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SCSL-04-15-A
(4849-4928)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

IN THE APPEALS CHAMBER

Before:	Hon. Justice Renate Winter, President Hon. Justice Jon Kamanda Hon. Justice George Gelaga King Hon. Justice Emmanuel Ayoola Hon. Justice Shireen Fisher
Acting Registrar:	Ms Binta Mansaray
Date filed:	29 June 2009

THE PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-04-15-A

PUBLIC

PROSECUTION REPLY BRIEF

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I. Introduction

A. General

1.1 Pursuant to Rule 113 of the Rules of Procedure and Evidence, the Prosecution files this Reply Brief to:

(1) the "Sesay Response to Prosecution Grounds of Appeal" (the "**Sesay Response Brief**"),[1] filed on behalf of Issa Hassan Sesay ("**Sesay**");

(2) "Kallon's Response to Prosecution Appeal Brief" (the "**Kallon Response Brief**"), filed on behalf of Morris Kallon ("**Kallon**");[2] and

(3) the "Gbao—Response to Prosecution Appellant Brief" (the "**Gbao Response Brief**"), filed on behalf of Augustine Gbao ("**Gbao**").[3]

1.2 The Prosecution relies on all of the submissions in the Prosecution Appeal Brief. This Reply Brief only addresses specific points raised in the Defence Response Briefs that warrant further submissions in reply, and does not address Defence submissions which are already adequately addressed in the Prosecution Appeal Brief, or which merely disagree with the Prosecution submissions. Where the Prosecution omits to address particular paragraphs or points in the Defence Response Briefs, this in no way implies that the Prosecution makes any concession to the Defence arguments.

1.3 The full references for abbreviated citations used in this Reply Brief are given in Appendix A.

B. Standards of review on appeal

1.4 The standards of review on appeal are addressed in paragraphs 1.5 to 1.20 of the Prosecution Appeal Brief.

1.5 The Gbao Response Brief argues that the Prosecution's right of appeal "should be more strictly construed" than the corresponding Defence right, because of the

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1 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1293, "Public Sesay Defence Response to Prosecution Grounds of Appeal", 24 June 2009 ("**Sesay Response Brief**").

2 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1292, "Confidential Kallon's Response to Prosecution Appeal Brief", 24 June 2009 ("**Kallon Response Brief**").

3 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1291, "Confidential Gbao – Response to Prosecution Appellant Brief", 24 June 2009 ("**Gbao Response Brief**").

Prosecution burden of proving guilt beyond reasonable doubt[4] and because of the principle of double jeopardy (*non bis in idem*).[5]

1.6 The Proseeution submits that the prineiple of *non bis in idem* is irrelevant to the standard of review in a Proseeution appeal. As a matter of logic, if the *non bis in idem* principle were relevant, Prosecution appeals would not be permitted at all. However, that logic is directly contradicted by Article 20(1) of the Special Court Statute and of the Rules of Procedure and Evidence (the "Rules") which provide expressly that the Prosecution has a right of appeal against judgements of the Trial Chambers.

1.7 Indeed, as a matter of logic, if the principle of *non bis in idem* were relevant in this situation, it would also be impossihle for the Appeals Chamber, in a successful defence appeal, to quash a conviction and to order a retrial. On the Defence's logic, the Appeals Chamber would in such a situation be confined to quashing the conviction and declaring the accused not guilty, since a retrial would amount to a second trial in the same matter. However, that logic is directly contradicted by Rule 118(C) of the Rules which provide expressly that "In appropriate circumstances the Appeals Chamber may order that the accused be retried before the Trial Chamber concerned or another Trial Chamber".

1.8 The Prosecution submission is that a retrial following the quashing of the first verdict by the Appeals Chamber is a *subsequent stage* in the one and the same criminal proceeding. It is not a second subsequent *criminal proceeding* in respect of the same matter. The *non bis in idem* principal only probibits a new criminal proceeding in respect of the same matter, after the first criminal proceedings has been finally concluded.

1.9 Thus, in the *Muvunyi* case, the ICTR Appeals Chamber very recently held (on 24 March 2009) that where an accused is retried after a first conviction is quashed on appeal, it is not a violation of the *non bis in idem* principle even if the prosecution adduces evidence at the second trial that was not adduced at the first trial.[6] The Appeals Chamber said that:

> The *non bis in idem* principle aims to protect a person who has been finally convieted or acquitted from being tried for the same offence again. The

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4 Gbao Response Brief, paras 4 and 5-8. See also Kallon Response Brief, paras 105-106.

5 Gbao Response Brief, paras 4 and 9-10.

6 *Prosecutor v. Muvunyi*, ICTR-2000-55A-AR73, "Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial", Appeal Chamber, 24 March 2009 ("***Muvunyi* 24 March 2009 Decision**").

Appeals Chamber quashed Mr. Muvunyi's conviction related to his alleged conduct at the Gikore Trade Center and ordered a retrial on Count 3 of the Indictment for that event, in accordance with the Rules. As such, there is no final judgement with respect to that allegation.[7]

1.10 It follows *a fortiori* that where the Appeals Chamber reverses an acquittal and substitutes a conviction (instead of remitting the matter to the Trial Chamber), this is not a second criminal proceeding in respect of the same matter, but a subsequent stage in the one and the same criminal proceeding. The *non bis in idem principle* has no application in this situation.

1.11 As to the argument that a different standard of review on appeal applies to Prosecution appeals because of the burden of proof on the Prosecution, it is acknowledged that the issue before the Appeals Chamber in an appeal against an acquittal is different to that in the case of an appeal against conviction. In the case of an appeal against conviction, the defence must establish that no reasonable trier of fact could on the evidence have come to a conclusion of guilt. In the case of an appeal against an acquittal, the prosecution must establish that the only conclusion open to any reasonable trier of fact on the evidence was that the accused was guilty.[8] It is submitted that the quotes in paragraphs 6 and 7 of the Gbao Response Brief, and the cases cited in footnote 9 of the Gbao Appeal Brief, as well as the quotes and cases cited in paragraph 1.10 of the Prosecution Appeal Brief, are all consistent with this, as is the quote from the Partially Dissenting Opinion of Justice King in the *CDF* Appeal Judgement, at paragraph 6 of the Gbao Response Brief. In a Prosecution appeal against acquittal, the standard is not whether the Prosecution has "disproved beyond reasonable doubt" the facts found by the Trial Chamber on which the acquittal was based, but rather, whether a finding of guilt was the only conclusion open to a reasonable trier of fact on all of the evidence in the case.[9]

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7 *Muvunyi* 24 March 2009 Decision, para. 16 (footnote omitted), observing that Article 14(7) of the International Covenant on Civil and Political Rights provides that "No one shall be liable to be tried or punished again for an offence for which he has already been *finally* convicted or acquitted in accordance with the law and penal procedure of each country" (emphasis added). An acquittal by the Trial Chamber that is subject to an appeal to the Appeals Chamber is not a *final* acquittal. An accused who is retried after an acquittal has been revered by the Appeals Chamber has therefore not been "finally acquitted" in the previous proceeding.

8 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1278, "Prosecution Appeal Brief", 1 June 2009 ("**Prosecution Appeal Brief**"), para. 1.10. Compare also *Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003 ("***Krnojelac* Appeal Judgement**"), para. 14; *Prosecutor v. Rutaganda*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003 ("***Rutaganda* Appeal Judgement**"), para. 24.

9 *Krnojelac* Appeal Judgement, para. 186 ("... the Appeals Chamber considers that the only reasonable finding that could be reached on the basis of the Trial Chamber's relevant findings of fact was that the

1.12 It is submitted that subject to this difference, the standard of review is the same for both Prosecution appeals and Defence appeals. In particular, the standard of the "reasonable trier of fact" is the same in both cases. To the extent that the Gbao Defence suggests otherwise, it is submitted that its argument is not supported by the established case law on the standards of review on appeal.

2. Prosecution's First Ground of Appeal: Continuation of the joint criminal enterprise after April 1998

A. Reply to the Sesay Response Brief

(i) Preliminary issue one[10]

2.1 The Prosecution has acknowledged that it would be impracticable at this stage to remit the case to the Trial Chamber for further findings of fact.[11] However, it is submitted that the Trial Chamber's findings, and the evidence contained in the trial record, provide a sufficient basis for the Appeals Chamber to determine that the only conclusion open to a reasonable trier of fact was that Sesay was liable pursuant to the JCE mode of liability for crimes in Freetown and the Western Area.[12]

(ii) Preliminary issue two[13]

2.2 The crimes in Kono District to which the Prosecution's ground of appeal relates are set out at paragraph 2065 of the Trial Judgement.[14] As Sesay was convicted under modes

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beatings were inflicted upon the non-Serb detainees because of their political or religious affiliation and that, consequently, these unlawful acts were committed with the requisite discriminatory intent"); *Prosecutor v. Brđanin*, IT-99-36-A, "Judgement", Appeals Chamber, 3 April 2007 ("***Brđanin* Appeal Judgement**"), para. 483 ("… the Prosecution has shown that no reasonable trier of fact could have failed to reach the conclusion that the principal perpetrators of the large-scale killings occurring at four of the locations identified by the Prosecution, on the basis of the rest of the Trial Chamber's findings, had the requisite *mens rea* for the crime of extermination"). See also, for instance, *Prosecutor v. Strugar*, IT-01-42-A, "Judgement", Appeals Chamber, 17 July 2008, para. 307; *Prosecutor v. Martić*, IT-95-11-A, "Judgement", Appeals Chamber, 8 October 2008, para. 318; *Prosecutor v. Tadić*, IT-94-1-A, "Judgement", Appeals Chamber, 15 July 1999 ("***Tadić* Appeal Judgement**"), para. 233.

10 Sesay Response Brief, paras 1-2.
11 Prosecution Appeal Brief, para. 2.172.
12 See also Prosecution Appeal Brief, paras 1.5-1.20 on the standards of review on appeal.
13 Sesay Response Brief, para. 3.
14 See also *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1252, "Prosecution's Notice of Appeal", 28 April 2009, para. 3(iii)(b).

of liability other than JCE for acts of enslavement,[15] the Prosecution does not seek to substitute these convictions with convictions under the JCE mode of liability.

(iii) Preliminary issue three (Parts 1 and 2)[16]

2.3 The Trial Judgement introduced neither a "fourth" category of JCE nor a theory of guilt by association and the Prosecution is by no means advocating for the creation of "outdated and bad law".[17] The Prosecution's position is that on the basis of the factual record before the Trial Chamber, and the Trial Chamber's own intermediate findings of fact, the legal theory of JCE as correctly articulated by the Trial Chamber[18] could not only sustain the finding that the JCE continued after April 1998, but that this was the only conclusion reasonably open to a trier of fact. Furthermore, while it is accepted that the third category of JCE may have generated some debate,[19] it is nonetheless firmly established in the case law of international criminal tribunals, and has been held by those tribunals to be part of customary international law.[20] The function of the Trial Chamber is to apply the existing law to the facts as found by the Trial Chamber. A Trial Chamber would not be acting within its duty if it declined to apply the established law on the basis that the law has been the subject of criticism by some commentators. It is similarly the duty of the Appeals Chamber to apply the established law. Paragraph 10 of the Sesay Response Brief does not accurately reflect any interpretation of JCE liability made either by the Prosecution or the Trial Chamber. It is moreover clear that responsibility under the first category of JCE can only arise where an accused shares the intent for the crimes found to be within the JCE.

