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**SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER**

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

Registrar: Mr. Herman von Hebel

Date filed: 28 April 2009

THE PROSECUTOR

against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-2004-15-A

PUBLIC

NOTICE OF APPEAL FOR AUGUSTINE GBAO

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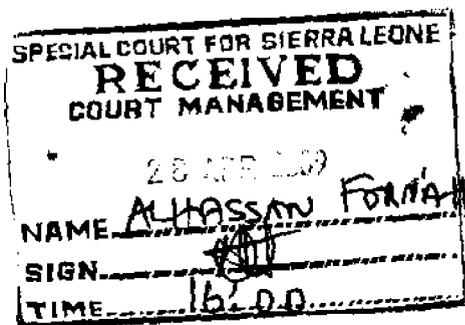
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I. Introduction

1. The Third Accused files this Notice of Appeal against the Judgement rendered by Trial Chamber I in the case of the *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* on 25 February 2009 (“Trial Chamber Judgement”)¹ and the Sentencing Judgement from 8 April 2009 (“Sentencing Judgement”)² pursuant to Article 20 of the Statute for the Special Court of Sierra Leone³ and Rule 108 of the Rules of Procedure and Evidence.⁴ This notice sets forth the various grounds of appeal, including both errors of law and fact, for the Appeals Chamber’s consideration.

2. Mr Gbao was convicted by a Majority decision in Trial Chamber I as a member of the joint criminal enterprise in the following areas under the following Counts:

- i. Bo District (between 1-30 June 1997): Counts 3-5, and 14;
- ii. Kenema District (between 1-30 June 1997): Counts 3-5, 11, 13;
- iii. Kono District (between 14 February-April 1998): Counts 3-5, 6-9, 10-11, 13, and 14; and
- ii. Kailahun District (between 25 May 1997-19 February 1998): Counts 1, 2, 3-5, 7-9, and 13.⁵

3. Judge Pierre Boutet dissented on the above disposition in its entirety.⁶

¹ *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1234, Judgement (TC), 25 February 2009. A corrigendum was filed on 7 April 2009, Doc. No. SCSL-04-15-T-1250, Corrigendum to Judgement (TC), 7 April 2009.

² *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1251, Sentencing Judgement (TC), 8 April 2009.

³ Statute of the Special Court for Sierra Leone, annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone, 16 January 2002. (“Statute”).

⁴ Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended 27 May 2008. (“Rules of Procedure and Evidence”).

⁵ Judgement, Part IX “Disposition” (p. 684-686).

⁶ Judgement, Part X “Dissenting Opinion of Justice Pierre G. Boutet” (pp. 688-696).

4. The Court also found Augustine Gbao guilty under Count 15 for aiding and abetting two of fourteen attacks on United Nations Peacekeepers, specifically those directed against Major Salahuedin and Lt Colonel Jaganathan on 1 May 2000.⁷

5. In its Sentencing Judgement, the Majority in the Trial Chamber sentenced Mr Gbao to between 6 and 25 years for each Count he was convicted.⁸ It was ordered that he serve these sentences concurrently. Judge Boutet dissented to the ultimate sentence against Gbao and found that a 15 year sentence would be appropriate.⁹

6. The Third Accused objects to the convictions and the sentences in their entirety and hereby files its Notice of Appeal asserting that each of the convictions and the ultimate sentence are so tainted by errors of law and fact that they should not be maintained against Gbao.

7. This Notice endeavours to present a comprehensive account of all that will appear in the Appellant's brief. Should a ground for appeal arise between 28 April 2009 and the filing of the Appellant's brief, the Defence will attempt to amend its notice. It is also suggested that the Court accept the jurisprudence of *Prosecutor v. Krajisnik*, where the Appeals Court considered novel grounds of appeal by the Appellant, even though it was not included in its notice of appeal, so long as the Respondent was not materially prejudiced.¹⁰

8. The Defence for Augustine Gbao submits that the Trial Chamber committed a multitude of serious errors of law and fact in its Judgement and Sentencing Judgement. The errors of law constitute discernible errors that invalidate the Trial Chamber's

⁷ Judgement, Part IX "Disposition" (p. 686).

⁸ Sentencing Judgement, Part VI "Disposition".

⁹ Sentencing Judgement, Separate and Dissenting Opinion of Justice Pierre G. Boutet, para. 4.

¹⁰ *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-A, Judgement (AC), 17 March 2009, para 748. Available at <http://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf>.

