

Case No. SCSL-2004-15-A

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

MONDAY, 26 OCTOBER 2009
10.30 A.M.
TRIAL

APPEALS CHAMBER

Before the Judges:	Justice Renate Winter, President Justice Jon Kamanda Justice George Gelaga King Justice Emmanuel Ayoola Justice Shireen Avis Fisher
For Chambers:	Mr Stephen Kostas Ms Rhoda Kargbo Mr Joakim Dungal
For the Registry:	Ms Elaine Bola-Clarkson Mr Thomas E Alpha
For the Prosecution:	Mr Joseph Kamara Mr Mohamed A Bangura Mr Reginald Fynn Mr Jeremy Waiser Ms Bridget Osho
For the Appellant Sesay:	Mr Wayne Jordash Ms Sareta Ashraph Mr Jared Keitel
For the Appellant Kallon:	Mr Charles Taku Mr Ogeto Kennedy Mr Mohamed P Fofanah
For the Appellant Gbao:	Mr John Cammegh
For the Office of the Principal Defender:	Ms Claire Carlton-Hanciles

1 THE COURT USHER: The Special Court for Sierra Leone,
2 Appeals Chamber. Justice Winter presiding. The case of the
3 Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao,
4 case number SCSL-0415A. All persons having anything to do before
5 this Special Court Appeals Chamber please draw near and give your
6 attendance.

7 JUSTICE WINTER: Thank you. Good morning. First of all I
8 would like to make sure that the accused persons can hear me.
9 May I ask you, Mr Sesay, if you can hear me and follow the
10 proceedings through translator?

11 ISSA SESAY: Yes.

12 JUSTICE WINTER: Thank you. May I ask Mr Kallon if he can
13 hear me and follow the proceedings through translation?

14 MORRIS KALLON: Yes, my Lord.

15 JUSTICE WINTER: Thank you. May I ask now Mr Gbao if he
16 can hear me and follow the proceedings through translation?

17 AUGUSTINE GBAO: Yes, your Honour.

18 JUSTICE WINTER: Thank you. Okay, I call now for the
19 appearances. The Prosecutor, please.

20 MR KAMARA: May it please your Honours, this morning, for
21 the Prosecution Joseph Kamara and with me, Mohamed A Bangura,
22 Reginald Fynn, Jeremy Waiser and Bridget Osho.

23 JUSTICE WINTER: Thank you. Now, counsel for Mr Sesay.

24 MR JORDASH: Good morning. Myself, Wayne Jordash, Sareta
25 Ashraph and Jared Kneitel.

26 JUSTICE WINTER: Thank you. The counsel for Mr Kallon,
27 please.

28 MR TAKU: May it please your Lordships, Chief Charles Taku
29 for Mr Kallon. With me is Mr Ogeto Kennedy and Mr Mohamed

1 Fofanah.

2 JUSTICE WINTER: Thank you. And finally the counsel for
3 Mr Gbao, please.

4 MR CAMMEGH: John Cammegh for Augustine Gbao.

5 JUSTICE WINTER: Thank you very much.

6 The Appeals Chamber of the Special Court for Sierra Leone
7 convenes today pursuant to its scheduling order issued on 12
8 October 2009 to deliver its judgment on appeal in the case of
9 Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao.
10 Following the practice of the Special Court, I will now not read
11 out the text of the judgment except for the disposition.
12 Instead, I will summarise some of the main findings of the
13 Appeals Chamber. This summary is neither exhaustive, nor part of
14 the judgment itself, which is the only authoritative account of
15 the Appeals Chamber rulings. Copies of the written judgment will
16 be available from the Registrar after this hearing.

17 This case concerns the role of Issa Hassan Sesay, Morris
18 Kallon and Augustine Gbao in the events that occurred during the
19 armed conflict in Sierra Leone. At times I will refer to the
20 three individuals collectively as the appellants.

21 On 25 February 2009 the Trial Chamber found Sesay and
22 Kallon guilty under Counts 1 through 14 for extermination,
23 murder, rape, sexual slavery, other inhumane acts, in particular
24 forced marriages and physical violence, and enslavement as crimes
25 against humanity pursuant to Article 2 of the Statute; for acts
26 of terrorism, collective punishment, murder, outrages upon
27 personal dignity, mutilation and pillage as war crimes pursuant
28 to Article 3 of the Statute; and for conscripting or enlisting
29 children under the age of 15 years into armed forces or groups or

1 using them to participate actively in hostilities as another
2 serious violation of the laws of war pursuant to Article 4 of the
3 Statute.

4 A majority of the Trial Chamber, Justice Boutet dissenting,
5 found Gbao guilty under Counts 1 through 11, 13 and 14, for
6 extermination, murder, rape, sexual slavery, other inhumane acts,
7 in particular forced marriages and physical violence, and
8 enslavement as crimes against humanity pursuant to Article 2 of
9 the Statute; and for acts or terrorism, collective punishments,
10 murder, outrages upon personal dignity, mutilation and pillage as
11 war crimes pursuant to Article 3 of the Statute.

12 The Trial Chamber also found the three appellants guilty
13 under Count 15 for intentionally directing attacks against
14 peacekeepers pursuant to Article 4 of the Statute, and Sesay and
15 Kallon were found guilty under Count 17 for violence to life,
16 health, physical or mental well-being of persons for the murder
17 of UNAMSIL peacekeepers pursuant to Article 3 of the Statute.

18 Not guilty verdicts were entered for all of the appellants
19 in respect of Count 16, which charged murder as a crime against
20 humanity, and Count 18 the taking of hostages. Gbao was
21 additionally found not guilty in respect of Count 12 for
22 conscripting or enlisting children under the age of 15 years into
23 armed forces, or groups, or using them to participate actively in
24 hostilities pursuant to Article 4 of the Statute, and in respect
25 of Count 17 for the murder of UNAMSIL peacekeepers pursuant to
26 Article 3 of the Statute.

27 On 8 April 2009, the Trial Chamber sentenced Sesay to a
28 total term of imprisonment of 52 years and Kallon on a total term
29 of imprisonment of 40 years. The majority of the Trial Chamber,

1 Justice Boutet dissenting, sentenced Gbao to a total term of
2 imprisonment of 25 years.

3 The Trial Chamber ordered each appellant's sentences to run
4 concurrently for all the counts.

5 The appellants and the Prosecution appealed the judgment of
6 the Trial Chamber and the appellants also appealed the sentences.
7 Sesay filed 46 grounds of appeal, Kallon filed 31 grounds of
8 appeal, Gbao filed 19 grounds of appeal and the Prosecution filed
9 three grounds of appeal. Oral hearings on appeal took place on
10 2, 3 and 4 September 2009.

11 Before turning to the merits of the appeals, I wish to note
12 that the Appeals Chamber has found that many of the appellants'
13 grounds of appeal share common deficiencies in that they are
14 vague, unsupported, undeveloped, failed to articulate the precise
15 error alleged, or are made outside the page limit allowed for
16 appellate submissions. Numerous submissions were summarily
17 dismissed for these reasons.

18 In addition to the above mentioned formal deficiencies in
19 the pleadings, many of the grounds of appeal were poorly
20 structured and organised. For instance, the parties group a
21 range of disparate arguments each concerning a substantial issue
22 under a single ground of appeal. The parties also frequently
23 raised the same argument in numerous grounds of appeal.

24 In the interests of justice, the Appeals Chamber has
25 endeavoured to fully consider these problematic submissions,
26 subject to the summarily dismissals outlined above. We note,
27 however, that the poorly structured and disorganised grounds of
28 appeal failed to assist the Appeals Chamber in its consideration
29 of the issues and arguments.

1 The Appeals Chamber observes that the tone and the language
2 of some submissions do not meet the standard expected of those
3 appearing before the Special Court. Although zealous advocacy is
4 encouraged, counsel should nevertheless maintain a respectful and
5 decorous tone in their submissions.

6 As an additional preliminary issue, the Appeals Chamber has
7 dealt with many grounds of appeal that raised common arguments
8 and issues together. These common issues are:

- 9 1. Alleged defects in the indictment.
- 10 2. The right to a fair trial and the assessment of
11 evidence.
- 12 3. Alleged errors pertaining to joint criminal enterprise.
- 13 4. The appellants' liability for attacks on UNAMSIL
14 peacekeepers.

15 The parties also submits additional grounds of appeal which
16 have been dealt with individually.

17 I will now turn to the Appeals Chamber's findings. I will
18 start with the common grounds of appeal, followed by the
19 individual grounds of appeal by Sesay, Kallon and Gbao, and the
20 Prosecution. Finally, I will address the appeals on cumulative
21 convictions and sentences.

22 Sesay alleges defects in the indictments in grounds 6
23 through 8, 10 through 13 and 44. For reasons in our written
24 decisions, the Appeals Chamber dismisses each of Sesay's ground
25 of appeal relating to the indictment

26 Kallon raises alleged defects in the indictment in grounds
27 1, 3 to 6, 9 through 16, and 19 through 30. Under ground 12,
28 Kallon challenges his conviction for instigating the murder of
29 waiyoh in wendedu in Kono District. He contends that the

1 indictment neither pleaded wendedu as a location for murder, nor
2 his personal involvement in the killing. The Appeals Chamber
3 finds that the specificity required for the pleading of the
4 location of an alleged crime will depend on factors including the
5 form of the accused's participation in the crime and proximity of
6 the accused person to the events at the location for which he is
7 alleged to be criminally responsible.

8 Applying these factors to the Trial Chamber's findings, the
9 Appeals Chamber holds that the location of the murder, wendedu,
10 was a material fact that should have been pleaded in the
11 indictment to inform Kallon adequately of the charges against him
12 so that he could prepare a defence. The Appeals Chamber
13 therefore finds that Kallon was not put on notice of the charge
14 that he instigated murder at wendedu. For these reasons the
15 Appeals Chamber allows ground 12 of Kallon's appeal. Kallon's
16 remaining grounds of appeal relating to the indictment are
17 dismissed.

18 Gbao alleges defects in the notice provided in his grounds
19 4 and 8(a). For reasons in the written decision the Appeals
20 Chamber dismisses Gbao's ground 4.

21 Under ground 8(a), Gbao contends that he was found to have
22 participated in the JCE through his role as the ideologist of the
23 RUF. Gbao further contends that this finding constituted an
24 error of law because the indictment did not allege that he
25 significantly contributed in this capacity.

26 The Appeals Chamber finds that Gbao received no notice of
27 the allegation that he participated in the JCE by instructing
28 others in the RUF ideology or causing its implementation. These
29 facts were found by the Trial Chamber to be necessary to the

1 determination of Gbao's participation in the JCE.

2 The Appeals Chamber therefore considers that Gbao was
3 denied notice of the material fact of his role in implementing
4 and imparting the RUF ideology. As a result, the Appeals Chamber
5 disallows the finding of Gbao's significant contribution to the
6 JCE through his role as an ideology expert and instructor.