2.4 The Prosecution relies further on its arguments at paragraphs 5.2 to 5.14 of the Prosecution Response Brief.

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15 See *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-1234, "Judgement", Trial Chamber, 2 March 2009 ("**Trial Judgement**"), para. 2065 (Item 4.1.2.4(i)-(iii)), and paras 2115-2116 and 2133.

16 Sesay Response Brief, paras 4-11.

17 Sesay Response Brief, para. 115.

18 Trial Judgement, paras 251-266.

19 For a recent commentary see e.g. H. Olasolo, "Joint Criminal Enterprise and its Extended Form: A Theory of Co-Perpetration Giving Rise To Principal Liability, A Notion of Accessorial Liability, or A Form of Partnership in Crime?" (2009) 20 *Criminal Law Forum* 263-287.

20 See e.g. *Prosecutor v. Stakić*, IT-97-24-A, "Judgement", Appeals Chamber, 22 March 2006, para. 62.

(iv) Preliminary issue four: Distinction betweeu "purpose" and "means"[21]

2.5 On the issue of the distinction between "purpose" and "means" in the context of JCE liability, the Prosecution relies on its arguments at paragraphs 5.4 to 5.14 of the Prosecution Appeal Brief. The Sesay Defence's recitation of some of the relevant jurisprudence says little in response to the Prosecution's First Ground of Appeal. Rather, it appears designed to holster Sesay's own grounds of appeal. In order to be held liahle under the JCE mode of liability, an accused need not have directly contributed *to the crimes*. The accused must be found to have intended the criminal means, which together with the objective, constitutes the JCE. However, the accused's own contributiou need only be a contribution *to the JCE*, aud not necessarily a contribution *to the criminal means*.

(v) Preliminary issue four: Continued participation of Sesay[22]

2.6 The argument in the Prosecution's First Ground of Appeal is that the JCE that was found by the Trial Chamber to have come into existence soon after the May 1997 coup *continued* after April 1998, and that the leading members of the AFRC and RUF did not at that point hegin to pursue the goal of taking over the country independently of each other. The Defence has failed to demonstrate any gaps in the Prosecution's analysis of Sesay's continued role in this joint pursuit of the common purpose or in the Prosecution's analysis of his contribution to the JCE.[23]

2.7 The Sesay Defence is not correct to state that the Trial Chamber found that there were no RUF fighters involved in the Freetown invasion.[24]

(vi) Preliminary issue four: Lack of comparative assessment of contribution[25]

2.8 The Sesay Defence argues that "the larger the criminal event that is alleged the more direct participation in those events would be required for either tbe crimes to be imputed to the Accused and for appropriate inferences concerning iutent to be

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21 Sesay Response Brief, paras 12-25.
22 Sesay Response Brief, paras 26-33.
23 Proseeution Appeal Brief, paras 2.151 to 2.161.
24 Trial Judgement, paras 860, 1514 and 2189.
25 Sesay Response Brief, paras 34-40.

reached."[26] The Sesay Defence cites no authority for this proposition, which the Prosecution submits is incorrect in law. The legal elements of the JCE mode of liability are the same regardless of the size of the JCE. For instance, in the *Karemera* case, the ICTR Appeals Chamber rejected a defence submission that "the Trial Chamber 'erred by failing to consider whether the 'extended' form of joint criminal enterprise liability applied to vast enterprises in customary international law'".[27] The Appeals Chamber found that:

> ... it is clear that there is a basis in customary international law for both JCE liability in general, and for the third category of JCE liability in particular. Moreover, though the Tribunal's Appeals Chamber and that of the ICTY have, in several cases dealing with different factual situations, explained the requirements for establishing different types of JCE liability, not once has either Appeals Chamber suggested that JCE liability can arise only from participation in enterprises of limited size or geographical scope.[28]

2.9 In establishing whether an accused was a participant in the JCE, and whether the accused made a significant contribution to the JCE, the same elements and the same rules of evidence apply, regardless of whether the JCE is large scale or small scale. The Trial Chamber must decide in the light of all of the evidence in the case as a whole whether the legal elements have been proved. While the Trial Chamber can only convict if satisfied that guilt has been established beyond a reasonable doubt, it is for instance possible for the Trial Chamber to be so satisfied on the basis of circumstantial or other evidence. There is no special rule that a large scale JCE requires proof of a more "direct responsibility", or more "direct" evidence of the accused's participation in the JCE.

2.10 As a practical matter, it may be, for instance, that in the case of JCE III: "In certain circumstances, crimes committed by other participants in a large-scale enterprise will not be foreseeable to an accused".[29] However, as a matter of law, it will always be a question to be determined on the evidence as a whole whether the elements of JCE liability have been proved. In the present case, for the reasons given in the Prosecution Appeal Brief, it is submitted that based on the Trial Chamber's findings and the evidence in the case, the only conclusion open to a reasonable trier of fact is that Sesay

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[26] Sesay Response Brief, para. 36.

[27] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, "Decision on Jurisdictional Appeals: Joint Criminal Enterprise", Appeals Chamber, 12 April 2006 (**"*Karemera* 12 April 2006 Decision"**), para. 11.

[28] *Karemera* 12 April 2006 Decision, para. 16 (footnote omitted).

[29] *Karemera* 12 April 2006 Decision, para. 17.

did make a continuing significant contribution to the JCE and possessed the requisite intent for the crimes found to be within the JCE, even though he was not directly concerned in the commission of the crimes in Freetown.[30] As noted in the Prosecution Appeal Brief, in order to be liable for all crimes committed within the JCE, a participant need not have made a contribution to each of the different types of crimes, or to the crimes in each of the different locations. It is sufficient that all of the crimes were within the JCE, and that the accused made a significant contribution *to the JCE*.[31]

2.11 The arguments set out at Annex A of the Sesay Response Brief do not undermine this argument.

(vii) Preliminary issue five: JCE III[32]

2.12 The Prosecution refers to its arguments at paragraph 2.147 of the Prosecution Appeal Brief and paragraphs 5.72 to 5.75 of the Prosecution Response Brief. Although the Trial Chamber considered the evidence separately in relation to each District, this did not affect the fact that there was still only one single JCE. The Prosecution's contention is that on the evidence the only conclusion open to a reasonable trier of fact is that the JCE continued after the end of April 1998. Contrary to what the Sesay Defence contends, a finding that Sesay, as a participant in the JCE, was responsible under JCE III for crimes that were a foreseeable consequence of the JCE, is not to confuse *jus ad bellum* with *jus in bello*. Sesay can only be responsible under JCE III for crimes that were a foreseeable consequence of the execution of the common criminal purpose. He is not individually responsible for the fact that the RUF engaged in a conflict. Sesay's liability for crimes committed in Freetown would follow from a finding that one or more of the crimes charged in Counts 1 to 14 were committed in Freetown, and that such crimes were intended criminal means within the JCE in one or more other locations, or a foreseeable consequence of the execution of the common purpose.

(viii) Lack of plurality: April to August 1998[33]

2.13 All of the findings mentioned at paragraph 47 of the Sesay Response Brief were considered in the Prosecution Appeal Brief and the Prosecution therefore did not base

30 See further Prosecution Appeal Brief, paras 2.153 to 2.161.
31 See Prosecution Appeal Brief, para. 3.32.
32 Sesay Response Brief, para. 45.
33 Sesay Response Brief, paras 46 to 56.

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its submissions on an incomplete reading of the Trial Judgement.[34] Indeed, a substantial part of the Prosecution's argument is based on the inferences that a reasonable Trial Chamber should have drawn from the Trial Chamber's *own findings*.

2.14 The reason for the lack of communication between Gullit and the RUF following Gullit's departure from Kono is not irrelevant to the issue as asserted by the Sesay Defence.[35] Gullit clearly wished to retain communication with the RUF and was hampered by logistical problems. As soon as communication was restored, Gullit spoke of cooperation.[36] A relatively short period of severed communications is not fatal to the continuation of a JCE.

2.15 In relation to Superman's departure for Koinadugu, the Prosecution refers to the full context of its submissions at paragraphs 2.51 to 2.62 of the Prosecution Appeal Brief. While it is true that it was "lawful for senior AFRC and RUF members to cooperate to act in concert, providing that this was not directed at furthering crime", it is not suggested that evidence of such action in concert should be viewed in isolation, rather, it constitutes one of the building blocks in establishing JCE liability.[37]

(ix) Lack of plurality: August to December 1998[38]

2.16 The Prosecution accepts that the Trial Chamber found there to be animosities both within the RUF, including between Bockarie and Superman, and between the RUF and the AFRC.[39] However, the Prosecution's argument is that on the evidence the only reasonable conclusion is that communication and cooperation continued notwithstanding such animosities. In particular, the Prosecution's submission is that the Trial Chamber placed undue emphasis on SAJ Musa's relationship with members of the RUF and his personal agenda. These factors are not relevant to crimes committed in Freetown and the Western Area in January and February 1999 after SAJ Musa's death.[40]

2.17 The Sesay Defence is not correct to assert at paragraphs 67 to 68 of the Sesay Response Brief that communication between Superman and Bockarie lasted for only one week. A more accurate reflection of the evidence of TF1-361 is that communication lasted for a

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34 Prosecution Appeal Brief, paras 2.23 and 2.42.
35 Sesay Response Brief, para. 54.
36 See Prosecution Appeal Brief, para. 2.46.
37 See also Sesay Response Brief, paras 81-82.
38 Sesay Response Brief, paras 57-83.
39 Prosecution Appeal Brief, paras 2.94-2.109.
40 Prosecution Appeal Brief, paras 2.99 to 2.101 and 2.87 to 2.93.

period of two weeks.[41] In any event, communication was resumed some months later, prior to the attack on Makeni.[42]

2.18 The Trial Chamber found Witness TF1-361 to be a reliable witness on the whole, and largely accepted his evidence.[43] The Prosecution refers in addition to its arguments at paragraphs 4.10 to 4.13 of the Prosecution Response Brief in relation to reliance on evidence of insider witnesses. It must be noted that the *Trial Chamber* found that a joint training base was established in Koinadugu and in this respect did not rely on the uncorroborated testimony of TF1-361.[44] There is no contradiction in the testimony of TF1-361 as his evidence shows that the consultation with Bockarie concerning the establishment of the joint training base occurred during Superman's second week in Koinadugu, prior to the suspension of communication.[45]

2.19 In relation to the reliance on TF1-184, it is not disputed that the evidence of the witness should be considered in its full context, nor is it disputed that SAJ Musa had developed hostility towards the RUF.