Judgement, as it has misdirected itself as to the legal principle to be applied. The errors of fact, even with the customary deference accorded Trial Chamber findings, include numerous incorrect applications of the law and/or were a patently incorrect, wholly erroneous evaluation of the evidence presented by Prosecution and Defence witnesses. These errors were so unreasonable that the only conclusion is that the Trial Chamber committed a myriad of discernible errors through its failure to exercise its discretion judiciously. No reasonable trier of fact could have reached the same findings as this Trial Chamber, who thereby abused its discretion.

9. The Defence for the Third Accused hereby files its grounds of appeal set forth below.

II. Grounds of Appeal

A. Grounds Applicable to All Counts

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

10. The Trial Chamber erred in fact in utilising documentary evidence to base its conviction, in part, against Augustine Gbao as a member of the Joint Criminal Enterprise in Counts 1-14 and for aiding and abetting two of the fourteen attacks on UNAMSIL under Count 15. These errors failed to follow their finding in paragraph 519 where it stated that these reports, in and of themselves, were “an insufficient basis upon which to ground a conviction”.

11. Relying upon documentary evidence to make findings beyond providing general background or adding context to understanding the conflict is impermissible. The Appellant requests that each improper use of documentary evidence in the Trial Chamber's Judgement should be removed and, if necessary, lead to reconsideration by the Appeals Chamber of the particular charges against the Accused and whether they can be sustained. If they cannot, the Appellant requests that the Appeals Chamber reverse the relevant conviction(s) and accompanying sentence.

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

12. The Majority in the Trial Chamber erred in fact by utilising expert testimony and reports beyond its parameters by drawing conclusions touching upon 'ultimate issues' in the case against Augustine Gbao. While there was no explicit reference to this principle in the Trial Chamber's Judgement, it was noted in paragraph 52 of Justice Bankole Thompson's separate concurring opinion.¹¹

13. The Appellant requests that each improper use of the expert testimony or report be removed and, if necessary, lead to reconsideration by the Appeals Chamber of the particular charges against the Accused and whether they can be sustained. If they cannot, the Appellant requests that the Appeals Chamber reverse the relevant conviction(s) and accompanying sentence.

¹¹ Judgement, Part XI Separate Concurring Opinion of Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute.

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

14. The Trial Chamber failed throughout the Judgement, but particularly the section relating to Kailahun District, to provide the Third Accused a sufficiently reasoned opinion in writing, as required under Article 18 of the Special Court Statute. For example, the Trial Chamber erred in fact by:

- i. Failing to acknowledge and/or respond to relevant legal arguments presented by the Defence in its Closing Brief;
- ii. Disregarding critical evidence without providing a reason;
- iii. Assuming the satisfaction of elements of crimes without elucidating its rationale;
- iv. Failing to assess the credibility of certain witnesses who were indispensable to the Majority's findings of joint criminal enterprise against Gbao or otherwise critically important to establishing the Prosecution's case;
- v. Failing to explain why certain Gbao witnesses, who were almost universally disregarded as lacking credibility, were judged credible when used to implicate the Third Accused (at least ostensibly) or otherwise establish the Prosecution's case;
- vi. Failing to explain why and when certain Prosecution witnesses were found to need corroboration for some testimony, but not for other testimony;
- vii. Not explaining the inconsistencies or contradictions between two witnesses found to be credible;
- viii. Failing to explain why it relied upon the testimony of a certain witness found credible by the Trial Chamber more than the testimony of another credible witness, likewise found to be credible in the Judgement, when they directly conflicted with one another;

- ix. Failing to adequately explain how it arrived at its sentences for the various convictions; and
- x. Other material matters relating to the Gbao's right to be presented with a reasoned written opinion.

15. While appreciating that the Trial Chamber cannot provide reasons why it accepted or rejected every assertion made by every witness over a four-year trial (as well as some legal arguments), the Trial Chamber has failed to observe Gbao's right to know how it arrived at particular conclusions throughout its Judgement. This error significantly affects the Appeals Chamber's ability to understand and review the Trial Chamber's findings as well as its evaluation of evidence.

16. Had the Trial Chamber exercised its responsibilities properly, it may have arrived at a different result regarding the overall criminal culpability of the Third Accused.

17. This error invalidates the Judgement in its entirety. If the Appeals Chamber finds otherwise, it should at least require it to reconsider all areas of the Judgement where sparse, summary findings are made and legitimate arguments are wholly ignored.

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

18. The Trial Chamber erred in law by inventing legal principles relating to the Prosecution's drafting of the Indictment, effectively lowering its burden. In finding that a post-conflict environment permits a lower standard of performance on behalf of the Prosecution (as well as other factors) the Trial Chamber impermissibly infringed upon the guaranteed rights of an Accused to a fair trial.

