[2278] Kenema,[2279] Kailahun,[2280] and Kono Districts.[2281] In Bo,[2282] Kenema,[2283] Kailahun,[2284] Kono Districts,[2285] Kallon incurred Article 6(1) JCE liability for crimes committed under Count 1.

2. Submissions of the Parties

878. Kallon sets out four principal arguments in his Ground 16. First, he contends that the Trial Chamber erred in law by relying on the burning of civilian homes in Koidu Town as acts of terrorism, whereas Koidu Town is not listed as a location under Count 14, and therefore he contends he had "no notice of these occasions and crimes."[2286]

879. Second, he argues that the Trial Chamber erred in law in convicting him of acts of terrorism. he argues that there is no consensus on the definition of terrorism in international criminal law currently and there was even less consensus when the acts were allegedly committed. Accordingly, Kallon contends, the crime lacks sufficient precision, thereby violating the principle of *nullum crimen sine lege*.[2287]

880. Third, Kallon submits that the Trial Chamber erred in fact in inferring that the acts were committed with the specific intent to cause terror, whereas other inferences were available from the evidence.[2288]

881. Fourth, Kallon argues that the Trial Chamber failed to provide adequate reasoning in support of its findings relating to unlawful killings as acts of terrorism in Kono District, thus depriving him of a meaningful review on appeal. Kallon argues that the Trial Chamber found that there was "an overwhelming amount of evidence that point[s] to the execution of policies that

[2278] Trial Judgment, paras 1031-1037.
[2279] Trial Judgment, paras 1122-1130.
[2280] Trial Judgment, paras 1491, 1493.
[2281] Trial Judgment, paras 1340-1365.
[2282] Trial Judgment, para. 2008.
[2283] Trial Judgment, para. 2056.
[2284] Trial Judgment, para. 2163.
[2285] Trial Judgment, para. 2102.
[2286] Kallon Appeal, para. 171, *citing* Trial Judgment, para. 2064.
[2287] Kallon Appeal, paras 157-160.

promote violence, targeted civilians, civilian object[s] in order to spread terror among the civilian population" and did not consider any alternative reasons for the conduct or explain its rationale.[2289]

882. The Prosecution responds that it is settled case law that the prohibition of terror against the civilian population is part of customary international law and a crime punishable under the Statute.[2290] The Prosecution further argues that the "the specific intent to spread terror need not be the only purpose of the unlawful acts or threats of violence", and the fact of coexisting purposes does not disprove the specific intent to spread terror.[2291] Kallon replies that even if acts of terrorism were a recognised crime during the relevant time-period, the specific intent to spread terror was not the only reasonable inference available from the evidence.[2292]

3. Discussion

(a) Notice of acts of burning in Koidu Town

883. Kallon submits that the Trial Chamber "erred in law by relying on the burning of civilian homes in Rembodu [*sic*][2293] and Koidu Town not pleaded in the indictment. This occasioned prejudice to the Accused preparation for defence as he had no notice of these occasions and crimes."[2294] As a preliminary matter, the Appeals Chamber notes that the Trial Chamber makes no reference to the location "Rembodu" in its judgment. The Appeals Chamber therefore understands Kallon to contend that he lacked notice of the crimes because Koidu Town was not a named location in the Indictment under Count 14, which pertained to acts of burning.

884. The Indictment particularises the charge under Counts 14 in relation to Kono District as follows:

> Between about 14 February 1998 and 30 June 1998, AFRC/RUF engaged in widespread looting and burning in various locations in the District, including Tombodu, Foindu and Yardu Sando, where virtually every home in the village was looted and burned.[2295]

[2288] Kallon Appeal, para. 161.
[2289] Kallon Appeal, para. 169, *quoting* Trial Judgment, para. 1342.
[2290] Prosecution Response, para. 7.7, *citing* Trial Judgment, para. 112.
[2291] Prosecution Response, para. 7.9, *quoting* Trial Judgment, para. 121; *Fofana and Kondewa* Appeal Judgment, para. 357.
[2292] Kallon Reply, para. 44.
[2293] The Trial Chamber, in fact, made no findings in regard to Rembodu.
[2294] Kallon Appeal, para. 171 (internal quotation omitted).
[2295] Indictment, para. 80.

885. The relevant question on appeal is whether the pleading of locations of acts of burning in Kono District as "in various locations in the District, including Tombodu, Foindu and Yardu Sando" without naming Koidu Town, is sufficiently specific to allow Kallon to prepare his defence for alleged JCE liability for acts of burning as terrorism in Koidu Town.

886. The Appeals Chamber recalls that the specificity required for the pleading of locations will depend on factors including those previously discussed.[2296] Kallon was convicted for acts of burning as acts of terrorism pursuant to his participation in the JCE. His liability for these acts derives significantly from his conduct in relation to other events and crimes, including those committed in locations in Kono that were pleaded with sufficient specificity.[2297] Much of his culpable conduct did not occur in Koidu Town, and therefore the pleading of the location does not require a high degree of specificity for Kallon's ability to prepare his defence with respect to his culpable conduct.

887. In regard to his notice of the alleged criminal acts in Koidu Town, the Appeals Chamber recalls that the Trial Chamber found that nonexhaustive pleading of locations may be adequate in light of the "sheer scale" of the alleged crimes.[2298] Therefore, in this case, Kallon had adequate notice notwithstanding the nonexhaustive pleading of locations.[2299] The Appeals Chamber has not found error in the Trial Chamber's general approach to applying the exception,[2300] and Kallon has not offered any argument as to why this exception to the requirements for pleading specificity should not apply to the pleading of acts of burning in Koidu Town, in view of the fact that his liability is pursuant to his participation in the JCE. Accordingly, the Appeals Chamber, Justices Winter and Fisher dissenting, reject Kallon's submission.

[2296] *See supra*, para. 830.
[2297] The Trial Chamber found that his relevant participation in the JCE included (i) involvement in the planning and execution of the attack against Koidu Town, (ii) participation in a meeting with Johnny Paul Koroma, Sesay and Superman in Koidu Town, (iii) presence in Koidu Town when AFRC/RUF fighters burned houses and killed civilians, (iv) ordering ambushes along the Makeni-Kono Highway between April and August 1998, (v) use of children under the age of 15 years as bodyguards, (vi) participation in the abduction for and planning of training SBUs in Kono, and (vii) ordering civilians to go on "food-finding" missions during which they were raped by RUF fighters, which activity Kallon endorsed and encouraged. Trial Judgment, paras 2093-2099.
[2298] Trial Judgment, para. 422, *citing Sesay* Decision on Form of Indictment, para. 23.
[2299] *Sesay* Decision on Form of Indictment, para. 23.
[2300] *See supra*, para. 52, 60, 172.

(b) Is the crime of acts of terrorism as charged under Count 1 insufficiently precise in violation of the principle *nullum crimen sine lege*?

888. The principle of *nullum crimen sine lege* provides that "a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed."[2301] The principle further requires that the criminality of the conduct as charged by the Prosecution was sufficiently foreseeable and accessible at the relevant time period for it to warrant a criminal conviction and sentence.[2302] The Appeals Chamber notes that the principle of *nullum crimen sine lege* does not impede the development of the law through the interpretation and clarification of the elements of a particular crime,[2303] but it does preclude the creation of a new criminal offence by defining a crime that was previously undefined or "interpreting existing law beyond the reasonable limits of acceptable clarification."[2304]

889. The starting point for analysis is the crime under the criminal heading chosen by the Prosecution for which the Appellant was convicted and sentenced.[2305] The Appeals Chamber notes that the Trial Chamber found that Count 1, as charged by the Prosecution, was a charge defined under Article 13(2) of Additional Protocol II.[2306] The Appeals Chamber recalls that the specific elements of acts of terrorism as defined under Article 13(2) of Additional Protocol II are (i) acts or threats of violence; (ii) the Accused wilfully made the civilian population or individual civilians not taking direct part in hostilities the objects of those acts or threats of violence; and (iii) the acts or threats of violence were carried out with the specific intent of spreading terror among the civilian population.[2307] The Appeals Chamber adopts the opinion of the ICTY Appeals Chamber that the prohibition of terror against a civilian population as enshrined under Article 13(2) of Additional Protocol II has been declared an offence that gives rise to individual criminal responsibility under customary international law by 1992.[2308] The Appeals Chamber, therefore, considers that acts of terrorism as defined under Article 13(2) of Additional Protocol II incurred individual criminal responsibility at the time of the offences for which Kallon was convicted. Kallon asserts, however,

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[2301] *Milutinović et al.* Decision of Jurisdiction- JCE, para. 37.
[2302] *Milutinović et al.* Decision of Jurisdiction- JCE, para. 37.
[2303] *Milutinović et al.* Decision of Jurisdiction- JCE, para. 38, *quoting Aleksovski* Appeal Judgment, paras 126-127; *Čelebići* Appeal Judgment, para. 173; *Vasiljević* Trial Judgment, para. 196.
[2304] *Milutinović et al.* Decision of Jurisdiction- JCE, para. 38;*Vasiljević* Trial Judgment, para. 196.
[2305] *See Milutinović et al.* Decision of Jurisdiction- JCE, para. 37; *Vasiljević*, para. 193.
[2306] Trial Judgment, para. 111, *citing Fofana and Kondewa* Appeal Judgment, para. 349.
[2307] *Fofana and Kondewa* Appeal Judgment, para. 350, *citing Galić* Appeal Judgment, paras 99-104*; Galić* Trial Judgment, para. 133; *Blagojević and Jokić* Trial Judgment, para. 589.
[2308] *Galić* Appeal Judgment, paras, 93-98, 113-129.

that the crime prohibiting acts of terror against a civilian population was insufficiently precise or accessible to determine criminal conduct during the relevant time period.[2309]

890. The Appeals Chamber is not persuaded by this assertion. Kallon points to various formulations of the crime of terrorism to support his claim that the definition of the crime was unsettled at the time of the offences here.[2310] However, the authority he relies on concerns prohibitions against terrorism or terrorism-related offences found in other international law than that controlling the crime now in question and are therefore inapposite to his claim that the prohibition found in Article 13(2) of Additional Protocol II was not customary international law at the time of the offences.[2311] Kallon's bare argument that the prohibition in Article 13(2) of Additional Protocol II has been variously described as "infliction of terror,"[2312] "terror against the civilian population"[2313] or "acts of terrorism"[2314] does not demonstrate that the elements of the offence, whatever its title, were not "defined with sufficient clarity under customary international law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible"[2315] at the time period relevant to commission of the offences.

891. The Appeals Chamber notes that a determination of "foreseeability" and "accessibility" with respect to the principle of *nullum crimen sine lege* must take into account the "specificity of international law."[2316] The prohibition against acts of terror as set out in Article 13(2) of Additional Protocol II is by its grounding in the laws of war considered customary international law.[2317] Customary law is not always laid out in written form and therefore determination of its accessibility may not be straightforward.[2318] However, in this instance, by virtue of its customary international law nature and codification in the Additional Protocols, the prohibition against acts of terror as enshrined in Article 13(2) of Additional Protocol II is sufficiently foreseeable and accessible to put the Appellant on reasonable notice that infringement of this norm could entail criminal

[2309] Kallon Appeal, para, 158, *citing Galić* Trial Judgment, Separate and Partially Dissenting Opinion of Judge Neito-Navia, paras 108-109; *Galić* Appeal Judgment, Separate Dissenting Opinion of Judge Shahabuddeen, para. 3.
[2310] Kallon Appeal, paras 157-160.
[2311] Kallon Appeal, para. 159.
[2312] Kallon Appeal, para. 158, fn. 429, *citing Galić* Appeal Judgment, para. 86.
[2313] Kallon Appeal, para. 158, fn. 429, *citing Brima et al.* Trial Judgment, paras 660-671.
[2314] Kallon Appeal, para. 158, fn. 429, *citing* Trial Judgment, paras 6, 110, 113, 115, 1032, 1096.
[2315] *Vasiljević* Trial Judgment, para. 201 (emphasis omitted).
[2316] *See Milutinović et al.* Decision of Jurisdiction- JCE, para. 38.
[2317] *Galić* Appeal Judgment, paras 97-105.
[2318] *Milutinović et al.* Decision of Jurisdiction- JCE, paras 41-42

responsibility.[2319] Kallon's conviction under Count 1 therefore does not violate the principle of *nullum crimen sine lege*. Kallon's submission in this regard is dismissed.

(c) Did the Trial Chamber err in finding that attacks in Bo, Kenema, and Kailahun Districts were committed with the specific intent to spread terror?

892. In arguing that multiple reasonable inferences could be drawn relating to the specific intent for acts of terrorism,[2320] Kallon offers alternative inferences that are either unsupported by the Trial Chamber's findings or the evidence or have been duly considered by the Trial Chamber. The Appeals Chamber notes that the Trial Chamber explicitly considered alternative inferences such as the directing of attacks at legitimate military targets[2321] and found that attacks such as the one on Tikonko "were not directed at any military or other legitimate objective."[2322] With regard to acts that Kallon asserts were perpetrated in the context of theft,[2323] the Trial Chamber found that the looting of money from Ibrahim Kamara was not an act of terror,[2324] but rather amounted to an act of pillage.[2325] The Trial Chamber found, however, that the killing of Tommy Bockarie when he refused to turn over a cassette player in the context of an attack on Sembehun was an act of violence that "served no discernible purpose apart from terrorising the civilian population."[2326] In this way, the Trial Chamber considered and distinguished acts that were solely perpetrated in the context of thefts from those acts that evinced the specific intent to spread terror. In light of the Trial Chamber's findings, Kallon fails to explain why no reasonable trier of fact could have excluded his proposed inferences based on the evidence adduced at trial.

893. Moreover, where the Trial Chamber's findings point to the possibility of an additional purpose for the acts found to constitute acts of terrorism, the Appeals Chamber recalls that "[t]he specific intent to spread terror need not be the only purpose of the unlawful acts or threats of violence," and the fact of coexisting purposes does not disprove the specific intent to spread terror provided the intent to spread terror was "principal among the aims."[2327] Kallon in putting forth multiple alternative inferences does not challenge the primacy of the specific intent to spread

[2319] *See Galić* Appeal Judgment, Separate Dissenting Opinion of Judge Shahabuddeen, para. 5, *citing Tadić* Jurisdiction Decision, paras 128-129; *Akayesu* Trial Judgment, paras 611-617.
[2320] Kallon Appeal, para. 161.
[2321] Kallon Appeal, para. 162.
[2322] Trial Judgment, para. 1032.
[2323] Kallon Appeal, para. 163.
[2324] Trial Judgment, para. 1034.
[2325] Trial Judgment, para. 1029.
[2326] Trial Judgment, para. 1035.

terror.[2328] Therefore, the mere existence of additional purposes such as the enslavement of civilians to mine for diamonds in Cyborg Pit[2329] in order to realise a profit does not alone disprove the requisite intent to spread terror. With regard to sexual violence in Kailahun, Kallon puts forth the alternate inference that sexual violence was committed "for the individual perpetrators' own sexual gratification."[2330] However, the Trial Chamber explicitly found that sexual violence committed in Kailahun was "not intended merely for personal satisfaction or a means of sexual gratification for the fighter," but rather the "savage nature of such conduct against the most vulnerable members of the society demonstrates that these acts were committed with the specific intent of spreading fear amongst civilian population as a whole."[2331] In other instances, the Trial Chamber found that the alternative inference posited by Kallon such as preventing opposition and addressing the Kamajor military threat[2332] were closely intertwined with the intent to spread terror such that crimes committed were "intended to illustrate the gruesome repercussions of collaborating or being perceived to collaborate with enemies of the RUF and so to terrorise and subdue the population."[2333] Kallon accordingly fails to demonstrate the error in the Trial Chamber's findings that the criminal acts perpetrated in Bo, Kenema, and Kailahun were committed with the specific intent to spread terror.

(d) Did the Trial Chamber fail to provide a sufficiently reasoned opinion with respect to acts of terrorism in Kono?

894. The Appeals Chamber recalls that, while the Trial Chamber is obliged to provide a reasoned opinion,[2334] it is not required to articulate every step of its reasoning in relation to each finding it makes or to set out in detail why it accepted or rejected a particular piece of evidence.[2335] It need only make findings of material facts that are essential to the determination of guilt in relation to a particular Count.[2336]

[2327] *Fofana and Kondewa* Appeal Judgment, para. 357; *Galić* Appeal Judgment, para. 104.
[2328] Kallon Appeal, paras 161-167.
[2329] Kallon Appeal, para. 166.
[2330] Kallon Appeal, para. 167.
[2331] Trial Judgment, para. 1348.
[2332] Kallon Appeal, para. 165
[2333] Trial Judgment, para. 1125.
[2334] Article 18 of the Statute and Rule 88(C) of the Rules.
[2335] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 18; s*ee* also *Brđanin* Appeal Judgment, para. 39.
[2336] *Brima et al*. Appeal Judgment, para. 268.

895. The Trial Chamber explained that the killing of an unknown number of civilians during an attack on Koidu Town,[2337] the killing of 30 to 40 civilians by Rocky,[2338] the killing of a 15 year old boy,[2339] the killing of an unknown number of civilians by Savage and Staff Alhaji,[2340] the killing of Chief Sogbeh,[2341] and the killing of Sata Sesay's eight family members[2342] amounted to acts of terrorism in Kono,[2343] by stating that these unlawful killings "were all committed widely and openly, without any rationale objective, except to terrorise the civilian population into submission."[2344] The Trial Chamber also explained that its findings were based on "an overwhelming amount of evidence that point[s] to the execution of policies that promoted violence, targeted civilians, [and] civilian objects in order to spread terror among the civilian population."[2345] In addition, Kallon's contention that the Trial Chamber did not consider any alternative reasons for the unlawful killings is belied by the fact the Trial Chamber found that the unlawful killings amounting to acts of terrorism were carried out "without any rationale [*sic*] objective."[2346] The Trial Chamber in this way sufficiently reasoned that certain unlawful killings in Kono amounted to acts of terrorism while the killing of Waiyoh and the unlawful killings in Koidu Buma and near PC Ground did not.[2347]

896. For these reasons, Kallon fails to establish that the Trial Chamber erred in finding him responsible for acts of terrorism in Bo, Kenema, Kailahun and Kono Districts.

4. Conclusion

897. In light of the foregoing, the Appeals Chamber dismisses Kallon's Ground 16 in its entirety.

[2337] Trial Judgment, paras 1269, 1270.
[2338] Trial Judgment, para. 1271.
[2339] Trial Judgment, para. 1272.
[2340] Trial Judgment, paras 1273-1275.
[2341] Trial Judgment, para, 1276.
[2342] Trial Judgment, para. 1277.
[2343] Trial Judgment, paras 1341-1343.
[2344] Trial Judgment, para. 1343.
[2345] Trial Judgment, para. 1342.
[2346] Trial Judgment, para. 1343.
[2347] Trial Judgment, paras 1344, 1345.

F. Alleged errors relating to physical violence (Kallon Ground 19)

1. Trial Chamber's findings

898. The Trial Chamber found that Kallon incurred JCE liability under Counts 10 to 11, *inter alia*, for the physical mistreatment of TF1-122 and the infliction of physical violence on TF1-129 in Kenema Town,[2348] and the amputation of the hands of three civilians[2349] and the flogging of TF1-197 and his brother in Tombodu in Kono District.[2350]

2. Submissions of the Parties

899. Kallon submits that the Trial Chamber erred in law and in fact by convicting him for acts of physical violence at locations in Kono District not pleaded in the Indictment, and that this defect was not cured.[2351]

900. In relation to acts of physical violence in Kenema District, Kallon submits that there was no evidence that he knew about, contributed to, or shared with the perpetrators the intent to commit the beatings of TF1-122 and of TF1-129.[2352] He also claims a lack of evidence that he knew about or shared the intent for the amputations of the hands of three civilians and the flogging of TF1-197 and his younger brother.[2353] As to the amputations, Kallon further claims a lack of evidence that he "was in any way linked to the perpetrators of the crime," and as to the flogging he avers that the perpetrators "were neither under his control or authority."[2354] The Prosecution responds that it was only required that Kallon substantially contributed to the JCE.[2355] Kallon offers no additional arguments in reply.

3. Discussion

901. With respect to physical violence in Kono District, the Indictment particularises the charge under Counts 10 and 11 in relation to Kono District as follows:

[2348] Trial Judgment, paras 1110-1112, 2050, 2056.
[2349] Trial Judgment, paras 1172, 2063, 2102.
[2350] Trial Judgment, paras 1173, 2063, 2102.
[2351] Kallon Appeal, para. 174.
[2352] Kallon Appeal, para. 176.
[2353] Kallon Appeal, para. 175.
[2354] Kallon Appeal, para. 175.
[2355] Prosecution Response, para. 7.67.

> Between about 14 February 1998 and 30 June 1998, AFRC/RUF mutilated an unknown number of civilians in various locations in the District, including Tombodu, Kaima (or Kayima) and Wondedu. The mutilations included cutting off limbs and carving "AFRC" and "RUF" on the bodies of the civilians.[2356]

902. The relevant question on appeal is whether the pleading of locations of acts of physical violence in Kono District as "in various locations in the District, including Tombodu, Kaima (or Kayima) and Wondedu" without naming Penduma and Yardu, is sufficiently specific to allow Kallon to prepare his defence for alleged JCE liability for acts of physical violence in Penduma and Yardu.

903. The Appeals Chamber recalls that the specificity required for the pleading of locations will depend on factors including those previously listed.[2357] Kallon was convicted for acts of physical violence pursuant to his participation in the JCE. Kallon makes no submission that he directly participated in any of these crimes, and in fact he contends he did not know of them. His liability is pursuant to his participation in the JCE and it is derived from his conduct in relation to other events and crimes which were committed at locations that were named in the Indictment.[2358]

904. In regard to his notice of the alleged criminal acts in Penduma and Yardu, the Appeals Chamber recalls that the Trial Chamber found that nonexhaustive pleading of locations may be adequate in light of the "sheer scale" of the alleged crimes.[2359] The Appeals Chamber has not found error in the Trial Chamber's general approach to applying the exception,[2360] and Kallon has not offered any argument why this exception to the requirements for pleading specificity should not apply to the acts of physical violence in Penduma and Yardu, in view of the fact that his liability is pursuant to his participation in the JCE. Accordingly, this submission is dismissed.

905. With respect to physical violence in Kenema District, the Appeals Chamber notes that the Trial Chamber did not specifically detail how it reached the conclusion that Kallon shared the intent for the acts of physical violence in question, nor did it expressly set out on which evidence it relied.[2361] Nonetheless, the Appeals Chamber considers that the Trial Chamber's conclusion was open to a reasonable trier of fact. Based on the "widespread and systematic nature of the crimes," the Trial Chamber found that the Supreme Council, of which Kallon was a member, initiated a

[2356] Indictment, para. 62.
[2357] *See supra*, para. 830.
[2358] *See supra*, para. 886, fn. 2515.
[2359] Trial Judgment, para. 422, *citing* Sesay Decision on Form of Indictment, para. 23.
[2360] *See supra*, para. 52, 60, 172.

"deliberate" policy of commission of crimes.[2362] Kallon was also "directly involved in the commission of crimes designed to further the common purpose," in particular the killing of enslaved civilian miners and enslavement, both of which he was found to have endorsed.[2363] He had an active combat role in the February/March 1998 attack on Koidu Town during which an unknown number of civilians were killed by Junta forces.[2364] Moreover, the Trial Chamber found that Kallon endorsed Johnny Paul Koroma's order to burn houses and kill civilians in Koidu Town in March 1998.[2365] He was further found to have participated in a mock vote on TF1-015's life, wherein he voted to kill the witness.[2366] In addition, Kallon received regular communications about the activities of the joint forces in Kono.[2367]

906. The Appeals Chamber, Justices Winter and Fisher dissenting, holds that these findings provide a sufficient basis on which a reasonable trier of fact could have inferred that Kallon also intended this crime. As Kallon does not question the evidence underpinning these findings, and in light of the fact that JCE liability does not require that Kallon knew about or intended the specific criminal incidents in question,[2368] the Appeals Chamber, Justices Winter and Fisher dissenting, rejects his submission.

907. Turning to Kallon's *actus reus*, the Appeals Chamber notes that he did not have to participate specifically in the crimes, so long as his participation in the JCE was such that he thereby significantly contributed to them.[2369] JCE liability also does not require "control or authority" over the perpetrators.[2370] Trial Chamber found that the three amputations and the flogging were both committed by fighters led by Staff Alhaji, who was used by the JCE members to commit crimes in furtherance of the Common Criminal Purpose.[2371] These findings demonstrate how the Trial Chamber "linked" the crimes to Kallon as a participant in the JCE.[2372] Because Kallon does not address the evidence relied on for these findings, his submission is dismissed.

[2361] *See* Trial Judgment, paras 2056, 2102.
[2362] Trial Judgment, para. 2004.
[2363] Trial Judgment, paras 2005, 2006.
[2364] Trial Judgment, paras 795, 1146, 2093.
[2365] Trial Judgment, paras 2093, 2103.
[2366] Trial Judgment, paras 1150, 2099.
[2367] Trial Judgment, para. 2097.
[2368] *See supra*, para. 823; *see also Rwamakuba* JCE Decision, para. 19, *quoting* the *Justice* Case; *Kvočka et al*. Appeal Judgment, para. 276.
[2369] *E.g. Krajišnik* Appeal Judgment, para. 706; *Kvočka et al*. Appeal Judgment, para. 96.
[2370] *See supra*, paras 414-415
[2371] Trial Judgment, paras 1172, 1173, 2063 (section 4.1.1.3 (iii), (vi)), 2080.
[2372] *See supra*, paras 397-402, 414, 415.

908. The Appeals Chamber dismisses Kallon's Ground 19 in its entirety.

G. Alleged error in convicting Kallon of planning the use of children under the age of 15 to participate actively in hostilities (Kallon Ground 20)

1. Trial Chamber's findings

909. The Trial Chamber convicted Kallon for planning the crime of using children under the age of 15 by the RUF to participate actively in hostilities in Kailahun, Kenema, Kono and Bombali Districts between 1997 and September 2000.[2373]

2. Submissions of the Parties

910. Kallon challenges his conviction for planning the use of child soldiers and submits that the Trial Chamber erred in finding that the elements of planning had been proven.[2374] In addition to this broad claim, he advances a number of arguments in support.[2375]

911. First, Kallon submits that the Trial Chamber failed to demonstrate that he was a senior RUF Commander during the attack on Koidu Town in February 1998 and how this position substantially contributed to the crime.[2376] Further, he argues that the Trial Chamber erred in finding that, with respect to crimes in Kono District, he "made a substantial contribution in the abduction of a large number of children to be sent to RUF camps."[2377]

912. Second, with respect to crimes in Kailahun District, Kallon submits that there is no evidence that he was involved in the decision-making processes that established the training bases at Bayama and Bunumbu, or in the planning of abduction of boys and girls and their subsequent training in these training bases.[2378] In addition, Kallon submits that the Trial Chamber erred in finding that he, Sesay and Superman gave orders that "young boys" should be trained to become soldiers.[2379]

[2373] Trial Judgment, para. 2234. In the Trial Judgment Kallon is convicted for planning use of child soldiers in Kailahun, Kono and Bombali Districts. The Corrigendum to the Trial Judgment includes Kenema District as well. *See* Corrigendum 7 April 2009, pp. 5-6.
[2374] Kallon Appeal, paras 190-227.
[2375] Kallon's arguments relating to pleading requirements in the Indictment have been dealt with elsewhere in the Judgment. *See supra,* paras 139-145.
[2376] Kallon Appeal, para. 192.
[2377] Kallon Appeal, para. 194, *citing* Trial Judgment, paras 1629-1632.
[2378] Kallon Appeal, paras 205-208.
[2379] Kallon Appeal, paras 209, 210.

913. Third, Kallon submits that the Trial Chamber erred in finding that he was involved in the use of child soldiers in 1994.[2380] Kallon further alleges that the Trial Chamber erred by relying on his presence in Zogoda with child soldiers to demonstrate a consistent pattern of conduct in violation of Rule 93 of the Rules.[2381]

914. Fourth, Kallon submits that the Prosecution did not discharge its burden of proof regarding the ages of children whose use he was found to have planned and that the Trial Chamber erred in law in establishing his *mens rea*.[2382]

915. The Prosecution responds that contrary to Kallon's assertion, the Trial Chamber did not rely on his command position in the RUF or his mere presence to convict him.[2383] As to Kallon's assertion that there is no evidence of his involvement in the decision making processes that established the training bases or the planning of the abduction of boys and girls and their subsequent training in Bayama or Bunumbu,[2384] the Prosecution responds that the law on planning does not require proof that the accused participated in the planning of every aspect of the operation or the actual crimes that are committed in the course of the operation.[2385] It submits that moreover, direct evidence of the accused's specific contribution to the plan is not necessary and that some or all of the elements of the crime may be established circumstantially based on the evidence as a whole,[2386] in which case the fact that certain witnesses did not mention or implicate him in their testimonies becomes irrelevant.[2387]

916. The Prosecution responds that contrary to Kallon's submission on the alleged shifting of the burden of proof, the Trial Chamber "correctly applied settled case law … according to which the *mens rea* standard of 'had reason to know' or 'should have known' encompasses negligence and requires the perpetrator to act with due diligence in the relevant circumstances."[2388] It submits that

[2380] Kallon Appeal, paras 219, 220, *citing* Trial Judgment, para. 1615.
[2381] Kallon Appeal, para. 221, *citing* Trial Judgment, para. 1615.
[2382] Kallon Appeal, paras 222- 227.
[2383] Prosecution Response, para. 7.77; *see* also para. 7.79.
[2384] Kallon Appeal, para. 205.
[2385] Prosecution Response, para. 7.81.
[2386] Prosecution Response, para. 7.81 *citing Brđanin* Appeal Judgment, paras 12-13, 25, 337; *Gacumbitsi* Appeal Judgment, paras 72, 115; *Kamuhanda* Appeal Judgment, para. 241; *Ntakirutimana* Appeal Judgment, para. 262; *Naletilić and Martinović* Appeal Judgment, paras 491-538.
[2387] Prosecution Response, para. 7.81.
[2388] Prosecution Response, para. 7.87.

it was accordingly "not absurd for the Trial Chamber to require that the perpetrator in a context of massive recruitment ascertains the person's age."[2389]

3. Discussion

(a) Abduction of children during the attack on Koidu Town in 1998

917. In finding that Kallon was a senior RUF commander during the attack on Koidu Town in February 1998,[2390] the Trial Chamber found that Kallon held the rank of Major during the retreat to Kono in February 1998[2391] and that he gave orders which were complied with by troops.[2392] Kallon does not challenge these findings or show how no reasonable trier of fact could have reached those findings on the basis of the evidence.[2393] This submission is dismissed.

(b) Training of children in Kailahun District

918. Kallon argues that the Trial Chamber erred in finding that he gave orders that "young boys" be trained, as the Trial Chamber itself found that the boys to be trained were over 15 years of age.[2394] The Appeals Chamber has previously considered this issue in addressing Sesay's Ground 43, and reiterates its conclusion that Kallon misinterprets the Trial Chamber's findings.[2395] Similarly, the Appeals Chamber has previously considered the Trial Chamber's reliance on the testimony of Witness TF1-366 in addressing Sesay's Ground 43, and reiterates its conclusion that the Trial Chamber reliance on that testimony was not erroneous.[2396] Kallon further fails otherwise to establish that the Trial Chamber erred in finding the testimony of Witness TF1-366 credible. This submission is rejected.

919. The Appeals Chamber also rejects Kallon's argument that it is not established beyond reasonable doubt that the boys and girls trained at the RUF training bases were under the age of 15.[2397] Witnesses TF1-141 and TF1-263 testified that they were 12 and 14 years of age respectively

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[2389] Prosecution Response, para. 7.87 (internal quotations omitted).
[2390] Trial Judgment, para. 2232.
[2391] Trial Judgment, para. 833.
[2392] Trial Judgment, paras 835-836.
[2393] Kallon Appeal, para. 192.
[2394] Kallon Appeal, para. 209, *citing* Trial Judgment, paras 1638, 2232.
[2395] *See supra*, para. 755.
[2396] *See supra*, para. 759.
[2397] Kallon Appeal, paras 205, 208.

at the time they were abducted and sent for military training.[2398] Similarly, Witness Dennis Koker saw Kallon bring juveniles under the age of 15 to Bunumbu for training.[2399] The Trial Chamber accepted the testimonies of the Witnesses and found them credible. Kallon has not established that no reasonable trier of fact could rely on their testimonies for a finding of fact. This submission is rejected.

(c) The conscription and use of child soldiers by the RUF in 1994

920. Kallon argues that the Trial Chamber relied on the testimony of Witness TF1-045 to establish his guilt for planning use of child soldiers.[2400] However, contrary to Kallon's assertion,[2401] the Trial Chamber did not rely on his presence in Camp Zogoda to demonstrate a consistent pattern of conduct in violation of Rule 93(B) of the Rules. Rather, the Trial Chamber found that the fact that children between the ages of 8 and 15 were trained at Camp Naama in Liberia; and Matru Jong and Pendembu and Camp Zogoda in Sierra Leone "demonstrates a consistent pattern of conduct by the RUF of recruiting and training children for military purpose that began as early as 1991 and continued throughout the Indictment period."[2402] Although the Trial Chamber also noted that Kallon was seen at Camp Zogoda with fighters in 1994, its finding on the consistent pattern of conduct related to the RUF rather than Kallon specifically. Moreover, there is no further indication that the Trial Chamber relied on the evidence that Kallon was at Camp Zogoda in 1994 to establish his liability for planning the crimes between 1997 and 2000. There is therefore no violation of Rule 93(B) of the Rules and consequently, no error as alleged. This submission is rejected.

(d) Whether the Trial Chamber erred in its assessment of the ages of alleged child soldiers and Kallon's *mens rea*

921. With respect to Kallon's submission that the Trial Chamber found that he and Sesay gave orders for "young boys" to be trained, but that those boys were 15 years of age and above, the Appeals Chamber refers to its conclusion above that some of the "young boys" included persons both under and above the age of 15.[2403] The Appeals Chamber recalls its decision concerning the Trial Chamber's assessment of the credibility of Witnesses TF1-141, TF1-263, TF1-366 and Dennis

[2398] Trial Judgment, paras 1697-1698.
[2399] Trial Judgment, para. 1638
[2400] Kallon Appeal, paras 219, 220.
[2401] Kallon Appeal, para. 221.
[2402] Trial Judgment, para. 1615.
[2403] *See supra*, paras 770-776, 918, 919.

Koker, particularly in relation to the ages of the children with whom they associated Kallon.[2404] The Appeals Chamber also recalls that the Trial Chamber exercised caution in determining the ages of children associated with the rebel factions in its findings.[2405] The Appeals Chamber defers to these findings[2406] and dismisses Kallon's argument regarding the testimonies of Witnesses TF1-141, TF1-263, TF1-366 and Dennis Koker relating to the ages of children.

922. Kallon contends that the Trial Chamber found that he "knew or had reason to know that the persons conscripted 'may have been' under the age of 15" was erroneous given its inconclusive nature, thereby suggesting that it was not the only reasonable inference that could be drawn from the evidence.[2407] Kallon mischaracterises the Trial Chamber's findings. Contrary to his assertion, the Trial Chamber did not find that he "knew or had reason to know that persons conscripted 'may have been' under the age of 15."[2408] Rather, the Trial Chamber identified several factors which it found to be "cumulatively sufficient to put the fighters who perpetrated the abductions and military training on notice that the persons involved may have been under the age of 15."[2409] Accordingly, this part of Kallon's argument must fail.

923. Kallon further submits that the Trial Chamber shifted the burden of proof to him by stating that "where doubt existed as to whether a person abducted or trained was under the age of 15, it was incumbent upon the perpetrator to ascertain the person's age."[2410] The Appeals Chamber has previously held that the prohibition on conscripting or using child soldiers existed in customary international law at the times relevant to the offences in this case, and that violation of this prohibition incurs individual criminal responsibility in customary international law.[2411] In reaching those holdings, the Appeals Chamber observed that a significant body of conventional international law imposes an obligation on parties to "take all feasible measures" to ensure that children are not recruited or used in hostilities.[2412] The accused are under a duty to act with due diligence to ensure that children under the age of 15 are not recruited or used in combat. Failure to exercise such due diligence to ascertain the age of recruits does not relieve an accused of his liability for their

[2404] *See supra*, paras 240, 919
[2405] Trial Judgment, paras 1627 ,1628.
[2406] *See supra*, paras 240, 919.
[2407] Kallon Appeal, para. 225.
[2408] Kallon Appeal, para. 225.
[2409] Trial Judgment, para. 1704.
[2410] Kallon Appeal, paras 225-227, *citing* Trial Judgment, para. 1704.
[2411] *Norman* Child Recruitment Decision, paras 17-24, 38-39.
[2412] *Norman* Child Recruitment Decision, para. 41.

recruitment or use.[2413] The Appeals Chamber therefore finds no error in the Trial Chamber's statement that the accused were under a duty to exercise due diligence to ascertain the age of a child.

(e) Did the Trial Chamber err in finding that Kallon planned the use of child soldiers?

924. Kallon submits a number of arguments contesting the Trial Chamber's finding that he planned the use of child soldiers.[2414] Kallon argues that the Trial Chamber relied solely on his command role to support that finding,[2415] and argues that there was no evidence that he was involved in the planning of the abduction and training of children.[2416]

925. The Trial Chamber found that Kallon "participated in the design and maintenance of [the RUF] system of forced recruitment and use [of child soldiers] and that his contribution in this regard was substantial."[2417] In reaching this conclusion, the Trial Chamber relied on its findings that: (i) Kallon was a senior RUF Commander during the attack on Koidu Town in February 1998 in which children were abducted in large numbers to be sent to RUF camps; (ii) Kallon gave orders for children to be trained at RUF camps; (iii) Kallon brought a group of children to Bunumbu for training in 1998; and (iv) Kallon was the senior RUF Commander on 3 May 2000 at Moria where child soldiers were used in the ambush of UNAMSIL forces.[2418] The Trial Chamber also found that the highly organised character of the process of conscripting and using child soldiers was such as to demand a substantial degree of prior planning by the RUF leadership.[2419]As these findings make clear, the Trial Chamber did not solely rely on Kallon's command role to find that he planned the use of child soldiers.[2420]

926. Kallon fails to show that no reasonable trier of fact could have inferred from these findings and the evidence as a whole that he planned the use of child soldiers.[2421] This submission is rejected.

[2413] *See e.g., Katanga and Chui* Decision on Confirmation of Charges, paras 250-252 (finding the *mens rea* satisfied when (i) the accused did not know that the child was under the age of 15 at the time he was recruited or used in combat and (ii) the accused lacked such knowledge because he did not act with due diligence in the relevant circumstances).
[2414] Kallon Appeal, para. 190.
[2415] Kallon Appeal, para. 193.
[2416] *See, e.g.*, Kallon Appeal, paras 194, 203, 204, 205, 206, 208.
[2417] Trial Judgment, para. 2231.
[2418] Trial Judgment, para. 2232.
[2419] Trial Judgment, paras 2225, 2231.
[2420] *See supra*, para. 770.
[2421] *See supra*, paras 768-776.

4. Conclusion

927. In view of the foregoing, the Appeals Chamber dismisses Kallon Ground 20 in its entirety.

H. Alleged errors relating to enslavement in Kenema, Kono and Kailahun Districts (Kallon Ground 21)

1. Trial Chamber's findings

928. The Trial Chamber found that Kallon incurred JCE liability for enslavement (Count 13) in Kenema, Kono and Kailahun Districts.[2422] Kallon had bodyguards who were under the age of 15 years, and he knew the SBUs were used to force the enslaved mining and guard the mining sites.[2423] During 1998 and 1999, Kallon brought persons under 15 years of age to be trained by the RUF at Bunumbu.[2424] Kallon, therefore, was engaged in the creation and maintenance of a system of enslavement that was created by the RUF in order to maintain and strengthen their fighting force.[2425] Through these acts, among others, Kallon was found to have participated in the JCE.[2426] The Trial Chamber also found Kallon guilty under superior responsibility for the enslavement of hundreds of civilians in camps throughout Kono District between February and December 1998.[2427]

2. Submissions of the Parties

929. Kallon submits first that "in relation to [C]ount 12, the Chamber dismissed some of [the] allegations" on which, he argues, his contribution to the system of enslavement was based.[2428] He also submits that the Trial Judgment is contradictory as to whether he had bodyguards under the age of 15 years.[2429] Second, Kallon submits that the Trial Chamber breached its own ruling that it would not rely on evidence that he personally conscripted children by bringing them for training to Bunumbu by using such evidence to convict him.[2430] Third, Kallon submits that the testimony of

[2422] Trial Judgment, paras 2056, 2102, 2163.
[2423] Trial Judgment, para. 2095.
[2424] Trial Judgment, para. 2095.
[2425] Trial Judgment, para. 2095.
[2426] Trial Judgment, para. 2095.
[2427] Trial Judgment, para. 2151.
[2428] Kallon Appeal, para. 234.
[2429] Kallon Appeal, para. 235.
[2430] Kallon Appeal, paras 235, 240, *citing* Trial Judgment, paras 1438, 2221.

TF1-141 does not support that Kallon was "actively" engaged in the abduction of children and planning their training as SBUs in Kono District in February/March 1998.[2431]

930. The Prosecution responds that Kallon "does not specify where the Trial Chamber dismissed [the] findings in relation to Count 12,"[2432] nor does he specify how this would be relevant to his criminal responsibility under Count 12, since in relation to Count 12 he was convicted for planning, and not on the basis of JCE liability.[2433] Kallon offers no additional arguments in reply.

3. Discussion

931. The Appeals Chamber notes that the finding that the "SBUs seen by TF1-141 with Kallon … in Kono in February 1998" and "the boys in SBUs seen by TF1-045 with Kallon in Freetown in 1997 and in Makeni in 1999 to 2000" were not bodyguards[2434] could be read to contradict the finding that "Kallon had bodyguards who were under the age of 15 years."[2435] However, Kallon fails to establish that this contradiction, if any, occasioned a miscarriage of justice. In inferring that Kallon was engaged in the system of enslavement, the Trial Chamber's findings show that it also relied on his contribution to the use of children under the age of 15 to actively participate in hostilities,[2436] which the Trial Chamber found included the use of children to guard the mines at Tombodu in Kono in February/March 1998[2437] and to intimidate and kill civilians working there.[2438] These findings were supported by evidence which Kallon does not address. This submission is therefore rejected.

932. The Trial Chamber's holding that it would not use evidence that Kallon may have personally conscripted children is limited to the use of that evidence for the purpose of determining

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[2431] Kallon Appeal, para. 236, *citing* Transcript, TF1-141, 11 April 2005, p. 89.
[2432] Prosecution Response, para. 7.145.
[2433] Prosecution Response, para. 7.145.
[2434] Trial Judgment, para. 1742.
[2435] Trial Judgment, para. 2095.
[2436] Trial Judgment, paras 2095, 2231 ("Kallon participated in the design and maintenance of this system of forced recruitment and use [of child soldiers] and … his contribution in this regard was substantial"), 2232, 2233 ("given the imperative of using children within the RUF organisation and Kallon's participation as a senior Commander, … he intended that this crime be committed"), 2234.
[2437] Trial Judgment, para. 1728 ("the children who guarded … the mines … at Tombodu in Kono in February/March 1998 were actively participating in hostilities").
[2438] Trial Judgment, paras 1719(iii) ("children younger that 15 were used to intimidate and kill civilians working at the mines at Tombodu in Kono District in February/March 1998"), 1722 ("By instilling fear in and committing crimes against civilians who were forced to work at the diamond mines, the AFRC/RUF also intended to retain control over this critical resource, which remained a constant military objective of both sides"), 1724 ("the use of children by RUF and AFRC fighters in the commission of crimes against the civilian population amounts to active participation in hostilities").

Kallon's responsibility for *personal* commission under Count 12.[2439] For purposes of that mode of liability, the allegation that Kallon brought children for training at Bunumbu was a material fact which was insufficiently pleaded in the Indictment, and so the Trial Chamber declined to enter a conviction that Kallon personally committed the crimes charged under Count 12. However, Kallon's conviction under Count 13, which is the subject matter of his present ground of appeal, was not based on personal commission, but instead on his participation in a JCE.[2440] The Trial Chamber did not exclude evidence of Kallon bringing children for training at Bunumbu from consideration in respect of the mode of liability of JCE, the pleading requirements of which are different from personal commission.[2441] Kallon's submission is therefore rejected.

933. The Appeals Chamber finds that a reasonable trier of fact could have relied on the relevant parts of TF1-141's testimony to find that "Kallon was actively engaged in the abduction for and planning of training of SBUs in Kono District in February/March 1998."[2442] In particular, TF1-141, a former child soldier,[2443] testified that after being captured he was with "Morris Kallon's men" and was then taken to a junction in Koidu Town where he saw Kallon. From there, TF1-141 was taken by Akisto, who was "close to Morris Kallon," with a group of combatants to Guinea Highway where he kept "guard in the night as security."[2444] The Appeals Chamber recalls that is has upheld the finding that Kallon was in charge of the Guinea Highway area.[2445] The Trial Chamber further provided corroboration of these parts of TF1-141's testimony.[2446] This submission is rejected.

934. The Appeals Chamber dismisses Kallon's Ground 21 in its entirety.

I. Alleged errors relating to pillage (Kallon Ground 22)

1. Trial Chamber's findings

935. The Trial Chamber found that Kallon incurred JCE liability for the following instances of pillage: (i) the looting of Le 800,000 by Bockarie from Ibrahim Kamara in June 1997 in Sembehun in Bo District;[2447] (ii) the appropriation of a bicycle, Le 500,000 and other items from TF1-197 near

[2439] Trial Judgment, para. 2221.
[2440] Trial Judgment, paras 2056, 2102, 2163.
[2441] *See supra*, paras 47-51.
[2442] Trial Judgment, para. 2096.
[2443] Trial Judgment, paras 579, 580.
[2444] Transcript, TF1-141, 11 April 2005, pp. 84, 85, 88-91.
[2445] *See supra*, para. 812.
[2446] Trial Judgment, fn. 3819,
[2447] Trial Judgment, paras 1029, 1974 (section 2.1.2), 2008.

Tombodu in Kono District;[2448] (iii) an unknown number of acts of pillage during the February/March 1998 attack on Koidu Town;[2449] and (iv) the looting of funds from Tankoro Bank in Koidu Town.[2450] The Trial Chamber found that Kallon was present at a meeting when Johnny Paul Koroma ordered that all houses in Koidu Town should be burned to the ground, which message Sesay reiterated.[2451] Looting of civilian property was committed during the execution of the order.[2452] Civilians complained to Kallon and Superman, who were Commanders on the ground, about the burning, harassment and looting, but they took no action in response.[2453]

2. Submissions of the Parties

936. Kallon first contends that he had no notice of his liability for the looting of a bank in Koidu Town by Bockarie.[2454] Second, he argues that the Trial Chamber erred in finding him guilty of the looting from Ibrahim Kamara, contending he was not in Bo at the time, did not control Bockarie, and did not know about the crime.[2455] Third, Kallon contends that there was no proof beyond reasonable doubt that he shared the intent of the unidentified perpetrators of the pillage in Kono[2456] as Witness TF1-366's testimony that Kallon attended the meeting with Koroma was uncorroborated.[2457] Fourth, Kallon argues that there was no evidence suggesting that he knew of the appropriation of items and money from TF1-197 or the perpetrators, that he shared their intent, or that there was "any relationship" between him and them.[2458]

937. The Prosecution responds that the Trial Chamber found that Kallon's active participation in the furtherance of the Common Criminal Purpose significantly contributed to the pillage in Bo and that the Trial Chamber's conclusion was reasonable.[2459] It further submits that the Trial Chamber did not convict Kallon based on his mere presence at the meeting with Koroma.[2460] Kallon makes no new arguments in reply.

[2448] Trial Judgment, paras 1335, 2063 (section 4.1.1.5 (i)), 2102.
[2449] Trial Judgment, paras 1336, 1337, 2063 (section 4.1.1.5 (ii)), 2102.
[2450] Trial Judgment, paras 1338, 2063 (section 4.1.1.5 (iii)), 2102.
[2451] Trial Judgment, paras 796, 799, 1141.
[2452] Trial Judgment, para. 1142.
[2453] Trial Judgment, para. 1144.
[2454] Kallon Appeal, para. 246.
[2455] Kallon Appeal, para. 242.
[2456] Kallon Appeal, para. 245.
[2457] Kallon Appeal, para. 244.
[2458] Kallon Appeal, para. 248.
[2459] Prosecution Response, para. 7.172.
[2460] Prosecution Response, para. 7.176.

3. Discussion

938. Concerning Kallon's notice of his alleged liability for the looting of a bank in Koidu Town, the Appeals Chamber recalls that the specificity required for the pleading of locations will depend on factors including those previously listed.[2461] The Trial Chamber found that Kallon significantly contributed to the looting from Ibrahim Kamara by his participation in the JCE,[2462] and that his liability derives from his conduct in relation to other events and crimes,[2463] and in particular, his participation in unlawful killings in Koidu Town, which were pleaded.[2464]

939. The Appeals Chamber recalls that the Trial Chamber found that nonexhaustive pleading of locations may be adequate in light of the "sheer scale" of the alleged crimes.[2465] The Appeals Chamber has not found error in the Trial Chamber's general approach to applying the exception,[2466] and Kallon has not offered any argument as to why this exception to the requirements for pleading specificity should not apply to pillage in Koidu Town. Accordingly, this submission is rejected.

940. Concerning the looting from Ibrahim Kamara, the Trial Chamber also found that Kallon incurred liability because of his significant contribution to the crime by his participation in the JCE.[2467] Kallon's present challenges to that conclusion are without merit, as it was not required that Kallon was either present in Bo at the time the crime was committed[2468] or knew about the specific incident.[2469] Further, given the finding that both Kallon and Bockarie were members of the JCE,[2470] which finding Kallon does not challenge here, it is irrelevant whether Kallon had control over Bockarie. This argument is rejected.

941. Regarding the finding that Kallon was present at the meeting when Johnny Paul Koroma ordered the burning of Koidu Town, the Appeals Chamber notes that the Trial Chamber referred

[2461] *See supra*, para. 830.
[2462] Trial Judgment, para. 2008.
[2463] *See supra*, para. 886, fn. 2515.
[2464] Trial Judgment, para. 2103.
[2465] Trial Judgment, para. 422, *citing Sesay* Decision on Form of Indictment, para. 23.
[2466] *See supra*, para. 60.
[2467] Trial Judgment, para. 2008.
[2468] *Simba* Appeal Judgment, para. 296 ("The Appeals Chamber agrees with the Prosecution that physical presence at the time a crime is committed by the physical perpetrator is not required for liability to be incurred by a participant in a JCE. However, as conceded by the Prosecution, it may be taken as an indicator of a co-perpetrator's contribution." [internal references omitted]); *Kvočka et al*. Appeal Judgment, paras 112, 113; *Krnojelac* Appeal Judgment, para. 81.
[2469] *See supra*, paras 795, 906; *see also Rwamakuba* JCE Decision, para. 19, *quoting* the *Justice* case; *Kvočka et al*. Appeal Judgment, para. 276.
[2470] Trial Judgment, para. 1990.

solely to Witness TF1-366 for this finding.[2471] It also referenced only TF1-366's testimony to find that Kallon took no action in response to civilians complaining to him about the burning, harassment and looting that followed Koroma's order.[2472] The Trial Chamber held that it would not accept TF1-366's testimony without corroboration as it relates to the acts and conducts of the Appellants.[2473]

942. The Appeals Chamber is satisfied that the findings on Kallon's involvement in the pillage in Kono provide sufficient corroboration for the impugned findings. Kallon "had an active combat role" during the attack on Koidu Town, during which an unknown number of acts of pillage were committed by AFRC/RUF troops, marking the continuation of "Operation Pay Yourself."[2474] Moreover, whether or not Kallon attended the meeting when Koroma issued his order to burn Koidu, his "subsequent conduct in Kono District demonstrates that he agreed to the order issued by Sesay and Johnny Paul Koroma and endorsed their actions."[2475] Indeed, Kallon was present in Koidu when the order, including the accompanying looting,[2476] was carried out, and rather than preventing the burning or warning the civilians, he and the other Commanders present "participated in it."[2477] As Kallon does not challenge the evidence relied on for these findings here, his argument fails.

943. The above findings by the Trial Chamber also demonstrate that Kallon shared the intent with the perpetrators of the pillage in Kono, which is why his submission to the contrary with respect to the looting of items from TF1-197 fails. The Appeals Chamber further recalls that it was not required that Kallon knew about this specific criminal incident in order for him to incur JCE liability for it. As to the "relationship" between Kallon and the perpetrators of this crime, the Appeals Chamber has already found that the Trial Chamber provided a sufficiently reasoned opinion as to how it imputed the crimes of pillage in Kono to the JCE members.[2478] Kallon

[2471] Trial Judgment, para. 1141, fn. 2191.
[2472] Trial Judgment, para. 1144, fn. 2199.
[2473] Trial Judgment, para. 546.
[2474] Trial Judgment, paras 784, 795, 1336, 1337, 2093.
[2475] Trial Judgment, para. 2093.
[2476] Trial Judgment, para. 1141-1142.
[2477] Trial Judgment, para. 1144.
[2478] *E.g.* Trial Judgment, paras 783 ("Operation Pay Yourself was announced by Johnny Paul Koroma … Superman then endorsed the Operation"), 784 ("Bockarie reiterated Koroma's order for Operation Pay Yourself … from this point onwards, looting was a systemic feature of AFRC and RUF operations"), 1336 ("AFRC/RUF fighters engaged in a systematic campaign of looting upon their arrival in Koidu, marking the continuation of Operation Pay Yourself"), 2070, 2071, 2082.

addresses none of the evidence on which that reasoning relies. Kallon's challenge relating to the looting of items from TF1-197 is therefore rejected.

4. Conclusion

944. For the aforementioned reasons, the Appeals Chamber dismisses Kallon's Ground 22 in its entirety.





IX. GBAO'S APPEAL

945. As Justices Winter and Fisher would allow Gbao Ground 8(j) and (k), and find that Gbao can not incur JCE liability, Justices Winter and Fisher dissent from the Appeals Chamber's decision on the remaining sub-grounds under Gbao Ground 8.

A. Alleged errors in the Trial Chamber's findings on Gbao's *mens rea* under JCE (Gbao Grounds 8(l), (m), (o), (p), (q), (r) and (s))

946. In these sub-grounds of appeal, Gbao challenges the Trial Chamber's findings regarding his *mens rea* for his convictions under JCE 1 and JCE 3 liability. In his Grounds 8(l) and (m), Gbao alleges that the Trial Chamber erred in finding that the crimes for which he was convicted under JCE 3 liability in Bo, Kenema and Kono Districts were reasonably foreseeable to him and that he willingly took the risk that those crimes might be committed. In his Grounds 8(o), (p), (q), (r) and (s), Gbao alleges that the Trial Chamber erred in finding that he shared the intent to commit the crimes for which he was convicted under JCE 1 liability in Kailahun District.

1. JCE liability for crimes committed in Bo, Kenema and Kono Districts (Gbao Grounds 8(l) and (m))

(a) Trial Chamber's findings

947. The Trial Chamber found with respect to Bo District that Gbao either knew or had reason to know that the deliberate, widespread killings of civilians occurred during RUF military assaults, that suspected Kamajor collaborators would be killed and that pillage took place during AFRC/RUF operations.[2479] As regards Kenema District, the Trial Chamber found that Gbao knew or had reason to know that deliberate, widespread physical violence against civilians occurred during RUF military assaults, that suspected Kamajor collaborators would be killed or subject to great suffering or serious physical injury and that civilians were enslaved in order to pursue the Common Criminal Purpose.[2480] With respect to Kono District, the Trial Chamber found that Gbao knew or had reason to know that deliberate, widespread sexual violence against civilians occurred during RUF military assaults, that sexual violence would have been inflicted upon these persons, that non-consensual sexual relationships in the context of forced marriages were likely to be committed by RUF

[2479] Trial Judgment, para. 2046.
[2480] Trial Judgment, para. 2058.

fighters, that sexual violence was intended by the members of the JCE to further the goals of the JCE and that civilians were enslaved in order to pursue the Common Criminal Purpose.[2481] The Trial Chamber further found that despite knowing that these crimes were being committed, Gbao "continued to pursue the common purpose of the joint criminal enterprise."[2482]

948. On the basis of those findings, the Trial Chamber concluded that Gbao "willingly took the risk that the crimes charged and proved under Counts 3-5 (unlawful killings) and Count 14(pillage) might be committed" in Bo District,[2483] that the crimes charged and proved under Counts 3 to 5, 11 and 13 might be committed in Kenema District[2484] and that the crimes charged and proved under Counts 3 to 5, 6 to 9, 10 and 11, 13 and 14 might be committed in Kono District.[2485] Accordingly, the Trial Chamber concluded that Gbao was liable for those crimes as a member of the joint criminal enterprise.[2486]

(b) Submissions of the Parties

(i) Gbao Ground 8(l)

949. Reiterating his prior argument in Ground 8(j),[2487] Gbao submits that the Trial Chamber erred in finding that, while the crimes under Counts 1 to 14 all fell "within" the common purpose under the basic form of JCE, they could also be found to fall outside the common purpose under the extended form of JCE.[2488] Should his liability in Bo, Kenema and Kono Districts nonetheless be considered under the extended form of JCE,[2489] Gbao submits that he cannot incur extended JCE liability because the Trial Chamber (i) failed to make findings linking him to the crimes committed by the physical perpetrators;[2490] (ii) failed to adequately explain how he could reasonably have foreseen the commission of crimes in Bo, Kenema and Kono Districts in the absence of evidence

[2481] Trial Judgment, paras 2106-2108.
[2482] Trial Judgment, paras 2046, 2058, 2108.
[2483] Trial Judgment, para 2048.
[2484] Trial Judgment, para. 2060.
[2485] Trial Judgment, para. 2109.
[2486] Trial Judgment, paras 2049, 2061, 2110.
[2487] Gbao Appeal, paras 144-149.
[2488] Gbao Appeal, para. 157; Gbao Reply, para. 76, *citing* Trial Judgment, paras 1982, 1985.
[2489] Gbao Appeal, para. 158; Gbao Reply, para. 76.
[2490] Gbao Notice of Appeal, para. 58; Gbao Appeal, para. 158.

supporting such a finding;[2491] and (iii) failed to explain how he willingly took the risk that such crimes would be committed.[2492]

(ii) Gbao Ground 8(m)

950. Gbao first submits that the findings regarding his *mens rea* for JCE liability are principally based upon the Trial Chamber's erroneous finding that he was the RUF ideology instructor.[2493] Gbao also submits that the findings on whether he knew of had reason to know of the crimes in Bo, Kenema and Kono Districts are unsubstantiated and unsupported by evidence.[2494] He further argues that those findings are contradicted by the findings that he: (i) was not in Bo, Kenema or Kono Districts during the Junta period or at any other time;[2495] (ii) neither communicated with anyone in these Districts during the Junta period,[2496] nor had a personal radio[2497] or a radio call name;[2498] (iii) never "met with the AFRC leaders or communicated with Junta leaders during the Junta period;"[2499] (iv) did not receive reports on unlawful killings in Bo, Kenema or Kono Districts;[2500] and (v) neither visited the frontlines nor was involved in military planning.[2501] Gbao further submits that during the Junta period there is no evidence that he was involved with the commission of crimes outside Kailahun District,[2502] received reports of crimes from other parts of Sierra Leone,[2503] or had *de facto* responsibility for investigating criminal acts outside of Kailahun District.[2504]

(c) Discussion

(i) Did the Trial Chamber fail to explain its findings?

951. Gbao's claim that the Trial Chamber erred in failing to make any findings linking him to the crimes committed by the principal perpetrators is undeveloped and unsupported.[2505]

[2491] Gbao Notice of Appeal, para. 58; Gbao Appeal, para. 158.
[2492] Gbao Notice of Appeal, para. 57; Gbao Appeal, para. 158.
[2493] Gbao Appeal, paras 160, 162.
[2494] Gbao Notice of Appeal, paras 60, 61; Gbao Appeal, paras 163, 167.
[2495] Gbao Appeal, para. 164, *citing* Trial Judgment, paras 954-1387, 1986, 2153.
[2496] Gbao Appeal, para. 165.
[2497] Gbao Appeal, para. 165, *citing* Trial Judgment, para. 844.
[2498] Gbao Appeal, para. 165, *citing* Trial Judgment, para. 717.
[2499] Gbao Appeal, para. 165, *quoting* Trial Judgment 775. *See* Trial Judgment, para. 2010.
[2500] Gbao Appeal, para. 166, *citing* Trial Judgment paras 2041, 2057, 2105.
[2501] Gbao Appeal, para. 166, *citing* Trial Judgment paras 682, 844.
[2502] Gbao Appeal, para. 168, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 13.
[2503] Gbao Appeal, para. 169, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 8, fn. 11.
[2504] Gbao Appeal, para. 169, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 8.
[2505] Gbao Appeal, para. 158. *See* also *supra*, para. 412.