(x) Cooperation between the AFRC and RUF in the January 1999 invasion[46]

2.20 The Sesay Defence is not correct to assert that the Prosecution failed to address the issue of SAJ Musa's refusal to allow communication with Superman or Bockarie or any resulting "non-communication".[47] The Prosecution has pointed to the Trial Chamber's findings that despite such orders, communication between Gullit, and Bockarie in particular, continued.[48]

2.21 In relation to the cooperation between Superman and the High Command, the Prosecution refers to its submissions at paragraphs 2.63 to 2.73 of the Prosecution Appeal Brief and notes that a gap in communication does not require a finding that action in concert had ceased. Rather, it is significant that despite animosities, the interdependence within the plurality was such that joint action in furtherance of the

41 TF1-361, Transcript 18 July 2005, p. 39.
42 Prosecution Appeal Brief, para. 2.61; see also TF1-361, Transcript 18 July 2005, p. 39.
43 Trial Judgement, para. 549.
44 Trial Judgement, para. 852, referring to TF1-263, Transcript 7 April 2005, pp. 6, 12; TF1-361, Transcript 12 July 2005, pp. 51-52 (CS) and evidence that SAJ Musa and Superman operated a joint military training camp: TF1-071, Transcript 18 July 2005, p. 42.
45 TF1-361, Transcript 12 July 2005, p. 68 and compare with TF1-361, Transcript 18 July 2005, p. 39.
46 Sesay Response Brief, paras 84-112.
47 Sesay Response Brief, para. 86.
48 Prosecutien Appeal Brief, paras 2.93 and 2.100.

common purpose was ongoing and that the same key players continued to resurface. Notably, Superman was part of the planning meeting for the joint AFRC/RUF second attack on Freetown.[49]

2.22 While the Prosecution did not challenge the Trial Chamber's finding at paragraph 2199 of the Trial Judgement that strategic points had already been burned when Bockarie gave Gullit the relevant orders, the Prosecution *did* challenge the inference the Trial Chamber drew from this finding.[50]

2.23 In relation to the arguments at paragraphs 103 to 105 of the Sesay Response Brief, the Prosecution refers to paragraphs 2.82 to 2.85 of the Prosecution Appeal Brief.

2.24 The Prosecution does not agree that the issue of unreasonable reliance on the testimony of Sesay is irrelevant. Sesay's evidence was relied upon in relation to key findings concerning Bockarie's *attitude* towards Gullit's communications during the Freetown attack. This gave the Trial Chamber an unfounded and uncorroborated basis on which to dismiss the reasonable inference that RUF leaders were poised to assist Gullit.

2.25 The Prosecution's submissions concerning the pattern of crimes found to have been committed by the Trial Chamber should be read in the context of the submissions as a whole and assist in demonstrating that the same criminal means continued to be intended by the participants in the JCE after April 1998. The Prosecution submits that the pattern does lead to the "irresistible conclusion" that the two rebel forces continued to implement their actions according to a common criminal plan.[51]

(xi) Application of legal principles[52]

2.26 The Prosecution refers to its submissions at paragraphs 2.145 to 2.146 of its Appeal Brief.

49 Trial Judgement, para. 894.
50 Prosecution Appeal Brief, para. 2.137; and see Sesay Response Brief, paras 101-102.
51 See Sesay Response Brief, para. 107.
52 Sesay Response Brief, paras 113-114.

B. Reply to the Kallon Response Brief

(i) Finding as to the formation, membership, purpose, continuation and ending of the JCE[53]

2.27 The Kallon Defence is incorrect to state that the Trial Chamber found that the common plan changed after the ECOMOG intervention. The Trial Chamber in fact concluded that "it was not a new common purpose that was agreed upon by the participants at this stage but a continuation of the common purpose that was in place during the Junta regime."[54] It is possible for a person to withdraw from a JCE or for new persons to join without a completely new JCE coming into existence. Changes to the plurality are distinct from changes to the common purpose.[55]

(ii) Principle of *nulla poena sine culpa*[56]

2.28 The Prosecution agrees that care must be taken in referring collectively to the AFRC and RUF. In view of the pleading, and finding, that there was a JCE between leading members of the AFRC and RUF, and that AFRC and RUF fighters were used as tools by those leading members to carry out crimes, reference to the "groups" must be seen as shorthand for the members and tools of the JCE. As such the use of the term "group" is not inappropriate. Furthermore, as the Trial Chamber found that only a JCE *between* the AFRC and the RUF was pleaded, the Prosecution's emphasis is on the continuation of a plurality of persons comprised of members of *both* the AFRC and the RUF.

(iii) Independent pursuits of the AFRC and RUF[57]

2.29 The Prosecution's submissions at paragraphs 2.28 to 2.33 of the Prosecution Appeal Brief must be considered in the context of the submissions that follow those paragraphs,

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53 Kallon Response Brief, paras 6-12.
54 Trial Judgement, para. 2069.
55 The Trial Chamber, at para. 262 of the Trial Judgement, correctly stated that the "identity of the other persons or persons making up the plurality may change over the course of the existence of the joint criminal enterprise as participants enter or withdraw from it". However, the jurisprudence cited in support of that statement concerned changes to the objective of the JCE resulting in the creation of a new JCE rather than changes to the plurality. Trial Judgement, para. 262, citing *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, "Judgement", Trial Chamber, 17 January 2005, paras 700-701. See also Kallon Response Brief, footnote 22. See further *Prosecutor v. Krajišnik*, IT-00-39-T, "Judgement", Trial Chamber, 27 September 2006 ("***Krajišnik* Trial Judgement**"), para. 1086.
56 Kallon Response Brief, paras 13-20. See also Kallon Response Brief, para. 46.
57 Kallon Response Brief, paras 21-23.

in particular the submissions at paragraphs 2.42 to 2.141 of the Prosecution Appeal Brief.

(iv) Contacts between the AFRC and RUF[58]

2.30 The Prosecution reiterates its submission that the evidence of ongoing friction between members of the plurality tends to demonstrate the Trial Chamber's error in finding that the disagreement in April 1998 marked the end of the JCE.[59] While the extent of discord may be relevant to a factual determination of whether or not there was a common plan,[60] the evidence in this case is that allegiances fluctuated and that the plurality was held together precisely by common interests and the shared pursuit of the common purpose. The Prosecution submits that the AFRC and RUF not only had to work together because it made sense strategically,[61] but also did in fact continue to act in concert after April 1998.

(v) Assessment of the conflict between AFRC and RUF[62]

2.31 The Prosecution's arguments concerning the importance of the Sewafe Bridge operation and the relevant dates are set out at paragraphs 2.43 and 2.44 of the Prosecution Appeal Brief. The Kallon Defence appears to misinterpret these arguments.

(vi) Events in the lead up to the Freetown attack[63]

2.32 The Prosecution refers to its reply to the Sesay Response Brief at paragraph 2.16 above in relation to SAJ Musa's personal attitude towards the RUF.

2.33 In relation to the cited evidence of TF1-167, the Prosecution does not dispute that there was a period when Gullit did not communicate with the RUF, namely when he lacked a microphone as found by the Trial Chamber.[64] Notably Witness TF1-167 also stated that RUF fighters were present during the march to Rosos, including in the command structure.[65] The Prosecution submits that the evidence cited by the Kallon Defence does

58 Kallon Response Brief, paras 24-25, 28 and 31-39.
59 Prosecution Appeal Brief, para. 2.109.
60 Kallon Response Brief, para. 36.
61 See Kallon Response Brief, para. 38.
62 Kallon Response Brief, paras 26-30.
63 Kallon Response Brief, paras 47-72.
64 Prosecution Appeal Brief, para. 2.46 and Trial Judgement, para. 848.
65 TF1-167, Transcript 19 October 2004, p. 47, lines 24-29.

not negate the Prosecution's thesis as to a JCE between the RUF and the AFRC at that time.

2.34 As to paragraph 55 of the Kallon Response Brief, it is submitted that the question is whether on the evidence as a whole, a reasonable trier of fact could have concluded otherwise than that that the joint criminal enterprise continued beyond the end of April 1998. If the answer to that question is negative, it is immaterial that there were certain contradictions in the evidence, or uncertainties concerning certain important facts. In a large scale international criminal trial, the evidence is rarely totally consistent, and there is rarely certainty as to every single fact. Notwithstanding this, there may still be only a single conclusion open to a reasonable trier of fact as to the ultimate issues in the case.

2.35 It is not argued that Superman was sent to Koinadugu "to join SAJ in order to expedite the plan to attack Freetown"[66] but rather that Superman was sent to SAJ Musa to ensure the action in concert between senior members of the RUF and AFRC continued and that Superman did in fact work with SAJ Musa for a period while at the same time working in concert with the RUF High Command. The Prosecution refers in addition to its submissions at paragraph 2.62 of the Prosecution Appeal Brief.

2.36 The Prosecution accepts that there was friction between Superman and Bockarie.[67] However, this did not prevent the two from cooperating to achieve their common aims. The Prosecution submits that the evidence cited by the Kallon Defence[68] does not require an inference other than the one the Prosecution submits is the only reasonable inference as set out in paragraph 2.35 above.

2.37 It is not necessary for the Prosecution to demonstrate that radio communications contained criminal content. Evidence of radio communications must be seen in the context of the evidence as a whole. The Prosecution refers in addition to its reply to the Sesay Response Brief at paragraph 2.21 above.

(vii) The Freetown invasion[69]

2.38 The Prosecution notes that the reference to the RUF plan to attack Freetown relates to the Trial Chamber's findings as to the meeting convened by Bockarie to plan the

66 Kallon Response Brief, para. 61.
67 Prosecution Appeal Brief, para. 2.103.
68 Kallon Response Brief, paras 57-61.
69 Kallon Response Brief, paras 73-93.

recapture of Kono and Freetown.[70] The Prosecution's arguments as to the necessary inferences to be drawn do not amount to "speculation".[71]

2.39 Further, the evidence set out by the Kallon Defence does not establish that there was no concerted action between the AFRC and RUF in the Freetown invasion. As noted above,[72] the Trial Chamber's *own findings* provide the basis for what the Prosecution submits are the only reasonable conclusions to be drawn, taken in the context of the evidence in the case as argued by the parties and analysed against the specific errors asserted by the Prosecution.

2.40 In relation to the release of high profile RUF prisoners from Pademba Road Prison, and the attempted release of Sankoh, it should be noted that Bockarie told Gullit to hand such prisoners over to Sesay's custody at Waterloo and this order was complied with.[73] This dispels the inference proposed by the Kallon Defence.