7 These are the common grounds relating to a fair trial and
8 assessment of evidence. These common issues are contained in
9 Sesay's ground 1 through 5, 14 through 18, 20 through 22 and 45,
10 Kallon's ground 1 and 7 and Gbao's ground 2, 6, 7 and 14. The
11 Appeals Chamber has considered these grounds of the appeal in its
12 written decision and dismisses them. In particular, with respect
13 to Gbao's ground 14, which claims that the Trial Chamber erred in
14 rejecting his motion alleging a breach of Rule 68, and an abuse
15 of process by the Prosecution, the Appeals Chamber notes that
16 both claims in that motion were based on the same facts and
17 sought the identical remedy. The remedy sought was a stay of the
18 proceedings under Counts 15 to 18 which in all cases requires a
19 showing of prejudice. Therefore, whether or not an abuse of
20 process requires a showing of prejudice, as Gbao claims on
21 appeal, the remedy he sought at trial necessitated such showing.

22 The Appeals Chamber finds that Gbao does not show that the
23 Trial Chamber erred in finding that he failed to show such
24 prejudice.

25 The next group of common issues pertain to JCE. Alleged
26 errors were raised by Sesay in his grounds 24 to 34 and 37, by
27 Kallon in his grounds 2, 8 to 11 and 15 and by Gbao in his
28 grounds 8(b) to (d), 8(e) to (m) and 8(o) to (s). These
29 submissions principally contain five common challenges relating

1 to the JCE which I will discuss in turn.

2 First: The appellants argue that the Trial Chamber erred
3 in defining the common purpose of the JCE. Their submissions
4 essentially turn on whether the Trial Chamber found the common
5 purpose of the JCE to be criminal or non-criminal and whether it
6 was sufficiently defined. The Appeals Chamber rejects these
7 contentions. The relevant passages on the trial judgment
8 indicate that the Trial Chamber found the common criminal
9 purpose, which consisted of the objective to gain and exercise
10 political power and control over the territory of Sierra Leone,
11 in particular the diamond mining areas, and the crimes as charged
12 under Counts 1 to 14 as means of achieving that objective.

13 This accords with our holding in *Brima et al* that the
14 common criminal purpose of a JCE comprises both the objective of
15 the JCE and the means contemplated to achieve that objective.

16 Second: The appellants argue that the Trial Chamber erred
17 in finding that a common criminal purpose existed. These
18 arguments are primarily based on factual challenges as to whether
19 the leaders of the AFRC and RUF acted in concert and whether they
20 contemplated crimes to achieve the common criminal purpose.
21 Having considered these claims, the Appeals Chamber finds them
22 without merit. In particular, the Appeals Chamber considers that
23 the appellants' references to instances in which some JCE members
24 abided by the law do not render unreasonable the Trial Chamber's
25 findings that they acted illegally in other respects.

26 Third: The appellants argue that the Trial Chamber erred
27 in concluding that they incurred JCE liability for crimes
28 committed by persons who were not found to be members of the JCE,
29 but who were used as tools by one or more JCE members to commit

1 crimes in furtherance of the JCE.

2 At the outset, the Appeals Chamber adopts the opinion of
3 the ICTY appeals judgment in Prosecutor v Brdjanin that the
4 member of a JCE may, as a matter of law, be held responsible for
5 crimes committed by non-members of the enterprise if it is shown
6 that the crime can be imputed to one member of the joint criminal
7 enterprise and that this member, when using a principal
8 perpetrator, acted in accordance with the common plan. The
9 existence of this link is a matter to be assessed on a
10 case-by-case basis.

11 Turning to the facts.

12 The appellants challenge the sufficiency of the Trial
13 Chamber's factual findings on the nexus between JCE members and
14 the crimes committed by principal perpetrators who were not
15 proven to be members of the JCE. They also challenge some of the
16 findings on the facts.

17 The Appeals Chamber has dismissed all these challenges,
18 save for one, which I will address in a moment. The Trial
19 Chamber reasoned that, for instance, the crimes fitted into the
20 widespread and systematic nature of the crimes per AFRC/RUF
21 fighters and that many crimes were committed per person directly
22 subordinate with the JCE members. The Appeals Chamber reiterates
23 in this regard that the trial judgment must be read as a whole.

24 The one challenge that succeeds concerns the Trial
25 Chamber's findings that the killing of a Limba man in Tongo Field
26 by an AFRC/RUF fighter could be imputed to the JCE members. This
27 crime was neither related to the AFRC/RUF force mining activities
28 in Tongo Field, nor was it committed within the permissive
29 environment in Kenema Town. In fact, the Trial Chamber held that

1 the killing was apparently an isolated crime. Under these
2 circumstances, the mere fact that the perpetrator was an AFRC/RUF
3 fighter was insufficient to impute this killing to a JCE member.
4 The Trial Chamber therefore erred in law in so doing. As a
5 result, none of the appellants could be held liable under the JCE
6 mode of liability for this crime.

7 Fourth: Sesay and Kallon argued that the Trial Chamber
8 erred in concluding that the JCE continued until the end of April
9 1998. The Appeals Chamber finds these submissions untenable.

10 Fifth: Kallon and Gbao argue that the Trial Chamber erred
11 in the category of the JCE it applied. Kallon's argument is
12 dismissed for reasons in our written decision.

13 In relation to Gbao, a majority of the Appeals Chamber,
14 Justices Fisher and Winter dissenting, finds that his challenge
15 fails because the Trial Chamber found that he was a participant
16 in the JCE. The majority also agrees with the Prosecution's
17 submission during the appeal hearing that Gbao shared the intent
18 for the crimes to be committed in Kailahun District, so he was a
19 participant in the joint criminal enterprise. Therefore, the
20 Appeals Chamber, Justices Fisher and myself dissenting, considers
21 that as a consequence Gbao, as with the other participants of the
22 JCE, is liable for all crimes which are a natural and foreseeable
23 consequence of putting into effect that criminal purpose.

24 I now turn to the last common issues on the appeal; the
25 common grounds relating to the attack on UNAMSIL peacekeepers.
26 The grounds of appeal at issue are Sesay's ground 28 and 44,
27 Kallon's ground 26, 27, 29, Gbao's ground 16 and the
28 Prosecution's ground 3.

29 The Appeals Chamber finds no merit to Sesay's grounds of

1 appeal and Kallon's grounds of appeal relating to the attacks on
2 UNAMSIL peacekeepers and dismisses them in their entirety.

3 AS to Gbao, he submits that the Trial Chamber erred in
4 finding that he tacitly approved of and encouraged the assaults
5 on the peacekeepers Salahuedin and Jaganathan at the Makump DDR
6 camp on 1 May 2000.

7 The Appeals Chamber has considered in particular the Trial
8 Chamber's finding that Gbao remained outside the camp throughout
9 these attacks. There is no indication in the trial judgment that
10 Gbao knew that any attack might take place, or that any crime
11 might be committed by Kallon or Kallon's forces while Kallon was
12 inside the Makump DDR camp. Therefore, the Appeals Chamber holds
13 that Gbao did not act with the requisite mens rea with respect to
14 the attack on Salahuedin which took place wholly inside the camp.
15 However, these considerations do not apply to the attack on
16 Jaganathan. Although Gbao may not have had the requisite mens
17 rea during the initial assault of Jaganathan, which took place
18 inside the DDR camp, as soon as Jaganathan was dragged out of the
19 camp and towards a waiting car behind which Gbao was standing
20 armed with an AK-47, Gbao had the relevant mens rea.

21 The Appeals Chamber therefore finds that the Trial Chamber
22 erred in holding that Gbao aided and abetted the attack against
23 Salahuedin and allows Gbao's ground 16 in this respect. The
24 remainder of the ground is dismissed.

25 Turning to the Prosecution's ground 3: It seeks the
26 reversal of the appellants' acquittals for the offence of taking
27 of hostages. The Prosecution argues that the Trial Chamber erred
28 in law in finding that the offence of hostage-taking requires the
29 threat to be communicated to a third party with the intent of

1 compelling the third party to act or refrain from acting as a
2 condition for the safety or release of the captives. The
3 Prosecution contends the appellants intended to utilise the
4 detention of the peacekeepers as leverage for the release of
5 Sankoh, who was arrested after the hostages were initially
6 detained.

7 The Appeals Chamber holds that the communication of a
8 threat to a third party is not a requirement of the offence of
9 the taking of hostages. We further hold that, although the
10 UNAMSIL peacekeepers may not have been initially detained with
11 the intent to use them as hostages, the requisite mens rea may
12 arise at a period subsequent to the initial seizure or detention.

13 The Appeals Chamber finds that some RUF fighters committed
14 the offence of taking of hostages with the intent to condition
15 the safety or release of the captured UNAMSIL personnel on the
16 release of Sankoh. However, the Appeals Chamber finds that the
17 Prosecution has failed to establish that the appellants possessed
18 the requisite mens rea to be held individually criminally
19 responsible of the offence, and therefore dismisses the remainder
20 of the ground.

21 I will now turn to the individual grounds of appeal of
22 Sesay, Kallon, Gbao and the Prosecution.

23 Sesay's appeal.

24 Under grounds 25, 27, 34 and 37, Sesay challenges the Trial
25 Chamber's findings on his participation in the JCE in Bo, Kenema,
26 Kono and Kailahun Districts. The Appeals Chamber notes that JCE
27 liability does not require that the accused performed any part of
28 the actus reus of the perpetrated crime. Rather, what is
29 required is that the accused participated in the common criminal

1 purpose and thereby lent a significant contribution to the crimes
2 for which the accused is to be found responsible. The Trial
3 Chamber correctly applied this standard.

4 The Appeals Chamber dismisses Sesay's argument in relation
5 to Bo, Kenema and Kailahun Districts. In relation to Kono
6 District, the Appeals Chamber finds that the Trial Chamber found
7 that the Yengema training base was established after Kono had
8 been recaptured by the RUF in December 1998, but this at least
9 seven months after the JCE ended.

10 The Appeals Chamber finds that the Trial Chamber therefore
11 erred in finding that Sesay participated in the JCE by ordering
12 the establishment and being involved in the planning and creation
13 of the Yengema training base. However, in light of the extensive
14 findings of Sesay's other forms of participation in the JCE in
15 Kono District we are satisfied that this error did not occasion a
16 miscarriage of justice.

17 Under ground 35, Sesay correctly notes that while the Trial
18 Chamber limited its legal findings on Count 13 in Kono District,
19 between December 1998 and January 2000, on holding that
20 enslavement was committed in Tombodu, it nonetheless held him
21 responsible for planning enslavement in mines in Tombodu and
22 throughout Kono District. This unreasoned addition to the scope
23 of Sesay's liability constitutes an error of law. The error
24 invalidates the verdict insofar as Sesay was convicted for
25 planning enslavement between December 1998 and January 2000 in
26 parts of Kono District other than Tombodu. The remainder of his
27 grounds 35 are rejected.

28 For reasons stated in our written decision, the Appeals
29 Chamber dismisses Sesay's remaining grounds of appeal from

1 conviction. Justice Fisher and myself concur in the outcome of
2 grounds 33, but dissent from the majority's reasoning on these
3 grounds. Justice Fisher similarly dissents under ground 45.