952. Gbao claims that the Trial Chamber failed to adequately explain how the crimes committed in Bo, Kenema and Kono Districts were reasonably foreseeable to him.[2506] The Appeals Chamber finds that Gbao has mischaracterized the Trial Chamber's findings. Contrary to Gbao's submission, the Trial Chamber did not find that the crimes in Bo, Kenema and Kono Districts were reasonably foreseeable to him. Rather, the Trial Chamber found that he "knew or had reason to know" of those crimes.[2507] The Trial Chamber's only findings with respect to foreseeability were in regard to the crimes of acts of terrorism and acts of collective punishment committed in Bo and Kenema Districts, which the Trial Chamber found were not reasonably foreseeable to Gbao.[2508] Gbao's contention is therefore flawed and misconceived, as the Trial Chamber found that he knew or had reason to know of the crimes in those Districts for which he was held responsible, and did not find, as Gbao suggests, that those crimes were reasonably foreseeable to him. In this respect, the Appeals Chamber notes that the Trial Chamber based its conclusion that Gbao knew or had reason to know of the crimes in Bo, Kenema and Kono Districts[2509] on numerous factors, including the facts that: (i) as IDU Commander, Gbao was charged with investigating crimes against civilians;[2510] (ii) in his capacity as OSC, Gbao oversaw the G5, which managed the capture and deployment of civilians in furtherance of the RUF's goals;[2511] (iii) Gbao had the position as a Vanguard and senior Commander in the RUF;[2512] (iv) the RUF ideology justified abuses against civilians considered to be "enemies of the revolution";[2513] and (v) RUF fighters deliberately killed civilians on a massive scale during military attacks from the time of the initial invasion in 1991.[2514] Moreover, with respect to the crimes of sexual violence in Kono District, the Trial Chamber noted the deliberate and widespread commission of these crimes during RUF military assaults,[2515] and inferred from Gbao's important role and oversight functions that he knew that non-consensual sexual relationships were likely to be committed by RUF fighters in the context of forced marriage.[2516] It

[2506] Gbao Appeal, para. 158.
[2507] Trial Judgment, paras 2046 (Bo District), 2058 (Kenema District), 2106-2108 (Kono District).
[2508] Trial Judgment, paras 2047 (Bo District), 2059 (Kenema District).
[2509] Trial Judgment, paras 2046 (Bo District), 2058 (Kenema District), 2106-2108 (Kono District).
[2510] Trial Judgment, paras 2039, 2046 (Bo District), 2057 (Kenema District), 2105 (Kono District).
[2511] Trial Judgment, paras 2045, 2046, (Bo District) 2057 (Kenema District), 2105 (Kono District).
[2512] Trial Judgment, para. 2046, (Bo District) 2057 (Kenema District), 2105 (Kono District).
[2513] Trial Judgment, paras 2044, 2045 (Bo District), 2058 (Kenema District), 2105 (Kono District).
[2514] Trial Judgment, para. 2043.
[2515] Trial Judgment, para. 2106.
[2516] Trial Judgment, para. 2107.

further considered that forced marriage was important to the RUF both as a tactic of war and as a means of obtaining unpaid logistical support for troops.[2517]

953. Finally, Gbao fails to establish that the Trial Chamber did not explain its finding that Gbao willingly took the risk that such crimes might be committed in Bo, Kenema and Kono Districts.[2518] The Appeals Chamber recalls that, as a general rule, a Trial Chamber "is required only to make findings on those facts which are essential to the determination of guilt on a particular count";[2519] it "is not required to articulate every step of its reasoning for each particular finding it makes"[2520] nor is it "required to set out in detail why it accepted or rejected a particular testimony."[2521] For each of the types of crimes committed in those districts, the Trial Chamber found that Gbao knew or had reason to know of the crimes.[2522] The Trial Chamber further found that Gbao, despite having that knowledge, continued to pursue the Common Criminal Purpose of the JCE.[2523] Accordingly, the Trial Chamber concluded that Gbao willingly took the risk that such crimes would be committed in Bo, Kenema and Kono Districts and was responsible for those crimes as a member of the JCE.[2524] In light of these findings, the Appeals Chamber concludes that Gbao fails to establish that the Trial Chamber did not provide sufficient reasoning for its conclusion.

(ii) Did the Trial Chamber err in finding that Gbao knew or had reason to know of the crimes in Bo, Kenema and Kono Districts?

954. Gbao argues that the Trial Chamber's finding that he had any knowledge of the crimes in Bo, Kenema and Kono Districts is "principally based upon Gbao's alleged role in training all recruits" in the RUF ideology.[2525] Gbao points to the Trial Chamber's finding 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."[2526] Gbao fails to show that it was unreasonable for the Trial Chamber to rely on his role as an ideological

[2517] Trial Judgment, para. 2107.
[2518] Gbao Appeal, para. 158.
[2519] *Krajišnik* Appeal Judgment, para. 139; *Hadžihasanović and Kubura* Appeal Judgment, para. 13.
[2520] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 18. *See* also *Brđanin* Appeal Judgment, para. 39.
[2521] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 20.
[2522] Trial Judgment, paras 2046, 2058, 2105-2108.
[2523] Trial Judgment, paras 2046, 2058, 2108.
[2524] Trial Judgment, paras 2048, 2049 (Bo District), 2060, 2061 (Kenema District), 2109, 2110 (Kono District).
[2525] Gbao Appeal, paras 160, 162.
[2526] Gbao Appeal, para. 161, *citing* Trial Judgment, para. 2019.

instructor at Baima base and his knowledge of the RUF ideology more generally to establish that he knew or had reason to know of the crimes. In addition, the Trial Chamber relied on a number of different grounds to establish Gbao's *mens rea*.

955. In arguing that the Trial Chamber erred in finding that he knew or had reason to know of the crimes committed, Gbao points to certain other of the Trial Chamber's findings and argues that these findings contradict that conclusion. However, Gbao fails to address the findings upon which the Trial Chamber relied. In particular, Gbao does not address the Trial Chamber's findings that the RUF ideology justified abuses against civilians considered to be "enemies of the revolution"[2527] and that RUF fighters deliberately killed civilians on a massive scale during military attacks from the time of the initial invasion in 1991.[2528] While Gbao notes that the Trial Chamber found no evidence to indicate that Gbao received reports regarding unlawful killings,[2529] that finding does not establish that no reasonable trier of fact could conclude that Gbao knew or had reason to know of the unlawful killings. Similarly, Gbao notes the finding that the IDU did not have power or authority over military activities,[2530] and the finding that Gbao did not visit the frontline and was not involved in military planning.[2531] However, these findings do not establish that the Trial Chamber erred in relying on Gbao's roles as OSC and overall IDU Commander, in which roles he supervised the RUF security units, and was charged with investigating crimes against civilians, to determine that he knew or had reason to know of the crimes.[2532] Finally, in arguing that he was not in and did not communicate with anyone in Bo, Kenema or Kono Districts, and did not communicate with the AFRC Supreme Council,[2533] Gbao fails to address the Trial Chamber's finding that the members of the JCE, including himself,[2534] ever contemplated the crimes charged under Counts 1 to 14 in order to gain and exercise political power and control "over … Sierra Leone."[2535] He therefore fails to establish that no reasonable trier of fact could have concluded that he knew or had reason to know of the crimes in Bo, Kenema and Kono Districts.

[2527] Trial Judgment, paras 2044, 2045 (Bo District), 2058 (Kenema District), 2105 (Kono District).
[2528] Trial Judgment, para. 2043.
[2529] Trial Judgment, para. 2041.
[2530] Trial Judgment, para. 682.
[2531] Trial Judgment, para. 844.
[2532] Trial Judgment, para. 2046.
[2533] Gbao Appeal, paras 164, 165.
[2534] Trial Judgment, paras 1990, 2172.
[2535] Trial Judgment, para. 1985.

(d) Conclusion

956. In consequence, Gbao's Grounds 8(l) and (m) are rejected.

957. The Appeals Chamber now turns to Gbao's challenges to his convictions under JCE 1 for the crimes committed in Kailahun District. Gbao's subgrounds under Ground 8 will be addressed in the order 8(q), 8(r), 8(s) and 8(p). His challenges to the Trial Chamber's findings on his intent for the crime of enslavement are addressed separately at the end.

2. Unlawful killings in Kailahun District (Gbao Ground 8(q))

(a) Trial Chamber's findings

958. The Trial Chamber found that Gbao incurred JCE 1 liability for the unlawful killings (Counts 3 to 5) of 63 alleged Kamajors in Kailahun Town on 19 February 1998 pursuant to the orders of Bockarie.[2536] It found that "Gbao intended the death of the [suspected] Kamajors as a consequence of his failure to halt the executions."[2537] Also, "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 in turn enhanced the power and capacity of the RUF to pursue the goals of the common purpose."[2538] In addition, the deaths were found to be a "logical consequence to the pursuance of the goals prescribed in [RUF] ideology."[2539]

959. With regard to these unlawful killings, the Trial Chamber found that Bockarie ordered suspected Kamajors to be arrested for investigation by Gbao.[2540] Pursuant to Bockarie's orders, 110 men were arrested and detained by Kailahun District MP Commander John Aruna Duawo and MPs subordinate to him.[2541] They were divided into two groups of 45 and 65 men, respectively.[2542] The first group was declared not to be Kamajors and then released by a JSBI panel led by Gbao.[2543] The second group was released on parole while the JSBI investigation was on-going.[2544] Upon learning that the second group had been released on parole, Bockarie ordered their re-arrest and

[2536] Trial Judgment, paras 2156, 2172.
[2537] Trial Judgment, para. 2166.
[2538] Trial Judgment, para, 2166.
[2539] Trial Judgment, para. 2168.
[2540] Trial Judgment, para. 1387.
[2541] Trial Judgment, para. 1388.
[2542] Trial Judgment, para. 1389.
[2543] Trial Judgment, para. 1391.
[2544] Trial Judgment, para. 1391.

execution.[2545] The Trial Chamber found that "Gbao was present when Bockarie gave the order and while it was carried out, but he did not directly participate in the killing.[2546]

(b) Submissions of the Parties

960. Gbao submits that the Trial Chamber erred in finding that he intended the killings of the 63 alleged Kamajors.[2547] He argues that his failure to intervene cannot reasonably be understood to indicate his intent because he had no power to halt the executions.[2548] Gbao argues that Bockarie was *de facto* leader of the RUF and the Trial Chamber had found that "Gbao's ability to exercise his powers effectively in areas where Bockarie ordered the commission of crimes is doubtful."[2549] Gbao also refers to the finding in the Sentencing Judgment that he "did not have the ability to contradict or influence the orders of men such as Sam Bockarie."[2550] According to Gbao, Bockarie had a propensity to be dictatorial and constantly harassed him.[2551] If Gbao had attempted to halt the executions he would have been killed and the alleged Kamajors executed shortly thereafter.[2552] In Gbao's view, he released the first group of 45 men[2553] and did "all in his power" to release the remaining 63 just before Bockarie ordered that they be killed.[2554] Gbao argues that the only reasonable inference is that he had no power to stop Bockarie from killing the alleged Kamajors and, therefore, the Trial Chamber erred in inferring that he shared the requisite intent.[2555]

961. The Prosecution responds that the killing of the suspected Kamajors was connected to the ideological objective of eliminating all those who supported the old regime, and sought to promote the objective, shared by Gbao, to strengthen RUF's hold over Sierra Leone while demonstrating the power of the RUF.[2556] In addition, it was reasonable to infer that Gbao intended the killings because he was the most senior RUF member present after Bockarie left when the bulk of the order was

[2545] Trial Judgment, para. 1392.
[2546] Trial Judgment, para. 1395.
[2547] Gbao Notice of Appeal, para. 69; Gbao Appeal, paras 187, 197.
[2548] Gbao Appeal, paras 192, 193.
[2549] Gbao Appeal, paras 192, 195, *quoting* Trial Judgment, para. 2041.
[2550] Gbao Appeal, para. 192, *quoting* Sentencing Judgment, para. 268.
[2551] Gbao Appeal, para. 192, *citing* Gbao Final Trial Brief, paras 24-44, fn. 225.
[2552] Gbao Appeal, para. 193.
[2553] Gbao Appeal, para. 194, *citing* Trial Judgment, para. 1392.
[2554] Gbao Appeal, paras 193-195.
[2555] Gbao Appeal, paras 193, 195, 196, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 11.
[2556] Prosecution Response, paras 5.84, 5.81, *citing* Trial Judgment, para. 2028.

carried out, and because there was no evidence that Gbao attempted to stop Bockarie.[2557] Gbao replies that he was not the most senior RUF member present in Kailahun after Bockarie left.[2558]

(c) Discussion

962. Whether it was reasonable for the Trial Chamber to find that Gbao intended the killings of the suspected Kamajors turns in part on what power Gbao had to halt them, and whether such power was the only sufficient basis on which his intent for this crime could be reasonably inferred.

963. The Trial Chamber found that generally "Gbao's ability to exercise his powers effectively in areas where Bockarie ordered the commission of crimes is doubtful."[2559] It is uncontested that Bockarie ordered the killings of the suspected Kamajors.[2560]

964. After Bockarie ordered the killing of the suspected Kamajors, and he killed three of them himself in front of Gbao and others, Bockarie left Kailahun Town before the remaining suspected Kamajors were killed.[2561] Gbao, however, stayed throughout the remainder of the executions.[2562] Although the Prosecution does not substantiate its assertion that Gbao was the most senior officer present, the Trial Chamber's findings make clear that he was a senior officer in Kailahun at the time of the killing.[2563] As such, while he was not found to have effective control over the security units as OSC, Gbao, by virtue of his supervisory role as OSC and status as a Vanguard, had "considerable influence" over the decisions taken by these units, which included MP Officers[2564] such as the ones who carried out the executions.[2565]

965. In the Appeals Chamber's view, these findings show that, while limited by the fact that Bockarie had ordered the executions, Gbao was not without power to halt them. Moreover, whether Gbao's power in the circumstances was such that he could actually have stopped the killings is not determinative of whether the Trial Chamber erred in inferring intent from his failure to intervene. Gbao had chaired the JSBI panel responsible for investigating the victims, and he was present when Bockarie executed three of them. He elected to stay, and did not interfere with the execution of the

[2557] Prosecution Response, para. 5.85.
[2558] Gbao Reply, para. 87, *citing* Trial Judgment, paras 664, 765, 2034.
[2559] Trial Judgment, para. 2041.
[2560] Trial Judgment, paras 1392-1394.
[2561] Trial Judgment, paras 1393, 1394.
[2562] Trial Judgment, para. 1395.
[2563] Trial Judgment, 1393, 1394.
[2564] Trial Judgment, paras 1395, 2034, 2035; *see supra*, paras 1042-1046; *see* also Gbao Appeal, paras 117-126.
[2565] Trial Judgment, paras 1395.

remaining suspected Kamajors. The Appeals Chamber is not satisfied that this was an unreasonable basis for inferring Gbao's intent. In addition, Gbao does not support his further assertions with any reference to evidence or the Trial Chamber's findings that Bockarie had a propensity to be dictatorial, that Bockarie harassed him, and would have killed him if he attempted to halt the executions.[2566] As to Gbao's claim that he "did all in his power" to release the victims, this argument is without merit given that Gbao did have some power to halt the executions and that his failure to do so is undisputed.[2567] It was therefore not unreasonable for the Trial Chamber to rely on Gbao's failure to halt the executions to infer his intent.

(d) Conclusion

966. For these reasons, the Appeals Chamber finds that Gbao fails to demonstrate that no reasonable trier of fact could have concluded that he shared the intent for the killings of the 63 suspected Kamajors. Gbao's sub-ground 8(q) is rejected.

3. Sexual violence in Kailahun District (Gbao Ground 8(r))

(a) Trial Chamber's findings

967. As regards Gbao's participation in the JCE in Kailahun District, the Trial Chamber found that "Gbao shared the requisite intent for rape within the context of 'forced marriage' in order to further the goals of the joint criminal enterprise."[2568] It further held that forced marriages were a "logical consequence to the pursuance of the goals prescribed in their ideology, the instruction of which … was imparted particularly by Gbao."[2569]

(b) Submissions of the Parties

968. Gbao submits that in the absence of any evidence and reasoning the Trial Chamber erred in finding he shared the requisite intent for rape in the context of forced marriage.[2570] As to the finding that the RUF ideology resulted in forced marriages, Gbao refers to his objections under his Grounds 8(a) and 8(b) in support.[2571]

[2566] Gbao Appeal, paras 192, 193.
[2567] Gbao Appeal, para. 193-195; Trial Judgment, para. 1392.
[2568] Trial Judgment, para. 2167. *See* also Trial Judgment, para. 2172.
[2569] Trial Judgment, para. 2168.
[2570] Gbao Notice of Appeal, para. 71; Gbao Appeal, para. 199.
[2571] Gbao Appeal, para. 200 (referring to arguments set forth in Sub-Grounds 8(a&b)).

969. Gbao further submits that no reasonable trier of fact could have found that he possessed the requisite intent under Count 1 in relation to sexual violence[2572] and Counts 7 to 9 in Kailahun.[2573] First, Gbao refers to his Ground 2 to argue that the Trial Chamber impermissibly relied on expert evidence to establish his intent.[2574] Second, he contends that it erroneously relied on the testimony of DIS-080[2575] who lacked credibility[2576] and "unequivocally denied that forced marriages occurred in Kailahun."[2577] Third, TF1-114's testimony concerned forced marriage after the Junta period and is thus temporally irrelevant.[2578] Lastly, Gbao avers that the remaining witnesses on whose testimony the Trial Chamber relied for all its findings on Counts 7 to 9 in Kailahun District, according to its own holdings, required corroboration where they related to his acts and conduct.[2579] Yet, he claims, the testimonies of these witnesses (TF1-314,[2580] TF1-093,[2581] TF1-371,[2582] TF1-366,[2583] and TF1-045[2584]) were only corroborated *by each other* even though they concerned his "acts and conduct,"[2585] specifically that he shared the requisite intent under JCE.[2586] As such, Gbao submits that they could not have been used in support of his alleged intent.[2587]

970. The Prosecution responds that the evidence of DIS-080 on married women also being taken as "bush wives" was corroborated,[2588] and there was no error in considering evidence allegedly outside the Junta period as the JCE was found to continue until April 1998.[2589] Moreover, Gbao does not specify which findings are affected by uncorroborated evidence and fails to show an error

[2572] Gbao reserved his challenge to Trial Chamber's finding of shared intent for sexual violence as an act of terrorism for the current Sub-Ground of Appeal. *See* Gbao Appeal, paras 179-180.
[2573] Gbao Appeal, paras 201, 211.
[2574] Gbao Appeal, paras 202, 204.
[2575] Gbao Appeal, para. 205, *citing* Trial Judgment, para. 1412, fn. 2624.
[2576] Gbao Appeal, para. 205; Trial Judgment, para. 530-531, fn. 988 (Trial Chamber rejected DIS-080's testimony in support of Sesay).
[2577] Gbao Appeal, para. 205, *citing* Transcript, DIS-080, 8 October 2007, p. 11. *See* also Gbao Reply Brief, para. 91.
[2578] Gbao Appeal, para. 206, *citing* Transcript, TF1-114, 28 April 2005, pp. 40, 41, 52-56, 61.
[2579] Gbao Appeal, paras 207, 210.
[2580] Gbao Appeal, para. 207, *citing* Trial Judgment, para. 594.
[2581] Gbao Appeal, para. 207, *citing* Trial Judgment, para. 603.
[2582] Gbao Appeal, para. 207, *citing* Trial Judgment, para. 543.
[2583] Gbao Appeal, para. 207, *citing* Trial Judgment, para. 546.
[2584] Gbao Appeal, para. 207, *citing* Trial Judgment, para. 561.
[2585] Gbao Appeal, paras 207, 209.
[2586] Gbao Appeal, para. 208 *citing* Decision on 23 Witness Statements, para. 33; *Galić* Decision on Rule 92*bis*, para. 10; *Bagosora et al*. Decision on the Prosecution's Rule 92*bis* Motion , para. 13.
[2587] Gbao Appeal, paras 208, 209, *citing Nahimana et al*. Appeal Judgment, para. 669.
[2588] Prosecution Response, para. 5.88, *citing* Trial Judgment, para. 1412, fn. 2624.
[2589] Prosecution Response, para. 5.89.

in the Trial Chamber's assessment of the extensive evidence of sexual violence in Kailahun.[2590] In relation to expert evidence, the Prosecution refers to its response to Gbao's Ground 2.[2591]

971. Gbao replies that he was only found to be a member of the JCE between 25 May 1997 and 19 February 1998 in Kailahun.[2592] Further, even if evidence outside the Junta period is taken into account, only one piece of testimonial evidence establishes his intent.[2593]

(c) Discussion

972. Gbao was found to have shared with the other participants in the JCE the requisite intent to commit acts of sexual violence in Kailahun District.[2594] The Trial Chamber found that these acts included subjecting an unknown number of women to sexual slavery and forced marriages in Kailahun.[2595] With regard to Gbao, the Trial Chamber found that he "shared the requisite intent for rape in the context of 'forced marriage' in order to further the goals of the JCE."[2596] The Trial Chamber further found that rapes and forced marriages "were a logical consequence to the pursuance of the goals prescribed in [the RUF] ideology."[2597] Contrary to Gbao's assertion that there are no findings connecting him to the acts of sexual violence in question,[2598] the Trial Chamber thus explained how it inferred his intent for these acts from its explicit finding that he shared the intent for rape within forced marriages. The Appeals Chamber is accordingly satisfied that the Trial Chamber provided a sufficiently reasoned opinion for its finding that Gbao shared the requisite intent for the acts under Counts 7 to 9 in Kailahun. Gbao's submission to the contrary is rejected.

973. Turning to the reasonableness of the impugned finding, Gbao's challenge that the Trial Chamber impermissibly relied on expert evidence to establish his intent[2599] has been addressed under Gbao's Ground 2.[2600] The remaining three challenges allege that the Trial Chamber erred in

[2590] Prosecution Response, para. 5.90, *citing* Trial Judgment, para. 1405.
[2591] Prosecution Response, para. 5.87, *referencing* Prosecution Response, paras 4.88-4.96.
[2592] Gbao Reply, para. 92, *citing* Trial Judgment, para. 2172.
[2593] Gbao Reply, para. 92, *referencing* Gbao Appeal, para. 206.
[2594] Trial Judgment, para. 2172.
[2595] Trial Judgment, paras 1473, 2156
[2596] Trial Judgment, para. 2167.
[2597] Trial Judgment, para. 2168.
[2598] Gbao Appeal, para. 199.
[2599] Gbao Appeal, paras 202, 204.
[2600] *See supra*, paras 252-255.

relying on insufficiently corroborated testimony, temporally irrelevant evidence and on the testimony of Witness DIS-080.[2601] These challenges will be addressed in turn below.

(i) Did the Trial Chamber err in relying on testimony requiring corroboration?

974. The Appeals Chamber notes that the testimonies of Witnesses TF1-314,[2602] TF1-093,[2603] TF1-371,[2604] TF1-366[2605] and TF1-045[2606] were found by the Trial Chamber to require corroboration in some, but not every circumstance. Thus, the Trial Chamber accepted the core of TF1-093's testimony without corroboration, particularly as it related to her own experiences, such as her time spent as a "bush wife."[2607] Similarly, the Trial Chamber accepted the evidence of TF1-371 and TF1-366 without corroboration where the evidence was more general in nature, or in the case of TF1-366, where the testimony also related to the witness's own experiences.[2608] TF1-314 was found to be "largely credible."[2609] The Trial Chamber did not rely on the testimony of TF1-045 for its findings on forced marriage and sexual slavery in Kailahun District.[2610]

975. The Trial Chamber only required corroboration of the testimony of Witnesses TF1-371, TF1-366 and TF1-314 in relation to any evidence that related to the acts and conduct of the Appellants.[2611] TF1-093's testimony was found to require corroboration where her testimony did not relate to her own experiences.[2612]

976. The Appeals Chamber notes that the Trial Chamber's findings based on the evidence provided by Witnesses TF1-314, TF1-093, TF1-371, and TF1-366 generally describe the occurrence of forced marriage and sexual slavery in Kailahun District,[2613] and in the case of TF1-093 and TF1-314 their evidence relates to their personal experience as "bush wives."[2614] As such,

[2601] Gbao Appeal, paras 205-209.
[2602] Trial Judgment, para. 594.
[2603] Trial Judgment, para. 603.
[2604] Trial Judgment, para. 543
[2605] Trial Judgment, para. 546.
[2606] Trial Judgment, para. 561.
[2607] Trial Judgment, para. 603.
[2608] Trial Judgment, paras 543, 546.
[2609] Trial Judgment, para. 594.
[2610] *See* Trial Judgment, para. 1405.
[2611] Trial Judgment, paras 543, 546, 594.
[2612] Trial Judgment, para. 603.
[2613] *See* Trial Judgment, paras 1406-1408, 1410-1413.
[2614] *See* Trial Judgment, paras 1406-1408, 1412.

this evidence does not relate to acts and conduct of the accused as defined by the Trial Chamber,[2615] and therefore by the Trial Chamber's own findings, does not require corroboration.[2616]

977. Gbao asserts that the testimony of these witnesses was "employed to find [he] possessed the requisite intent" and therefore relates to his acts and conduct.[2617] However, he does not point to any relevant intent findings that are based on the testimony of the aforementioned witnesses.[2618] Accordingly, Gbao fails to demonstrate how the Trial Chamber erred in basing its findings on the uncorroborated evidence of the above mentioned witnesses. This argument fails.

(ii) Did the Trial Chamber err in relying on testimony outside the Junta period?

978. Gbao's argument that the Trial Chamber relied on evidence of events outside the Junta period is limited to the testimony of Denis Koker (TF1-114).[2619] Gbao points to parts of Koker's testimony relating to the witness's observation of forced marriage in Kailahun District as an MP Adjutant.[2620] This evidence pertains to the period after the 6 to 14 February 1998 ECOMOG intervention, which according to the Trial Chamber marked the end of the Junta period.[2621]

979. However, the Appeals Chamber notes that the Trial Chamber's findings on forced marriages during the Junta period were not based solely on Koker's testimony.[2622] In fact, the only one of these findings singly based on Koker's testimony is that "it was regular practice for women to be forcibly taken as 'wives' and some Commanders had five or six 'wives.'"[2623] Gbao does not address the numerous other pieces of evidence the Trial Chamber relied on, such as the testimony of Witness TF1-371 that many Commanders had a captured 'wife,'[2624] to conclude that such a practice existed "throughout the Indictment period."[2625] This submission is untenable.

[2615] The Trial Chamber defined acts and conduct in relation to the admission of witness statements under 92*bis* to include the shared requisite intent for JCE liability. Decision on 23 Witness Statements, para. 33. *See supra*, para. 235.
[2616] Trial Judgment, paras 543, 546, 594, 603.
[2617] Gbao Appeal, paras 207, 208.
[2618] Gbao Appeal, paras 207, 208.
[2619] Gbao Appeal, para, 206; Denis Koker was identified as TF1-114 before he testified publicly. Trial Judgment, Annex B, para. 55, fn. 105.
[2620] Gbao Appeal, para. 206; Transcript, TF1-114, 28 April 2005, pp. 63-64.
[2621] Trial Judgment, paras 2067, 2172; Denis Koker left Freetown at the start of the ECOMOG intervention on 6 to 14 February 1998 with a convoy that made multiple stops before it reached Kailahun; in addition, he did not become MP Adjutant until the time of his medical check-up in Buedu. Transcript, TF1-114, 28 April 2005, pp. 40-41, 52-56, 61.
[2622] *See* Trial Judgment, paras 1405-1413.
[2623] Trial Judgment, para. 1411.
[2624] Trial Judgment, para. 1411. fn. 2622.
[2625] Trial Judgment, paras 1405-1413. *See* also Trial Judgment, fn. 2621.

(iii) Did the Trial Chamber err in relying on the testimony of DIS-080?

980. Gbao argues that the Trial Chamber erred in relying on Witness DIS-080's testimony to support its finding that a woman's married status was no bar to becoming a "bush wife."[2626] He asserts that this finding falls by DIS-080's lack of credibility and denial that forced marriages occurred in Kailahun.[2627] The Appeals Chamber notes that the Trial Chamber put DIS-080 in the category of defense witnesses who "testified out of loyalty to the RUF and their superior commanders … and not necessarily to assist the Trial Chamber in its search for the truth."[2628] The impugned finding, however, was supported by the testimony of other witnesses, such as TF1-093 and TF1-371.[2629] The Trial Chamber accepted Witness TF1-093's testimony, where, as here, it related to her own experience as a "bush wife."[2630] The challenged finding is further supported by Witness TF1-371, whose testimony on general matters relating to forced marriages did not require corroboration.[2631] Aside from his challenges to the testimonies of TF1-093 and TF1-371 dismissed above, Gbao does not dispute the substance of their evidence. The Appeals Chamber is therefore not satisfied that the denial by DIS-080 that forced marriages occurred, rendered unreasonable the Trial Chamber's impugned finding. Gbao accordingly fails to show an error.

(d) Conclusion

981. Gbao's Ground 8(r) is dismissed in its entirety. Having thus found, the Appeals Chamber need not consider Gbao's additional assertion that in the absence of a valid finding that he shared the intent for these acts under Counts 7 to 9, he could also not be held responsible therefore under Count 1.

4. Acts of terrorism (killings and sexual violence) in Kailahun District (Gbao Ground 8(o))

(a) Trial Chamber's findings

982. The Trial Chamber found that Gbao incurred JCE liability for the acts of terrorism of unlawful killings and sexual violence in Kailahun District.[2632] He was found to have shared with

[2626] Gbao Appeal, para. 205, *citing* Trial Judgment, para. 1412, fn. 2524.
[2627] Gbao Appeal, para. 205.
[2628] *See* Trial Judgment, paras 530-531.
[2629] Trial Judgment, para. 1412, fn. 2624.
[2630] Trial Judgment, para. 603.
[2631] *See* Trial Judgment, para. 543.
[2632] Trial Judgment, Disposition. p. 684. Acts of terrorism were also found to have been committed through Count 6, but Count 6 was not pleaded in respect of Kailahun District. *Ibid*., para. 1405.

other participants in the JCE the requisite intent to commit acts of terror.[2633] Also, acts of terror committed in Kailahun were "the logical consequence to the pursuance of the goals prescribed in the [RUF] ideology, the instruction on which … was imparted particularly by Gbao, who was present during the execution [of suspected Kamajors]."[2634]

983. The unlawful killings constituting acts of terrorism were the killings of the suspected Kamjors ordered by Bockarie.[2635] As to sexual violence, the Chamber found a consistent pattern of sexual slavery and forced marriage that was committed with the requisite specific intent to terrorise the civilian population in Kailahun District.[2636]

(b) Submissions of the Parties

984. Gbao submits that the Trial Chamber failed to explicitly find that he held the requisite intent for acts of terrorism.[2637] In fact, the Trial Chamber found that "the Prosecution failed to adduce evidence of acts of terrorism in parts of Kailahun District that were controlled by the RUF and where Gbao was located."[2638] Gbao submits that, in any event, he did not have the requisite intent under Count 1 for the killings[2639] or sexual violence.[2640] He argues that he chaired the panel which released the first group of 45 men and released the second group of 65 men on parole. [2641] This second group of men were subsequently re-arrested and killed on Bockarie's order.[2642] As such, rather than being indicative of the intent for Count 1, the evidence suggests Gbao was doing his best to facilitate the victims' release.[2643] Gbao refers to his Sub-Ground 8(r) to argue that he did not possess the requisite intent under Count 1 for sexual violence.[2644]

985. The Prosecution responds that the finding that Gbao shared the intent for terror in Kailahun is necessarily implicit in that he was found to have been a participant in the JCE,[2645] which finding

[2633] Trial Judgment, para. 2172.
[2634] Trial Judgment, para. 2168.
[2635] Trial Judgment, para. 1491.
[2636] Trial Judgment, para. 1493.
[2637] Gbao Notice of Appeal, para. 64; Gbao Appeal, paras 172, 180.
[2638] Gbao Notice of Appeal, para. 65; Gbao Appeal, para. 173, *quoting* Trial Judgment para. 2047.
[2639] Gbao Appeal, para. 175.
[2640] Gbao Appeal, paras 175, 179, 180.
[2641] Of the 65 men, 63 civilians and one soldier *hors de combat* were subsequently killed; "the uncle of Commander Alpha Fatoma" escaped the execution. *See* Trial Judgment, paras 1389, 1396.
[2642] Gbao Appeal, paras 176, 177, *citing* Trial Judgment, paras 1390-1392.
[2643] Gbao Appeal, paras 177, 178, *citing* Partially Dissenting Opinion of Justice Boutet, paras 9, 11.
[2644] Gbao Appeal, para. 179.
[2645] Prosecution Response, para. 5.79.

was reasonable.[2646] Gbao replies that the requisite intent to commit acts of terror must be found before he can be found to be part of the JCE.[2647]

(c) Discussion

986. This ground essentially turns on whether the Trial Chamber's findings on the requisite intent for acts of terror in respect of Gbao were sufficiently reasoned and if so, whether the Trial Chamber could reasonably find that Gbao shared such intent.

987. In the section of the Trial Judgment on Gbao's JCE liability for the crimes committed in Kailahun District, the Trial Chamber concluded that Gbao "shared with the other participants in the joint criminal enterprise the requisite intent to commit," acts of terror in Kailahun.[2648] The Trial Chamber did not explicitly enumerate the findings on which it based this conclusion. Nevertheless, the question is whether a reading of the Trial Judgment as a whole[2649] reveals on what basis the Trial Chamber determined Gbao's *mens rea*.

988. After making extensive findings regarding the killing of 63 suspected Kamajors[2650] and sexual violence in Kailahun,[2651] the Trial Chamber concluded that these acts constituted "violence committed with the specific intent to spread terror among the civilian population."[2652] The Trial Chamber noted that the required intent "can be inferred from the circumstances of the acts or threats, that is, from their nature, manner, timing and duration."[2653] Accordingly, the Trial Chamber reasoned that the killings in Kailahun found to be acts of terror were carried out in public,[2654] on a large scale[2655] and targeted civilians.[2656] As to the acts of sexual violence, the Trial Chamber explained that they amounted to acts of terrorism based on the "consistent pattern of conduct" in respect of these crimes.[2657] The Trial Chamber therefore sufficiently explained its reasoning that the

[2646] Prosecution Response, paras 5.79-5.82.
[2647] Gbao Reply, para. 82.
[2648] Trial Judgment, para. 2172.
[2649] *E.g. Orić* Appeal Judgment, para. 38; *Naletilić and Martinović* Appeal Judgment, para. 435; *Stakić* Appeal Judgment, para. 344.
[2650] Trial Judgment, paras 1447-1454.
[2651] Trial Judgment, paras 1405-1413.
[2652] Trial Judgment, para. 1491, 1493.
[2653] Trial Judgment, para. 121, *quoting Galić* Appeal Judgment, para. 104; *Fofana and Kondewa* Appeal Judgment, para. 357.
[2654] *See* Trial Judgment, paras 1393, 1395, 1396.
[2655] Trial Judgment, para. 1449.
[2656] Trial Judgment, para. 1448.
[2657] Trial Judgment, para. 1346-1352, 1493.

killings of suspected Kamajors and acts of sexual violence were committed with the specific intent to spread terror.

989. As to whether Gbao shared this intent, the Trial Chamber found that he intended the killings of the suspected Kamajors "in order to strengthen the power and control of the RUF over Kailahun District and the civilian population there."[2658] Gbao was also found to have "shared the requisite intent for rape within the context of 'forced marriage' in order to further the goals of the joint criminal enterprise."[2659] The Trial Chamber further concluded that the acts of terror committed in Kailahun "were a logical consequence to the pursuance of the goals prescribed in [the RUF] ideology, which … was imparted particularly by Gbao."[2660] Considering that the Trial Chamber is not required to articulate every step of its reasoning for each particular finding that it makes,[2661] the Appeals Chamber is satisfied that the Trial Chamber, by these findings, provided a sufficiently reasoned opinion on why Gbao held the requisite intent for acts of terrorism in Kailahun.

990. In support of his position to the contrary, Gbao refers to the Trial Chamber's finding that the "Prosecution failed to adduce evidence of acts of terrorism in parts of Kailahun District that were controlled by the RUF and where Gbao was located."[2662] The Trial Chamber, however, firmly based its substantial findings regarding the killings of the 63 suspected Kamajors[2663] and sexual violence in Kailahun[2664] on the evidence adduced at trial, and on that basis found the killings and sexual violence to constitute acts of terrorism.[2665] The finding Gbao which refers to cannot be read in isolation from the context in which it was made. The "acts of terrorism" to which it primarily refers was the RUF practice of "burning of civilian houses and targeting of traditional civilian authorities."[2666] The Trial Chamber rightly noted that evidence of *such* acts of terrorism was not adduced in respect of Kailahun District.[2667] In Kailahun District, the acts of terrorism found to have occurred included the killing of 63 suspected Kamajors and acts of sexual violence.[2668] Furthermore, the Trial Chamber held that based on "evidence adduced in relation to the various Districts," that sexual violence and forced marriages as acts of terrorism were "regularly

[2658] Trial Judgment, para. 2166.
[2659] Trial Judgment, para. 2167.
[2660] Trial Judgment, para. 2168.
[2661] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 18.
[2662] Trial Judgment, para. 2047.
[2663] Trial Judgment, paras 1387-1397.
[2664] Trial Judgment, paras 1405-1413.
[2665] Trial Judgment, paras 1491, 1493.
[2666] Trial Judgment, para. 2047.
[2667] Trial Judgment, paras 1490-1495, 2047, 2156.

committed" by AFRC/RUF members, including Kailahun.[2669] In this regard, the Appeals Chamber also notes the finding that some of the victims of these crimes had been abducted from locations throughout Sierra Leone and brought to Kailahun District.[2670] The abduction, sexual violence and forced marriage committed against these women and girls were found by the Trial Chamber to constitute acts of terrorism.[2671] Because forced marriage is a continuing crime, it follows that the acts of terrorism continued from the place of abduction to Kailahun District. Gbao's allegation of a lack of reasoned opinion is therefore rejected.

991. The Appeals Chamber now turns to Gbao's submission that the Trial Chamber's finding that he held the requisite intent for acts of terrorism in Kailahun is unreasonable. As a preliminary matter, the Appeals Chamber notes that while Gbao disputes that he shared such intent for both the killing of the 63 suspected Kamajors and the sexual violence in Kailahun, his present ground of appeal only details that challenge in respect of the killings. The detailed arguments for why he did not share the intent required under Count 1 in respect of the acts of sexual violence, Gbao submits, are presented under his Ground 8(r).[2672] Gbao's Ground 8(r) has been earlier rejected.[2673]

992. Gbao's challenge is based on the claim that he was doing his best to facilitate the release of the victims and therefore did not have the requisite intent under Count 1 in relation to the killings.[2674] Gbao has misconstrued the Trial Chamber's findings. While the panel chaired by Gbao paroled the 63 suspected Kamajors as he alleges,[2675] the Trial Chamber made no findings as to whether that group would have been released eventually or what active steps, if any, Gbao took in attempting to secure their release. As such, Gbao fails to demonstrate that it was unreasonable for the Trial Chamber to infer his intent to commit acts of terror from his adherence to the RUF ideology and his presence as a senior and effective commander at the execution of 63 suspected Kamajors.[2676]

993. In addition, the Appeals Chamber notes that the acts of terror committed in Kailahun were found to be "the logical consequence to the pursuance of the goals prescribed in [RUF] ideology,

[2668] *See* Trial Judgment, paras 1491, 1493.
[2669] Trial Judgment, paras 1346-1352, 1493.
[2670] Trial Judgment, paras 1460, 1465.
[2671] Trial Judgment, paras 1350-1351.
[2672] Gbao Appeal, para. 179.
[2673] *See supra*, para. 981.
[2674] Gbao Appeal, paras 175-177.
[2675] Trial Judgment, para. 1391.
[2676] Trial Judgment, paras 1393, 1395, 2035.

the instruction on which … was imparted particularly by Gbao, who was present during the execution [of the suspected Kamajors]."[2677] The Trial Chamber in this way linked Gbao's imparting of the RUF ideology to the requisite intent to commit acts of terror by finding that Gbao, being "a strict adherent to the RUF ideology"[2678] and the acts of terror having been found by the Trial Chamber to be a logical consequence of that ideology,[2679] had the requisite intent to commit acts of terror.[2680]

(d) Conclusion

994. For these reasons, Gbao fails to demonstrate that no reasonable trier of fact could have concluded that he shared the intent for the killing of the 63 suspected Kamajors as an act of terror. Gbao's sub-ground 8(o) fails.

5. Collective punishment in Kailahun District (Gbao Ground 8(p))

(a) Trial Chamber's findings

995. The Trial Chamber found Gbao guilty under JCE 1 of committing collective punishments (Count 2) by the crimes set out in Counts 3 to 5 (unlawful killings) in relation to events in Kailahun Town in Kailahun District.[2681] It found that "the killing of 63 civilians near a roundabout in Kailahun Town by members of the RUF on the orders of Bockarie and in the presence of other senior members including Gbao" was "committed with the aim of indiscriminately punishing civilians perceived to be Kamajors or collaborators."[2682]

(b) Submissions of the Parties

996. Gbao submits that the Trial Chamber failed to find that he held the specific intent required for collective punishment.[2683] In any event, he did not share the specific intent to collectively punish the 63 alleged Kamajors with the principal perpetrators of the crime,[2684] because he sought

[2677] Trial Judgment, para. 2168.
[2678] Trial Judgment, para. 2170.
[2679] Trial Judgment, para. 2168.
[2680] Trial Judgment, para. 2172.
[2681] Trial Judgment, Disposition, p. 684.
[2682] Trial Judgment, paras 1491-1492.
[2683] Gbao Notice of Appeal, para. 67; Gbao Appeal, paras 181, 186.
[2684] Gbao Appeal, paras 182-184, *citing* Partially Dissenting Opinion of Justice Boutet, paras 9, 11.

to facilitate the release of the victims[2685] and shared the sentiments of the panel investigating them, which he led, that they were not Kamajors.[2686] Also, Gbao avers that Bockarie, one of the principal perpetrators, does not appear to have had such intent, as he was informed that the first group did not include Kamajors and that the second group had been paroled pending final investigation.[2687] In Gbao's view, Bockarie appeared to act out of "impulsive criminality, rather than a desire for collective punishment."[2688] The Prosecution refers to the arguments made in its response to Gbao's Sub-Ground 8(o).[2689] Gbao offers no arguments in reply.

(c) Discussion

997. After due consideration of the Parties' submissions, the Appeals Chamber overturns Gbao's conviction for collective punishments in Kailahun.

6. Enslavement in Kailahun District (Gbao Ground 8(s))

(a) Trial Chamber's findings

998. The Trial Chamber found that "Gbao was directly involved in the planning and maintaining of a system of enslavement."[2690] It held that enslavement and forced labour, among other crimes, were a logical consequence of RUF ideology, the instruction of which was imparted particularly by Gbao.[2691] The Trial Chamber concluded that Gbao shared with the other JCE members the requisite intent to commit, *inter alia*, enslavement in Kailahun.[2692] Among the underlying acts constituting enslavement in Kailahun District were forced farming, forced mining and forced military training.[2693] Gbao was found to have managed the forced civilian farming in Kailahun between 1996 and 2001,[2694] and in 1997 and 1998, Gbao met with civilian Commanders and instructed them regarding the produce and labour they were to provide in support of the war.[2695] Civilians were also

[2685] Gbao Appeal, para. 185.
[2686] Gbao Appeal, para. 185.
[2687] Gbao Appeal, para. 184.
[2688] Gbao Appeal, para. 184.
[2689] Prosecution Response, para. 5.83.
[2690] Trial Judgment, para. 2167.
[2691] Trial Judgment, para. 2168.
[2692] Trial Judgment, para. 2172.
[2693] Trial Judgment, para. 2156.
[2694] Trial Judgment, para. 2037.
[2695] Trial Judgment, para. 2037.

forced to work on Gbao's personal farm in 1997 and 1998.[2696] Further, Gbao and Patrick Bangura oversaw the forced civilian mining at Giema, which took place from 1998 to 1999.[2697]

(b) Submissions of the Parties

999. Gbao submits that the Trial Chamber erred in fact in finding that he shared the requisite intent for enslavement.[2698] At the outset, Gbao reiterates his objections to the imputation of responsibility to him based on his role as RUF ideologist and states that he was not involved in any military training.[2699] The bulk of his present sub-ground, therefore, is based on a claim that the Trial Chamber erroneously relied on evidence concerning the forced farming and forced mining and his involvement therein.[2700]

1000. With respect to his involvement in forced farming, Gbao first argues that the Trial Chamber relied on temporally irrelevant and unreliable witness testimony.[2701] Second, as to his alleged personal farm, Gbao submits that TF1-330 did not state that civilians were forced to work on it.[2702] As such, TF1-108's testimony that they were so forced was left uncorroborated, despite the finding that it required corroboration.[2703] Third, Gbao challenges the finding that he managed large-scale civilian farming in Kailahun from 1996-2001.[2704] Fourth, Gbao argues that the Trial Chamber's finding that he met with "civilian Commanders" to discuss the quantities of produce and labour they were to provide is based on non-credible[2705] and irrelevant testimony.[2706] As to the forced farming itself, Gbao submits that the Trial Chamber erred in finding that physical violence took place on RUF farms during the Junta period.[2707] Lastly on the issue of forced farming, Gbao submits that the Trial Chamber failed to explain how the farming furthered the goals of the Junta[2708] and, even if it did, how his involvement therein furthered the JCE.[2709]

[2696] Trial Judgment, para. 2037.
[2697] Trial Judgment, para. 1433.
[2698] Gbao Notice of Appeal, paras 73-74; Gbao Appeal, paras 213, 237.
[2699] Gbao Appeal, para. 215.
[2700] *See* Gbao Appeal, para. 215.
[2701] Gbao Appeal, paras 216-220, 269. *See supra*, para. 1057.
[2702] Gbao Appeal, para. 219; Transcript, TF1-330, 14 March 2006, p. 27 (closed session).
[2703] Gbao Appeal, para. 219; *See* Trial Judgment, paras 1425, 1426.
[2704] Gbao Appeal, paras 223, 224.
[2705] Gbao Appeal, para. 225. *See supra*, para. 1075.
[2706] Gbao Appeal, para. 225.
[2707] Gbao Appeal, para. 222.
[2708] Gbao Appeal, paras 226-230.
[2709] Gbao Appeal, para. 228.

1001. As to his involvement in forced mining, Gbao submits that the evidence does not support that mining took place in Kailahun during the Junta period, or that he intended to further the JCE.[2710] Gbao further argues that there can be no finding that the mining furthered the objectives of the JCE because there is no evidence that any diamond from Kailahun went to support the Junta[2711] and no diamonds were found in Kailahun District; the diamond mining was fake, as "part of an elaborate ruse devised by Pa Patrick."[2712]

1002. The Prosecution responds that the Trial Chamber did not err in considering evidence relating to events after 19 February 1998 because the JCE continued until the end of April 1998.[2713] As to how the forced farming furthered the goals of the JCE, the Trial Chamber emphasized the critical importance of the planned and organised system of forced labour in Kailahun.[2714] It adds that enslavement does not require a showing that diamonds were found and used in support of the JCE.[2715]

1003. Gbao replies that he was convicted for crimes committed between 25 May 1997 and 19 February 1998[2716] and that, in any event, it is unclear whether the crimes for which he was convicted — such as forced labour at a farm near Pendembu between 1999-2001 — were committed before April 1998.[2717] Moreover, the Trial Chamber gave no examples of how the produce from Kailahun was used to support the Junta.[2718] He also argues that, because he incurred JCE liability under Count 13, it must be shown that the mining was done in furtherance of the JCE.[2719]

(c) Discussion

1004. Gbao challenges the reasonableness of the Trial Chamber's finding that he shared the requisite intent for enslavement in Kailahun by attacking the evidence relied on by the Trial Chamber to make findings regarding forced farming and forced mining found to constitute

[2710] Gbao Appeal, para. 232, 233.
[2711] Gbao Appeal, paras 235-236.
[2712] Gbao Appeal, para. 235; *See* Transcript, DAG-110, 2 June 2008, pp. 86-90.
[2713] Prosecution Response Brief, para. 5.91, *citing* Trial Judgment 2172-2173.
[2714] Prosecution Response Brief, para. 5.92, *citing* Trial Judgment, paras 1478,1479, 2036.
[2715] Prosecution Response Brief, para. 5.94.
[2716] Gbao Reply, para. 96, *citing* Trial Judgment, para. 2172.
[2717] Gbao Reply, para. 97, fn. 71, *citing* Trial Judgment, para. 1424.
[2718] Gbao Reply, para. 98.
[2719] Gbao Reply, para. 99.

enslavement.[2720] Alternatively, Gbao submits that neither forced farming nor forced mining furthered the goals of the JCE.[2721]

1005. In relation to forced farming, Gbao generally claims that the evidence relied on by the Trial Chamber is temporally irrelevant and unreliable. In particular, Gbao challenges the Trial Chamber's findings in relation to (i) RUF "government" farms operating in Kailahun; (ii) physical violence perpetrated against civilian farm workers; (iii) the large-scale coordination of farms and use of produce by the RUF and his meeting with civilian commanders in 1997 and 1998; (iv) the use of forced labour on his personal farm; and (v) his involvement in the management of forced farming in Kailahun from 1996 to 2000. As to forced mining, Gbao asserts that uncorroborated and temporally irrelevant evidence relied on by the Trial Chamber does not establish that forced mining took place in Kailahan during the Junta period. The Appeals Chamber deals with each challenge in turn.

(i) Did the Trial Chamber err in finding Gbao was involved in forced farming in Kailahun?

1006. The Appeals Chamber notes that Witnesses TF1-141,[2722] TF1-113,[2723] TF1-114[2724] and TF1-367[2725] gave evidence of forced farming after the Junta period. As to the testimony of TF1-036, the transcript pages cited by Gbao refer to a screening process in relation to military training, not forced farming, and accordingly do not relate to Gbao's present argument.[2726] The observations of TF1-045, contrary to Gbao's assertion, are relevant to the Junta period as the witness observed forced farming from "1997 to disarmament."[2727] Gbao only points to three findings[2728] — two in relation to two separate RUF "government" farms[2729] and a finding relating to civilian workers subjected to physical violence on such farms[2730] — that are supported by the abovementioned testimonies relating to events outside the Junta period. The Appeals Chamber addresses Gbao's temporal relevancy concerns specific to the impugned findings below.[2731]

[2720] Gbao Appeal, paras 216-220.
[2721] Gbao Appeal, paras 226-230, 235-236.
[2722] Transcript, TF1-141, 12 April 2005, p. 16-18.
[2723] Transcript, TF1-113, 6 March 2006, pp. 32-33.
[2724] Transcript, TF1-114, 28 April 2005, pp. 40-41, 52-56, 61.
[2725] Transcript, TF1-367, 22 June 2006, pp. 23-24 (closed session).
[2726] Transcript, TF1-036, 27 July 2005, p. 57-58 (closed session).
[2727] Transcript, TF1-045, 18 November 2005, pp. 65-66.
[2728] Gbao Appeal, paras 222, 216 fns. 249, 254.
[2729] Trial Judgment, paras 1423-1424.
[2730] Trial Judgment, para. 2036.
[2731] *See supra*, paras 1008, 1009.

1007. In addition to temporal challenges to the evidence, Gbao challenges the credibility of the testimony of TF1-330,[2732] TF1-108[2733] and TF1-366.[2734] Gbao's general credibility challenges to TF1-330 and TF1-108, are addressed in the discussion of his Ground 11.[2735] Under his present ground of appeal, Gbao asserts that TF1-108, TF1-366,[2736] and TF1-045's[2737] testimonies required corroboration, but were uncorroborated. The Appeals Chamber addresses whether the testimony in relation to the impugned findings were adequately corroborated below.[2738]

a. RUF "government" farms

1008. The Appeals Chamber notes that the Trial Chamber found that two RUF government farms, one located in Pendembu and another located between Benduma and Buedu, operated outside the Junta period.[2739] These findings were primarily based on the testimony of TF1-141 and TF1-113.[2740] Gbao, however, does not explain the error occasioned by consideration of this evidence. The Trial Chamber limited Gbao's JCE liability in respect of Kailahun District to the period between 25 May 1997 and 19 February 1998.[2741] While the two farms in question operated outside this time period, other RUF "government" farms operated in Kailahun from 1996 to 2001,[2742] which included the Junta period.[2743] Consequently, in the context of Gbao's JCE liability for crimes committed in Kailahun, the Trial Chamber's findings on RUF "government" farms were not based solely on the evidence which Gbao asserts is temporally irrelevant. Gbao's submission is therefore rejected.

b. Physical violence against civilians on RUF government farms

1009. Gbao challenges the Trial Chamber's finding that there was "ample evidence that civilians were enslaved and subjected to physical violence while working on RUF government farms."[2744]

[2732] Gbao Appeal, paras 222, 223, 225.
[2733] Gbao Appeal, paras 223, 217.
[2734] Gbao Appeal, para. 217.
[2735] Gbao Appeal, paras 218, 222, 223, 225. *See supra*, para. 1095.
[2736] Gbao Appeal, para. 217.
[2737] Gbao Apeal, para. 222.
[2738] *See supra*, paras 1009-1011.
[2739] Trial Judgment, paras 1423, 1424.
[2740] Trial Judgment, paras 1423-1424, fns 2660-2670.
[2741] Trial Judgment, para. 2172.
[2742] *See* Trial Judgment, para. 1422.
[2743] *See* Trial Judgment, para. 2037.
[2744] Trial Judgment, para. 2036, fn. 3772. *See* Gbao Appeal, para. 213.

The supporting testimony of TF1-114 and TF1-113 mainly concerned physical violence against civilians working on RUF farms in Kailahun after 19 February 1998.[2745] This temporal irrelevance does not render the Trial Chamber's finding inapplicable to Gbao, since it does not disprove the occurrence of physical violence on RUF farms during the time period relating to Gbao's JCE liability. Indeed, the Trial Chamber's finding on physical violence on RUF "government" farms is sufficiently supported by the credible testimony of other witnesses,[2746] whose temporal relevance is unchallenged by Gbao.[2747] TF1-108's testimony supporting the impugned finding was corroborated by the credible testimony of TF1-330 and TF1-045.[2748] The Trial Chamber did not question TF1-330's credibility[2749] and found that TF1-045 did not need corroboration, unless testifying to the "acts and conduct of the accused."[2750] Here, TF1-045 was simply testifying to general matters regarding the working conditions on RUF farms.[2751] As such, this evidence does not relate to the acts and conduct of the accused as defined by the Trial Chamber,[2752] and therefore by the Trial Chamber's own findings did not require corroboration.[2753] While Gbao correctly asserts, in his final challenge to the above finding, that DAG-111 did not testify that civilian farm workers were subjected to violence on RUF farms on the cited transcript page,[2754] the Appeals Chamber is satisfied that the Trial Chamber's finding was open to a reasonable trier of fact based on the other credible witnesses. Gbao accordingly fails to show an error, and his submission is untenable.

[2745] *See* Transcript, TF1-114, 28 April 2005, pp. 52-56, 61; Transcript, TF1-113, 6 March 2006, pp. 32-33.
[2746] Trial Judgment, para. 2036, fn. 3772.
[2747] Gbao Appeal, para. 222.
[2748] Trial Judgment, para. 2036, fn. 3772.
[2749] *See* Trial Judgment, paras 532-603.
[2750] Trial Judgment, para. 561.
[2751] Transcript, TF1-045, 21 November 2005, p. 64
[2752] Decision on 23 Witness Statements, para. 33. *See supra*, para. 325. "Where the prosecution case is that the accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92bis(A) excludes any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish- (g) that he had participated in the joint criminal enterprise, or (h) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes." Decision on 23 Witness Statements, para. 33, *citing Galić* Decision on Rule 92*bis*, para. 10; *Bagosora et al*. Decision on the Prosecution's Rule 92*bis* Motion , para. 13.
[2753] Trial Judgment, paras 559-561.
[2754] Transcript, DAG-110, 2 June 2008, p. 57.

c. Large-scale coordination of farms and use of produce by the RUF and Gbao's meeting with civilian commanders

1010. Gbao challenges the Trial Chamber's findings that farming was coordinated on a large-scale[2755] and that he met with "civilian Commanders" to instruct them about produce and labour to be provided in support of the war.[2756] He does so by attacking the credibility of TF1-108 and TF1-330[2757] and arguing that TF1-108 did not testify regarding Gbao's meeting with "civilian Commanders" in 1997 and 1998 at the transcript pages cited.[2758] The Trial Chamber's credibility concerns were addressed when it stated that TF1-108's testimony was corroborated by a credible witness such as TF1-330.[2759] Gbao's claim that TF1-108 did not testify that Gbao met with civilian commanders is without merit; the witness testified that Gbao met with "civilian Commanders" regarding produce and labour in support of the war in 1997, 1998, and 1999.[2760] This submission fails.

d. Gbao's personal farm

1011. With regard to Gbao's use of forced labour on his personal farm, the Trial Chamber found that "civilians were required to work on farms owned by …Gbao… in each year from 1995 to 2000."[2761] Gbao correctly asserts that this finding is not fully supported by TF1-330, as TF1-330 did not testify that civilians were *forced* to work, but rather simply worked on Gbao's farm.[2762] Contrary to Gbao's assertion, however, the occurrence of forced farming on Gbao's personal farm is supported by other evidence: TF1-366 testified that he captured civilians and sent them to work on Gbao's farm.[2763] As this evidence related to TF1-366's own experience, it did not require corroboration.[2764] Accordingly, TF1-366's testimony as to forced labour also provides the credible evidence needed to corroborate TF1-108's testimony[2765] that Gbao had a farm where civilians involuntarily worked.[2766] The Trial Chamber's finding therefore stands. Additionally, Gbao's claim

[2755] Trial Judgment, para. 2036.
[2756] Trial Judgment, para. 2037.
[2757] Gbao Appeal, paras 223, 225.
[2758] Gbao Appeal, para. 225.
[2759] *See* Trial Judgment, paras 597, 532-603.
[2760] Transcript, TF1-108, 7 March 2006, p. 95.
[2761] Trial Judgment, para. 1425.
[2762] Gbao Appeal, para. 219; Transcript, TF1-330, 14 March 2006, p. 27 (closed session) (emphasis added).
[2763] Trial Judgment, para 1425, fn. 2671. Transcript, TF1-366, 10 November 2005, pp. 6-7 (closed session).
[2764] Trial Judgment, para. 546.
[2765] Trial Judgment, para. 597.
[2766] Transcript, TF1-108, 7 March 2006, p. 112-113.

that it is "unclear whether this all took place" during the Junta period is without merit as the Trial Chamber found that Gbao had a private farm in every year between 1995 and 2000.[2767] Gbao's challenge to the impugned finding is therefore rejected.

e. Gbao's management of forced farming

1012. Finally, in relation to the Trial Chamber's finding that Gbao managed large-scale forced civilian farming in Kailahun which existed from 1996 to 2001, Gbao asserts that the Trial Chamber's finding does not stand as it relates to events outside the period from 25 May 1997 to 19 February 1998, the temporal limit imposed by the Trial Chamber to his JCE liability for crimes committed in Kailahun.[2768] As some farms created before or during the Junta period continued in operation thereafter,[2769] evidence relating to these farms falls within the relevant time period for Gbao's JCE liability. Gbao accordingly fails to explain the error in considering evidence relating to the existence of these farms and his involvement in their management in order to determine whether he shared the requisite intent for enslavement in Kailahun during the relevant time period.

1013. The Appeals Chamber notes that Gbao was in Bombali District between March 1999 and May 2000.[2770] The Appeals Chamber also notes that the Trial Chamber did not make findings as to how Gbao managed RUF "government" farms in Kailahun from afar.[2771] However, while the Trial Chamber found that Gbao managed large-scale forced civilian farming until 2001, Gbao argues that his liability for these crimes was limited to 19 February 1998. Accordingly, no demonstrable error results from a failure to consider events relevant to a time period for which Gbao, on his own submission, was not held responsible.

1014. For these reasons, Gbao submissions in relation to forced farming are rejected.

[2767] Trial Judgment, para. 1425, fn. 2671.
[2768] Gbao Appeal, para. 224.
[2769] *See* Trial Judgment, para. 1422.
[2770] Gbao Appeal, para. 224.
[2771] Trial Judgment, paras 1417-1424, 2037.

(ii) Did the Trial Chamber err in finding Gbao was involved in forced mining in Kailahun?

1015. The Appeals Chamber notes that Gbao was found to have overseen forced civilian mining in Giema, which took place between 1998 and 1999.[2772] Gbao asserts, however, that mining did not (i) take place in Kailahun, (ii) take place during the Junta period, and (iii) even if it did, TF1-330 did not explicitly testify that civilians were forced to mine.[2773]

1016. First, the Appeals Chamber notes that TF1-371's testimony in relation to the Supreme Council's appointment of senior members to supervise diamond mining areas only refers to Kono and Kenema Districts as traditional areas of diamond mining.[2774] Contrary to Gbao's assertion, however, there is ample evidence of forced mining activity in Kailahun. TF1-366, whose testimony in relation to general matters did not require corroboration,[2775] testified that forced mining took place in Kailahun in locations such as Yenga, Jabama and Golahun.[2776] TF1-108's corroborated testimony[2777] also provided evidence of forced mining activities throughout Kailahun.[2778] Consequently, the fact that senior members of the Supreme Council were appointed to supervise diamond mining areas in Kono and Kenema, as suggested by Gbao,[2779] does not disprove that mining took place in Kailahun, especially in light of testimony provided by TF1-108 and TF1-366.[2780]

1017. Second, in respect of Gbao's temporal challenge to the evidence, he argues that TF1-330 testified about mining activities in 1998 "at a time when Bockarie was in Kailahun District" which, Gbao argues, puts TF1-330's testimony after the Junta period.[2781] However, the Trial Chamber's findings Gbao relies on do not unequivocally support his claim,[2782] and Gbao does not support it beyond reference to those findings.[2783] Rather, the salient passages in the Trial Judgment to which Gbao refers, concern mining in 1998 and state that "Gbao and Patrick Bangura oversaw the

[2772] Trial Judgment, para. 1433.
[2773] Gbao Appeal, paras 232, 233.
[2774] Gbao Appeal, para. 233; Transcript, TF1-371, 20 July 2006, pp. 34-37 (closed session).
[2775] Trial Judgment, para. 546.
[2776] Trial Judgment, paras 1432-1433.
[2777] TF1-108's testimony was corroborated by TF1-330. Trial Judgment, para. 1433, fn. 2711. The Trial Chamber did not express any credibility concerns in relation to TF1-330's testimony. *See* Trial Judgment, paras 532-603.
[2778] Trial Judgment, para. 1433, fn. 2711.
[2779] Gbao Appeal, para. 233, fn. 273.
[2780] Trial Judgment, para. 1433; Transcript, TF1-108, 8 March 2006, pp. 38-40.
[2781] Gbao Appeal, para. 233; Transcript, TF1-330, 14 March 2006, p. 50 (closed session).
[2782] Trial Judgment, paras 1432, 1433.
[2783] Gbao Appeal, para. 233, fn. 274.

civilians mining at Giema as well as 'the soldiers who had guns.'"[2784] Gbao fails to show an error and therefore his challenge is rejected.

1018. Third, while TF1-330 did not explicitly state that civilians were "forced" to mine for diamonds in Giema, the witness did testify that civilians were not given food and soldiers with guns oversaw the civilians as they worked.[2785] The Trial Chamber therefore reasonably inferred from the evidence that the labour civilians provided was forced. Gbao's submission in relation to forced mining in Kailahun is therefore rejected.