(viii) Application of legal principles[74]

2.41 The Prosecution does not dispute that an accused's role in a leadership position may be relevant to his liability pursuant to a JCE, however, it is submitted that "effective control" is not a *requirement* in order for JCE liability to ensue.[75]

2.42 The Kallon Defence argues that distance from the crime scenes, while not negating the possibility of JCE liability, goes to show whether participation was "significant".[76] However, the Prosecution submits that an accused may make a significant contribution to a JCE without ever being at an actual crime scene.[77] As the Trial Chamber found, as to the required extent of the participation of an accused a JCE, the Prosecution need not demonstrate that the accused's participation is *necessary* or *substantial*, and it is only required that the accused must at least have made a significant contribution to the crimes for which he is held responsible.[78] Thus, a *substantial* contribution by the accused is not required. As the ICTY Appeals Chamber recently held in *Krajišnik*:

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70 See Prosecution Appeal Brief, para. 2.63 and Trial Judgement, paras 861-862.

71 See Kallon Response Brief, para. 73.

72 See paragraph 2.13 above.

73 Prosecution Appeal Brief, para. 2.80, relying on Trial Judgement, para. 887 and footnote 1735.

74 Kallon Response Brief, paras 94-100.

75 Prosecution Appeal Brief, para. 2.146.

76 Kallon Response Brief, para. 98.

77 See e.g. *Krajišnik* Trial Judgement, paras 7-9, 883 and 1121.

78 Trial Judgement, para. 261, citing *Brđanin* Appeal Judgement, para. 430, citing *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, "Judgement", Appeals Chamber, 28 February 2005 ("***Kvočka* Appeal Judgement**"), paras 97-98.

> The Trial Chamber held that a contribution of the accused to the JCE need not, as a matter of law, be substantial. The Appeals Chamber agrees and rejects JCE counsel's contention to the contrary. It also recalls that the accused's contribution to the crimes for which he is found responsible should at least be significant. As such, JCE counsel is wrong to suggest that JCE criminalises the mere holding of beliefs supportive of crimes.[79]

It is submitted that a "significant" contribution is one that had some actual contributory effect, even if the accused was only one of many participants in the JCE having a minor role as compared to other participants. (In paragraphs 2.113, 2.156, 2.162, 3.32 and 3.32 of the Prosecution Appeal Brief, the words "substantial contribution" should in fact be understood as meaning "significant contribution" in this sense.)

2.43 In reply to paragraphs 99 and 100 of the Kallon Response Brief, the Prosecution refers to its submissions at paragraphs 5.20 to 5.27 of the Prosecution Response Brief and at paragraph 2.12 above.

C. Reply to the Gbao Response Brief

(i) Errors of fact or law[80]

2.44 The Prosecution submits that it is irrelevant whether the alleged errors are errors of law or fact, since the Prosecution has pleaded both types of errors in its notice of appeal. The Prosecution acknowledges the different standards of review on appeal for errors of law and errors of fact. The Prosecution also acknowledges that the errors set out in its First Ground of Appeal are prima facie all errors of fact rather than errors of law. However, in some cases, even where the Trial Chamber correctly articulates the law, the fact that it reaches an unreasonable conclusion when applying the law to the evidence and its findings of fact may lead an Appeals Chamber to conclude that the Trial Chamber must have nonetheless not fully appreciated the correct legal principles, such that it must have ultimately applied the wrong legal test, which is an error of law.

(ii) Justice Boutet's Dissent[81]

2.45 The Prosecution disputes that, by referring to the findings of the Trial Chamber, it thereby "fails to acknowledge Judge Boutet's dissent". A judgement of a Trial

79 *Krajišnik* Appeal Judgement, para. 675 (footnote omitted), citing *Brdanin* Appeal Judgement, para. 430; *Kvočka* Appeal Judgement", para. 97.
80 Gbao Response Brief, paras 15-16.
81 Gbao Response Brief, paras 17-18.

Chamber can be given unanimously, or can be given by majority.[82] Even where the judgement is given by majority, that judgement is *the* judgement of *the* Trial Chamber. A finding of fact in the judgement of the Trial Chamber is a finding *by* the Trial Chamber, whether or not it was a unanimous judgement. A judgement of a Trial Chamber does not carry any lesser status by virtue of the fact that it was a majority judgement. It is not necessary, whenever referring to a judgement of a Trial Chamber, to point out whether it was a unanimous judgement or a majority judgement, since this is irrelevant. The Prosecution has never denied that Justice Boutet appended a dissenting opinion,[83] but this dissenting opinion does not undermine or weaken the Trial Judgement.

(iii) Prosecution's role as organ of international criminal justice[84]

2.46 The Gbao Defence is incorrect to state that the Prosecution has chosen to "align itself with the majority's findings that Gbao significantly contributed to the JCE as RUF Ideologist or ideology instructor".[85] The Prosecution submits that it was open to the Trial Chamber to consider the nexus between the ideology and the crimes that were committed and that to do so did not constitute an error.[86] However, the primary contention of the Prosecution is that Gbao also participated in the JCE *in other ways* which were also taken into account by the Trial Chamber in making its findings. It is submitted that even if the repetitive nature of the Trial Chamber's findings in relation to the ideology, coupled with the strong dissent of Justice Boutet, may lead to the "ideology findings" being given undue prominence, and this should not detract from full consideration being given to all of the ways in which Gbao contributed to the JCE on the evidence and on the Trial Chamber's findings.

2.47 The Prosecution does not dispute the role of the Prosecution in assisting the Court in the fair administration of justice. The Prosecution rejects the contention, however, that it is acting solely for the purpose of obtaining a conviction. The Prosecution has consistently alleged that Gbao was a member of the JCE as charged in the Indictment. The Prosecution is not obliged to urge an acquittal simply because the Trial Chamber afforded a particular aspect of the evidence a greater prominence than that which had

82 Rule 88(C) of the Rules of Evidence and Procedure.
83 Prosecution Appeal Brief, footnotes 30 and 33.
84 Gbao Response Brief, paras 22-36.
85 Gbao Response Brief, para. 22.
86 See Prosecution Response Brief, paras 5.64-5.66.

been contended by the Prosecution at trial, or simply because the Trial Chamber based a finding on particular evidence that had not been relied upon by the Prosecution in relation to the issue in question. The Gbao Response Brief does not establish how the Prosecution has in any way acted inconsistently with its proper role in the criminal justice system. It is submitted that the Gbao Defence's arguments in this respect are simply a digression from the real issues which neither undermine the Prosecution's substantive arguments on appeal nor assist the Defence in its substantive response.

2.48 While it may be possible for the Prosecution to appeal or seek dismissal of convictions on the convicted person's behalf, in the present case the Prosecution does not do so and submits that there is no basis for the dismissal of any of the convictions in this case. The Prosecution brings its own grounds of appeal against the Trial Judgement for the reasons set out in the Prosecution Appeal Brief and this Reply Brief, and with reference also to the reasons given in the Prosecution Response Brief.

(iv) Alleged JCE in Kono District after April 1998[87]

2.49 It is notable that the Gbao Response Brief is focussed almost entirely on the findings as to Gbao's role as RUF ideologist and ideology instructor, believing this (together with his role in the recruitment of child soldiers) to be the only basis on which the Prosecution argues that his contribution continued after April 1998.[88] The *other ways* in which he was found to have contributed to the JCE, including through his positions of authority, are not addressed in the Gbao Response Brief. The Prosecution's argument is that Gbao's role in the JCE, in all the ways found by the Trial Chamber prior to the end of April 1998, *continued* after April 1998 until at least the end of February 1999.[89]

(v) Alleged JCE in Kailahun District after April 1998[90]

2.50 In relation to Gbao's convictions on Counts 1, 7, 9 and 13, the Prosecution explained in the Prosecution Appeal Brief that these crimes were found to be of a continuing

87 Gbao Response Brief, paras 37-38.
88 Gbao Response Brief, para. 37.
89 Paragraph 2.168 of the Prosecution Appeal Brief begins with "Gbao was found to have made a sufficient contribution to the JCE in Kailahun District".
90 Gbao Response Brief, paras 39-49.

nature.[91] Thus, while they commenced before the end of April 1998, they continued in some cases up to the end of September 2000.

2.51 The Gbao Defence provides a misleading summary of the Trial Chamber's findings in relation to the killing of 64 suspected Kamajors.[92] The Trial Chamber considered this event independently of any reference to the RUF ideology.[93] However, it went on to say that it was *strengthened* in drawing its conclusions by the knowledge that Gbao was a strict adherent to the RUF ideology "and gave instruction on all its principles to all new recruits to the RUF".[94] Whatever the conclusion on appeal in relation to this last finding, it would not detract from the fact that the Trial Chamber was already satisfied that Gbao's role in the killings was a significant contribution to the JCE even before it referred to Gbao's role in RUF ideology as another reason why this was the only reasonable conclusion open to it. It is conceded, however, that this event took place during the JCE period as found by the Trial Chamber and it is not relied upon specifically as a factor in support of the continuation of the JCE.[95]

2.52 In relation to forced labour, the Prosecution refers to paragraphs 5.92 to 5.94 of the Prosecution Appeal Brief and to paragraphs 7.148 to 7.166 of the Prosecution Response Brief.

(vi) How crimes in Kailahun furthered the JCE[96]

2.53 The Prosecution notes that even if the crimes under Counts 1, 7, 9 and 13 in Kailahun were committed exclusively by members of the RUF, this does not mean that the crimes were not within a JCE involving both members of the AFRC and members of the RUF. In the case of JCE liability, it is not necessary that all members of the JCE were directly involved in the commission of all of the crimes that were within the JCE. It is only necessary to establish that an accused made a significant contribution *to the JCE.* It is not necessary for each crime to have been committed by a combination of AFRC and RUF forces.

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[91] Prosecution Appeal Brief, paras 2.177-2.179. See also Prosecution Response Brief, para. 5.91 in relation to Gbao Response Brief, footnote 47.
[92] Gbao Response Brief, para. 40.
[93] Trial Judgement, paras 2165-2166.
[94] Trial Judgement, para. 2170.
[95] See Gbao Response Brief, para. 45.
[96] Gbao Response Brief, paras 47-49.

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3. Prosecution's Second Ground of Appeal: Acquittal of Gbao on Count 12

A. Introduction

3.1 The Prosecution's Second Ground of Appeal contends that the only conclusion open to any reasonable trier of fact on the evidence before the Trial Chamber and the Trial Chamber's own findings is that Gbao is guilty on Count 12 of the Indictment on the basis of his participation in a JCE, or alternatively, on the basis that he planned and/or aided and abetted those crimes.

3.2 Paragraphs 3.19 to 3.44 of the Prosecution Appeal Brief set out the relevant findings of the Trial Chamber in support of the Prosecution's contentions in so far as they relate to the period of the JCE as found by the Trial Chamber (that is, until late April 1998).

3.3 Paragraphs 3.45 to 3.53 of the Prosecution Appeal Brief set out the relevant findings of the Trial Chamber in support of the Prosecution's contentions in so far as they relate to the period after the end of April 1998.