4 Kallon's appeal.

5 Under ground 2, 8, 9, 10, 11 and 15, Kallon challenges the
6 Trial Chamber's finding that he participated in and shared the
7 intent of the JCE in Bo, Kenema, Kono and Kailahun Districts
8 merely by membership in the RUF and the Supreme Council.

9 The Appeals Chamber rejects these submissions. In
10 particular, contrary to Kallon's submission, the Trial Chamber
11 did not convict him based on mere membership in the Supreme
12 Council or in the RUF; rather, it inferred from the widespread
13 and systematic nature of the crimes, in particular the attacks in
14 Bo and the forced labour in Kenema District, that such conduct
15 was a deliberate policy which must have been initiated by the
16 members of the Supreme Council of which he was one.

17 The Appeals Chamber finds no error in the Trial Chamber's
18 inference that he contributed to the JCE through his involvement
19 on the Supreme Council.

20 Under ground 14, Kallon challenges the Trial Chamber's
21 findings on his superior responsibility for the enslavement of
22 hundreds of civilians in camps throughout Kono District between
23 February and December 1998. The Appeals Chamber agrees with
24 Kallon's contention that the Trial Chamber's findings are
25 insufficient as a matter of law to find him liable under Article
26 6(3) for enslavement in Kono District after August 1998. The
27 Trial Chamber determined that the evidence failed to establish
28 that he had effective control over RUF forces after that date.
29 The Appeals Chamber therefore grants Kallon's ground 14

1 concerning that part.

2 For reasons given in our written decision, the Appeals
3 Chamber dismisses Kallon's remaining grounds of appeal from
4 conviction.

5 Gbao's appeal.

6 In ground 8 Gbao challenges his conviction pursuant to the
7 JCE. Gbao's subground 8(p) challenges the Trial Chamber's
8 finding that he shared the intent to commit acts of collective
9 punishment in Kailahun District. The Appeals Chamber agrees that
10 the Trial Chamber erred in so finding and therefore grants Gbao's
11 subground 8(p).

12 I note that as a result of Justice Fisher and my dissent as
13 to whether Gbao could incur JCE liability at all, the Appeals
14 Chamber's decision regarding the remaining subgrounds in Gbao's
15 ground 8 is by majority.

16 Subgrounds 8(l) and (m) concern Gbao's mens rea for JCE1
17 and JCE3 liability as to the crimes in Bo, Kenema and Kono
18 Districts. These are dismissed in the written decision.

19 Gbao's subgrounds 8(o), (q), (r) and (s) challenge the
20 Trial Chamber's finding that he shared the intent to commit the
21 crimes in Kailahun District. These challenges are also
22 dismissed.

23 In particular, with respect to the unlawful killings of 63
24 suspected Kamajors in Kailahun Town, on 19 February 1998, the
25 majority considers that the Trial Chamber's finding demonstrates
26 that while Gbao was limited by the fact that Bockarie had ordered
27 the executions he was not without power to halt them. Moreover,
28 whether Gbao's power in the circumstances was such that he could
29 actually have stopped the killings is not determinative of

1 whether the Trial Chamber reasonably inferred caused intent from
2 his failure to intervene.

3 Gbao had chaired the GSBI panel responsible for
4 investigating the victims, and he was present when Bockarie
5 executed three of them, yet he elected to remain present after
6 Bockarie left when the rest of the suspected Kamajors were
7 executed later the same day without interfering in their
8 execution.

9 Subgrounds 8(b), (c) and (i) concern Gbao's participation
10 in the JCE. Ground 8(b) is moot as a result of the Appeals
11 Chamber's unanimous decision to uphold Gbao's subground 8(a).

12 Under subground 8(c), Gbao alleges that the Trial Chamber
13 erred in law and fact in finding that he was part of the
14 plurality of persons that formed the JCE. The majority dismisses
15 this claim, noting especially that the Trial Chamber was not
16 required to make findings on Gbao's concerted action with the
17 AFRC beyond finding that his acts established his participation
18 in the common criminal purpose. The manner and degree in which
19 the accused and the members of the JCE interact, coordinate and
20 mutually rely on one another's contribution can indicate whether
21 the accused shared a common purpose and significantly contributed
22 to realising it.

23 However, it was not necessary, as a matter of law, for the
24 Trial Chamber to find that Gbao worked in concert with the AFRC
25 once it found that the JCE was composed of senior leaders of the
26 AFRC and RUF and he was a senior leader of the RUF.

27 In respect of subground 8(i), the majority finds that Gbao
28 could reasonably have been found to have significantly
29 contributed to the JCE by way of his status, assignment, rank,

1 relationship with Sankoh, failure to investigate the beating of
2 TF1-113 and involvement in the farming in Kailahun District.

3 For the reasons in the written judgment, Gbao's remaining
4 grounds of appeal from conviction are dismissed.

5 That concludes the summary of the appellants' appeals from
6 conviction.

7 I now turn to the Prosecution's two remaining grounds of
8 appeal. As an introductory matter, the Appeals Chamber
9 reiterates, concerning grounds 1 and 2, that it will only disturb
10 findings of facts by the Trial Chamber where no reasonable trier
11 of fact could have arrived at those findings. When the
12 Prosecution is appealing against an acquittal, this standard
13 requires it to show that when account is taken of the errors of
14 fact committed by the Trial Chamber, all reasonable doubt of the
15 appellant's guilt has been eliminated.

16 In ground 1, the Prosecution asserts that the Trial Chamber
17 erred in not finding the appellants responsible under JCE
18 liability for crimes committed after April 1998. The Prosecution
19 argues that the common criminal purpose continued at least until
20 the end of February 1999, after the Freetown invasion in January
21 1999.

22 The Trial Chamber found that after April 1998, the AFRC and
23 RUF were independent groups not acting in concert to realise a
24 shared common purpose, but only irregularly communicating and
25 cooperating in their independent pursuit of similar but separate
26 purposes. The Appeals Chamber finds Justices Kamanda and King
27 dissenting, that the Trial Chamber's interpretation of the
28 evidence and findings were coherent and reasonable in light of
29 the evidence as a whole, and reflect reasonable doubt as to the

1 accused's liability for the crimes for which they were acquitted.
2 The majority, therefore, dismisses the Prosecution's ground 1.

3 Turning to the Prosecution's second ground: It challenges
4 Gbao's acquittal under ground 12, arguing that the Trial Chamber
5 should have found him liable either pursuant to JCE, planning or
6 aiding and abetting for the recruitment or use of the child
7 soldiers. This ground of appeal essentially turns on whether,
8 and if so to what extent, Gbao contributed to the crimes charged
9 under Count 12.

10 As a preliminary legal matter, the Appeals Chamber finds
11 that JCE liability, planning, and aiding and abetting all require
12 that the accused contributes to the crimes albeit to a different
13 degree. On the fact, the Appeals Chamber finds that the
14 Prosecution fails to show that no reasonable trier of fact could
15 have found that Gbao's level of contribution to the crime charged
16 under Count 12 was insufficient for any of the modes of
17 liabilities alleged by the Prosecution. Ground 2 is therefore
18 dismissed.

19 I will now turn to the grounds of appeal on cumulative
20 convictions and sentence.

21 Kallon and Gbao argue that their convictions for the same
22 acts and conduct for extermination as a crime against humanity,
23 pursuant to Count 3 of the indictment and murder as a crime
24 against humanity pursuant to Count 4 of the indictment, are
25 impermissibly cumulative.

26 The Appeals Chamber agrees. The crime of murder is
27 subsumed in the crime of extermination and, consequently,
28 convictions under Count 3 for extermination, and Count 4 for
29 murder, for the same underlying acts are impermissibly cumulative

1 with respect to specified killings at Tikonko, and Tikonko
2 Junction in Bo District, Cyborg Pit in Kenema District, Tombodu
3 and Koidu Town in Kono District, and Kailahun Town in Kailahun
4 District.

5 The Appeals Chamber further finds that because the crime of
6 extermination is the more specific offence, the impermissibly
7 cumulative convictions for specified killings should stand under
8 Count 3, but not under Count 4.

9 In relation to sentence, the appellants argue that the
10 Trial Chamber erroneously double-counted the specific intents of
11 acts of terrorism and collective punishments as both increasing
12 the gravity of the underlying offences and as an element of the
13 offences of acts of terrorism and collective punishments.

14 The Appeals Chamber agrees that the Trial Chamber
15 double-counted the specific intent of the offences of acts of
16 terrorism and collective punishments; first, as increasing the
17 gravity of the underlying offences and, second, as part of the
18 offence of acts of terrorism and collective punishments and both
19 are reflected in the sentences imposed. Accordingly, the Appeals
20 Chamber will revise the sentences imposed on Sesay, Kallon and
21 Gbao as appropriate.

22 The Appeals Chamber rejects the remaining submissions in
23 Sesay's ground 46 and Kallon's ground 31.

24 In Gbao's ground 18, he argues that the Trial Chamber erred
25 in its consideration of the form and degree of his participation
26 in the crimes when it found that one of his major contributions
27 to the JCE was his role as an ideology instructor. Having
28 disallowed the finding that Gbao contributed to the JCE in his
29 role as an ideology expert and instructor, we find that this

1 conduct cannot be considered for sentencing purposes. The
2 Appeals Chamber therefore will determine the consequences of his
3 holding - of this holding in its revision of the sentences
4 imposed for crimes Gbao committed pursuant to his participation
5 in the JCE. The remaining submissions in Gbao's ground 18 are
6 rejected.

7 That concludes the summary of our judgment. I will now
8 read out the disposition of the appeals judgment.

9 For the foregoing reasons, the Appeals Chamber, pursuant to
10 Article 20 of the Statute and Rule 106 of the Rules of Procedure
11 and Evidence, noting in the written submissions of the parties --
12 noting the written submissions of the parties and their oral
13 arguments presented at the hearings on 2, 3 and 4 September 2009,
14 sitting in open session.

15 Mr Sesay, will you please stand.

16 with respect to Sesay's ground of appeal, allows ground 35
17 in part, reverses the verdict of guilty for Sesay under Article
18 6(1) of the Statute for planning enslavement in the form of
19 forced mining between December 1998 and January 2000 in parts of
20 Kono District other than Tombodu and dismisses the remainder of
21 the ground; allows ground 36 in part, reverses the verdict of
22 guilty for Sesay under Article 6(3) of the Statute insofar as it
23 relates to enslavement at the Yengema training base between
24 December 1998 and about 30 January 2000, and dismisses the
25 remainder of the ground; allows ground 46 in part, holds that the
26 Trial Chamber impermissibly counted the specific intent for acts
27 of terrorism and collective punishments as aggravating factors
28 for the underlying offences and dismisses the remainder of the
29 grounds; reverses the verdict of guilty for Sesay pursuant to

1 Article 6(1) of the Statute for the killing of a Limba man in
2 Tongo Field; reverses the verdict of guilty for Sesay pursuant to
3 Article 6(1) of the Statute for murder, a crime against humanity
4 under Count 4, for specified acts for which Sesay was also found
5 guilty for extermination, a crime against humanity under Count 3;
6 dismisses the remaining grounds of appeal. Mr Sesay, you may be
7 seated.