19. The effect of lowering this paramount and guaranteed protection has the effect of irreparably harming the rights of the Accused. Accordingly, the Appellant requests that the Appeals Chamber invalidate the entire Judgement. In the alternative, we would invite the Appeals Chamber to review the findings relating to the alleged defects in the Indictment under the appropriate standard of review.

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

20. The Trial Chamber erred in law and fact by repeatedly accepting the veracity of testimony from Prosecution witnesses, whether piecemeal (in a subjective and insufficiently detailed manner) or wholesale. In our submission no single Prosecution witness that testified against Gbao was found to be entirely devoid of credibility. This contrasted starkly with the impermissibly high standard required by the Trial Chamber regarding credibility of Defence Witnesses, who were almost universally found to lack credibility, except when the Trial Chamber used their testimony to provide context to findings that benefited the Prosecution case or when it used these ostensibly non-credible witnesses called by co-defendants to implicate Gbao.

21. More generally, the Trial Chamber failed to set forth its reasoning why certain witnesses were found credible when they had been seriously impugned. The Chamber also repeatedly failed to acknowledge the countless retractions of direct testimony of Prosecution witnesses during cross-examination (thus invalidating their direct testimony and impairing their overall credibility). Additionally, the Chamber erred in their subjective, incomplete and hence misleading acceptance of partial testimony from certain witnesses who, taken in complete context, were patently and wholly unreliable. The Trial Chamber's witness assessment was also poisoned by an inadequate and occasionally

careless use of uncorroborated testimony when certain testimony required corroboration (according to its own findings).

22. Proper scrutiny of witness credibility would at the least have produced an assessment more critical of certain Prosecution witnesses, especially those admitting to lying under oath, insider witnesses who committed serious crimes and witnesses with myriad inconsistencies in their testimony. The overall effect of these assessments curtails the Appeals Chamber's ability to adequately assess its Judgement.

23. It necessarily follows that the Trial Chamber failed to conduct the appraisal of evidence with full impartiality, even keeping in mind the customary discretion accorded to finders of fact in assessing witness credibility. No reasonable trier of fact would have reached the same conclusion. The Third Accused submits that the gravity of this error can only be met by invalidating the Trial Chamber's Judgement, or at least a requirement that it reconsider a majority of its findings, particularly in relation to Kailahun District, where the errors were most offensive.

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

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

25. It is submitted that the gravity of this error by the Trial Chamber demands the Appeals Chamber to reconsider whether it can sustain the convictions against Gbao without various testimony deemed critical by the Trial Chamber, particularly in Kailahun District.

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

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

27. The Third Accused suggests that the effect of this error requires the Appeals Chamber to reconsider whether it can sustain the convictions against Gbao regarding several Counts in the Judgement without certain testimony that the Trial Chamber deemed critical, particularly in Kailahun District.

B. Grounds Related to Joint Criminal Enterprise

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

28. The Majority in the Trial Chamber erred in law and fact in paragraphs 991-1014, 1016-1041, and 1970-2049 by finding Gbao responsible for unlawful killings (Counts 3-

5) and pillage (Count 14) in Bo District as a member of the joint criminal enterprise (“JCE”) between 1 – 30 June 1997.

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

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

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

i. Sub-Grounds Applicable to All Locations

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

32. The Majority in the Trial Chamber made serious errors of fact and law in finding Gbao to be a member of the joint criminal enterprise in his position as “The Ideologist”

of the RUF. The Prosecution never made this allegation in the Indictment. Over the course of the four-year trial, the Prosecution never advanced the argument that Gbao significantly contributed to the alleged joint criminal enterprise as the “Ideologist” for the RUF. In making this finding and attributing criminal responsibility to Gbao, the Majority has denied him his right to a fair trial.

33. We submit that the gravity of this error demands the Appeals Chamber to overturn the convictions and sentences entered against Gbao under the doctrine of joint criminal enterprise.

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

34. The Majority in the Trial Chamber erred in fact in paragraph 2170, as well as in other areas of the Judgement, by finding that Gbao was an ideology instructor training all new RUF recruits throughout the Indictment period. This factual finding is not only wholly erroneous, not being based on testimony from either Defence or Prosecution witnesses, it distorts the truth.

35. We submit that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under the doctrine of joint criminal enterprise.

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

36. The Majority in the Trial Chamber erred in law and fact in finding that Gbao was part of a plurality of persons acting in concert, either explicitly or by inference, in an effort to further the common purpose of the alleged joint criminal enterprise. The Majority found Gbao a member of the JCE with the AFRC, but failed to describe why he was found to be a member and how he acted in concert with the AFRC, instead offering only seemingly arbitrary findings of his membership in the plurality.