3.4 Paragraphs 3.54 to 3.96 of the Prosecution Appeal Brief set out the relevant findings of the Trial Chamber and evidence that was before the Trial Chamber in support of the Prosecution's alternative contention that Gbao was responsible for planning and/or aiding and abetting the crimes in Count 12 of the Indictment.

B. Relationship between Count 12 and Count 13

3.5 In reply to paragraphs 61-63 and 126 of the Gbao Response Brief, the Prosecution relies on its submissions in paragraphs 3.34 to 3.42 of the Prosecution Appeal Brief. In determining whether Gbao was guilty on Count 12, the Trial Chamber was entitled, and indeed required, to have regard to any relevant findings relating to any other Count, in so far as those findings were relevant to Count 12. In relation to each count on which an accused is charged, the Trial Chamber is required to make its findings on the basis of all of the evidence in the case as a whole. Some evidence may clearly be relevant to more than one count, and if so, it must be taken into account in relation to each count to which it is relevant. Similarly, the findings of the Trial Chamber in relation to one count may also be relevant in relation to another count, and if so, those findings must be taken into account in considering each count to which they are relevant. It is not the case, as the Gbao Response Brief appears to suggest, that the evidence and findings related to each count must be considered independently, and that evidence and findings of the Trial Chamber can not be taken into account in relation to more than one count.

3.6 It is submitted that the system of enslavement that was found by the Trial Chamber to exist in Kailahun District, in respect of which Gbao was found to be individually criminally responsible as a participant in the JCE, was closely connected to the forced military training that included children. Apart from anything else, there was a connection by virtue of the screening system, which was managed by the G5 over which Gbao was found to have a supervisory role.[97] The Gbao Defence appears not to dispute that it was this screening system that identified who was fit for military training, and that those sent for military training included children. The Trial Chamber found that the G5, which managed the capture and deployment of civilians in furtherance of the RUF's goals, was considered to be a security agency falling under the purview of the Overall Security Commander (OSC).[98] Gbao was the Overall Security Commander (OSC) from 1996 to 2001 and remained so throughout the Indictment period.[99]

3.7 The Gbao Defence contends that apart from the finding that Gbao loaded former child soldiers onto a truck and removed them from the ICC (as to which, see the subsequent paragraphs), there are no other findings relevant to Count 12 that indicate that Gbao was involved in a system of enslavement related to forced military training.[100] The Prosecution submits that this is not correct. At paragraphs 1487-1488 of the Trial Judgement, the Trial Chamber found that forced military training in Kailahun District between 30 November 1996 and 1998 constituted the crime of enslavement as charged in Count 13. Gbao was found to be individually criminally responsible for these acts of forced military training as enslavement, as a participant in the JCE.[101] The Trial Chamber expressly found that "Gbao was directly involved in the planning and maintaining of a system of enslavement".[102] In any event, as submitted in paragraph 3.32 of the Prosecution Appeal Brief, it is not necessary in order to

97 Prosecution Appeal Brief, paras. 3.35-3.39, 3.59-3.61.
98 Trial Judgement, para. 2045.
99 Trial Judgement, para. 697.
100 Gbao Response Brief, para. 62.
101 Trial Judgement, paras 2156 (Item 5.1.3(iv)) and 2164-2173, especially para. 2167.
102 Trial Judgement, para. 2167.

establish Gbao's responsibility for enslavement to show that he contributed specifically to the crime of enslavement. It is necessary only to establish that the acts of enslavement were within the JCE, that Gbao shared the intent of the JCE, and that Gbao made a significant contribution *to the JCE*.

3.8 Contrary to the Gbao Defence's claim, the Prosecution does not rely "principally" upon the contention that Count 12 was corollary to Count 13 in order to demonstrate that the Trial Chamber erred in acquitting Gbao on Count 12.[103] Rather, the Prosecution relies on the totality of the Trial Chamber's findings as set out in paragraphs 3.34 to 3.42 of the Prosecution Appeal Brief. Further, in reply to paragraph 62 of the Gbao Response Brief, the Trial Chamber's finding relating to Gbao's role in loading former child soldiers onto trucks and removing them from the ICC[104] was only one of the findings relied upon by the Prosecution in support of its submissions.

3.9 As to paragraphs 64-66 of the Gbao Response Brief, the evidence of TF1-141 that screening took place in Gbao's presence was only one of many items of evidence and findings of the Trial Chamber referred to in the Prosecution Appeal Brief on which the Prosecution relies in relation to this ground of appeal.

3.10 As to paragraphs 64-66 of the Gbao Response Brief, the Trial Chamber did not find that Gbao was "not a highly respected RUF officer" in Kailahun District. Rather, it "note[d] that there is evidence that *certain fighters* did not respect the Unit Commanders, and Gbao personally, since they were not fighters".[105] In any event, the question whether Gbao was respected or not is immaterial to issues of Gbao's rank, responsibility, acts and criminal responsibility. A person can be in a very senior position and yet not be respected—lack of respect does not mean that a person does not have a senior role. A person does not need to be respected in order to plan a crime, or to be a participant in a joint criminal enterprise. Even if for the sake of argument it were assumed to be the case, as the Defence suggests, that the G5 units were not "part of the operational military command structure", this would not mean that members of the G5 had no responsibility for the system of enslavement, or that Gbao was not a participant in the JCE, or that he did not plan or aid and abet the conscription and/or the use of child soldiers. Numerous findings actually show the

103 Gbao Response Brief, para. 63.
104 Gbao Response Brief, para. 62.
105 Trial Judgement, footnote 1308, emphasis added.

particular importance of G5 commanders in the system of enslavement, as shown in paragraphs 7.157 to 7.158 of the Prosecution Response Brief for Kailahun District.

3.11 Similarly, as regards paragraphs 73 to 77 of the Gbao Response Brief, the Trial Chamber in fact found that "although the evidence is insufficient to conclude that Gbao had effective control over" the G5,[106] it was satisfied on the evidence that "Gbao had considerable prestige and power within the RUF in Kailahun District",[107] that he had "considerable influence over the decisions taken by" the G5 and other bodies,[108] and that he had a "supervisory role" over the G5 aud other bodies.[109] The Gbao Defence does not establish that this conclusion was not reasonably open to the Trial Chamber. JCE liability is not to be conflated with superior responsibility under Article 6(3). For JCE responsibility, and responsibility for planning or aiding and abetting, it need not be established that the accused had effective control over the direct perpetrator, or had the ability to give orders to the direct perpetrators.

3.12 As to paragraphs 78-100 of the Gbao Response Brief, it is submitted that these paragraphs do no more than disagree with the Trial Chamber's evaluation of the evidence in the case. It is submitted that the Gbao Defence does not establish that the findings of fact made by the Trial Chamber were not reasonably open to it on the basis of the evidence before it. The Prosecution submission is that based on those findings which the Trial Chamber did make, it was not open to a reasonable trier of fact to conclude that Gbao was not guilty. Contrary to what is suggested in paragraph 78 of the Gbao Response Brief, the Prosecution is not seeking to "reverse" the Trial Chamber's findings as to Gbao's role within the RUF in Kailahun District. On the contrary, the Prosecutiou *relies* on those findings. As submitted in paragraphs 3.12 to 3.17 of the Prosecution Appeal Brief, the basis of this ground of appeal is that although the Trial Chamber made these findings of fact, it failed to go on to consider whether in the light of these findings, the elements of JCE liability or of aiding and abetting were satisfied in relation to Gbao in respect of Count 12. In contrast with superior responsibility under Article 6(3) of the Statute, JCE liability, planning, and aiding and abetting, do not depend on whether the accused had the power to issue orders to the direct perpetrators, to enforce discipline, or on whether the accused received reports from the direct perpetrators.

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106 Trial Judgement, para. 2034.
107 Trial Judgement, para. 2033.
108 Trial Judgement, para. 2035.
109 Trial Judgement, para. 2035.

3.13 Paragraphs 105-113 of the Gbao's Response Brief argue that the Trial Chamber's finding that Gbao had loaded former child soldiers onto trucks and removed them from the ICC[110] was erroneous.[111] However, with regard to alleged inconsistencies discussed in the Gbao Response Brief in relation to TF1-174,[112] it is "within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence. The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable."[113] Just as the Trial Chamber is not required to refer expressly to every item of evidence in its judgement, it cannot be required to address every inconsistency between different items of evidence. The Trial Chamber is presumed to have considered all of the evidence in the case as a whole, including the contradictions and inconsistencies in the body of evidence as a whole. The Trial Chamber in this case was clearly alive to the relevant issues and adequately dealt with the evidence and addressed any inconsistencies.[114] It is settled jurisprudence that the mere existence of inconsistencies does not nullify the testimony of a witness.[115] For inconsistencies to have a nullifying effect, the appellant must show that the inconsistencies in question do truly unsettle the "fundamental features" of the case.[116]

3.14 It is not the Prosecution's submission that Gbao's presence during a single G5 screening constitutes Gbao's criminal responsibility for planning the conscription of children for military training.[117] Rather, it is a piece of evidence that the Prosecution relies upon together with all the findings of the Trial Chamber set out in paragraphs 3.54 to 3.96 of the Prosecution Appeal Brief. It is submitted that the Trial Chamber duly addressed the inconsistencies discussed in the Gbao Response Brief in relation to TF1-174[118] (see paragraph 3.9 above) in arriving at its findings at paragraph 1690 of the Trial Judgement.

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110 Trial Judgement, para. 1690.
111 Gbao Response Brief, paras. 62, 102-113.
112 Gbao Response Brief, paras. 105-113.
113 *Prosecutor v. Kupreškić et al.*, IT-95-16-A, "Judgement", Appeals Chamber, 23 October 2001 (***"Kupreškić* Appeal Judgement"**), paras. 30-32.
114 Trial Judgement, paras 478-491, 522-536, 539-603.
115 *Kupreškić* Appeal Judgement, para. 31.
116 *Kupreškić* Appeal Judgement, para. 31.
117 Gbao Response Brief, para. 65, referring to Prosecution Appeal Brief, para. 3.64.
118 Gbao Response Brief, paras. 105-113.

C. Gbao's role in planning the Count 12 crimes

3.15 As to Gbao's contribution to, and his intent for the planning of, the crimes in Count 12 of the Indictment, the Prosecution relies particularly on its submissions in paragraphs 3.34 to 3.42 and 3.69 to 3.75 of the Prosecution Appeal Brief. It is recalled that the Prosecution's submissions specific to Gbao's role in planning are in addition and in the alternative to the submissions on Gbao's JCE responsibility for the crimes in Count 12.[119]

3.16 In relation to this ground of appeal, the Prosecution relies not only on the evidence in the case as a whole, but also specifically on the findings of fact made by the Trial Chamber. The Prosecution's contention is that on the basis of the findings of fact that the Trial Chamber *did* make, the only conclusion open to any reasonable trier of fact is that Gbao is individually responsible for the Count 12 crimes. The Prosecution's reasons for this contention are set out in the Prosecution Appeal Brief.