8 Mr Kallon, will you please stand.

9 with respect to Kallon's ground of appeal, allows ground 12
10 and reverses the verdict of guilty for Kallon pursuant to Article
11 6(1) of the Statute for instigating the murder of waiyoh in
12 wendedu in Kono District; allows ground 14 in part, reverses the
13 verdict of guilty for Kallon pursuant to Article 6(3) of the
14 Statute for the crime of enslavement committed in Kono District
15 from the end of August 1998 to December 1998 and dismisses the
16 remainder of the ground; allows ground 30 in part, reverses the
17 verdict of guilty for Kallon pursuant to Article 6(1) of the
18 Statute for murder, a crime against humanity under ground 4 for
19 specified acts for which Kallon was also found guilty for
20 extermination, a crime against humanity under Count 3 and
21 dismisses the remainder of the ground; allows ground 31 in part,
22 holds that the Trial Chamber impermissibly counted the specific
23 intent for acts of terrorism and collective punishments as
24 aggravating factors for the underlying offences and dismisses the
25 remainder of the ground; reverses the verdict of guilty for
26 Kallon pursuant to Article 6(1) of the Statute for the killing of
27 a Limba man in Tongo Field; dismisses the remaining grounds of
28 appeal.

29 Mr Kallon, you may be seated.

1 Mr Gbao, will you please stand.

2 With respect to Gbao's ground of appeal, allows ground 8 in
3 part, holds that the Trial Chamber violated Gbao's right to a
4 fair trial by finding that he significantly contributed to the
5 JCE through his role as an ideology expert and instructor,
6 reverses the verdict of guilty for Gbao pursuant to Article 6(1)
7 of the Statute for the killing of a Limba man in Tongo Field,
8 reverses the verdict of guilty for Gbao pursuant to Article 6(1)
9 of the Statute for collective punishment in Kailahun District and
10 dismisses, Justices Winter and Fisher dissenting the remainder of
11 the ground; allows ground 16 in part, reverses the verdict of
12 guilty for Gbao pursuant to Article 6(1) of the Statute in
13 relation to the attack against UNAMSIL peacekeeper Major
14 Salahuedin and dismisses the remainder of the ground; allows
15 ground 19 in part, reverses the verdict of guilty for Gbao
16 pursuant to Article 6(1) of the Statute for murder, a crime
17 against humanity under ground 4 for specified acts for which Gbao
18 was also found guilty for extermination, a crime against humanity
19 under ground 3 and dismisses the remainder of the ground;
20 dismisses the remaining grounds of appeal.

21 Mr Gbao, you may be seated.

22 With respect to the Prosecution's ground of appeal,
23 dismisses ground 1, Justices Kamanda and King dissenting;
24 dismisses ground 2; allows ground 3 in part, holds that the
25 communication of a threat or third party is not a requirement of
26 the offence of taking of hostages, holds that the requisite mens
27 rea may arise at a period subsequent to the initial seizure or
28 detention, holds that some RUF fighters other than the three
29 appellants committed the offence of the taking of hostages with

1 the intent to condition the safety or release of the captured
2 UNAMSIL personnel on the release of Sankoh, holds that the
3 Prosecution has failed to establish that Sesay, Kallon or Gbao
4 are liable for this offence and dismisses the remainder of the
5 ground.

6 Mr Sesay, Mr Kallon and Mr Gbao, will you please stand.

7 Consequently, the Appeals Chamber revises the sentences as
8 follows. In respect of Sesay, taking into account the grounds of
9 appeal which have been allowed, the particular circumstances of
10 this case as well as the form and degree of the participation of
11 Sesay in the crimes, and the seriousness of the crimes, the
12 Appeals Chamber finds that the effective sentence imposed by the
13 Trial Chamber reflects the totality of Sesay's culpable conduct
14 for the crimes under Counts 1 through 14. The Appeals Chamber
15 therefore imposes a global sentence for Count 1 through 14 of 52
16 years of imprisonment. The Appeals Chamber affirms the sentence
17 of 51 years of imprisonment under Count 15 and 45 years of
18 imprisonment under Count 17.

19 In respect of Kallon, taking into account the grounds of
20 appeal which have been allowed, the particular circumstances of
21 this case, as well as the form and degree of the participation of
22 Kallon in the crimes, and the seriousness of the crimes, the
23 Appeals Chamber finds that the effective sentence imposed by the
24 Trial Chamber reflects the totality of Kallon's culpable conduct
25 for the crimes under Counts 1 through 14. The Appeals Chamber
26 therefore imposes a global sentence for Counts 1 through 14 of 39
27 years imprisonment. The Appeals Chamber affirms the sentence of
28 40 years imprisonment under Count 15 and 35 years imprisonment
29 under Count 17.

1 In respect of Gbao, taking into account the grounds of
2 appeal which have been allowed, the particular circumstances of
3 this case, as well as the form and degree of participation of
4 Gbao in the crimes, and the seriousness of the crimes, the
5 Appeals Chamber finds that the effective sentence imposed by the
6 Trial Chamber reflects the totality of Gbao's culpable conduct
7 for the crimes under Counts 1, 3 through 11 and 13. The Appeals
8 Chamber Justices Fisher and Winter dissenting therefore imposes a
9 global sentence for Counts 1, 3 through 11 and 13 of 25 years
10 imprisonment. Taking into account that Gbao's ground 16 has been
11 allowed in part, the sentence of 25 years imprisonment under
12 Count 15 is decreased to 20 years imprisonment.

13 Orders that the sentences shall run concurrently. Orders
14 that Issa Hassan Sesay shall serve a total term of imprisonment
15 of 52 years subject to credit being given under Rule 101(d) of
16 the Rules of Procedure and Evidence for the period for which he
17 has already been in detention.

18 Orders that Morris Kallon shall serve a total term of
19 imprisonment of 40 years subject to credit being given under Rule
20 101(d) of the Rules of Procedure and Evidence for the period for
21 which he has already been in detention.

22 Orders that Augustine Gbao shall serve a total term of
23 imprisonment of 25 years subject to credit being given under Rule
24 101(d) of the Rules of Procedure and Evidence for the period for
25 which he has already been in detention.

26 Orders that this judgment shall be enforced immediately
27 pursuant to Rule 119 of the Rules of Procedure and Evidence.
28 Orders in accordance with Rule 109 of the Rules of Procedure and
29 Evidence that Issa Hassan Sesay, Morris Kallon and Augustine Gbao

1 remain in the custody of the Special Court for Sierra Leone
2 pending the finalisation of arrangements to serve their
3 sentences.

4 The convicted persons may be seated.

5 Justice Winter appends a separate concurring opinion in
6 which Justice Fisher joins. Justice Kamanda and Justice King
7 append a dissenting opinion in respect of Prosecution's ground 1.
8 Justice Ayoola appends a separate concurring opinion to the
9 judgment. Justice Fisher appends a partially dissenting opinion
10 to the judgment and sentence in which Justice Winter joins.

11 I will now ask Justice King to read out his and Justice
12 Kamanda's partially dissenting opinion.

13 JUSTICE KING: Thank you, Madam President.

14 Dissenting opinion of Justice Gelaga King and Justice John
15 Kamanda on Prosecution's first ground of appeal.

16 We agree with the Appeals Chamber judgment, except on one
17 issue only: Continuation of the AFRC/RUF joint criminal
18 enterprise after April 1998. With respect, we disagree with the
19 majority of the Appeals Chamber's conclusion that - and I quote -
20 "The Prosecution fails to establish that the Trial Chamber erred
21 in finding that the common criminal purpose between the AFRC and
22 RUF ended in late April 1998."

23 On the contrary, we agree with the Prosecution that on the
24 basis of the Trial Chamber's findings and the evidence before it
25 the only conclusion open to any reasonable trier of fact is that
26 the joint criminal enterprise which the Trial Chamber found to
27 have existed from May 1997 to April 1998 continued to exist until
28 at least February 1999.

29 Furthermore, we are of the opinion that there is abundant

1 evidence that after the ECOMOG intervention in February 1998, and
2 after April 1998, it was still the common purpose of the AFRC/RUF
3 junta acting in concert to take any actions necessary to regain
4 and exercise political power and control over the territory of
5 Sierra Leone; in particular the diamond mining areas. Such
6 actions included the commission of the crimes charged in Counts 1
7 to 14 of the indictment.

8 It is in the light of these facts that the Prosecution has
9 complained in its first ground of appeal that the said findings
10 of the Trial Chamber were wrong.

11 The Prosecution's first ground of appeal states - and I
12 quote - "The Trial Chamber erred in law and/or erred in fact in
13 finding that the common plan, design or purpose joint criminal
14 enterprise between leading members of the AFRC and RUF ceased to
15 exist sometime in the end of April 1998."

16 The findings of the Trial Chamber which led to its
17 determination that the joint criminal enterprise between the AFRC
18 and RUF ended in late April 1998 are as follows:

- 19 1. That a rift erupted between the two factions in late
20 April 1998 and that the rift was fatal to the common purpose; and
- 21 2. That following this rift the AFRC and the RUF acted
22 independently of each other and pursued independent and separate
23 plans.

24 The Trial Chamber was of the view that the evidence of
25 continuing communication and cooperation between the AFRC and the
26 RUF, from late April 1998 up to the invasion of and retreat from
27 Freetown, was insufficient to demonstrate that the two groups
28 continued to share a common criminal purpose.

29 Furthermore, the Trial Chamber considered that the crimes

1 committed by the AFRC/RUF after late April 1998 were in
2 furtherance of each faction's separate plan. We will address the
3 above findings having regard to the submission of the parties.

4 The Trial Chamber's finding that a rift between the RUF and
5 AFRC in late 1998 terminated the joint criminal enterprise. The
6 Trial Chamber found that the common plan between the AFRC and the
7 RUF ceased to exist from late April 1990 when a rift between the
8 two forces erupted. In this regard it stated - and I quote -
9 "The rift between the two forces erupted after the Sewafe Bridge
10 attack when Gullit disclosed to his troops that Bockarie had
11 beaten him and seized his diamonds and that Johnny Paul Koroma
12 was under RUF arrest. Gullit declared that the AFRC troops would
13 withdraw from Kono District to join SAJ Musa in Koinadugu
14 District. Gullit and Bazy accordingly departed, taking with
15 them the vast bulk of the AFRC fighters in Kono District. The
16 split was acrimonious and Gullit decisively refused to accept
17 Superman's attempt to reimpose cooperation, ignoring a directive
18 from him to return to Kono District."

19 It should be noted here that Gullit (also known as Alex
20 Tamba Brima), Johnny Paul Koroma (also known as JPK) and Bazy
21 (also known as Bazy Kamara) were commanders in the Armed Forces
22 Revolutionary Council (AFRC). Bockarie (also known as Mosquito)
23 was a commander in the Revolutionary United Front (RUF).