37. The Majority in the Trial Chamber also erred, in law and fact, by finding that Gbao was part of the plurality of persons acting in concert in furtherance of the common purpose of the JCE, as only senior members of the RUF were found to be acting in concert with the AFRC.

38. It is suggested that the gravity of these errors requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under joint criminal enterprise.

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

39. The Majority in the Trial Chamber erred in fact by failing to detail through factual findings the methods by which the alleged members of the joint criminal enterprise “used” non-members of the JCE to commit crimes as provided in the Indictment in an effort to further the common purpose.

40. It is suggested that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao for crimes committed by non-JCE members under joint criminal enterprise.

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

41. The Majority in the Trial Chamber erred in law in paragraph 2016, and in other sections of their Judgement, by criminalising the non-criminal purpose of taking power and control over the territory of Sierra Leone, not inherently impermissible under international law. While it is acknowledged that any non-criminal common purpose can become criminal if it involves the commission of crimes, we submit that one can infer that the Trial Chamber made this finding independent of whether it involved the commission of crimes or not.

42. It is suggested that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under joint criminal enterprise.

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

43. The Majority in the Trial Chamber erred in finding many different common purposes and/or means to achieve the common purpose in its Judgement. It also routinely re-characterised the nature of the common purpose and confused what constituted the criminal means involved in achieving the alleged common purpose and the common purpose itself. The Trial Chamber also found different criminal purposes for the AFRC and RUF.

44. It is suggested that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under joint criminal enterprise.

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

45. The Majority in the Trial Chamber erred in their findings on the establishment of a common plan that certain activities by the RUF and AFRC during the Junta period constituted criminal means to achieving their alleged goal of taking and maintaining power over the territory of Sierra Leone.

46. It is suggested that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under joint criminal enterprise.

Sub-Ground 8(h): The Trial Chamber Erred in Fact by Finding that Crimes Found to have been Committed were in Furtherance of the Alleged Joint Criminal Enterprise

47. The Trial Chamber erred in fact in finding that the crimes committed in Bo, Kenema, Kono and Kailahun Districts were sufficiently in furtherance of the alleged joint criminal enterprise. The findings did not sufficiently demonstrate a nexus between the crimes and how they furthered the joint criminal enterprise.

48. It is suggested that the gravity of this error should require the Appeals Chamber to overturn the convictions entered against Gbao and substitute an acquittal, as well as overturning the Majority's sentences on all counts for which Gbao was convicted under

joint criminal enterprise.

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

49. The Majority in the Trial Chamber erred in law and fact by finding that Gbao significantly contributed to the joint criminal enterprise as “The Ideologist” of the RUF.

50. The Majority in the Trial Chamber also erred in law and fact by finding that Gbao’s other alleged contributions—his status, rank, assignment and relationship with Foday Sankoh, his role as overall security commander, his role in the Trial Chamber’s findings regarding enslavement in Kailahun District, and in failing to investigate the beating of TF1-113—significantly contributed to the joint criminal enterprise.

51. It is suggested that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under joint criminal enterprise, as his acts did not amount to a significant contribution.

ii. Sub-Grounds Relating to Bo, Kenema and Kono Districts

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

52. The Majority in the Trial Chamber erred in fact by finding Gbao individually criminally responsible as a member of the joint criminal enterprise under category three, or the extended form, *mens rea* standard in Bo, Kenema and Kono Districts when all

crimes found to be part of the joint criminal enterprise were category one, or basic form, in all locations.

53. Since the Chamber found that Counts 1-14 in the Indictment were within the joint criminal enterprise and intended by the participants to further the common purpose to take power and control over Sierra Leone, it wrong in law to convict Gbao under the extended form.

54. It is suggested that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under joint criminal enterprise.

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

55. The Majority in the Trial Chamber erred in fact by finding Gbao individually criminally responsible for crimes in Bo, Kenema and Kono Districts as a member of the joint criminal enterprise, as it found that he did not share the intent of the other members of the joint criminal enterprise.

56. It is suggested that the gravity of this error requires the Appeals Chamber to dismiss all convictions and pursuant sentences in relation to crimes in Bo, Kenema and Kono Districts, where Gbao was not found to have intended the crimes as an alleged member of the joint criminal enterprise.

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

57. The Majority in the Trial Chamber erred in fact by failing to explain why crimes that were found proven beyond reasonable doubt were a foreseeable consequence of Gbao's alleged membership in the joint criminal enterprise or that he willingly took the risk that these crimes would be committed.