1019. For these reasons, Gbao fails to demonstrate that the evidence adduced at trial does not support a finding that he was involved in forced farming or forced mining in Kailahun. Having determined that the Trial Chamber did not so err, the Appeals Chamber now turns to Gbao's argument that these activities were not done in furtherance of the JCE.[2786]

(iii) Did the Trial Chamber err in finding that forced farming and forced mining furthered the goals of the JCE?

1020. The Appeals Chamber notes the finding that Gbao's "involvement in designing, securing and organizing the forced labour of civilians to produce foodstuffs significantly contributed to maintaining the strength and cohesiveness of the RUF fighting force."[2787] This finding is not predicated on the use of forced labour on Gbao's personal farm,[2788] but rather, as the Trial Chamber explained in detail, on a system whereby produce collected from RUF "government" farms was turned over to Gbao and then Sesay for commercialisation.[2789] The money made from the trade of this produce was used to buy ammunition.[2790] In this way, the Trial Chamber found that Gbao's involvement in forced farming was directed towards furthering the goals of the JCE as it was a method to secure revenue to strengthen the RUF fighting force.[2791]

1021. The Trial Chamber also found that the "RUF engaged in diamond mining in Kailahun District as early as 1996 and until 2000," and that "the mining activities were an important and vital

[2784] Trial Judgment, para. 1433.
[2785] Transcript, TF1-330, 14 March 2005, p. 49 (closed session).
[2786] Gbao Appeal, paras 226-230, 235.
[2787] Trial Judgment, para. 2039.
[2788] Trial Judgment, para. 2037.
[2789] Trial Judgment, para. 1430-1431, 2037.
[2790] Trial Judgment, para. 1427.
[2791] Trial Judgment, paras 2037, 2039.

source of income for the RUF, and later the AFRC/RUF Junta."[2792] Gbao's claim that no diamond was ever found in Kailahun and diamond mining was but "an elaborate ruse," and therefore could not have furthered the JCE is unsupported, as the transcript pages he cites do not mention mining, let alone any "elaborate ruse."[2793]

1022. Gbao's challenge to the Trial Chamber's finding that forced farming and forced mining were done in furtherance of the JCE therefore fails.

(d) Conclusion

1023. Gbao's Ground 8(s) is rejected.

B. Alleged Errors Regarding Gbao's Participation in the JCE (Grounds 8(b), (c) and (i))

1. Gbao's Ground 8(b): Error in finding that Gbao trained all RUF recruits throughout the Indictment Period

(a) Trial Chamber's findings

1024. The Trial Chamber found that "[i]n 1995, Gbao was a Sergeant and was sent to the Baima base in Kailahun District as an ideology instructor."[2794] The Trial Chamber found that "Gbao was responsible for the teaching of the ideology to the new commando recruits."[2795] The Trial Chamber further held that "Gbao was a strict adherent to the RUF ideology and gave instruction on its principles to all new recruits to the RUF."[2796]

(b) Submission of the Parties

1025. Under his Ground 8(b), Gbao submits that the Trial Chamber erred in finding that he trained all RUF recruits throughout the Indictment Period.[2797] First, he argues that there is no evidence that he trained any recruit during the Indictment Period, that is, between 30 November 1996 and

[2792] Trial Judgment, para. 1432.
[2793] Gbao Appeal, para. 235; Transcript, DAG-110, 2 June 2008, pp. 86-90.
[2794] Trial Judgment, para. 734.
[2795] Trial Judgment, para. 2012. *See* also Trial Judgment, paras 12, 2012 (training of "junior commandos" or "commandos).
[2796] Trial Judgment, para. 2170. *See* also Trial Judgment, paras 2011 (characterising Gbao as "the RUF ideology expert and instructor under the rubric of the JCE"), 2019, 2168 (recalling a previous finding that ideology instruction "was imparted particularly by Gbao").
[2797] Gbao Notice of Appeal, para. 34; Gbao Appeal, para. 43.

15 September 2000.[2798] Second, Gbao submits that the Trial Chamber's finding is contradictory to its further finding that most RUF recruits received scant ideological training.[2799] Gbao contends that the impugned finding that he trained all RUF recruits in ideology is the essential foundation for his convictions on the basis of JCE liability.[2800]

1026. The Prosecution responds that the alleged error does not invalidate Gbao's convictions on the basis of JCE liability.[2801] The Prosecution argues that even if the impugned finding is erroneous, Gbao's JCE liability did not rest solely or decisively on that finding. Gbao replies that his convictions on the basis of JCE liability cannot be sustained without the impugned finding.[2802] Gbao argues that the Trial Chamber's findings relating to his JCE liability were founded on his role as RUF ideologist, as is evident from the Sentencing Judgment,[2803] which found that Gbao's "major contributions to the joint criminal enterprise can be characterised by his role as an ideology instructor…."[2804]

(c) Discussion

1027. The Appeals Chamber has previously upheld Gbao's Ground 8(a) and overruled the Trial Chamber's findings that he significantly contributed to the JCE through his role as an ideology expert and instructor.[2805] Gbao's Ground 8(b) is therefore moot. The Appeals Chamber will further consider below whether a reasonable trier of fact could have found, on the basis of the Trial Chamber's other findings, that Gbao significantly contributed to the JCE.

2. Gbao's Ground 8(c): Failure to Describe Gbao's Membership in the JCE and How He Acted in Concert with the AFRC

(a) Trial Chamber's findings

1028. The Trial Chamber found that Sankoh, Bockarie, Sesay, Kallon, Superman, Eldred Collins, Mike Lamin, Isaac Mongor, Gibril Massaquoi, Gbao and other RUF Commanders were acting in concert with the AFRC, including at least Koroma, Gullit, Bazzy, Five-Five, SAJ Musa, Zagalo,

[2798] Gbao Appeal, paras 43, 44.
[2799] Gbao Appeal, paras 47, 48, *citing* Trial Judgment, para. 655.
[2800] Gbao Appeal, paras 45, 48.
[2801] Prosecution Response, paras 5.57, 5.58.
[2802] Gbao Reply, paras 25-28, 35, 36.
[2803] Gbao Reply, para. 35.
[2804] Sentencing Judgment, para. 270.
[2805] *See supra*, paras 178-182.

Eddie Kanneh and others to hold power in Sierra Leone on or shortly after 25 May 1997.[2806] On this basis, it was satisfied that the JCE involved a plurality of persons.[2807]

(b) Parties' Submissions

1029. Under his Ground 8(c), Gbao argues that the Trial Chamber erred in law and fact in finding that he was part of the plurality of persons that formed the AFRC/RUF JCE.[2808]

1030. Gbao contends first that the Trial Chamber failed to describe how he was a member of the JCE and how he acted in concert with the AFRC.[2809] He argues that the Trial Chamber did not find "a single example" of him acting in concert with the AFRC, which shows that there was no evidence of such interaction.[2810] Gbao further argues that the Trial Chamber erred in finding him to be part of the JCE plurality, as only senior members of the RUF were found to have been acting in concert with the AFRC.[2811]

1031. The Prosecution responds that Gbao was found to be a senior RUF Commander,[2812] as exemplified by his position amongst the Vanguards, who were recognized senior officers and military advisors to Junior Commanders.[2813] In any case, the Trial Chamber did not restrict the scope of the plurality to senior AFRC and RUF officers.[2814] Finally, the Prosecution argues that it was sufficient to show cooperation between RUF and AFRC leaders, as opposed to specific joint action between Gbao and the AFRC, to demonstrate concerted action in the implementation of the Common Criminal Purpose.[2815] Gbao replies that the Trial Chamber explicitly restricted the scope of the JCE to senior RUF and AFRC members.[2816] At any rate, Gbao argues that the absence of interaction with the AFRC shows that he was not a part of the JCE.[2817]

[2806] Trial Judgment, para. 1990.
[2807] Trial Judgment, para. 1990.
[2808] Gbao Appeal, para. 49.
[2809] Gbao Notice of Appeal, para. 36; Gbao Appeal, paras 49, 52.
[2810] Gbao Appeal, para. 54.
[2811] Gbao Notice of Appeal, para. 37; Gbao Appeal, paras 55 (*citing* Trial Judgment, para. 1992), 61, 62.
[2812] Prosecution Response, para. 5.59, *citing* Trial Judgment para. 765; Partially Dissenting Opinion of Justice Boutet, para. 21.
[2813] Prosecution Response, para. 5.59, *citing* Trial Judgment para. 667.
[2814] Prosecution Response, para. 5.59.
[2815] Prosecution Response, para. 5.63, *citing Haradinaj et al*. Trial Judgment, para. 139.
[2816] Gbao Reply, para. 43.
[2817] Gbao Reply, para. 46.

(c) Discussion

1032. The Appeals Chamber notes as a preliminary matter that the Trial Chamber described in detail the reasons for its conclusion that Gbao, through his contribution to the Common Criminal Purpose, in combination with the necessary *mens rea*, was a member of the JCE.[2818] Gbao's claim to the contrary is rejected.

(i) Acted "in concert" with the AFRC

1033. The Trial Chamber found as a general matter that "the three Accused … and the other listed individuals were all acting in concert."[2819] Gbao does not contest this finding generally, nor does he contest that other AFRC and RUF members of the JCE were acting in concert. Rather, Gbao only contests the Trial Chamber's failure to find that *he* acted in concert with the *AFRC*.[2820] In particular, Gbao's arguments are centred on the Trial Chamber's failure to find that he acted in concert with the AFRC in a direct or physical manner.[2821]

1034. The Trial Chamber found that it must be established that the "plurality of persons acted in concert with each other."[2822] The Trial Chamber considered that "[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."[2823] The Appeals Chamber considers that these statements accurately reflect the law. However, contrary to Gbao's suggestion, the Trial Chamber did not introduce an additional element to JCE liability. The Trial Chamber properly understood the law as requiring that the accused participated in the common purpose

[2818] Trial Judgment, paras 2010-2039, 2057, 2105, 2164, 2165, 2167-2170 (Gbao's participation), 2040-2048, 2058-2060, 2106-2109, 2166, 2168-2171 (Gbao's *mens rea*), 2049, 2061, 2110, 2172 (conclusions on Gbao's membership in the JCE).
[2819] Trial Judgment, para. 1990. *See* also Trial Judgment, para. 2081.
[2820] *See, e.g.,* Gbao Appeal, paras 51 ("[L]ed the [Trial Chamber] to conclude that Gbao part [sic] of the plurality of persons acting in concert with the AFRC."), 52 ("The [Trial Chamber] erred in fact, however, by failing to describe … how he acted in concert with the AFRC."), 53 ("As stated, such joint action between Gbao and the AFRC is absent in the Judgment."), 54 ("Similarly, the [Trial Chamber] 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…."); Gbao Reply, paras 44 ("Furthermore, while there need not be endless findings demonstrating joint action between the AFRC and Gbao, a failure to present one single action is surely an indicator that Gbao did not act jointly with the AFRC."), 46 ("At any rate, the argument that there were no apparent findings in the case showing any interaction, much less criminal action, between Gbao and any AFRC member (much less one of their senior members) between 25 May 1997 and February 1998 persuasively demonstrates, we submit, that Gbao was not part of the JCE with the AFRC.").
[2821] *See* Gbao Appeal, para. 54 (arguing that the Trial Chamber failed to find "the existence of a single conversation between Gbao and any AFRC, whether in person or by radio"); Gbao Reply, paras 44, 46.
[2822] Trial Judgment, para. 257, *citing Krajišnik* Trial Judgment, para. 884. *See* also Trial Judgment, para. 261.
[2823] Trial Judgment, para. 257, *citing Haradinaj et al.* Trial Judgment, para. 139; *Krajišnik* Trial Judgment, para. 884.

shared by the members of the JCE.[2824] In contrast, the concept of "acting in concert" advanced by the Trial Chamber serves to clarify the required relationship between the persons said to be a plurality sharing a common purpose. This makes clear that the plurality of persons must have a common purpose, and not merely the same purpose, in the sense that persons act together in the pursuit of that purpose, creating a relationship of inter-dependence and cooperation.[2825] Alternatively, persons with identical purposes who do not share that purpose in common, as evidenced by the absence of joint action between them, do not constitute a plurality of persons having a common criminal purpose within the meaning of JCE liability. Thus, the requirement that the "plurality of persons acted in concert with each other in the implementation of a common purpose"[2826] merely clarifies and restates the first two elements of JCE liability, namely the existence of a plurality of persons sharing a common criminal purpose.

1035. Gbao then errs in proposing an additional legal element of concerted action to establish his participation in the JCE. To establish Gbao's liability under JCE, the Trial Chamber was not required to make findings on Gbao's concerted action with the AFRC beyond finding that his acts established his contribution to the Common Criminal Purpose. In this regard, however, the Appeals Chamber notes that the accused's "joint action" with other members of the JCE, as an *evidentiary* matter, can be relevant to assessing the accused's participation in the JCE. Simply, the character, quality and quantity of the accused's joint action with other members of the JCE may be relevant evidentiary considerations when analysing the intent and contribution of the accused relative to the common purpose of the JCE. The Appeals Chamber considers that this evaluation must be made on a case-by-case basis, but does note that the manner in which the members of the JCE interact and cooperate can take as many forms as conceived by the participants to pursue the realisation of their shared common criminal purpose. What matters is that they are all "the cog[s] in the wheel of

[2824] Trial Judgment, para. 261. *See Tadić* Appeal Judgment, paras 196, 227(iii); *Milutinović et al*. Trial Judgment, para. 103; *Brđanin* Appeal Judgment, para. 430; *Ntakirutimana* Appeal Judgment, para. 466. *See* also *Rwamakuba* JCE Decision, para. 25. *See* further *Trial of Franz Schonfeld and others,* British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, p. 68 (summing up of the Judge Advocate) ("if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present … provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly"); *Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), Judgment of 24 August 1948 (*Ponanzo* Case) (the accused "must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means").
[2825] *Brđanin* Appeal Judgment, para. 430 (holding that it must be found that "the criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise"); *Stakić* Appeal Judgment, para. 69 ("The Appeals Chamber considers that the Trial Chamber's findings demonstrate that there was a plurality of persons that acted together in the implementation of a common goal.").
[2826] Trial Judgment, para. 261.

events leading up to the result which in fact occurred."[2827] Nonetheless, the manner in and degree to which the accused and the members of the JCE interact, coordinate and mutually rely on one another's contributions can indicate whether the accused shared the common purpose and significantly contributed to realising it.[2828]

1036. For the reasons outlined above, the Appeals Chamber also rejects Gbao's suggestion that it was necessary for the Trial Chamber to find that he worked in concert with the AFRC, once it found that the JCE was composed of senior leaders of the AFRC and RUF and that he was a senior leader of the RUF.[2829]

1037. Accordingly, Gbao's claim that the Trial Chamber erred in failing to find that he acted "in concert" with the AFRC fails.

(ii) Senior RUF leader

1038. The Appeals Chamber rejects the premise of Gbao's argument that he could not be a member of the AFRC/RUF JCE if he was not a senior officer of the RUF.[2830] While the Trial Chamber found as a general matter that there was insufficient evidence to establish that mid- and low-level commanders of the AFRC and RUF, as well as rank-and-file soldiers of both groups, were members of the JCE, this was only a general finding as to a broad group of persons.[2831] This finding did not strictly limit the JCE to only "senior leaders" of the RUF and AFRC, nor did it imply that the Trial Chamber was foreclosed from finding that individuals not found to be "senior leaders" were also members of the JCE. Thus, notwithstanding such a finding, it was open to a reasonable trier of fact, in light of more specific, individualised evidence, to conclude that Gbao, even if a non-senior officer, was also a member of the AFRC/RUF JCE together with senior officers of those groups.

1039. Gbao mischaracterises the Trial Chamber's findings with respect to Bombali District.[2832] The Trial Chamber found that the crimes committed in Bombali District were not attributable to the Accused because the crimes occurred after the termination of the JCE and the perpetrators of those

[2827] *Tadić* Appeal Judgment, para. 199, *quoting Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), Judgment of 24 August 1948.
[2828] *See, e.g.*, *Krajišnik* Trial Judgment, para. 1082.
[2829] Gbao Reply, para. 45.
[2830] Gbao Appeal, para. 61.
[2831] Trial Judgment, para. 1992.
[2832] Gbao Appeal, para. 60.

crimes were AFRC forces under the command of Gullit.[2833] The Trial Chamber further reasoned that while there were RUF troops among those forces, the crimes could still not be attributed to the Accused because the most senior RUF commander among those RUF troops, Major Brown, was not in a command position, confirming that RUF troops were under the control of the AFRC and Gullit.[2834] The Trial Chamber neither reasoned nor found that Major Brown was not a participant in the JCE because he was not in a position of command over soldiers.

3. Gbao's Ground 8(i): Error in Finding that Gbao Significantly Contributed to the JCE as "The Ideologist" or Otherwise

(a) Trial Chamber's findings

1040. Examining whether Gbao participated in the JCE, the Trial Chamber found that he was an "ideology instructor"[2835] who taught RUF recruits and monitored the implementation of the RUF ideology.[2836] It held that this ideology, in its normative and operational settings, significantly contributed to the crimes which were within the JCE or a natural and foreseeable consequence thereof.[2837]

1041. The Trial Chamber also considered other ways in which Gbao participated in the JCE. For instance, it found that Gbao had a "supervisory role"[2838] over the IDU,[2839] the MP,[2840] the IO[2841] and the G5,[2842] which entailed travelling widely in Kailahun to monitor the implementation of the RUF ideology.[2843] Gbao was also found to have been involved in the forced labour of civilians to produce foodstuffs,[2844] which in the Trial Chamber's view significantly contributed to maintaining the strength and cohesiveness of the RUF fighting force.[2845] Moreover, the Trial Chamber held that Gbao's "status, rank and personal relationship with Sankoh, as well as his knowledge of the RUF's

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[2833] Trial Judgment, paras 1507, 1508, 2180.
[2834] Trial Judgment, paras 845, 1507.
[2835] Trial Judgment, paras 734, 2010, 2028.
[2836] Trial Judgment, paras 2028, 2035.
[2837] Trial Judgment, paras 2030-2032, 2038. *See* generally Trial Judgment, paras 2012-2027.
[2838] Trial Judgment, para. 2034. *See* generally Trial Judgment, paras 697-700 (findings on role of OSC).
[2839] The Internal Defence Unit (IDU) was responsible for investigating misconduct by fighters. Trial Judgment, para. 682.
[2840] The Military Police (MP) was responsible for enforcing discipline in the RUF, including by making arrests, assisting investigations and enforcing punishments. Trial Judgment, para. 690.
[2841] The Intelligence Office (IO) was responsible for reporting intelligence from the front lines regarding violations of RUF rules as well as the progress of military activity. Trial Judgment, para. 688.
[2842] The General staff unit 5 (G5) was responsible for all civilians in RUF-held territory. Trial Judgment, para. 692.
[2843] Trial Judgment, para. 2035.
[2844] *See* generally Trial Judgment, paras 1417-1426, 1478-1482 (findings on forced farming in Kailahun District).

ideology" gave him considerable prestige in the RUF in Kailahun.[2846] It further considered that Gbao's failure to properly investigate allegations against a civilian woman (TF1-113) and his instruction that she be publicly beaten, would have had a demonstrative effect to compel the obedience of the civilian population in Kailahun to RUF authority.[2847]

(b) Submissions of the Parties

1042. Gbao submits that the Trial Chamber erred in finding that he significantly contributed to the JCE.[2848] Gbao avers that the Trial Chamber erred in finding that he significantly contributed to the JCE as "The Ideologist" of the RUF.[2849] Gbao further argues that the Trial Chamber erred in finding that he significantly contributed to the JCE by way of his status/assignment, rank, relationship with Sankoh, failure to investigate the beating of TF1-113 and involvement in the farming in Kailahun District.[2850]

1043. Gbao makes three challenges to his contribution as "The Ideologist".[2851] Gbao further challenges the Trial Chamber's findings on the other ways in which he contributed to the JCE. Gbao first argues that the Trial Chamber erred in finding that he significantly contributed to the JCE in his supervisory role over the IDU, MP, IO and G5 and supports this argument with three related submissions.[2852]

1044. Second, Gbao submits that his role as OSC and Overall IDU Commander could not amount to a significant contribution to the JCE in light of his limited authority and responsibilities.[2853] Gbao avers that the Trial Chamber found that he, as OSC and Overall IDU Commander, (i) did not have effective control over any security unit other than the IDU;[2854] (ii) was not superior to the Overall Unit Commanders;[2855] (iii) had no right to initiate investigations for the mistreatment of civilians by RUF fighters;[2856] (iv) had no right to initiate Joint Security Board Investigations nor was he ever

[2845] Trial Judgment, para. 2039.
[2846] Trial Judgment, para. 2033.
[2847] Trial Judgment, para. 2039.
[2848] Gbao Appeal, para. 143.
[2849] Gbao Notice of Appeal, para. 49; Gbao Appeal, para. 103.
[2850] Gbao Notice of Appeal, para. 50; Gbao Appeal, para. 103.
[2851] Gbao Appeal, paras 105-113.
[2852] Gbao Appeal, para. 115.
[2853] Gbao Appeal, paras 120-126.
[2854] Gbao Appeal, para. 120, *citing* Trial Judgment, paras 2034, 2153.
[2855] Gbao Appeal, para. 120, *citing* Trial Judgment, para. 698.
[2856] Gbao Appeal, para. 120 *citing* Trial Judgment, para. 684.

involved in such outside of Kailahun during the Junta period;[2857] (v) did not enforce punishments, as that power lay with the High Command;[2858] (vi) did not receive reports concerning any investigations during the Junta period[2859] or reports regarding unlawful killings in Bo, Kenema and Kono Districts;[2860] and (vii) was not proven to have failed in his duty to ensure that investigations were properly undertaken.[2861] Gbao adds that most disputes, investigations, and punishments were dealt with by local Area Commanders, and not the security apparatus.[2862] Gbao additionally argues that his alleged contribution through his status as OSC, if any, did not reach beyond Kailahun District.[2863]

1045. Third, Gbao disputes the finding that he contributed by travelling widely throughout Kailahun to ensure that RUF ideology was implemented.[2864] Fourth, Gbao submits that the Trial Chamber erred in relying on his rank to determine the significance of his contribution, as it failed to specify what rank he held.[2865] Gbao further submits that the Trial Chamber erred in finding that he contributed to the JCE by virtue of the prestige allegedly flowing from his personal relationship with Foday Sankoh.[2866] Fifth, Gbao submits that Trial Chamber erred in finding that he contributed to the JCE by failing to investigate the alleged beating of TF1-113.[2867]

1046. Lastly, Gbao submits that the Trial Chamber erred in concluding that he contributed to the JCE through his involvement in forced farming.[2868] Specifically, Gbao argues that the Trial Chamber failed to explain how the forced farming in Kailahun District furthered the Junta's goal of holding power over Sierra Leone.[2869] Gbao argues that in relation to his own alleged farm, it is unclear how food for his personal consumption could have furthered the said goal.[2870] Invoking the Dissenting Opinion of Justice Boutet, Gbao further argues that there is insufficient evidence to conclude that forced farming, in contrast to forced mining, was directed to achieving the goals of

[2857] Gbao Appeal, para. 121, *citing* Trial Judgment, para. 702.
[2858] Gbao Appeal, para. 121, *citing* Trial Judgment, para. 686.
[2859] Gbao Appeal, para. 121.
[2860] Gbao Appeal, para. 123, *citing* Trial Judgment, paras 2041, 2057, 2105.
[2861] Gbao Appeal, para. 123, *citing* Trial Judgment, paras 2041, 2057, 2105.
[2862] Gbao Appeal, para. 120, *citing* Trial Judgment, para. 685.
[2863] Gbao Appeal, paras 122-124, 126.
[2864] Gbao Appeal, para. 127.
[2865] Gbao Appeal, paras 103, 137.
[2866] Gbao Appeal, paras 103, 138.
[2867] Gbao Appeal, para. 140.
[2868] Gbao Appeal, paras 129, 130.
[2869] Gbao Appeal, para. 132.
[2870] Gbao Appeal, para. 133.

the JCE.[2871] Nonetheless, even if the farming did contribute to the JCE's goals, Gbao relies on the Dissenting Opinion of Justice Boutet to argue that the Trial Chamber failed to explain how his involvement therein furthered the JCE.[2872]

1047. The Prosecution responds that it was reasonably open to the Trial Chamber to conclude that there was a criminal nexus between the ideology and the crimes.[2873] Moreover, Gbao's role as ideology instructor notwithstanding, the Trial Chamber did not err in finding that Gbao contributed to the JCE in other ways.[2874] With regard to forced farming in Kailahun District, the Prosecution argues that the Trial Chamber reasonably inferred that forced farming furthered the JCE, given the central importance of Kailahun District to the RUF during the conflict[2875] as a farming area to provide food to troops and a key logistical base.[2876]

(c) Discussion

1048. Gbao raises a number of specific issues of fact as preliminary challenges. He further claims that the Trial Chamber erred in fact in concluding that his alleged contributions significantly contributed to the joint criminal enterprise. The Appeals Chamber will first consider those preliminary issues, before turning to the broader issue of Gbao's contribution.

(i) Teaching the RUF Ideology

1049. The Appeals Chamber has previously upheld Gbao's Ground 8(a) and overruled the Trial Chamber's findings that he significantly contributed to the JCE through his role as an ideology expert and instructor.[2877] Consideration of Gbao's challenges to the Trial Chamber's findings that he significantly contributed to the JCE through his role as the RUF ideology expert and instructor therefore does not arise.

[2871] Gbao Appeal, para. 135, *quoting* Partially Dissenting Opinion of Justice Boutet, para. 14.
[2872] Gbao Appeal, paras 134, 136, *citing* Partially Dissenting Opinion of Justice Boutet, para. 15.
[2873] Prosecution Response, para. 5.65.
[2874] Prosecution Response, para. 5.67, *citing* Trial Judgment, paras 701-703, 2034.
[2875] Prosecution Response, para. 5.69, *citing* Trial Judgment, para. 1381.
[2876] Prosecution Response, para. 5.69, *citing* Trial Judgment, para. 1381, 1383.
[2877] *See supra*, paras 178-182.

(ii) Supervising the RUF Security Apparatus

1050. Gbao challenges the Trial Chamber's finding that he supervised the MP and G5 units in Kailahun District to ensure that the RUF ideology was put into practice.[2878] Gbao contests this finding on the grounds that Witness DIS-188, upon whom the Trial Chamber relied was previously found to require corroboration and that the witness's testimony does not support the Trial Chamber's finding.[2879] Gbao fails to establish that the Trial Chamber erred in finding this testimony credible. The Trial Chamber did find as a general matter that the witness's testimony required corroboration, as it was "inconsistent" and the witness "was not genuinely assisting the Court to arrive at the truth."[2880] However, the Trial Chamber further noted that it had doubts as to the witness's veracity because the witness's testimony "was influenced in part by his support for the RUF movement and its ideology."[2881] By merely pointing to the Trial Chamber's own finding, Gbao fails to demonstrate that it was unreasonable for the Trial Chamber to rely on this witness's testimony in these circumstances. The Appeals Chamber recalls that the Trial Chamber "is not required to articulate every step of its reasoning for each particular finding it makes,"[2882] nor is it "required to set out in detail why it accepted or rejected a particular testimony."[2883]

1051. Moreover, contrary to Gbao's claim, the testimony of Witness DIS-188 cited in footnote 3770[2884] does support the finding that Gbao

> was a "popular" and "effective Commander" who travelled widely in Kailahun District, visiting different areas behind the front lines, reporting on whether the MP and G5 units were doing their jobs and observing the conduct of investigations in order to ensure that the RUF ideology was put into practice.[2885]

The testimony of Witness DIS-188 cited in footnote 3771[2886] does not support the finding that Gbao's "supervisory role entailed, in great measure, the monitoring of the implementation of the ideology."[2887] However, Gbao fails to show that this error rendered unreasonable the Trial Chamber's finding that as OSC, he travelled widely in Kailahun District, reported on whether the

[2878] Gbao Appeal, para. 127, 128.
[2879] Gbao Appeal, paras 127, 128.
[2880] Trial Judgment, para. 568.
[2881] Trial Judgment, para. 568.
[2882] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 18. *See* also *Brđanin* Appeal Judgment, para. 39.
[2883] *Krajišnik* Appeal Judgment, para. 139; *Musema* Appeal Judgment, para. 20.
[2884] Transcript, DIS-188, 1 November 2007, pp. 95-97.
[2885] Trial Judgment, para. 2035.
[2886] Transcript, DIS-188, 1 November 2007, pp. 25-28.
[2887] Trial Judgment, para. 2035.

MP and G5 units were doing their jobs and observed the conduct of investigations in order to ensure that the RUF ideology was put into practice. The Appeals Chamber will accordingly disregard the characterization of Gbao's supervisory role as monitoring the implementation of the RUF ideology, but the remaining impugned findings stand.

1052. Gbao's claim that the RUF security apparatus – the IDU, MP, IO and G5 – had no or only a nominal role during the Junta Period[2888] relies on bare assertions unsupported by evidence and questionable inferences from other facts established by the Trial Chamber. Gbao further fails to address the Trial Chamber's finding that the RUF "security units enjoyed enhanced importance [in RUF controlled territory] as the central components of a static administration."[2889] Thus, Gbao merely provides an alternative interpretation of the evidence and fails to show that the Trial Chamber's findings were unreasonable.

1053. In arguing that he had limited authority and responsibility in his role as OSC, Gbao has pointed to a number of the Trial Chamber's findings regarding the structure and operations of the RUF security apparatus.[2890] Gbao highlights, in particular, findings that he had little or no authority to issue orders to the Overall Unit Commanders,[2891] initiate investigations[2892] or enforce punishments.[2893] However, the Trial Chamber did not disregard these findings in its reasoning, specifically noting that "the evidence is insufficient to conclude that Gbao had effective control over [the IDU, MP, IO and G5] as OSC."[2894] Nonetheless, the Trial Chamber found that Gbao still had "considerable influence over the decisions taken by these bodies" due to "his appointment to this position by Sankoh, his status as a Vanguard and his power to issue recommendations."[2895] The Trial Chamber further specifically found that whatever his *de jure* authority, Gbao "enjoyed substantial practical authority over the members of the security units."[2896] The Trial Chamber considered then, that it was his "considerable influence" and "practical authority" as the supervisor of the RUF security apparatus, rather than his formal power and authority, that founded in part Gbao's contribution to the JCE through his role as OSC. By merely pointing to other findings, Gbao

[2888] Gbao Appeal, paras 57, 118, 119.
[2889] Trial Judgment, para. 700.
[2890] Gbao Appeal, paras 120, 121.
[2891] Gbao Appeal, para. 120, *citing* Trial Judgment, para. 698.
[2892] Gbao Appeal, paras 120, 121, *citing* Trial Judgment, paras 684, 702.
[2893] Gbao Appeal, para. 121, *citing* Trial Judgment, para. 686.
[2894] Trial Judgment, para. 2034.
[2895] Trial Judgment, para. 2034.
[2896] Trial Judgment, para. 699.

fails to address the Trial Chamber's reasoning and its finding that he had "considerable influence" over the RUF security apparatus.

(iii) Forced Farming in Kailahun District

1054. The Appeals Chamber has previously considered Gbao's claims under his Grounds 8(s) and 11 regarding forced farming in Kailahun District.[2897] The Appeals Chamber recalls its conclusions that Gbao fails to establish that the Trial Chamber erred in concluding that forced farming took place in Kailahun District during the Junta period, or that the Trial Chamber erred in finding that Gbao shared the intent to commit the crime of enslavement with respect to that of forced farming.[2898]

1055. Gbao's claim that the Trial Chamber failed to explain how the forced farming in Kailahun District furthered the goals of the Junta government[2899] ignores the Trial Chamber's findings. The Trial Chamber found that the produce from these farms was used by the RUF in their operations[2900] and that the produce was turned over by Gbao to Sesay for commercialisation.[2901] Similarly, Gbao's claim that the Trial Chamber failed to make findings as to how his involvement in forced farming furthered the goal of the JCE[2902] fails to address the Trial Chamber's findings on Gbao's involvement[2903] and articulate how those findings were erroneous or could not support the Trial Chamber's conclusion.

(iv) Influence from Rank and Personal Relationship with Foday Sankoh

1056. In both Grounds 8(c) and (i), Gbao claims that he was not a senior leader of the RUF, but only a captain and mid-level officer, arguing that the Trial Chamber thus erred in finding his rank significant was significant in its determination of whether he significantly contributed to the JCE.[2904] In arguing that he only held the rank of captain and that the Trial Chamber therefore erred in finding his rank significant, Gbao mischaracterizes the Trial Chamber's finding and ignores the Trial Chamber's relevant findings.[2905] Gbao does not dispute the Trial Chamber's finding that he

[2897] *See supra*, paras 1071-1099, 998-1063.
[2898] *See supra*, paras 1082-1099, 1004-1019.
[2899] Gbao Appeal, para. 132.
[2900] Trial Judgment, para. 2036.
[2901] Trial Judgment, para. 2037. *See* also Trial Judgment, paras 1420, 1479.
[2902] Gbao Appeal, para. 134.
[2903] Trial Judgment, paras 2036, 2037.
[2904] Gbao Appeal, paras 56, 58, 137.
[2905] Trial Judgment, para. 2033.

was OSC for the RUF and Overall IDU Commander,[2906] and that he often served as Chairman of the Joint Security Board of Investigations.[2907] More importantly, Gbao does not challenge the Trial Chamber's finding that "in RUF controlled territory, the OSC was responsible for the enforcement of discipline and law and order."[2908] Similarly, Gbao neither challenges the Trial Chamber's finding that he was a Vanguard,[2909] nor the findings regarding the status and authority Vanguards held.[2910] In particular, he does not challenge the Trial Chamber's finding that assignment and status could be more important in terms of authority and influence than rank in the RUF.[2911] Accordingly, Gbao's citation to testimonial evidence of his rank by Witness DAG-048 and the testimony of Witness TF1-371 does not establish that the Trial Chamber unreasonably found that he had considerable prestige and power in Kailahun District.

1057. Gbao further claims that the Trial Chamber erred in finding that he gained additional prestige and power within the RUF as a result of a personal connection with Foday Sankoh.[2912] However, Gbao fails to articulate how this error rendered unreasonable the Trial Chamber's finding that "Gbao had considerable prestige and power within the RUF in Kailahun District,"[2913] particularly as he does not contest his assignment as OSC and Overall IDU Commander and his status as a Vanguard, as noted above.

(v) Beating of TF1-113

1058. Gbao misrepresents the Trial Chamber's findings regarding the general credibility of TF1-113. Contrary to his assertion, the Trial Chamber did not consider that this witness required corroboration when testifying about Gbao's acts and conduct.[2914] Rather, the Trial Chamber was not convinced that the whole of the witness's testimony was not credible, and found that it was only necessary to exercise extreme caution and often seek corroborative evidence.[2915] Furthermore, Gbao fails to support his assertion that the testimonies of witnesses who lie under oath should, as a rule, be disregarded,[2916] as none of the authorities he cites supports such a proposition.[2917] In that

[2906] Trial Judgment, para. 697.
[2907] Trial Judgment, para. 701.
[2908] Trial Judgment, para. 700.
[2909] Trial Judgment, para. 668.
[2910] Trial Judgment, paras 667-669
[2911] Trial Judgment, paras 672, 673.
[2912] Gbao Appeal, paras 138, 139.
[2913] Trial Judgment, para. 2033.
[2914] Gbao Appeal para. 141.
[2915] Trial Judgment, para. 600.
[2916] Gbao Appeal, para. 142.

regard, the Appeals Chamber notes that Rules 77 and 91 of the Rules allow a Chamber to hold in contempt a witness who wilfully gives false testimony under oath, but nothing in the Rules obligates a Chamber to discard the testimony of such witnesses for that reason alone. Rather, Rule 89 permits a Chamber to admit any evidence it deems relevant. The Appeals Chamber will not lightly disturb the Trial Chamber's exercise of its discretion in this respect. Indeed, "it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points."[2918] Accordingly, Gbao's claim that the Trial Chamber erred in finding TF1-113's testimony credible on this issue is rejected.[2919]

(vi) The Trial Chamber's finding that Gbao significantly contributed to the JCE

1059. In addition to the claims previously addressed, Gbao submits four grounds in support of his argument that the Trial Chamber erred in finding that he significantly contributed to the JCE.

1060. Gbao first argues that the Trial Chamber erred in finding that he significantly contributed as the OSC, submitting that the RUF security apparatus had a nominal role during the Junta period,[2920] and that he had limited authority over the RUF security units.[2921] Gbao further submits that the security apparatus did not deal with most disciplinary issues in fact, which "were instead handled by the local Area Commander where the crime was alleged to have taken place."[2922] The Appeals Chamber has previously dismissed Gbao's first submission,[2923] and has noted that the Trial Chamber found that Gbao, whatever his *de jure* authority, exercised "considerable influence" and "practical authority" over the RUF security apparatus.[2924] The Appeals Chamber further notes with respect to the last submission that the Trial Chamber specifically distinguished between discipline in combat areas and RUF-controlled territory, finding that although "Gbao may have possessed only limited authority in respect to combat operations," "the OSC was responsible for the enforcement of discipline and law and order" in RUF-controlled territory.[2925] In this regard, the Appeals Chamber recalls the Trial Chamber's findings regarding the role of the RUF security

[2917] *See Seromba* Trial Judgment, para. 92; *Nahimana et. al* Trial Judgment, para. 551; *Nahimana et. al* Appeal Judgment, para. 820. *See supra*, paras 259-265.
[2918] *Kupreškić et al*. Appeal Judgment, para. 32.
[2919] *See supra*, para. 265.
[2920] Gbao Appeal, paras 117-119.
[2921] Gbao Appeal, paras 120-122.
[2922] Gbao Appeal, para. 120.
[2923] *See supra*, paras 1052, 1053.
[2924] *See supra*, para. 1053.

apparatus and the RUF disciplinary system in maintaining the cohesiveness of the RUF as an armed force and allowing the RUF leadership to control RUF fighters.[2926]

1061. Second, Gbao argues that he had only a nominal role as OSC outside Kailahun District,[2927] noting that the Trial Chamber found that there was insufficient evidence that he received reports of unlawful killings in Bo, Kenema and Kono Districts or that he failed in his duty to ensure proper investigations were conducted in those areas.[2928] The Appeals Chamber notes that the findings Gbao cites do not show that no reasonable trier of fact could have found that he had a more than nominal role outside Kailahun District, particularly in light of the Trial Chamber's specific findings regarding his practical influence and authority over the RUF security apparatus as a whole. Furthermore, Gbao fails to show that it was not open to a reasonable trier of fact to conclude that he significantly contributed to the JCE on the basis of his contributions in Kailahun District. The Appeals Chamber recalls that the Trial Chamber's findings regarding Gbao's significant role as OSC in Kailahun District,[2929] his supervision of the MP and G5 units in Kailahun District[2930] and the finding that Gbao had considerable prestige and power in the RUF in Kailahun District.[2931] Moreover, the Trial Chamber specifically found that Kailahun District played an important role in the realisation of the Common Criminal Purpose:

> The[] widespread and systematic crimes [by the RUF in Kailahun[2932]] were for the benefit of the RUF and the Junta in furthering their ultimate goal of taking political, economic and territorial control over Sierra Leone. We find it was only through their joint action that the AFRC and RUF were able to control the entire country, because the RUF needed the AFRC to access Kenema and Bo Districts, while the AFRC could not bring Kailahun within the sphere of the Junta Government control without cooperation from the RUF. Thus, RUF activities in Kailahun furthered the ultimate goal of joint political, economical and territorial control.[2933]

1062. Third, Gbao argues that the Trial Chamber did not demonstrate how the forced farming significantly contributed to the JCE, with respect to the forced farming in Kailahun District.[2934] However, Gbao does not address the Trial Chamber's findings that the produce from these farms

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[2925] Trial Judgment, para. 700.
[2926] Trial Judgment, paras 679-691, 706, 711, 712.
[2927] Gbao Appeal, paras 122-126.
[2928] Gbao Appeal, para. 123, *citing* Trial Judgment, paras 2041, 2057, 2105.
[2929] Trial Judgment, para. 700.
[2930] Trial Judgment, para. 2035.
[2931] Trial Judgment, para. 2033.
[2932] Trial Judgment, para. 2158.
[2933] Trial Judgment, para. 2159.
[2934] Gbao Appeal, para. 132, *citing* Trial Judgment, para. 2039.

was used by the RUF in their operations[2935] and that the produce was turned over by Gbao to Sesay for commercialisation.[2936] Furthermore, Gbao characterises as "generic" the Trial Chamber's finding that his role in the forced farming significantly contributed to maintaining the strength and cohesiveness of the RUF fighting force. This does not, however, show that the Trial Chamber erroneously concluded that Gbao significantly contributed to the JCE through his role in the forced farming.

1063. Finally, Gbao argues that the lack of findings that he acted "in concert" with the senior leaders or members of the AFRC demonstrates that he did not significantly contribute to the JCE.[2937] In light of all the above findings and discussion, the Appeals Chamber is not satisfied that the absence of findings that Gbao directly acted together with members of the AFRC precluded a reasonable trier of fact from concluding that Gbao significantly contributed to the JCE. The Appeals Chamber recalls that the manner in which the members of the JCE interact and cooperate can take as many forms as conceived by the participants to pursue the realisation of their shared common criminal purpose.[2938] In this respect, the Appeals Chamber notes that the Trial Chamber found that Gbao remained in Kailahun after the May 1997 coup on Bockarie's instructions, and that in June 1997 Bockarie ordered Gbao to move from Giema to Kailahun Town.[2939] The Trial Chamber further found that other senior RUF Commanders also remained in Kailahun District, including the Area Commander Denis Lansana and the overall G5 Commander Prince Taylor.[2940] Furthermore it found that the RUF and AFRC worked alongside one another in Kailahun District.[2941] The Appeals Chamber also notes the important role Kailahun District played in the realisation of the Common Criminal Purpose.[2942]

1064. Accordingly, the Appeals Chamber concludes that Gbao fails to show that the Trial Chamber erred in finding that he significantly contributed to the JCE.

[2935] Trial Judgment, para. 2036.
[2936] Trial Judgment, para. 2037. *See* also Trial Judgment, paras 1420, 1479.
[2937] Gbao Appeal, para. 54; Gbao Reply, paras 44, 46.
[2938] *See supra*, para. 1035.
[2939] Trial Judgment, para. 775.
[2940] Trial Judgment, para. 765.
[2941] Trial Judgment, para. 765.
[2942] Trial Judgment, para. 2159.

4. Conclusion

1065. For the foregoing reasons, the Appeals Chamber dismisses Gbao's Grounds 8(b), 8(c) and 8(i) in their entirety.

C. Killing of an *hors de combat* soldier (Gbao's Ground 9)

1. Trial Chamber's findings

1066. The Trial Chamber found Gbao liable pursuant to JCE 1 for the unlawful killing, as a crime against humanity, of one *hors de combat* SLA soldier, who was killed on Bockarie's orders in Kailahun District.[2943]

2. Submissions of the Parties

1067. Gbao argues that the Trial Chamber erred in law in finding that the killing of this *hors de combat* SLA soldier constituted murder as a crime against humanity.[2944] In support of his argument, Gbao submits that, the Trial Chamber, in its own legal holdings, held that "it is trite law that an armed group cannot hold its own members as prisoners of war" and that the killing of the same individual did not constitute a war crime.[2945] In Gbao's view, these holdings contradict its finding of murder as a crime against humanity.

1068. The Prosecution argues that the general requirements of crimes against humanity are not the same as those of war crimes and that the paragraphs of the Trial Judgment on which Gbao relies relate to the latter and not the former.[2946]

3. Discussion

1069. The Appeals Chamber finds Gbao's argument to be misconceived. The Trial Chamber held that the killing of the *hors de combat* SLA soldier "does not constitute the *war crime* of violence to life, as charged in Count 5 of the Indictment."[2947] Gbao was convicted of the unlawful killing of the *hors de combat* SLA soldier as a *crime against humanity*, as charged in Count 4 of the

[2943] Trial Judgment, paras 2156, 2172.
[2944] Gbao Appeal, para. 238.
[2945] Trial Judgment, paras 1453-1454.
[2946] Prosecution Response, para. 7.44.
[2947] Trial Judgment, para. 1454 (emphasis added).

Indictment.[2948] There is no merit to Gbao's argument that this conviction contradicted the Trial Chamber's own findings.

4. Conclusion

1070. Gbao's Ground 9 is dismissed in its entirety.

D. Alleged errors in finding enslavement in Kailahun District (Gbao Ground 11)

1. Trial Chamber's findings

1071. The Trial Chamber found that Gbao incurred JCE liability for the crime of enslavement in Kailahun District.[2949] Among the underlying acts constituting enslavement in Kailahun District were forced farming on RUF "government" farms and farms owned by Commanders, including Gbao,[2950] and forced mining.[2951] It concluded that "Gbao was directly involved in the planning and maintaining of a system of enslavement" in Kailahun District.[2952]

2. Submissions of the Parties

1072. Gbao submits that the Trial Chamber erred in finding that enslavement existed in Kailahun District during the Indictment period and that he played a role therein.[2953]

1073. First, Gbao argues that civilians were remunerated "in kind" for their work.[2954] He points to the Trial Chamber's findings that the RUF opened schools in Kailahun and provided books and chalk, that parents agreed to gather food as their contribution for the free education, that the RUF "government" in Kailahun provided free medical services to civilians, that there was no apparent discrimination in the distribution of medical care and education to civilians and fighters,[2955] and that in return for their work and produce civilians received free medical treatment at RUF hospitals.[2956] Gbao further argues the Trial Chamber erroneously disregarded Defence witness

[2948] Trial Judgment, para. 2156.
[2949] Trial Judgment, para. 2172.
[2950] Trial Judgment, para. 1425.
[2951] Trial Judgment, para. 2156.
[2952] Trial Judgment, para. 2167.
[2953] Gbao Appeal, paras 253, 264.
[2954] Gbao Appeal, paras 255-261, 277, 278.
[2955] Gbao Appeal, para. 255, *citing* Trial Judgment, para. 1384.
[2956] Gbao Appeal, para. 255, *citing* Trial Judgment, para. 1421.

testimony that the farming was remunerated[2957] and that four of the nine relevant Prosecution witnesses testified that civilians worked for food, free healthcare, free education or other "payment in kind" in Kailahun.[2958] Gbao impugns the Trial Chamber's finding that these civilians comprised a "limited few privileged people," arguing that it was contradicted by the findings that the RUF "attempted to establish good relationships *with the civilian population* in order to maintain Kailahun as a defensive stronghold" and that there was "no apparent discrimination in the distribution of medical care and education to both civilians and fighters."[2959] Also, Gbao avers, the Trial Chamber erroneously relied on TF1-330, TF1-108 and TF1-366 to find the absence of payment in kind. He submits that Exhibit 84b showed that TF1-330 was in fact paid for his work, and that TF1-108 and TF1-366 lacked credibility.[2960] As to the forced mining, Gbao submits that the finding that civilians worked without food was improperly based on TF1-330's testimony, as the witness only visited the mines one day at an unknown time for an unknown duration.[2961]

1074. Second, Gbao submits that the evidence does not establish that the work was forced.[2962] He invokes Defence witness testimony allegedly disregarded by the Trial Chamber.[2963] Gbao further argues that TF1-330 only testified that he (Gbao) had a farm, not that civilians were forced to work on it, and that TF1-108's testimony that his farm was overseen by an armed guard was uncorroborated despite being found to require corroboration.[2964] In respect of mining, Gbao argues that the mining occurred after the 6 to 14 February 1998 ECOMOG intervention, that there was no evidence that AFRC/RUF fighters supervised it, and that TF1-330 did not testify that civilians were forced to work in the mines.[2965]

1075. Third, Gbao contends that he did not play any role in the alleged forced farming and forced mining.[2966] He contends that TF1-108 was "perhaps the least reliable witness in the entire case."[2967] TF1-366 lied so often during his testimony that Judge Thompson remarked: "he's virtually

[2957] Gbao Appeal, para. 256.
[2958] Gbao Appeal, para. 257.
[2959] Gbao Appeal, paras 257, 258, *quoting* Trial Judgment, paras 531, 1384.
[2960] Gbao Appeal, paras 259, 260.
[2961] Gbao Appeal, paras 277, 278.
[2962] Gbao Appeal, paras 262, 263, 272, 276-279.
[2963] Gbao Appeal, para. 256.
[2964] Gbao Appeal, para. 272; Gbao Reply, para. 109. Gbao additionally submits he was not on notice of the allegation concerning his personal farm. Gbao Appeal, paras 273, 274..
[2965] Gbao Appeal, paras 275, 276.
[2966] Gbao Appeal, paras 264-271, 276, 277.
[2967] Gbao Appeal, paras 266, 267 *citing Seromba* Trial Judgment, para. 92, *Nahimana et al*. Trial Judgment, para. 551, *Nahimana et al*. Appeal Judgment, para. 820.

repudiating [his own] record."[2968] TF1-330 lacked credibility because his testimony was inconsistent with documentary evidence[2969] and the witness did not mention Gbao's name in any statement until a couple of months before testifying.[2970] In Gbao's view, TF1-330's testimony should be disregarded or at least corroborated.[2971] In any event, the testimony did not show that Gbao contemplated designing the forced labour "at both the preparatory and execution phases."[2972] In fact, TF1-330 testified that Prince Taylor, the overall G5 commander, instructed Kailahun civilians on what to do.[2973]

1076. Regarding his alleged role in the mining activities, Gbao argues that mining at Giema was overseen by "Mr. Patrick" alone, and TF1-330's testimony did not demonstrate that Gbao supervised it.[2974] He further contends that the testimonies of TF1-108 and TF1-366 should be dismissed or, alternatively, corroborated as they relate to Gbao.[2975]

1077. As to the alleged payment in kind, the Prosecution refers to its response to Sesay Grounds 40 and 32 in part.[2976] It also argues that Gbao fails to show an abuse of discretion in respect of the finding that a "limited few privileged people" were remunerated.[2977]

1078. The Prosecution refers to its response to Gbao Ground 8 as to Gbao's role in forced farming.[2978] It further recalls the findings on the system of forced farming and mining, how it was planned, organised and maintained by G5 commanders, and that it was supervised by Commanders of the G5, presided over by Gbao as OSC.[2979] These findings were based on the evidence of a number of different Prosecution and Defence witnesses.[2980] The Prosecution further submits that the Trial Chamber reasonably found that Gbao had a personal farm between 1996 and 1999.[2981]

1079. With respect to Gbao's alleged role in mining, the Prosecution submits that, even if Gbao was not seen at the mines, it does not follow that he was not planning mining "from the

[2968] Gbao Appeal, para. 268.
[2969] Gbao Appeal, para. 269.
[2970] Gbao Appeal, para. 269.
[2971] Gbao Appeal, para. 269.
[2972] Gbao Appeal, para. 270.
[2973] Gbao Appeal, para. 271.
[2974] Gbao Appeal, paras 276, 277.
[2975] Gbao Appeal, para. 279.
[2976] Prosecution Response, para. 7.151, *referencing* Prosecution Response, paras 7.128 to 7.133.
[2977] Prosecution Response, para. 7.151, *referencing* Prosecution Response, Sections 3.B and 4.
[2978] Prosecution Response, para. 7.153, *referencing* Prosecution Response, Section 5.D.
[2979] Prosecution Response, para. 7.157-7.159.
[2980] Prosecution Response, para. 7.159.

background" through his G5 commanders, such as Patrick Bangura.[2982] The Prosecution further submits that whether the miners received food is irrelevant to the existence of enslavement.[2983]

1080. In reply, Gbao refers to three examples of alleged factual errors.[2984] As to his role as OSC, Gbao replies that he had no effective control over the G5[2985] and that the testimony relied on for the finding that the G5 was supervising civilian mining camps related to Kono District.[2986] Gbao considers the Prosecution's submission that he planned mining "from the background" speculative and there is no evidence that Patrick Bangura was a G5 commander.[2987]

3. Discussion

1081. The Appeals Chamber will address Gbao's three arguments in turn.

(a) Remuneration for the labour

1082. As a preliminary legal matter, the Appeals Chamber observes that lack of remuneration is not an element of the crime against humanity of enslavement under Article 2.c of the Statute. Rather, absence of remuneration for labour allegedly underlying the offence may constitute a relevant evidentiary factor in determining whether the labour was forced, which in turn may be an indicia of whether enslavement has been committed.[2988] In this regard, the Appeals Chamber endorses the Trial Chamber's reference to the *Kunarac et al*. Appeal Judgment, which quoted the following passage from the *Pohl* case:

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labour – would still remain. There is no such thing

[2981] Prosecution Response, para. 7.161.
[2982] Prosecution Response, para. 7.164.
[2983] Prosecution Response, para. 7.165, *referencing* Prosecution Response, paras 7.128-7.133 (Sesay Ground 40).
[2984] Gbao Reply, para. 106.
[2985] Gbao Reply, para. 107.
[2986] Gbao Reply, para. 108.
[2987] Gbao Reply, para. 108.
[2988] *Kunarac et al*. Appeal Judgment, para. 119 ("The Appeals Chamber considers that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.").

> as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.[2989]

1083. Turning to the present case, Gbao argues that the civilians who farmed and mined for the RUF in Kailahun were remunerated "in kind," primarily by receiving free education and medical care. However, even assuming that Gbao is correct, this does not evince an error because such remuneration was not a determinative factor for the Trial Chamber's conclusion that the labour was forced. It found that

> while it may have been the case that free medical services were provided to some part of the population of Kailahun District at various times during the armed conflict, the provision of such services cannot be exculpatory or excusatory for the forced labour and coercive conditions that the civilian population endured.[2990]

1084. Gbao does not challenge this finding, and the Appeals Chamber notes that it accords with the law as set out above that "there is no such thing as benevolent slavery." Moreover, this finding is not in contradiction with the Trial Chamber's findings that the RUF opened schools in Kailahun and provided non-discriminatory medical services in Giema, while continuing to commit crimes against civilians in Kailahun throughout the Indictment period.[2991] Gbao's challenge to the finding that the civilian miners in Giema "worked without food," fails as it simply offers an alternative interpretation of TF1-330's testimony.[2992]

1085. For these reasons, the Appeals Chamber need not address the remainder of Gbao's argument, which centres on showing that the labour was remunerated "in kind." Gbao's argument is rejected. The Appeals Chamber now turns to Gbao's other submissions on why the labour in his view was not forced.

(b) Forced nature of the labour

1086. Gbao first argues that the Trial Chamber erroneously disregarded a number of Defence witnesses' testimonies.[2993] Yet Gbao himself acknowledges that some of these witnesses testified that armed men oversaw the workers on the farms, albeit stating they did so to protect the civilians.[2994] Moreover, merely referring to a select number of witnesses and asking the Appeals

[2989] *Kunarac et al*. Appeal Judgment, para. 123, *quoting Pohl Case*, p. 970; Trial Judgment, para. 203.
[2990] Trial Judgment, para. 1421.
[2991] Trial Judgment, paras 1384, 1385.
[2992] Gbao Appeal, paras 277, 278; Trial Judgment, para. 1433.
[2993] Gbao Appeal, para. 256.
[2994] Gbao Appeal, para. 256, fn. 296.

Chamber to "accept their evidence" based on an unsubstantiated assertion of bias by the Trial Chamber, as Gbao does here,[2995] is insufficient to show an error. This prong of Gbao's appeal therefore fails.

1087. With regard to the remaining submissions, the Appeals Chamber notes, by way of introduction, that Gbao omits to address the evidence for certain important findings regarding the forced nature of and his role in the labour. For example, he does not address the testimony of TF1-330 that refusing to farm was not an option for the civilians:

> [N]ow, I am free. Whatever I want to do for myself, I will do. But at that time, we wouldn't do anything by ourselves, apart from working for them. Except that one day they would just say "Work for us" […] You wouldn't do it, they would beat you. They would continue beating you; if you are going to die, you die. No, you wouldn't deny doing it.[2996]

1088. Gbao similarly omits to mention TF1-330's testimony that the RUF had a "subscription" system in Kailahun, whereby civilians were required to surrender produce to the G5, that Gbao instructed the G5 Commander on the farming products to demand from the civilians, which instructions were conveyed to civilians,[2997] and that the produce subscribed to the G5 or S4 were to be transmitted to Gbao.[2998]

1089. Turning to the findings that Gbao challenges, he first argues that the finding that "[c]ivilians were also forced to work in Gbao's farm in Giema" is erroneous because the parts of TF1-330's testimony relied on do not corroborate TF1-108's testimony.[2999] This is incorrect. TF1-330 testified that he worked on Gbao's farm in the general context of describing the forced nature of the labour to which he was subjected in the different locations where he worked.[3000] This was sufficient corroboration to accept TF1-108's evidence in the present regard. TF1-330's testimony also corroborated TF1-108's evidence for the finding, impugned by Gbao on the same basis, that "Gbao had a bodyguard on his farm called Korpomeh who 'guarded' the civilians who worked there."[3001] Presented with the reliable evidence of TF1-330 on the matter, it was reasonable for the Trial Chamber to rely on TF1-366 and TF1-108 to find that "civilians were required to work on [the]

[2995] Gbao Appeal, para. 256.
[2996] Trial Judgment, para. 1419, *quoting* Transcript, TF1-330, 14 March 2006, p. 30 (closed session).
[2997] Trial Judgment, para. 1427, fns 2677-2681.
[2998] Trial Judgment, paras 1428, 1429, fns 2685-2690.
[2999] Trial Judgment, para. 1426; Gbao Appeal, para. 272.
[3000] Transcript, TF1-330, 14 March 2006, pp. 27-30 (closed session).
[3001] Trial Judgment, para. 1426; Gbao Reply, para. 106.

farm[] owned by … Gbao" and that the civilians working there "were treated badly, forced to work at gun point and sometimes beaten."[3002]

1090. Second, Gbao submits, without support, that mining only occurred after the 6 to 14 February 1998 ECOMOG intervention, and he further ignores the Trial Chamber's reference to TF1-371's testimony for its finding that the "work in the mines was carried out by civilians who were forced to work under the supervision of AFRC/RUF fighters."[3003]

1091. Third, Gbao challenges the Trial Chamber's reliance on TF1-367's testimony, arguing that the witness testified about Kono and not Kailahun.[3004] This challenge relates to the finding that "[m]any of the civilians were forced to live in 'zoo bushes', which were mining or farming communities guarded by RUF fighters for 'protection.'"[3005] Gbao's submission is without merit because he fails to address the additional evidence relied on for the impugned finding, namely TF1-113, and does not explain why TF1-113 in this instance required corroboration.

1092. Fourth, Gbao's argument that the Trial Chamber relied on evidence of TF1-108 and DIS-157 which is not on the record, relates to the finding that "civilians carried … palm oil, cocoa and coffee" to trading places "to exchange it for items such as rice, salt, Maggi and sometimes clothes."[3006] Gbao's challenge fails because it was not unreasonable to infer that the civilians were forced from DIS-157's testimony that they were escorted by armed men,[3007] and Gbao omits to mention the testimonies of TF1-330 and DAG-110, both cited by the Trial Chamber,[3008] corroborating that inference.[3009]

1093. For the foregoing reasons, the Appeals Chamber rejects Gbao's challenge to the Trial Chamber's conclusion that the farming and mining in Kailahun District was forced. That conclusion was open to a reasonable trier of fact on the totality of the evidence.

[3002] Trial Judgment, para. 1425.
[3003] Trial Judgment, para. 1432.
[3004] Gbao Reply, para. 106.
[3005] Trial Judgment, para. 1415, fn. 3637.
[3006] Gbao Reply, para. 106; Trial Judgment, paras 1430, 1431.
[3007] Transcript DIS-157, 25 January 2008, p. 31.
[3008] Trial Judgment, fn. 2700.
[3009] Transcript, TF1-330, 14 March 2006, pp. 42, 43 (closed session); Transcript DAG-110, 2 June 2008, p. 45.

(c) Gbao's role in the forced labour

1094. Gbao's submission that the Trial Chamber erred in finding that he played a role in the forced labour has already been partially addressed in the Appeals Chamber's discussion above. Four of Gbao's arguments in support of that submission remain to be addressed here.

1095. Gbao first challenges the credibility of Witnesses TF1-108, TF1-336 and TF1-330. With regard to TF1-108, the Appeals Chamber has upheld the Trial Chamber's assessment of this witness in relation to Sesay's Ground 18, which presents similar challenges to this witness.[3010] As to TF1-366, Gbao relies on a statement by Judge Thompson that the witness was "virtually repudiating [his own] record." Gbao does not substantiate this quotation with a reference to the transcript. In any event, this statement in itself is insufficient to demonstrate an error in the Trial Chamber's assessment of TF1-366 that his testimony required reliable corroboration with respect to the acts and conduct of the Appellants.[3011] As to TF1-330, Gbao merely asserts that Exhibit 84b, a handwritten note dated 13 February 1999, shows that TF1-330 was paid in kind for his work, and that it is "surprising" that TF1-330 did not mention Gbao's significant role in forced labour until a couple of months before testifying.[3012] These submissions fail to show TF1-330 lacked credibility.

1096. Second, Gbao impugns the finding that "Gbao and Patrick Bangura oversaw the civilians mining at Giema as well as 'the soldiers who had guns.'"[3013] This challenge is dismissed since Gbao misrepresents TF1-330's testimony to diminish his (Gbao) role in the mining.[3014]

1097. Third, Gbao asserts that, if he had truly planned the enslavement in Kailahun District, "[o]ne may have expected that Gbao's role might have been remembered by the relevant RUF insiders."[3015] This speculative submission is untenable.