24 The Trial Chamber found that in August 1998 Bockarie
25 modified the RUF radio codes to prevent Superman from monitoring
26 radio transmissions and forbade radio operators from contacting
27 Superman. It also found that in Koinadugu District from August
28 1998, Superman and those fighters under his command operated as
29 an independent RUF faction.

1 The above factual findings are at the core of the Trial
2 Chamber's finding that the so-called rift in late 1998 was fatal
3 to the joint criminal enterprise. We opine that as the
4 Prosecution correctly submitted no reasonable trier of fact could
5 have found that such instance of a fractious relationship
6 occurring in April 1998 signified the end of the joint criminal
7 enterprise. Sesay and Kallon submit that the Trial Chamber did
8 not attribute the rift between AFRC and RUF to the ill-treatment
9 of Koroma and Gullit, but to a relatively protracted and
10 prolonged process involving a number of causative factors.

11 The submission is unfounded, misguided and not supported by
12 the evidence. In our opinion, such holding, based on the sole
13 evidence of one insider witness given before another Trial
14 Chamber in a previous case, could not be regarded by a reasonable
15 trier of fact as conclusive of the termination of the joint
16 criminal enterprise.

17 A fortiori, the Trial Chamber's findings establish that
18 internal friction was an ongoing feature of relations between the
19 Armed Forces Revolutionary Council and the RUF and within the RUF
20 itself, even during the period within which the Trial Chamber
21 found the joint criminal enterprise existed.

22 For instance, it found that "while the two groups initially
23 had a functioning relationship, over time it began to sour and
24 disagreements between the AFRC and RUF were frequent. On or
25 about August 1997, Sam Bockarie, the acting leader of the RUF, in
26 the absence of Foday Sankoh, left Freetown to establish his
27 headquarters in Kenema as he was dissatisfied with Johnny Paul
28 Koroma's management of the government and the discord was such
29 that he feared that attempts would be made on his life."

1 Notwithstanding the disputes that arose in April 1998, the
2 Trial Chamber found that the AFRC and the RUF continued to
3 interact and communicate. It found further that some time after
4 April 1998 - and I quote - "In one radio communication between
5 Gullit and Sesay, Gullit told Sesay to have confidence in him and
6 insisted that they needed to cooperate. In a subsequent radio
7 communication with Bockarie, Gullit explained the logistical
8 reasons for his lack of contact. Bockarie indicated that he was
9 very happy that the two sides, both the RUF and the SLA, the
10 Sierra Leone Army, were brothers."

11 The evidence cited shows that the so-called rift which
12 erupted in April 1998 did not prevent the AFRC/RUF acting in
13 concert in furtherance of their common purpose after April 1998.
14 We therefore find that the Trial Chamber erred in fact by giving
15 undue weight to the alleged rift and failing to evaluate the
16 entirety of the evidence which proves that the RUF and AFRC
17 continued their joint criminal enterprise despite the rift.

18 Did the Trial Chamber err in finding that in late April
19 1998 the AFRC and RUF ceased to share a common purpose? Evidence
20 of continued common purpose between the RUF and AFRC after April
21 1998, the continued interaction and cooperation between the two
22 groups. The Trial Chamber found that after the last combat
23 operation between the RUF and AFRC, when they jointly attacked
24 ECOMOG at Sewafe Bridge in late April 1998, the common plan
25 between the AFRC and RUF ceased to exist and that - and I quote -
26 "Each group thereafter had its own separate plan."

27 It found that the AFRC's plan, hatched by SAJ Musa, was to
28 launch an attack on Freetown for the purpose of reinstating the
29 AFRC as the army of Sierra Leone which plan, according to the

1 Trial Chamber, did not involve the RUF.

2 We consider that no reasonable trier of fact could have
3 come to the conclusion that because SAJ Musa planned to reinstate
4 the army, that was evidence of termination of the common purpose
5 between the AFRC and the RUF. On the contrary, the plan to
6 reinstate the army is poignant evidence of the common purpose to
7 take over the Sierra Leone government. We say this for the
8 simple reason that the mandate to create, let alone reinstate,
9 the country's army belongs to the legitimate Government of Sierra
10 Leone and no one else.

11 In any event, assuming that SAJ Musa's plan was shared by
12 other AFRC commanders, that is no reason to hold that the common
13 purpose between the AFRC and the RUF ceased to exist. In fact,
14 SAJ Musa's plan is clear proof of an act which was to be done in
15 furtherance of the common purpose to regain power and control
16 over the territory of Sierra Leone through the commission of
17 crimes within the Statute.

18 The Trial Chamber had found that the joint criminal
19 enterprise between the AFRC and the RUF originated after the coup
20 d'etat by the Sierra Leone Army on 27 May 1997, following which
21 coup leaders of the then recently formed AFRC contacted leaders
22 of the RUF to arrange a joint government.

23 The Trial Chamber further found that following the ECOMOG
24 intervention of 14 February 1998 - and I quote - "Despite the
25 change of circumstances following the retreat from Freetown after
26 the ECOMOG intervention, the leading members of the AFRC and RUF
27 maintained the common purpose to take power and control over
28 Sierra Leone."

29 The Trial Chamber posited that - and I quote - "A common

1 objective in itself is not enough to demonstrate that the
2 plurality of persons acted in concert with each other as
3 different and independent groups may happen to share the same
4 objectives." However, in the instant case, there is strong
5 evidence of AFRC/RUF concerted action to achieve their common
6 objective in furtherance of their joint criminal enterprise.
7 After Gullit and his troops departed from Kono District in late
8 April 1998, they travelled to Kurubonla in Koinadugu District.
9 SAJ Musa advised Gullit to establish an AFRC defensive base in
10 Bombali District. Gullit accordingly led his group of AFRC
11 fighters towards Mansofinia across Bombali District to Rosos. A
12 small number of RUF fighters also formed part of the group and
13 were subordinate to Gullit's command.

14 This concerted action of the AFRC/RUF continued unabated as
15 can be seen from the following finding of the Trial Chamber - and
16 I quote - "The AFRC troops under Gullit's command committed
17 numerous atrocities against civilians in their destructive march
18 across Bombali District. Villages near Bumbuna and the border of
19 Bombali and Koinadugu Districts were razed by fire. Civilians at
20 multiple villages, including Kamagbengbe and Port Loko were
21 killed. The town of Karina was attacked and civilians were
22 massacred, abducted and subjected to amputations. Homes were
23 also looted and burned. Amputations were carried out near
24 Gbendembu and crimes of equal savagery were committed in other
25 locations.

26 Upon arrival at Rosos, Gullit declared that "No civilians
27 were to be permitted within 15 miles of the camp and that any
28 civilians captured nearby was to be executed."

29 Although a rift erupted between certain commanders of both

1 factions in late April 1998, such storm in a teacup does not
2 detract from the compelling evidence accepted by the Trial
3 Chamber that the two forces continued to communicate and to
4 cooperate in furtherance of the shared common purpose. We opine
5 that the decisive question as to whether the joint criminal
6 enterprise continued after April 1998, in spite of the
7 acknowledged RUF/AFRC peevishness is: Did the RUF and AFRC
8 continue to work cooperatively in furtherance of the common
9 purpose in spite of the fractiousness? There is clearly abundant
10 evidence referred to above to merit an answer in the affirmative.

11 We therefore do not agree with our learned colleagues in
12 the Appeals Chamber who consider reasonable the Trial Chamber's
13 finding that from 1998 until December 1998, from April 1998 until
14 December 1998, the interaction between the two groups was
15 sporadic and occasional and did not establish that the leadership
16 of both groups continued to act in concert.

17 The trial judgment makes it clear that the only period when
18 the absence of cooperation and communication between the two
19 forces may be regarded as significant spanned from the time
20 Gullit and his forces departed from Kono in late April/May 1998
21 until the time they reached Rosos, sometime in July or August
22 1998. Yet, even at that time the Trial Chamber found that during
23 the march from Mansofinia to Rosos Gullit's radio operator was
24 captured and the microphone for their radio was lost as a result
25 of which - and I quote - "Gullit's group was not in direct
26 communication with SAJ Musa or the RUF command until they reached
27 Rosos sometime in July or August 1998."

28 The Trial Chamber further stated that - and I quote - "At
29 about this time Gullit also communicated with Sesay and Kallon on

1 the radio." These findings lead to the only reasonable
2 conclusion that even during the period when the tension between
3 the two forces was at its peak, from the AFRC's departure from
4 Kono and their march from Mansofinia to Rosos, the AFRC forces
5 still intended to communicate and did communicate with the RUF as
6 soon as the logistics so permitted.

7 Furthermore, when Gullit's troops abandoned Rosos due to
8 bombardments by ECOMOG forces, they proceeded to Major Eddie Town
9 where Gullit communicated with the AFRC and RUF commanders.

10 The Trial Chamber found that in late August 1998, at the
11 joint training camp or training base in Koinadugu, Bockarie
12 ordered that a group of four radio operators be dispatched from
13 Kono to join Gullit's fighting force as informants in order to
14 ensure that the RUF High Command was apprised of Gullit's
15 movements and intentions.

16 Addressing the Prosecution's submission challenging the
17 Trial Chamber's finding that the radio operators were only sent
18 as informants rather than to reinforce the RUF/AFRC fighting
19 forces in Rosos, the majority considered that "The Prosecution's
20 assertion is not inconsistent with the Trial Chamber's finding
21 that Bockarie sent the radio operators to act as informants."
22 The majority stated that - and again I quote - "None of the
23 evidence cited by the Prosecution contradicts the Trial Chamber's
24 finding but only establishes that radio operators were sent to
25 Gullit via SAJ Musa in Koinadugu in response to a request from
26 Gullit."

27 Even if *arguendo* it is accepted that the radio operators
28 were sent as informants only, and not as reinforcements, is that
29 not direct and conclusive evidence that those commanders of the

1 AFRC and RUF were working in concert in furtherance of the common
2 purpose as at late August 1998? With respect, the majority
3 unwittingly glosses over the issue by merely stating that the
4 Prosecution's submission does not contradict the Trial Chamber's
5 finding that radio operators were sent as informants.

6 The critical issue is whether the joint criminal enterprise
7 was being continued by sending radio operators with the aim of
8 ensuring that the AFRC/RUF's forces in Rosos would ultimately be
9 reinforced. The evidence relied on by the Trial Chamber supports
10 this view. The impugned Trial Chamber's finding is in any event
11 evidence which confirms interactions between Gullit's troops and
12 RUF High Command up to the time SAJ Musa arrived at Major Eddie
13 Town.

14 The Trial Chamber's findings further reveal some more
15 significant interaction and cooperation between AFRC and RUF High
16 Commands during the attack on Freetown on 6 January 1999. The
17 evidence discloses that in the heat of the Freetown attack, and
18 during the retreat from Freetown, Gullit of the Armed Forces
19 Revolutionary Council was in regular contact with Bockarie of the
20 Revolutionary United Front informing the latter of the advance of
21 his troops and requesting RUF reinforcement which Bockarie agreed
22 to send from Makeni.