3.17 The Gbao Defence in essence seeks to challenge the findings of fact made by the Trial Chamber, or at least, the factual conclusions drawn by the Trial Chamber from its findings of fact. Thus, the Gbao Defence seeks to argue that Gbao lacked authority,[120] that he was allegedly not a highly respected RUF officer,[121] that he had no control over the G5,[122] that he did not issue orders to the G5,[123] that he did not receive all copies of reports from security units,[124] and that he had a limited role in enforcing discipline.[125] The Prosecution refers to its submissions in paragraphs 3.10 and 3.11 above. It is submitted that it is necessary to be precise about what the Trial Chamber actually found.

3.18 Further, contrary to the Gbao Defence's claims,[126] it is submitted that the Trial Chamber's findings referred to in paragraph 3.37 of the Prosecution Appeal Brief do demonstrate that Gbao had "sufficient authority" within the RUF. The Trial Chamber found that the fact that Gbao may have possessed only limited authority in respect to combat operations is immaterial to the extent of his authority as OSC in RUF

119 Prosecution Appeal Brief, para. 3.54.
120 Gbao Response Brief, paras. 70-95. See also Gbao Response Brief, para. 100
121 Gbao Response Brief, paras. 70-72.
122 Gbao Response Brief, paras. 73-78.
123 Gbao Response Brief, paras. 79-84.
124 Gbao Response Brief, paras. 85-90.
125 Gbao Response Brief, paras. 91-95.
126 Gbao Response Brief, paras. 70-95

controlled territory where combat operations did not take place, and the security units enjoyed enhanced importance as the central components of a static administration.[127]

D. Gbao's role in aiding and abetting the Count 12 crimes

3.19 It is not the Prosecution's submission that Gbao's mere presence in Kailahun District was enough to demonstrate that Gbao approved of acts of other RUF members relating to Count 12.[128] Rather, this was additional to the other submissions relied upon by the Prosecution.[129]

3.20 In reply to paragraphs 114-115 of the Gbao Response Brief, the Prosecution relies on the submissions in the Prosecution Appeal Brief, and the evidence and findings of the Trial Chamber referred to therein, in relation to Gbao's authority within the RUF at this time, and his knowledge of the conscription and/or the use of child soldiers by the RUF. The Gbao Defence claims that "Gbao was accosted and embarrassed by the RUF leadership" for authorising the re-opening of the ICC in Makeni, which according to the Gbao Defence demonstrates Gbao's lack of authority.[130] However, Gbao was not "accosted" on the grounds that he lacked the authority for authorising the re-opening of the ICC in Makeni; rather, he was reprimanded because he did not inform his colleagues in the RUF High Command that he had granted permission for the re-opening of the ICC in Makeni.[131]

3.21 In reply to paragraphs 116-117 of the Gbao Response Brief, the Prosecution relies on its submissions and the findings of the Trial Chamber set out at paragraph 3.87 of the Prosecution Appeal Brief.

E. Gbao's contribution to the JCE

3.22 The Gbao Defence relies on its submissions in the Gbao Appeal Brief relating to Gbao's Ground 8 (and the sub-grounds thereunder) to contend that Gbao was not a

127 Trial Judgement, para. 700.
128 Gbao Response Brief, para. 98.
129 See Prosecution Appeal Brief, paras. 3.79-3.81.
130 Gbao Response Brief, paras. 114-115, referring to the evidence of TF1-174, Transcript 28 March 2006, pp.71-72; see also Gbao Response Brief, para. 129.
131 TF1-174, Transcript 28 March 2006, pp.70-72.

member of the JCE.[132] In reply, the Prosecution relies on the submissions in the Prosecution Response Brief relating to Gbao's Ground 8.[133]

3.23 There appears to be no challenge by the Gbao Defence to the Trial Chamber's finding at paragraph 1985 of the Trial Judgement that the crimes charged in Count 12 that were found to have been committed were within the common purpose.[134] The Gbao Defence's contention appears to be rather that Gbao was not a member of the JCE.[135] The Gbao Defence acknowledges that where Gbao is found to be a JCE participant, Gbao need not make a significant contribution to the specific crimes found to have been committed under Count 12 to satisfy the *actus reus* requirements.[136]

3.24 In reply to paragraphs 127-129 of the Gbao Response Brief, there is no finding of the Trial Chamber to suggest that Gbao was opposed to the conscription and/or the use of child soldiers. Rather, the Trial Chamber said that what it found against Gbao was "insufficient to constitute a substantial contribution to the widespread system of child conscription or the consistent pattern of using children to actively participate in hostilities".[137] For the reasons given, the Prosecution submits that on the Trial Chamber's findings and the evidence before it, that conclusion was one that was not open to a reasonable trier of fact.

F. Modes of liability

3.25 In reply to paragraphs 130-131 of the Gbao Response Brief, it is submitted that it is not the case on the Trial Chamber's findings that Count 12 cannot be within the JCE for some participants and outside the JCE for other participants.

3.26 The Prosecution relies on its submissions at paragraph 2.147 of the Prosecution Appeal Brief, at paragraphs 5.72 to 5.75 of the Prosecution Response Brief, and at paragraph 2.12 of this Reply Brief.

3.27 In reply to paragraphs 134-136 of the Gbao Response Brief, the Prosecution relies on the submissions made in paragraphs 3.45-3.53 of the Prosecution Appeal Brief.

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132 Gbao Response Brief, para. 121.
133 Prosecution Response Brief, Sections 2 A (i) & (iv), 5 A & D.
134 Gbao Response Brief, para. 121; see also Gbao Response Brief, para. 131
135 Gbao Response Brief, para. 121.
136 Gbao Response Brief, para. 121.
137 Trial Judgement, para. 2235.

G. Conclusion

3.28 The Gbao Defence Response revolves around Gbao's alleged lack of authority[138] and appears not to address or challenge his specific role and intent for the crimes as submitted in the Prosecution Appeal Brief. This Prosecution Ground of Appeal is predicated upon Gbao being individually responsible for the Count 12 crimes under Article 6(1). This does not require the Prosecution to establish that Gbao was in a superior-subordinate relationship with the perpetrators of the crimes in Count 12.[139]

4. Prosecution's Third Ground of Appeal: Acquittals of Sesay, Kallon and Gbao on Count 18

A. Reply to the Sesay Response Brief

(i) Error of fact: intention to compel third parties

4.1 Paragraphs 119 to 142 of the Sesay Response Brief take issue with the Prosecution submission that on the evidence in the case, the only conclusion open to any reasonable trier of fact is that the perpetrators had the intent to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of the UNAMSIL peacekeepers who had been seized.[140]

4.2 Paragraphs 120 to 123 of the Sesay Response Brief argue, essentially, that mistrust, hostilities and grievances on the part of many in the RUF "might be a link in the evidential chain and a step towards criminal conduct",[141] but that such mistrust, hostilities and grievances do not of themselves establish the *mens rea* for hostage taking.

4.3 The Prosecution does not take issue with this Defence submission. The Prosecution does not argue that the mistrust, hostilities and grievances were of themselves sufficient to establish the *mens rea*. The Prosecution relies *cumulatively* on all of the matters referred to in the Prosecution Appeal Brief. It is not suggested that any one of those matters considered in isolation would necessarily suffice. The Prosecution has

138 Gbao Response Brief, paras. 70-95, 98-100, 114-117, 124-125.
139 Gbao Response Brief, para. 125.
140 Prosecution Appeal Brief, para. 4,57.
141 Sesay Response Brief, para. 123.

repeatedly emphasised that all of the evidence in the case, and all of the intermediate findings of fact by the Trial Chamber, need to be considered as a whole.

4.4 It is submitted that the test for proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt".[142] A "bare possibility"[143] or "frivolous doubt"[144] is not sufficient to raise a reasonable doubt.

4.5 Thus, in the *Čelebići* Appeal Judgement, the ICTY Appeals Chamber said:

> A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him [….] Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[145]

4.6 Bearing in mind the standard of review on appeal for errors of fact,[146] it is submitted that the question in the present case is therefore this. On all of the evidence before the Trial Chamber, could any reasonable trier of fact have reached the conclusion that there was a fair or rational explanation for the detention of the peacekeepers that was consistent with any hypothesis other than that the detention of the peacekeepers was undertaken with an intent to compel a third person to act or refrain from acting as an explicit or implicit condition for the safety or the release of the victim?

4.7 Paragraph 124 of the Sesay Response Brief suggests that the peacekeepers might have been detained "upon sympathy with a cause", but without intent to compel any person to act in a particular way. Even if this were a theoretical possibility (which is not conceded), the question would still have to be asked in this case: why would the

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142 See the prosecution argument in the *Tadić* Appeal Judgement, para. 174, in relation to a prosecution ground of appeal in which the Appeals Chamber concluded in that case, at para. 183, that: "In the light of the facts found by the Trial Chamber, the Appeals Chamber holds that, in relation to the possibility that another armed group killed the five men, the Trial Chamber misapplied the test of proof beyond reasonable doubt. On the facts found, the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men in Jaskici." See also the prosecution argument referred to in the *Prosecutor v. Limaj et al.*, IT-03-66-A, "Judgement", Appeals Chamber, 27 September 2007, para. 155.

143 Prosecution argument in *Tadić* Appeal Judgement, para. 174 (see previous footnote).

144 *Rutaganda* Appeal Judgement, para. 488.

145 *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001, para. 458.

146 See Prosecution Appeal Brief, paras 1.7-1.12; compare also *Prosecutor v. Kordić and Čerkez* , IT-95-14/2-A, "Judgement", Appeals Chamber, 17 December 2004, paras 288-290.

perpetrators detain the victims "upon sympathy with a cause"? The question would still have to be asked whether, on all of the evidence before the Trial Chamber, a reasonable trier of fact could have reached the conclusion that there was a fair or rational explanatiou for the detention of the peacekeepers "upon sympathy with a cause" that was consistent with any hypothesis other than that the detention of the peacekeepers was undertaken with an intent to compel a third person to act or refrain from acting in a particular way.

4.8 Paragraphs 126 and 128 of the Sesay Response Brief argue that the Prosecution has not established a link between the direct perpetrators' grievances with the DDR process and the detentions. However, as submitted above, the link can be established hy circumstances rather than by direct evidence of a link. Whether there is direct evidence of such a link, or whether circumstantial evidence is relied upon to establish such a link, the same question referred to above needs to be asked. Was it open to a reasonable trier of fact on the evidence to conclude that there was a fair or rational explanation for the detention of the victims consistent with the hypothesis that they were not taken as hostages? No such possible explanation has been suggested.

4.9 Paragraph 127 of the Sesay Response Brief takes issue with the Prosecution's statement that some of the hostages who were high-ranking UNAMSIL officers "seemed to have been specifically targeted due to their rank". The Proseeution concedes that there was no express finding by the Trial Chamber to this effect. However, the Prosecution submits that in determining whether the conclusion of the Trial Chamber was open to a reasonable trier of fact, it is necessary to consider the evidence as a whole, and the fact that significant nnmbers of victims were of high rank is an aspect of the evidence as a whole.