1098. Lastly, Gbao argues that TF1-330's testimony was insufficient to show that Gbao designed the forced labour at both the preparatory and execution phases, which is a requirement for planning.[3016] The Appeals Chamber notes that the Trial Chamber did not convict Gbao for the enslavement in Kailahun District under the mode of liability of planning. Instead, Gbao's direct

[3010] *See supra*, paras 218-223.
[3011] Trial Judgment, para. 546. *See* also *supra*, paras 261, 262.
[3012] Gbao Appeal, para. 269.
[3013] Gbao Appeal, paras 276, 277; Trial Judgment, para. 1433.
[3014] Transcript, TF1-330, 14 March 2006, pp. 48, 49 (closed session), 50; Transcript, TF1-330, 17 March 2006, p. 33 (closed session).
[3015] Gbao Appeal, para. 265, 270.

involvement "in the planning and maintaining of a system of enslavement" in Kailahun was found to constitute a form of contribution to the JCE in this case.[3017] For that purpose, it was not required that Gbao's conduct in question was such that it met the legal elements of planning as a mode of liability distinct from JCE. The submission also fails on the ground that the Trial Chamber did not rely solely on the testimony of TF1-330 for its findings on Gbao's involvement in the forced labour which constituted enslavement in Kailahun.[3018]

4. Conclusion

1099. The Appeals Chamber dismisses Gbao's Ground 11 in its entirety.

E. Acts of sexual slavery and forced marriage as acts of terrorism (Gbao Ground 12)

1. Trial Chamber's findings

1100. The Trial Chamber found that the acts of sexual slavery and forced marriage in Kailahun District were committed with the specific intent to spread terror and therefore constituted acts of terrorism.[3019]

2. Submissions of Parties

1101. Gbao submits that the Trial Chamber erred in fact in finding that the crimes committed under Counts 7-9 in Kailahun District were committed with the requisite *mens rea* for the crime of acts of terrorism.[3020] He argues that the Trial Chamber failed to consider whether terror was the likely result or the intended result of the crimes, and that the "the evidence point[s] 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."[3021]

1102. The Prosecution submits it was open to the Trial Chamber to conclude that sexual slavery and forced marriage in Kailahun District were committed with the specific intent to terrorise the civilian population.[3022] The Prosecution notes that with regard to the specific intent requirement, a

[3016] Gbao Appeal, para. 270; *Brima et al*. Appeal Judgment, para. 301.
[3017] Trial Judgment, para. 2167.
[3018] *See e.g.* Trial Judgment, para. 2037.
[3019] Trial Judgment, para. 1493.
[3020] Gbao Appeal, paras 281-288.
[3021] Gbao Appeal, para. 284.
[3022] Prosecution Response, para. 7.11.

distinction needs to be drawn between the intent of the JCE members and the intent of principal perpetrators.[3023]

3. Discussion

1103. The Appeals Chamber recalls its conclusion that the Trial Chamber was not required to find that those who carried out the *actus reus* of the crimes had the requisite *mens rea* for acts of terrorism.[3024] The Appeals Chamber notes the Trial Chamber's findings that acts of terrorism were within the Common Criminal Purpose of the JCE,[3025] and that, with respect to Kailahun District, Gbao intended the commission of acts of terrorism and shared that Common Criminal Purpose.[3026] The Trial Chamber further found that one or more members of the JCE used the non-members who carried out the *actus reus* of the crimes to commit the crime of acts of terrorism.[3027]

1104. By merely referring to the Trial Chamber's factual findings on acts of sexual slavery and forced marriage in Kailahun District,[3028] Gbao fails to establish that no reasonable trier of fact could have found that the persons who committed those acts acted with the specific intent to spread terror. Gbao only offers an alternative interpretation of the evidence without explaining how the Trial Chamber's conclusion was unreasonable. Gbao further fails to address the Trial Chamber's finding that the members of the JCE intended the commission of acts of terrorism.

4. Conclusion

1105. Gbao's Ground 12 is dismissed in its entirety.

[3023] Prosecution Response, para. 7.11.
[3024] *See supra*, para. 655.
[3025] Trial Judgment, para. 1982.
[3026] Trial Judgment, para. 2172.
[3027] Trial Judgment, para. 1992.
[3028] Trial Judgment, paras 1405-1413.

X. PROSECUTION'S APPEAL

A. Continuation of the AFRC/RUF JCE after April 1998 (Prosecution Ground 1)

1106. The Prosecution's Ground 1 asserts that the Trial Chamber erred in not finding the Appellants responsible under JCE liability for crimes committed after April 1998.[3029] First, the Prosecution alleges that the Trial Chamber erred in holding that the AFRC/RUF JCE ceased to exist some time in late April 1998.[3030] The Prosecution argues that the Common Criminal Purpose continued at least until the end of February 1999.[3031] Second, the Prosecution submits that the Appellants continued to participate in the JCE throughout that period.[3032]

1. Whether the AFRC/RUF JCE continued until at least the end of February 1999

1107. The Prosecution supports its position by six main arguments, namely, that: (i) the AFRC and RUF continued to cooperate after April 1998,[3033] in particular in the lead up to,[3034] during[3035] and after[3036] the invasion of Freetown in January 1999; (ii) they continued to have common interests after April 1998, and each could only achieve their common goal to regain power and control over Sierra Leone through cooperation;[3037] (iii) the pattern of crimes committed by both AFRC and RUF forces continued to be the same after late April 1998;[3038] (iv) the Trial Chamber erred in finding that after April 1998 there was an AFRC plan to "reinstate the army" and in relying on that finding to establish the end of the JCE;[3039] (v) the Trial Chamber erred in finding that the internal discord in AFRC/RUF relations in late April 1998 signalled the end of the JCE;[3040] and (vi) the Trial Chamber unreasonably relied on the evidence of Sesay to find that the JCE ended in late April 1998.[3041] The Prosecution also submits that the Trial Chamber erred in law in applying the elements of JCE.[3042]

[3029] Prosecution Appeal, paras 2.7-2.11.
[3030] Prosecution Notice of Appeal, para. 2; Prosecution Appeal, para. 2.7.
[3031] Prosecution Notice of Appeal, para. 3; Prosecution Appeal, para. 2.9, 2.149, 2.150.
[3032] Prosecution Appeal, paras 2.9, 2.151-2.169.
[3033] Prosecution Appeal, paras 2.35, 2.42-2.86.
[3034] Prosecution Appeal, paras 2.42-2.73.
[3035] Prosecution Appeal, paras 2.74-2.80.
[3036] Prosecution Appeal, paras 2.81-2.86.
[3037] Prosecution Appeal, paras 2.38, 2.110-2.126.
[3038] Prosecution Appeal, paras 2.40, 2.130-2.141.
[3039] Prosecution Appeal, paras 2.36, 2.87-2.93.
[3040] Prosecution Appeal, paras 2.37, 2.94-2.109.
[3041] Prosecution Appeal, paras 2.39, 2.127-2.129.
[3042] Prosecution Appeal, paras 2.41, 2.142-2.148.

1108. The Appeals Chamber will first consider the alleged error of law. When analysing the alleged errors of fact, the Appeals Chamber will first examine the specific challenges the Prosecution makes to the Trial Chamber's findings, and then consider the Prosecution's ultimate claim that the only reasonable conclusion open to a trier of fact was that the JCE continued until the end of February 1999.

(a) Did the Trial Chamber err in its application of the law on JCE?

(i) Trial Chamber's findings

1109. The Trial Chamber found that the RUF "had no control over" the AFRC forces in Freetown during the attack and did not form part of a common operation with the AFRC forces for this attack on 6 January 1999.[3043] In respect of the crimes committed in Koinadugu District, the Trial Chamber held that Superman "had no effective control" over SAJ Musa in that District[3044] and that Superman was not "under the effective control" of Bockarie or Sesay after August 1998.[3045] It also held that the RUF High Command "had no effective control" over the fighters who committed the crimes in Koinadugu and Bombali Districts.[3046]

(ii) Submissions of the Parties

1110. The Prosecution submits that the Trial Chamber erroneously applied the test for determining whether the JCE members continued to act in concert to contribute to the common purpose.[3047] It argues that "effective control" is not a requirement for JCE liability.[3048] Sesay and Kallon respond that the Trial Chamber properly considered the concept of control in part as relevant to the existence of a common purpose,[3049] and Gbao avers that the Prosecution alleges an error of fact rather than one of law.[3050]

[3043] Trial Judgment, para. 893.
[3044] Trial Judgment, para. 1501.
[3045] Trial Judgment, para. 1502.
[3046] Trial Judgment, paras 1499. *See* also Trial Judgment, paras 1500, 1504, 1508, 2177, 2180.
[3047] Prosecution Appeal, paras 2.41, 2.142-2.148.
[3048] Prosecution Appeal, para. 2.146.
[3049] Sesay Response, paras 113, 114, *citing* Trial Judgment, paras 893, 1499; Kallon Response, paras 95, 96.
[3050] Gbao Response, paras 15, 16, *citing* CDF Appeal Judgment, para. 70.

(iii) Discussion

1111. The Appeals Chamber concludes that the Prosecution fails to identify which elements of JCE liability the Trial Chamber erroneously applied by considering issues of command and control as part of its analysis, and further fails to establish how the Trial Chamber's alleged error invalidates the Trial Chamber's conclusion at paragraph 2075 of the Trial Judgment. The Prosecution has merely attempted to build a legal argument out of what is a question of fact.

(b) AFRC and RUF interaction between late April 1998 and the invasion of Freetown

(i) Trial Chamber's findings

1112. The Trial Chamber found that a major rift occurred between the AFRC and RUF forces after their capture of Koidu Town.[3051] Following this rift, Gullit announced that the AFRC troops would withdraw from Kono to join the AFRC Commander SAJ Musa in Koinadugu District.[3052] It found that, after the last joint operation between the RUF and AFRC attacking ECOMOG at the Sewafe Bridge in late April 1998, the common plan between the AFRC and RUF ceased to exist.[3053] Each group thereafter independently pursued separate plans.[3054] The Trial Chamber concluded that the AFRC/RUF Common Criminal Purpose ended in late April 1998.[3055] It further found that the Prosecution failed to establish that a common purpose resurfaced or was newly contemplated between members of the AFRC and RUF before the advance on Freetown on 6 January 1999.[3056]

1113. In August 1998, after the RUF's failed attempt to retake Koidu Town from ECOMOG in the Fiti-Fata mission, RUF Commander Superman departed Kono District with loyal RUF fighters and joined SAJ Musa in Koinadugu District.[3057] Although he had sporadic contact with Bockarie and Sesay from Koinadugu, the Trial Chamber found that from August 1998 Superman and his troops operated as an independent RUF faction and not in concert with the RUF High Command in Buedu.[3058]

[3051] Trial Judgment, paras 817-820, 2073.
[3052] Trial Judgment, paras 819, 2073.
[3053] Trial Judgment, para. 2074.
[3054] Trial Judgment, para. 2074.
[3055] Trial Judgment, para. 2076.
[3056] Trial Judgment, para. 2190.
[3057] Trial Judgment, paras 823, 824.
[3058] Trial Judgment, para. 854.

(ii) Submissions of the Parties

1114. The Prosecution makes three submissions challenging the Trial Chamber's specific factual findings in support of its argument that the AFRC and RUF continued to cooperate between late April 1998 and the invasion of Freetown in January 1999.[3059]

1115. First, it argues that the Trial Chamber erred in concluding that the mistreatment of Koroma and Gullit had a dramatic divisive effect in late April 1998.[3060] Second, the Prosecution argues that the four radio operators dispatched from Kono to Gullit's group at Camp Rosos[3061] in late August 1998 were sent to reinforce his group, rather than, as found by the Trial Chamber, to keep the RUF High Command apprised of his movements and intentions.[3062] Third, the Prosecution challenges the Trial Chamber's finding that Superman and his men operated as an independent RUF faction in Koinadugu District after August 1998.[3063]

1116. Both Sesay and Kallon submit that the Trial Chamber reasonably inferred that Bockarie sent the radio operators as informants given the suspicion and mistrust between the AFRC and RUF.[3064] Sesay also responds that the communication between Superman in Koinadugu and Bockarie in Kailahun lasted for only one week,[3065] and Bockarie then sent a message to all RUF radio stations that Superman was no longer part of the RUF.[3066] In addition, Superman refused an order to go to Buedu because he believed Bockarie would kill him.[3067] Kallon responds that the testimonies of a number of witnesses support the conclusion that Superman left Buedu due to conflicts with Bockarie rather than to expedite the attack on Freetown.[3068] The Prosecution replies that it does not suggest that Superman was sent to SAJ Musa to expedite the attack on Freetown, but rather that he

[3059] *See* Prosecution Appeal, para. 2.35.
[3060] Prosecution Appeal, paras 2.43, 2.44.
[3061] Following their departure from Kono District, AFRC forces under Gullit established their first base in Bombali District at Rosos Town. Gullit and his forces travelled to Bombali District and established a defensive base in Rosos on the recommendation of SAJ Musa. Trial Judgment, para. 845.
[3062] Prosecution Appeal, paras 2.47, 2.50, *citing* Trial Judgment, para. 853.
[3063] Prosecution Appeal, paras 2.51-2.63, *citing* Trial Judgment, paras 852-854; Transcript, TF1-366, 8 November 2005, pp 78-81; Transcript, TF1-041, 10 July 2006, pp 50-54; Transcript, TF1-184, 5 December 2005, pp 21-24; Transcript, TF1-361, 12 July 2005, pp 40-75.
[3064] Sesay Response, paras 61, 62; Kallon Response, paras 64-71.
[3065] Sesay Response, paras 67, 68, *citing* Transcript, TF1-361, 12 July 2005, pp. 56, 57; Transcript, TF1-361, 18 July 2005, pp. 39, 40.
[3066] Sesay Response, para. 67, *citing* Transcript, TF1-361, 12 July 2005, pp. 56, 57; Transcript, TF1-361, 18 July 2005, pp. 39, 40.
[3067] Sesay Response, para. 68, *citing* Transcript, TF1-361, 18 July 2005, p. 40.
[3068] Kallon Response, paras 54-61, *citing* Transcript, George Johnson, 19 October 2004, pp. 34, 42, 45; Transcript, TF1-361, 18 July 2005, pp. 39, 44; Transcript, TF1-371, 21 July 2006, pg. 41; Transcript, TF1-371, 28 July 2006, p. 26; Transcript, TF1-371, 1 August 2006, p. 29.

was sent to ensure the action in concert between the senior leaders of the RUF and AFRC continued.[3069]

(iii) Discussion

1117. As a preliminary matter, it is not clear whether the Prosecution argues that the Trial Chamber erred in finding that the attack on the Sewafe Bridge occurred in late April 1998 rather than May 1998.[3070] In any event, the Prosecution merely cites certain evidence regarding the date of the attack on the Sewafe Bridge without addressing the evidence relied on by the Trial Chamber and showing how the Trial Chamber's finding was unreasonable. The Prosecution therefore fails to establish that the Trial Chamber erred.

1118. The Prosecution's bare submission that it was unreasonable for the Trial Chamber to conclude that "Gullit and the AFRC would have participated with the RUF in the Sewafe Bridge attack if it was events prior to that attack that were the cause of the 'rift'"[3071] fails to identify an error. The Prosecution fails to challenge the Trial Chamber's findings that after the Sewafe Bridge attack, Gullit stated that "the AFRC troops would withdraw from Kono District to join SAJ Musa in Koinadugu District" and that "[t]he split was acrimonious and Gullit decisively refused to accept Superman's attempt to re-impose cooperation…."[3072] Nor does the Prosecution challenge the Trial Chamber's findings that this rift erupted after Gullit informed the AFRC troops of how the RUF had treated him and Koroma.[3073] By failing to challenge any of these findings, the Prosecution fails to point to the Trial Chamber's specific error. Similarly, the Prosecution's submission that "the conclusion that the mistreatment of Gullit and Koroma had a dramatic divisive effect in April 1998 was not reasonably open to the Trial Chamber"[3074] is unsupported and does not address the Trial Chamber's unchallenged findings.

1119. The Prosecution's assertion that the radio operators were sent by Bockarie in late August 1998 to reinforce SAJ Musa's and Gullit's forces[3075] is not inconsistent with the Trial Chamber's finding that Bockarie sent the radio operators to act as informants. Indeed, none of the evidence cited by the Prosecution contradicts the Trial Chamber's finding, but only establishes that

[3069] Prosecution Reply, para. 2.35.
[3070] Prosecution Appeal, para. 2.44.
[3071] Prosecution Appeal, para. 2.43.
[3072] Trial Judgment, para. 819.
[3073] Trial Judgment, para. 819.
[3074] Prosecution Appeal, para. 2.44.

radio operators were sent to Gullit via SAJ Musa in Koinadugu in response to a request from Gullit.[3076] Moreover, the Trial Chamber found that when SAJ Musa later arrived in Major Eddie Town[3077] to join Gullit, he prohibited the RUF radio operators from using the communications equipment and ordered that any RUF who approached a radio would be killed.[3078] Accordingly, the Prosecution fails to show that the Trial Chamber erred in finding that Bockarie sent the radio operators as informants.

1120. With respect to the Prosecution's claim that the Trial Chamber erred in finding that from August 1998 Superman and his fighters operated as an independent RUF force and were no longer working in concert with the RUF High Command,[3079] the Trial Chamber found that Superman decided in August 1998 to join forces with SAJ Musa following the failed Fiti-Fata mission,[3080] and that Superman further refused an order from Bockarie to report to Headquarters in Buedu.[3081] The Prosecution argues that Superman was sent by Bockarie to join SAJ Musa in Koinadugu, but merely cites evidence supporting this conclusion without addressing the evidence relied on by the Trial Chamber. In making this finding, the Trial Chamber preferred certain evidence after specifically considering and rejecting the alternative evidence that Bockarie ordered Superman to Koinadugu, reasoning that it was not credible in light of the animosity between Bockarie and Superman and Superman's subsequent refusal to cooperate with the RUF High Command.[3082] Similarly, the finding that Superman communicated with Bockarie after his arrival in Koinadugu District and informed Bockarie of the attack on Kabala was specifically considered by the Trial Chamber, which found that this communication was "sporadic".[3083] The Trial Chamber further found that Bockarie shortly after cut off all communication with Superman and forbade all RUF radio operators from contacting Superman, which finding the Prosecution does not challenge.[3084] Finally, by merely citing the evidence, the Prosecution fails to show how the Trial Chamber erred in not accepting the testimony of Witness TF1-361 that SAJ Musa and Superman consulted with Bockarie via radio concerning the training base in Koinadugu. Accordingly, the Appeals Chamber

[3075] Prosecution Appeal, paras 2.47, 2.50, *citing* Trial Judgment, para. 853.
[3076] Transcript, TF1-361, 12 July 2005, pp. 59-62 (closed session); Transcript, TF1-361, 18 July 2005, p. 37 (closed session); Transcript, TF1-360, 21 July 2005, pp. 7-9 (closed session), 19; Transcript, TF1-360, 20 July 2005, pp 49-54.
[3077] Major Eddie Town was also known as Colonel Eddie Town. Trial Judgment, para. 850, fn. 1668.
[3078] Trial Judgment, para. 856.
[3079] Trial Judgment, para. 854.
[3080] Trial Judgment, para. 824.
[3081] Trial Judgment, para. 824.
[3082] Trial Judgment, para. 824, fn. 1611.
[3083] Trial Judgment, para. 854.
[3084] Trial Judgment, para. 825.

finds, Justices Kamanda and King dissenting, that the Prosecution fails to establish that no reasonable trier of fact could have found that Superman did not work in concert with the RUF High Command after August 1998, and its claim is rejected. The Appeals Chamber, Justices Kamanda and King dissenting, will therefore not further consider the Prosecution's arguments that suggest the interaction between Superman and the AFRC represented cooperation between the AFRC and RUF.

(c) AFRC and RUF common interests and interdependency after late April 1998

(i) Trial Chamber's findings

1121. The Trial Chamber held that, after the common plan between the AFRC and RUF ceased to exist in late April 1998, each group independently pursued separate plans.[3085] Although the AFRC and RUF cooperated occasionally thereafter, there was insufficient evidence to conclude that senior members of the two groups acted jointly.[3086]

(ii) Submissions of the Parties

1122. The Prosecution submits that, even after April 1998, the AFRC and RUF continued to have common interests and were interdependent in the achievement of their purpose to take power and control over Sierra Leone.[3087] In support, the Prosecution submits three challenges to the Trial Chamber's specific factual findings.[3088]

(iii) Discussion

1123. Contrary to the Prosecution's submission,[3089] the Trial Chamber did make findings as to the independent objectives of the RUF and AFRC at the time of the attack on Freetown. The Trial Chamber found that the RUF planned a military operation to capture Freetown,[3090] while the AFRC "contemplated their individual plan to capture Freetown and to 'reinstate the army'."[3091] In this respect, the Appeals Chamber recalls the Trial Chamber's holding that "[a] common objective in itself is not enough to demonstrate that the plurality of persons acted in concert with each other as

[3085] Trial Judgment, para. 2074.
[3086] Trial Judgment, para. 2075.
[3087] Prosecution Appeal, paras 2.38, 2.112.
[3088] Prosecution Appeal, paras 2.112-2.126.
[3089] Prosecution Appeal, para. 2.116.
[3090] Trial Judgment, para. 2185.
[3091] Trial Judgment, para. 2187.

different and independent groups may happen to share the same objectives."[3092] The Prosecution does not challenge this legal holding by the Trial Chamber, which the Appeals Chamber has previously found accurately reflects the law.[3093]

1124. The Prosecution's claim that the attempted release of Sankoh was inconsistent with the RUF and AFRC pursuing rival plans[3094] misrepresents the Trial Chamber's finding. The Trial Chamber did not find that the RUF and AFRC were pursuing rival plans, but only that they independently pursued separate plans.[3095] As the Prosecution's claim that the attempted release of Sankoh evinces loyalty to the leaders of the RUF offers an alternative interpretation of the evidence, the Appeals Chamber will take it into account when considering the Prosecution's ultimate claim that the Trial Chamber erred in not finding that the JCE continued until at least February 1999.

1125. The Prosecution claims that the only reasonable conclusion that could be drawn from the evidence was that the senior leaders of the RUF intended to cooperate with the AFRC to recapture Freetown.[3096] This claim fails to demonstrate an error. As the Prosecution notes, the Trial Chamber found that although there was evidence that the RUF intended to coordinate with the AFRC's movements so that the two forces together could capture Freetown, there was no evidence that this plan was ever communicated to the AFRC.[3097] The Prosecution does not challenge this finding. The Appeals Chamber concludes, Justices Kamanda and King dissenting, that the Prosecution accordingly fails to show that the Trial Chamber erred.

(d) AFRC Commanders' support for SAJ Musa's plan to "re-instate the army"

(i) Trial Chamber's findings

1126. The Trial Chamber found that, after the AFRC/RUF JCE ended in late April 1998,[3098] the AFRC contemplated a separate plan to "re-instate the army", which plan did not involve the RUF.[3099] SAJ Musa determined that the AFRC should attack Freetown to reinstate the AFRC as the

[3092] Trial Judgment, para. 257.
[3093] *See supra*, para. 1034.
[3094] Prosecution Appeal, para. 2.118, *citing* Trial Judgment, paras 41, 880.
[3095] Trial Judgment, paras 2185-2187.
[3096] Prosecution Appeal, paras 2.114, 2.115.
[3097] Trial Judgment, para. 863.
[3098] Trial Judgment, paras 2073-2076.
[3099] Trial Judgment, paras 2073, 2187.

army of Sierra Leone, and he and the AFRC troops began their advance towards Freetown in November 1998.[3100]

(ii) Submissions of the Parties

1127. The Prosecution submits that the plan to "re-instate the army" was SAJ Musa's alone and that there was no evidence that it was supported by other AFRC commanders, including Gullit, Bazzy and Five-Five.[3101]

(iii) Discussion

1128. The Prosecution fails to establish that the Trial Chamber erred[3102] in finding that the AFRC contemplated their individual plan to capture Freetown and to "reinstate the army."[3103] The Prosecution's argument centres on the contention that "the evidence before the Trial Chamber did not establish that any AFRC commander other than SAJ Musa had or supported this plan."[3104] The Prosecution points to the fact that the majority of the AFRC troops elected to remain with the RUF following SAJ Musa's departure in February 1998,[3105] but fails to address the Trial Chamber's findings that Gullit left Kono to join SAJ Musa in late April 1998[3106] and later subordinated himself and his forces to SAJ Musa.[3107] While the Trial Chamber found that there were disagreements between SAJ Musa and Gullit regarding communication with the RUF during the planning and advance to Freetown,[3108] these findings do not show that Gullit, much less other AFRC commanders, did not subscribe to the plan to reinstate the army. To the contrary, the fact that the AFRC commanders remained with SAJ Musa and participated in the advance towards Freetown and the absence of any findings of disputes regarding the plan itself[3109] provide a reasonable basis for inferring that they agreed with that plan notwithstanding their disagreements regarding other matters. For these reasons, the Appeals Chamber finds, Justices Kamanda and King dissenting, that

[3100] Trial Judgment, paras 857, 858.
[3101] Prosecution Appeal, paras 2.36, 2.87-2.93.
[3102] Prosecution Appeal, paras 2.87-2.93.
[3103] Trial Judgment, para. 2187. *See* also Trial Judgment, paras 2073, 2176.
[3104] Prosecution Appeal, para. 2.36.
[3105] Prosecution Appeal, para. 2.90.
[3106] Trial Judgment, para. 819.
[3107] Trial Judgment, para. 856.
[3108] Prosecution Appeal, paras 2.92, 2.93, *citing* Trial Judgment, paras 857, 858.
[3109] Trial Judgment, paras 855-860.

the Prosecution's claim that there was no evidence that other AFRC commanders supported SAJ Musa's plan[3110] is incorrect.

1129. Similarly, the evidence cited by the Prosecution[3111] does not directly or clearly support its contention, and some of the evidence cited supports the finding that SAJ Musa's plan was more widely shared.[3112] In any event, by merely citing certain evidence, the Prosecution fails to explain why it was unreasonable for the Trial Chamber to prefer other evidence.

1130. In addition, while the Prosecution suggests that the plan to reinstate the army derived from SAJ Musa's hostility to the RUF and was solely his plan,[3113] the Trial Chamber also found that the existence of separate and independently pursued plans was consistent with "the distrust and animosity that existed between Gullit and the RUF in May 1998…."[3114] The Prosecution does not contest this finding. The fact that the AFRC did not attempt to reinstate the army during its three-day occupation of the city of Freetown in January 1999[3115] does not establish that the AFRC's plan did not continue after SAJ Musa's death, particularly as the AFRC under Gullit continued implementing the plan by attacking Freetown.[3116] Finally, as the Trial Chamber found that the plan to "reinstate the army" was the AFRC's plan,[3117] and that in Koinadugu District the AFRC forces under SAJ Musa, the RUF forces under Superman[3118] and the STF forces under Bropleh were "three distinct factions of fighters",[3119] disagreements between SAJ Musa and Superman and the fact that the STF forces remained with Superman after SAJ Musa departed to join Gullit[3120] do not establish that members of the AFRC did not support the plan to reinstate the army.

[3110] Prosecution Appeal, para. 2.90
[3111] Prosecution Appeal, para. 2.91.
[3112] *See, e.g.*, Exhibit 119, *Brima et al.* Transcript, TF1-334, 13 June 2005, p. 49; Transcript, TF1-334, 6 July 2006, pp. 79-81; Transcript, George Johnson, 19 October 2004, pg. 59.
[3113] Prosecution Appeal, para. 2.89.
[3114] Trial Judgment, para. 2185.
[3115] Prosecution Appeal, para. 2.91.
[3116] Trial Judgment, paras 874-883.
[3117] Trial Judgment, para. 2073.
[3118] The Appeals Chamber recalls that the Trial Chamber found that at this time "Superman and those fighters under his command operated as an independent RUF faction." Trial Judgment, para. 854; *see supra*, para. 1034.
[3119] Trial Judgment, para. 851.
[3120] Prosecution Appeal, para. 2.88, *citing* Trial Judgment, para. 855.

(e) Internal discord between the AFRC and RUF

(i) Trial Chamber's findings

1131. The Trial Chamber found that, while the AFRC and RUF initially had a functioning relationship, over time it began to sour and disagreements were frequent.[3121] The Trial Chamber held that the AFRC/RUF JCE ended following a rift between the two groups in late April 1998.[3122]

(ii) Submissions of the Parties

1132. The Prosecution submits that the Trial Chamber erred in finding that the particular discord between the AFRC and RUF in late April 1998 signified the end of the JCE, because previous disputes during the existence of the JCE were not found to have such a divisive effect and because a degree of in-fighting was consistently present.[3123] Sesay and Kallon respond that the Prosecution's submissions misrepresent the Trial Judgment's findings, as the Trial Chamber attributed the "rift [between the AFRC and RUF] to a relatively protracted and prolonged process, involving a number of causative factors…."[3124] Moreover, while internal discord may not exclude the existence of a JCE, "the extent of discord is certainly relevant to a factual determination of whether or not there was a shared common plan, and shared intent to commit the crimes."[3125] The Prosecution replies that its argument is based on the inferences that a reasonable trier of fact should have drawn from these findings cited by Sesay.[3126]

(iii) Discussion

1133. While the Prosecution claims that the Trial Chamber "erred in taking one particular instance of fractious relations in April 1998 as signifying the end of the JCE,"[3127] it fails to explain why, on the facts, the Trial Chamber's finding was unreasonable; indeed, it fails to reference or address the circumstances that led the Trial Chamber to that finding. By merely listing prior disagreements between the AFRC and RUF,[3128] the Prosecution neither analogises the circumstances in late April 1998 to those prior disagreements, nor rebuts the particular characteristics of the circumstances in

[3121] Trial Judgment, para. 24.
[3122] Trial Judgment, para. 2073.
[3123] Prosecution Appeal, paras 2.37, 2.94-2.109.
[3124] Sesay Response, paras 46, 47; Kallon Response, para. 29.
[3125] Kallon Response, paras 32, 36.
[3126] Prosecution Reply, para. 2.13.
[3127] Prosecution Appeal, para. 2.109.
[3128] Prosecution Appeal, paras 2.96-2.98.

late April 1998 upon which the Trial Chamber relied. Similarly, the lists of disagreements between SAJ Musa and the RUF and within the RUF itself[3129] are not responsive to the Trial Chamber's findings and reasoning regarding events in late April 1998. Moreover, the Appeals Chamber notes that the Trial Chamber did not rely exclusively on the fact and seriousness of the discord between the RUF and AFRC to reach its finding, as it also considered the behaviour of the two groups after April 1998.[3130]

1134. To the extent that the Prosecution suggests that the Trial Chamber could not, as a matter of law, find that the members of the JCE no longer shared a common purpose on the basis of the seriousness of internal discord because it had previously found a common purpose notwithstanding prior disagreements,[3131] such a suggestion must be rejected. While a trier of fact may find a shared common purpose notwithstanding internal friction between the alleged members of the JCE, it is also certainly open to a trier of fact to find that the extent of disagreement was such as to preclude the conclusion that there was a shared common purpose, or to find that the level of internal discord had grown so serious as to show that the members no longer shared a common purpose. Similarly, the Prosecution's submissions that there may be internal struggles, friction, separate motives, and diverging agendas[3132] among the members of the JCE are unresponsive to the issue, as while such factors do not necessarily preclude the finding of a shared common purpose, they are still relevant evidentiary considerations. The assessment of the effect of any disagreements or discord vis-à-vis the existence of a shared common purpose is an evidentiary matter to be made on a case-by-case basis in light of all relevant circumstances.[3133]

(f) The Trial Chamber's reliance on the testimony of Sesay

(i) Trial Chamber's findings

1135. The Trial Chamber relied on Sesay's testimony in part to find that (i) Bockarie doubted the veracity of Gullit's claim that SAJ Musa had died and suspected that the AFRC tried to mislead the RUF;[3134] (ii) despite his representations to Gullit, it seemed that Bockarie did not immediately order

[3129] Prosecution Appeal, paras 2.99-2.108.
[3130] Trial Judgment, paras 845-860, 2073-2076, 2184-2212.
[3131] *See* Prosecution Appeal, paras 2.37, 2.94, 2.95, 2.109.
[3132] Prosecution Appeal, para. 2.94.
[3133] *See Martić* Appeal Judgment, para. 123.
[3134] Trial Judgment, para. 889.

the deployment of RUF troops;[3135] and (iii) Bockarie regarded the AFRC's failure to wait for reinforcements as evidence that Gullit had lied to him and that SAJ Musa was in fact still alive.[3136]

(ii) Submissions of the Parties

1136. The Prosecution submits that the Trial Chamber erred in relying on Sesay's testimony for these findings.[3137] In the Prosecution's view, given that Sesay's testimony in question was uncorroborated and against the weight of the other evidence, no reasonable trier of fact could have relied on it.[3138]

(iii) Discussion

1137. The Prosecution's overly broad reference to "other evidence and … the weight of all of the other evidence and findings in the case referred to above"[3139] is vague and fails to precisely explain why no reasonable trier of fact could have accepted the challenged testimony to make the particular findings it impugns. Moreover, the Trial Chamber's findings the Prosecution highlights are not inconsistent or contradictory, as the Trial Chamber found only that Sesay's version of events was "not generally accepted."[3140] The Appeals Chamber recalls that the "Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence."[3141] This submission is accordingly rejected.

(g) Did the Trial Chamber err in finding that the AFRC/RUF JCE ended in late April 1998?

1138. The Appeals Chamber now turns to the Prosecution's ultimate claim that the only reasonable inference from the facts as found by the Trial Chamber was that the JCE did not end in late April 1998, but continued until at least until the end of February 1999.

(i) Applicable Law

1139. The Appeals Chamber recalls that, in order for the Prosecution to mount a successful appeal against an acquittal based on errors of fact, it must show that, when account is taken of the errors of

[3135] Trial Judgment, para. 889.
[3136] Trial Judgment, para. 889.
[3137] Prosecution Appeal, paras 2.39, 2.129.
[3138] Prosecution Appeal, para. 2.129.
[3139] Prosecution Appeal, para. 2.129.
[3140] Trial Judgment, para. 608.
[3141] *Kupreškić et al.* Appeal Judgment, para. 32.

fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[3142]

1140. The Appeals Chamber holds that in order to establish the existence of a joint criminal enterprise, it must be shown that the plurality of persons acted in concert with each other.[3143] The Appeals Chamber recalls that the concept of "acting in concert" restates and clarifies that the plurality of persons alleged to form the joint criminal enterprise must share a common criminal purpose and not simply have identical purposes.[3144] As the ICTY Appeals Chamber held in *Brđanin*, in establishing the elements of JCE liability, it must be shown that "the criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise."[3145] Accordingly, different persons or groups may have *identical* criminal purposes yet be found not to share a *common* criminal purpose for JCE liability, for example because they did not act together or in concert to realise that criminal purpose.[3146] The Appeals Chamber considers that the existence of a shared common criminal purpose is a matter of evidence to be determined by the trier of fact on a case-by-case basis in light of the totality of the circumstances as established by the evidence.[3147]

1141. Factors relevant in determining whether a plurality of persons shared a common criminal purpose include, but are not limited to: the manner and degree of interaction, cooperation and communication (joint action) between those persons;[3148] the manner and degree of mutual reliance by those persons on each other's contributions to achieve criminal objectives that they could not have achieved alone;[3149] the existence of a joint decision-making structure;[3150] the degree and character of dissension; and the scope of any joint action as compared to the scope of the alleged

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[3142] *See supra*, para. 33; *Orić* Appeal Judgment, para. 12; *Hadžihasanović and Kubura* Appeal Judgment, para. 12; *Halilović* Appeal Judgment, para. 11; *Limaj et al.* Appeal Judgment, para. 13, *referencing* the ICTR *Bagilishema* Appeal Judgment, para. 14.
[3143] *See supra*, para. 1034; *see Krajišnik* Trial Judgment, para. 884.
[3144] *See supra*, para. 1034.
[3145] *Brđanin* Appeal Judgment, para. 430. *See* also *Stakić* Appeal Judgment, para. 69 ("The Appeals Chamber considers that the Trial Chamber's findings demonstrate that there was a plurality of persons that acted together in the implementation of a common goal.").
[3146] *See supra*, para. 1034; *see* also *Haradinaj et al.* Trial Judgment, para. 139; *Krajišnik* Trial Judgment, para. 884.
[3147] *Tadić* Appeal Judgment, para. 227; *Milutinović et al*. Trial Judgment Vol. I, para. 102.
[3148] *See Brđanin* Appeal Judgment, para. 410 (holding that whether a crime forms part of the common purpose may be inferred from the "the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose"); *Krajišnik* Trial Judgment, para. 884.
[3149] *Krajišnik* Trial Judgment, para. 1082.
[3150] That the plurality of persons "need not be organised in a military, political or administrative structure" as a matter of law does not imply that the presence or absence of such a structure is not a relevant evidentiary consideration. *Vasiljević* Appeal Judgment, para. 100; *Tadić* Appeal Judgment, para. 227.

common criminal purpose.[3151] The mere showing of some communication and cooperation is not necessarily sufficient to establish a shared common purpose. As JCE liability attaches individual criminal responsibility for the commission of crimes perpetrated by others, the trier of fact must always ensure that the evidence establishes that the persons alleged to constitute the plurality joined together to realise their common goal.[3152]

(ii) Discussion

1142. Having considered the Prosecution's submissions as a whole, the Appeals Chamber concludes, Justices Kamanda and King dissenting, that the Prosecution fails to establish that the Trial Chamber erred in finding that the Common Criminal Purpose between the AFRC and RUF ended in late April 1998. The Trial Chamber found that after April 1998, the AFRC and RUF were independent groups not acting in concert to realise a shared common purpose, but only irregularly communicating and cooperating in their independent pursuit of similar, but separate purposes.[3153] The Prosecution constructs an alternative interpretation of the evidence and the Trial Chamber's findings to support its contention that the AFRC and RUF continued to share a common purpose following Gullit's departure from Kono District. However, the Prosecution fails to show that all doubts as to the Accused's guilt are eliminated. The Appeals Chamber finds, Justices Kamanda and King dissenting, that the Trial Chamber's interpretation of the evidence and findings were coherent and reasonable in light of the evidence as a whole, and reflect reasonable doubt as to the Accused's liability for the crimes for which they were acquitted.

1143. In arguing that the Trial Chamber erred in finding that the Common Criminal Purpose ended in late April 1998, the Prosecution cites the Trial Chamber's own findings to show that the AFRC and RUF continued to cooperate after April 1998.[3154] In the period prior to the attack on Freetown, the Prosecution highlights communications between AFRC leaders, particularly Gullit, and the RUF High Command and Bockarie's dispatch of four radio operators to join Gullit as reinforcements in response to Gullit's request.[3155] The Prosecution further highlights the communication between Gullit and Bockarie following SAJ Musa's death immediately prior to the invasion of Freetown, as

[3151] *See Brđanin* Appeal Judgment, para. 430 (the trier of fact must "specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims.").
[3152] *Martić* Appeal Judgment, para. 172; *Brđanin* Appeal Judgment, para. 431.
[3153] *See, e.g.*, Trial Judgment, paras 2074-2076, 2176, 2180, 2184-2212.
[3154] Prosecution Appeal, paras 2.42-2.86.
[3155] Prosecution Appeal, paras 2.42-2.62.

well as the communication and cooperation between Gullit and Bockarie during and after the attack on Freetown.[3156] The Prosecution also makes numerous submissions regarding how these findings should be interpreted, particularly noting that internal discord, power struggles and ulterior motives do not preclude a finding of a common purpose,[3157] and suggesting how the individual interests of the AFRC and RUF[3158] as well as the pattern of crimes committed[3159] support the finding that the AFRC and RUF continued to share a common purpose. Nonetheless, the Appeals Chamber finds, Justices Kamanda and King dissenting, that the Prosecution merely provides an alternative interpretation of the evidence, and fails to show that the Trial Chamber's conclusion was unreasonable.

1144. As an initial matter, the Appeals Chamber notes that the assessment of whether the alleged plurality was acting in concert to realise a shared common purpose is principally an evidentiary matter. The Prosecution points to a number of considerations that it suggests either support or do not disprove the existence of a shared common purpose. For example, the Prosecution notes that "a gap in communication does not require a finding that action in concert had ceased",[3160] that the rupture of the joint AFRC/RUF command structure "is not fatal to the continuation of the JCE",[3161] that "[h]armony between members of a JCE is not a legal requirement of JCE responsibility",[3162] and that "the fact that strategies may have differed does not detract from the joint commitment to the common goal."[3163] The Appeals Chamber considers, Justices Kamanda and King dissenting, that while these propositions are generally correct as a matter of law, they are largely unhelpful when assessing whether the Trial Chamber factually erred in light of the evidence as a whole. The Appeals Chamber finds, Justices Kamanda and King dissenting, that by merely pointing out that the Trial Chamber *could have found* a shared common purpose notwithstanding those factors, the Prosecution does not show that a reasonable trier of fact must have found a shared common purpose.

[3156] Prosecution Appeal, paras 2.63-2.86.
[3157] Prosecution Appeal, paras 2.94-2.109.
[3158] Prosecution Appeal, paras 2.110-2.126.
[3159] Prosecution Appeal, paras 2.130-2.141.
[3160] Prosecution Reply, para. 2.21.
[3161] Prosecution Appeal, para. 2.109.
[3162] Prosecution Appeal, para. 2.94.
[3163] Prosecution Appeal, para. 2.115.

1145. Similarly, the Appeals Chamber notes that the Prosecution's submissions with respect to the parallel interests of the AFRC and RUF[3164] and the continuing pattern of crimes[3165] are not particularly probative. The Trial Chamber found that the AFRC and RUF did not act in concert and share a common purpose, notwithstanding their similar objectives.[3166] The Appeals Chamber finds, Justices Kamanda and King dissenting, that the Prosecution's reference to the similarity of their interests and the fact that each group individually continued to commit the crimes that constituted the criminal means of the prior shared criminal purpose is therefore misplaced, as those facts are consistent with the Trial Chamber's reasoning and conclusion. The Appeals Chamber finds, Justices Kamanda and King dissenting, that by pointing to those facts, the Prosecution does not address the critical issue of whether there was a shared common criminal purpose or simply similar purposes, separately and independently pursued.

1146. With respect to the period from April 1998 until December 1998, that is, the period from Gullit's departure to the initial stages of the eventual attack on Freetown, the findings and evidence cited by the Prosecution[3167] show only minimal cooperation and communication between the RUF and AFRC. The Trial Chamber found that the interaction between the two groups was "sporadic" and "occasional" and did not establish that the leadership of both groups continued to act in concert.[3168] The Appeals Chamber finds, Justices Kamanda and King dissenting, that this conclusion was reasonable, particularly when the scarce amount of cooperation during this period is contrasted with the degree of cooperation between the AFRC and RUF prior to late April 1998 and in light of the degree of discord between the leaders of the AFRC and RUF exemplified by Gullit's "acrimonious" departure from Kono. The Prosecution's argument that such discord does not preclude a finding of a shared common purpose[3169] is not responsive to the critical issue, particularly as the Prosecution fails to show that the Trial Chamber erred in its factual findings regarding the degree of cooperation between the AFRC and RUF during this period. The Appeals Chamber further notes that the Prosecution fails to show any mutual reliance between the AFRC and RUF leadership during this period. The Prosecution does not show that the actions of the RUF in Kono and Kailahun Districts directly or indirectly supported the AFRC's operations in Koinadugu and Bombali Districts during this period, or *vice versa*. The Trial Chamber specifically

[3164] Prosecution Appeal, paras 2.116, 2.119-2.126.
[3165] Prosecution Appeal, paras 2.130-2.141.
[3166] *See* Trial Judgment, paras 2074-2076, 2184-2190.
[3167] Prosecution Appeal, paras 2.42-2.62.
[3168] Trial Judgment, para. 2075.
[3169] Prosecution Appeal, paras 2.94-2.109.

found that after their departure from Kono, the AFRC forces no longer received arms and ammunition from Kailahun, forcing them to be self-sufficient and rely on captured supplies,[3170] which the Prosecution does not challenge. In this respect, the Appeals Chamber also notes that while the Prosecution suggests that the AFRC and RUF *could* only realise their individual purposes through cooperation,[3171] the critical inquiry is whether they in fact did so to the extent that they can be said to have acted in concert such that a common purpose between them is the only reasonable inference. Accordingly, the Appeals Chamber finds, Justices Kamanda and King dissenting, that the Prosecution fails to establish that all reasonable doubt as to the Accused's guilt has been eliminated.

1147. The Prosecution further argues that the only reasonable interpretation of the Trial Chamber's findings is that the RUF, in particular Bockarie,[3172] and the AFRC, in particular Gullit,[3173] intended to cooperate together during the attack on Freetown, and that the RUF and AFRC did in fact act in concert prior to, during and after the attack on Freetown.[3174] In support of its interpretation, the Prosecution points to the death of SAJ Musa as removing an obstacle to cooperation between the AFRC and RUF,[3175] the common interest of both groups in seizing Freetown[3176] and the interdependence of the groups to realise their objectives.[3177] However, again, the Appeals Chamber finds, Justices Kamanda and King dissenting, that the Prosecution has only provided an alternative interpretation of the evidence without establishing that all reasonable doubt as to the Accused's guilt has been eliminated.

1148. The Trial Chamber's findings establish only that Gullit and Bockarie communicated on a few occasions prior to and during the attack,[3178] and that Bockarie dispatched RUF fighters to Freetown following Gullit's request for reinforcements.[3179] The Trial Chamber further found it was not clear when Bockarie dispatched those forces,[3180] that it was not clear whether the RUF forces were willing to support the AFRC's retreat[3181] and, in any event, the RUF forces did not enter

[3170] Trial Judgment, para. 846.
[3171] Prosecution Appeal, paras 2.116, 2.123.
[3172] Prosecution Appeal, para. 2.77.
[3173] Prosecution Appeal, para. 2.79.
[3174] Prosecution Appeal, paras 2.63-2.86.
[3175] Prosecution Appeal, paras 2.101, 2.116.
[3176] Prosecution Appeal, paras 2.115, 2.119-2.123.
[3177] Prosecution Appeal, paras 2.116, 2.123.
[3178] Trial Judgment, paras 875, 876, 881, 886.
[3179] Trial Judgment, para. 891.
[3180] Trial Judgment, paras 889, 891.
[3181] Trial Judgment, para. 884.





Freetown and only met the AFRC forces after their retreat to Waterloo.[3182] While the Prosecution argues that the communication between Bockarie and Gullit, together with other considerations, supports the inference that the AFRC and RUF shared a common purpose,[3183] the Trial Chamber interpreted the evidence as showing that the RUF and AFRC continued to act independently.[3184] In particular, the Trial Chamber noted that (i) the RUF plans to attack Freetown were not communicated to the AFRC;[3185] (ii) Bockarie distrusted Gullit's claim that SAJ Musa had died;[3186] (iii) Bockarie did not send the RUF troops until after the AFRC had entered Freetown;[3187] (iv) Gullit did not again contact Bockarie for assistance after his arrival in Freetown until the AFRC was encircled by ECOMOG forces;[3188] (v) Bockarie and Gullit continued to be in conflict;[3189] and (vi) Bockarie publicly overstated his actual role in the Freetown attack.[3190] Accordingly, the Trial Chamber was not satisfied that the Prosecution proved beyond reasonable doubt that the leaders of the AFRC and RUF were acting in concert to realise a shared common purpose.[3191] In light of these findings and reasoning, the Appeals Chamber finds, Justices Kamanda and King dissenting, that the Prosecution's alternative inferences and interpretations fail to establish that all reasonable doubt as to the Accused's guilt has been eliminated.

1149. Therefore, the Appeals Chamber concludes, Justices Kamanda and King dissenting, that the Prosecution fails to show that the Trial Chamber erred in finding that the Common Criminal Purpose of the AFRC/RUF JCE ended in late April 1998. For that reason, the Appeals Chamber, Justices Kamanda and King dissenting, finds that it need not consider the Prosecution's claims regarding the Appellants' liability pursuant to JCE after that date.

2. Conclusion

1150. In light of the foregoing, the Prosecution's Ground 1 is dismissed in its entirety.

[3182] Trial Judgment, paras 884, 888.
[3183] Prosecution Appeal, paras 2.70-2.86.
[3184] *See e.g.*, Trial Judgment, paras 2197-2199.
[3185] Trial Judgment, para. 863.
[3186] Trial Judgment, paras 875, 889.
[3187] Trial Judgment, paras 2197, 2201.
[3188] Trial Judgment, para. 2198.
[3189] Trial Judgment, para. 2198.
[3190] Trial Judgment, para. 2198.
[3191] Trial Judgment, para. 2184.

B. Gbao's alleged liability for conscripting children under the age of 15 into armed forces or groups or using them to participate actively in hostilities (Prosecution Ground 2)

1151. The Prosecution appeals Gbao's acquittal under Count 12, arguing that the Trial Chamber should have found him liable either pursuant to JCE, planning or aiding and abetting. Because the Appeals Chamber, Justices Kamanda and King dissenting, has dismissed the Prosecution's Ground 1 in which it argued that the JCE continued beyond late April 1998, there is no basis for the submission that Gbao is liable under Count 12 pursuant to JCE after that date.[3192] The Appeals Chamber proceeds to consider the remainder of the Prosecution's Ground 2.

1. Trial Chamber's findings

1152. The Trial Chamber acquitted Gbao of the charge under Count 12 of conscripting children under the age of 15 into armed forces or groups or using them to participate actively in hostilities.[3193] It found that Gbao loaded former child soldiers onto a truck and removed them from the Interim Care Centre in Makeni in May 2000, but that this was insufficient to constitute a substantial contribution to the widespread system of child conscription or the consistent pattern of using children to actively participate in hostilities.[3194] It found no other evidence that Gbao participated in the design of these crimes.[3195]

2. Submissions of the Parties

1153. The Prosecution submits that on the Trial Chamber's findings and the evidence, the only conclusion open to any reasonable trier of fact is that Gbao incurs JCE liability for the crimes charged under Count 12 found to have been committed between May 1997 and April 1998.[3196]

1154. The Prosecution argues that both conscription and use of child soldiers were within the JCE, as evidenced by the Trial Chamber's own findings.[3197] As to Gbao's liability, the Prosecution argues that Gbao was a member of the JCE and shared the intent for the crimes under Count 12, and that, even if he did not, those crimes were a natural and foreseeable consequence of effecting the Common Criminal Purpose. It further submits that it is not necessary that Gbao substantially

[3192] Prosecution Appeal, paras 3.45-3.53.
[3193] Trial Judgment, paras 2235-2237.
[3194] Trial Judgment, para 2235.
[3195] Trial Judgment, para. 2235.
[3196] Prosecution Appeal, paras 3.6, 3.16, 3.17, 3.44, 3.97(i).
[3197] Prosecution Appeal, paras 3.19-3.27.

contributed "specifically to the commission of the Count 12 crimes," only that he "made a substantial contribution *to the JCE*."[3198]

1155. In any event, the Prosecution submits, Gbao substantially contributed to the crimes in question.[3199] It argues as follows. There was a scheme in place for forced recruitment whereby civilians of all ages were abducted and brought to Kailahun for screening to ascertain their suitability for combat operations.[3200] Civilians, including children below 15 years of age, underwent forced military training and were then deployed for military tasks.[3201] Gbao was based in Kailahun at the relevant time and held a "position of power and authority" and had "considerable prestige and power within the RUF" in the District.[3202] He traveled widely in Kailahun to report on whether the MP and G5 units were doing their job and he had "a supervisory role over the IDU, the MPs, the IO and the G5."[3203] His area of responsibility therefore extended to the G5, which was in charge of screening civilians before sending them to training.[3204]

1156. The Prosecution further avers that Gbao was found to have substantially contributed to the system of enslavement in Kailahun, which included forced military training.[3205] It argues that the only reasonable inference is that Gbao was aware of the child conscription and use by the RUF.[3206] Also, given the "consistent pattern of systematic and large-scale" child recruitment and his "position of and leadership in Kailahun," it would be unreasonable to conclude that Gbao did not share the intent that child soldiers be conscripted and used pursuant to an RUF policy.[3207] It adds that Gbao was found to have shared the intent for enslavement which included forced military training of civilians; because some of those civilians were less than 15 years old, "it would be inconsistent to find that Gbao did not share the same intent in relation to Count 12."[3208]

1157. Next, the Prosecution submits that Gbao participated in the planning of the system of conscription of children under the age of 15 in Kailahun District from 1996 to December 1998.[3209]

[3198] Prosecution Appeal, paras 3.28-3.32, 3.43.
[3199] Prosecution Appeal, para. 3.33.
[3200] Prosecution Appeal, paras 3.34, 3.35.
[3201] Prosecution Appeal, para. 3.35.
[3202] Prosecution Appeal, paras 3.36, 3.37.
[3203] Prosecution Appeal, para. 3.37.
[3204] Prosecution Appeal, para. 3.37.
[3205] Prosecution Appeal, para. 3.38.
[3206] Prosecution Appeal, paras 3.39, 3.40.
[3207] Prosecution Appeal, para. 3.41.
[3208] Prosecution Appeal, para. 3.42.
[3209] Prosecution Appeal, paras 3.8, 3.54.

It also submits that Gbao aided and abetted the crimes charged under Count 12 committed outside of Kailahun District.[3210] Alternatively, the Prosecution submits that Gbao aided and abetted the crimes charged under Count 12 committed both inside and outside of Kailahun District.[3211]

1158. Regarding Gbao's liability for planning, the Prosecution submits that both the child conscription and the RUF system of enslavement "fell under a unique structure set up for handling all captured civilians, whether men, women or children."[3212] This organised structure entailed a screening procedure which civilians had to undergo before they were allocated different functions or positions within the movement.[3213] It refers to a number of Trial Chamber findings in support[3214] which it submits show that the screening, which was carried out by the G5, was a necessary and systematic step which assessed the suitability of civilians including children for military training.[3215]

1159. The Prosecution then points to the finding that Gbao was OSC from 1996 to 2001 and, as such, supervised, advised and sometimes gave orders to the G5[3216] and received a copy of all of the reports sent by security units.[3217] Relying on Witness TF1-141, it submits that screening sometimes took place in Gbao's presence[3218] and refers to the finding that "the use of children as participants in active hostilities was not only condoned but was supervised by senior commanders and in particular, the commanders of the G5, presided over by Gbao as OSC."[3219]

1160. In the Prosecution's view, this shows that Gbao played an important role in the supervision, coordination and monitoring of the recruitment process.[3220] It posits that no reasonable trier of fact could have found that his oversight functions fell short of the screening and military training of children, which was found to have occurred on a large scale and was considered to be within his area of responsibility.[3221] It adds that Gbao's role included ensuring that RUF policies regarding the

[3210] Prosecution Appeal, paras 3.54, 3.76, 3.97(iii).
[3211] Prosecution Appeal, paras 3.77, 3.97(iii).
[3212] Prosecution Appeal, paras 3.55-3.57, *citing* Trial Judgment, paras 1414, 1433-1435, 1478, 1487-1488, 168-1619, 1633-1635.
[3213] Prosecution Appeal, para. 3.59.
[3214] Prosecution Appeal, paras 3.59-3.61.
[3215] Prosecution Appeal, para. 3.61.
[3216] Prosecution Appeal, paras 3.63, 3.66, *citing* Trial Judgment, paras 697, 699.
[3217] Prosecution Appeal, para. 3.63, *citing* Trial Judgment, para. 698.
[3218] Prosecution Appeal, para. 3.64, *citing* Transcript, TF1-141, 12 April 2005, pp. 14-15.
[3219] Prosecution Appeal, para. 3.65, *citing* Trial Judgment, para. 710.
[3220] Prosecution Appeal, para. 3.67.
[3221] Prosecution Appeal, para. 3.67.

use of civilians as forced labour were properly implemented, including the forced recruitment of children under the age of 15.[3222]

1161. The Prosecution concludes that given Gbao's position, role and function, "the only conclusion open to any reasonable trier of fact is that Gbao participated in the execution, administration and running of a plan designed to use civilians as forced labour in Kailahun, which included the military training of both adults and children under the age of 15 in order to increase the RUF armed manpower"[3223] and therefore, that Gbao substantially contributed to the crime.[3224]

1162. The Prosecution submits that Gbao knew or had reason to know that the implementation and maintenance of the RUF policy to conscript civilians included children under the age of 15, and that he acted with the intent that the crime be committed or with the reasonable knowledge that the crime would likely be committed in the execution of the policy.[3225]

1163. Turning to Gbao's aiding and abetting, the Prosecution asserts that his failure to interfere in the massive recruitment, training and subsequent use of civilians including children under the age of 15, and his position as IDU and OSC Commander, amounts to tacit approval and encouragement of the crime.[3226] The Prosecution evinces Gbao's *mens rea* from the consistent, continuous and systematic pattern of abductions, training and use of child soldiers.[3227]

1164. The Prosecution impugns the Trial Chamber's finding that Gbao's loading former child soldiers onto a truck and removing them from the Interim Care Centre in Makeni in May 2000 did not demonstrate he substantially contributed to child conscription or use.[3228] It argues that some of the children who were removed were under the age of 15[3229] and, based on TF1-174's testimony, some of them were subsequently used in combat by the RUF during an attack on ZAMBATT peacekeepers.[3230]

[3222] Prosecution Appeal, para. 3.68, *citing* Trial Judgment, paras 700, 704-707, 2039.
[3223] Prosecution Appeal, para. 3.70.
[3224] Prosecution Appeal, para. 3.70.
[3225] Prosecution Appeal, paras 3.71-3.74.
[3226] Prosecution Appeal, para. 3.81, *citing* Trial Judgment, para. 279, *Brđanin* Appeal Judgment, para. 273, *Orić* Appeal Judgment, para. 43, *Kayishema and Ruzindana* Appeal Judgment, paras 201-202.
[3227] Prosecution Appeal, para. 3.83, *citing* Trial Judgment, paras 1614-1617.
[3228] Prosecution Appeal, paras 3.84-3.86, *citing* Trial Judgment, paras 1690, 2235.
[3229] Prosecution Appeal, para. 3.90.
[3230] Prosecution Appeal, paras 3.92-3.94.

1165. Gbao responds that the Trial Chamber correctly found that he did not commit the crimes charged under Count 12 pursuant to a JCE.[3231] In support, he refers to his own Ground of Appeal 8,[3232] adding that he played no role in military matters, had no effective control over the G5,[3233] and that the finding that he shared the intent under Count 13 does not demonstrate that he shared the intent under Count 12.[3234] Gbao further cites the testimony of Witnesses DAG-080, TF1-165 and TF1-174 that he opposed the use of child soldiers.[3235]

1166. Gbao further responds that he did not plan[3236] or aid and abet[3237] the conscription or use of child soldiers inside and outside of Kailahun District. In particular, he submits that Witness TF1-141 is not credible[3238] and that the testimony that Gbao was sometimes present during the screening of civilians is insufficient to show planning of the conscription of children for military training.[3239] Gbao also avers that he was not a highly respected RUF officer in Kailahun District,[3240] had no control over the G5,[3241] and that the Trial Chamber erred in finding that he issued orders to the G5[3242] and that he "received a copy of all of the reports sent by security units."[3243] Further, even if such reports were produced, he could not have taken any formal action pursuant to their content or initiated investigations for misconduct.[3244] Gbao submits that the Trial Chamber never found that he worked closely with the G5 "pursuant to the Trial Chamber's findings under Count 12"[3245] and that his role in enforcing discipline was strictly limited.[3246] He adds that he could not initiate investigations,[3247] issue punishments or give orders,[3248] and that he lacked effective control over security units including the G5 and faced harassment from RUF fighters.[3249]

[3231] Gbao Response, paras 119-133.
[3232] Gbao Response, para. 121.
[3233] Gbao Response, paras 123-125.
[3234] Gbao Response, para. 126.
[3235] Gbao Response, paras 127-129, *citing* Transcript, DAG-080, 6 June 2008, p. 90; Transcript, TF1-165, 31 March 2006, p. 17; Transcript, TF1-174, 28 March 2006, p. 91.
[3236] Gbao Response, paras 57-95.
[3237] Gbao Response, paras 96-118.
[3238] Gbao Response, para. 66, *citing* Trial Judgment, paras 582-583.
[3239] Gbao Response, paras 64-65.
[3240] Gbao Response, paras 70-72, *citing* Trial Judgment, paras 697, FN. 1308, 2041.
[3241] Gbao Response, paras 73-78, *citing* Trial Judgment, paras 696, 698, 2034, 2041, 2153, 2155, 2178, 2181, 2217, 2237, 2294, 2298, 2299.
[3242] Gbao Response, paras 82, 83.
[3243] Gbao Response, paras 85, 86.
[3244] Gbao Response, paras 87-88, *citing* Trial Judgment, paras 681, 684.
[3245] Gbao Response, para. 89 *citing* Trial Judgment, para. 2037.
[3246] Gbao Response, paras 91-96.
[3247] Gbao Response, para. 93, *citing* Trial Judgment, paras 684, 701-703.
[3248] Gbao Response, paras 94, 95 *citing* Trial Judgment, paras 685-687, 697-698, 701-703.
[3249] Gbao Response, para. 100.

1167. Lastly, Gbao submits that the finding that he loaded former child soldiers onto a truck and removed them from the Interim Care Centre in Bombali District is erroneous,[3250] but in any event does not amount to aiding and abetting child conscription and use.[3251] As to whether the removed children were used in combat, he argues that until 6 May 2000 when Witness TF1-174 left the Interim Care Centre for Freetown, "all 320 children, including the 170 found to have been removed by Gbao, were still at the [Interim Care Centre]."[3252] He posits that his consent to reopen the Interim Care Centre demonstrates his desire to rehabilitate former child soldiers rather than send them into combat[3253] and shows that he lacked the authority to make decisions.[3254]

1168. The Prosecution does not make any new arguments in its reply.

3. Discussion

1169. The present ground of appeal essentially turns on whether, and if so to what extent, Gbao contributed to the crimes charged under Count 12. In this respect, the Appeals Chamber finds, as a preliminary matter, that the Prosecution is incorrect in law to suggest that JCE liability does not require that the accused contribute to the crimes for which he is alleged to be responsible.[3255] The Appeals Chamber has already held that, while JCE liability does not require that the accused performed any part of the *actus reus* of the perpetrated crime,[3256] it does require that the accused by his participation in the common criminal purpose lent "a significant contribution to the crimes for which the accused is to be found responsible."[3257]

[3250] Gbao Response, para. 102.
[3251] Gbao Response, paras 101-102.
[3252] Gbao Response, paras 106-107, *citing* Transcript, TF1-174, 21 March 2006 (closed session), p.66.
[3253] Gbao Response, para. 114.
[3254] Gbao Response, paras 114-117.
[3255] Prosecution Appeal, para. 3.32.
[3256] *See supra*, paras 610-636; *Brđanin* Appeal Judgment, para. 427 ("the accused need not have performed any part of the *actus reus* of the perpetrated crime"); *Kvočka et al.* Appeal Judgment, para. 99 ("A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met."); *Vasiljević* Appeal Judgment, paras 100, 119 ("[T]he participation of the accused in the common purpose is required, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose"); *Tadić* Appeal Judgment, paras 196, 227.
[3257] *See supra*, paras 313, 401, 611; *see* also *Krajišnik* Appeal Judgment, para. 695; *Brđanin* Appeal Judgment, paras 427, 430.