23 The Trial Chamber found that Bockarie agreed to send
24 reinforcements; that he made a public announcement on Radio
25 France Internationale in the afternoon of 6 January 1999 that
26 Gullit's troops had captured Freetown and would continue to
27 defend it. Further, that Bockarie and Gullit - and I quote -
28 "Arranged that Armed Forces Revolutionary Council fighters would
29 meet the Revolutionary United Front's reinforcements at a factory

1 near wellington."

2 The Trial Chamber highlighted Bockarie's order that
3 strategic positions, including government buildings, be burned
4 and also the advice from Bockarie to Gullit that if ECOMOG forced
5 them to retreat further the troops should burn the central part
6 of Freetown.

7 Many instances of nauseating and barbaric atrocities
8 committed by the Revolutionary United Front and the Armed Forces
9 Revolutionary Council forces during their retreat from Freetown
10 in January 1999 are catalogued in the Trial Chamber's findings.
11 Understandably, we will refer to the bare minimum - and I quote -
12 "According to witness George Johnson, Armed Forces Revolutionary
13 Commander Five-Five, also known as Santigie Borbor Kanu, issued
14 an order to commit 200 civilian amputations and to send the
15 amputees to the government. Several witnesses testified that
16 rebels asked civilians whether they wanted short sleeves or long
17 sleeves and their arms were amputated either at the elbow or at
18 the wrist, accordingly. Rebels were also known to amputate four
19 fingers, leaving only the thumb which they referred to as
20 one-love and which they encouraged the victims to show to Tejan
21 Kabbah."

22 At this juncture, one is impelled to reflect on these
23 words, "Blessed is the man that walketh not in the counsel of the
24 ungodly, nor standeth in the way of sinners, nor sitteth in the
25 seat of the scornful, but his delight is in the law of the Lord;
26 and in his law doth he meditate day and night. And he shall be
27 like a tree planted by the rivers of water, that bringeth forth
28 his fruit in his season; his leaf also shall not wither and
29 whatsoever he doeth shall prosper. The ungodly are not so; but

1 are like the chaff which the wind driveth away. Therefore, the
2 ungodly shall not stand in the judgment, nor sinners in the
3 congregation of the righteous, for the Lord knoweth the way of
4 the righteous, but the way of the ungodly shall perish."

5 State House did not escape the carnage. The Trial Chamber
6 found that, quote, "Approximately 30 persons were killed by the
7 rebels at State House. On 6 January 1999 the rebels took women
8 to State House where they were raped. Each of the senior
9 commanders and many of the troops had captured women at their
10 disposal."

11 We will cite one more instance of this sickening and sordid
12 episode - and I quote - "TF1-093, a former Revolutionary United
13 Front fighter, had been living with her brother and her child in
14 Freetown since 1998. On 6 January 1999, TF1-093's brother was
15 shot and killed. A named commander who recognised her gave
16 TF1-093 command of a group of over 50 men, women and children,
17 all of whom were armed with knives and had been instructed to
18 kill civilians. TF1-093 and the fighters under her command
19 burned houses and killed and raped civilians. They killed more
20 than 20 people, not including those that were caught inside
21 burning houses."

22 We opine that these findings would lead a reasonable trier
23 of fact to conclude that Bockarie of the Revolutionary United
24 Front, and Gullit of the Armed Forces Revolutionary Council,
25 continued to act in concert in January 1999 and that the RUF and
26 AFRC shared the common purpose to regain power in Sierra Leone
27 through the commission of crimes within the Statute.

28 Finally, the Trial Chamber found that - and I quote -
29 "After the retreat from Freetown, Sesay chaired a meeting of the

1 AFRC and RUF commanders, including Kallon, Rambo and Superman, at
2 which the two groups planned to cooperate in a second attack on
3 Freetown. This second attack failed."

4 It is therefore quite clear to us that having regard to all
5 the evidence to which we have referred the only reasonable
6 conclusion is that the two forces continued to share the same
7 common purpose; the continued pattern of crimes as evidence of
8 the means contemplated within the common purpose.

9 The Prosecution listed the Trial Chamber's findings
10 regarding the attack on the civilian population and the crimes of
11 burning, looting, forced recruitment and forced labour and
12 submitted that the pattern of atrocities committed by the Armed
13 Forces Revolutionary Council and the Revolutionary United Front
14 in obedience to Bockarie's order show that - and I quote - "It
15 was intended that the means used to achieve the goals of
16 capturing Freetown and controlling the seat of power continued to
17 include the same criminal means."

18 The majority found the Prosecution's submissions on the
19 continuing pattern of crimes "not particularly probative" and
20 that the Prosecution's reference to - and I quote - "The fact
21 that each group individually continued to commit the crime that
22 constituted the criminal means of the prior shared criminal
23 purpose" is "misplaced as these facts are consistent with the
24 Trial Chamber's reasoning and conclusion."

25 We beg to disagree. It is quite clear to us - and it also
26 makes good sense - that the Prosecution's reference to the
27 continued pattern of crimes is most relevant in assessing whether
28 a common purpose continued to exist between the Armed Forces
29 Revolutionary Council and the Revolutionary United Front after

1 April 1998. In determining whether a common purpose continued to
2 exist after the ECOMOG intervention of 14 February 1998 the Trial
3 Chamber found - and I quote - "That the common purpose and the
4 means contemplated within remain the same as they were as there
5 was no fundamental change."

6 We endorse this finding.

7 In assessing whether the AFRC/RUF directed a widespread or
8 systematic attack against the civilian population, within the
9 meaning of Article 2 of the Statute, the Trial Chamber found the
10 attack on the civilian population, from February 1998 until the
11 end of January 2000, involved a series of large-scale concerted
12 military actions undertaken by the AFRC/RUF forces in multiple
13 locations throughout Sierra Leone. Further, it found that the
14 enslavement and forced marriages of civilians in Kailahun
15 District persisted as before and these practices spread to Kono
16 District, Bombali District, Koinadugu District, Freetown and the
17 Western Area and Port Loko District.

18 The Trial Chamber also found that - and I quote - "In
19 addition to ongoing forced labour in Kenema and Kailahun
20 Districts the attack against the civilian population of Sierra
21 Leone continued throughout other parts of the country between
22 1998 and January 2000."

23 It further found - and again I quote - "That during the
24 January 1999 invasion of Freetown rebel troops were ordered by
25 their leaders to burn public and private property and to kill and
26 maim civilians."

27 The Trial Chamber was satisfied - I quote again - "That the
28 widespread violence against civilian was organised. The evidence
29 contains multiple examples of operations staged by AFRC/RUF

1 forces pursuant to preconceived plans or policies which were
2 given particular names and directed at specific objectives.
3 Operation Pay Yourself was instituted by the Armed Forces
4 Revolutionary Council and the Revolutionary United Front
5 commanders who, unable to pay their troops, encouraged the
6 looting of civilian property. The Fiti-Fata mission in August
7 1998 and the RUF attack to recapture Kono District in December
8 1998 saw numerous atrocities committed against civilians."

9 we list these findings for the simple reason that it
10 follows logically and conclusively that the Trial Chamber's
11 findings made in respect of the chapeau requirements of crimes
12 against humanity are equally important and relevant to the Trial
13 Chamber's findings regarding the joint criminal enterprise. The
14 Appeals Chamber is also of the view that the widespread and
15 systematic nature of various crimes is a relevant factor in the
16 determination of whether a joint criminal enterprise exists.

17 Therefore, we opine that having regard to the crimes
18 committed by the Armed Forces Revolutionary Council and the
19 Revolutionary United Front, after late April 1998 throughout
20 Sierra Leone, taking into account the modus operandi of the
21 various attacks against the civilian population, and noting the
22 widespread and systematic nature of those attacks, all of these
23 factors point like a gun in one direction and one direction only:
24 That the criminal means of the common purpose that the Trial
25 Chamber found to exist, from May 1997 to late April 1998,
26 continued until February 1999 at the least.

27 In the circumstances, we find that the only conclusion open
28 to a reasonable trier of fact is that the Armed Forces
29 Revolutionary Council and the Revolutionary United Front, after

1 April 1998, continued to contemplate the commission of crimes
2 within the statute for the purpose of achieving their common plan
3 to regain power and control over the territory of Sierra Leone,
4 in particular the diamond mining areas.

5 Conclusion.

6 In the light of the foregoing considerations, we find that
7 a reasonable trier of fact would have concluded that the Armed
8 Forces Revolutionary Council, the Revolutionary United Front
9 joint criminal enterprise, which the Trial Chamber found to have
10 existed from May 1997 to late April 1998, when the Trial Chamber
11 held it ceased to exist, did in fact continue to exist until at
12 least February 1999 during which period the Armed Forces
13 Revolutionary Council and the Revolutionary United Front shared a
14 common purpose which contemplated the commission of crimes within
15 the Statute.

16 We therefore grant the Prosecution's first ground of
17 appeal, done in Freetown this day.

18 JUSTICE WINTER: Thank you. May I now ask Justice Ayoola
19 to read out a summary of his separate concurring opinion.

20 JUSTICE AYoola: Thank you, Madam President.

21 I append a separate concurring opinion to the judgment of
22 the Court. I now give a summary of my separate opinion in regard
23 to Gbao's subground 8(j) and subground 8(k).

24 Gbao raised the following complaints in his subgrounds 8(j)
25 and 8(k): First, the Trial Chamber erred in fact by finding Gbao
26 individually criminally responsible as a member of the joint
27 criminal enterprise by using the extended JCE full mens rea
28 standard against him in Bo, Kenema and Kono Districts, when all
29 crimes found to be part of the joint criminal enterprise were

1 found to have been committed pursuant to the first form of JCE.

2 Second, the majority of the Trial Chamber erred in law by
3 finding Gbao individually criminally responsible for crimes in
4 Bo, Kenema and Kono Districts as a member of the joint criminal
5 enterprise because he could not properly have been found to have
6 shared the intent in these three locations with other members of
7 the JCE.

8 The offences committed were charged in the counts. Each of
9 the counts was preceded by what can be regarded as particulars of
10 the offence grouped by district according to location of the
11 event. However, the structure of the indictment should not be
12 construed as indicating that there were as many joint enterprises
13 as there were districts, or as there were locations of the
14 crimes.

15 The Trial Chamber approached the case in its consideration
16 of the criminal responsibility of the respective accused in
17 respect of each of the districts where the events took place. On
18 this appeal Gbao put his case substantially as in the subgrounds.

19 The Prosecution for their part submitted, among other
20 things, that applicable legal principles do not require, in order
21 to establish JCE liability, the proof of significant contribution
22 and the requisite intent for the crimes charged with respect to
23 each location covered by the JCE, and that the Trial Chamber was
24 correct in finding that "where the joint criminal enterprise is
25 alleged to include crimes committed over a wide geographical
26 area, an accused may be found criminally responsible for his
27 participation in the enterprise even if his significant
28 contributions to the enterprise occurred only in a much smaller
29 geographical area provided he had knowledge of the wider purpose

1 of the common design."