4.10 Paragraphs 129 to 132 of the Sesay Response Brief refer to individual matters which the Sesay Defence submits are insufficient to establish the requisite *mens rea* for hostage taking. The Prosecution repeats that it does not contend that any of those matters in isolation wonld be sufficient. Rather, the Prosecution relies on all of the matters referred to in the Prosecution Appeal Brief as a whole.

4.11 As to paragraph 134 of the Sesay Response Brief, the Prosecution submits that the issue in this case is not one of abstract distinetions between expressions snch as "use as leverage" and "compel". The relevant issues in this case are those referred to in paragraphs 4.6 to 4.8 above.

4.12 As to paragraphs 135 to 137 of the Sesay Response Brief, the Prosecution reiterates that the question is whether it was open to a reasonable trier of fact to conclude that there was any reasonable hypothesis consistent with innocence. On the evidence as a whole, what other rational explanation could there be for the detention of the peacekeepers?

4.13 As to paragraphs 138 to 141 of the Sesay Response Brief, the Prosecution submits that in cases where the *mens rea* is formed after the initial detention, what must be proved beyond a reasonable doubt is that the relevant *mens rea* existed at some time when the victims were being detained. As long as the Trial Chamber is satisfied that this is proved beyond a reasonable douht (or the Appeals Chamber is satisfied that this was the only conclusion open to any reasonable trier of fact), it need not necessarily be certain whether the *mens rea* was formed at the time of initial detention or subsequently. As noted above, the *mens rea* can he established by circumstantial evidence; direct evidence is not required.

(ii) Whether commuuieation of a threat is an element of the crime of hostage taking

4.14 As regards paragraphs 147(a) and 148-149 of the Sesay Response Brief, the Prosecution relies on the submissions in the Prosecution Appeal Brief.

4.15 As to paragraphs 150-156 of the Sesay Response Brief, the Prosecution relies on the submissions in the Prosecution Appeal Brief. It is not the case, as the Sesay Defence claims, that the Prosecution accepted "that the ICTY repeatedly accepted the need … to prove communication of threat as the basis for hostage taking".[147] The submission in paragraphs 4.35 to 4.43 of the Prosecution Appeal Brief is that this has never been clearly decided as part of the *ratio decidendi* of any case in an international criminal tribunal. The Sesay Defence itself points to no clear authority for the proposition that commnnication of a threat *is* a legal requirement. The Defence position is ultimately that expressions such as "*so as to*" and "*in order to*" necessarily imply a requirement of communication of a threat to a third party. As a matter of plain langnage, and as a matter of logic, they do not.[148]

4.16 As to paragraphs 157 to 162 of the Sesay Response Brief, the Sesay Defence concedes that of the national authorities referred to in Appendix B to the Prosecution

[147] Sesay Response Brief, para. 150.
[148] Sesay Response Brief, para. 156.

Appeal Brief, the only one that expressly requires a communication of a threat to a third party is the Canadian legislation. The Prosecution submits that it is sufficient that a threat is issued to the victim, although the detention of the victim must be undertaken with the intent of compelling a third party (whether or not a threat has actually been communicated to the third party). Examples in the Prosecution's Appendix B that expressly require communication of a threat to the victim only, or which require a "threat" without indicating who must be threatened, are entirely consistent with the Prosecution position.[149] As to the submission in paragraph 158(b) of the Sesay Response Brief, the Prosecution refers to the last two sentences of the previous paragraph.

4.17 As to paragraphs 163 to 164 of the Sesay Response Brief, it is submitted that the cited passages from the *Pinochet* case are consistent with the Prosecution position. These passages do not say that a threat must be communicated to a third party, but merely that the purpose of the detention must be to compel a third party to act or refrain from acting. That is the Prosecution position.

4.18 As to paragraph 165 of the Sesay Response Brief, it is submitted that a single element of a crime in the ICC Elements is either an *actus reus* or a *mens rea* element but not both. The opening words of the third element of the crime of hostage taking ("The Accused intended …") indicates that it is a *mens rea* element.

4.19 As to paragraphs 166 to 169, the Prosecution submits that the text of the Lambert Commentary speaks for itself. The Lambert Commentary does not say words to the effect that "A threat must be communicated to a third party, but it is sufficient if it is merely an implicit threat". *Simpson v. Libya*[150] could not be clearer in expressing its understanding of the Lambert Commentary:

> … the hostage taker [need not have] … communicated its intended purpose to the outside world. Consistent with the plain text, ... the intentionality requirement focuse[s] on the *mens rea* of the hostage taker. ... 'demands' are not required to establish the element of hostage-taking: "The words 'in order to compel' do not require more than a motivation on the part of the offender".[151]

4.20 As to paragraphs 170-173 of the Sesay Response Brief, it is acknowledged that the Trial Chamber must be satisfied that the *mens rea* is proved beyond reasonable doubt (or on appeal, the Appeals Chamber must be satisfied that this was the only

149 Sesay Response Brief, para. 158(i).
150 See Prosecution Appeal Brief, para. 4.33.
151 See Prosecution Appeal Brief, para. 4.33.

conclusion open to any reasonable trier of fact). However, the Prosecution takes issue with the suggestion that the *mens rea* can only be proved by means of evidence of a threat being issued to the third party. In international law, elements of crimes need not be proved by any particular type of evidence. In principle, any element of any crime can be proved, for instance, by circumstantial evidence, if this is sufficient to establish the element beyond a reasonable doubt. As submitted above, the issue in this case is whether, on the evidence in the case as a whole, it was open to a reasonable trier of fact to conclude that the *mens rea* was not established. The Prosecution submits that it was not open to a reasonable trier of fact to so conclude.

B. Reply to the Kallon Response Brief

(i) Error of fact: intention to compel third parties

4.21 Paragraph 108 of the Kallon Response Brief argues that the Prosecution conflates the RUF with the Accused in general. This is denied. The Prosecution acknowledges that in the case of nearly all crimes of which the Accused were convicted, they were not found to have personally committed the crimes. Their individual responsibility depended upon findings that the elements of other modes of liability had been established. The individual responsibility of each of the Accused for the taking of UNAMSIL peacekeepers as hostages, as charged in Count 18, is considered separately in paragraphs 4.76 to 4.112 of the Prosecution Appeal Brief.

4.22 Paragraph 109 of the Kallon Response Brief appears to argue that evidence of an element of one count charged in the Indictment cannot also be used as evidence of an element of a different count charged in the Indictment. It is submitted that this argument is clearly wrong in law, and no authority is cited in support of it. This paragraph also refers to the "unfairly antagonistic defence" of Kallon's co-accused, but does not explain or substantiate how his trial was rendered unfair by the conduct of co-accused.

4.23 As to paragraphs 110 to 114 of the Kallon Appeal Brief, it is submitted that the Appeals Chamber (like all chambers of international criminal tribunals) must apply the existing law, not make up the law. Where the law is unclear, it is necessary to seek to determine what the existing law is by reference to authorities, and to legal arguments based on those authorities. In this respect, the Prosecution refers to the submissions in the Prosecution Appeal Brief. The submission of the Kallon Defence that the Appeals Chamber should "ratify" the legal findings of the Trial Chamber because they "appear to be a reasonable interpretation" casts the Appeals Chamber in the role of a legislature rather than that of a court of law.

4.24 In relation to the Prosecution submission that a threat need not be communicated to a third party, the Prosecution refers to paragraphs 4.8 and 4.20 to 4.31 of the Prosecution Appeal Brief. In reply to the Kallon Defence's argument that the Trial Chamber's interpretation is in line with the *Blaškić* case, the Prosecution refers to paragraphs 4.35 to 4.43 of the Prosecution Appeal Brief and reiterates that *Blaškić*[152] does not support the Defence position, but rather, emphasises the use of the censurable act to gain an advantage, an interpretation confirmed in *Karadžic*.[153] The Prosecution submits that the reference to the *Norman* case at paragraph 113 of the Kallon Response Brief is inapposite: the issue in this case concerns the correct interpretation of the elements of a single crime (hostage-taking), not a choice between two different provisions. Furthermore, it is not the case that if there is any uncertainty as to the legal elements of a crime, the interpretation most favourable to the accused must be adopted. It is established in the case law that the principle of *nullum crimen sine lege* (the prohibition on retrospective criminal legislation) does not prevent a court from interpreting and clarifying the elements of a particular crime.[154]

4.25 As to paragraphs 115 to 116 of the Kallon Appeal Brief, the Prosecution submits that the usual elements of the various modes of liability apply to this crime, including the applicable *mens rea* requirement. An accused can only be convicted for this crime if all of the elements of the crime and the elements of the relevant mode of liability are established. The Prosecution has never suggested otherwise. The individual responsibility of each of the three Accused in this case is dealt with at length in paragraphs 4.76 to 4.112 of the Prosecution Appeal Brief.

4.26 As regards paragraphs 118 to 135, the Prosecution relies on its submissions in Section 2 of the Prosecution Response Brief, responding to the various Defence grounds of appeal alleging defective pleading of the Indictment. It is submitted that it has not

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152 *Prosecutor v. Blaškić*, IT-95-14-T, "Judgement", Trial Chamber, 3 March 2000, para. 187 and *Prosecutor v. Blaškić*, IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004 ("***Blaškić* Appeal Judgement**"), para. 639.

153 Paragraph 4.43 of Prosecution Appeal Brief citing *Prosecutor v. Karadžić*, IT-95-5/18-I, "Trial Chamber Decision on Six Preliminary Motions Challenging Jurisdiction", Trial Chamber, 28 April 2009, para. 64, referring to *Blaškić* Appeal Judgement, paras. 638-639.

154 *Čelebići* Appeal Judgement, para. 173; *Aleksovski Appeal Judgement*, para. 126.

been established by the Kallon Defence that this count was defectively pleaded. In any event, the Kallon Defence makes no showing that the Defence complained of the alleged defect at the pre-trial stage. It is therefore submitted that in the absence of any showing by the Defence of actual prejudice suffered,[155] even if the Appeals Chamber were to find the Indictment defective in this respect, which is denied, it should find that the Accused waived the right to challenge the indictment on this ground, or find that no miscarriage of justice had resulted notwithstanding the defect.[156]

4.27 The argument in paragraph 123 of the Kallon Appeal Brief, that the Prosecution is attempting to mould a case against the Respondent on appeal, is entirely without merit given the Prosecution is not seeking to introduce new evidence or expand the factual allegations relevant to the crimes pleaded in the indictment.[157] Rather, the Prosecution submission is that on the basis of the evidence aud the Trial Chamber's findings in the case, the Trial Chamber erred in not entering a conviction on this count. In response to paragraph 124 of the Kallon Appeal Brief, the Prosecution refers to paragraphs 2.25 to 2.30 of its Response and asserts that it did comply with the principle in *Kupreškić*.[158]

4.28 In reply to paragraphs 127-129 of the Kallon Appeal Brief, arguing that there was insufficient notice regarding the locations where the acts constituting Count 15-18 are alleged to have occurred,[159] the Prosecution refers to paragraphs 2.61-2.62, 2.65-2.70 and 2.74 of the Prosecution Response Brief.