58. While the Appeals Chamber should dismiss the convictions under joint criminal enterprise for the various reasons listed in this Notice, if it considers Gbao's culpability in Bo, Kenema and Kono Districts under Form III of joint criminal enterprise liability, it should dismiss the charges based upon the Majority in the Trial Chamber's failure to make findings linking the crimes committed by physical perpetrators and how these crimes were reasonably foreseeable to Gbao. In the alternative, it was not reasonably foreseeable to Gbao that these crimes would be committed.

59. It is suggested that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao under joint criminal enterprise.

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

60. The Majority in the Trial Chamber erred in fact by finding that Gbao had any knowledge whatsoever about the crimes it found to have been committed in Bo, Kenema and Kono Districts. Despite many explicit findings to the contrary, the Majority made no findings apart from generically and arbitrarily attributing knowledge to Gbao.

61. We submit that the gravity of this error requires the Appeals Chamber to overturn the Majority's finding where such cursory, unsubstantiated findings are made.

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

62. The Majority in the Trial Chamber erred in fact by finding Gbao responsible for crimes requiring a specific intent in Bo, Kenema and Kono under form III, or the extended form, of liability.

63. While the Appeals Chamber should dismiss the convictions under joint criminal enterprise for the various reasons listed in this Notice, if it considers Gbao's culpability in Bo, Kenema and Kono Districts under Form III of joint criminal enterprise liability, it is suggested that the gravity of this error requires the Appeals Chamber to overturn the convictions and sentences entered against Gbao where the Majority convicted Gbao for a specific intent crime under joint criminal enterprise.

iii. Sub-Grounds Relating to Kailahun District

Sub-Ground 8(o): The Majority in the Trial Chamber Erred in Fact in Finding that Gbao Shared the Specific Intent with Members of the JCE or the Principal Perpetrators under Count 1

64. The Majority in the Trial Chamber erred in fact in paragraphs 1380-1443, 1444-1495, 1970-1973, and 2156-2173 by convicting Gbao of Count 1 without making any finding to demonstrate that he held the intent to commit the crime of terrorism. If the Appeals Chamber finds that the Majority in the Trial Chamber did in fact find Gbao possessed the requisite general and specific intent, it erred in making this finding.

65. In direct contradiction of this finding, in paragraph 2047 the Majority in the Trial Chamber wrote that “the Prosecution has failed to adduce evidence of acts of terrorism in the parts of Kailahun District that were controlled by the RUF and where Gbao was located”.

66. Even if the Appeals Chamber accepts the Majority’s findings regarding the *actus reus* of Gbao in the alleged joint criminal enterprise, it should additionally and independently dismiss the conviction against Gbao, as the Majority did not properly find Gbao’s specific intent to terrorise the civilian population.

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

67. The Majority in the Trial Chamber erred in fact in paragraphs 1380-1443, 1444-1495, 1970-1973, and 2156-2173 by convicting Gbao of Count 2 without making any finding to demonstrate that he held the intent to commit the crime of collective punishment. If the Appeals Chamber finds that the Majority in the Trial Chamber did in fact find Gbao possessed the requisite intent, it erred in making that finding.

68. Even if the Appeals Chamber accepts the Majority’s findings regarding the *actus reus* of Gbao in the alleged joint criminal enterprise, it should additionally and independently dismiss the conviction against Gbao, as the Majority did not properly assess Gbao’s intent to collectively punish the civilian population.

Sub-Ground 8(q): The Majority in the Trial Chamber Erred in Fact in Finding that Gbao Shared the Intent with Members of the JCE or the Principal Perpetrators under Counts 3-5

69. The Majority in the Trial Chamber erred in fact in paragraphs 2156-2173 in finding that Gbao intended for the alleged Kamajors being detained in Kailahun Town to be killed. This finding led to a conviction as a member of the joint criminal enterprise in Kailahun District. The Chamber made this finding despite earlier unambiguous findings that directly counter evidence of intent.

70. Even if the Appeals Chamber accepts the Majority's findings regarding the *actus reus* of Gbao in the alleged joint criminal enterprise as it relates to Counts 3-5, it should additionally and independently dismiss the conviction against Gbao in Kailahun District, as Gbao did not share the intent to commit the crimes under Counts 3-5.

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

71. The Majority in the Trial Chamber erred in fact in paragraphs 2156-2173 in finding that Gbao shared the requisite intent with members of the JCE under Counts 7-9. The Majority found Gbao shared the intent without substantiating this summary finding with direct or circumstantial evidence.

72. Even if the Appeals Chamber accepts the Majority's findings regarding the *actus reus* of Gbao in the alleged joint criminal enterprise as it relates to Counts 7-9, it should additionally and independently dismiss the conviction against Gbao in Kailahun District, as Gbao did not share the intent to commit the crimes under Counts 7-9.