2 To put these rival contentions in proper perspective, it is
3 expedient to note at the outset that the Trial Chamber, Justice
4 Boutet dissenting, found that Gbao made significant contribution
5 in Kailahun to the furtherance of the common purpose by securing
6 revenue, territory and manpower for the junta government, and by
7 aiming to reduce or eliminate civilian opposition to junta rule.
8 This finding was made in paragraph 2164 of the trial judgment.

9 In my opinion, the finding that in respect of crimes
10 committed in Bo, Kenema and Kono districts, Gbao did not share
11 the intent of "principal perpetrators to commit the crimes
12 committed against civilians in furtherance of the joint criminal
13 enterprise under the stated counts" cannot lead reasonably to a
14 conclusion that he was not a member of the joint criminal
15 enterprise.

16 On the indictment, the joint criminal enterprise was not
17 presented as a conglomeration of district-based joint criminal
18 enterprises but as a single joint criminal enterprise that was
19 nationwide. Besides, Gbao did not need to share the intent of
20 the principal perpetrators who themselves did not need to help
21 the members of the joint criminal enterprise. However, he needed
22 to share the requisite intent with other participants.

23 This case, therefore, turns specially on the requisite
24 intent. Principal perpetrators are the actual physical
25 perpetrators of the crime or those who performed the actus reus
26 of the crime. The imposition of liability upon an accused for
27 his participation intended to further a common criminal purpose
28 does not require an understanding or an agreement between the
29 accused and the principal perpetrator of the crime to commit the

1 particular crime.

2 It follows, in my opinion, that a shared intention between
3 Gbao and the principal perpetrators, who may not be members of
4 the JCE, is not the shared intention envisaged in stating the JCE
5 principles, even though the intent of the principal perpetrators
6 may be relevant in determining whether the crime committed by
7 them is within a common purpose or not.

8 There is really no substance in the suggestion by Gbao that
9 the absence of a shared intention to use the crimes committed in
10 Bo, Kenema and Kono Districts, as means of achieving the common
11 purpose, Gbao was not a member of the joint criminal enterprise.
12 Such suggestion, in my opinion, must have emanated from an unduly
13 narrow interpretation of the applicable principles.

14 In my opinion, as long as Gbao agreed with the common
15 criminal purpose, his choice of extent of the criminal campaign
16 does not terminate his membership unless he withdraws from the
17 joint criminal enterprise. Where members of a joint criminal
18 enterprise agree, as in this case, on a criminal campaign of
19 widespread and systematic attack on a civilian population, it is
20 reasonable to presume that they agree to the underlying crimes
21 that constitute the attack.

22 There is sufficient evidence in my opinion, before the
23 Trial Chamber, for each finding that Gbao was a member of the
24 joint criminal enterprise. The requisite shared intent that
25 needs to be established in regard to Gbao's JCE liability is a
26 shared intent on the part of all co-perpetrators to perpetrate
27 crimes against humanity and war crimes charged in the indictment.
28 It is sufficient for a participant in a joint criminal enterprise
29 to perform acts that in some way are directed to the furtherance

1 of that common design.

2 The submission by the Prosecution that applicable legal
3 principles do not require, in order to establish JCE liability,
4 the proof of significant contribution and the requisite intent
5 for the crimes charged with respect to each location covered by
6 the JCE is, in my opinion, in accord with the theory of JCE.

7 In the final analysis, the substance of the issues that
8 arise from the two subgrounds is: whether Gbao is a member of
9 the JCE and whether he has rightly been found to be criminally
10 responsible for crimes in Bo, Kenema and Kono districts,
11 notwithstanding that the Trial Chamber held that he did not
12 directly intend those crimes as a means of achieving the common
13 purpose, but which he willingly took the risk might be committed
14 by other members of the JCE or persons under their control.

15 It is apt to observe that the fact that Gbao did not intend
16 the crimes found unproved in Bo, Kenema and Kono, as means of
17 achieving the common purpose, does not logically lead to a
18 conclusion that he did not subscribe to the common purpose.

19 In this case the three requirements that are common to the
20 three categories of JCE are found by the Trial Chamber; namely:

- 21 (1) a plurality of persons;
22 (2) the existence of a common purpose or plan which amounts
23 to or involves the commission of a crime provided in the Statute;
24 and
25 (3) the participation of the accused in a common purpose.

26 It is instructive to recall that the plurality found by the
27 Trial Chamber was not a district by - was not on a
28 district-by-district basis. The common purpose in this case, as
29 pleaded and found, is expansive. It involves a criminal design

1 that contemplates perpetration of numerous crimes on a large and
2 nationwide scale. Gbao foresaw that crimes charged and proved
3 which he did not intend as a means of achieving the common
4 purpose might be committed by other members of the joint criminal
5 enterprise of which he is a participant or persons under their
6 control, but willingly took the risk by continuing to participate
7 in the enterprise.

8 If Gbao realises, without agreeing to such conduct being
9 used, that other members of the JCE may commit crimes as a means
10 of achieving the common purpose of the JCE, but nevertheless
11 continues to participate with the other members in the venture,
12 that will amount to a sufficient mental element for Gbao to be
13 criminally responsible as a member of the JCE if the other
14 members with the requisite intent commits the crimes within the
15 common criminal purpose in the course of the venture.

16 In my opinion, and it suffices to dispose of this question
17 by referring to Gbao's submission which accepted that the
18 reasonable and foreseeable consequence element may well be
19 accommodated within the basic element - basic form of the JCE -
20 when Gbao submits as follows - and I quote - "The basic element
21 of JCE, the common purpose either has such crimes within it or,"
22 and I emphasise, "as a reasonable and foreseeable consequence of
23 it." A reasonable and foreseeable consequence of the common
24 criminal purpose is that it will lead to widespread commission of
25 the crimes charged without limitation as to districts, as has
26 happened.

27 In the circumstances, it is difficult to understand how
28 Gbao turns around to claim that there was a misplacement of mens
29 rea standard by the Trial Chamber. In any event, it is a

1 misconception to conclude that the Trial Chamber applied the
2 wrong mens rea standard in convicting Gbao.

3 It is not necessary to ascertain the intent of the member
4 of the JCE in regard to criminal activities of the JCE in every
5 town or district where such activity took place in order to
6 determine whether there was a joint criminal enterprise or
7 whether if there was -- Gbao was a participant of the JCE -- his
8 membership of the joint criminal enterprise has been found to
9 become manifest in his activities in Kailahun.

10 What was required under the doctrine of JCE on such large
11 scale as in this case is that, in regard to the joint criminal
12 enterprise, a trier of fact must find that the accused made a
13 contribution to the common criminal purpose and that the common
14 intended crime offer convictions under the third category of JCE
15 crime did in fact take place. In this case, the common intended
16 crime are crimes against humanity designed to be committed
17 nationwide.

18 Where the joint criminal enterprise is not based on an
19 understanding as to the limited extent of the territorial scope
20 of the enterprise a member of the JCE who actively participates
21 in the enterprise cannot, by himself, limit the scope of the
22 enterprise. His reasonable option is to withdraw from the
23 enterprise. Gbao, who was assigned to the RUF in Kailahun,
24 actively implemented the criminal means by which the RUF intended
25 to achieve the objectives of the enterprise in his sphere of
26 activities. His intent in Bo, Kenema and Kono, in regard to the
27 crimes in those other districts, cannot lead to a reasonable
28 conclusion that he and the other members of the JCE do not share
29 an intent in regards to the existence of the joint criminal

1 enterprise and the means of achieving its common purpose.

2 The Trial Chamber made an assessment of Gbao's
3 responsibility in Kailahun and found the requisite intent for the
4 relevant crimes under the first category of JCE. Their findings,
5 concerning his intent in relation to the crimes committed in Bo,
6 Kenema and Kono, as a means of achieving the common purpose of
7 the joint criminal purpose, in my opinion, are inconsequential
8 and unnecessary. The submission that the mens rea element of JCE
9 is not met is not tenable.

10 I agree with the conclusion arrived at by Justice Kamanda
11 and Justice King in regard to the subgrounds contained in the
12 body of the appeal judgment, that Gbao's subgrounds 8(j) and 8(k)
13 be dismissed. Gbao's subground 8(a) has earlier been allowed
14 with the result that his role as an RUF ideology instructor is
15 not taken into consideration in defining his role in the joint
16 criminal enterprise, or at all, in consideration of the issues
17 arising in regard to subgrounds 8(j) and 8(k).

18 The rest of the findings made by the Trial Chamber in
19 regards to his role and contribution to the JCE, without the
20 finding that he was an ideology instructor, are sufficient to
21 support the conclusion that he is a member of the joint criminal
22 enterprise.

23 Thank you.

24 JUSTICE WINTER: Thank you very much. I am now reading my
25 own separate concurring opinion.

26 I write separately to express my understanding of the
27 Appeals Chamber holding regarding one aspect of the mens rea
28 standard for the crime of conscripting and enlisting children
29 under the age of 15 years into armed forces or groups or using

1 them to participate actively in hostilities.

2 It appears from the facts of this case that the age of the
3 children who were conscripted or used in combat was not always
4 immediately apparent. The Trial Chamber held that where doubt
5 might have arisen -- sorry, where doubt may have existed as to
6 whether a person abducted or trained was under the age of 15 it
7 was incumbent on the perpetrators to ascertain the person's age.
8 Kallon appealed this finding in ground 20. The Appeals Chamber
9 finds no error in the Trial Chamber's statement that the accused
10 were under a duty to exercise due diligence to ascertain the age
11 of the child.

12 I concur in this finding, but I wish to clarify what I take
13 it to mean precisely. Our holdings relies on the ICC decision in
14 the Katanga case which applies the mens rea with regard to the
15 age of the child as it is codified in the ICC elements of crimes.
16 The ICC in Katanga requires that the perpetrator knew or should
17 have known that the victims were under the age of 15 years. The
18 Katanga decision accords the should have known standard with an
19 accused's failure to comply with his duty to act with due
20 diligence.

21 The Appeals Chamber holding affirming the duty of the
22 accused to exercise due diligence in ascertaining the age of the
23 child is identical to the articulation of the duty found by the
24 ICC.

25 It is therefore my understanding that the mens rea standard
26 reflected in our judgment is knew or should have known with
27 respect to the age of child. Consequently, the Appeals Chamber
28 has rejected the Trial Chamber's implication that evidence of the
29 accused's reason to know may be required.

1 In addition to this clarification, I also wish to express
2 my complete agreement with the reasoning and conclusions
3 expressed by Justice Fisher in her partially dissenting and
4 concurring opinion insofar as it pertains to Gbao's subgrounds
5 8(g) and 8(k), Gbao's subground 8(i), Sesay's ground 33 and 46,
6 and her opinion regarding the failure to plead locations with
7 sufficient specificity.

8 In particular, I join her dissent from the majority's
9 decision to confirm Gbao's conviction under JCE liability given
10 the Trial Chamber's findings that he did not share the common
11 criminal purpose with the other participants in the case before
12 us.

13 Thank you. I will now ask Justice Fisher to read her
14 partially dissenting opinion as a summary. Justice Fisher asked
15 me to apologise in case she might have difficulties with her
16 voice. Please, Justice Fisher.