1170. Planning and aiding and abetting also require that the accused contribute to the crimes, to an even higher degree. These forms of liability only attach where the accused "substantially" contributed to the crimes.[3258]

1171. The Prosecution's theory as to Gbao's contribution to the crimes is principally the same for all three modes of liability alleged, and can be summarised as follows: (i) the G5 played a role in the system of enslavement in Kailahun by screening captured civilians, including children, and assessing their suitability for different types of labour such as military training; and (ii) Gbao had power and prestige over the RUF in Kailahun and a supervisory role over the G5, to which he sometimes issued orders. The Appeals Chamber stresses that it is not sufficient that this theory could allow for an inference that Gbao significantly or substantially contributed to the crimes. For the Prosecution to succeed, it must show that no reasonable trier of fact could have arrived at the Trial Chamber's conclusion. As explained earlier, because the Prosecution is appealing against an acquittal, its alternative reading of the facts must eliminate all reasonable doubt of the accused's guilt.[3259]

1172. The Prosecution fails to meet this burden. First, while it is true that the Trial Chamber found that the G5 screened captured civilians to assess their suitability for different types of labour,[3260] and that children were "screened to ascertain their suitability for combat operations,"[3261] the Trial Chamber made no finding that the G5's screening was done for the purpose of conscripting children under the age of 15, or that it resulted in the use of such children in active combat. Moreover, the only link between Gbao and child conscription made in the findings is his relationship as OSC over the G5.[3262] However, this finding was made in respect of the RUF's disciplinary system and not as to whether Gbao contributed to child conscription. The Prosecution refers to the testimony of Witness TF1-141 who stated that the G5 decided whether he was fit for military training,[3263] and that he was told that the first person he met after his abduction and travel

[3258] Planning: *Brima et al*. Appeal Judgment, para. 301; *Kordić and Čerkez* Appeal Judgment, para. 26. Aiding and abetting: *Simić* Appeal Judgment, para. 85; *Blaškić* Appeal Judgment, para. 48; *Vasiljević* Appeal Judgment, para. 102; *Čelebići* Appeal Judgment, para. 352; *Tadić* Appeal Judgment, para. 229.
[3259] *See supra*, para. 33; *Orić* Appeal Judgment, para. 12; *Hadžihasanović and Kubura* Appeal Judgment, para. 12; *Halilović* Appeal Judgment, para. 11; *Limaj et al.* Appeal Judgment, para. 13, *referencing* the ICTR *Bagilishema* Appeal Judgment, para. 14.
[3260] Trial Judgment, para. 1414.
[3261] Trial Judgment, para. 1618.
[3262] Trial Judgment, para. 710.
[3263] Prosecution Appeal, para. 3.60.

to Kailahun was Gbao.[3264] This evidence is insufficient to eliminate all doubt as to whether Gbao "participated in the execution, administration and running of a plan" encompassing child conscription, as argued by the Prosecution.[3265]

1173. The Trial Chamber's scant findings on Gbao's involvement in the child conscription stand in stark contrast to its detailed findings on his involvement in the other types of forced labour in Kailahun District administered by the G5, in particular forced farming,[3266] and also on his co-accused's substantial contribution to the crimes under Count 12.[3267] This disparity in findings reflects a corresponding difference in the amount of reliable evidence. The Prosecution argues no error in the Trial Chamber's assessment of the available evidence.

1174. In this regard, the Appeals Chamber is not persuaded by the Prosecution's attempt to link child conscription and use with the enslavement in Kailahun District. While both were within the JCE, it does not follow that Gbao, simply by contributing to the latter crime also significantly contributed to the former, as the two crimes are distinct both in law and in fact. The Trial Chamber found no evidence that Gbao's participation in the JCE was such that it contributed to both.[3268] By merely reiterating the Trial Chamber's findings, without proffering any evidence that might have been disregarded by the Trial Chamber, the Prosecution's submission is but a bare request that the Appeals Chamber substitute its own conclusion for that of the Trial Chamber. Such a submission fails to meet the Prosecution's burden to eliminate all reasonable doubt as to Gbao's guilt.

1175. The Prosecution makes two additional submissions as to Gbao's alleged responsibility for aiding and abetting child conscription and use outside Kailahun District. The first is that his alleged contribution to planning the execution of the crime in Kailahun District, coupled with his purported failure to interfere in the recruitment of civilians including persons under the age of 15 being sent to training and then used for military purposes, amounted to tacit approval and encouragement of the crime.[3269] The Appeals Chamber recalls that it has rejected the Prosecution's contention that Gbao significantly or substantially contributed to the child conscription and use in Kailahun District. Moreover, assuming *arguendo* that Gbao did so contribute, the Prosecution fails to point to findings or evidence establishing Gbao's alleged failure to interfere beyond Kailahun, or suggest what

[3264] Prosecution Appeal, para. 3.66.
[3265] Prosecution Appeal, para. 3.70.
[3266] Trial Judgment, paras 1420. 1425, 1427, 2037.
[3267] Trial Judgment, paras 2226-2228, 2231, 2232.
[3268] *See* Trial Judgment, para. 2235.

measures he could have taken in that respect and what effect his failure to do so would have had on the perpetrators. To the contrary, the Prosecution itself refers to evidence that Gbao granted permission for the re-opening of the Interim Care Centre in Makeni in February 2000.[3270]

1176. The Prosecution's second submission is that Gbao aided and abetted "re-recruitment" and use of the children he removed from the Interim Care Centre in May 2000.[3271] The Trial Chamber found that the fact that Gbao loaded former child fighters onto a truck and removed them from the Interim Care Centre in May 2000 was "insufficient to constitute a substantial contribution to the widespread system of child conscription or the consistent pattern of using children to participate actively in hostilities."[3272] The Prosecution challenges this finding,[3273] essentially arguing that some of the removed children were used in combat in the Lunsar area during the RUF attack on the ZAMBATT peacekeepers.[3274]

1177. The Appeals Chamber is not satisfied that the Prosecution succeeds in eliminating all reasonable doubt as to Gbao's guilt in this regard. First, it remains unclear if the persons Gbao removed were under the age of 15 years. The Prosecution seeks to infer from the finding that between 1998 and 2002 "the mean average" of children "in most Centres" was 14 years[3275] that "some of" the children removed by Gbao were under the age of 15.[3276] This submission does not eliminate all reasonable doubt as to the children's age.

1178. Second, the Prosecution also fails to eliminate all reasonable doubt as to whether they were used to participate actively in hostilities. Here, the Prosecution relies on the testimony of TF1-174.[3277] It says the witness testified that he left Makeni on 6 May 2000 and that when he returned to the Interim Care Centre at Makeni the number of children there had decreased drastically.[3278] A day after Gbao removed the children from the Interim Care Centre, "one of the boys" returned to the Interim Care Centre crying and saying that "a good number of his companions were killed in the attack at Lunsar."[3279] The Prosecution posits that this leads to the only reasonable inference that the

[3269] Prosecution Appeal, paras 3.80, 3.81.
[3270] Prosecution Appeal, para. 3.89.
[3271] Prosecution Appeal, para. 3.96; Trial Judgment, paras 1690, 2235.
[3272] Trial Judgment, para. 2235.
[3273] Prosecution Appeal, para. 3.86.
[3274] Prosecution Appeal, paras 3.91-3.94.
[3275] Trial Judgment, para. 1626.
[3276] Prosecution Appeal, para. 3.90.
[3277] Prosecution Appeal, paras 3.91, 3.93, 3.94; Prosecution Appeal, para. 3.92.
[3278] Prosecution Appeal, para. 3.92.
[3279] Prosecution Appeal, para. 3.92.

children removed by Gbao were used in combat during the RUF attack on the ZAMBATT peacekeepers between 3 and 4 May 2000.[3280] However, the Prosecution fails to eliminate the doubt arising from the fact that, according to the Prosecution's recitation of TF1-174's testimony, Gbao does not appear to have removed the children before 6 May 2000, that is, two days *after* the attack in which the Prosecution says the children he removed were used.

1179. Having found the Prosecution fails to eliminate all doubt as to Gbao's significant or substantial contribution to the crimes charged under Count 12, the Appeals Chamber need not address the additional submissions on Gbao's *mens rea*.

1180. The Prosecution's Ground 2 is dismissed in its entirety.

[3280] Prosecution Appeal, paras 3.93, 3.94.





XI. GROUNDS OF APPEAL RELATING TO CUMULATIVE CONVICTIONS AND SENTENCING

A. Cumulative Convictions (Kallon Ground 30, Gbao Ground 19)

1. Trial Chamber's findings

1181. The Trial Chamber held that an accused may be convicted under different statutory provisions based on the same conduct to the extent that each provision requires proof of a materially distinct element not required by the other provision.[3281] Accordingly, the Trial Chamber considered whether cumulative convictions could be entered for, *inter alia*, murder and extermination as crimes against humanity; the war crimes of murder, mutilation, outrages upon personal dignity and pillage on the one hand and collective punishments and acts of terrorism on the other; and liability under Articles 6(1) and 6(3) of the Statute.[3282]

2. Submissions of the Parties

1182. Kallon and Gbao do not dispute the Trial Chamber's legal test for cumulative convictions for the same acts and conduct.[3283] Both Kallon and Gbao argue that their convictions for the same acts and conduct for extermination as a crime against humanity pursuant to Count 3 of the Indictment, and murder as a crime against humanity pursuant to Count 4 of the Indictment, are impermissibly cumulative.[3284] Kallon and Gbao contend that they were convicted under both Counts for committing crimes in Bo, Kenema, Kono and Kailahun pursuant to their participation in a JCE, and that this cumulative conviction for murder as a crime against humanity and extermination as a crime against humanity is impermissible.[3285] Gbao contends that the Appeals Chamber should dismiss one of the convictions under Count 3 or Count 4, and substantially reduce the sentence imposed.[3286]

1183. Kallon further contends that his convictions for the war crimes of murder under Count 5, outrages upon personal dignity under Count 9, mutilations under Count 10 and pillage under Count

[3281] Trial Judgment, para. 2300.
[3282] Trial Judgment, paras 2302-2313.
[3283] *See* Kallon Appeal, para. 296 (Kallon submits that the test for cumulative convictions is that "multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other.").
[3284] Kallon Appeal, para. 295; Gbao Appeal, para. 488.
[3285] Kallon Appeal, para. 295; Gbao Appeal, para. 488.

14 as well as those of collective punishment and acts of terrorism violated the principle prohibiting cumulative convictions.[3287] Kallon argues that, as the underlying acts that formed the collective punishment and terrorism were those of murder, outrages upon personal dignity, mutilations and pillage, the convictions for both sets of crimes were impermissibly cumulative. Kallon contends that the convictions for terrorism and collective punishment contain a materially distinct element, requiring intent to terrorise or intent to punish collectively; however, the other war crimes do not.[3288]

1184. The Prosecution acknowledges that the Appellants were convicted cumulatively under Count 3 and Count 4 for the following conduct:

(i) The unlawful killings of an unknown number of civilians at Tikonko Junction in Bo District; the unlawful killings of 14 civilians at a house in Tikonko in Bo District; the unlawful killings of three civilians on the street in Tikonko; and the unlawful killings of approximately 200 other civilians during an attack on Tikonko on 15 June 1997;[3289]

(ii) The unlawful killings of over 63 civilians at Cyborg Pit in Tongo Field in Kenema District;[3290]

(iii) The unlawful killings of about 200 civilians in Tombodu between February and March 1998; the unlawful killings of about 47 civilians in Tombodu between February and March 1998 in Kono District; the unlawful killings of three civilians in Tombodu sometime in March; the unlawful killings of an unknown number of civilians by burning them alive in a house in Tombodu about March 1998; the unlawful killings of 30 to 40 civilians in April 1998 in Koidu Town in Kono District;[3291]

[3286] Gbao Appeal, para. 488.
[3287] Kallon Appeal, paras 297, 300.
[3288] Kallon Appeal, paras 297, 300. Kallon makes a third argument in which he references his conviction under Articles 6(1) and 6(3) of the Statute for crimes against UNAMSIL personnel, committed in Bombali, based on the same underlying conduct. This submission was withdrawn in the corrigendum to his Appeal. Corrigendum to Kallon Appeal, p. 9.
[3289] Prosecution Response, para. 8.9*, citing* Trial Judgment, para. 1974, items 2.1.1. sub-paragraphs (i) to (ii).
[3290] Prosecution Response, para. 8.9*, citing* Trial Judgment, para. 2050 items 3.1.1. sub-paragraphs (x) to (xiv).
[3291] Prosecution Response, para. 8.9*, citing* Trial Judgment, para. 2062, items 4.1.1.1. sub-paragraphs (iii) to (vii) and (viii) to (ix).

(iv) The unlawful killings of three civilians by Bockarie and the ordered unlawful killings of 63 civilians in Kailahun Town, Kailahun District.[3292]

1185. The Prosecution submits that the Appellants should be convicted for this conduct under Count 3 alone, rather than under both Count 3 and Count 4, and the Disposition should be amended accordingly.[3293] The Prosecution argues that Count 3 is the more specific conviction, that "the Appellant's full culpability would be more adequately and fairly described by the conviction for extermination" as a crime against humanity rather than murder as a crime against humanity, and that the choice of which conviction to enter is not a matter of discretion.[3294]

1186. In addition, the Prosecution submits some conduct for which convictions were entered under Count 4 was not the basis for a conviction under Count 3, and the convictions under Count 4 with respect to this conduct should remain undisturbed.[3295]

1187. In respect of Gbao's argument for a reduction in his sentence, the Prosecution submits that it is "unwarranted and inappropriate," because although the Trial Chamber entered cumulative convictions for Counts 3 and 4 for the same conduct there is no indication that this "led the Trial Chamber to impose a substantially higher sentence than it would otherwise have imposed."[3296] The Prosecution argues that Gbao did not submit any support for his contention that a reduction in sentence is warranted when a conviction is found to be impermissibly cumulative. Furthermore, the Prosecution submits that even if Count 4 were reversed, it would not lead to a reduction in the total sentence because all of his sentences were ordered to run concurrently, therefore the reversal of one should have no affect on the remaining convictions and sentences.[3297]

1188. In response to Kallon's argument that collective punishment and terrorism are impermissibly cumulative with murder, outrages upon personal dignity, mutilation and pillage (the "other war crimes"), the Prosecution submits that Kallon misapplied the *Čelebići* test and "conflated the factual conduct in the underlying crimes with the legal elements of those crimes."[3298] Collective punishment and terrorism contain distinct elements requiring proof of a fact not required by the other war crimes, and the other war crimes also require proof of a fact not required by

[3292] Prosecution Response, para. 8.9*, citing* Trial Judgment, para. 2156, items 5.1.1. sub-paragraph (i).
[3293] Prosecution Response, para. 8.10.
[3294] Prosecution Response, para. 8.11.
[3295] Prosecution Response, para. 8.12.
[3296] Prosecution Response, para. 8.13.
[3297] Prosecution Response, para. 8.13.

collective punishment and terrorism; therefore, the Prosecution argues "it is not possible to hold that any of the other war crimes are 'lesser included offences' of collective punishment and terrorism."[3299]

1189. Kallon and Gbao made no additional submissions in reply.

3. Discussion

(a) Applicable law

1190. The jurisprudence on cumulative convictions has been thoroughly addressed at the international tribunals. The test to determine the permissibility of cumulative convictions was set out in the *Čelebići* Appeal Judgment, which stated:

> Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[3300]

1191. The test applied is therefore two-part: first, it is permissible to enter cumulative convictions under different statutory provisions for the same criminal act if each statutory provision has a "materially distinct element" that is not contained in the other statutory provision.[3301] Second, if this is not the case then the conviction for the criminal act should be upheld under the "more specific provision."[3302] It is the legal elements of each statutory provision, and not the acts themselves that

[3298] Prosecution Response, para. 8.15 [emphasis omitted].
[3299] Prosecution Response, paras 8.17-8.18.
[3300] *Čelebići* Appeal Judgment, paras 412-413.
[3301] *Čelebići* Appeal Judgment, para. 412. *See Ntakirutimana* Appeal Judgment, para. 542; *Musema* Appeal Judgment, paras 358-370.
[3302] *Čelebići* Appeal Judgment, para. 413.

must be considered when applying this test.[3303] The issue of whether the same act can lead to a conviction under multiple statutory provisions is a question of law.[3304]

(b) Cumulative convictions for extermination as a crime against humanity (Count 3) and murder as a crime against humanity (Count 4)

1192. The Appeals Chamber notes that the Trial Chamber correctly stated the law on cumulative convictions with respect to Counts 3 and 4 when it held that "[it] is impermissible to convict for both murder [as a crime against humanity] and extermination [as a crime against humanity] under Count 4 and Count 3 based on the same conduct. What makes a statutory provision materially distinct is whether "it requires proof of a fact not required by the other."[3305] Murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; they are only distinguished by the fact that extermination requires killings "on a massive scale."[3306] The crime of murder is therefore subsumed in the crime of extermination and consequently convictions under Counts 3 and 4 for the same underlying acts are impermissibly cumulative.

1193. Turning to the second prong of the test, since the first part of the *Čelebići* test was not met, we now turn to the issue under which count the convictions should be upheld. Following the principle in *Čelebići* the statutory provision that is more specific, that is, "contains an additional materially distinct element" should stand.[3307] Extermination as a crime against humanity contains the additional element that the crime must be committed on a massive scale, which murder as a crime against humanity does not contain. Therefore, extermination as a crime against humanity is the more specific statutory provision and convictions for the above noted criminal conduct[3308] should stand under Count 3, but not under Count 4.

[3303] *Strugar* Appeal Judgment, para. 322, *quoting Stakić* Appeal Judgment, para. 356. *See Kordić* & *Čerkez* Appeal Judgment, paras 1033, 1040; *Čelebići* Appeal Judgment, para. 322.
[3304] *Strugar* Appeal Judgment, para. 322. *See* also *Kunarac et al.* Appeal Judgment, para. 174; *Kordić* & *Čerkez* Appeal Judgment, para. 1032; *Stakić* Appeal Judgment, para. 356.
[3305] *Ntakirutimana* Appeal Judgment, para. 542. *See Čelebići* Appeal Judgment, para. 412. The standard was clarified in the *Kunarac et al.* Appeal Judgment, para. 168. *See* also *Vasiljević* Appeal Judgment, paras 135, 146; *Krstić* Appeal Judgment, para. 218.
[3306] *Ntakirutimana* Appeal Judgment, para. 542.
[3307] *Čelebići* Appeal Judgment, para. 413.
[3308] *See supra*, para. 1184.

1194. The Appeals Chamber also notes that some of the conduct resulting in convictions under Count 4 is not part of the conviction under Count 3[3309] and therefore the convictions for these underlying acts are not cumulative. These convictions therefore stand under Count 4 since it is permissible to convict on both counts if each count is based on *distinct* conduct.[3310]

1195. Having found that the Trial Chamber impermissibly entered cumulative convictions, the Appeals Chamber will take this holding into consideration in its determination of the sentence imposed under Count 4 for each of the Appellants.

(c) Cumulative convictions for acts of terrorism (Count 1) and collective punishments (Count 2) with the war crimes of murder (Count 5), outrages upon personal dignity (Count 9), mutilations (Count 10) and pillage (Count 14)

1196. Kallon's second submission is that the war crimes of acts of terrorism (Count 1) and collective punishment (Count 2) are impermissibly cumulative with the convictions for war crimes of murder (Count 5), outrages upon personal dignity (Count 9), mutilations (Count 10) and pillage (Count 14).[3311] Kallon argues that the crimes of acts of terrorism and collective punishments have materially distinct elements, the intent to terrorise and the intent to punish, but the other war crimes that underlie these crimes do not have materially distinct elements "when they are encompassed within" the crimes of collective punishment and acts of terrorism.[3312] For example, Kallon explains if murder is included in the crime of collective punishment then the elements of murder becomes a part of the crime of collective punishment and "there is no added element of the death of the victim that is part of murder, but not part of the collective punishment when *murder* is a form of collective punishment."[3313]

1197. The Appeals Chamber finds Kallon's appeal is misconceived and based on a misapplication of the law on cumulative convictions. Cumulative convictions are permissible if the different statutory provisions contain materially distinct elements, that is, the proof of a fact in one statutory provision is not required by the other statutory provision.[3314] In the *Fofana and Kondewa* Appeal Judgment the Appeals Chamber found that cumulative convictions "are permissible for collective

[3309] Trial Judgment, para. 1974, Items 2.1.1 (iii) to (iv); Trial Judgment, para. 2050, Items 3.1.1 (i) to (ix); Trial Judgment, para. 2063, Items 4.1.1 (i), (ii) and (x) to (xii); Trial Judgment, para. 2156, Item 5.1.1 (ii).
[3310] Trial Judgment, para. 2304. *See Brima et al.* Trial Judgment, para. 2109.
[3311] Kallon Appeal, paras 297, 300.
[3312] Kallon Appeal, paras 299-300.
[3313] Kallon Appeal, para. 299.

punishment, in addition to murder, cruel treatment and pillage."[3315] The same reasoning applies to acts of terrorism.

1198. The Appeals Chamber agrees with the Trial Chamber's finding that the definition of the war crimes of collective punishment and acts of terrorism both contain materially distinct elements not present in the definitions of the crimes of murder, outrages upon personal dignity, mutilation and pillage.[3316] The crime of acts of terrorism requires proof of an intention to spread terror among the civilian population,[3317] and collective punishment requires proof of an intention to punish collectively.[3318] These elements are not contained in the war crimes of murder, outrages upon personal dignity, mutilations and pillage.[3319] Conversely, the war crime of murder requires proof of the death of the person,[3320] outrages upon personal dignity requires proof of humiliation, degradation or otherwise violation of the dignity of the person,[3321] mutilations requires proof of permanent disfigurement or disablement[3322] and pillage requires proof of unlawful appropriation of property,[3323] which the crimes of collective punishment and acts of terrorism do not contain.[3324] Consistent with the case law on cumulative convictions, the Appeals Chamber upholds the Trial Chamber's findings that each crime requires proof of a materially distinct element, and therefore cumulative convictions are permissible for the war crimes of collective punishment and acts of terrorism with the war crimes of murder, outrages upon personal dignity, mutilations and pillage.[3325]

4. Conclusion

1199. The Appeals Chamber holds that the Trial Chamber erred in entering cumulative convictions under Counts 3 and 4 for the following acts:

[3314] *Čelebići* Appeal Judgment, paras 412-413.
[3315] *Fofana and Kondewa* Appeal Judgment, para. 225.
[3316] Trial Judgment, para. 2309.
[3317] Trial Judgment, paras 113, 2309. *See Fofana and Kondewa* Appeal Judgment, para. 350.
[3318] Trial Judgment, para. 126. *See Fofana and Kondewa* Appeal Judgment, para. 224.
[3319] Trial Judgment, para. 2309.
[3320] *See Fofana and Kondewa* Appeal Judgment, paras 146, 225; *Kvočka et al.* Appeal Judgment, para. 261; *Čelebići* Appeal Judgment, para. 423; Trial Judgment, paras 142, 2308.
[3321] ICC Elements of Crimes, Article 8(2)(c)(ii); *see* Trial Judgment, paras 175, 2309.
[3322] ICC Elements of Crimes, Article 8(2)(c)(i); *see* Trial Judgment, para. 180.
[3323] *See Fofana and Kondewa* Appeal Judgment, para. 225; *Kordić and Čerkez* Appeal Judgment, paras 79, 84; Trial Judgment, paras 207, 2308.
[3324] *Fofana and Kondewa* Appeal Judgment, para. 225; Trial Judgment, paras 2308-2309.
[3325] *See Fofana and Kondewa* Appeal Judgment, para. 225; Trial Judgment, para. 2310.

(i) in Bo District: the unlawful killings of an unknown number of civilians at Tikonko Junction; the unlawful killings of 14 civilians at a house in Tikonko; the unlawful killings of three civilians on the street in Tikonko; the unlawful killings of approximately 200 other civilians during an attack on Tikonko on 15 June 1997;

(ii) the unlawful killings of over 63 civilians at Cyborg Pit in Tongo Field in Kenema District;

(iii) in Kono District: the unlawful killings of about 200 civilians in Tombodu between February and March 1998; the unlawful killings of about 47 civilians in Tombodu between February and March 1998; the unlawful killings of three civilians in Tombodu sometime in March 1998; the unlawful killings of an unknown number of civilians by burning them alive in a house in Tombodu about March 1998; the unlawful killings of 30 to 40 civilians in April 1998 in Koidu Town; and

(iv) the unlawful killings of three civilians by Bockarie and the ordered unlawful killings of 63 civilians in Kailahun Town, Kailahun District.

1200. The Appeals Chamber holds that the verdict of guilt under Count 4, murder as a Crime against Humanity, shall be reversed for these offences and the verdict of guilt under Count 3, extermination as a Crime against Humanity, shall be sustained.

B. Standard of review for appeals against sentences

1201. The Appeals Chamber has previously set out the standard of review for appeals against sentences and hereafter reiterates the applicable principles.[3326] The relevant provisions on sentencing are set out in Article 19 of the Statute and Rules 99 to 105 of the Rules. According to Article 19, a Trial Chamber must take into account the gravity of the offence and the individual circumstances of the convicted person.[3327] The Statute also provides that in determining the term of imprisonment the Trial Chamber shall have recourse to the practice regarding prison sentences in the ICTR and the national courts of Sierra Leone, as appropriate.[3328] According to Rule 101 of the Rules, aggravating and mitigating circumstances, *inter alia,* shall be taken into account.[3329] Rule

[3326] *See Fofana and Kondewa* Appeal Judgment, paras 465-467; *Brima et al.* Appeal Judgment, paras 308-309.
[3327] *Fofana and Kondewa* Appeal Judgment, para. 465.
[3328] *Fofana and Kondewa* Appeal Judgment, paras 465, 475-477.
[3329] *Fofana and Kondewa* Appeal Judgment, para. 465.

101(c) of the Rules provides that the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.[3330]

1202. Appeals against sentence, as appeals from a judgment of a Trial Chamber, are appeals *stricto sensu*. They are not trials *de novo*.[3331] Trial Chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[3332] The Appeals Chamber will not lightly overturn findings relevant to sentencing by the Trial Chamber.[3333] As a general rule, the Appeals Chamber will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[3334]

1203. In the *Brima et al.* and *Fofana and Kondewa* Appeal Judgments, the Appeals Chamber explained that to demonstrate that the Trial Chamber committed a discernible error in exercising its discretion:

> the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[3335]

C. Sesay's appeal against sentence (Sesay Ground 46)

1. Trial Chamber's findings

1204. The Trial Chamber convicted Sesay for:

(i) Committing by participating in a joint criminal enterprise pursuant to Article 6(1) of the Statute crimes under:

i. Count 1 in relation to events in Bo, Kenema, Kono and Kailahun Districts;

ii. Count 2 in relation to events in Kenema, Kono and Kailahun Districts;

[3330] *Fofana and Kondewa* Appeal Judgment, paras 465, 546-552.
[3331] *Fofana and Kondewa* Appeal Judgment, para. 466.
[3332] *Fofana and Kondewa* Appeal Judgment, para. 466.
[3333] *Brima et al.* Appeal Judgment, para. 309; *Fofana and Kondewa* Appeal Judgment, para. 466.

iii. Count 3 in relation to events in Bo, Kenema, Kono, and Kailahun Districts;

iv. Count 4 in relation to events in Bo, Kenema, Kono, and Kailahun Districts;

v. Count 5 in relation to events in Bo, Kenema, Kono, and Kailahun Districts;

vi. Count 6 in relation to events in Kono District;

vii. Count 7 in relation to events in Kono and Kailahun Districts;

viii. Count 8 in relation to events in Kono and Kailahun Districts;

ix. Count 9 in relation to events in Kono and Kailahun Districts;

x. Count 10 in relation to events in Kono Districts;

xi. Count 11 in relation to events in Kenema and Kono Districts;

xii. Count 13 in relation to events in Kono and Kailahun Districts; and

xiii. Count 14 in relation to events in Bo and Kono Districts.[3336]

(ii) Planning pursuant to Article 6(1) of the Statute crimes under:

i. Count 12 in relation to events in Kailahun, Kenema, Kono and Bombali Districts; and

ii. Count 13 in relation to events in Kono District.[3337]

(iii) Superior responsibility pursuant to Article 6(3) of the Statute for crimes under:

i. Count 13 in relation to events in Kono District;

ii. Count 15 in relation to events in Bombali, Port Loko, Kono and Tonkolili Districts; and

iii. Count 17 in relation to events in Bombali and Tonkolili Districts.[3338]

[3334] *Fofana and Kondewa* Appeal Judgment, para. 466.
[3335] *Fofana and Kondewa* Appeal Judgment, para. 466; *Brima et al.* Appeal Judgment, para. 309.

1205. The Trial Chamber found the inherent gravity of enslavement and use of child soldiers, crimes for which Sesay was found liable under Article 6(1), planning, to be "exceptionally high."[3339] Victims of enslavement "were rampantly abducted often in situations of extreme violence, tied up with ropes and chained like chattels, to be used as slaves, working long hours under oppressive conditions with no adequate food or medicines."[3340] Child soldiers were abducted and trained at military bases where they were told that if they failed to comply with orders they would be executed.[3341] Sesay distributed drugs as "morale boosters" to these child fighters and expressed concern when child combatants were being removed from the RUF fighting forces.[3342] The Chamber concluded that Sesay's direct involvement in the planning of enslavement as well as use of child soldiers evinces criminal conduct the gravity of which "reaches the highest level."[3343]

1206. The Trial Chamber found that the offences for which Sesay incurred Article 6(1) JCE liability including unlawful killings, sexual violence, physical violence, and enslavement carried an inherent gravity that was also "exceptionally high."[3344] The Trial Chamber described the inherent gravity of crimes of pillage and acts of burning for which Sesay was found liable under Article 6(1) JCE as high.[3345] In instances where acts of burning were found to constitute acts of terrorism, the Trial Chamber also considered the inherent gravity of the criminal acts in question as high.[3346] The Trial Chamber further emphasised that these crimes "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 captured territory were crimes of a shocking nature, deserving condemnation in the strongest possible terms."[3347] Particular to Sesay, the Trial Chamber found that his "hands-on approach" and "hugely influential" role as a senior military leader and member of the Supreme Council "seriously increased the gravity of the offences committed" such that "his culpability reache[d] the highest level."[3348]

[3336] Sentencing Judgment, para. 3.
[3337] Sentencing Judgment, para. 4.
[3338] Sentencing Judgment, para. 5.
[3339] Sentencing Judgment, paras 171, 187.
[3340] Sentencing Judgment, paras 166, 162, 160.
[3341] Sentencing Judgment, para. 212.
[3342] Sentencing Judgment, para. 212.
[3343] Sentencing Judgment, paras 211, 212.
[3344] Sentencing Judgment, paras 116, 136, 158, 171.
[3345] Sentencing Judgment, para. 178.
[3346] Sentencing Judgment, para. 178.
[3347] Sentencing Judgment, para. 215.
[3348] Sentencing Judgment, para. 215.

1207. The Trial Chamber considered Sesay's role in crimes such as those against UNAMSIL personnel, for which he incurred superior responsibility under Article of 6(3) of the Statute, "utterly reprehensible" in light of the fact that he was a senior military commander who allowed to "go unchecked attacks directed against a UN peacekeeping force that had been deployed as a result of the Lomé Peace Accord, to which the RUF was one of the signatories."[3349] These attacks were characterised by "abductions, captures, threats of death and the disarming of UNAMSIL peacekeepers."[3350] Several peacekeepers were killed as a result of the attacks.[3351]

1208. Victims of the crimes for which Sesay was found liable included young children and women.[3352] Many of the victims of physical violence found themselves permanently disfigured and incapacitated such that they have been unable to undertake simple daily tasks and have become permanently reliant on others.[3353] Sexual violence crimes targeted women and sought to disempower the civilian population and instil fear in communities.[3354] The majority of victims of forced marriages, rapes and sexual slavery were young girls of school age or village women.[3355] Enslaved individuals included arbitrarily abducted civilians who provided forced labour under threat of severe violence, even death.[3356] Young children, forced to become child soldiers, were used to perpetrate killings, rapes as well as amputate civilians and burn homes.[3357] The Trial Chamber found that victims of these crimes suffered severe psychological and physical pain that impacted the victims, their families and the broader community.[3358]

1209. In addition to the above, the Trial Chamber considered mitigating factors in sentencing such as Sesay's forced recruitment into the RUF at 19 years,[3359] lack of prior criminal conduct,[3360] level of cooperation with the Prosecution,[3361] assistance to civilians,[3362] facilitation of the peace and reconciliation process,[3363] family circumstances[3364] and remorse.[3365] The Trial Chamber found that

[3349] Sentencing Judgment, para. 218.
[3350] Sentencing Judgment, para. 191.
[3351] Sentencing Judgment, para. 196.
[3352] *See* Sentencing Judgment, paras 128-129, 152, 182.
[3353] Sentencing Judgment, para. 155-156.
[3354] Sentencing Judgment, para. 129.
[3355] Sentencing Judgment, para. 128.
[3356] Sentencing Judgment, paras 165-166.
[3357] Sentencing Judgment, para. 181.
[3358] *See* Sentencing Judgment, paras 115, 132-135, 155-157, 168-170, 176-177,184-186, 197.
[3359] Sentencing Judgment, para. 220.
[3360] Sentencing Judgment, para. 221.
[3361] Sentencing Judgment, paras 222-223.
[3362] Sentencing Judgment, para. 224.
[3363] Sentencing Judgment, paras 225-229.

the only mitigating circumstances proved "on the basis of a balance of probabilities" were those "in relation to Sesay's real and meaningful contribution to the peace process in Sierra Leone,"[3366] but did not accept his contention that this dedication to the peace process kept him from preventing and punishing the perpetrators of the attacks on UNAMSIL personnel.[3367] The Trial Chamber did not find any aggravating factors beyond those considered in regards to Sesay's criminal conduct.[3368]

1210. The Trial Chamber sentenced Sesay to a total and concurrent term of imprisonment of 52 years resulting from the following:

(i) Fifty-two (52) years for acts of terrorism, a war crime, charged under Count 1;

(ii) Forty-five (45) years for collective punishments, a war crime, charged under Count 2;

(iii) Thirty-three (33) years for extermination, a crime against humanity, charged under Count 3;

(iv) Forty (40) years for murder, a crime against humanity, charged under Count 4;

(v) Forty (40) years for murder, a war crime, charged under Count 5;

(vi) Forth-five (45) years for rape, a crime against humanity, charged under Count 6;

(vii) Forty-five (45) years for sexual slavery, a crime against humanity, charged under Count 7;

(viii) Forty (40) years for other inhumane acts (forced marriage), a crime against humanity, charged under Count 8;

(ix) Thirty-five (35) years for outrages upon personal dignity, a war crime, charged under Count 9;

(x) Fifty (50) years for mutilation, a war crime, charged under Count 10;

[3364] Sentencing Judgment, para. 230.
[3365] Sentencing Judgment, paras 231-232.
[3366] Sentencing Judgment, para. 228.
[3367] Sentencing Judgment, paras 227-228.
[3368] Sentencing Judgment, para. 219.

(xi) Forty (40) years for other inhumane acts (physical violence), a crime against humanity, charged under Count 11;

(xii) Fifty (50) years for conscripting or enlisting children under the age of 15 into an armed force or group or using them to participate actively in hostilities, a war crime (other serious violation of international humanitarian law), charged under Count 12;

(xiii) Fifty (50) years for enslavement, a crime against humanity, charged under Count 13;

(xiv) Twenty (20) years for pillage, a war crime, charged under Count 14;

(xv) Fifty-one (51) years for intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, a war crime (other serious violations of international humanitarian law), charged under Count 15; and

(xvi) Forty-five (45) years for murder, a war crime, charged under Count 17.[3369]

2. Submissions of the Parties

(a) Sesay Appeal

1211. Sesay argues the Trial Chamber erred in law, in fact and in procedure in its assessment of the gravity of the offences under Counts 1 through 15 and 17, and his individual circumstances as they relate to sentencing considerations.[3370] He presents nine arguments in support of this contention.

1212. First, he argues that the Trial Chamber erroneously considered that he "had the 'highest level' of culpability."[3371] He contends the Trial Chamber did not properly account for the form and degree of his participation in the crimes for which he was found responsible for his participation in the JCE.[3372] He submits that the Trial Chamber in effect considered Sesay's role as "concomitant with having himself committed the killings at Savage pit, the gang rapes supervised by Staff Alhaji and the amputations in Kono";[3373] whereas, Sesay contends, the Trial Chamber should have

[3369] Sentencing Judgment, pp. 93-94.
[3370] Sesay Appeal, para. 353.
[3371] Sesay Appeal, para. 353.
[3372] Sesay Appeal, paras 353, 355, 358.
[3373] Sesay Appeal, para. 355.

considered the specific role he played in the commission of the crime, that is, his relative culpability.[3374] Sesay argues that the Trial Chamber should have assessed his responsibility in light of the culpability of his co-defendants, Kallon and Gbao, the former co-accused Sankoh, Bockarie, Johnny Paul Koroma, and AFRC convicted persons Brima, Kanu, and Kamara, and other members of the JCE such as the Honourables.[3375] He contends in particular that the culpability of Kallon and the AFRC convicted persons "far outweighs" his own.[3376] If the Trial Chamber followed this approach, Sesay contends, it would have found that his participation in the JCE and other criminal conduct "was remote and minimal."[3377] He also argues that those convicted under "the extended JCE doctrine [are] entitled to reduced sentences."[3378]

1213. Second, Sesay contends the sentences in relation to Counts 15 and 17 are "manifestly excessive and fail to represent Sesay's minimal culpability."[3379] Sesay contends that his role in the crimes was not as significant as Kallon's, but that Kallon's sentence was less than Sesay's.[3380] He also contends his sentence is manifestly excessive for an offence under Article 6(3) of the Statute, and disproportionate when compared to other sentences under the same mode of liability.[3381]

1214. Third, Sesay contends that his sentence under Count 12 is also manifestly excessive.[3382] He argues that his role in the "well-run system of training bases" and commission of the crime "on a large scale and in an organised fashion" was "very limited in comparison with that of other RUF members."[3383] He argues that this system pre-dated his involvement and that the Trial Chamber did not make any findings that his contribution altered its operations.[3384]

1215. Fourth, Sesay contends that the Trial Chamber erroneously considered for purposes of sentencing an increased gravity for crimes against humanity of murder and rape that also amounted to acts of terrorism or collective punishments.[3385] According to Sesay, this error constitutes

[3374] Sesay Appeal, para. 356, 358.
[3375] Sesay Appeal, para. 358.
[3376] Sesay Appeal, paras 362-363.
[3377] Sesay Appeal, para. 358.
[3378] Sesay Appeal, para. 356.
[3379] Sesay Appeal, para. 365.
[3380] Sesay Appeal, para. 366.
[3381] Sesay Appeal, para. 366.
[3382] Sesay Appeal, para. 370.
[3383] Sesay Appeal, para. 371.
[3384] Sesay Appeal, para. 371.
[3385] Sesay Appeal, para. 373.

impermissible double counting "of the *mens rea* requirements for one set of crimes so as to permit the conviction and sentencing of the Accused on counts that were never pleaded."[3386]

1216. Fifth, Sesay alleges that the Trial Chamber found his considerable contribution to the peace process amounted to a mitigating circumstance but erred in law failing to give any "noticeable weight to this significantly mitigating factor."[3387] In support of his allegation, Sesay relies on the Dissenting Opinion of Justice Itoe and alleges that the Trial Chamber erred in disregarding seminal case law such as the ICTY Trial Chamber case of *Plavšić,* which recognized Plavšić's post-conflict conduct as a mitigating factor.[3388] Sesay argues that "subsequent conduct" is not only relevant if it "alleviates the suffering of victims" but if there is a considerable contribution to peace in the region.[3389] Sesay argues the Trial Chamber erred in law in considering his responsibility for the UNAMSIL attacks in its determination of whether Sesay's post-conflict conduct warranted mitigation. He submits that a finding of guilt with regard to the attacks on UNAMSIL personnel does not negate "Sesay's actual contribution to the peace process."[3390] The fact that he could have contributed more to the peace process by preventing or punishing the perpetrators of the attacks against UNAMSIL personnel does not mean that Sesay's contribution to the peace process did not meet the considerable contribution standard laid down in *Plavšić*.[3391] He argues the Trial Chamber failed to reconcile its "assessment of the UNAMSIL incident" with the statement of Alpha Konare, the UN Special Representative to the Secretary General in Sierra Leone who stated that Sesay's desire for peace during the peace process was genuine.[3392]

1217. Sixth, Sesay contends the Trial Chamber committed three errors with regard to its assessment of his character and the protection he provided to civilians during the conflict: (i) the Trial Chamber erred in failing to take into account the numerous witnesses who provided evidence of "Sesay's reputation as a moderate and the opposition he faced from other senior RUF commanders"[3393]; (ii) the Trial Chamber erred in failing to accord adequate weight to evidence from Defence witnesses who testified about Sesay's positive character, but who, according to Sesay, were deemed by the Trial Chamber not to be credible for the purposes of ascertaining

[3386] Sesay Appeal, para. 373.
[3387] Sesay Appeal, para. 376.
[3388] Sesay Appeal, paras 377, 378.
[3389] Sesay Appeal, para. 379, *citing Babić* Appeal Judgment, paras 56, 59.
[3390] Sesay Appeal, para. 382.
[3391] Sesay Appeal, para. 380.
[3392] Sesay Appeal, para. 381.
[3393] Sesay Appeal, para. 383.

Sesay's guilt at trial;[3394] and (iii) the Trial Chamber erred in failing to consider statements annexed to Sesay's Sentencing Brief which referred to Sesay's care and protection of civilians in Bombali and Tonkolili Districts.[3395]

1218. Seventh, Sesay alleges that the Trial Chamber erred in failing to consider whether violations of Sesay's rights during a six-week period, and he contends that, during that time, he was interviewed under coercive circumstances when he was first incarcerated, amounted to a mitigating circumstance.[3396] The Trial Chamber erred, according to Sesay, in holding that exclusion of the evidence gained from these interviews was a sufficient remedy to the violations of Sesay rights, whereas Sesay contends it should also have considered it as a mitigating factor.[3397] He submits that case law from the ICTR shows that violations of an accused's rights are "a factor in mitigation of any future sentence."[3398]

1219. Eighth, Sesay contends that the Trial Chamber made a discernable error in failing to accord weight to the likelihood that Sesay will serve his sentence abroad. Sesay argues that since the Trial Chamber found it is more likely than not that Sesay will serve his sentence abroad, and that serving a sentence abroad "would normally amount to a factor in mitigation," the Trial Chamber was required to take this factor into account in mitigation.[3399] Sesay contends that the Trial Chamber should have made a "specific order or provision regarding the likelihood that Sesay would serve his sentence abroad," or at least have granted him the possibility to revisit the sentence once an agreement requiring the sentence to be served abroad was finalized.[3400]

1220. Ninth, Sesay submits that the Trial Chamber erred "in failing to give any weight to Sesay's statement of remorse."[3401] In support of his submission, he contends first that he "clearly expressed his remorse for the suffering of victims during the war" and whether or not "it was not expansive enough for the Trial Chamber's liking does not negate its sincerity";[3402] second, that the Trial Chamber erred in failing to consider other factors which were indicative of his remorse such as his

[3394] Sesay Appeal, paras 386, 387, 389.
[3395] Sesay Appeal, para. 390.
[3396] Sesay Appeal, paras 394, 396.
[3397] Sesay Appeal, para. 395.
[3398] Sesay Appeal, para. 395.
[3399] Sesay Appeal, paras 397, 398.
[3400] Sesay Appeal, para. 398.
[3401] Sesay Appeal, para. 401.
[3402] Sesay Appeal, para. 401.

peace-building and humanitarian orders, his testimony "during the proceedings" and "other acts including his orders against rape, looting and harassing civilians."[3403]

(b) Prosecution Response

1221. In response to Sesay's contention that the Trial Chamber did not properly account for the form and degree of his participation in the crimes it submits that Sesay's participation was neither "remote", nor "minimal."[3404] According to the Prosecution, the Trial Chamber specifically analysed Sesay's role in the crimes.

1222. The Prosecution submits that there is no requirement that the participation of an accused in a JCE be assessed in relation to other perpetrators or JCE members. Nonetheless, according to the Prosecution, the Trial Chamber took into account Sesay's participation relative to other members of the JCE when it referred to Bockarie,[3405] considered for sentencing purposes the individual role of each of the accused roles in the JCE[3406] and arrived at different findings for each of them.[3407]

1223. The Prosecution contends that, contrary to Sesay's submission, the Trial Chamber did not impermissibly double-count the *mens rea* for acts of terrorism and collective punishments.[3408] It argues that the Trial Chamber *ensured* that there was no double counting by adopting an approach under which the gravity of the crimes in Counts 1 and 2 were not considered separately.[3409] Rather, the additional gravity that arose from the fact that other crimes were also acts of terror or collective punishments was taken into account only as an aggravating factor in the sentencing for those other crimes.[3410]

1224. The Prosecution submits there is no requirement that a Trial Chamber *must* take post-conflict conduct into account as a mitigating factor.[3411] It further submits that the decision as to the weight to be accorded to mitigating circumstance lies within the wide discretion afforded to the Trial Chamber at sentencing.[3412] The Prosecution disputes Sesay's comparison with the the ICTY

[3403] Sesay Appeal, para. 401.
[3404] Prosecution Response, para. 9.2
[3405] Sentencing Judgment, para. 214.
[3406] Sentencing Judgment, paras 213-215, 238-240, 265-271.
[3407] Prosecution Response, paras 9.7, 9.8
[3408] Prosecution Response, paras 9.19, 9.22.
[3409] Prosecution Response, para. 9.20.
[3410] Prosecution Response, para. 9.20.
[3411] Prosecution Response, para. 9.25.
[3412] Prosecution Response, para. 9.28.

case of *Prosecutor v. Plavšić* on the basis that it contends that Plavšić was found to have been "instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska" and to have "made a considerable contribution to peace in the region."[3413]

1225. The Prosecution submits that it was within the Trial Chamber's discretion to consider that any assistance offered by Sesay to civilians during the conflict "should not be given undue weight in mitigation" and Sesay has not demonstrated that the Trial Chamber abused its discretion in this regard.[3414]

1226. The Prosecution disputes Sesay's characterisation of his pre-trial questioning. It submits there was no evidence that the Prosecution interviewed Sesay under "coercive conditions" or that the need for Sesay's "urgent psychiatric care" resulted from the Prosecution's alleged coercive treatment of Sesay. The Trial Chamber made no error in ignoring this claim as a mitigating factor.[3415]

1227. In response to Sesay's argument that his sentence should have been mitigated because he will likely serve it abroad, the Prosecution submits that serving sentence outside the country is not necessarily a mitigating factor although this factor was "taken into account" in the ICTY Trial Chamber in *Prosecutor v. Mrđa*.[3416] Further, the Prosecution argues that there is no indication that this factor was in any event given any significant weight in the *Mrđa* case, and it was observed there that serving a sentence in a foreign country was a "common aspect of the prison sentences imposed by the [ICTY]."[3417] The Prosecution submits that the Trial Chamber was entitled, in its discretion, to give little significance or weight to this factor, or to not treat it as a mitigating factor at all.[3418]

1228. Finally, the Prosecution submits that the Trial Chamber did consider Sesay's expression of empathy with the victims in mitigation and properly exercised its discretion in finding that Sesay's statement of remorse was not sincere.[3419]

[3413] Prosecution Response, para. 9.26, *citing Plavšić* Sentencing Judgment, para. 94.
[3414] Prosecution Response, para. 9.13.
[3415] Prosecution Response, para. 9.32.
[3416] Prosecution Response, paras 9.33, 9.56, *citing Mrđa* Trial Judgment, para. 109.
[3417] Prosecution Response, para. 9.33, *citing Mrđa* Trial Judgment, para. 109.
[3418] Prosecution Response, para. 9.33.
[3419] Prosecution Response, para. 9.34, *citing* Sentencing Judgment, para. 231.

3. Discussion

(a) The form and degree of Sesay's participation in the crimes

1229. A Trial Chamber must ultimately impose a sentence that reflects the totality of the convicted person's culpable conduct.[3420] This principle, the totality principle, requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused in the crimes.[3421]

1230. Sesay contests the Trial Chamber's evaluation of his role in the crimes. To do so, he draws comparisons with the criminal conduct of others, but he does not directly challenge or address the Trial Chamber's numerous findings of the specific roles that he played. For example, Sesay contends that the Trial Chamber should have considered that his role was "remote" and "minimal," but he fails to address the extensive findings of his direct participation in crimes, such as his liability for planning enslavement and the use of children under the age of 15 to participate actively in hostilities, his superior responsibility for enslavement, attacks against peacekeepers and murder of peacekeepers. He also ignores the Trial Chamber's findings that at all relevant times he was an influential senior RUF commander and that during the JCE he was a member of the Supreme Council who furthered the Common Criminal Purpose by securing revenues, territory and manpower for the Junta government and by using criminal means to reduce or eliminate the civilian opposition to the Junta regime.

1231. The Appeals Chamber endorses the view of the ICTY Appeals Chamber that a Trial Chamber is not required to assess the participation of an accused in a JCE relative to the participation of other perpetrators when determining the overall level of the accused's participation.[3422] Sesay's reliance on the *Krstić* Appeals Judgment for this proposition is inapposite. The ICTY Appeals Chamber in *Krstić* held that:

> Radislav Krstić's guilt should have been assessed on an individual basis. The Appeals Chamber further agrees that the comparative guilt of other alleged co-conspirators, not adjudicated in this case, is not a relevant consideration.[3423]

[3420] *Fofana and Kondewa* Appeal Judgment, para. 546.
[3421] *Fofana and Kondewa* Appeal Judgment, para. 546.
[3422] *Babić* Appeal Judgment, para. 40.
[3423] *Krstić* Appeal Judgment, para. 254.

1232. The ICTY Appeals Chamber in *Krstić* merely allowed that the Trial Chamber there "was entitled" to consider the accused's guilt "in context of the conduct of any alleged co-perpetrators."[3424] In the present case, the Trial Chamber specifically addressed Sesay's role with respect to Bockarie and Sesay's role in relation to others within the JCE and to his subordinates who committed the crimes for which he was convicted under Article 6(3) of the Statute. It noted Sesay's "very high position of authority within the RUF" and considered that he was "effectively the second highest senior RUF officer after Sam Bockarie."[3425] It further recalled its findings that:

> Sesay was a member of the AFRC Supreme Council, and participated in the meeting[s] of this body throughout the Junta regime. Within the RUF, Sesay, together with Bockarie, approved the appointment of senior RUF commanders to deputy ministerial positions within the Junta government, in order to integrate the RUF into the AFRC regime. The Chamber concluded that given his power, authority, and influence, including his role, rank, and relationship with Bockarie, Sesay contributed significantly to the JCE."[3426]

1233. The Appeals Chamber, therefore, finds no error in the Trial Chamber's assessment that Sesay's "level of participation was key to the furtherance of the objectives of the JCE" and that "his culpability reaches the highest level."[3427]

(b) Double-counting the *mens rea* of acts of terrorism and collective punishments

1234. We endorse the ICTY Appeals Chamber's holding that with respect to alleged errors concerning the gravity of the offence or aggravating factors, an appellant must demonstrate that the Trial Chamber impermissibly double counted the factor in question.[3428]

1235. A Trial Chamber must ensure that they do not allow the same factor to detrimentally influence the Appellant's sentence twice. In the present case the Trial Chamber stated:

> The Chamber, Justice Itoe dissenting, is of the view that, where a particular act amounting to criminal conduct within the jurisdiction of the Court, such as murder or rape as a crime against humanity has also, because of the additional element of intent necessary for a conviction for acts of terrorism or collective punishments as a war crime, amounted to a crime as alleged in Counts 1 and 2 of the Indictment, for purposes of sentencing we will consider such acts of terrorism or collective punishment as factors which increase the gravity of the underlying offence.[3429]

[3424] *Krstić* Appeal Judgment, para. 254.
[3425] Sentencing Judgment, para. 214.
[3426] Sentencing Judgment, para. 214 (internal citations omitted).
[3427] *See* Sentencing Judgment, para. 215.
[3428] *Deronjić* Appeal Judgment, para. 107.
[3429] Sentencing Judgment, para. 106.

1236. The Trial Chamber thus considered that the additional *mens rea* of specific intent which transformed an underlying offence into an act of terrorism or collective punishments increased the gravity of the underlying offence and it took this additional gravity of the offence into account for the purposes of determining the appropriate sentences under Counts 3-11, 13 and 14. In addition, the Trial Chamber entered a sentence for the convictions under Counts 1 and 2. By so doing, the Trial Chamber double-counted the specific intent of the offences of acts of terrorism and collective punishments: first, as increasing the gravity of the underlying offences, and second, as part of the offence of acts of terrorism and collective punishments. Both are reflected in the sentences imposed. Where a factor is not an element of a crime, that factor may be considered in aggravation of sentence. However, where a factor is an element of an offence for which a sentence is imposed, it cannot also constitute an aggravating factor for the purposes of sentencing.[3430]

1237. Having found that the Trial Chamber impermissibly double-counted the specific intent of acts of terrorism and collective punishments as increasing the gravity of the underlying offences, the Appeals Chamber will revise the sentences as appropriate.

(c) Sesay's contribution to the peace process

1238. Sesay argues that the Trial Chamber erred in law in failing to attach any noticeable weight to Sesay's post-conflict conduct. Sesay contends that the test of whether his post-conflict conduct warranted mitigation is whether his contribution to the peace process amounted to a considerable contribution. If this considerable contribution standard was met, then, Sesay asserts, the Trial Chamber was required to attach weight to this factor in mitigation of his sentence. According to Sesay, the fact that he was convicted under Counts 15 and 17 for a failure to prevent and punish the perpetrators of attacks against UNAMSIL peacekeepers is irrelevant to the Trial Chamber's consideration of how much weight to attach to Sesay's post-conflict conduct as a mitigating factor. Sesay contends the *Plavšić* case indicates he is entitled to mitigation, notwithstanding his role in the UNAMSIL attacks.

1239. The Trial Chamber found that Sesay "proved mitigating circumstances on the balance of the probabilities in relation to Sesay's real and meaningful contribution to the peace process in Sierra Leone following his appointment as interim leader of the RUF."[3431] The Trial Chamber's

[3430] *See e.g., Blaškić* Appeal Judgment, para. 693, *citing Vasiljević* Appeal Judgment, paras 172-173.
[3431] Sentencing Judgment, para. 228.

consideration of post-conflict conduct as a mitigating factor for sentencing purposes is consistent with prior cases at this court and other international criminal tribunals.[3432] Despite finding that Sesay established a mitigating circumstance, however, the Trial Chamber did not state what weight it attached to this factor. By failing to do so, the Trial Chamber erred in law in failing to provide a reasoned opinion in writing. Instead, it stated that it "[did] not accept Sesay's explanation of his reasons for failing to prevent or punish the perpetrators of the attacks against the UNAMSIL personnel, a direct affront to the international community's own attempts to facilitate peace in Sierra Leone."[3433] Sesay contends that the Trial Chamber was not entitled to consider his liability for crimes against peacekeepers in relation to his post-conflict conduct for the purposes of sentencing. The Appeals Chamber, Justices Winter and Fisher dissenting, disagrees. The Trial Chamber could reasonably have considered that Sesay's failure to punish his subordinates for crimes against UNAMSIL peacekeepers, including while he was interim leader of the RUF, undermined the international community's attempts to facilitate peace in Sierra Leone. As the Trial Chamber held:

> it [is] utterly reprehensible that such a senior military commander, who was in a position of authority and had effective control of subordinate commanders and troops, would allow, or would allow to go unchecked, attacks directed against a UN Peacekeeping Force that had been deployed as a result of the Lomé Peace Accord, to which the RUF was one of the signatories. UN Peacekeepers act at the behest of the international community in order to preserve the peace for the benefit of ordinary civilians. Sesay's conduct as overall military commander can only be condemned in the strongest terms possible, and the Chamber considers the gravity of Sesay's criminal conduct in this regard to reach the highest level.[3434]

The Appeals Chamber endorses the view of the ICTY Appeals Chamber that "[p]roof of mitigating circumstances does not automatically entitle an appellant to a 'credit' in the determination of the sentence."[3435] The weight to be attached to a mitigating circumstance is within the discretion of the Trial Chamber,[3436] and an Appellant bears "the burden of demonstrating that the Trial Chamber abused its discretion" in the weight it attached.[3437] Sesay has not fulfilled this burden on appeal, and his submissions are therefore rejected.

[3432] *Fofana and Kondewa* Sentencing Judgment, para. 67; *Plavšić* Sentencing Judgment, para. 94.
[3433] Sentencing Judgment, para. 228.
[3434] Sentencing Judgment, para. 218.
[3435] *Babić* Appeal Judgment, para. 44; *Niyitegeka* Appeal Judgment, para. 267.
[3436] *Musema* Appeal Judgment, para. 396.
[3437] *Babić* Appeal Judgment, para. 44, *citing Kayishema and Ruzindana* Appeal Judgment, para. 366; *Niyitegeka* Appeal Judgment, para. 266. A Trial Chamber's decision may be disturbed on appeal "if an appellant shows that the Trial

(d) Sesay's character and protection of civilians during the conflict

1240. With respect to Sesay's contention that the Trial Chamber should have taken into account "[n]umerous witnesses [who] provided evidence of Sesay's reputation as a moderate," the Appeals Chamber notes that Sesay does not support his allegation by identifying the names of particular witnesses or referencing any arguments as to why the Trial Chamber abused its discretion in failing to consider Sesay's reputation as a moderate is a mitigating circumstance. Accordingly, the Appeals Chamber finds that Sesay has not demonstrated that the Trial Chamber abused its discretion in this regard.

1241. With regard to the evidence of Defence witnesses of Sesay's good character which the Trial Chamber deemed not credible at trial, Sesay argues that the Trial Chamber abused its discretion in failing to accord weight to this evidence in relation to Sesay's good character because the witnesses' testimonies were relevant and probative of Sesay's character, even if the Trial Chamber found their evidence was not reliable in relation to other facts.[3438]

1242. The Appeals Chamber notes that some of the witness evidence that Sesay contests was disregarded by the Trial Chamber because it found that the witnesses[3439] "testified out of loyalty to RUF and their superior commanders, and evidently were trying to assist Sesay and Kallon in this trial, and not necessarily to assist this Chamber in the search for the truth."[3440] Sesay fails to explain how the Trial Chamber's reasoning, which he does not challenge, would not also pertain to their testimony concerning Sesay's character. The Appeals Chamber therefore finds no error in the Trial Chamber's holding that "it attached no probative value to" this evidence.[3441]

1243. The Appeals Chamber also observes, in relation to Sesay's argument that the evidence he annexed to his sentencing brief and provided at trial was erroneously disregarded in sentencing because it was repetitive,[3442] and that the Trial Chamber in fact expressly considered this evidence at the sentencing stage in paragraphs 70 and 224 of the Sentencing Judgment. The Trial Chamber considered these submissions and held that although "Sesay on occasion gave assistance to civilians.... [this] would do little in our opinion to show Sesay's good character ... in the

Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion." *Čelebići* Appeal Judgment, para. 780.
[3438] Sesay Appeal, paras 387, 388.
[3439] Witnesses DIS-069, DAG-048, DIS-188, and DIS-164. *See* Trial Judgment, paras 530-532.
[3440] Trial Judgment, paras 530-532.
[3441] Sentencing Judgment, para. 207.

circumstances found to exist then, [and therefore] it should not be given undue weight in mitigation."[3443] Sesay fails to show error in this regard.

(e) Alleged coercive treatment by the Prosecution

1244. The Appeals Chamber is of the view that, contrary to Sesay's argument, the Trial Chamber took into account Sesay's argument that the Prosecution's "coercive conduct" during his arrest and "interview process" denied him of the real possibility of cooperation with the Prosecution. These circumstances were the subject of the "lengthy voir dire process," and Sesay's submissions were noted in paragraph 72 of the Sentencing Judgment.[3444] In the context of considering "Substantial cooperation" with the Prosecution, the Trial Chamber found that Sesay's treatment by the Prosecution during the six day period after his arrest did not preclude him from cooperating with the Prosecution at any point since that episode, and thus it did not warrant additional relief beyond that already afforded to Sesay, namely, that the Trial Chamber expunged from the record the statements obtained by the Prosecution during this six day period.[3445] On appeal, Sesay has not shown any error and, therefore, his submission is untenable.

(f) Likelihood of serving sentence abroad

1245. The Trial Chamber found that:

> [W]hilst it seems more likely than not at this stage that the convicted persons in this trial will serve sentences outside Sierra Leone, this is a decision that ultimately lies within the discretion of the President of the Court, based upon agreements concluded by the Registrar. The Chamber is unable to speculate on the result of these negotiations and decision-making processes, upon which it has no conclusive information, which lie outside of its control. It therefore notes for purposes of record that it has not given any weight to this factor in the consideration of the sentences of any of the convicted persons in this case.
>
> The Chamber, however, wishes to recognize that, in general terms, sentences served abroad, where family visits are likely to be few, may be harder to bear. Such circumstances would normally amount to a factor in mitigation.[3446]

1246. The Appeals Chamber finds no error in the Trial Chamber's decision not to mitigate the Appellants sentences as a consequence of the fact that they will likely be served outside of Sierra

[3442] Sesay Appeal, paras 390, 391, 392.
[3443] Sentencing Judgment, para. 224.
[3444] Sentencing Judgment, para. 72.
[3445] Sentencing Judgment, para. 222.
[3446] Sentencing Judgment, paras 205, 206.