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

73. The Majority in the Trial Chamber erred in fact in paragraphs 2156-2173 in finding that Gbao shared the requisite intent for enslavement under Count 13 as a member of the alleged joint criminal enterprise.

74. Even if the Appeals Chamber accepts the Majority's findings regarding the *actus reus* of Gbao in the alleged joint criminal enterprise as it relates to Counts 13, it should additionally and independently dismiss the conviction against Gbao in Kailahun District, as Gbao did not share the intent to commit the crimes under Counts 13.

Request for Relief Regarding Joint Criminal Enterprise

75. It is suggested that the Appeals Chamber reverse the finding that a joint criminal enterprise existed and that Gbao was a member of the JCE in relation to its findings in Bo, Kenema, Kono, and Kailahun, as Gbao was not part of the plurality of persons nor a significantly contributing member of the joint criminal enterprise between the RUF and AFRC based upon the grounds enumerated above.

76. The Third Accused also requests that the Appeals Chamber remove this finding from the Trial Chamber's disposition, with the concomitant reduction in sentence, including all convictions under Counts 1-14.

Counts 7-9 can be upheld, which we suggest they cannot, it should at the least dismiss these convictions as constituting acts of terror.

84. The Appeals Chamber should reverse this finding and, if it has not dismissed all counts against Gbao for his membership in the joint criminal enterprise based upon the reasons enumerated above, it should lead to a reduction in sentence for the Third Accused.

D. Grounds of Appeal Relating to UNAMSIL (Count 15)

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

85. The Trial Chamber erred in fact and law in its 22 July 2008 decision by finding that, while a breach of the Prosecution's Rule 68 obligations had been established by the Defence for its failure to disclose highly relevant and exculpatory evidence, it was the obligation of the Defence Counsel for the Third Accused to complain about the Prosecution's breach as early as possible.¹³ Although a breach was found, the Trial Chamber waived the Prosecution's obligations and found no material prejudice.

86. It is suggested that this exculpatory evidence which the Prosecution held for over two years—a statement by [REDACTED]—fully exonerates Gbao for his limited role in the UNAMSIL attacks under Count 15. The failure to find material prejudice against Gbao (and as a

¹³ *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1201, Written Reasoned Decision on Gbao Motion Requesting the Trial Chamber to Stay Trial Proceedings on Counts 15-18 Against the Third Accused for Prosecution's Violation of Rule 68 and Abuse of Process (TC), 22 July 2008.

result order a stay of proceedings against Gbao for Counts 15-18) for the violation included errors of fact and law and the Appeals Chamber should reverse the Trial Chamber's decision. As a result of this reversal, the Appeals Chamber should, as a consequence, dismiss the aiding and abetting conviction under Count 15 and its accompanying sentence.

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

87. The Trial Chamber erred in law and fact in its 22 July 2008 decision to the Gbao Motion Requesting the Trial Chamber to Stay Proceedings of Counts 15-18 Against the Third Accused for Prosecution's Violation of Rule 68 and Abuse of Process by declining to make any findings in response to Gbao's abuse of process claim made against the Prosecution. As a result of the Prosecution intentionally or negligently holding a highly exculpatory document for the entirety of its case (for reasons unknown and never fully explained) and only disclosing it at the conclusion of its case, it abused the processes of this Tribunal and has brought the administration of their case into disrepute.

88. The Appeals Chamber should review the abuse of process claim made by the Gbao Defence and rule that the Prosecution has abused the processes of this Court. As a consequence, Counts 15-18 should be dismissed as against Gbao. As a result of this decision, the Appeals Chamber should dismiss the aiding and abetting conviction under Count 15 and its accompanying sentence.

89. To avoid a miscarriage of justice, the Appeals Chamber should also accept the written statement [REDACTED] to be admitted in evidence for the Appellate stage.

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

90. The Trial Chamber erred in law by refusing to allow the Gbao Defence to cross-examine witnesses and to present witnesses that served to exonerate himself in the context of the joint RUF Trial, particularly as it related to his intended defence for Counts 15-18. The Defence endured repeated interference from the Bench in its attempt to present its case, experiencing an overabundance of protection of the Second Accused, thereby contravening Gbao's guarantee in Article 17(1) to be "equal before the Court".

91. The Court's repeated in-court rulings and written findings from April to June 2008 actively prevented Gbao from obtaining the attendance and examination of witnesses on his behalf under the same conditions, and in full equality, as witnesses against him, thereby violating Article 17(4) of the Statute. The event culminated in instructions from the Presiding Judge of the RUF Bench to "guide the witness".¹⁴ We submit the clear intent of this ruling was to instruct the witness to testify in a certain way. While not the only incident of judicial obstruction, in this case Counsel for the Third Accused was instructed to guide DAG-111, the most important witness to Mr Gbao's defence in relation to the attacks against UNAMSIL Peacekeepers on 1 May 2000.