17 JUSTICE FISHER: Thank you, Madam President.

18 I respectfully but fundamentally dissent from the
19 majority's decision to confirm the Trial Chamber's convictions of
20 Gbao under joint criminal enterprise liability.

21 In my written opinion, I also express reservations
22 regarding the majority's decision on Gbao's actus reus for JCE
23 liability, certain aspects of Sesay's appeal, the degree of
24 specificity required for pleading locations in the indictment,
25 and I also join the separate opinion of Justice Winter that she
26 just recited, but I will focus today on my main point of dissent
27 here; Gbao's mens rea for JCE liability.

28 The majority holds that Gbao can incur individual criminal
29 responsibility under JCE notwithstanding the Trial Chamber's own

1 findings that he did not share the common criminal purpose with
2 the participants of the JCE in the case before us. In my view,
3 this entirely detaches JCE liability from the requisite mens rea
4 that defines it. I am compelled to dissent from this
5 unprecedented holding which abandons the keystone of JCE
6 liability as it exists in customary international law.

7 Joint criminal enterprise, JCE, is a mode of attributing
8 liability for a crime. It is part of and defined by customary
9 international law. It is not itself a crime; it is not liability
10 for membership in an organisation. It is definitely not a form
11 of conspiracy as known by that or any other name in national law,
12 or national jurisprudence.

13 Let me first say that I am in complete agreement with the
14 general statements of the law on JCE set out in our appeal
15 judgment. In particular, we hold that, "Both JCE1 and JCE3
16 require the existence of a common criminal purpose which must be
17 shared by the members of the JCE, including in particular the
18 accused."

19 In other words, before arriving at the question of whether
20 the accused may incur JCE liability for reasonably foreseeable
21 crimes committed beyond the scope of the common criminal purpose
22 a trier of fact must be satisfied, beyond reasonable doubt, that
23 the accused shared the intent to commit the crimes within the
24 common criminal purpose. JCE3 therefore cannot attach without
25 first finding all the elements of JCE1.

26 It follows from the section of our appeal judgment,
27 consistent with JCE in customary international law, that
28 liability under both JCE1 and JCE3 requires, among other things,
29 that the accused possess "the same criminal intention" as the

1 other participants in the JCE; that he shares the common criminal
2 purpose with them.

3 Accordingly, the accused must intend the full extent of the
4 shared common criminal purpose, both in terms of the crimes
5 intended and the geographical area covered by the JCE. Where
6 this is established, and the other elements of JCE liability are
7 met, customary international law attaches criminal responsibility
8 to the accused not only for his own actions but also for the
9 actions of his fellow JCE members that further the commonly
10 intended crimes - that is JCE1 - or that are reasonably
11 foreseeable consequences of carrying out the commonly intended
12 crimes, that is JCE3. Conversely, if the accused did not intend
13 these crimes to begin with, neither form of JCE liability can
14 arise.

15 In the present case, the judgment of the Appeals Chamber
16 reflects that we unanimously found that the common criminal
17 purpose established by the Trial Chamber in the present case was
18 - and I quote - "The objective to gain and exercise political
19 power and control over the territory of Sierra Leone, in
20 particular the diamond mining areas, and the crimes as charged
21 under Counts 1 to 14 as means of achieving that objective."

22 The statutory crimes within the common criminal purpose
23 were thus the criminal acts described under Counts 1 to 14 in the
24 indictment. The geographical scope of the common criminal
25 purpose was the territory of Sierra Leone, though the crimes for
26 which the appellants were convicted were committed in Bo, Kenema,
27 Kono and Kailahun districts.

28 To this point I completely agree with our appeal judgment.
29 Where I differ from the majority is in the recognition of what I

1 believe to be a fatal contradiction in the Trial Chamber's
2 conclusion that Gbao was a "participant or member in the JCE"
3 while at the same time finding that Gbao did not intend any of
4 the crimes in Bo, Kenema, or Kono Districts as a means of
5 achieving the common criminal purpose.

6 He was found by the Trial Chamber only to have intended the
7 crimes committed in Kailahun District. Since Gbao did not intend
8 the crimes in Bo, Kenema and Kono districts, a total of more than
9 63 crime incidents, he did not share the same criminal intention
10 as the other participants in the common criminal purpose. He
11 cannot therefore be found to incur JCE liability.

12 In affirming Gbao's conviction under JCE, the majority
13 ignores this contradiction and reasons that it was sufficient for
14 the Trial Chamber to conclude that Gbao was a "participant or
15 member in the JCE." Therefore, according to the majority's
16 reasoning, it matters not whether Gbao intended the crimes in Bo,
17 Kenema and Kono, because as a "member of the JCE" he was liable
18 for the commission of the crimes in Bo, Kenema and Kono districts
19 which were within the common criminal purpose so long as it was -
20 and I quote the majority - "reasonably foreseeable that some of
21 the members of the JCE or persons under their control would
22 commit crimes."

23 This reasoning is not only circular, but dangerous. First,
24 describing Gbao as a participant under this theory is mistaken
25 because whether or not he was a participant is only significant
26 if it means that he shared the common intent of the JCE; that is,
27 the common criminal purpose. The Trial Chamber's findings,
28 unquestioned and indeed quoted by the majority, state
29 unequivocally that he did not.

1 Second, the majority collapses the distinction between the
2 mens rea required for JCE1 and the mens rea applicable to JCE3 by
3 holding that Gbao can be liable for crimes within the common
4 criminal purpose that he did not intend but were only reasonably
5 foreseeable to him. Such an extension of JCE liability blatantly
6 violates the principle of nullum crimen sine lege, because it
7 imposes criminal responsibility without legal support in
8 customary international law. The majority makes no effort to
9 reason why it considers that this extension of JCE liability was
10 part of the law to which Gbao was subject at the time these
11 offences were committed and it fails to cite a single case in
12 which this extension of liability is recognised as part of
13 customary international law.

14 This dearth of international jurisprudential support was
15 acknowledged by the Prosecution, which admitted at the appeal
16 hearing that there "may be no authority" in international
17 criminal law in which the mens rea element for JCE as
18 characterised or applied as the Trial Chamber applied it to Gbao;
19 that is because there is none. The primary justification
20 suggested by the majority for its radical departure from
21 customary international law is that its conflation of JCE1 and
22 JCE3 mens rea standards "is consistent with the pleading of the
23 crimes in the indictment."

24 That an indictment may plead in the alternative does not
25 establish that there is no distinction between the forms of
26 liability so pleaded. Also, whether the indictment permissibly
27 pleaded JCE is irrelevant as an evidentiary matter.

28 Finally, in a perplexingly contradictory and unexplained
29 pronouncement, the majority expresses its agreement with the

1 Prosecution's position at the appeal hearing that Gbao "shared
2 the intent for the crimes to be committed in Kailahun District so
3 he was a participant in the joint criminal enterprise."

4 As an initial matter, this position is contrary to the
5 majority's own reasoning as it envisages a common criminal
6 purpose different from that found by the Trial Chamber and
7 confirmed unanimously on appeal. That different subsidiary
8 common criminal purpose is limited solely to Kailahun District
9 and excludes acts of pillage, Count 14, as no such crimes were
10 committed there.

11 If in fact the majority accepts the position of the
12 Prosecution, that the shared intent for the crimes committed in
13 Kailahun describes the common criminal purpose of the JCE, then
14 Gbao would presumably have been liable under JCE1 for the crimes
15 in Kailahun District and liable under JCE3 for the crimes in the
16 other districts. However, such a limited subsidiary JCE was
17 never sufficiently pleaded in the indictment, nor found by the
18 Trial Chamber; nor did the Trial Chamber make any findings that
19 the crimes in Bo, Kenema and Kono were reasonably foreseeable by
20 Gbao as a consequence of the implementation of that subsidiary
21 JCE, as opposed to the countrywide JCE found by the Trial
22 Chamber. This theory, therefore, finds no support in the
23 pleadings or the findings.

24 I repeat: The only JCE pleaded, established and upheld in
25 this case had as its common criminal purpose to control the
26 territory of Sierra Leone through the commission of the crimes
27 charged under Counts 1 to 14. Gbao either shared the intent of
28 this criminal purpose, both in terms of the types of crimes and
29 the geographical scope it encompassed, or he did not. The Trial

1 Chamber found that he did not. The majority does not question
2 these findings.

3 The Trial Chamber's error with respect to Gbao's mens rea
4 is not simply a harmless mistake that can be rectified or
5 overlooked on appeal. Rather, because of this error, the entire
6 legal edifice, the Trial Chamber and majority have constructed
7 for Gbao's JCE liability is so fundamentally flawed that those
8 convictions which rest upon it collapse. I therefore would grant
9 Gbao's ground 8(j) and 8(k).

10 I wish to emphasise that I do not question that heinous
11 crimes were committed against the civilian population of Sierra
12 Leone as found by the Trial Chamber, nor would I find Gbao
13 innocent of all the charges against him. I am satisfied that the
14 Trial Chamber's findings establish beyond reasonable doubt that
15 Gbao is guilty of aiding and abetting the crimes of enslavement
16 committed in Kailahun District, and I join with the majority in
17 finding him guilty under Count 15 of aiding and abetting the
18 attack on the UNAMSIL peacekeeper. My disagreement with the
19 majority is therefore not about whether Gbao is guilty of some
20 crimes but, rather, whether Gbao is guilty of all the crimes for
21 which he was convicted by the Trial Chamber pursuant to his
22 alleged participation in the JCE.

23 In concluding, I am obliged to note that the doctrine of
24 JCE, since its articulation by the ICTY Appeals Chamber in Tadic,
25 has drawn criticism for its potentially overreaching application.
26 International criminal tribunals must take such warnings
27 seriously and ensure that the strictly construed legal elements
28 of JCE in customary international law are consistently applied to
29 safeguard against JCE being overreaching or lapsing into guilt by

1 association.

2 For Gbao, the Trial Chamber and the majority have abandoned
3 the safeguards laid down by other tribunals as reflective of
4 customary international law. As a result, Gbao stands convicted
5 of committing crimes which he did not intend, to which he did not
6 significantly contribute and which were not a reasonably
7 foreseeable consequence of the crimes he did intend. The
8 majority's decision to uphold these convictions is regrettable.
9 I can only hope that the primary significance of that decision
10 will be as a reminder of the burden resting on triers of fact
11 applying JCE and a warning of the unjustified consequences that
12 ensue when they fail to carry that burden.

13 JUSTICE WINTER: Thank you. I thank all persons present
14 here and declare the case closed.

15 MR KAMARA: May I be heard your Honours? Excuse me, your
16 Honours, I think I may seize the opportunity now to say a big
17 thank you to you, your Honours.

18 MR TAKU: Your Honour, we object. There is no place in the
19 rules for the Prosecutor to make a statement after the judgment.

20 MR CAMMEGH: So do I.

21 JUSTICE WINTER: I declared the case closed.

22 MR KAMARA: As my Lord pleases. Thank you very much.

23 (The hearing adjourned at 12:36 p.m.)
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