Leone. As discussed in the *Mrđa* case, which is relied upon by Sesay, it is common practice that convicted persons from international criminal tribunals serve their sentences in foreign countries.[3447] Sesay does not refer to any case in which serving the sentence in a foreign country has been considered as a mitigating factor for sentencing purposes.[3448]

(g) Statement of remorse

1247. Although the Trial Chamber found Sesay's statements of remorse were generally "not sincere," it accepted that his expression of empathy toward the victims of the conflict were in fact sincere.[3449]

1248. With regard to any further mitigating weight, Trial Chamber exercised its discretion to find that Sesay's statements, apart from his empathy toward victims of the conflict, did not show any real remorse.[3450] Sesay, however, relies on the ICTY Trial Chamber case of *Brđanin* to assert that in order to constitute a mitigating circumstance "it is sufficient for the accused to extend his sympathy for victims of the conflict."[3451] The Appeals Chamber finds that this is a mischaracterisation of the law. In *Fofana and Kondewa*, the Appeals Chamber observed that only in a minority of cases have Trial Chambers found that an accused's expressions of regret or empathy for victims, without acknowledgement of responsibility for the crimes, constituted a mitigating factor. The Appeals Chamber acknowledged that it is:

> aware of only two cases at the *ad hoc* Tribunals in which the Chamber considered whether an accused's expressions of regret or empathy for victims without acknowledgement of responsibility for the crimes could constitute a mitigating factor. In *Vasiljević*, the ICTY Appeals Chamber opined that an accused can express sincere regrets without admitting his participation in a crime, and that this could be a factor taken into account by the Trial Chamber.[3452] However, in *Vasiljević*, the Appeals Chamber declined to consider Vasiljević's expressions of regret to be a mitigating circumstance.[3453]
>
> The ICTY Trial Judgment in *Orić* is the only case in which a convicted person received credit for expressions of empathy for the victims without acknowledging responsibility.[3454] In *Blaškić*, the accused attempted to express remorse while denying

[3447] *Mrđa* Trial Judgment, para. 109.
[3448] The Trial Chamber in *Mrđa* considered only that service of sentence in a foreign country could be taken into consideration for purposes of parole or early release. *See Mrđa* Trial Judgment, para. 109.
[3449] *M.Nikolić* Sentencing Appeal Judgment, para. 117.
[3450] Trial Judgment, para. 231.
[3451] Sesay Appeal, para. 401.
[3452] *Fofana and Kondewa* Appeal Judgment para. 487, *citing Vasiljević* Appeal Judgment, para. 177.
[3453] *Fofana and Kondewa* Appeal Judgment para. 487, *citing Vasiljević* Appeal Judgment, para. 177.
[3454] *Fofana and Kondewa* Appeal Judgment para. 488, *citing Orić* Trial Judgment, para. 752.

> accountability and the Trial Chamber refused to take it into account because, after establishing the facts, it felt his remorse was not sincere.[3455]

1249. In *Fofana and Kondewa* we held that the Trial Chamber did not err in taking such an expression into account, but we did not hold that the Trial Chamber must in all circumstances do so. The circumstances of the *Brđanin* case, relied upon by Sesay, are readily distinguished from the present case. In *Brđanin*, the ICTY Trial Chamber allowed expressions of regret for the suffering of victims as a mitigating factor although Brđanin did not express remorse for his own responsibility. The Trial Chamber expressly recognised that Brđanin, through his counsel, told victims he felt sorry for what they had suffered.[3456] Sesay has not pointed to any similar facts in this case. His submission is rejected.

4. Conclusion

1250. For the foregoing reasons, the Appeals Chamber holds that the Trial Chamber erred in double-counting the specific intent of acts of terrorism and collective punishments as increasing the gravity of the underlying offences. The Appeals Chamber will revise the sentences imposed on Sesay as appropriate. The remaining submissions in Sesay Ground 46 are rejected.

D. Kallon's appeal against sentence (Kallon Ground 31)

1. Trial Chamber's findings

1251. The Trial Chamber convicted Kallon for:

(i) Committing through participating in a joint criminal enterprise pursuant to Article 6(1) of the Statute crimes under:

i. Count 1 in relation to events in Bo, Kenema, and Kailahun Districts;

ii. Count 2 in relation to events in Kenema, Kono and Kailahun Districts;

iii. Count 3 in relation to events in Bo, Kenema, Kono and Kailahun Districts;

iv. Count 4 in relation to events in Bo, Kenema, Kono and Kailahun Districts;

[3455] *Fofana and Kondewa* Appeal Judgment para. 487, *citing Blaškić* Trial Judgment, para. 775.
[3456] *Brđanin* Trial Judgment, para. 1139.

v. Count 5 in relation to events in Bo, Kenema, Kono and Kailahun Districts;

vi. Count 6 in relation to events in Kono District;

vii. Count 7 in relation to events in Kono and Kailahun Districts;

viii. Count 8 in relation to events in Kono and Kailahun Districts;

ix. Count 9 in relation to events in Kono and Kailahun Districts;

x. Count 10 in relation to events in Kono District;

xi. Count 11 in relation to events in Kenema and Kono Districts;

xii. Count 13 in relation to events in Kenema, Kono, and Kailahun Districts; and

xiii. Count 14 in relation to events in Bo and Kono Districts.[3457]

(ii) Instigating pursuant to Article 6(1) of the Statute crimes under Count 4 and Count 5 in relation to events in Kono District.[3458]

(iii) Planning pursuant to Article 6(1) of the Statute crimes under Count 12 in relation to events in Kailahun, Kenema, Kono and Bombali Districts.[3459]

(iv) Committing and ordering pursuant to Article 6(1) of the Statute crimes under Count 15 in relation to events in Bombali District.[3460]

(v) Superior Responsibility pursuant to Article 6(3) of the Statute for crimes under:

i. Count 1 in relation to events in Kono District;

ii. Count 7 in relation to events in Kono District;

iii. Count 8 in relation to events in Kono District;

iv. Count 9 in relation to events in Kono District;

[3457] Sentencing Judgment, para. 6.
[3458] Sentencing Judgment, para. 7.
[3459] Sentencing Judgment, para. 7.
[3460] Sentencing Judgment, para. 7.

v. Count 13 in relation to events in Kono District;

vi. Count 15 in relation to events in Bombali, Port Loko, Kono and Tonkolili Districts; and

vii. Count 17 in relation to Bombali and Tonkolili Districts.[3461]

1252. The Trial Chamber found that the crimes for which Kallon incurred Article 6(1) liability, in addition to his JCE liability, included unlawful killings, use of child soldiers and committing attacks against peacekeepers.[3462] The inherent gravity of these crimes was found to be exceptionally high.[3463] The Trial Chamber specifically recalled that Kallon brought children to Bunumbu for training in 1998.[3464] In relation to the attacks on UNAMSIL peacekeepers, "Kallon struck Major Salahuedin in the face and attempted to stab him with a bayonet" and ordered an attack against of convoy of 100 Zambian peacekeepers.[3465] The Trial Chamber found that the gravity of Kallon's criminal conduct reached the highest levels with respect to the use of child soldiers and attacks on UNAMSIL peacekeepers.[3466]

1253. With respect to the unlawful killings, sexual violence crimes, physical violence crimes, enslavement, pillage, and acts of burning committed pursuant to Kallon's participation in the JCE, the Trial Chamber found the inherent gravity of these crimes to be either exceptionally high or high.[3467] Where these acts were found to constitute acts of terrorism or collective punishments, the Trial Chamber, Justice Itoe dissenting, considered this to be a factor which increased the gravity of the underlying offence.[3468] Kallon's contribution to the offences committed through the JCE was found to be "substantial" and his culpability reaching a "high level."[3469] The Trial Chamber emphasised that Kallon was a Senior Commander and member of the Supreme Council "whose participation in important decision making processes and personal involvement in the commission of crimes made him a key player in the regime."[3470] Kallon attended meetings of the Junta governing body fairly regularly and was directly involved in crimes committed in the diamond

[3461] Sentencing Judgment, para. 8.
[3462] Sentencing Judgment, para. 234.
[3463] *See* Sentencing Judgment, paras 116, 187, 204.
[3464] Sentencing Judgment, para. 236.
[3465] Sentencing Judgment, para. 237.
[3466] Sentencing Judgment, paras 236, 237.
[3467] Sentencing Judgment, paras 116, 136, 158, 171, 178.
[3468] Sentencing Judgment, para. 238.
[3469] Sentencing Judgment, para. 240.
[3470] Sentencing Judgment, para. 240.

mining areas.[3471] The Trial Chamber further found that Kallon used his bodyguards to force civilians to mine at Tongo Field and was present at the mines when enslaved civilian miners were killed.[3472]

1254. Kallon also incurred liability pursuant to Article 6(3) of the Statute for crimes including unlawful killings, sexual violence, enslavement and crimes against UNAMSIL personnel whose inherent gravity the Trial Chamber found to be "exceptionally high."[3473] Where these crimes also constituted acts of terrorism or collective punishments, the Trial Chamber, Justice Itoe dissenting, concluded that the gravity of the underlying offence increased.[3474]

1255. The Trial Chamber determined that Kallon's position as a superior commander, his high rank, status as a Vanguard, and his real authority to control all subordinate commanders established that the gravity of his criminal conduct was of the highest level.[3475] Kallon was third in command in the whole of the RUF and second in command and deputy to Sesay with responsibility over the Makeni-Magburaka area where UNAMSIL events occurred.[3476] The Trial Chamber found that in this position he issued and addressed orders to commanders regarding events leading to attacks on UNAMSIL peacekeepers.[3477] The Trial Chamber further found that Kallon made no attempt to prevent and punish the perpetrators of the eight attacks and killing of four UNAMSIL personnel for which he was found liable as a superior.[3478]

1256. With respect to the crimes for which Kallon was found liable, the Trial Chamber considered mitigating factors put forth by the Kallon Defense including forced recruitment,[3479] lack of prior criminal conduct,[3480] good character and contributions,[3481] amnesty,[3482] family circumstances,[3483] remorse,[3484] duress,[3485] and superior orders.[3486] The Trial Chamber found that Kallon's sincere

[3471] Sentencing Judgment, para. 239.
[3472] Sentencing Judgment, para. 239.
[3473] Sentencing Judgment, paras 116, 136, 171, 204.
[3474] Sentencing Judgment, para. 241.
[3475] Sentencing Judgment, para. 246.
[3476] Sentencing Judgment, para. 244.
[3477] Sentencing Judgment, para. 245.
[3478] Sentencing Judgment, paras 244, 246.
[3479] Sentencing Judgment, para. 250.
[3480] Sentencing Judgment, para. 251.
[3481] Sentencing Judgment, para. 252.
[3482] Sentencing Judgment, para. 253.
[3483] Sentencing Judgment, para. 254.
[3484] Sentencing Judgment, paras 255-256.
[3485] Sentencing Judgment, paras 257-262.
[3486] Sentencing Judgment, paras 257-262.

apology to the victims of the war and acknowledgment of his role in the conflict was a mitigating factor to be taken into account in reducing his sentence.[3487] In addition, the Trial Chamber carefully considered whether Kallon was acting under duress and/or superior orders, but found Kallon had not established on the balance of probabilities, Justice Itoe dissenting, that his life was under actual threat had he disobeyed orders.[3488] Particular to UNAMSIL events, the Trial Chamber recalled that Kallon was found liable under Article 6(3) and was personally in a superior position and therefore found it implausible that Kallon acted under duress and/or superior orders.[3489]

1257. The Trial Chamber additionally considered aggravating factors beyond the gravity of Kallon's criminal conduct.[3490] The Trial Chamber found that the abduction of civilians from a mosque, "a traditional place of civilian safety and sanctuary" and the use of this same site by rebels, including Kallon, to vote on whether TF1-015 should be killed constituted an aggravating factor to be considered in sentencing.[3491]

1258. In respect of the crimes for which Kallon was found guilty, the Trial Chamber sentenced him to a total and concurrent term of imprisonment of 40 years resulting from the following:

(i) Thirty-nine (39) years for acts of terrorism, a war crime, charged under Count 1;

(ii) Thirty-five (35) years for collective punishments, a war crime, charged under Count 2;

(iii) Twenty-eight (28) years for extermination, a crime against humanity, charged under Count 3;

(iv) Thirty-five (35) years for murder, a crime against humanity, charged under Count 4;

(v) Thirty-five (35) years for murder, a war crime, charged under Count 5;

(vi) Thirty-five (35) years for rape, a crime against humanity, charged under Count 6;

(vii) Thirty (30) years for sexual slavery, a crime against humanity, charged under Count 7;

[3487] Sentencing Judgment, para. 256.
[3488] Sentencing Judgment, paras 259-260.
[3489] Sentencing Judgment, para. 262.
[3490] Sentencing Judgment, para. 248.
[3491] Sentencing Judgment, para. 247.

(viii) Thirty (30) years for other inhumane acts (forced marriage), a crime against humanity, charged under Count 8;

(ix) Twenty-eight (28) years for outrages upon personal dignity, a war crime, charged under Count 9;

(x) Thirty-five (35) years for mutilation, a war crime, charged under Count 10;

(xi) Thirty (30) years for other inhumane acts (physical violence), a crime against humanity, charged under Count 11;

(xii) Thirty-five (35) years for conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, a war crime (other serious violations of international humanitarian law), charged under Count 12;

(xiii) Thirty-five (35) years for enslavement, a crime against humanity, charged under Count 13;

(xiv) Fifteen (15) years for pillage, a war crime, charged under Count 14;

(xv) Forty (40) years for intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, a war crime (other serious violation of international humanitarian law), charged under Count 15; and

(xvi) Thirty-five (35) years for murder, a war crime, charged under Count 17.[3492]

2. Submissions of the Parties

(a) Kallon's Appeal

1259. Kallon raises nine challenges against the sentences imposed by the Trial Chamber.

1260. First, he alleges the Trial Chamber erred in failing to take account of the form and degree of his participation in the crimes. With respect to the crimes Kallon was convicted for as a participant

[3492] Sentencing Judgment, pp. 95-96.





in the JCE and for command responsibility, Kallon argues that the Trial Chamber erred in failing to consider that the crimes were committed by others such as Rocky and Staff Alhaji. Specifically, he argues his connection to these crimes is at best remote and the Trial Chamber has not linked Kallon to any of these crimes. Some of these crimes, he further argues, such as sexual violence and other physical violence were committed by others such as Rocky or Staff Alhaji who were not found to be members of the JCE. With respect to Kallon's convictions for the use of child soldiers, Kallon argues that the Trial Chamber failed to consider his remote connection to certain uses of child soldiers which he was not found to have personally committed, specifically crimes found to have been committed by Rocky. Furthermore, he argues that the Trial Chamber in determining gravity erred in considering use of child soldiers "throughout the territory of Sierra Leone" thereby considering locations where he was not convicted.

1261. Second, Kallon argues that the Trial Chamber impermissibly double-counted when it considered acts of terrorism and collective punishments increase the gravity of the underlying offences.[3493] Under established jurisprudence, Kallon submits, it is an error because the "infliction of terror and collective punishments were fully counted as elements of those crimes."[3494]

1262. Third, Kallon contends the Trial Chamber erred in considering Rocky's actions taken at the Sunna Mosque in Koidu prior to Kallon's arrival as an aggravating factor.[3495] He cites the ICTY Appeals Chamber case of *Deronjić* in support of his argument that "only those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence … may be considered in aggravation." Furthermore, Kallon argues the Trial Chamber erred in considering as an aggravating factor that Kallon voted on whether or not someone should be killed. He submits that "voting on whether someone should be killed (who was not killed), while admittedly callous, is not an aggravating factor as to a crime, and should not have been considered."[3496]

1263. Fourth, Kallon argues that the Trial Chamber erred in finding that Kallon did not act under "duress and/or superior orders with respect to the UNAMSIL events" because Foday Sankoh had been arrested, and that he had not established that "his life was under actual threat in [the] event that

[3493] Kallon Appeal, paras 313-314.
[3494] Kallon Appeal, para. 314.
[3495] Kallon Appeal, para. 315.
[3496] Kallon Appeal, para. 315.





he failed to obey these orders."[3497] Kallon also submits that the Trial Chamber "erred in holding that because Kallon was personally in a superior position, issuing orders [of his own], his responsibility under Article 6(3) negates him from raising these defences."[3498] Kallon argues that this holding is erroneous because Article 6(4) of the Statute states, "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Trial Chamber determines that justice so requires."[3499] According to Kallon, for the Trial Chamber to find that an accused person convicted as a superior cannot assert as a mitigating circumstance that he was acting under orders, renders the provisions of Article 6(4) applicable only to the "lowest level of military/rebel movements" and ignores the plain language of the Statute.[3500]

1264. Fifth, Kallon also argues that the Trial Chamber erred in failing to take into account his post-conflict conduct. He contends that at the end of the conflict he risked his life to disobey Foday Sankoh and other hardliners opposed to the peace process to help ECOWAS, UNAMSIL, and the Government of Sierra Leone, and that the Trial Chamber erred in failing to find this as a mitigating factor.[3501]

1265. Sixth, Kallon argues that the Trial Chamber erroneously failed to take into account his young age at the time of the offences as a mitigating circumstance. He submits that he was 31 years old in 1996 and that the ICTY and ICTR have considered ages up to 33 to be mitigating circumstances.

1266. Seventh, Kallon argues that the Trial Chamber erred in failing to take into account his (i) good behaviour in detention, (ii) attempts to prevent brutal crimes, (iii) renunciation of violence and (iv) work to transform RUF into a political party, despite recognising this conduct as a mitigating factor.

[3497] Kallon Appeal, para. 318.
[3498] Kallon Appeal, para. 319.
[3499] Kallon Appeal, para. 319, *quoting* Article 6(4) of the Statute.
[3500] Kallon Appeal, para. 319.
[3501] Kallon Appeal, paras 322-323.

1267. Eighth, Kallon argues that the Trial Chamber erred in attaching only very little weight to mitigating circumstances that it recognised, such as his (i) sincere remorse, (ii) lack of previous convictions, (iii) family circumstances and (iv) assistance to victims and other detainees.[3502]

(b) Prosecution Response

1268. The Prosecution responds that Kallon's form and degree of participation in each individual crime is immaterial.[3503] Co-perpetratorship in a JCE, on the basis of which Kallon was found guilty, only requires that the Accused share the *mens rea* or "intent to pursue a common purpose" and performs some acts that "in some way are directed to the furtherance of the common design." Participation in a JCE does not require that the accused commit the *actus reus* of a specific crime.[3504]

1269. Thus, the Prosecution submits that Kallon's claim that the Trial Chamber erroneously considered crimes by other, non-JCE members in sentencing Kallon and its repeated claims that it was only remotely connected to the crimes lacks merit.[3505] The Trial Chamber found Kallon's contribution to the crimes committed pursuant to the JCE to have actively participated in the furtherance of the common purpose and thereby to have significantly contributed to the commission of the "JCE crimes" for which he was convicted.[3506] At sentencing, the Trial Chamber recalled Kallon's involvement in the governing body of the Junta, his direct involvement of crimes committed in diamond mining area of Kenema and his endorsement of enslavement and killings of civilians "in order to control and exploit natural resources vital to the financial survival of the Junta Government."[3507]

1270. The Prosecution argues that the unlawful killings by Rocky were some of the crimes for which Kallon was convicted on the basis of JCE liability. It submits that committing crimes in a place of religious worship or sanctuary may be considered as an aggravating factor.[3508] Accordingly, the Prosecution submits it was within the Trial Chamber's discretion to find that "the

[3502] Kallon Appeal, paras 331-334.
[3503] Prosecution Response, para. 9.36.
[3504] Prosecution Response, para. 9.36.
[3505] Prosecution Response, para. 9.37.
[3506] Prosecution Response, para. 9.37.
[3507] Prosecution Response, para. 9.37.
[3508] Prosecution Response, para. 9.41, *citing Brima et al.* Sentencing Judgment, para. 22.

fact that civilians were abducted from a Mosque a traditional place of civilian safety and sanctuary" was an aggravating factor.[3509]

1271. According to the Prosecution, the Trial Chamber is "endowed with a considerable degree of discretion in deciding on the factors which may be taken into account."[3510] It is not required to "articulate every step" of its reasoning in reaching particular findings, and failure to list in a Judgment "each and every circumstance" placed before it and considered, "does not necessarily mean that [it] either ignored or failed to evaluate the factor in question."[3511]

3. Discussion

(a) Gravity of the offences

1272. Kallon contests the Trial Chamber's assessment of the form and degree of his participation in the crimes, but he fails to address the facts considered by the Trial Chamber, let alone show that consideration of those facts or the failure to consider other facts amounted to an abuse of discretion. For example, Kallon does not address the Trial Chamber's finding that he was "one of the few RUF commanders to be a member of the AFRC Supreme Council," and that "his involvement in the governing body of the Junta substantially contributed to the JCE, as this body was involved in the decision making processes through which the Junta regime determined how best to secure power and maintain control over the territory of Sierra Leone."[3512] He also does not address the Trial Chamber's consideration of his direct involvement in the crimes committed in the diamond mining areas, including his use of "his bodyguards to force civilians to mine diamonds in Tongo Field" and his presence "at the mining pits in Tongo Field when SBUs and other rebels shot into the [mining] pits killing unarmed, enslaved civilian miners."[3513] Based on these findings, among others, the Trial Chamber concluded that "Kallon's level of participation in the JCE was that of a Senior Commander, a "key player in the regime."[3514] Kallon's submissions are therefore rejected.

[3509] Prosecution Response, para. 9.41.
[3510] Prosecution Response, para. 9.25.
[3511] Prosecution Response, para. 9.45.
[3512] Sentencing Judgment, para. 239.
[3513] Sentencing Judgment, para. 239.
[3514] Sentencing Judgment, para. 240.

(b) Double-counting the *mens rea* for acts of terrorism and collective punishments

1273. Kallon's submissions do not extend those raised by Sesay, discussed above.[3515] The Appeals Chamber recalls its reasons there and allows this part of Kallon's Ground 31 for the same reasons.

(c) Aggravating factors in relation to crimes at Sunna Mosque in Koidu Town

1274. The Trial Chamber found that:

> [T]he fact that civilians were abducted from a Mosque – a traditional place of civilian safety and sanctuary – and that the same site was further used by the rebels, including Kallon, in voting on TF1-015's life, constitutes an aggravating factor.[3516]

1275. The Appeals Chamber finds that the location of an attack, as in places of civilian sanctuary such as churches, mosques, schools, and hospitals, may be considered as part of the gravity of the offence or an aggravating factor, and this is consistent with the case law of Trial Chambers at the Special Court and ICTR.[3517] In part, Kallon contends that the Trial Chamber erred in considering Rocky's actions at the Sunna Mosque, which occurred prior to the arrival of Kallon, as an aggravating factor for Kallon's sentence.[3518]

1276. Article 19 of the Statute provides that "[i]n 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." The individual circumstances of the convicted person include the aggravating and mitigating factors,[3519] which must therefore relate to the offender himself.[3520] The Appeals Chamber adopts the view of the ICTY Appeals Chamber that the fact that the aggravating circumstances "must relate to the offender himself is not to be taken as a rule that such circumstances must specifically pertain to the offender's personal characteristics. Rather, it simply reflects the general principle of individual responsibility that underlies criminal law: a person

[3515] *See supra*, paras 1234-1237.
[3516] Sentencing Judgment, para. 247.
[3517] *Brima et al.* Sentencing Judgment, para. 22; *Muhimana* Trial Judgment, para. 605 (participation in attacks against *Tutsi* civilians who had sought refuge in churches and a hospital, which are traditionally regarded as places of sanctuary and safety constituted aggravating circumstances.)
[3518] Kallon Appeal, para. 315.
[3519] *Fofana and Kondewa* Appeal Judgment, para. 465, fn. 898; *see* also *Naletilić and Martinović* Appeal Judgment, para. 592, *quoting Blaškić* Appeal Judgment, para. 679 ("the individual circumstances of the accused, including aggravating and mitigating circumstances").
[3520] *Deronjić* Appeal Judgment, para. 124, *citing Kunarac et al.* Trial Judgment, para. 850.

cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible."[3521]

1277. In this case, the first attack on civilians at the Sunna Mosque in which Kallon did not participate could not be an aggravating factor for purposes of Kallon's sentence. The Trial Chamber rightly noted, however, that "the same site was further used by the rebels, including Kallon, in voting on TF1-015's life, constitutes an aggravating factor."[3522]

1278. Although we find error in the holding that Rocky's conduct at the Sunna Mosque constituted an aggravating factor for Kallon, the Appeals Chamber finds no reason to interfere in the sentence. The Appeals Chamber recalls that the weight to be attached to an aggravating circumstance is within the discretion of the Trial Chamber,[3523] and an Appellant bears "the burden of demonstrating that the Trial Chamber abused its discretion" in the weight it attached.[3524] In view of the Trial Chamber's proper consideration of Kallon's use of the Sunna Mosque as an aggravating circumstance, the Appeals Chamber considers that Kallon has not shown that the Trial Chamber abused its discretion in determining the weight to be given to this aggravating circumstance. Kallon's submission is therefore rejected.

(d) Duress and superior orders

1279. In regard to factors of duress and acting under superior orders, Kallon argues that the Trial Chamber erred in considering these two separate arguments as one mitigating factor.[3525] The Appeals Chamber notes, however, that the Trial Chamber acknowledged that Kallon submitted at trial that these factors were separate mitigating factors and it explained that even though it was considering these factors under the heading "Executing Orders" it did not imply that these factors are the same.[3526] The Trial Chamber committed no error in this regard.

1280. Kallon argues that the Trial Chamber erred in finding that he had failed to establish that with respect to the UNAMSIL events his life was under threat if he failed to obey Sankoh's orders.

[3521] *Deronjić* Appeal Judgment, para. 124.
[3522] Sentencing Judgment, para. 247.
[3523] *Musema* Appeal Judgment, para. 396.
[3524] *Babić* Appeal Judgment, para. 44 citing *Kayishema and Ruzindana* Appeal Judgment, para. 366; *Niyitegeka* Appeal Judgment, para. 266. A Trial Chamber's decision may be disturbed on appeal "if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion." *Celebići* Appeal Judgment, para. 780.
[3525] Kallon Appeal, para. 317.
[3526] Sentencing Judgment, para. 257.





According to Kallon, the Trial Chamber "ignored the power that Sankoh could still exert even from prison."[3527] He also contends that his post-conflict conduct came at personal risk because it contravened Sankoh's orders.

1281. Beyond mere assertions, Kallon provides no support for these contentions. He simply states that Sankoh could exert power from prison, Sankoh issued the order in relation to the UNAMSIL events, and that Prosecution Witness TF1-362 testified that disobeying Foday Sankoh could lead to death. But he fails to cite any Trial Chamber finding or other evidence which could sustain such assertions. His submissions are undeveloped and therefore rejected.

4. Conclusion

1282. For the foregoing reasons, the Appeals Chamber holds that the Trial Chamber erred in double-counting the specific intent of acts of terrorism and collective punishments as increasing the gravity of the underlying offences. The Appeals Chamber will revise the sentences imposed on Kallon as appropriate. The remaining submissions in Kallon Ground 31 are rejected.

E. Gbao's appeal against sentence (Gbao Ground 18)

1. Trial Chamber's findings

1283. The Trial Chamber convicted Gbao for:

(i) Committing by participating in a joint criminal enterprise pursuant to Article 6(1) of the Statute crimes under:

i. Count 1 in relation to events in Kailahun District;

ii. Count 2 in relation to events in Kailahun District;

iii. Count 3 in relation to events in Bo, Kenema, Kono and Kailahun Districts;

iv. Count 4 in relation to events in Bo, Kenema, Kono, and Kailahun Districts;

v. Count 5 in relation to events in Bo, Kenema, Kono, and Kailahun Districts;

vi. Count 6 in relation to events in Kono District;

[3527] Kallon Appeal, para. 318.

vii. Count 7 in relation to events in Kono and Kailahun Districts;

viii. Count 8 in relation to events in Kono and Kailahun Districts;

ix. Count 9 in relation to events in Kono and Kailahun Districts;

x. Count 10 in relation to events in Kono District;

xi. Count 11 in relation to events in Kenema and Kono Districts;

xii. Count 13 in relation to events in Kenema, Kono and Kailahun Districts;

xiii. Count 14 in relation to events in Bo and Kono Districts;[3528] and

(ii) Aiding and Abetting pursuant to Article 6(1) of the Statute crimes under Count 15 in relation to events in Bombali District.[3529]

1284. The Trial Chamber found Gbao guilty of aiding and abetting pursuant to Article 6(1) of the Statute the attacks directed at Salahuedin and Jaganathan and that the gravity of these crimes was high.[3530] The Trial Chamber further found that "he deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation at the Makump DDR camp."[3531] With respect to the unlawful killings, sexual violence crimes, physical violence crimes, enslavement, pillage, and acts of burning committed pursuant to the JCE the Trial Chamber found the inherent gravity of these crimes to be either exceptionally high or high,[3532] and where these crimes also constituted acts of terrorism or collective punishment the Trial Chamber, Justice Itoe dissenting, considered the gravity of the underlying offence to be further increased.[3533]

1285. Specific to Gbao's participation in the JCE, the Trial Chamber found that "Gbao was a loyal and committed functionary of the RUF organisation," whose major contributions to the JCE were "characterised by his role as an ideology instructor and his planning and direct involvement in the enslavement of civilians on RUF government farms within Kailahun District."[3534] The Trial Chamber added that whilst the crimes Gbao committed pursuant to his participation in the JCE were

[3528] Sentencing Judgment, para. 9.
[3529] Sentencing Judgment, para. 10.
[3530] Sentencing Judgment, para. 264.
[3531] Sentencing Judgment, para. 264.
[3532] Sentencing Judgment, paras 265, 116, 136, 158, 171, 178.
[3533] Sentencing Judgment, para. 265.

"vast and atrocious" Gbao's involvement "was more limited than that of his co-defendants" such that it diminished his responsibility for sentencing purposes.[3535]

1286. The Trial Chamber considered aggravating circumstances put forth by the Prosecution and found that Gbao's abuse of his position of leadership and authority with respect to the attacks against Salahuedin and Jaganathan to be an aggravating factor in sentencing.[3536] Gbao's education, training as a police officer, pecuniary gain from the enslavement of civilians, challenge to the court's jurisdiction, and exercise of his right not to attend court proceedings did not in the Trial Chamber's view constitute aggravating circumstances.[3537]

1287. As to mitigating circumstances, the Trial Chamber considered Gbao's level of remorse, advanced age, and lack of prior criminal conduct.[3538] The Trial Chamber concluded that Gbao's age of 60 years was a mitigating factor in sentencing[3539] and that limited credit would be given to his lack of prior criminal conduct due to the serious nature of the crimes committed.[3540]

1288. In respect of the crimes for which Gbao was found guilty, the Trial Chamber sentenced him to a total and concurrent term of imprisonment of 25 years resulting from the following:

(i) Twenty-five (25) years for acts of terrorism, a war crime, charged under Count 1;

(ii) Twenty (20) years for collective punishments, a war crime, charged under Count 2;

(iii) Fifteen (15) years for extermination, a crime against humanity, charged under Count 3;

(iv) Fifteen (15) years for murder, a crime against humanity, charged under Count 4;

(v) Fifteen (15) years for murder, a war crime, charged under Count 5;

(vi) Fifteen (15) years for rape, a crime against humanity, charged under Count 6;

[3534] Sentencing Judgment, para. 270.
[3535] Sentencing Judgment, para. 271.
[3536] Sentencing Judgment, para. 272.
[3537] Sentencing Judgment, paras 273-276.
[3538] Sentencing Judgment, paras 277-279.
[3539] Sentencing Judgment, para. 278.
[3540] Sentencing Judgment, para. 279.

(vii) Fifteen (15) years for sexual slavery, a crime against humanity, charged under Count 7;

(viii) Ten (10) years for other inhumane acts (forced marriage), a crime against humanity, charged under Count 8;

(ix) Ten (10) years for outrages upon personal dignity, a war crime, charged under Count 9;

(x) Twenty (20) years for mutilation, a war crime, charged under Count 10;

(xi) Eleven (11) years for other inhumane acts (physical violence), a crime against humanity, charged under Count 11;

(xii) Twenty-five (25) years for enslavement, a crime against humanity, charged under Count 13;

(xiii) Six (6) years for pillage, a war crime, charged under Count 14; and

(xiv) Twenty-five (25) years for intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, a war crime, charged under Count 15.[3541]

2. Submissions of the Parties

(a) Gbao's Appeal

1289. Gbao submits that the Trial Chamber erred in law and in fact in imposing a sentence of 25 years for his JCE liability for crimes and for aiding and abetting crimes committed against UNAMSIL personnel.[3542] In support, he makes seven arguments, which will be addressed in turn.

1290. First, he argues the Trial Chamber erred in assessing the gravity of his conduct by "unfairly aggregat[ing] the gravity of Gbao's conduct by combining his culpability with convictions of the other two Accused and calculat[ing] the gravity cumulatively" and failing "to otherwise accurately

[3541] Sentencing Judgment, pp. 96-98.
[3542] Gbao Appeal, para. 356.

reflect the gravity of the Accused's conduct."[3543] He submits that although the Trial Chamber used appropriate factors in their assessment of the gravity of the offences, it nevertheless erred by "repeatedly calculating Gbao's culpability according to findings in relation to which he was not convicted."[3544] Gbao submits that the gravity of the offence must be assessed individually, even for JCE members. He contends, however, that his sentence was aggravated in part because of the crimes committed under Counts 1 and 2 in Bo, Kenema and Kono Districts for which he was found not guilty, and he submits that his sentence should be reduced accordingly, particularly for Counts 1 and 2.[3545]

1291. Second, he contends the Trial Chamber erred in assessing the gravity of the offences by making findings that were not proven beyond reasonable doubt.[3546] In support, he points to the Trial Chamber's consideration of the following findings:

(i) civilians in Kailahun District were "restrained in ropes and chains", whereas Gbao contends the Trial Chamber did not make this finding in the Trial Judgment;[3547]

(ii) civilians in Kailahun District were "forced to live in camps manned by armed guards", whereas Gbao contends the Trial Chamber did not make this finding in the Trial Judgment;[3548] and

(iii) in relation to enslavement in Kailahun District that "some commanders had private mines where they mined while child soldiers stood guard" whereas the cited paragraph of the Trial Judgment refers to Kono District, not Kailahun District, and there are no such findings in relation to Kailahun District.[3549]

1292. Third, he argues that the Trial Chamber failed "to accurately reflect Gbao's individual circumstances" in relation to his JCE liability.[3550] Gbao contends the Trial Chamber made "significant findings" on "his limited role in the JCE," but nonetheless sentenced Gbao to 25 years of imprisonment based on "his role as an ideology instructor and his involvement in planning forced

[3543] Gbao Appeal, para. 356.
[3544] Gbao Appeal, paras 359, 360.
[3545] Gbao Appeal, paras 361-363.
[3546] Gbao Appeal, para. 359.
[3547] Gbao Appeal, para. 370, *citing* Sentencing Judgment, para. 168.
[3548] Gbao Appeal, para. 370, *citing* Sentencing Judgment, para. 168.
[3549] Gbao Appeal, para. 370, *citing* Sentencing Judgment, para. 165.
[3550] Gbao Appeal, para. 359.

farming in Kailahun District."[3551] Gbao contends that, by imposing such a lengthy sentence, the Trial Chamber failed to give sufficient weight to its own findings that he had a limited role in the JCE, and thereby abused its sentencing discretion.[3552]

1293. Fourth, in relation to Count 15, Gbao contends that the Trial Chamber "vastly inflated the gravity of the offences for which Gbao was convicted"[3553] by aggregating all fourteen of the attacks against the peacekeepers when assessing the gravity of the offences, rather than limiting its analysis to the two incidents for which he was convicted.[3554] Similarly, Gbao argues that in relation to his sentence, the Trial Chamber should have only considered the effect on the two victims of his crimes rather than the effect on all the victims of the crimes against peacekeepers.[3555]

1294. Fifth, he submits the Trial Chamber erred in finding, in relation to the offences at the Makump DDR camp on 1 May 2000, that the fact that he was "the most senior RUF commander present until Kallon's arrival and he remained the Commander with the largest number of fighters present" constituted an aggravating factor.[3556] He argues that these facts were "an element of the offence for which Gbao was convicted" such that the Trial Chamber relied on these facts to find that he aided and abetted the crimes by tacit encouragement.[3557] He submits these facts could not additionally be used as an aggravating factor.[3558] He also contends there was no finding that he abused his position of authority, but instead that the Trial Chamber found he tried to placate Kallon when Kallon arrived.[3559] He quotes ICTR and ICTY Appeals Chamber jurisprudence for the principle 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 harsher sentence."[3560] He requests that the Appeals Chamber reject the finding that he abused his leadership position and accordingly substantially reduce his sentence under Count 15.[3561]

[3551] Gbao Appeal, para. 375, *citing* Sentencing Judgment, para. 270.
[3552] Gbao Appeal, para. 375.
[3553] Gbao Appeal, para. 376.
[3554] Gbao Appeal, paras 377, 381-382.
[3555] Gbao Appeal, paras 379-280, *citing* Sentencing Judgment, paras 196-198.
[3556] Gbao Appeal, para. 387.
[3557] Gbao Appeal, paras 385-386.
[3558] Gbao Appeal, para. 388.
[3559] Gbao Appeal, paras 399, 396, *citing* Trial Judgment, para. 1790.
[3560] Gbao Appeal, para. 392 (and citations therein).
[3561] Gbao Appeal, para. 398.

1295. Sixth, Gbao argues the Trial Chamber failed to properly mitigate his sentence by failing to take into account that he will likely serve his sentence in a foreign country.[3562]

1296. Finally, he contends that the sentence imposed by the Trial Chamber "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."[3563] He contends that Gbao's sentence of 25 years for "membership in a [JCE]" is almost twice the average sentence for this mode of liability at the ICTY, but his individual contribution was found to be "on the lower end of the continuum."[3564] He compares his case with that of Fofana,[3565] Kondewa,[3566] the ICTR accused Ntakirutimana and his co-accused,[3567] Muvenyi,[3568] Zigiranyirazo,[3569] the ICTY accused Aleksovski,[3570] Blagojević and Jokić,[3571] Limaj and co-accused,[3572] Furundjiza,[3573] Mrkšić,[3574] Milutinović[3575] and Martinović.[3576] Gbao contends that his analysis of the sentences imposed in these cases demonstrates that his own sentence is "so disproportionate as to amount to an unprecedented and irrational act of judicial retribution."[3577]

(b) Prosecution Response

1297. In response, the Prosecution submits that there is no indication that the Trial Chamber attributed to Gbao the gravity of offences in Counts 1 and 2 for which Sesay and Kallon were convicted, but for which Gbao was acquitted.[3578]

1298. In relation to the attack against UNAMSIL peacekeepers, the Prosecution submits that contray to Gbao's claims, only the gravity of the UNAMSIL crime for which Gbao was convicted was considered in respect of Gbao.[3579]

[3562] Gbao Appeal, paras 401-404.
[3563] Gbao Appeal, para. 356.
[3564] Gbao Appeal, para. 426, *quoting* Sentencing Judgment, para. 271.
[3565] Gbao Appeal, paras 428-435, 443-449.
[3566] Gbao Appeal, paras 436-449.
[3567] Gbao Appeal, paras 450-452.
[3568] Gbao Appeal, paras 453-454.
[3569] Gbao Appeal, paras 455-457.
[3570] Gbao Appeal, paras 458-461.
[3571] Gbao Appeal, paras 462-465.
[3572] Gbao Appeal, paras 466-469.
[3573] Gbao Appeal, paras 470-472.
[3574] Gbao Appeal, paras 473-475.
[3575] Gbao Appeal, paras 476-477.
[3576] Gbao Appeal, paras 478-481.
[3577] Gbao Appeal, para. 482.
[3578] Prosecution Response, para. 9.47.

1299. The Prosecution argues that contrary to Gbao's claims, the findings in the Sentencing Judgment are based on findings in the Trial Judgment. The Prosecution argues there is no indication that the Trial Chamber's findings at paragraphs 165 and 168 of the Sentencing Judgment were meant to relate only to Kailahun District, as Gbao claims.[3580]

1300. The Prosecution submits that the Trial Chamber considered the extent of Gbao's "limited role" in the JCE. It also contends the Trial Chamber took into account his role in the offence under Count 15 in recognizing that Gbao was not primarily responsible for the attack, and may not have been able to prevent it. In the end, the Prosecution submits, Gbao's "limited role" in Count 15 is properly reflected in the considerably lower sentence that he received, compared to Sesay and Kallon.[3581]

1301. Finally, contrary to the Gbao's submissions, the Prosecution submits that the Trial Chamber was correct to consider as an aggravating factor Gbao's abuse of his position of leadership and authority.[3582]

1302. Gbao makes no new submissions in Reply.

3. Discussion

(a) Gravity of offences committed pursuant to the JCE

1303. Gbao contends that the Trial Chamber erroneously aggregated the gravity of all of the crimes, including those for which he was not convicted, when assessing the gravity of his conduct. He submits that the Trial Chamber thereby failed to take into account that Gbao was not convicted of Counts 1 and 2 in Bo, Kenema and Kono Districts. To the contrary, the Trial Chamber expressly listed each of the crimes for which Gbao was found guilty, including the Districts where they were committed. In this list, the Trial Chamber properly limited Gbao's liability for acts of terrorism and collective punishments to Kailahun District, whereas the liability for Sesay and Kallon also includes crimes committed in Bo, Kenema and Kono Districts. The Trial Chamber's subsequent analysis of the gravity of the offences is not ascribed to any accused – it is strictly an analysis of the gravity of the offences - and it contains no indication that the Trial Chamber erroneously considered the

[3579] Prosecution Response, para. 9.48, *citing* Sentencing Judgment, para. 264.
[3580] Prosecution Response, para. 9.51.
[3581] Prosecution Response, para. 9.52.
[3582] Prosecution Response, para. 9.53.

gravity of offences of acts of terrorism and collective punishments committed outside Kailahun District in relation to Gbao's sentence. Gbao's submissions are, therefore, untenable.

(b) Consideration of findings not proved beyond reasonable doubt

1304. Gbao contends the Trial Chamber increased his sentence based in part on findings not proved beyond reasonable doubt and he supports his argument with three references to the Sentencing Judgment. The first two references do not evince error. He argues the Trial Chamber found that civilians in Kailahun District were "restrained in ropes and chains"[3583] and "forced to live in camps manned by armed guards"[3584] and that no such findings were made for Kailahun District; however, there is no indication that the Trial Chamber made these statements in the Sentencing Judgment in relation to Kailahun District. In fact, it would appear that the first quotation pertains to Tombodu in Kono District and the second to Tongo Fields in Kenema District, and findings in the Trial Judgment support each statement.[3585]

1305. The third statement pointed to by Gbao suggests the Trial Chamber may have misstated in a limited instance the district in which child soldiers stood guard at a mining site, but the conduct relates to forced mining in Kono District for which Gbao was not found liable and there is no indication that the Trial Chamber erroneously considered this conduct in relation to Gbao's sentence.

(c) The form and degree of Gbao's participation in the JCE

1306. As noted above, a Trial Chamber must ultimately impose a sentence that reflects the totality of the convicted person's culpable conduct.[3586] This requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused in the crimes.[3587] In its assessment of the form and degree of Gbao's participation in the JCE, the Trial Chamber considered the following significant:

> 266. The Chamber recalls its finding that Gbao's status, assignment, rank and personal relationship with Sankoh, as well as his knowledge of the RUF's ideology were all

[3583] Gbao Appeal, para. 370, *citing* Sentencing Judgment, para. 168.
[3584] Gbao Appeal, para. 370, *citing* Sentencing Judgment, para. 168.
[3585] *See* Trial Judgment, paras 1252 (Tombodu), 1119 (Tongo Field), 1248 (Kono District).
[3586] *Fofana and Kondewa* Appeal Judgment, para. 546.
[3587] *Fofana and Kondewa* Appeal Judgment, para. 546.

factors demonstrating that Gbao had considerable prestige and power within the RUF in Kailahun District. Gbao's supervisory role entailed the monitoring of the implementation of the ideology. We also recall that we found that the RUF ideological objective of toppling the 'selfish and corrupt' regime by eliminating all those who supported that regime and who, a fortiori, were considered as enemies to the AFRC/RUF Junta alliance. The Chamber, by a majority, Justice Boutet dissenting, found that:

… Gbao was an ideology instructor and that ideology played a significant role in the RUF movement as it ensured not only the fighters' submission and compliance with the orders and instructions of the RUF leadership but also hardened their determination, their resolve and their commitment to fight to ensure the success and achievement of the ideology of the movement. It was in this spirit that the crimes alleged in the Indictment and for which the Accused are charged, were committed. Given this consideration, it is undeniable therefore, that the ideology played a central role in the objectives of the RUF.

267. The Chamber recalls that Gbao was also directly involved in the planning and enslavement of civilian labour on RUF government farms in Kailahun District, and worked very closely with the G5 in Kailahun Town to manage the large-scale, forced civilian farming that existed in Kailahun between 1996 and 2001, including the period between 25 May 1997 and 14 February 1998. Furthermore, Gbao's involvement in designing, securing and organising the forced labour of civilians to produce foodstuffs significantly contributed to maintaining the strength and cohesiveness of the RUF fighting force. Despite having knowledge that crimes were being committed by RUF fighters on a large scale, Gbao continued to pursue the common purpose of the joint criminal enterprise.

268. The Chamber recalls however 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. 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.

269. The Chamber has found that crimes committed in furtherance of the joint criminal enterprise, which '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 captured territory' were crimes of a shocking nature, deserving of condemnation in the strongest terms possible.

270. 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'. Gbao was a loyal and committed functionary of the RUF organisation, whose major contributions to the joint criminal enterprise can be characterised by his role as an ideology instructor and his planning and direct involvement in the enslavement of civilians on RUF government farms within Kailahun District.

271. Whilst the crimes committed pursuant to the joint criminal enterprise for which Gbao has been convicted are vast and atrocious, the Chamber recognises that Gbao's involvement within the overall scheme, whilst sufficient in law to attract criminal liability, was more limited than that of his co-defendants. The Chamber thus finds Gbao's individual contribution to the joint criminal enterprise, and his own particular criminal

> responsibility, to be on the lower end of the continuum, and considers his role as diminishing his responsibility for sentencing purposes.[3588]

1307. As is abundantly clear from this passage, the Trial Chamber considered that the form and degree of Gbao's participation in the crimes for which he was held liable pursuant to the JCE are: (i) his role as an ideology instructor and (ii) his planning and direct involvement in the enslavement of civilians on RUF government farms within Kailahun District.[3589] The Appeals Chamber recalls its holding that the finding that Gbao contributed to the JCE in his role as an ideology expert and instructor violated his right to a fair trial. As a result, the finding was disallowed.[3590] This conduct also cannot be considered as part of the form and degree of Gbao's conduct for sentencing purposes. The Appeals Chamber will determine the consequences of this holding in its revision of the sentences imposed for crimes Gbao committed pursuant to his participation in the JCE.

(d) Gravity of offences against UNAMSIL peacekeepers

1308. Gbao contends that the Trial Chamber erroneously aggregated all of the offences committed against UNAMSIL peacekeepers when assessing the gravity of the offences for which he was convicted under Count 15. The Appeals Chamber recalls that it has allowed Gbao Ground 16, in part, and reversed the verdict of guilt for Gbao for aiding and abetting the attack directed against Salahuedin. We will therefore only consider Gbao's submissions here in relation to his sentence for aiding and abetting the attack against Jaganathan.

1309. The Appeals Chamber notes that the Trial Chamber properly limited itself to considering Gbao's liability for "aiding and abetting the attacks directed against Salahuedin and Jaganathan on 1 May 2000 and found that he deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation at that Makump DDR camp."[3591]

1310. It determined that the "gravity of this crime is high."[3592] However, the Trial Chamber's analysis of the gravity of the offences committed against UNAMSIL peacekeepers makes it difficult, in relation to one of the factors considered, to determine how the gravity of the two offences for which Gbao was convicted is distinguished from the additional 12 offences for which Sesay and Kallon were found guilty. The Trial Chamber initially noted that the RUF directed 14

[3588] Sentencing Judgment, paras 266-271.
[3589] Sentencing Judgment, para. 270.
[3590] *See supra*, para. 182.
[3591] Sentencing Judgment, para. 264.
[3592] Sentencing Judgment, para. 264.

attacks against UNAMSIL peacekeepers,[3593] and it identified many of the victims of these assaults by name, including Jaganathan.[3594] It then considered the scale and brutality of the offences, the vulnerability of the victims, the number of victims, the impact on victims and the degree of suffering. The Trial Chamber's analysis of these considerations expressly addresses the gravity of the attacks in relation to the victims as identified, and therefore the gravity relevant to Gbao's offences can be ascertained from the Sentencing Judgment. The Appeals Chamber finds no error in this reasoning.

1311. In considering the impact of the attacks on the UNAMSIL peacekeeping force and the international community, the Trial Chamber's reasoning leaves unclear the extent to which it considered this factor in relation to Gbao's offences. For example, it is unclear to what extent the Trial Chamber considered the attack on Jaganathan to have disrupted the peace process in Sierra Leone and to have caused a response in the international community.[3595]

1312. The Appeals Chamber is of the view that although the Trial Chamber's reasoning could have been clearer, its analysis concerned the general conduct of attacks against peacekeepers in the context of the conflict in Sierra Leone to aggravate all of the attacks including the attack for which Gbao was found liable. By doing so, the Trial Chamber did not aggravate Gbao's sentence for crimes he did not commit. Rather, it considered that he participated in an attack that was part of 14 attacks committed "in a short period of time" which threatened, *inter alia*, the international community's efforts to assist Sierra Leone. The Appeals Chamber does not find this constitutes error in the Trial Chamber's exercise of its sentencing discretion.

(e) Consideration as an aggravating factor that Gbao was "the senior RUF commander" with "the largest number of fighters" at Makump DDR camp

1313. Gbao contends that the Trial Chamber erred when it considered his position of authority as an aggravating factor for his conviction for aiding and abetting the assault on Jaganathan. He contends that his position of authority was already accounted for by the Trial Chamber when it found that he aided and abetted by tacit encouragement. Gbao's submissions are misconceived. Gbao's position of authority was a factor in the Trial Chamber's determination that he tacitly approved Kallon's assault on Jaganathan and thereby aided and abetted Kallon's conduct, however

[3593] Sentencing Judgment, para. 191.
[3594] Sentencing Judgment, para. 192.
[3595] Sentencing Judgment, paras 199-203.





the Trial Chamber did not, and need not have, relied upon findings that he was "the senior RUF commander" (*i.e.*, as Gbao states, the *most* senior RUF commander[3596]) with "the largest number of fighters" at the Makump DDR camp in order to find that his conduct amounted to aiding and abetting.

1314. Gbao's contention that the Trial Chamber erred by taking into account his leadership role rather than any abuse of that role as an aggravating factor is similarly unavailing. The relevant passage of the Sentencing Judgment must be read in conjunction with the Trial Chamber's findings on Gbao's role in the attack on Jaganathan in paragraphs 2261 through 2265 of the Trial Judgment.

1315. In the Sentencing Judgment, the Trial Chamber noted that Gbao was convicted of aiding and abetting the attacks directed against Jaganathan at the Makump DDR camp "where he was the senior RUF Commander present at the time of Kallon's arrival and he remained the RUF Commander with the largest number of fighters present." As the senior RUF Commander until Kallon's arrival representing the RUF, a signatory to the Lomé Accord, he had a duty to support UNAMSIL personnel who were tasked with bringing peace to the population of Sierra Leone. Thus, it was reasonable for the Trial Chamber to find that Gbao had abused his position of authority, including by (i) demanding, with the support of thirty to forty armed RUF subordinates, that UNAMSIL give him back his five fighters, (ii) fomenting an atmosphere of hostility and (iii) orchestrating an armed confrontation at the Makump DDR camp.[3597]

(f) Serving sentence in a foreign country

1316. The Appeals Chamber recalls its holding that the Trial Chamber did not error in declining to mitigate the sentences of the Accused in light of its finding that they will likely serve their sentences in a foreign country.[3598] Gbao does not extend the argument made previously by Sesay, and therefore the Appeals Chamber dismisses his argument for the same reasons.

(g) Disproportionate sentence for aiding and abetting an attack against a UNAMSIL peacekeeper

1317. We endorse the view of the ICTY Appeals Chamber that sentences of like individuals in like cases should be comparable.[3599] The relevance of previous sentences is however often limited as a

[3596] Gbao Appeal, para. 387.
[3597] Trial Judgment, paras 1786, 2263.
[3598] *See supra*, para. 1246.
[3599] *Kvočka et al.* Appeal Judgment, para. 681.

number of elements, relating, *inter alia*, to the number, type and gravity of the crimes committed, the personal circumstances of the convicted person and the presence of mitigating and aggravating circumstances, dictate different results in different cases such that it is frequently impossible to transpose the sentence in one case *mutatis mutandis* to another.[3600] This follows from the principle that the determination of the sentence involves the individualisation of the sentence so as to appropriately reflect the particular facts of the case and the circumstances of the convicted person.[3601]

1318. As a result, previous sentencing practice is but one factor among a host of others which must be taken into account when determining the sentence.[3602] Nonetheless, as held by the ICTY Appeals Chamber in *Jelisić*, a disparity between an impugned sentence and another sentence rendered in a like case can constitute an error if the former is out of reasonable proportion with the latter. This disparity is not in itself erroneous, but rather gives rise to an inference that the Trial Chamber must have failed to exercise its discretion properly in applying the law on sentencing.[3603]

1319. In the instant appeal, none of the cases cited by Gbao are instructive because the crimes for which the accused were convicted and the individual circumstances of the accused are readily and significantly distinguished from the present case. Importantly, Gbao fails to address the fact that, unlike any of the cases he relies upon, he is convicted of aiding and abetting an attack against a UN peacekeeper. Gbao's submissions are therefore rejected.

4. Conclusion

1320. For the foregoing reasons, the Appeals Chamber holds that the Trial Chamber erred in double-counting the specific intent of acts of terrorism and collective punishments as increasing the

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[3600] *Kvočka et al.* Appeal Judgment, para. 681. *See* also *Čelebići* Appeal Judgment, paras 719, 721; *Furundžija* Appeal Judgment, para. 250; *Limaj et al.* Appeal Judgment, para. 135, *Blagojević and Jokić* Appeal Judgment, para. 333, *M. Nikolić* Judgment on Sentencing Appeal, para. 38, *Musema* Appeal Judgment, para. 387.
[3601] *Čelebići* Appeal Judgment, paras 717, 821; *D. Nikolić* Judgment on Sentencing Appeal, para. 19; *Babić* Judgment on Sentencing Appeal, para. 32; *Naletilić and Martinović* Appeal Judgment, para. 615; *Simić* Appeal Judgment, para. 238; *Bralo* Judgment on Sentencing Appeal, para. 33; *Jelisić* Appeal Judgment, para. 101.
[3602] *Krstić* Appeal Judgment, para. 248.
[3603] *Jelisić* Appeal Judgment, para. 96.

gravity of the underlying offences, and erred in finding that Gbao's role as an ideology expert and instructor contributed to the form and degree of Gbao's conduct in relation to crimes he committed pursuant to the JCE. The Appeals Chamber will revise the sentences as appropriate. The remaining submissions in Gbao Ground 18 are rejected.





XII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence;

NOTING the written submissions of the Parties and their oral arguments presented at the hearings on 2, 3 and 4 September 2009;

SITTING in open session;

WITH RESPECT TO SESAY'S GROUNDS OF APPEAL;

ALLOWS Ground Thirty-Five, in part, **REVERSES** the verdict of guilty for Sesay under Article 6(1) of the Statute for planning enslavement in the form of forced mining between December 1998 and January 2000 in parts of Kono District other than Tombodu, and **DIMISSES** the remainder of the Ground;

ALLOWS Ground Thirty-Six, in part, **REVERSES** the verdict of guilty for Sesay under Article 6(3) of the Statute insofar as it relates to enslavement at the Yengema training base between December 1998 and about 30 January 2000, and **DISMISSES** the remainder of the Ground;

ALLOWS Ground Forty-Six, in part, **HOLDS** that the Trial Chamber impermissibly counted the specific intent for acts of terrorism and collective punishments as aggravating factors for the underlying offences, and **DISMISSES** the remainder of the Ground;

REVERSES the verdict of guilty for Sesay pursuant to Article 6(1) of the Statute for the killing of a Limba man in Tongo Field;

REVERSES the verdict of guilty for Sesay pursuant to Article 6(1) of the Statute for murder, a Crime against Humanity under Count 4 for specified acts for which Sesay was also found guilty for extermination, a Crime against Humanity under Count 3;

DISMISSES the remaining Grounds of Appeal;

WITH RESPECT TO KALLON'S GROUNDS OF APPEAL;





ALLOWS Ground Twelve and **REVERSES** the verdict of guilty for Kallon pursuant to Article 6(1) of the Statute for instigating the murder of Waiyoh in Wendedu in Kono District;

ALLOWS Ground Fourteen, in part, **REVERSES** the verdict of guilty for Kallon pursuant to Article 6(3) of the Statute for the crime of enslavement committed in Kono District from the end of August 1998 to December 1998, and **DISMISSES** the remainder of the Ground;

ALLOWS Ground Thirty, in part, **REVERSES** the verdict of guilty for Kallon pursuant to Article 6(1) of the Statute for murder, a Crime against Humanity under Count 4 for specified acts for which Kallon was also found guilty for extermination, a Crime against Humanity under Count 3, and **DISMISSES** the remainder of the Ground;

ALLOWS Ground Thirty-One, in part, **HOLDS** that the Trial Chamber impermissibly counted the specific intent for acts of terrorism and collective punishments as aggravating factors for the underlying offences, and **DISMISSES** the remainder of the Ground;

REVERSES the verdict of guilty for Kallon pursuant to Article 6(1) of the Statute for the killing of a Limba man in Tongo Field;

DISMISSES the remaining Grounds of Appeal;

WITH RESPECT TO GBAO'S GROUNDS OF APPEAL;

ALLOWS Ground Eight, in part, **HOLDS** that the Trial Chamber violated Gbao's right to a fair trial by finding that he significantly contributed to the JCE through his role as an ideology expert and instructor, **REVERSES** the verdict of guilty for Gbao pursuant to Article 6(1) of the Statute for the killing of a Limba man in Tongo Field, **REVERSES** the verdict of guilty for Gbao pursuant to Article 6(1) of the Statute for Collective Punishments in Kailahun District, and **DISMISSES**, Justices Winter and Fisher dissenting, the remainder of the Ground;

ALLOWS Ground Sixteen, in part, **REVERSES** the verdict of guilty for Gbao pursuant to Article 6(1) of the Statute, in relation to the attack against UNAMSIL peacekeeper Major Salahuedin and **DISMISSES** the remainder of the Ground;

ALLOWS Ground Nineteen, in part, **REVERSES** the verdict of guilty for Gbao pursuant to Article 6(1) of the Statute for murder, a Crime against Humanity under Count 4 for specified acts





for which Gbao was also found guilty for extermination, a Crime against Humanity under Count 3, and **DISMISSES** the remainder of the Ground;

DISMISSES the remaining Grounds of Appeal;

WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL;

DISMISSES Ground One**,** Justices Kamanda and King dissenting;

DISMISSES Ground Two;

ALLOWS Ground Three, in part, **HOLDS** that the communication of a threat to a third party is not a requirement of the offence of the taking of hostages, **HOLDS** that the requisite *mens rea* may arise at a period subsequent to the initial seizure or detention, **HOLDS** that some RUF fighters other than the three Appellants committed the offence of the taking of hostages with the intent to condition the safety or release of the captured UNAMSIL personnel on the release of Sankoh, **HOLDS** that the Prosecution has failed to establish that Sesay, Kallon or Gbao are liable for this offence, and **DISMISSES** the remainder of the Ground;

CONSEQUENTLY REVISES the sentences as follows:

> **In respect of Sesay**, taking into account the Grounds of Appeal which have been allowed, the particular circumstances of this case as well as the form and degree of the participation of Sesay in the crimes, and the seriousness of the crimes, the Appeals Chamber finds that the effective sentence imposed by the Trial Chamber reflects the totality of Sesay's culpable conduct for the crimes under Counts 1 through 14. The Appeals Chamber therefore imposes a global sentence for Counts 1 through 14 of fifty-two (52) years imprisonment. The Appeals Chamber affirms the sentence of fifty-one (51) years imprisonment under Count 15 and forty-five (45) years imprisonment under Count 17;
>
> **In respect of Kallon**, taking into account the Grounds of Appeal which have been allowed, the particular circumstances of this case as well as the form and degree of the participation of Kallon in the crimes, and the seriousness of the crimes, the Appeals Chamber finds that the effective sentence imposed by the Trial Chamber reflects the totality of Kallon's culpable conduct for the crimes under Counts 1 through 14. The Appeals Chamber therefore imposes a global sentence for Counts 1 through 14 of thirty-nine (39) years imprisonment.





The Appeals Chamber affirms the sentence of forty (40) years imprisonment under Count 15 and thirty-five (35) years imprisonment under Count 17;

In respect of Gbao, taking into account the Grounds of Appeal which have been allowed, the particular circumstances of this case as well as the form and degree of the participation of Gbao in the crimes, and the seriousness of the crimes, the Appeals Chamber finds that the effective sentence imposed by the Trial Chamber reflects the totality of Gbao's culpable conduct for the crimes under Counts 1, 3 through 11 and 13. The Appeals Chamber, Justices Winter and Fisher dissenting, therefore imposes a global sentence for Counts 1, 3 through 11 and 13 of twenty-five (25) years imprisonment. Taking into account that Gbao's Ground 16 has been allowed, in part, the sentence of twenty-five (25) years imprisonment under Count 15 is decreased to twenty (20) years imprisonment;

ORDERS that the sentences shall run concurrently;

ORDERS that Issa Hassan Sesay shall serve a TOTAL TERM OF IMPRISONMENT OF FIFTY-TWO (52) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

ORDERS that Morris Kallon shall serve a TOTAL TERM OF IMPRISONMENT OF FORTY (40) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

ORDERS that Augustine Gbao shall serve a TOTAL TERM OF IMPRISONMENT OF TWENTY-FIVE (25) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

ORDERS that this Judgment shall be enforced immediately pursuant to Rule 119 of the Rules of Procedure and Evidence;

ORDERS, in accordance with Rule 109 of the Rules of Procedure and Evidence that Issa Hassan Sesay, Morris Kallon and Augustine Gbao remain in the custody of the Special Court for Sierra Leone pending the finalization of arrangements to serve their sentences.





Delivered on 26 October 2009 at Freetown, Sierra Leone.

Justice Renate Winter, Presiding | Justice Jon M. Kamanda | Justice George Gelaga King

Justice Emmanuel Ayoola | Justice Shireen Avis Fisher

Justice Winter appends a Separate Concurring Opinion to the Judgment in which Justice Fisher joins.

Justice Kamanda and Justice King append a Dissenting Opinion in respect of Prosecution Ground 1.

Justice Ayoola appends a Separate Concurring Opinion to the Judgment.