92. The effect of these decisions handicapped the Gbao Defence to such a degree that it was highly difficult, to the point of near impossibility, to present its defence regarding the events of 1 May 2000 at the Makump DDR camp outside Makeni in the north of Sierra Leone. In an effort to protect the rights of the second Accused, the Trial Chamber failed to treat the Accused equally and, as a consequence, violated guaranteed rights of the Third Accused under the Special Court Statute.

¹⁴ RUF Transcripts, 16 June 2008, p.60

93. The effect of these errors of law should serve to dismiss Counts 15-18. As a consequence of such unreasonable judicial obstruction, we submit the Appeals Chamber should reverse the aiding and abetting conviction under Count 15 of the Statute and its accompanying sentence.

Ground 16: The Trial Chamber Erred in Fact by Not Properly Finding the Requisite Actus Reus or Mens Rea to Convict Gbao for Aiding and Abetting Certain Alleged Attacks Against Major Salahuedin and Lieutenant Colonel Jaganathan

94. The Trial Chamber erred in fact in convicting Gbao for rendering practical assistance, encouragement or moral support to RUF fighters, including the Second Accused, at the Makump DDR camp on 1 May 2000. His actions at the camp on that day were not specifically directed to assist in the perpetration of the crime, as credible witnesses for both the Prosecution and Defence testified unequivocally that Gbao attempted to calm down Kallon before the crimes were perpetrated.

95. Even if the *actus reus* is established beyond reasonable doubt based on the findings made by the Trial Chamber, we aver that it cannot be shown that Gbao possessed the requisite intent that his acts at the camp would assist in the commission of the alleged crimes committed by other RUF fighters, including the Second Accused. The Trial Chamber erred in fact in finding that Gbao's intent to assist Kallon in the commission of the crime could be inferred from the circumstances.

96. The gravity of these errors of law and fact should serve to dismiss Gbao's conviction under Count 15, as Gbao's actions did not substantially effect the perpetration of the crime. The Appeals Chamber should therefore dismiss Count 15 as against Gbao.

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

97. The Trial Chamber erred in fact in finding that the attacks on Major Salahuedin and Lieutenant Colonel Jaganathan at the Makump DDR camp on 1 May 2000 constituted a serious violation of international humanitarian law under prevailing international standards. The Trial Chamber found that the Second Accused led a group of RUF and attacked Salahuedin and Jaganathan without any particularised assistance by Gbao. These attacks, while regrettable, cannot be considered to surpass the necessary threshold to qualify as a serious violation of international humanitarian law.

98. The gravity of this error of fact should serve to dismiss the convictions against Gbao for aiding and abetting the Second Accused at the Makump Camp on 1 May 2000. Since Gbao was not otherwise involved in the attacks on UN Peacekeepers under any mode of liability, it should serve to dismiss the findings made against him.

E. Grounds Relating to Sentence

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

99. If the Appeals Chamber upholds the Majority’s convictions against Augustine Gbao for his alleged membership in the joint criminal enterprise and/or for aiding and abetting crimes committed against UNAMSIL personnel (and therefore will need to consider the sentences imposed for the convictions under these modes of liability), it will

be necessary for it to consider the propriety of the 25-year sentence the Majority entered against Gbao. The Majority in the Trial Chamber has erred in law and fact in imposing this sentence, as it:

- (i) unfairly aggregated the gravity of Gbao's conduct by combining Gbao's culpability with convictions of the other two Accused and calculating the gravity cumulatively;
- (ii) did not otherwise accurately reflect the gravity of the Accused's conduct;
- (iii) included findings to increase Gbaos' sentence which were not proven beyond reasonable doubt in the case;
- (iv) mistakenly attributed an aggravating factor against Gbao; and
- (v) failed to properly mitigate his sentence based upon a wealth of factors; and
- (vi) cannot be reconciled with sentencing principles and objectives at the Special Court or any other international tribunal and is generally out of proportion with a line of sentences passed in similar circumstances for similar offences.

100. In short, the punishment does not fit the crimes for which Gbao was convicted. The Trial Chamber disregarded the criteria by which sentences should be assessed. The gravity of these errors constitutes an abuse of the Court's sentencing discretion in its overstatement of Gbao's criminal culpability (as stated by Judge Boutet in his dissent in the Sentencing Judgement)¹⁵ and should invalidate the Majority's decision. If the Appeals Court upholds the convictions against Gbao, it should markedly reduce his sentence to time served.