Justice Fisher appends a Partially Dissenting Opinion to the Judgment and Sentence in which Justice Winter joins in part.

[Seal of the Special Court for Sierra Leone]





XIII. SEPARATE CONCURRING OPINION OF JUSTICE RENATE WINTER

1. I write separately to express my understanding of the Appeals Chamber's holding regarding one aspect of the *mens rea* standard for the crime of conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

2. It appears from the facts of this case that the age of the children who were conscripted or used in combat was not always immediately apparent. The Trial Chamber held that "where doubt may have existed as to whether a person abducted or trained was under the age of 15, it was incumbent on the perpetrators to ascertain the person's age."[1] Kallon appealed this finding in Ground 20. The Appeals Chamber finds no error in the Trial Chamber's statement that the accused were under a duty to exercise due diligence to ascertain the age of a child.[2]

3. I concur in this finding, but wish to clarify what I take it to mean, precisely. Our holding relies on the ICC's decision in the *Katanga* case, which applies the *mens rea* with regard to the age of the child as it is codified in the ICC Elements of Crimes. The ICC in *Katanga* requires that the perpetrator "knew or should have known" that the victims were under the age of 15 years.[3] The *Katanga* decision equates the "should have known" standard with an accused's "failure to comply with his duty to act with due diligence."[4] The Appeals Chamber's holding affirming the duty of the accused to exercise due diligence in ascertaining the age of the child is identical to the articulation of the duty found by the ICC.

4. It is therefore my understanding that the *mens rea* standard reflected in our judgment is "knew or should have known" with respect to the age of the child. Consequently, the Appeals Chamber has rejected this Trial Chamber's implication that evidence of the accused's "reason to know" may be required.[5]

5. In addition to this clarification, I also wish to express my complete agreement with the reasoning and conclusions expressed by Hon. Justice Fisher in her Partially Dissenting and Concurring Opinion insofar as it pertains to Gbao's Sub-Grounds 8(j) and 8(k), Gbao's Sub-Ground

[1] Trial Judgment, para. 1704.
[2] Appeal Judgment, para. 923.
[3] *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, 30 September 2008, para. 251; ICC-ASP/1/3, B. Elements of Crimes, p. 153.
[4] *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, 30 September 2008, para. 252(ii).

8(i), Sesay's Grounds 33 and 46, and her opinion regarding the failure to plead locations with sufficient specificity. In particular, I join her dissent from the Majority's decision to confirm Gbao's conviction under JCE liability, given the Trial Chamber's findings that he did not share the Common Criminal Purpose with the other participants in the case before us.

Done at Freetown this 26th day of October, 2009

Hon. Justice Renate Winter

[Seal of the Special Court for Sierra Leone]

[5] Trial Judgment, para. 1705.

XIV. DISSENTING OPINION OF JUSTICE GELAGA KING AND JUSTICE JON KAMANDA ON PROSECUTION'S FIRST GROUND OF APPEAL

1. We agree with the Appeals Chamber Judgment, except on one issue: Continuation of the AFRC/RUF Joint Criminal Enterprise (JCE) after April 1998. With respect, we disagree with the Majority of the Appeals Chamber's ("Majority") conclusion that "the Prosecution fails to establish that the Trial Chamber erred in finding that the Common Criminal Purpose between the AFRC and RUF ended in late April 1998."[1] On the contrary, we agree with the Prosecution that on the basis of the Trial Chamber's findings and the evidence before it, the only conclusion open to any reasonable trier of fact is that the JCE, which the Trial Chamber found to have existed from May 1997 to April 1998, continued to exist until at least February 1999.[2] Furthermore, we are of the opinion that there is abundant evidence that after the ECOMOG intervention in February 1998 and after April 1998, it was still the Common Purpose of the AFRC/RUF Junta, acting in concert, to take any actions necessary to regain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. Such actions included the commission of the crimes charged in Counts 1 to 14 of the Indictment. It is in the light of these facts that the Prosecution has complained, in its First Ground of Appeal, that the said findings of the Trial Chamber were wrong.

2. The Prosecution's First Ground of Appeal states:

> The Trial Chamber erred in law and/or erred in fact in finding that the common plan, design or purpose / joint criminal enterprise between leading members of the AFRC and RUF ceased to exist some time in the end of April 1998.[3]

The findings of the Trial Chamber which led to its determination that the JCE between AFRC and RUF ended in late April 1998 are as follows:

(i) That a rift erupted between the two factions in late April 1998 and that the rift was fatal to the common purpose,[4] and

(ii) That following this rift, the ARFC and the RUF acted independently of each other and pursued independent and separate plans.[5]

[1] Appeal Judgment para 1161.
[2] Prosecution Appeal, para. 2.149.
[3] Prosecution Notice of Appeal, para. 2.
[4] Trial Judgment, paras 817-820, 2073.
[5] Trial Judgment, paras 819, 2073-2074.

The Trial Chamber was of the view that the evidence of continuing communication and cooperation between the AFRC and the RUF from late April 1998 up to the invasion of and retreat from Freetown was insufficient to demonstrate that the two groups continued to share a Common Criminal Purpose. Furthermore, the Trial Chamber considered that the crimes committed by the AFRC/RUF after late April 1998 were in furtherance of each faction's separate plan. We will address the above findings having regard to the submissions of the Parties.

I. The Trial Chamber's finding that a rift between the RUF /AFRC in late 1998 terminated the JCE

3. The Trial Chamber found that the common plan between the AFRC and the RUF ceased to exist from late April 1998, when a rift between the two forces erupted. In this regard it stated:

> The rift between the two forces erupted after the Sewafe Bridge attack when Gullit disclosed to his troops that Bockarie had beaten him and seized his diamonds and that Johnny Paul Koroma was under RUF arrest. Gullit declared that the AFRC troops would withdraw from Kono District to join SAJ Musa in Koinadugu District. Gullit and Bazzy accordingly departed, taking with them the vast bulk of the AFRC fighters in Kono District. The split was acrimonious and Gullit decisively refused to accept Superman's attempt to re-impose cooperation, ignoring a directive from him to return to Kono District.[6]

It should be noted here that Gullit aka Alex Tamba Brima, Johnny Paul Koroma aka JPK and Bazzy aka Bazzy Kamara were Commanders in the AFRC. Bockarie aka Mosquito was a Commander in the RUF. The Trial Chamber found that in August 1998, Bockarie modified the RUF radio codes to prevent Superman from monitoring radio transmissions and forbade radio operators from contacting Superman.[7] It also found that, in Koinadugu District from August 1998, Superman and those fighters under his command operated as an independent RUF faction.[8]

4. The above factual findings are at the core of the Trial Chamber's finding that the so-called rift in late 1998 was fatal to the JCE. We opine that, as the Prosecution correctly submitted, no reasonable trier of fact could have found that such instance of a fractious relationship occurring in April 1998 signified the end of the JCE.[9] Sesay and Kallon submit that the Trial Chamber did not attribute the rift between AFRC and RUF to the ill treatment of Koroma and Gullit, but to a

[6] Trial Judgment, para. 819.
[7] Trial Judgment, para. 825.
[8] Trial Judgment, para. 854.
[9] Prosecution Appeal, para. 2.109.

relatively protracted and prolonged process involving a number of causative factors.[10] The submission is unfounded, misguided and not supported by the evidence. In our opinion, such finding - based on the sole evidence of one insider witness given before another Trial Chamber in a previous case[11] - could not be regarded by a reasonable trier of fact as conclusive of the termination of the JCE.

5. *A fortiori,* the Trial Chamber's findings establish that internal friction was an ongoing feature of relations between the AFRC/RUF and within the RUF itself, even during the period within which the Trial Chamber found the JCE existed.[12] For instance, it found that "while the two groups initially had a functioning relationship, over time it began to sour and disagreements between the AFRC and RUF were frequent. On or about **August 1997,** Sam Bockarie, the acting leader of the RUF in the absence of Foday Sankoh, left Freetown to establish his headquarters in Kenema, as he was dissatisfied with Johnny Paul Koroma's management of the government and the discord was such that he feared that attempts would be made on his life."[13]

6. Notwithstanding the disputes that arose in April 1998, the Trial Chamber found that the AFRC and the RUF continued to interact and communicate. It found further that sometime after April 1998, "in one radio communication between Gullit and Sesay, Gullit told Sesay to have confidence in him and insisted that they needed to cooperate. In a subsequent radio communication with Bockarie, Gullit explained the logistical reasons for his lack of contact. Bockarie indicated that "he was very happy . . . that the two sides, both the RUF and the SLA, were brothers."[14] The evidence cited shows that the so-called rift which erupted in April 1998 did not prevent the AFRC/RUF acting in concert in furtherance of their Common Purpose, after April 1998. We, therefore, find that the Trial Chamber erred in fact by giving undue weight to the alleged rift and failing to evaluate the entirety of the evidence which proves that the RUF and AFRC continued their JCE despite the rift.

[10] Sesay Response, para. 46; Kallon Response, para. 29.
[11] Trial Judgment, para. 819, referring to Exhibit 119 [*Prosecution v. Brima et al.*, SCSL-04-16-T], Transcript 19 May 2005, TF1-334, p. 14.
[12] Trial Judgment para. 24.
[13] Trial Judgment para. 24 (Emphasis added.)
[14] Trial Judgment, para. 849

II. Did the Trial Chamber err in finding that in late April 1998 the AFRC and RUF cease to share a Common Purpose?

(a) Evidence of continued Common Purpose between the RUF and AFRC after April 1998 – the continued interaction and cooperation between the two groups

7. The Trial Chamber found that after the last combat operation between the RUF and AFRC when they jointly attacked ECOMOG at Sewafe Bridge in late April 1998, the common plan between the AFRC and RUF ceased to exist and that "each group thereafter had its own separate plan."[15] It found that the AFRC's plan, hatched by SAJ Musa, was to launch an attack on Freetown for the purpose of reinstating the AFRC as the army of Sierra Leone,[16] which plan according to the Trial Chamber, did not involve the RUF.[17]

8. We consider that no reasonable trier of fact could have come to the conclusion that because SAJ Musa planned to "reinstate the army," that was evidence of termination of the Common Purpose between the AFRC and the RUF. On the contrary, the plan to reinstate the army is poignant evidence of the Common Purpose to take over the Sierra Leone Government. We say this for the simple reason that the mandate to create, let alone reinstate, the country's army belongs to the legitimate Government of Sierra Leone and no one else. In any event, assuming that SAJ Musa's plan was shared by other AFRC commanders, that is no reason to hold that the common purpose between the AFRC and the RUF ceased to exist. In fact, SAJ Musa's plan is clear proof of an act which was to be done in furtherance of the Common Purpose to regain power and control over the territory of Sierra Leone, through the commission of crimes within the Statute.

9. The Trial Chamber had found that the JCE between the AFRC and the RUF originated after the *coup d'etat* by the Sierra Leone Army on 27 May 1997, following which, coup leaders of the then recently formed AFRC contacted leaders of the RUF to arrange a joint 'government.' The Trial Chamber further found that following the ECOMOG intervention of 14 February 1998 and "despite the change of circumstances following the retreat from Freetown after the ECOMOG intervention, the leading members of the AFRC and RUF maintained the common purpose to take power and control over Sierra Leone."[18]

[15] Trial Judgment, para. 2074.
[16] Trial Judgment, para. 857.
[17] Trial Judgment, para. 2073.
[18] Trial Judgment, para. 2072.

10. The Trial Chamber posited that "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."[19] However, in the instant case, there is strong evidence of AFRC/RUF concerted action to achieve their common objective in furtherance of their Joint Criminal Enterprise. After Gullit and his troops departed from Kono District in late April 1998, they travelled to Kurubola in Koinadugu District. SAJ Musa advised Gullit to establish an AFRC defensive base in Bombali District. Gullit accordingly led his group of AFRC fighters from Mansofinia across Bombali District to Rosos. **"A small number of RUF fighters also formed part of the group and were subordinate to Gullit's command."**[20]

11. This concerted action of the AFRC/RUF continued unabated as can be seen from the following finding of the Trial Chamber:

> The AFRC troops under Gullit's command committed numerous atrocities against civilians in their destructive march across Bombali District. Villages near Bunbuna and the border of Bombali and Koinadugu Districts were razed by fire; civilians at multiple villages including Kamagbengbe and Foroh Loko were killed; the town of Karina was attacked and civilians were massacred, abducted and subjected to amputations. Homes were also looted and burned. Amputations were carried out near Gbendembu and crimes of equal savagery were committed in other locations. Upon arrival at Rosos, Gullit declared that no civilians were to be permitted within 15 miles of the camp and that any civilians captured nearby was to be executed.[21]

Although a rift erupted between certain commanders of both factions in late April 1998, such storm in a teacup does not detract from the compelling evidence, accepted by the Trial Chamber, that the two forces continued to communicate and to cooperate in furtherance of the shared common purpose. We opine that the decisive question as to whether the JCE continued after April 1998 in spite of the acknowledged RUF/AFRC peevishness is: Did the RUF and AFRC continue to work cooperatively in furtherance of the common purpose in spite of the fractiousness? There is, clearly, abundant evidence, referred to above, to merit an answer in the affirmative.

12. We, therefore, do not agree with our learned colleagues in the Appeals Chamber who consider "reasonable" the Trial Chamber's finding that, from April 1998 until December 1998, the interaction between the two groups was "sporadic" and "occasional" and did not establish that the leadership of both groups continued to act in concert.[22] The Trial Judgment makes it clear that the only period when the absence of cooperation and communication between the two forces may be

[19] Trial Judgment, para. 257; Appeal Judgment, para. 1142.
[20] Trial judgment, para. 845. (Emphasis added)
[21] Trial judgment, para 847.

regarded as significant spanned from the time Gullit and his forces departed from Kono in late April/May 1998 until the time they reached Rosos sometime in July or August 1998.[23] Yet, even at that time, the Trial Chamber found that during the march from Mansofinia to Rosos, Gullit's radio operator was captured and the microphone for their radio was lost, as a result of which "Gullit's group was . . . not in direct communication with SAJ Musa or the RUF High Command until they reached Rosos sometime in July or August 1998."[24]

13. The Trial Chamber further stated that "[a]t about this time, Gullit also communicated with Sesay and Kallon on the radio."[25] These findings lead to the only reasonable conclusion that, even during the period when the tension between the two forces was at its peak – from the AFRC's departure from Kono and their march from Mansofinia to Rosos – the AFRC forces still intended to communicate and did communicate with the RUF as soon as the logistics so permitted. Furthermore, when Gullit's troops abandoned Rosos, due to bombardments by ECOMOG forces, they proceeded to Major Eddie Town, where Gullit communicated with AFRC and RUF Commanders.[26]

14. The Trial Chamber found that in late August 1998, at the joint training base in Koinadugu, Bockarie ordered that a group of four radio operators be dispatched from Kono to join Gullit's fighting force as informants, in order to ensure that the RUF High Command was apprised of Gullit's movements and intentions.[27] Addressing the Prosecution's submission challenging the Trial Chamber's finding that the radio operators were only sent as "informants" rather than to reinforce the RUF/AFRC fighting forces in Rosos,[28] the Majority considered that "the Prosecution's assertion . . . is not inconsistent with the Trial Chamber's finding that Bockarie sent the radio operators to act as informants."[29] The Majority stated that "none of the evidence cited by the Prosecution contradicts the Trial Chamber's finding, but only establishes that radio operators were sent to Gullit via SAJ Musa in Koinadugu in response to a request from Gullit."[30] Even if, *arguendo,* it is accepted that the radio operators were sent as informants only, and not as reinforcements, is that not

[22] Appeal Judgment, para. 1165, Trial Judgment, para. 2075.
[23] Trial Judgment, para. 848.
[24] Trial Judgment, para. 848.
[25] Trial Judgment, para. 848.
[26] Trial Judgment, para. 850.
[27] Trial Judgment, para. 853.
[28] Prosecution Appeal, paras 2.47-2.50.
[29] Appeal Judgment, para. 1138.
[30] Appeal Judgment, para. 1138.

direct and conclusive evidence that those Commanders of the AFRC and RUF were working in concert in furtherance of their common purpose as at late **August 1998**?

15. With respect, the Majority unwittingly glosses over the issue by merely stating that the Prosecution's submission does not contradict the Trial Chamber's finding that radio operators were sent as informants. The critical issue is whether the JCE was being continued by sending radio operators with the aim of ensuring that the AFRC/RUF's forces in Rosos would ultimately be reinforced. The evidence relied on by the Trial Chamber supports this view.[31] The impugned Trial Chamber's finding is, in any event, evidence which confirms interactions between Gullit's troops and RUF High Command up to the time SAJ Musa arrived at Major Edie Town.[32]

16. The Trial Chamber's findings further reveal some more significant interaction and cooperation between AFRC and RUF High Commands during the attack on Freetown on 6 January 1999. The evidence discloses that in the heat of the Freetown attack and during the retreat from Freetown, Gullit (AFRC) was in regular contact with Bockarie (RUF), informing the latter of the advance of his troops and requesting RUF reinforcement which Bockarie agreed to send from Makeni.[33] The Trial Chamber found that Bockarie agreed to send reinforcements;[34] that he made a public announcement on Radio France Internationale, in the afternoon of **6 January 1999,** that Gullit's troops had captured Freetown and would continue to defend it.[35] Further, that Bockarie and Gullit "arranged that AFRC fighters would meet the RUF reinforcements at a factory near Wellington."[36] The Trial Chamber highlighted Bockarie's order that strategic positions, including Government buildings, be burned[37] and also the advice from Bockarie to Gullit that if ECOMOG forced them to retreat further, the troops should burn the central part of Freetown.[38]

17. Many instances of nauseating and barbaric atrocities committed by the RUF and AFRC Forces during their retreat from Freetown in January 1999 are catalogued in the Trial Chamber's findings. Understandably, we will refer to the bare minimum: "According to witness George Johnson, AFRC Commander Five-Five [Santigie Borbor Kanu] issued an order to commit 200

[31] Transcript, TF1-361, 18 July 2005, pp. 43-51; Transcript, TF1-360, 21 July 2005, pp. 6-7.
[32] Trial Judgment, para. 856.
[33] Trial Judgment, paras 876, 880, 883, 884.
[34] Trial Judgment, paras 876, 884.
[35] Trial Judgment, para. 881.
[36] Trial Judgment, para. 884.
[37] Trial Judgment, para. 881 ("Bockarie also announced over BBC Radio that he was reinforcing the troops in Freetown and that he had ordered that strategic positions, including Government buildings, be burned.")
[38] Trial Judgment, para. 883, ("Bockarie "advised Gullit" that his troop burn the central part of Freetown that if ECOMOG forced them to retreat further, the troop should burn the central part of Freetown.")

civilian amputations and to send the amputees to the Government. Several witnesses testified that rebels asked civilians whether they wanted 'short sleeves' or 'long sleeves' and their arms were amputated either at the elbow or at the wrist accordingly. Rebels were also known to amputate four fingers, leaving only the thumb, which they referred to as 'one love' and which they encouraged the victims to show to Tejan Kabbah."[39]

18. At this juncture, one is impelled to reflect on these words:

> Blessed is the man that walketh not in the counsel of the ungodly, nor standeth in the way of sinners, nor sitteth in the seat of the scornful. But his delight is in the law of the Lord; and in his law doth he meditate day and night. And he shall be like a tree planted by the rivers of water, that bringeth forth his fruit in due season; his leaf also shall not whither; and whatsoever he doeth shall prosper. The ungodly are not so: but are like the chaff which the wind driveth away. Therefore the ungodly shall not stand in the judgment, nor sinners in the congregation of the righteous. For the Lord knoweth the way of the righteous: but the way of the ungodly shall perish.[40]

19. State House did not escape the carnage. The Trial Chamber found that "approximately 30 persons were killed by the rebels at State House. On January 6, 1999, the rebels took women to State House where they were raped. Each of the senior Commanders and many of the troops had captured women at their disposal."[41] We will cite one more instance of this sickening and sordid episode: "TF1-093, a former RUF fighter, had been living with her brother and her child in Freetown since 1998. On January 6 1999, TF1-093's brother was shot and killed . . . [A] named Commander, who recognised her . . . gave TF1-093 command of a group of over 50 men, women and children, all of whom were armed with knives and had been instructed to kill civilians. TF1-093 and the fighters under her command burned houses and killed and raped civilians . . . They killed more than 20 people, not including those that were caught inside burning houses."[42] We opine that these findings would lead a reasonable trier of fact to conclude that Bockarie (RUF) and Gullit (AFRC) continued to act in concert in January 1999 and that the RUF and AFRC shared the common purpose to regain power in Sierra Leone through the commission of crimes within the Statute.

20. Finally, the Trial Chamber found that "after the retreat from Freetown, Sesay chaired a meeting of AFRC and RUF Commanders including Kallon, Rambo and Superman at which the two

[39] Trial Judgment, para. 1521
[40] Holy Bible, Psalm 1
[41] Trial Judgment, para. 1523
[42] Trial Judgment, para. 1528-1529

groups planned to cooperate in a second attack on Freetown. This second attack failed."[43] It is therefore, quite clear to us, that having regard to all the evidence to which we have referred, the only reasonable conclusion is that the two forces continued to share the same Common Purpose.

(b) The continued pattern of crimes as evidence of the means contemplated within the Common Purpose

21. The Prosecution listed the Trial Chamber's findings regarding the attack on the civilian population and the crimes of burning, looting, forced recruitment and forced labour[44] and submitted that the pattern of atrocities committed by the AFRC and RUF in obedience to Bockarie's order show that "it was intended that the means used to achieve the goals of capturing Freetown and controlling the seat of power continued to include the same criminal means."[45] The Majority found the Prosecution's submissions on the continuing pattern of crimes "not particularly probative"[46] and that the Prosecution's reference to "the fact that each group individually continued to commit the crime that constituted the criminal means of the prior shared criminal purpose" is "misplaced, as those facts are consistent with the Trial Chamber's reasoning and conclusion."[47] We beg to disagree.

22. It is quite clear to us - and it makes good sense - that the Prosecution's reference to the continued pattern of crimes is most relevant in assessing whether a common purpose continued to exist between the AFRC and the RUF after April, 1998. In determining whether a common purpose continued to exist after the ECOMOG Intervention of 14 February 1998, the Trial Chamber found "that the common purpose and the means contemplated within remained the same as they were, as there was no fundamental change".[48] We endorse this finding.

23. In assessing whether the AFRC/RUF directed a widespread or systematic attack against the civilian population within the meaning of Article 2 of the Statute, the Trial Chamber found the attack on the civilian population from February 1998 until the end of January 2000 involved a series of large-scale concerted military actions undertaken by the AFRC/RUF forces in multiple locations throughout Sierra Leone. Further, it found that the enslavement and 'forced marriages' of civilians

[43] Trial Judgment, para. 894
[44] Prosecution Appeal, paras 2.131-2.141.
[45] Prosecution Appeal, para. 2.130.
[46] Appeal Judgment, para. 1164.
[47] Appeal Judgment, para. 1164.
[48] Trial Judgment, para. 2069.

in Kailahun District persisted as before, and these practices spread to Kono District, Bombali District, Koinadugu District, Freetown and the Western Area and Port Loko District.[49]

24. The Trial Chamber also found that: "in addition to ongoing forced labour in Kenema and Kailahun Districts, the attack against the civilian population of Sierra Leone continued throughout other parts of the country between February 1998 and January 2000."[50] It further found "that during the January 1999 invasion of Freetown, rebel troops were ordered by their leaders to burn public and private property and to kill and maim civilians."[51] The Trial Chamber was satisfied "that the widespread violence against civilians was organised. The evidence contains multiple examples of operations staged by AFRC/RUF forces pursuant to preconceived plans or policies which were given particular names and directed at specific objectives … 'Operation Pay Yourself' ... was instituted by AFRC/RUF Commanders who, unable to pay their troops encouraged the looting of civilian property. The Fiti-Fata mission in August 1998 and the RUF attack to recapture Kono District in December 1998 saw numerous atrocities committed against civilians."[52]

25. We list these findings for the simple reason that it follows, logically and conclusively, that the Trial Chamber's findings made in respect of the *chapeau* requirements of crimes against humanity are equally important and relevant to the Trial Chamber's findings regarding the JCE. The Appeals Chamber is also of the view that the widespread and systematic nature of various crimes is a relevant factor in the determination of whether a JCE exists.[53]

26. Therefore, we opine that having regard to the crimes committed by the AFRC and the RUF after late April 1998 throughout Sierra Leone, taking into account the *modus operandi* of the various attacks against the civilian population, and noting the widespread and systematic nature of those attacks, all these factors point, like a gun, in one direction and one direction only: that the criminal means of the Common Purpose that the Trial Chamber found to exist from May 1997 to late April 1998 continued until February, 1999, at the least. In the circumstances, we find that the only conclusion open to a reasonable trier of fact is that the AFRC and the RUF after April 1998, continued to contemplate the commission of crimes within the Statute for the purpose of achieving their common plan to regain power and control over the territory of Sierra Leone, in particular the diamond mining areas.

[49] Trial Judgment, para. 947.
[50] Trial Judgment, para. 959.
[51] Trial Judgment, para. 960.

III. Conclusion

27. In the light of the above considerations, we find that a reasonable trier of fact would have concluded that the AFRC/RUF Joint Criminal Enterprise which the Trial Chamber found to have existed from May 1997 to late April 1998, when the Trial Chamber held it ceased to exist, did in fact continue to exist until at least February 1999, during which period the AFRC and RUF shared a common purpose which contemplated the commission of crimes within the Statute. We, therefore, grant the Prosecution's First Ground of Appeal.

Done at Freetown this 26th day of October, 2009

Hon Justice George Gelaga King
Justice of Appeal

Hon Justice Jon Moadeh Kamanda
Justice of Appeal

[52] Trial Judgment, para. 961.
[53] Appeals Judgment, para. 375.

XV. SEPARATE OPINION OF JUSTICE EMMANUEL AYOOLA IN RESPECT OF GBAO'S SUB-GROUND 8(J) AND 8(K).

1. In considering any case in which the issue of joint criminal enterprise (JCE) responsibility is raised, it is fitting to bear in mind, as guidance, that the legal principles concerned are important; but they can only be stated broadly. The facts too are important. Often, the facts of each case may determine the conclusion. It is thus that the issues that arise from these sub-grounds will turn, ultimately, on law and facts regardless of how Gbao described the errors in the sub-grounds. The doctrine of joint criminal enterprise will continue to be applied case-by-case as the facts and factual scenario of each case may determine.

Gbao's Sub-Grounds 8(j) and 8(k)

2. Gbao raised the following complaints in his Sub-Grounds 8(j) and 8(k):

> a. 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 District when all crimes found to be part of the JCE were found to have been committed pursuant to the first form of JCE[1].
>
> b. The Majority of 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.[2]

3. The three accused, including Gbao, were charged with eight counts of crimes against humanity, eight counts of war crimes and two counts of other serious violations of international humanitarian law.[3] Each of them was charged pursuant to Article 6(1) of the Statute for having committed, planned, ordered, instigated and aided and abetted the crimes charged under all 18 Counts of the indictment. The prosecution alleges that the Accused personally committed the crimes charged; and, committed the crimes charged in Counts 1 to 14 through their membership in a

[1] Gbao Appeal, p. 46.
[2] Gbao Appeal, p. 48.
[3] Trial Judgment, para. 71.

joint criminal enterprise ("JCE"). In regard to all the Counts of the Indictment it was alleged that they bear superior responsibility pursuant to Article 6(3) of the Statute.[4]

4. The Prosecution's case is that members of the JCE committed the crimes charged in Counts 1 to 14 in all the geographical areas pleaded in the Indictment during the period from 25 May to January 2000 and that the common purpose of the enterprise is set out in paragraphs 36 to 38 of the Indictment; the objective of the enterprise being to "take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas." That objective was to be achieved "by conduct constituting crimes within the Statute."[5]

5. The Trial Chamber found that the Accused were on notice of their alleged role in the JCE.[6]

6. It found that the evidence establishes that "as early as 1991 high ranking members of the RUF, including the Accused and subordinate fighters, had as their objective taking power and control over Sierra Leone following the 25 May 1997 coup; high ranking members of the RUF leadership agreed to form a joint "government" in order to control the territory of Sierra Leone; the taking of power and control over State territory is intended to be implemented through the commission of crimes within the Statute, this may amount to a common criminal purpose;"[7] "the strategy of the Junta was thenceforth to maintain its power over Sierra Leone and to subject the civilian population to AFRC/RUF rule by violent means; 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; the AFRC/RUF forces cooperated on armed operations in which crimes against civilians were committed.[8] The crimes charged under counts 1 to 14 were within the joint criminal enterprise and intended by the participants to further the common purpose to take power and control over Sierra Leone.[9]

7. Further, the crimes contemplated within the joint criminal enterprise in order to maintain power over the territory of Sierra Leone commenced soon after the coup of May 1997. The Junta launched attack in Districts where the regime had not yet consolidated its power. In these attacks the criminal means mentioned were used to further the common criminal purpose by consolidating

[4] Trial Judgment, para. 340, 376
[5] Trial Judgment, para. 351.
[6] Trial Judgment, para. 393.
[7] Trial Judgment, para. 1979.
[8] Trial Judgment, para. 1980.
[9] Trial Judgment, para. 1982.

the territorial control of the Junta after the coup."[10] During "the Junta regime, high ranking AFRC and RUF members shared a common plan which was to take any action necessary to gain and exercise political power over the territory of Sierra Leone, in particular the diamond mining areas. Joint AFRC/RUF forces targeted civilians in a widespread and systematic attach designed to terrorise the population into submission through collective punishment, unlawful killings, sexual violence and physical violence. In addition, the joint AFRC/RUF forces continued to rely on the forced labour of civilians to generate revenue, used children under the age of 15 years as fighter and generally accepted pillage as a means to gratify the fighters."[11]

8. It is evident from these findings that the criminal enterprise or design was perpetration of crimes against humanity committed as part of a campaign of attack against the civilian population of Sierra Leone. The campaign involved, in addition, among other things, war crimes of varying nature. All these crimes were found to have been committed on a widespread scale; covering the entire territory of Sierra Leone.

9. Several findings by the Trial Chamber show that the joint criminal enterprise to attack the civilian population of Sierra Leone was a single systematic campaign manifesting throughout Sierra Leone. As observed by the ICTY Trial Chamber in *Kupreskic*, "the essence of Crimes against Humanity is systematic policy of a certain scale and gravity directed against a civilian population."[12]

10. The Trial Chamber found that the three-stage criminal campaign against the civilian population took place between 30 November 1996 and January 2002 during which the AFRC/RUF waged an attack "encompassing horrific violence and mistreatment against the civilian population of Sierra Leone"; and which evolved in three stages within the indictment period.[13] The second stage of the criminal campaign, relevant to these sub-grounds, was characterized by the joint AFRC/RUF campaign to strengthen their government through brutal suppression of perceived opposition by killing and beating civilians, not only in the capital; but throughout the Districts including Bo, Kenema and Kailahun. The AFRC/RUF also increased 'government' revenues and

[10] Trial Judgment, para. 1983.
[11] Trial Judgment, para. 1985.
[12] *Kupreškić et. al*, Trial Chamber (Cassese, May and Mumba, JJ) 14 January 2000.
[13] Trial Judgment, para. 944.

the personal wealth of individual commanders through forced mining in Kenema and Kono Districts.[14]

The Indictment

11. The offences committed were charged in the Counts. Each of the Counts was preceded by what can be regarded as particulars of the offence grouped by Districts according to location of the events. However, the structure of the Indictment should not be construed as indicating that there were as many joint enterprises as there were Districts or as there were locations of the crimes. Presumably, the form of the Indictment was intended to be a response to and improve on the specificity requirement. Nonetheless, the Trial Chamber approached the case in its consideration of the criminal responsibility of the respective accused in respect of each of the Districts where the events took place, on the footing that the "Prosecution alleges that the Accused are criminally responsible pursuant to Article 6(1) of the Statute, or alternatively Article 6(3) of the Statute, for the crimes committed [in the mentioned District] between 1 June 1997 and 30 June 1997."[15]

12. I opine that the assessment by the Trial Chamber of the criminal responsibility of each of the Accused persons in relation to the events in the Districts cannot determine the limits of his criminal responsibility as a member of the JCE; nor does the assessment of the extent of the participation of a member of the JCE by reference to the location or locations in which the JCE was executed, necessarily, determine such member's overall criminal responsibility for the offence charged in each of the Counts in respect of which a single verdict of 'guilty' or 'not guilty' is expected to be and has been pronounced.

13. Against this background, a consideration of the significance of the relevant findings made by the Trial Chamber is undertaken in the context of the issues raised by the two sud-grounds.

The relevant findings

14. In regard to Bo, the Trial Chamber found that: Gbao did not share the intent of the *principal perpetrators*[16] to commit the crimes committed against civilians under Counts 3 to 5 (unlawful killings), and Count 14 (pillage) in Bo District in furtherance of the joint criminal enterprise.[17] It found that Gbao either knew or had reason to know that the deliberate, widespread killing of

[14] Trial Judgment para 946
[15] Trial Judgment, para 1974 (Bo District); para.2050 (Kenema District); para. 2060 (Kono District).
[16] Italics supplied.
[17] Trial Judgment, para. 2040, 2042.

civilians occurred during RUF military assaults. Similarly, he knew or had reason to know that suspected Kamajor collaborators would be killed and that pillage took place during AFRC/RUF operations. Despite having knowledge that crimes were being committed by RUF fighters on a large scale, Gbao continued to pursue the common purpose of the joint criminal enterprise.[18]

15. In regard to Gbao's criminal responsibility, the Trial Chamber concluded that it was satisfied beyond reasonable doubt that "Gbao willingly took the risk that the crimes charged and proved under unlawful killings (Counts 3 to 5) and pillage (Count 14), *which he did not intend as a means of achieving the common purpose*,[19] might be committed by other members of the joint criminal enterprise or persons under their control."[20]

16. In regard to Kenema District, the Trial Chamber stated that it was satisfied that the Prosecution has proved beyond reasonable doubt that "Gbao willingly took the risk that the crime charged and proved under counts 3 to 5 (unlawful killings), Count 11 (physical violence) and Count 13 (enslavement), *which he did not intend as a means of achieving the common purpose*,[21] might be committed by the other members of the joint enterprise or persons under their control."[22]

17. In respect of Kono District similar statement was made; with the only difference that the crimes mentioned were those charged and proved under Counts 3-5, 6-9, 10-11, 13 and 14[23].

18. The majority of the Trial Chamber, Justice Boutet dissenting, found that Gbao was criminally responsible as a member of the joint criminal enterprise for the crimes committed in Bo District and proved under unlawful killings (Counts 3 to 5) and pillage (Count 14) to have occurred between 1 June 1997 and 30 June 1997.[24] Similar findings (not as to date) were made in respect of Kenema District in regard to crimes charged and proved in Counts 3 to 5 (unlawful killings), Count 11 (physical violence) and Count 13 (enslavement); and, in respect of Kono District for the crimes charged and proved under counts 3 to 5, 6 to 9, 10, and 11, 13 and 14 to have occurred between 14 February 1998 and April 1998.[25]

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[18] Trial Judgment, para. 2040.
[19] Italics supplied.
[20] Trial Judgment, para. 2048.
[21] Italics supplied.
[22] Trial Judgment, para. 2060.
[23] Trial Judgment, para. 2109.
[24] Trial Judgment, para. 2049.
[25] Trial Judgment, para. 2061.

The submissions

19. Building on these findings, Gbao put his case thus: (a)"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. [The Trial Chamber] 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 extend in the RUF case."[26] (b) "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."[27]

20. For its part, the Prosecution puts its response as follows: i. Applicable legal principles do not require, in order to establish JCE liability, the proof of significant contribution and the requisite intent for the crimes charged with respect to each location covered by the JCE; ii The Trial Chamber was correct in finding that "Where the joint criminal enterprise is alleged to include crimes committed over a wide geographical area ….an accused may be found criminally responsible for his participation in the enterprise, even if his significant contributions to the enterprise occurred only in a much smaller geographical area, provided that he had knowledge of the wider purpose of the common design."[28] iii. Kaliahun where the requisite intent for the relevant crimes under the first category of JCE was found to be satisfied is the correct starting point of the assessment of Gbao's responsibility.[29] iv. As an alternative argument, to the extent that the Trial Chamber applied the *mens rea* standard for the third category of JCE to Gbao with respect to Bo, Kenema and Kono, this was legally permissible because, in principle, there is nothing to prevent a JCE from being seen as divisible in the sense of certain crimes in certain locations being intended by some members but foreseeable only to others.[30]

Discussion

[26] Gbao Appeal, para. 147.
[27] Gbao Appeal, para. 155.
[28] Prosecution Response Brief, para 5.72.
[29] Prosecution Response Brief, para. 5.73.
[30] Prosecution Response Brief, para. 5.74.

21. To put these rival contentions in proper perspective, it is expedient to note, at the outset, that the Trial Chamber (Justice Boutet dissenting) found that Gbao made "significant contribution in Kailahun to the furtherance of the common purpose by securing revenue, territory and manpower for the Junta Government, and by aiming to reduce or eliminate civilian opposition to Junta rule."[31] The Trial Chamber (Justice Boutet dissenting) also found that Gbao shared with the other participants in the joint criminal enterprise the requisite intent to commit the crimes of acts of terror, collective punishment, unlawful killings, sexual violence and enslavement in Kailahun District between 25 May 1997 and 19 February 1998.[32] It is noted that there was no indication in these findings that the crimes were not intended as a means of achieving the common purpose.

22. I opine that the finding that in respect of crimes committed in Bo, Kenema and Kono Districts, Gbao did not share the intent of "principal perpetrators" to commit the crimes committed against civilians in furtherance of the joint criminal enterprise under the stated Counts cannot lead, reasonably, to a conclusion that he was not a member of the JCE, unless the JCE is compartmentalized by District; contrary to the Prosecution's case. On the Indictment the JCE was not presented as a conglomeration of district-based joint common enterprises; but as a single joint criminal enterprise that was nationwide. Besides, Gbao did not need to share the intent of the '*principal perpetrators*' who, themselves, did not need to have been members of the JCE.[33] However, he needed to share the requisite intent with the other participants. This case turns, therefore, partially on the requisite intent.

23. "*Principal perpetrators*" are the actual physical perpetrators of the crime, or those who performed the *actus reus* of the crime. As was observed by Judge Bonomy in the *Decision on Odjanics Motion Challenging Jurisdiction*: "Factual scenarios in cases before the Tribunal are rarely such that all persons involved in perpetration of the crimes pursuant to a JCE can be found to be participants in that particular JCE."[34] In this case the Trial Chamber found that "non-members who committed crimes were sufficiently closely connected to one or more members of the joint criminal enterprise acting in furtherance of the common purpose that such crimes can properly be

[31] Trial Judgment, para. 2164.
[32] Trial Judgment, para. 2122.
[33] Brdanin Appeal judgment, para 410. "…what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose."
[34] Separate Opinion of Judge Ian Bonomy, Milutinovic et al. Decision on Odjanics Motion Challenging Jurisdiction para. 3.

imputed to all members of the joint criminal enterprise when other conditions of liability are fulfilled."[35]

24. The imposition of liability upon an accused for his participation intended to further a common criminal purpose does not require an understanding or an agreement between the accused and the principal perpetrator of the crime to commit the particular crime.[36] It follows that a shared intention between Gbao and the principal perpetrators, who may not be members of the JCE, is not the shared intention envisaged in stating the JCE principles; even though the intent of the principal perpetrators may be relevant in determining whether the crime committed by them is within the common purpose or not. In the result, not much weight needs be attributed to the finding by the Trial Chamber that Gbao did not share the intent of the principal perpetrators in determining his participation in the JCE. It is noted that the ICTY Appeal Chamber held in *Brdanin* that:

> as far as the basic form of JCE is concerned, an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question forms part of the common criminal purpose. In cases where the principal perpetrator shares that common criminal purpose of the JCE or, in other words, is a member of the JCE, and commits a crime in furtherance of the JCE, it is superfluous to require an additional agreement between that person and the accused to commit that particular crime.[37]

25. For reasons that will be stated, presently; there is really no substance in the suggestion by Gbao that in the absence of a shared intention to use the crimes committed in Bo, Kenema and Kono District *as means* of achieving the common purpose, Gbao was not a member of the JCE. Such suggestion must have emanated from an unduly narrow interpretation of the applicable principles and a misconception of what constituted the JCE in this case. The applicable principles cannot be applied in this case as if the JCE is concerned with a one-transaction criminal activity like, for instance robbing a bank.

26. In my opinion, as long as Gbao agreed with the common criminal purpose his choice of the extent of the criminal campaign does not terminate his membership; unless he withdraws from the JCE. Where members of a JCE agree, as in this case, on a criminal campaign of widespread and systematic attack on a civilian population; it is reasonable to presume that they agree to the underlying crimes that constitute the attack. The agreement need not be express; it can be tacit,

[35] Trial Judgment, para. 1992.
[36] Brdanin Appeal Judgment, para. 415.
[37] Brdanin Appeal Judgment, para. 418.

manifesting in conduct signifying assent. There is sufficient evidence before the Trial Chamber for its finding that Gbao was a member of the JCE.

27. The consideration of the issues will, therefore, proceed on the footing that Gbao was at all material times a member of the JCE; and, that the requisite objective and subjective elements of his membership have been found proved beyond doubt by the Trial Chamber.

28. It is recalled that Gbao's participation did not need to involve direct commission of crimes or presence at the time a crime was committed.[38] The requisite shared intent that needs to be established in regard to Gbao's JCE liability is the shared intent on the part of all co-perpetrators to perpetrate crimes against humanity and war crimes charged in the Indictment. It is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of that common design.[39] The requisite mental element is intent to pursue a common purpose.[40]

29. The submission by the Prosecution that applicable legal principles do not require, in order to establish JCE liability, the proof of significant contribution and the requisite intent for the crimes charged with respect to each location covered by the JCE is in accord with the theory of JCE. Where the JCE is expansive, adequate safeguard for the accused is in the requirement that there must be a link between the accused and the crime as legal basis for the imputation of a JCE criminal liability.[41]

30. In the final analysis, the substance of the issues that arise from the two sub-grounds is: whether Gbao is a member of the JCE and whether he has rightly been found to be criminally responsible for crimes in Bo, Kenema and Kono Districts; notwithstanding that the Trial Chamber held that he did not directly intend those crimes *as a means* of achieving the common purpose but which he willingly took the risk might be committed by other members of the JCE or persons under their control. It is apt to observe that the fact that Gbao did not intend the crimes found and proved

[38] In *Tadić* Appeal Judgment it was held at para. 227 that although participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute is one of the objective elements of JCE mode of participation in the crimes provided for in the ICTY Statute, this participation "need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc) but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."
[39] *Vašiljević* Appeal Decision, para. 102.
[40] *Vašiljević* Appeal Decision, para. 102.
[41] *Brđanin* Appeal Judgment, para 411.

in Bo, Kenema and Kono *as means* of achieving the common purpose does not by itself lead to a conclusion that he did not subscribe to the common purpose.

31. The two questions that arise from the two sub-grounds and fall to be addressed later are (i) whether Gbao was convicted of first form of JCE by way of the *mens rea* standard applicable to the third form of JCE; and (ii) whether the *mens rea* element of JCE was not met.

32. The JCE principle expounded in *Tadic* is adequate to deal with these issues. It is to be recalled, however, that *Tadic* continues to be discussed in regard to some issues which, understandably, could not have been resolved in the case; understandably, issues determined in a case are essentially shaped and defined by the factual scenario of the case.[42] It is also essential to the application of the principles to convert terms used when the case is about a simple one-event criminal activity (like killing a person) to suit cases, such as the present case, of a joint criminal enterprise that contemplates a widespread and systematic collective criminality. The "same criminal intention to kill" where killing is the common design of the JCE must be converted to the "same criminal intention to attack the civilian population" where that is the common design."

33. In applying the law of joint criminal enterprise expounded in *Tadic* to this case it needs be borne in mind that the joint common enterprise on which the case for the prosecution rests in this case is one joint criminal enterprise; not as many enterprises as there are Districts in Sierra Leone, nor as many joint criminal enterprises as there are crimes. As described in the Trial Judgment it was "*a common plan* which was to take any action necessary to gain and exercise political power and control *over the territory of Sierra Leone*[43], in particular the diamond mining areas";[44] crimes were contemplated by the participants of the joint criminal enterprise to be within the common purpose. In considering these matters it is also borne in mind that, as was stated by the ICTY Appeals Chamber in Decision on Ordanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise in *Milutinovic*:[45] "Criminal liability pursuant to a joint criminal enterprise is not a liability for mere

[42] An example of such then unresolved issue manifested in *Brdanin* concerning the question whether the person who carries out the *actus reus* of a crime must be a JCE member. In that case the ICTY Appeal Chamber observed that: the factual scenario in *Tadic*, contrary to the one in case at hand, involved a small group of participants operating in one municipality, and that the principal perpetrators were clearly participants in the JCE. It is therefore not surprising that the Appeals Chamber in that case essentially focused on post-World War II cases where this was also the case, even though every case cited by *Tadic* required participation of the principal perpetrator in the JCE as *the sine qua non* of ascribing liability to the accused. In light of the above, the Appeal chamber judgment in *Tadic* cannot be considered conclusive as to whether principal perpetrators must be members of the JCE."
[43] Italics supplied.
[44] Trial Judgment para 1985.
[45] *Prosecutor v Milutinović*, 21 May 2003, para. 26.

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 joint criminal enterprise, a different matter." This is why factors that need to be adverted to for the purpose of determining the criminal responsibility of an accused under the JCE theory include his significant contribution to the execution of the enterprise that contemplates the commission of numerous crimes; and, the link between such contribution and the crime. In this regard, that factual element must necessarily be determined case-by-case.

34. In the case law of JCE the first category of JCE applies in cases "where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime with intent)."[46] Often the first category presents the simplest form of JCE, such as when two or more persons plan to rob a bank, without any intent to kill anyone, and execute their plan without killing. All the persons who participate in the plan are criminally responsible regardless of the individual roles of the participant in the crime. An illustration of this category given in *Tadic* is quite elaborate; but it is not difficult to conceive of an even more complex form of the basic category where the scope of the JCE is large.[47]

35. There may arise situations, such as the present, in which one of the parties to the common criminal enterprise does not agree *to some extent* to *the means*; but nevertheless *continues to participate in the enterprise* with the foresight that the other members would use the means in furtherance of the common criminal enterprise. In such a case the other members would not be acting outside the common design but, rather, playing it out, as the party (Gbao in this case) foresaw they would within and in furtherance of the joint criminal enterprise, fulfilling its shared *intention*.

36. There are some authorities which, I presume, proceed from common-sense and reason, that an accused would be criminally responsible if he realises, (although he did not agree with the

[46] *Tadić* Appeal Judgment, para. 220.

[47] The illustration of the first category in *Tadic Appeal Judgment para.196,* is as follows: "The first category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they all possess the intent to kill. The objective and subjective prerequisite for imputing criminal responsibility to a participant who did not, or cannot be proven to have effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend the result."

conduct being used) that a member of the criminal enterprise may commit a criminal act within the purpose of the enterprise with the requisite intent, but nevertheless continues to participate with the member in the criminal enterprise as that would be sufficient mental element for the accused to be guilty of the offence committed. In the decision of the High Court of Australia in *McAuliffe v R*[48], reference was made to remarks made in *Chang Wing-Su v. The Queen*[49] as being the correct principle accepted in some other decision. It was stated as follows:

> "If B realizes (*without agreeing to such conduct being used*) that A may kill or inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture."[50]

37. It may not be inappropriate to refer also to the opinion of the High Court of Australia in *McAuliffe*[51] as follows: "There was no occasion for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime *other than that which is planned*, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is *when the incidental crime falls within the common purpose*." (Italics supplied)

38. In regard to the third category, there would have been a common design to pursue one course of conduct, but one of the perpetrators commits an act which, *while outside the common design,* was nevertheless a natural and foreseeable consequence of the common purpose.[52] This category deals with a crime foreseen as incidental to the planned crime. An example of this is described in *Tadic*.[53]

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[48] McAuliffe v R [1995] HCA 37; (1995) 69 ALJR 621; 183 CLR 108 para19

[49] (1991) QB 134. cited with approval in the Privy Council decision of Hui Chi-Ming v. The Queen (19920 1 AC 34 at 51, decision of the High Court of Australia in McAuliffe v R [1995] HCA 37; (1995) 69 ALJR 621; 183 CLR 108 para19; UK House of Lords decision in R. v.. Powell [1999] AC 1998; separate Opinion of Judge Hunt in *Prosecutor v. Milutinović et. al*, 21 May 2003, footnote 45

[50] ibid

[51] McAuliffe v. R [1955] HVA 37; (1995) 69 ALJR 621; 183 CLR 108 ; para19

[52] *Tadić* Appeal judgment, para. 204

[53] There "would be a common shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."

39. That a joint criminal enterprise may incorporate both basic and extended forms of the enterprise is illustrated by the example given in the Separate Opinion of Judge Hunt in *Milutinovic*.[54]

40. In this case the three requirements that are common to the three categories of JCE are found by the Trial Chamber, namely: (i) a plurality of persons; (ii) the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided in the Statute, and (iii) the participation of the accused in the common purpose. It is instructive to recall that the plurality found by the Trial Chamber was not on a District by District basis; but a single plurality covering all the criminal activities of the JCE in Sierra Leone, including criminal activities in Kailahun where Gbao's activities were undertaken. The common purpose in this case, as pleaded and found, is expansive; it involves a criminal design that contemplates perpetration of numerous crimes on a large and nation-wide scale.

41. The issues in regard to the sub-grounds now being considered, therefore, turn on the subjective elements of the first and third categories of JCE liability as expounded in the case law in light of the factual scenario in the case.

42. The two questions that arise from the sub-grounds of appeal can now be dealt with briefly.

(i) Whether Gbao was convicted of first form of JCE by way of the mens rea standard applicable to the third form of JCE.

43. The question arose because the nub of the criminal responsibility imputed to Gbao is that he foresaw that crimes charged and proved which he did not intend *as a means of achieving the common purpose*, might be committed by other members of the joint criminal enterprise or persons under their control, but willingly took the risk.[55]

44. In this case Gbao foresaw that crimes charged and proved which he did not intend *as a means of achieving the common purpose*, might be committed by other members of the joint criminal enterprise (of which he is a participant) or persons under their control, but willingly took

[54] Prosecutor v. Milutinovic et. al, 21 May 2003, Separate Opinion of Judge Hunt para. 13

[55] Trial Judgment, paras 2046 and 2048: "Gbao either knew or had reason to know that the deliberate, widespread killing of civilians occurred during the RUF military assaults. Similarly, he knew or had reason to know that that suspected Kamajor collaborators would be killed and that pillage took place during AFRC/RUF operations. Despite having knowledge that crimes were being committed by RUF fighters on a large scale, Gbao continued to pursue the common purpose of the joint criminal enterprise."[55]

the risk by continuing to participate in the enterprise.[56] The principle earlier referred to in *Chang Wing-Su v. The Queen*[57] becomes readily persuasive in regard to him and becomes even more apposite when adapted and rendered thus: "If Gbao realizes (*without agreeing to such conduct being used*) that other members of the JCE may commit crimes as a means of achieving the common purpose of the JCE, but nevertheless continues to participate with the other members in the venture, that will amount to a sufficient mental element for Gbao to be criminally responsible as a member of the JCE if the other members, with the requisite intent, commits the crimes within the common criminal purpose in the course of the venture."

45. There is really no need to discuss this aspect of the matter at any length further. It suffices to refer to Gbao's submission which accepted that the reasonable and foreseeable consequence element may well be accommodated within the basic element of JCE when Gbao submits as follows: "The basic element of JCE, the common purpose, either has such crimes within it or *as a reasonable and foreseeable consequence of it.*"[58] A reasonable and foreseeable consequence of the common criminal purpose is that it will lead to widespread commission of the crimes charged without limitation as to Districts; as has happened. In the circumstances it is difficult to understand how he turns round to claim that there was a misplacement of *mens rea* standard by the Trial Chamber.

46. Besides, the submission by the Prosecution, offered in the alternative, is persuasive. The Prosecution submitted as follows: "As an alternative argument, to the extent that the Trial Chamber applied the *mens rea* standard for the third category of JCE to Gbao with respect to Bo, Kenema and Kono, this was legally permissible because, in principle, there is nothing to prevent a JCE from being seen as divisible in the sense of certain crimes in certain locations being intended by some members but foreseeable only to others."

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[56] Trial Judgment, paras 2046 and 2048: "Gbao either knew or had reason to know that the deliberate, widespread killing of civilians occurred during the RUF military assaults. Similarly, he knew or had reason to know that that suspected Kamajor collaborators would be killed and that pillage took place during AFRC/RUF operations. Despite having knowledge that crimes were being committed by RUF fighters on a large scale, Gbao continued to pursue the common purpose of the joint criminal enterprise."[56]

[57] Chang Wing-Su v. The Queen (1991) QB 134. cited with approval in the: Privy Council decision of Hui Chi-Ming v. The Queen (19920 1 AC 34 at 51; decision of the High Court of Australia in McAuliffe v R [1995] HCA 37; (1995) 69 ALJR 621; 183 CLR 108 para19; UK House of Lords decision in R. v.. Powell [1999] AC 1998; and in the separate Opinion of Judge Hunt in Prosecutor v. Milutinovic et. Al, 21 May 2003, footnote 45

[58] Gbao Appeal, para. 148.

47. It is fitting to add the whichever category is relied on, the underlying rational basis of making a party to the JCE liable for the acts of other participants of the JCE is clear. It is that a party who embarks on a criminal venture with others is criminally responsible for the acts of those others either, because he intended it; or, because it is reasonably foreseen by him as an incident of the venture. In this wise, the issue raised by Gbao, in my opinion is merely academic. The evidence that points to his membership of the JCE is ample. He has not shown how the decision is invalidated even if a third category *mens rea* standard is applied since either of the standards leads to a finding of his criminal responsibility as a co-perpetrator. He has also not shown how a miscarriage of justice has been occasioned since he had notice in the Indictment that the Prosecution would be relying on both categories.

48. In any event, it is a misconception to conclude that the Trial Chamber applied the wrong *mens rea* standard in convicting Gbao. With the foresight that the other members of the JCE would perpetrate the crimes as means of achieving the objectives of the common purpose he, nevertheless, continued to function as member of the JCE for the realization of the common purpose through the criminal means that are also within the common purpose and are designed to strengthen the criminal campaign.

49. In this regard it is pertinent to recall that Gbao, who was found by the Trial Chamber to be a member of the JCE; was also found to have faithfully pursued the means of achieving the purpose of the JCE in Kailahun District to which he was assigned and was found criminally liable for offences of terrorism, collective punishments, extermination, murder, violence to life etc, sexual slavery, other inhumane acts, outrages upon personal dignity committed in that District in furtherance of the common purpose of the JCE. There has been no suggestion that he withdrew from the JCE at any time, as was the case of SAJ Musa, formerly a participant of the JCE, who withdrew from the JCE in February 1998.[59]

50. The complaint that the Trail Chamber used the extended JCE form *mens rea* standard against him lacks substance and is rejected.

(ii) Whether the mens rea *element of JCE was not met.*

51. As earlier noted, Gbao argued that the Trial Chamber, having found that he did not share the intent to commit the crimes committed in Bo, Kono and Kenema with the JCE members; erred in its

[59] Trial judgment, para. 2079.

legal conclusion by finding that he was nonetheless criminally responsible. He submitted that as the *mens rea* element of JCE is not met, a conviction under this mode of responsibility is impermissible.

52. Earlier in this Opinion the issue has been discussed at some length. Enough has been said about the question of shared intent. The conclusion of the matter is that the submission made by Gbao that the findings by the Trial Chamber concerning his intent in regard to the crimes found committed in Bo, Kenema and Kono negate the findings as to his criminal responsibility on the basis of the JCE, is misconceived and untenable.

53. Merely as a recapitulation; it is recalled that The Trial Chamber made an assessment of Gbao's responsibility in Kaliahun and found the requisite intent for the relevant crimes under the first category of JCE. The findings concerning his intent in relation to the crimes committed in Bo, Kenema and Kono as a means of achieving the common purpose of the JCE are inconsequential and unnecessary in light of other findings made. It is not necessary to ascertain the intent of a member of the JCE in regard to criminal activities of the JCE in every town or District where such activity took place in order to determine whether there was a JCE or whether, if there was, Gbao was a participant of that JCE. His membership of the JCE has been found to become manifest in his activities in Kaillahun. What was required under the doctrine of JCE of such large scale as in this case is, as was the opinion expressed in *Brjanin,* that in regard to JCE a trier of fact must find that the accused made a contribution to the common criminal purpose; and that the common intended crime (or, for convictions under the third category of JCE, crime) did in fact take place.[60] In this case "the common intended crimes" are crimes against humanity; designed to be committed nationwide.

54. Besides, it is expedient to reiterate that a close and holistic reading of the Trial Judgment does disclose that the Trial Chamber was emphatic in its findings in regard to Bo, Kenema and Kono that the three accused were acting in concert; and that non-members who committed crimes (described as principal participants) were sufficiently closely connected to one or more members of the JCE acting in furtherance of the common purpose that such crimes can properly be imputed to

[60] *Brđanin* Appeal Judgment. para 430.

all members of the JCE when the other conditions of liability are fulfilled.[61] There was no finding that any of the crimes went beyond the scope of the JCE.

55. The conclusion that Gbao sought to draw from the findings on which he relied: that the *mens rea* element of JCE is not met, does not follow. Where the joint criminal enterprise is not based on an understanding as to the limited extent of the territorial scope of the enterprise, a member of the JCE who actively participates in the enterprise cannot by himself limit the scope of the enterprise. His reasonable option is to withdraw from the enterprise. It defies reason to suggest that: whereas Gbao, who was assigned by the RUF to Kailahun and actively implemented the criminal means by which the RUF intended to achieve the objectives of the JCE in his sphere of activities, his intent in regard to the crimes in Bo, Kenema and Kono, leads to a reasonable conclusion that he and the other members of the JCE do not share an intent in regard to the existence of the JCE and the means of achieving its common purpose.

56. For these reasons, the submission that the *mens rea* element of JCE is not met is not tenable.

57. I agree with the conclusion arrived at by Justice Kamanda and Justice King contained in the body of the Appeal Judgment that Gbao's sub-grounds 8(j) and 8(k) be dismissed. Gbao's sub-ground 8(a) has earlier been allowed with the result that his role as an RUF Ideology Instructor is not taken into consideration in defining his role in the JCE or at all in consideration of the issues arising in regard to sub-grounds 8(j) and 8(k). The rest of the findings made by the Trial Chamber in regard to his role and contribution to the JCE without the finding that he was an Ideology Instructor are sufficient to support the conclusion that he is a member of the JCE.

Justice Emmanuel Ayoola

[Seal of the Special Court for Sierra Leone]

[61] Trial judgment para. 1991.

XVI. PARTIALLY DISSENTING AND CONCURRING OPINION OF JUSTICE SHIREEN AVIS FISHER

1. I respectfully, but fundamentally, dissent from the Majority's decision to confirm the Trial Chamber's convictions of Gbao under Joint Criminal Enterprise liability. Notwithstanding the Trial Chamber's findings that he did not share the Common Criminal Purpose with the other participants of the JCE in the case before us, the Majority holds that Gbao can incur individual criminal responsibility under JCE,[1] thereby entirely detaching JCE liability from the requisite *mens rea* that defines it. I am compelled to dissent from this unprecedented holding, which abandons the keystone of JCE liability as it exists in customary international law. "Common purpose or design" liability[2] demands that the accused share with others a common criminal purpose, and I cannot agree with the Majority's decision to abandon this legal requirement.

2. This error as to Gbao's *mens rea* is compounded by the Majority's decision to uphold the conclusion of the Trial Chamber regarding Gbao's *actus reus*: that Gbao significantly contributed to the furtherance of the Common Criminal Purpose. The Majority's decision in this regard is flawed because it is based on a finding the Trial Chamber never made.

3. The Trial Chamber held Gbao individually criminally responsible for the crimes committed in furtherance of a common criminal purpose that the Trial Chamber found he did not himself share. The Majority upholds this reasoning and in addition, concludes that he contributed to the furtherance of this common criminal purpose, notwithstanding the absence of any confirmed finding of the Trial Chamber to that effect. I must dissent.

A. Gbao cannot incur JCE liability

4. As a preliminary matter, I disagree with the Majority that Gbao's Grounds 8(j) and (k) are "vague, disjointed, imprecise and unclear," nor do I agree that these grounds "do not fulfil the minimum basic requirements of pleading Grounds of Appeal."[3] Gbao clearly sets forth his arguments under these grounds in his Notice of Appeal,[4] and fully develops them in his Appeal Brief,[5] citing the applicable law and the Trial Chamber's findings, explaining the precise legal error

[1] Appeal Judgment, paras 482-493.
[2] *Tadić* Appeal Judgment, para. 227.
[3] Appeal Judgment, para. 481.
[4] Gbao Notice of Appeal, paras 52-56.
[5] Gbao Appeal, paras. 144-156.

and how that error invalidates his convictions. Moreover, given that the Parties and the Appeals Chamber extensively discussed these arguments during the Appeal Hearing, I do not consider that they could be subject to summary dismissal.

1. Gbao was found not to have shared the Common Criminal Purpose

5. Gbao contests the Trial Chamber's finding that he could be held liable under JCE for crimes that he did not intend but which the Trial Chamber found were within the Common Criminal Purpose. He takes exception to his conviction for these crimes based on the Trial Chamber's conclusion that he "willingly took the risk" that these crimes might be committed.[6] The Majority finds no error in the Trial Chamber's conclusion.

6. A shared common criminal purpose is the foundation of all JCE liability, under any "form" of JCE recognized in customary international law. By eliminating the requirement for a shared common criminal purpose, the Trial Chamber and Majority dangerously expand the scope of potential JCE liability beyond the limits allowed by law.