¹⁵ Sentencing Judgement, Separate and Dissenting Opinion of Justice Pierre G. Boutet, para. 3..

Sub-Ground 18(a): The Trial Chamber did not Correctly Assess the Gravity of the Crimes Against Gbao

101. In its Sentencing Judgement, the Trial Chamber erred in fact by repeatedly attributing findings (on at least twenty-two (22) occasions) against Gbao for crimes that he was acquitted, despite its repeated pronouncements that each Accused must be individually assessed in sentencing for his personal culpability during the Indictment period.

102. These errors are particularly prevalent relating to acts of terrorism (Count 1) and collective punishments (Count 2). In these districts, Sesay and Kallon were convicted of acts of terror (Count 1) and collective punishments (Count 2), but Gbao was acquitted. However, the Court did not differentiate between the three in its analysis of the gravity of the crimes committed by each of the three Accused. Consequently, Gbao was given a higher sentence than he would have if he had been assessed based upon his individual criminal responsibility.

103. The Trial Chamber also erred in making particular findings in its Sentencing Judgement that were not proven beyond reasonable doubt during the trial. In fact, some assertions made by the Trial Chamber were not based upon any evidence on the record whatsoever.

104. These errors require wholesale reconsideration of the gravity of the offences against Gbao and, subsequently we submit, a substantially lower sentence for all of the convictions entered against him.

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

105. The Trial Chamber erred in fact by finding that the abuse of Gbao's position of leadership and authority constitutes an aggravating factor. The Trial Chamber principally erred by failing to show how Gbao had authority and how he abused it.

106. This error has the effect of invalidating the Trial Chamber's finding and thus requiring reconsideration of the sentence levied against Gbao.

Sub-Ground 18(c): The Trial Chamber Erred in Law and Fact by Failing or Refusing to Consider Certain Factors as Mitigating Under a Balance of Probabilities Standard

107. The Majority has erred in law and fact by rejecting certain mitigating factors as not established on a balance of probabilities. Establishing a factor based upon a balance of probabilities necessarily involves a degree of speculation, something not accepted by the Trial Chamber, thereby establishing an error of law.

108. The Majority also erred in refusing to consider arguments that did not wholly rely upon findings of fact in its final Judgement. This position fails to recognise the nature of bifurcated trials—one phase assessing guilt or innocence and one assessing the proper sentence. In this case, since no testimony was allowed at the Sentencing hearing, Defence and Prosecution teams were required to rely upon testimony during the four-year trial in an effort to mitigate their sentences. This testimony, while perhaps irrelevant to a determination of guilt or innocence, was clearly relevant to assessing an appropriate sentence and therefore should have been considered.

109. The Trial Chamber erred in fact in failing to consider certain mitigating factors. It is suggested that the Appeals Chamber consider these arguments in mitigation and significantly lower the sentence imposed by the Majority in this case.

Sub-ground 18(d): Even Without Additional Mitigating Factors Considered to Reduce Gbao's Sentence, the Sentence Imposed by the Majority in the Trial Chamber was Excessive

110. The Majority in the Trial Chamber erred in fact in imposing an arbitrary and excessive sentence upon Gbao for his involvement in the alleged joint criminal enterprise and his role in aiding and abetting two of the fourteen attacks on UN Peacekeepers on 1 May 2000. Levying a sentence of this magnitude requires much greater and more direct participation, a higher degree of intent for the crimes found to be committed, a superior role which Gbao was found not to have possessed, as well as other factors insufficiently considered by the Trial Chamber. The sentence is out of proportion with other similar cases.

111. If the Appeals Chamber upholds the convictions against Gbao as a significantly contributing member of the JCE with the requisite intent, as well as aiding and abetting other RUF commanders in two of fourteen attacks against UNAMSIL, it is submitted that the Majority's sentence was manifestly excessive and should be significantly reduced.

Ground 19: The Majority in the Trial Chamber Erred in Fact by Convicting Gbao for Acts Based Upon the Same Conduct

112. The Majority in the Trial Chamber erred in fact by finding Gbao guilty for Counts 3 and 4 in Bo, Kenema, Kono and Kailahun Districts for the same conduct, a contradiction of their legal findings in the Judgement.

113. If the Appeals Chamber upholds the convictions against Gbao as a significantly contributing member of the joint criminal enterprise with the requisite intent, it should dismiss either Count 3 or 4 against Gbao in each of the above locations, as they impermissibly convict based upon the same conduct. The effect of this error should also lead the Appeals Chamber to reduce Gbao's sentence accordingly.

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John Cammegh



Scott Martin