(a) Law

7. JCE is not a crime in itself, nor is JCE liability for membership in an organisation. Instead, JCE is a mode of attaching liability for a crime under the Statute.[7] Where it attaches, the accused is responsible for committing that crime.[8]

8. I am in complete agreement with the general statements of the law on JCE set out in our Appeal Judgment in section V.E.3(a), paragraphs, 474 and 475. We also rightly note in the Judgment that JCE 2 is not at issue in the instant case.[9] In particular, we hold that "both JCE 1 and JCE 3 require the existence of a common criminal purpose which must be shared by the members of the JCE, including in particular the accused.[10]" In other words, before arriving at the question of

[6] Trial Judgment, paras 2048, 2060, 2109.
[7] *Krajišnik* Appeal Judgment, Separate Opinion of Judge Shahabuddeen, para. 22; *Milutinović et al*. Decision on Jurisdiction- JCE, para. 23.
[8] *Krajišnik* Appeal Judgment, para. 662.
[9] Appeal Judgment, para. 475.
[10] Appeal Judgment, para. 475. *See* also *Tadić* Appeal Judgment, paras 204 ("The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed."), 220 ("With regard to the third category of cases, it is appropriate to apply the notion of 'common purpose' only where the following requirements concerning *mens rea* are

whether the accused may incur JCE liability for reasonably foreseeable crimes committed *beyond* the scope of the common criminal purpose, a trier of fact must be satisfied beyond reasonable doubt that the accused shared the intent to commit the crimes *within* the common criminal purpose.[11] JCE 3 therefore cannot attach without first finding all the elements of JCE 1.

9. It follows from this section of our Appeal Judgment, consistent with JCE as customary international law, that liability under both JCE 1 and JCE 3 requires, among other things, that the accused possess "the same criminal intention" as the other participants in the JCE – that he shares the common criminal purpose with them.[12] Where he shares that intent, all other elements met, he incurs JCE 3 liability for crimes which he does not intend, but which are reasonably foreseeable to him if he willingly takes the risk that they may be committed in the implementation of the crimes that he does intend as part of the common criminal purpose.[13]

10. It is therefore crucial to define the common criminal purpose in order to ascertain the accused's liability pursuant to a JCE. In particular, the trier of fact must establish which crime or crimes under the Statute of the Special Court the alleged plurality of persons in the JCE shared the intent to commit.[14] Additionally, it must

> specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims) [and] make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise.[15]

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fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose."). Emphasis added. *See* further *Kvočka et al*. Appeal Judgment, para. 83.

[11] *Stakić* Appeal Judgment, paras 84, 86.

[12] *Krajišnik* Appeal Judgment, paras 200 ("it must be shown that 'the JCE participants, including the accused, had a common state of mind, namely the state of mind that the statutory crime(s) forming part of the objective should be carried out."), 707 ("The 'bridge' … between the JCE's objective and Krajišnik's criminal liability, as far as his *mens rea* is concerned, consisted of the shared intent that the crimes involved in the common objective be carried out."); *Tadić* Appeal Judgment, para. 196 ("The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the **same** criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill."); *Milutinović et al*. Trial Judgment, Vol 1, para. 108 ("The Prosecution must prove that the accused voluntarily participated in at least one aspect of the common purpose and, furthermore, that the accused shared with the other joint criminal enterprise members the intent to commit the crime or underlying offence.) Emphasis added.

[13] Appeal Judgment, para. 475.

[14] *Brima et al*. Appeal Judgment, para. 80; *Tadić* Appeal Judgment, para. 227.

[15] *Brđanin* Appeal Judgment, para. 430; *Stakić* Appeal Judgement, para. 69.

11. Once the scope of the common criminal purpose shared by the participants has been established, the trier of fact must be satisfied that the accused, too, shares "the same criminal intention" as the other participants.[16] Accordingly, he must intend the full extent of the shared common criminal purpose, both in terms of the crimes intended and the geographical area covered by the JCE. Where this is established, and the other elements of JCE liability are met, customary international law attaches criminal responsibility to the accused not only for his own actions, but also for the actions of his fellow JCE members that further the commonly intended crimes (JCE 1) or that are reasonably foreseeable consequences of carrying out the commonly intended crimes (JCE 3).[17] Conversely, if the accused did not intend those crimes to begin with, neither form of JCE liability can arise.

(b) Legal error in finding that Gbao incurs JCE liability

12. The judgment of the Appeals Chamber reflects that we unanimously find that the common criminal purpose established by the Trial Chamber in the present case was:

> [T]he objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and the crimes as charged under Counts 1 to 14 as means of achieving that objective ("Common Criminal Purpose").[18]

13. The statutory crimes within the Common Criminal Purpose were thus the criminal acts described under Counts 1 to 14 in the Indictment. The geographical scope of the Common Criminal Purpose was the territory of Sierra Leone, though the crimes for which the Appellants were convicted were committed in Bo, Kenema, Kono and Kailahun Districts.

14. Where I first differ from the Majority is in the recognition of what I believe to be the fatal contradiction in the Trial Chamber's conclusion that Gbao was a "participant" in the JCE.[19] While Gbao's "participation" in the JCE is a legal conclusion, requiring proof beyond reasonable doubt that Gbao had the requisite *mens rea* and *actus reus*, the Trial Chamber's finding that Gbao was a "participant" is unsupported by any reference to the evidence. In fact, it is contradicted by the Trial Chamber's findings on his *mens rea*. In making its detailed findings on Gbao's "participation" in the Common Criminal Purpose,[20] the Trial Chamber found that Gbao did not intend any of the

[16] *Tadić* Appeal Judgment, para. 196.
[17] *Brđanin* Appeal Judgment, para. 431.
[18] Appeal Judgment, para. 305; Trial Judgment, paras 1979-1985.
[19] Trial Judgment, paras 1990, 2081; Appeal Judgment, paras 485, 486.
[20] Trial Judgment, Section 2.2.2.3.3.

crimes in Bo, Kenema and Kono Districts as means of achieving the Common Criminal Purpose.[21] He was found to have intended only the crimes committed in Kailahun District.[22] In addition to being geographically distinct from the crimes in Bo, Kenema and Kono, the crimes in Kailahun did not even include all of the counts which formed the means of achieving the common objective, as acts of pillage (Count 14) was neither charged nor found to have been committed there.[23]

15. By contrast, Sesay and Kallon, who were also found by the Trial Chamber to have been "participants" in the same JCE as Gbao, were found to have intended not only the crimes committed in Kailahun, but all the crimes in all four Districts at issue, including the acts of pillage under Count 14.[24] Their intent thus is identical to the Common Criminal Purpose.

16. The inescapable conclusion from the finding that Gbao did not intend the crimes in Bo, Kenema and Kono Districts – a total of approximately 63 crime incidents, and, in addition, the continuous crimes of enslavement and forced marriage[25] – is that Gbao did not share the "same criminal intention"[26] as the other alleged participants in the Common Criminal Purpose. He cannot, therefore, be found to incur JCE liability.

17. In affirming Gbao's convictions under JCE, the Majority adopts the Trial Chamber's circular reasoning, but compounds the Trial Chamber's error by collapsing the distinction between JCE 1 and JCE 3. The Majority reasons that it was sufficient for the Trial Chamber to conclude that Gbao was a "participant" in the JCE and therefore shared the Common Criminal Purpose.[27] By virtue of that conclusion, the Majority reasons, he is responsible for all crimes by members of the JCE that either he intended or were reasonably foreseeable.[28] Therefore, according to the Majority's reasoning, it matters not whether Gbao intended the crimes in Bo, Kenema and Kono;[29] given that he was "a member of the JCE," he was liable for the commission of "the crimes in Bo, Kenema and Kono Districts, which were within the Common Criminal Purpose," so long as it was "reasonably

[21] Trial Judgment, paras 2040, 2048, 2060, 2109; Appeal Judgment paras 488-491.
[22] Trial Judgment, para. 2172.
[23] *See* Trial Judgment, paras 1444, 2156.
[24] Trial Judgment, paras 2002, 2008, 2056, 2092, 2102, 2103, 2163.
[25] Bo District: 11 distinct crime incidents (Trial Judgment, para. 1974, 1975); Kenema District: at least 18 crime incidents and the enslavement of an unknown number of civilians between 1 August 1997 and about 31 January 1998 (Trial Judgment, paras 2050, 2051); Kono District: 34 crime incidents, the rapes and "forced marriages" of an unknown number of women during the February/March 1998 attack on Koidu Town, and the enslavement of an unknown number of civilians between February and April 1998 (Trial Judgment, paras 2063, 2064).
[26] *Tadić* Appeal Judgment, para. 196.
[27] Appeal Judgment, paras 486, 492.
[28] Appeal Judgment, paras 485, 492.
[29] Appeal Judgment, paras 492, 493.

foreseeable that some of the members of the JCE or persons under their control would commit crimes."[30]

18. This reasoning is not only circular, but dangerous. First, describing Gbao as a "participant" under this theory is mistaken because whether or not he was a "participant" is only significant if it means that he shared the common intent of the JCE, that is, the Common Criminal Purpose. The Trial Chamber's findings, unquestioned, and indeed quoted by the Majority, state unequivocally that he did not.[31]

19. Second, the Majority collapses the distinction between the *mens rea* required for JCE 1 and the *mens rea* applicable to JCE 3 by holding that Gbao can be liable for crimes *within* the Common Criminal Purpose that he did not intend and that were only reasonably foreseeable to him. Such an extension of JCE liability blatantly violates the principle *nullum crimen sine lege* because it imposes criminal responsibility without legal support in customary international law applicable at the time of the commission of the offence. The Majority makes no effort to reason why it considers that this extension of JCE liability was part of the law to which Gbao was subject at the time these offences were committed and it fails to cite a single case in which this extension of liability is recognized as part of customary international law. This dearth of jurisprudential support was acknowledged by the Prosecution which admitted at the Appeal Hearing that there "may be no authority" in international criminal law in which the *mens rea* element for JCE is characterized or applied as the Trial Chamber applied it to Gbao.[32]

20. The primary justification suggested by the Majority for its radical departure from customary international law is that its conflation of JCE 1 and JCE 3 *mens rea* standards "is consistent with the pleading of the crimes in the Indictment."[33] That an Indictment may plead in the alternative does not establish that there is no distinction between the forms of liability so pled. Also, whether the Indictment permissibly pleaded JCE is irrelevant as an evidentiary matter.

21. The Majority further agrees with the Trial Chamber's finding that:

[30] Appeal Judgment, para. 493.
[31] Appeal Judgment, paras 488-491.
[32] Transcript, Appeal Hearing, (Dr. Christopher Staker), 3 September 2009, pp. 196, 197.
[33] Appeal Judgment, para. 492.

> Therefore, the distance of Gbao to many of the crimes is not a reason for denying his participation under the basic form. What matters is that he intended or that it was foreseeable to him that he would further the joint criminal enterprise.[34]

"Basic form" is used in the jurisprudence to mean JCE 1.[35] The Trial Chamber's pronouncement on the law here is wrong, and the Majority's agreement is therefore misplaced. The distance of an accused to the crimes may of course be a relevant evidentiary consideration in determining whether the necessary *mens rea* and *actus reus* for JCE liability are established. More critically, the Trial Chamber's reference to a foreseeability standard with respect to JCE 1 is plainly erroneous,[36] as is the conflation of the *actus reus* and *mens rea* elements in the holding that it must be "foreseeable" to the accused that he "would further" the JCE.

22. Finally, in a perplexingly contradictory and unexplained pronouncement, the Majority expresses its agreement with the Prosecution's position at the Appeal Hearing that Gbao "shared the intent for the crimes to be committed in Kailahun District, so he was a participant in the joint criminal enterprise."[37] As an initial matter, this position is contrary to the Majority's own reasoning, as it envisages a common criminal purpose different from that found by the Trial Chamber and confirmed unanimously on appeal. That different "subsidiary" common criminal purpose is limited solely to Kailahun District and excludes acts of pillage (Count 14), as no such crimes were committed there.

23. If in fact the Majority accepts the position of the Prosecution that the shared intent for commission of the crimes committed in Kailahun describes the common criminal purpose of the JCE, then Gbao would presumably have been liable under JCE 1 for the crimes in Kailahun District, and liable under JCE 3 for the crimes in other Districts. However, such a limited, "subsidiary" JCE was neither sufficiently pleaded in the Indictment nor found by the Trial Chamber. Nor did the Trial Chamber make any findings that the crimes in Bo, Kenema and Kono were reasonably foreseeable by Gbao as a consequence of the implementation of that "subsidiary" JCE, (as opposed to the country-wide JCE found by the Trial Chamber.) This theory therefore finds no support in the pleadings or the evidence.

24. The only JCE pleaded, established and upheld in this case had as its Common Criminal Purpose to control the territory of Sierra Leone through the commission of the crimes charged under

[34] Trial Judgment, para. 2013.
[35] *See e.g. Kvočka et al*. Appeal Judgment, para. 110.
[36] *Tadić* Appeal Judgment, para. 228.

Counts 1 to 14.[38] Gbao either shared the intent of this criminal purpose – both in terms of the type of crimes and the geographical scope it encompassed – or he did not.

25. It remains unclear what common criminal purpose, in the Majority's mind, Gbao did share. It purports to hold that Gbao shared the Common Criminal Purpose that the Trial Chamber found established on the evidence.[39] But as explained, that was a legal impossibility, given that the evidence showed that he did not share the intent of the other "participants" in the JCE. The Majority has not articulated, any alternative common criminal purpose which Gbao shared. Yet it convicts him pursuant to JCE liability. That conviction was neither in accordance with the law nor the facts as found by the Trial Chamber and upheld on appeal.

26. The Trial Chamber's error with respect to Gbao's *mens rea* is not simply a harmless mistake that can be rectified or overlooked on appeal. Rather, because of this error, the entire legal edifice the Trial Chamber and Majority have constructed for Gbao's JCE liability is so fundamentally flawed that those convictions which rest upon it collapse.

(c) Conclusion

27. The Trial Chamber found that Gbao did not share the Common Criminal Purpose. Its decision, upheld by the Majority, to nonetheless convict Gbao under JCE absent the crucial element of shared criminal intent constitutes a legal error which invalidates Gbao's conviction under JCE.

28. I therefore would grant Gbao's Grounds 8(j) and (k). Although Gbao formally only requests his JCE convictions to be reversed in respect of Bo, Kenema and Kono Districts, the critical submission in these grounds of appeal is that he was not part of the JCE at all. As that submission in my opinion succeeds, there is no basis on which the Trial Chamber was permitted to convict Gbao under the JCE mode of liability for any of the crimes in the four Districts. I further note that the elimination of Gbao as a participant in the JCE might have implications for the scope of his co-accused's JCE liability for crimes in Kailahun.

[37] Transcript, Appeal Hearing, (Dr. Christopher Staker), 3 September 2009, p. 194.
[38] *Supra*, para. 12; Appeal Judgment, para. 305; Trial Judgment, paras 1979-1985.
[39] Appeal Judgment, para. 485.

2. Gbao cannot be found to have contributed to the Common Criminal Purpose

29. Although the absence of the requisite *mens rea* is sufficient to compel a reversal of Gbao's convictions under JCE liability, the same result is also required by the absence of a finding of Gbao's significant contribution to the crimes within the JCE for which he was found responsible, an element necessary to establish the *actus reus* of JCE liability.[40]

30. In dismissing Gbao's Ground 8(i), the Majority holds that a reasonable trier of fact could have concluded, on the basis of the Trial Chamber's confirmed findings, that Gbao significantly contributed to the realisation of the Common Criminal Purpose.[41] I dissent from this conclusion.

31. The Majority has considered whether the Trial Chamber reasonably found that Gbao significantly contributed to the Common Criminal Purpose through his role as OSC and his participation in forced farming in Kailahun District.[42] However, the Majority overlooks the fact that the Trial Chamber did not itself make such a finding. The Majority thereby upholds Gbao's conviction under JCE in the absence of any confirmed finding by a trier of fact that Gbao significantly contributed to the furtherance of the Common Criminal Purpose.

32. In the Appeal Judgement we unanimously uphold Gbao's Ground 8(a) and disallow the Trial Chamber's finding "of [Gbao's] significant contribution to the JCE through his role as an ideology expert and instructor."[43] We hold that reference to Gbao's role as an ideology instructor and expert must be struck from the Trial Chamber's findings because Gbao had no notice of the allegation that he contributed to the JCE in this capacity.[44] The Majority fails to consider the consequences of this holding, but is content in this regard to note that "[c]onsideration of Gbao's challenges to the Trial Chamber's findings that he significantly contributed to the JCE through his role as the RUF ideology expert and instructor therefore does not arise."[45] Instead they assert that Gbao's position as OSC and his role in forced farming in Kailahun District were sufficient to establish beyond a reasonable doubt his significant contribution to the JCE, a finding never made by the Trial Chamber.

[40] *E.g. Tadić* Appeal Judgment, para. 227(iii); *Krajišnik* Appeal Judgment, para. 706.
[41] Appeal Judgment, para. 1063.
[42] Appeal Judgment, paras 1058-1063.
[43] Appeal Judgment, para. 182.
[44] Appeal Judgment, Disposition, p. 478.
[45] Appeal Judgment, para. 1048.

33. I cannot agree. Having determined that the Trial Chamber erred in relying on Gbao's role as RUF ideology instructor and expert in finding that he significantly contributed to the JCE, it was incumbent on the Appeals Chamber to fully consider the consequences of its conclusion. In particular, the Appeals Chamber had to determine whether the reversed finding on Gbao's role as an ideology instructor and expert was so integral to the Trial Chamber's finding on his contribution to the JCE that the latter cannot stand without the former.

34. We say in our Judgment granting Gbao's Appeal on Ground 8(a) that the Trial Chamber's erroneous finding on Gbao's role as the RUF ideology instructor and expert was integral to its finding on his contribution to the JCE. Indeed, we hold that "[t]he Trial Chamber … found it necessary to assess the significance of the RUF ideology to the RUF, and Gbao's role in implementing the ideology in order to find that Gbao participated in the JCE."[46] We further hold that Gbao's unpleaded role as RUF ideology instructor and expert was "found [by the Trial Chamber] to be *necessary* to the determination of Gbao's participation in the JCE."[47]

35. The Trial Chamber clearly expressed its decisive reliance on Gbao's unpleaded role as the RUF ideology instructor and expert to find that he significantly contributed to the JCE. The Trial Chamber stated, *inter alia*:

> In making a determination on the participation of Gbao, the RUF ideology expert and instructor under the rubric of the JCE, the Chamber deems it necessary to address, *inter alia*, issues relating to the ideology of the RUF and how its content and philosophy impacted on its Commanders and fighters in their operational activities vis-à-vis their relationship with the civilian population.[48]
>
> We recall that Gbao was not a member of the AFRC/RUF Supreme Council and remained in Kailahun District during the Junta regime. He was not directly involved or did not directly participate in any crimes committed in Bo District. However, the Chamber has found that Gbao was an ideology instructor and that ideology played a significant role in the RUF movement….[49]
>
> [W]e are of the opinion that where the evidence establishes that there is a criminal nexus between [a revolutionary] 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. …[50]

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[46] Appeal Judgment, para. 180.
[47] Appeal Judgment, para. 181 (emphasis in original).
[48] Trial Judgment, para. 2011.
[49] Trial Judgment, para. 2010.
[50] This statement in itself is extremely troubling, because it substitutes holding an ideology which had a nexus to the commission of crimes for the mens rea and actus reus elements of JCE liability. It implies, in direct contravention of settled law, that JCE is criminal liability for mere membership in an organisation. See e.g. Milutinović et al. Decision

> … Therefore, the distance of Gbao to many of the crimes is not a reason for denying his participation under the basic form. … In this regard, the relevant factors, amongst others, to be considered are Gbao's commitment to the RUF ideology; his role in propagating and implementing the said ideology as the propelling force behind the conflict; [and] the nexus between the ideology and the joint criminal enterprise….[51]
>
> The Chamber is satisfied that there is compelling direct and circumstantial evidence to justify the inference that the ideology of the RUF, in its normative and operational settings, significantly contributed to the commission of the crimes falling within the joint criminal enterprise and were [sic] natural and foreseeable consequences of the same.[52]

36. Additionally, the Trial Chamber confirmed in the Sentencing Judgment the centrality of Gbao's role as the RUF ideology instructor and expert to his contribution to the JCE:

> 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. Gbao was a loyal and committed functionary of the RUF organisation, whose major contributions to the joint criminal enterprise can be characterised by his role as an ideology instructor and his planning and direct involvement in the enslavement of civilians on RUF government farms within Kailahun District.[53]

37. In light of this clear reasoning the Appeals Chamber holds that Gbao's unpleaded role as RUF ideology instructor and expert was "found [by the Trial Chamber] to be *necessary* to the determination of Gbao's participation in the JCE."[54] Indeed, the Trial Chamber itself confirmed that "it include[d] *only* those established facts that have been seriously considered by the Chamber in determining whether or not, an Accused bears responsibility for the charges against him."[55] In short, the Trial Chamber was not satisfied beyond reasonable doubt that Gbao significantly participated in the JCE without this reversed finding.

38. The Appeals Chamber is not in the position to speculate whether the Trial Chamber would have found that Gbao significantly contributed to the realisation of the Common Criminal Purpose had it not considered his role as the RUF ideology instructor and expert. The Appeals Chamber's role is limited to reviewing the Trial Chamber's findings as the Trial Chamber found them. It must

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on Jurisdiction- JCE, para. 26. As the Appeals Chamber finds, the Trial Chamber did not so conclude on the facts of this case, but the legal statement read in isolation is most worrying. Appeal Judgment para__.

[51] Trial Judgment, paras 2013, 2014, citing *Simić* Trial Judgment, para. 158.

[52] Trial Judgment, para. 2038.

[53] Sentencing Judgment, para. 270.

[54] Appeal Judgment, para. 181 (emphasis in original).

[55] Trial Judgment, para. 479 (emphasis in original).

take those findings as they are, and cannot intuit or conjecture what conclusions the Trial Chamber would have reached in other circumstances.

39. In my respectful opinion, the Majority fails to appreciate this crucial aspect of the appeal process. Instead, it proceeds as if the Trial Chamber found that Gbao significantly contributed to the Common Criminal Purpose only through his role as OSC and his participation in forced farming in Kailahun District.[56] The Trial Chamber, however, made no such finding.

40. The Majority accordingly misapplies the standard of review and analyses the reasonableness of a hypothetical finding that the Trial Chamber did not make. The standard on appeal requires deference to a finding of fact reached by the Trial Chamber.[57] The Majority here has misapplied that standard. Having struck the actual finding of the actual Trial Chamber, the Majority has theorized that a hypothetical reasonable trier of fact could have reached a different finding. As a consequence, the Majority upholds Gbao's conviction under JCE in the absence of any confirmed finding by the trier of fact that Gbao significantly contributed to the realisation of the Common Criminal Purpose.

41. It is be beyond the scope of appellate review for the Appeals Chamber to act as the trier of fact and determine itself whether the Trial Chamber's confirmed findings prove beyond a reasonable doubt that Gbao significantly contributed to the realization of the Common Criminal Purpose. In this respect, I fully concur that:

> an appeal is not a trial *de novo* and the Appeals Chamber cannot be expected to act as a primary trier of fact. Not only is the Appeals Chamber not in the best position to assess the reliability and credibility of the evidence, but doing so would also deprive the Parties of their fundamental right to appeal factual findings.[58]

I consider that making findings on such critical questions as an accused's significant contribution to the common criminal purpose is a task only within the purview of the trier of fact and beyond the proper scope of appellate review.

B. Concluding remarks on Gbao's JCE liability

42. I wish to emphasise that I do not question that heinous crimes were committed against the civilian population of Sierra Leone as found by the Trial Chamber, nor would I find Gbao innocent

[56] Appeal Judgment, paras 1058-1063.
[57] Appeal Judgment, para. 32.
[58] *Orić* Appeal Judgment, para. 186.

of all the charges against him. I am satisfied that the Trial Chamber's findings establish beyond reasonable doubt that Gbao is guilty of aiding and abetting the crimes of enslavement committed in Kailahun District, and I join with the Majority in finding him guilty under Count 15 of aiding and abetting the attack on an UNAMSIL peacekeeper.

43. My disagreement with the Majority is therefore not about whether Gbao is guilty of some crimes, but rather, whether Gbao is guilty of all the crimes for which he was convicted by the Trial Chamber pursuant to his alleged participation in the JCE. As I find that the Trial Chamber erred in holding Gbao personally liable under JCE, I respectfully dissent from the Majority's decision to confirm those convictions.

44. In concluding, I am obliged to note that the doctrine of JCE, since its articulation by the ICTY Appeals Chamber in *Tadić*, has drawn criticism for its potentially overreaching application. International criminal tribunals must take such warnings seriously,[59] and ensure that the strictly construed legal elements of JCE are consistently applied[60] to safeguard against JCE being overreaching or lapsing into guilt by association.[61]

45. For Gbao, the Trial Chamber and the Majority have abandoned the safeguards laid down by other tribunals as reflective of customary international law. As a result, Gbao stands convicted of committing crimes which he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend. The Majority's decision to uphold these convictions is regrettable. I can only hope that the primary significance of that decision will be as a reminder of the burden resting on triers of fact applying JCE, and as a warning of the unfortunate consequences that ensue when they fail to carry that burden.

46. While I do not wish to detract from these concerns, I also consider it necessary to express some reservations regarding the Majority's decisions on certain aspects of Sesay's appeal, and the degree of specificity required for pleading locations in the Indictment.

[59] *See e.g. Brđanin* Appeal Judgment, para. 426; *Krajišnik* Appeal Judgment, paras 657-659, 670, 671; *Krajišnik* Appeal Judgment, Separate Opinion of Judge Shahabuddeen; *Milutinović et al*. Decision on Jurisdiction- JCE, paras 24-26; *Rwamakuba* JCE Decision.
[60] *Krajišnik* Appeal Judgment, para. 671.
[61] *Brđanin* Appeal Judgment, paras 426-431.

C. Reservations regarding the Majority's decision on Sesay's appeal

1. Ground 33: Submissions outside the Notice of Appeal

47. Part of Ground 33 as presented in Sesay's Appeal Brief claims that the Trial Chamber erred in finding that acts of unlawful killings, sexual violence and forced marriage in Kailahun District constituted acts of terrorism.[62] The Majority rejects this submission because it falls outside the scope of Sesay's Notice of Appeal, even though the Prosecution has not objected on that basis.[63] I agree the ground should be dismissed, but disagree with the Majority's decision to dismiss the ground for a formal error.

48. Notices of Appeal and Appeal Briefs are regulated in Rules 108 and 111, respectively, as well as in the Practice Direction on Filing Documents before the Special Court for Sierra Leone, as amended. None of these legal instruments require an appellant to frame his Appeal Brief strictly within the scope of his Notice of Appeal, nor do they provide for sanctions if he fails to do so.[64]

49. That is not to say that an appellant can depart from his Notice of Appeal as he sees fit.[65] However, notices of appeal serve a particular purpose, and holding an appellant to what he has noticed is not an end in itself. Rather, a notice of appeal "ensures the adverse party enough time to respond and guarantees due litigation of the matter before the Appeals Chamber."[66] By this rationale, and given the predominantly adversarial nature of our proceedings, the Appeals Chamber need only be concerned with the permissibility of submissions beyond the Notice of Appeal if the adverse party objects on that ground.[67] It is not an issue to be considered, as in the present case, *proprio motu*.

50. Furthermore, while the Appeals Chamber may have the discretion to not consider grounds of appeal that suffer from such formal errors,[68] it should do so cautiously and with fair warning to

[62] Sesay Appeal, paras 225-226.
[63] Appeal Judgment, para. 466, fn. 1198.
[64] Contrary to the ICTY, the Special Court has never issued a practice direction setting out the formal requirements for appeals from judgment. At the ICTY, the grounds of appeal in the Appeal Brief "must be set out and numbered in the same order as in the Appellant's Notice of Appeal, unless otherwise varied with leave of the Appeals Chamber," a variation of the grounds of appeal must be sought by way of motion, and failure to comply with these requirements may result in sanctions by the Appeals Chamber, including an order for clarification or re-filing, or dismissal. IT/201, Practice Direction on Formal Requirements for Appeals from Judgment, 7 March 2002, paras 2, 4(c), 17.
[65] *See Orić* Appeal Judgment, para. 65.
[66] *Orić* Appeal Judgment, para. 65. *See* also *Simba* Appeal Judgment, para. 12.
[67] *See Fofana and Kondewa* Appeal Judgment, paras 504-506 (declining to entertain a Prosecution submission not included in its Notice of Appeal after objection by one of the accused).
[68] *See Simba* Appeal Judgment, para. 12.

the Parties, to ensure the fairness of the proceedings and in light of the gravity of the issues. To proceed otherwise and fail to exercise its discretion risks elevating form over substance, as the Majority has done here.

51. I have considered the parts of Sesay's Ground 33 now at issue, and find they should be dismissed on the merits, and not because they fall outside the scope of his Notice of Appeal.

2. Ground 45: Abuse of the appellate process

52. In his Ground 45, Sesay requests that the Appeals Chamber reconsider its Sesay Appeal Decision on Protective Measures. I concur in the Appeals Chamber's judgment that the ground should be dismissed. However, I would summarily dismiss this ground because Sesay neither identifies the prejudice he has suffered, nor explains how the Appeals Chamber's error invalidates his convictions.[69] I dissent from the Majority's reasoning in support of its dismissal of the ground, which I find to be wrong in law and unfortunate in tone.

53. The Majority holds that Sesay's submission "was raised merely to abuse the process of the Court"[70] Simply filing a submission which can be summarily dismissed because of pleading deficiencies is not the same as abusing the process of the Court. An abuse requires from the submission something much more egregious, and normally disingenuous, for example, repeated "blatantly untruthful allegations" which "go beyond being frivolous."[71] The Majority further suggests that a request for reconsideration of an interlocutory decision by the Appeals Chamber cannot be filed in an appeal from a Trial Judgment.[72] However, as the Rules are silent as to the manner in which a request for reconsideration should be presented, the Majority's suggestion is both unsupported and potentially unfair to the Parties.

54. In addition, the Majority engages in unwarranted hyperbole by characterising Sesay's submission as "manifestly incompetent"[73] and "palpably frivolous."[74] While flawed, Sesay's submission is neither incompetent nor frivolous. The tone of the Majority's decision creates the impression that requests for reconsideration will not be entertained. In fact, however, the Appeals

[69] Sesay Notice of Appeal, para. 94; Sesay Appeal, para. 352.
[70] Appeal Judgment, para. 248.
[71] *Prosecutor v. Žigić*, IT-98-30/1-R.2, Decision on Zoran Žigić's Request for Review under Rule 119, 25 August 2006, para. 10.
[72] Appeal Judgment, para. 245.
[73] Appeal Judgment, para. 247.
[74] Appeal Judgment, para. 248.

Chamber is the final court of review for proceedings before the Special Court and, I consider, has the inherent power to reconsider its decisions.[75] While I do not mean to diminish the value of ensuring the finality of the Appeals Chamber's decisions, I am concerned that the Majority's decision may have an unwarranted chilling effect on the willingness of accused persons before the Special Court to request reconsideration of the Appeals Chamber's prior interlocutory decisions, even where such requests are well-founded.

3. Ground 46: Mitigation for contribution to the peace process

55. The Trial Chamber found that Sesay's contribution to the peace process in Sierra Leone was a mitigating factor.[76] The Appeals Chamber holds that the Trial Chamber erred in law by failing to state what weight it attached to this mitigating factor.[77] Nonetheless, the Majority dismisses Sesay's claim that the Trial Chamber erred by failing to attach any weight to this factor because, it holds, Sesay fails to meet "the burden of demonstrating that the Trial Chamber abused its discretion."[78]

56. I concur with the Majority that the Trial Chamber erred in law. I am unable to agree with the manner in which it then disposes of the issue. I fail to see how Sesay could have demonstrated how the Trial Chamber abused its discretion when the Trial Chamber itself did not state how, or even if, it used its discretion in weighing the effect of Sesay's post-conflict conduct once it found that conduct to be a mitigating factor in determining Sesay's sentence. Sesay cannot be expected to demonstrate an error in a finding the Trial Chamber did not make.

57. The Trial Chamber considered "several witness statements lending support to the suggestion that Sesay made a critical contribution to the peace process."[79] Among them were statements by the Special Representative of the Secretary-General of the UN to Sierra Leone from 1999-2003 (and subsequently Chair of the African Union), Oluyemi Adeniji, and by the President of ECOWAS from 1999-2000 and former President of Mali, Alpha Konaré.[80] Mr. Adeniji stated that Sesay "undoubtedly, direct[ed] a lot of his energies towards bringing the RUF to disarmament in the face of internal opposition." For his part, Mr. Konaré stated that Sesay "never created any preconditions

[75] *Norman* Decision on Prosecution Appeal Against Refusal of Leave to File an Interlocutory Appeal, para. 34, *citing Delić et al*. Judgment on Sentence Appeal, para. 48. *See* also *Brima et al*. Appeal Judgment, para. 63, *quoting Ntagerura et al*. Appeal Judgment, para. 55.
[76] Sentencing Judgment, para. 228.
[77] Appeal Judgment, para. 1238.
[78] Appeal Judgment, para. 1238.
[79] Sentencing Judgment, para. 226.
[80] Sentencing Judgment, para. 226.

for the RUF's disarmament" and "appeared to be such a contrast to the other commanders and indeed Sankoh himself, that he appeared to be an anomaly in the RUF movement."[81]

58. The Trial Chamber's failure to explain how it weighed this and other evidence regarding Sesay's post-conflict conduct in mitigation, or if it weighed it at all, was a legal error. Having found that this conduct constituted a mitigating factor, the Trial Chamber was obliged to take it into account[82] and provide a reasoned opinion as to how it took it into account. Rather than hypothesizing on how the Trial Chamber approached this issue,[83] the Appeals Chamber should itself have considered Sesay's mitigating post-conflict conduct when reconsidering his sentence.

D. Failure to plead locations with sufficient specificity

59. I also write separately with regard to whether locations were pleaded with sufficient specificity in the Indictment.

60. I join the Appeals Chamber's opinion that the question is one of fairness to the accused.[84] I agree that the key issue is whether the material facts are pleaded in an indictment with enough specificity so that an accused can adequately prepare his defence.[85]

61. Analysing Kallon's Ground 12, the Appeals Chamber lists some factors for determining whether locations were pleaded with sufficient specificity.[86] I agree that applying the factors to the charge that Kallon instigated the murder of Waiyoh at Wendedu in Kono District necessitates that this conviction is quashed.

62. I differ with the Appeals Chamber's application of the factors under Kallon's Grounds 16, 19 and 22. While I concur in the result under Ground 22, I must respectfully dissent from the Majority's holding under Kallon Grounds 16 and 19. I also dissent from the Majority's summary dismissal of Sesay's argument regarding the pleading of acts of burning in Koidu Town, which he makes under his Ground 8.

63. In Ground 22, Kallon objects to the pleading of looting of the Tankoro Bank in Koidu Town. The Appeals Chamber finds that Kallon did not need the location to be pleaded with greater

[81] Sentencing Judgment, para. 226.
[82] Appeal Judgment, para. 1238; Art. 19(2) of the Statute.
[83] *See* Appeal Judgment, para. 1238.
[84] Appeal Judgment, para. 836.
[85] Appeal Judgment, para. 829*; Ntagerura* Appeal Judgment, para. 22.

specificity in order to prepare his defence, because the conduct giving rise to Kallon's JCE liability for the looting included his participation in killings in Koidu Town, which were specifically pleaded.

64. I concur that Kallon was given adequate notice of the location of the charged conduct, but because the looting was part of a massive and "systematic campaign,"[87] called "Operation Pay Yourself", which started in Bombali District and spread to numerous locations including Koidu Town.[88] As a consequence of "Operation Pay Yourself", looting civilian property became a "key component"[89] and systemic feature of AFRC/RUF operations.[90] In light of the pervasiveness of this crime and that it was happening simultaneously in many locations in the larger area (Kono District) in which Koidu Town is situated, it was sufficient and accurate for the Indictment to plead that there was "widespread looting … in various locations in [Kono] District."[91]

65. In Ground 16, Kallon contends he lacked notice of acts of burning as acts of terrorism in Koidu Town. Sesay similarly objects in his Ground 8. Acts of burning were charged under Counts 1, 2 and 14,[92] but none of these counts names Koidu Town as a location.[93] The Appeals Chamber denied these grounds and reasoned that because much of Kallon's conduct that gave rise to his JCE liability for the crimes did not occur in Koidu Town, the location did not need to be pleaded with greater specificity for Appellants to prepare their defence.

66. In my view, this reasoning is correct only to the extent that an accused's ability to provide certain defences, such as alibi, depend on his ability to challenge evidence of his presence at the location where his culpable conduct was alleged to have taken place.[94] The accused, however, is entitled to prepare a defence against *both* the allegation that the crime occurred and the allegation that he is liable for the crime (*i.e.,* "the nature and cause of the charges"[95]). To defend against the former, he must have adequate notice of the location of the offence, which would not vary as a result of the mode of liability charged. Thus, the Majority's inquiry should not have ended with its

[86] Appeal Judgment, para. 830.
[87] Trial Judgment, para. 1336.
[88] Trial Judgment, para. 961.
[89] Trial Judgment, para. 2071.
[90] Trial Judgment, paras 783-784.
[91] Indictment, para. 80.
[92] Appeal Judgment, paras 86, 89.
[93] *See* Appeal Judgment, para. 884.
[94] *Niyitegeka* Appeal Judgment, para. 61.
[95] Article 17(4)(a) of the Statute; *See* also ICCPR, art. 14(3)(a); ECHR, art. 6(3)(a); ACHR, art. 7(4); HRC General Comment ("not only the exact legal description of the offence but also the facts underlying it")

examination of the form of the accused's participation in the crime. It should have also examined whether the other factors it identified led to the conclusion that the accused had sufficient notice of the location of the crimes.

67. In applying those factors, I consider that the failure to plead Koidu Town as the location of burning as acts of terrorism and collective punishment rendered the Indictment defective as to this criminal incident. In contrast to the systemic looting described above, the burnings of civilian houses did not happen simultaneously in many locations within a larger area which was sufficiently pleaded. Instead, as found by the Trial Chamber, it was restricted to Koidu Town[96] in order to punish civilians for failing to support the AFRC/RUF.[97] The only other location in Kono District in which the Trial Chamber found burnings was Tombodu, a village which was much smaller than Koidu Town and removed by some considerable distance. Tombodu was specifically pleaded in the Indictment.[98] Koidu Town, the seat of Kono District and the site of significant destruction by burning, was not. There was nothing in the Indictment to place Sesay or Kallon on notice that they were being charged with the crimes of acts of terrorism and collective punishments for the large scale burning of Koidu Town, crimes for which they were ultimately convicted.

68. In Ground 19, Kallon contests the pleading of Penduma and Yardu for crimes committed against four individuals for which he was convicted for mutilations under Count 10 and physical violence under Count 11. Again, the Majority considers that because Kallon's conduct that gave rise to his JCE liability for the crimes in Penduma and Yardu did not occur in those towns, he did not need the locations to be pleaded with greater specificity in order to prepare his defence.[99] For the reasons above, I disagree with the degree of reliance on the location of Kallon's culpable conduct.

69. In addition, I dissent from the Majority's holding because I do not consider that the Appellants could have prepared their defence against the allegations of mutilations and physical violence of the four individuals in Penduma[100] and in Yardu[101] unless the names of the villages where these crimes occurred were specified. The very fact that the Appellants were charged with mutilations occurring on a widespread scale over many Districts makes it even more essential that,

[96] Trial Judgment, para. 1141 (finding that the day after capturing Koidu Town, Johnny Paul Koroma ordered that "all of the houses in Koidu Town should be burned to the ground").
[97] Trial Judgment, para. 1361.
[98] Trial Judgment, paras 159-1160, 1361; Indictment, para. 80.
[99] Appeal Judgment, paras 903, 904.
[100] Trial Judgment, para. 795.

when the Prosecution seeks convictions for distinct acts of criminal conduct, the accused are provided sufficient information to investigate the specific crimes Pleading an entire District as the location of particular crimes known by the Prosecutor to have occurred in a specific town or village, fails to provide the specificity as to location that is required for the preparation of the defence. Unlike crimes that are not particularly connected to a precise location because of their continuous and ambulant nature (*e.g.*, load-carrying and food-gathering as enslavement and force marriage in Kailahun District), or repetitive and pervasive character (*e.g.*, enslavement, sexual slavery and forced marriage in Kailahun District[102]), these crimes were temporally and geographically discrete events that the Prosecution established, through witness testimony, to have taken place in named locations.[103] It was, in my view, necessary to plead these locations.

70. The Majority concludes, I believe wrongly, that the Trial Chamber was correct when it declined to review on appeal the adequacy of the pleading of locations and relied instead on its pre-trial decisions on the form of the Indictment. That Trial Court decision, which the Majority upholds, relied on the mode of liability and in addition the "sheer scale" exception without inquiring further as to the necessity for, or the practicability of, alleging particular locations. It concluded that pleading entire districts or using phrases "such as" and "including but not limited to" was "acceptable if the reference is … to locations but not otherwise."[104] The Trial Chamber fails to reason this conclusion or explain why location is as a general matter less material to notice necessary to understand the charges and prepare a defence than other facts for which it did not allow such vague pleading.

71. In my view, the Majority wrongly upholds the Trial Chamber in its application of the "sheer scale" exception to the pleading of locations because the exception does not apply when it is practicable for the Prosecution to adduce witness evidence of the material fact.[105] Contrary to the approach adopted by the Trial Chamber in its pre-trial decision on the form of the Indictment, it is not enough simply to find the cataclysmic dimensions of the alleged criminality.[106] Rather, the "sheer scale" exception is grounded in the impracticability of pleading in greater detail *as a*

[101] Trial Judgment, paras 1186-1187.
[102] *See e.g.,* Trial Judgment, para. 1479, 1485 (enslavement), 1409-1410 (sexual slavery and forced marriage).
[103] Trial Judgment, paras 1198 (TF1-217 in regard to Penduma), 1186-1187 (TF1-197 in regard to Yardu).
[104] *Sesay* Decision on Form of Indictment, para. 23.
[105] *Ntakirutimana* Appeal Judgment, paras. 73-74; *Kupreškić et al.* Appeal Judgment, para. 89.
[106] *See Sesay* Decision on Form of Indictment, para. 23.

consequence of the scale of the alleged crimes,[107] and the Trial Chamber therefore must assess not only the general dimensions of the criminality, but, given the crimes as pleaded in the Indictment, whether the scale of the crimes charged made it "impracticable" for the Prosecution to plead locations with greater specificity.[108] As held by the ICTY and ICTR Appeals Chambers, the Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused in the course of the trial depending on how the evidence unfolds.[109]

72. The Prosecution did know before proceeding to trial about the acts of mutilation and physical violence against the four persons in Penduma and Yardu. The Prosecution's Supplemental Pre-Trial Brief shows that it would adduce evidence of the exact crimes under Counts 10 and 11 that were found to have occurred at those villages. In relation to Penduma, the Prosecution knew it had a witness who would, and did, testify with specificity about the specific events of the crime.[110] In relation to Yardu, the Prosecution knew that the witness it would later rely upon at trial expressly named Yardu during the investigation as the location of the exact crimes which were found by the Trial Chamber.[111]

73. Likewise, it was practicable for the Prosecution to include in the Indictment that the burnings that were charged as Acts of Terrorism and Collective Punishment in Kono occurred in

[107] *Kvočka et al.* Appeal Judgment, para. 30 ("[E]ven where it is impracticable or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused and the trial should only proceed where the right of the accused to know the case against him and to prepare his defence has been assured."). *See* also *Kupreškić et al.* Appeal Judgment, para. 92; *Niyitegeka* Appeal Judgment, para. 194; *Blaškić* Appeal Judgment, para. 220; *Ntakirutimana* Appeal Judgment, para. 26; *Kvočka et al.* Appeal Judgment, paras 30-31; *Naletilić and Martinović* Appeal Judgment, para. 25; *Ntagerura et al.* Appeal Judgment, para. 27.
[108] *Kupreškić et al.* Appeal Judgment, para. 89.
[109] *Ntagerura et al.* Appeal Judgment, para. 27; *Niyitegeka* Appeal Judgment, para. 194; *Kvočka et al.* Appeal Judgment, para. 30; *see* also *Kupreškić et al.* Appeal Judgment, para. 92.
[110] *Compare* Prosecution Supplemental Pre-Trial Brief, pp. 34-35 (stating that Witness TF1-217 would testify that, "The witness was forced to watch his wife raped by 8 men. She and other women who had been raped were later stabbed to death. The witness then had an arm amputated after 11 strikes and was told to go to Kabbah with a message.") *with* Trial Judgment, paras 1193-1198 (finding TF1-217's was raped by eight men and his hand amputated).
[111] *Compare* Prosecution Supplemental Pre-Trial Brief, pp. 40-41 (stating that Witness TF1-197 would testify that, "The witness was captured a third time and taken to Yardu. The rebel commander ordered his amputation. The witness's left hand was amputated. Rebels beat, cut and shot to death 6 other men. The witness given [*sic*] letter for Kabbah.") *with* Trial Judgment, para. 1187 (finding on the basis of TF1-197's testimony that "The rebels amputated TF1-197's arm with a cutlass. They told him to go to President Kabbah, because Kabbah had extra hands and could fix his amputation. The rebels gave him a letter to give to Kabbah.").

Koidu Town. The Prosecution Supplemental Pre-Trial Brief shows that a witness relied upon by the Trial Chamber would give evidence in relation to Koidu Town, that the "rebels burnt the town."[112]

74. This information might have been considered (with additional disclosures) to cure the defective Indictment, but, as the Appeals Chamber noted, "the Prosecution bears the burden of showing on appeal that the defect in the Indictment did not prejudice Kallon's ability to prepare his defence. The Prosecution has not offered any submissions that Kallon had notice of the charge as a result of timely, clear and consistent information detailing the factual underpinnings of the charge."[113]

75. Since the Prosecution knew from the outset the evidence with which it intended to establish these discrete and site-specific crimes, the "sheer scale" exception did not apply. The Trial Chamber's application of the "sheer scale" exception to relieve the Prosecution of its duty to name these locations in the Indictment is, in my opinion, an error, resulting from the Trial Chamber's failure to first inquire as to whether it was practicable for the Prosecution to provide more details in the Indictment.

76. The error is compounded by the Trial Chamber's attenuated analysis of whether the pleading of locations was defective. Rather than properly assessing the degree of specificity required for the pleading of locations, the Trial Chamber wrongly considered the Appeals Chamber to have "explicitly held that it falls within the discretion of a Trial Chamber to limit evidence that falls outside locations not specifically mentioned in the Indictment."[114] Relying in part on this incorrect reading of the Appeals Chamber's holding in *Brima et al.*, the Trial Chamber failed to consider whether the Appellants lacked sufficient notice of crimes charged at locations that were not named in the Indictment.[115]

77. Contrary to the interpretation ascribed by the Trial Chamber, the Appeals Chamber actually held that the *Brima et al.* Trial Chamber properly exercised its discretion to (i) reverse a previous decision that the pleading of locations was sufficient, (ii) hold that the pleading of locations was defective, and (iii) refuse to enter convictions for crimes at unnamed locations. The Appeals Chamber stated that it falls within the discretion of a Trial Chamber to reconsider such a decision if

[112] Prosecution Supplemental Pre-Trial Brief, p. 314 (TF1-217: "This witness will testify that after the February 1998 ECMOG Intervention, AFRC and RUF forces occupied Koidu. Rape became frequent. The Kamajors expelled the rebels but shortly afterwards AFRC/RUF recaptured the town. After re-entry the rebels burnt the town."),
[113] Appeal Judgment, para. 835.
[114] Trial Judgment, para. 422.

a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.[116] The Appeals Chamber further held that:

> [T]he Trial Chamber's limited treatment of the evidence of crimes committed in such locations was a proper exercise of its discretion in the interest of justice, taking into account that it is the Prosecution's obligation to plead clearly material facts it intends to prove, so as to afford the Appellants a fair trial.[117]

78. By so holding, the Appeals Chamber agreed with the *Brima et al.* Trial Chamber that the pleading of locations non-exhaustively through the use of phrases such as "in locations including," "in various locations in [a specified] District, including," "in several locations including" is insufficiently specific and can render an indictment defective in regard to crimes charged at unnamed locations.

79. I recognise that in cases of crimes committed on a massive scale there are inherent difficulties in pleading the material facts, such as the identity of the victims, the time and place of the events, and the means by which the offence was committed. Nonetheless, since the *Brima et al.* Appeal Judgment, the Appeals Chamber has held that Trial Chambers must apply the "sheer scale" exception in a manner that safeguards the fair trial rights of the accused. To do so, I would submit, the Trial Chamber must determine the degree of specificity for pleading locations particular to the charges in the Indictment and whether it is practicable for the Prosecution to plead location with sufficient specificity to give notice of the crimes alleged. The factors provided by the Appeals Chamber, and discussed above, guide an assessment of the required degree of specificity for pleading locations. It is my view that such inquiry must focus on the relevance of location both to the accused's ability to defend against the crime itself and against his liability for the crime.

80. As held by the ICTY and ICTR Appeals Chambers, where the Trial Chamber finds that the Prosecution was capable of pleading a material fact, but it did not, then the "sheer scale" exception does not apply.[118] If the Trial Chamber concludes that the Indictment is defective, such defects will render the trial unfair with respect to the affected charge if the Prosecution has not cured the

[115] Trial Judgment, para. 422.
[116] *Brima et al.* Appeal Judgment, para. 63 (emphasis added).
[117] *Brima et al.* Appeal Judgment, para. 63.
[118] *Ntakirutimana* Appeal Judgment, paras. 73-74 ("[T]he Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the 'sheer scale' of the crime made it impossible to identify that individual in the Indictment."); *Kupreškić et al.* Appeal Judgment, para. 89.

resulting prejudice by providing timely, clear and consistent notice of the material facts of the charge.[119]

81. For the reasons above, I find the locations of the crimes in Penduma and Yardu, and the burnings in Koidu Town should have been pleaded in the Indictment by reference to the village and town names. The sheer scale exception does not excuse the Prosecution's failure to plead the names of the locations when it knew from the outset the evidence with which it intended to establish that these discrete crimes occurred at specified locations. The resulting prejudice from these defects may have been cured by subsequent Prosecution disclosures, but, if so, the Prosecution made no attempt to demonstrate this.

82. I therefore find the Indictment defective with respect to the pleading of Koidu Town under Counts 1, 2 and 14 and Penduma and Yardu under Counts 10 and 11. I further find that although the pleading of Penduma and Yardu under Counts 10 and 11 was only challenged on appeal by Kallon, the lack of notice with respect to these named locations affected the fair trial rights of Sesay as well since he was also convicted for these crimes.[120] I would, therefore, allow Sesay's Ground 8, in part, and Kallon's Grounds 19 and 22 and reverse the convictions for Sesay and Kallon under Counts 1 and 2 for acts of burning in Koidu Town and Counts 10 and 11 for the crimes at Penduma and Yardu in Kono District. As I would not have found JCE liability for Gbao, I need not address his liability for crimes at these locations.

83. I fully join the opinions and conclusions expressed by Hon. Justice Winter in her Partially Concurring Opinion regarding the correct *mens rea* standard for the crime of conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Done at Freetown this 26th day of October, 2009

Hon. Justice Shireen Avis Fisher

[Seal of the Special Court for Sierra Leone]

[119] *See e.g. Simić* Appeal Judgment, paras 23, 24; *Gacumbitsi* Appeal Judgement, para. 163; *Kupreškić et al.* Appeal Judgment, para. 114.
[120] *See Kvočka et al.* Appeal Judgment, para. 76.

ANNEX I: PROCEDURAL HISTORY

1. The Prosecution and the Defence filed their respective Notices of Appeal on 28 April 2009.[3843] Sesay raised forty-six (46) grounds of appeal, Kallon raised thirty-one (31) grounds of appeal, Gbao raised nineteen (19) grounds of appeal and the Prosecution raised three (3) grounds of appeal.

2. On 30 April 2009, Kallon filed a Motion for Extension of Time to File Appeal Brief and Extension of Page Limit.[3844] The Pre-Hearing Judge allowed the motion in part, granting the Parties an extension of time of 10 days and no later than 1 June 2009 to file their Appeal Briefs; and an extension of time of 7 days and no later than 24 June 2009 to file their Response Briefs. The Parties were further granted an extension of page limits of 50 pages for their Appeal Briefs and Response Briefs respectively. The Parties were not granted any extension of time or extension of page limits for their Reply Briefs.[3845]

3. On 5 May 2009, Sesay filed an Application for Extension of Time to File Appeal Brief and Extension of Page Limit[3846] requesting that the deadline for the submission of Appeal Briefs be extended by 2 weeks and the page limits extended to 300 pages. The Pre-Hearing Judge denied the Motion.[3847]

4. On 7 May 2009, Sesay filed a motion requesting the Appeals Chamber to Order the Prosecution to Disclose Rule 68 Material. The Appeals Chamber dismissed the motion in its entirety holding that the Prosecution had not breached its disclosure obligations.[3848]

5. On 11 May 2009, Kallon filed a Motion for Leave to File an Amended Notice and Grounds of Appeal[3849] due to a number of typographical errors in sections of his Notice and Grounds of

[3843] Prosecution's Notice of Appeal, 28 April 2009; Sesay Notice of Appeal, 28 April 2009; Kallon's Notice and Grounds of Appeal, 28 April 2009; Notice of Appeal for Augustine Gbao, 28 April 2009.
[3844] Kallon Defence Motion for Extension of Time to File Appeal Brief and Extension of Page Limit, 30 April 2009.
[3845] Decision on Kallon Defence Motion for Extension of Time to File Appeal Brief and Extension of Page Limit, 4 May 2009.
[3846] Sesay Defence Application for Extension of Time to File Appeal Brief and Extension of Page Limit, 5 May 2009.
[3847] Decision on Sesay Defence Application for Extension of Time to File Appeal Brief and Extension of Page Limit, 7 May 2009.
[3848] Decision on Sesay Defence Motion Requesting the Appeals Chamber to Order the Prosecution to Disclose Rule 68 Material, 16 June 2009.
[3849] Kallon Defence Motion for Leave to File an Amended Notice and Grounds of Appeal, 11 May 2009.

Appeal. The motion was granted by the Appeals Chamber[3850] and an Amended Kallon's Notice and Grounds of Appeal was filed on 13 May 2009.[3851]

6. The Prosecution, Kallon and Gbao filed their respective Appeal Briefs on 1 June 2009.[3852] Sesay filed his Appeal Brief on 2 June 2009. The Parties filed their Response Briefs on 24 June 2009.[3853] The Parties' Reply Briefs were filed on 29 June 2009,[3854] with the exception of Kallon's public Reply Brief which was filed on 19 October 2009.[3855]

7. On 19 June 2009, Sesay submitted a Request to File a Motion in Excess of Ten Pages[3856] in anticipation of his intention to file a motion pursuant to Rule 115 to introduce additional evidence from *Prosecutor v Taylor* for consideration on Appeal. On 22 June 2009, the Pre-Hearing Judge granted the motion in part and ordered that the Defence file a motion pursuant to Rule 115 not exceeding twenty (20) pages.[3857]

8. On 26 June 2009, the Prosecution filed a Request for Extension of Page Limit for Response to the Sesay Rule 115 Motion.[3858] The Pre-Hearing Judge granted the motion on 30 June 2009 and ordered that the Prosecution file a response to the Sesay Defence motion pursuant to Rule 115 not exceeding twenty (20) pages.[3859]

9. On 29 June 2009, Gbao filed a Request under Rule 115 for Additional Evidence from *Prosecutor v Taylor* to be admitted on Appeal.[3860] The Pre-Hearing Judge dismissed the Motion[3861] because it was not satisfied that non-admission of the evidence would amount to a miscarriage of justice.

[3850] Decision on Kallon Defence Motion for Leave to File an Amended Notice and Grounds of Appeal, 12 May 2009.
[3851] Kallon Defence Amended Kallon's Notice and Grounds of Appeal, 13 May 2009.
[3852] Prosecution Appeal Brief, 2 June 2009; Sesay Grounds of Appeal, 2 June 2009; Kallon Appeal Brief, 2 June 2009; Appeal Brief for Augustine Gbao, 2 June 2009.
[3853] Prosecution Response Brief, 24 June 2009; Sesay Defence Response to Prosecution Grounds of Appeal, 24 June 2009; Kallon Response to Prosecution Appeal Brief, 24 June 2009; Gbao Response to Prosecution Appellant Brief, 24 June 2009.
[3854] Prosecution Reply Brief, 29 June 2009; Sesay Reply to Prosecution Response to Sesay Grounds of Appeal, 29 June 2009; Kallon Reply to Prosecution Response Brief, 29 June 2009; Gbao Reply to Prosecution Response to Gbao Appellant Brief.
[3855] Kallon Reply to Prosecution Response Brief, 19 October 2009.
[3856] Sesay Defence Request to File a Motion in Excess of Ten Pages, 19 June 2009.
[3857] Decision on Sesay Defence Request to File a Motion in Excess of Ten Pages, 22 June 2009.
[3858] Prosecution Request for Extension of Page Limit for Response to Sesay Rule 115 Motion, 26 June 2009.
[3859] Decision on Prosecution Request for Extension of Page Limit for Response to Sesay Rule 115 Motion, 30 June 2009.
[3860] Gbao Defence Request under Rule 115 for Additional Evidence to be Admitted on Appeal, 29 June 2009.
[3861] Decision on Gbao Defence Request under Rule 115 for Additional Evidence to be Admitted on Appeal, 5 August 2009.

10. On 29 June 2009, Sesay filed a motion requesting that the Appeals Chamber Admit Additional Evidence from *Prosecutor v Taylor* pursuant to Rule 115[3862] for consideration in Sesay's appeal. On 6 July 2009, the Appeals Chamber dismissed the Motion holding that it was improperly filed.[3863] The Appeals Chamber granted the Sesay Defence liberty to file the Motion before the Pre-Hearing Judge within one day from the filing of the Ruling. The Sesay Defence filed a Request that the Pre-Hearing Judge Present Additional Evidence from *Prosecutor v Taylor* before the Appeals Chamber[3864] on 7 July 2009. On 5 August 2009, the Pre-Hearing Judge dismissed the Sesay Defence Motion as it was not satisfied that non-admission of the evidence would amount to a miscarriage of justice.[3865]

11. On 31 August 2009, Sesay requested that the Pre-Hearing Judge Present to the Appeals Chamber Exhibit MFI-134 from *Prosecutor v Taylor*, pursuant to Rule 115.[3866] The Appeals Chamber denied Sesay's request on 14 October 2009.[3867]

12. The Appeals Chamber filed a Scheduling Order for Appeal Hearing[3868] on 3 August 2009 and oral arguments of the Parties were heard by the Appeals Chamber on 2, 3 and 4 September 2009 respectively.

[3862] Sesay Defence Request that the Appeals Chamber Admit Additional Evidence from *Prosecutor v Taylor*, 29 June 2009.
[3863] Decision on Sesay Defence Request that the Appeal's Chamber Admit Additional Evidence from *Prosecutor v Taylor*, 6 July 2009.
[3864] Sesay Defence Request that the Pre-Hearing Judge Present Additional Evidence from *Prosecutor v Taylor* before the Appeals Chamber, 7 July 2009.
[3865] Decision on Sesay Defence Request that the Pre-Hearing Judge Present Additional Evidence from *Prosecutor v Taylor* before the Appeals Chamber, 5 August 2009.
[3866] Sesay Defence Request that the Pre-Hearing Judge Present to the Appeals Chamber Exhibit MFI-134 from *Prosecutor v Taylor*, 31 August 2009.
[3867] Decision on Sesay Request to Admit Exhibit MFI-134 from *Prosecutor v Taylor*, 14 October 2009.
[3868] Scheduling Order for Appeal Hearing, 3 August 2009.

ANNEX II: GLOSSARY

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I. List of abbreviations

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
a.k.a.	Also known as
CDF	Civil Defence Forces
Cf.	Compare with
DDR	Disarmament, Demobilisation and Reintegration
Partially Dissenting Opinion of Justice Boutet	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, Partially Dissenting Opinion of Justice Pierre G. Boutet
Corrigendum to Sesay Appeal	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Corrigendum to the Grounds of Appeal, 8 June 2009
G1, G2, G3, G4, G5	RUF General Staff units, Trial Judgment, para. 675
Gbao Reply	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Public Gbao- Reply to Prosecution

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Geneva Conventions (I)-(IV)	UN Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31 (entered into force 21 October 1950); UN Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces in at Sea, 12 August 1949, 75 U.N.T.S. 85 (entered into force 21 October 1950); UN Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950); UN Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950)
Gullit	Alias of Alex Tamba Brima, Trial Judgment, para. 33
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
IDU	RUF Internal Defence Unit, Trial Judgment, paras 675, 682-687

Indictment	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment, 2 August 2006
Indictment Period	30 November 1996 to 15 September 2000, Indictment, paras 16, 83
IO	RUF Intelligence Office, Trial Judgment, paras 675, 688-689
JCE	Joint Criminal Enterprise
JCE 1, JCE 2, JCE 3	First category of JCE, Second category of JCE, Third category of JCE
JSBI	RUF Joint Security Board of Investigations, Trial Judgment, paras 701-703
Junta Period	25 May 1997 to February 1998. Trial Judgment, paras 743-781, 2076.
Kallon Reply	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Kallon Reply to Prosecution Response, 29 June 2009.
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MP	RUF Military Police, Trial Judgment, paras 679, 690, 691
NPFL	National Patriotic Front of Liberia
OSC	RUF Overall Security Commander, Trial Judgment, paras 697-700
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Prosecution Notice of Appeal	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Prosecution's Notice of Appeal, 28 April 2009.
Prosecution Notice Concerning JCE	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Prosecution Notice Concerning Joint Criminal Enterprise and Raising Defects in the Indictment, 3 August 2007.
Sesay Reply	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Public Reply to Prosecution Response to Sesay Grounds of Appeal, 29 June 2009.
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Sesay Appeal	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Public Corrected Redacted Grounds of Appeal, 15 June 2009.
Sesay Notice of Appeal	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Public Sesay Notice of Appeal, 28 April 2009.
Sesay Final Trial Brief	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Confidential Sesay Final Trial Brief, 1 August 2008.
Special Court	The Special Court for Sierra Leone was established in 2000 by an agreement between the United Nations and the Government of Sierra Leone with a mandate to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.
STF	Special Task Force, Trial Judgment, para. 17
Trial Chamber	Trial Chamber I
Trial Judgment	*Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine*

	Gbao, Case No. SCSL-04-15-T, Judgement, 2 March 2009
UNAMSIL	United Nations Mission in Sierra Leone. The UN Security Council passed Resolution 1270 authorising the deployment of 6000 UN peacekeepers to Sierra Leone
Vanguard	Title within RUF, Trial Judgment, paras 11, 667-669, 2012.