4.29 Paragraphs 137 to 157 of the Kallon Response Brief suggest that an alternative reason for the detention of the UNAMSIL peacekeepers may have been that they were considered "enemy combatants". The Prosecution submits that on the findings of the Trial Chamber, no reasonable trier of fact could have entertained this hypothesis. The Trial Chamber found that UNAMSIL was prohibited from engaging in hostilities and that it was only empowered to use force in self-defence,[160] that it acted consistently

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155 The bare allegation of material prejudice in paragraph 127 of the Kallon Response Brief is insufficient.

156 *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-A-475, "Judgement", Appeals Chamber, 22 February 2008, paras 42-45.

157 *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-616, "Decision on the Defence Motion to Request the Trial Chamber To Rule That the Prosecution Moulding of Evidence is Impermissible", Trial Chamber, 1 August 2006.

158 The Accused must be made aware of the "legal ingredients of the offence charged": Prosecutor *v. Kupreškić et al.*, IT-95-16-T, "Judgement", Trial Chamber, 14 January 2000, para. 725.

159 The attacks including but not being limited to locations within Bombali, Kailahun, Kambia, Port Loko and Kono Districts: *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-619, "Corrected Amended Consolidated Indictment", Trial Chamber, 2 August 2006, para. 83.

160 Trial Judgement, paras 1907-1917.

with its mandate,[161] that it did not have the military capability to cause significant damage to the RUF,[162] that in some cases it acted in self-defence when attacked but in other cases did not,[163] and that the RUF knew or had reason to know of UNAMSIL's protected status.[164]

4.30 As to paragraphs 158 to 172 of the Kallon Response Brief, the Prosecution relies on the evidence and the Trial Chamber's findings as a whole, and in particular, on the matters referred to in paragraphs 4.91 to 4.104 of the Prosecution Appeal Brief, in support of the contention that the only conclusion open to a reasonable trier of fact is that the elements of Article 6(1) and/or Article 6(3) are satisfied in relation to Kallon. Particular aspects of the evidence, such as the radio communication referred to in paragraphs 159-160 of the Kallon Response Brief, cannot be considered in isolation. The question that must be answered is: On the evidence as a whole, what other rational explanation could there be for the detention of the peacekeepers? (See paragraph 4.12 above.)

4.31 As to paragraphs 173 to 174 of the Kallon Response Brief, the Prosecution refers to paragraph 4.22 above.

4.32 As to paragraphs 175 to 182 of the Kallon Response Brief, the Prosecution refers to paragraph 4.25 above. The fact that the Indictment may not have sufficiently pleaded sufficient particulars of Kallon's personal commission of the crime of hostage taking is immaterial, since the Prosecution in this ground of appeal does not seek a conviction on that particular mode of liability. In any event, the Trial Chamber found that defects in the indictment concerning Kallon's personal commission of the attack against Salahuedin was cured.[165]

4.33 As to paragraphs 183 to 239 of the Kallon Response Brief, the Prosecution relies on the Prosecution's response in the Prosecution Response Brief to Kallon's Grounds 23 to 28. It is submitted that the Kallon Defence does not establish that the findings of the Trial Chamber were not open to a reasonable trier of fact. The passage from the Trial Judgement quoted in paragraph 185 of the Kallon Response Brief very clearly establishes Kallon's involvement in the detention of Salaheudin, Maroa and others. It

161 Trial Judgement, paras 1918-1923.
162 Trial Judgement, para. 1924.
163 Trial Judgement, paras 1925-1937.
164 Trial Judgement, paras 1938-1943.
165 Trial Judgement, paras. 2243-2246; Prosecution Response Brief, paragraphs 2.42 and 2.44.

is not the case that the Trial Chamber failed to convict Gbao in respect of this incident.[166] Gbao was found to have ordered the attack directed against Jaganathan.[167]

4.34 As to paragraphs 240 to 259 of the Kallon Response Brief, the Kallon Defence itself acknowledges that "Rule 82(B) requires the showing of extraordinary circumstances in order to establish a conflict of interest that might cause serious prejudice to an accused".[168] The Prosecution submits that the mere fact that two co-accused at a joint trial may seek to shift blame to the other is not in itself an "extraordinary circumstance" requiring separate trials in order to avoid "serious prejudice" to the accused. In any trial of multiple accused charged with the same crimes, it is commonplace for each accused to seek to blame the other for the crimes, or at least to emphasise the role of the other accused in the crime and to minimise his or her own role. It is submitted that the Trial Chamber took this into account when it evaluated the evidence in the case a whole.

4.35 An obvious problem that could arise if the co-accused in such a case were tried separately would be that inconsistent verdicts might result in the different trials. A single trial of all accused, in which the conflicting evidence of the accused can be tested against each other in the light of all of the evidence in the case as a whole can be an effective means of establishing the truth. The rights of the accused are not thereby prejudiced. Each accused remains entitled to call whatever evidence he or she wishes in support of his or her case, and to test the evidence of other accused in cross-examination. There is a fundamental and essential public interest in ensuring consistency in verdicts, and for this reason, it is desirable to have joint trials of accused charged with acts committed in the same transaction before the same Trial Chamber on the same evidence.[169]

4.36 Other reasons for having joint trials of accused charged with the same crimes include judicial economy and minimising hardship to witnesses.[170]

4.37 The Kallon Defence has not established that the joint trial in this case was unfair.

4.38 As to paragraphs 261 to 262 of the Kallon Response Brief, the Prosecution submits that the principles for determining whether or not cumulative convictions are

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166 As argued in Kallon Response Brief, para. 187.

167 See Trial Judgement, paras. 2247-2248.

168 Kallon Response Brief, para. 252.

169 See, for instance, *Prosecutor v. Stanišić, Prosecutor v. Župljanin*, IT-04-79-PT, IT-99-36/2-PT, "Decision on Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments", Trial Chamber, 23 September 2008 ("***Župljanin and Stanišić* 23 September 2008 Decision**"), para. 49.

170 *Župljanin and Stanišić* 23 September 2008 Decision, paras 46-48.

permissible in respect of two different crimes are well settled. The Prosecution refers to paragraphs 4.113 to 4.119 of the Prosecution Appeal Brief. The Kallon Defence's submission on cumulative convictions simply has no merit.

C. Reply to the Gbao Response Brief

(i) Alleged Abuse of Process

4.39 Paragraphs 145 to 150 of the Gbao Response Brief argue that the Prosecution "continued to rely upon findings it knows are questionable" in relying "upon evidence of Major Maroa's abduction whilst aware this version of events is in stark contrast to the account in a statement given by Major Maroa himself in 2004."[171] However, the account of Maroa mentioned hy the Defence was not introduced as evidence before the Trial Chamber and was never tested in examination in chief or cross examination. The Prosecution simply relies on a finding by the Trial Chamber in paragraph 1799, which reads as follows:

> While at the communication centre, Jaganathan saw Maroa and the other three peacekeepers arriving in a Land Rover, escorted by Gbao. Gbao took three rifles out of the boot of his car. Maroa was bleeding from his mouth and the other three peacekeepers were limping."

4.40 This finding relies on the testimony of Ganese Jaganathan and Leonard Ngondi,[172] who were found by the Trial Chamber to be "two reliable witnesses."[173]

4.41 As to the unfounded allegation of abuse of process,[174] the Prosecution relies on its submissions in the Prosecution Response Brief in response to Gbao's Ground 14.[175]

(ii) Allegation that Salahuedin was not abducted

4.42 The Gbao Defence further argues that the Prosecution submitted that Gbao should be found responsible for aiding and abetting the hostage taking of Salahuedin.[176] However, what tbe Prosecution actually said was:

> The Trial Chamber found Gbao liable under Article 6(1) of the Statute for aiding and abetting the attacks directed against Salahuedin and Jaganathan on 1 May 2000, as charged in Count 15. The Prosecution submits that on

171 Gbao Response Brief, para. 145.
172 Transcript of 20 June 2006, Ganese Jaganathan, p. 31; Transcript of 29 March 2006, Leonard Ngondi, p. 32.
173 Trial Judgement, para. 578.
174 Gbao Response Brief, paras 146-150.
175 Prosecution Response Brief, paras 4.76 to 4.78.
176 Gbao Response Brief, paras 151-152.

> the basis of the Trial Chamber's findings and the evidence in the case as a whole, the only conclusion open to any reasonable trier of fact is that Gbao is additionally guilty under Article 6(1) on the basis of these facts for the crime of hostage-taking.[177]

4.43 It is obvious that this submission only applies to the situation where a person was actually abducted, thus to the abduction of Jaganathan.[178]

(iii) Gbao's contention that the Prosecution was correct in noting that, had Gbao been the interlocutor, perhaps the UNAMSIL conflict would have been resolved

4.44 The Gbao Defence claims that the Prosecution submitted in paragraph 4.109 of its Appeal Brief that had Gbao been the interlocutor, perhaps the UNAMSIL conflict would have been resolved.[179] This conclusion was drawn from one passage in the Prosecution Appeal Brief, which states as follows:

> ... [t]he Trial Chamber found that after the first abductions, Mendy and Gjellesdad went first to the headquarters of the security units in Makeni and requested to speak to Gbao, whom they knew as the "chief security officer" of the RUF. Ngondi was confident that he would be able to reach an agreement with Sesay, Kallon, Gbao and the others, as their discussions had been successful in the past. It is submitted that the only reasonable conclusion from these findings is that the UNAMSIL commanders saw in Gbao an important interlocutor to negotiate the release of the hostages.[180]

4.45 It is misleading for the Gbao Defence to suggest that what the Prosecution meant by this was that "had Gbao been the interlocutor, perhaps the UNAMSIL conflict would have been resolved". This was never the Prosecution's position. What the Prosecution in fact said was that the fact that Gbao was important interlocutor of UNAMSIL showed that he "was aware of the intention of the RUF to capture and detain the UNAMSIL personnel with the intent to compel a third party to act or abstain from acting." The Prosecution submitted "that the only conclusion reasonably open is that Gbao's acts and words encouraged and supported the commission of the hostage-taking."[181]

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177 Prosecution Appeal Brief, para. 4.105, referring to Trial Judgement, para. 2265.
178 Trial Judgement, paras 1786 and 2261.
179 Gbao Response Brief, paras 154-156.
180 Prosecution Appeal Brief, para. 4.109, citing Trial Judgement, paras 1801-1804.
181 Prosecution Appeal Brief, para. 4.112.

(iv) Gbao's contention that the Trial Chamber did not err in law

4.46 The Gbao Defence seems to support the Prosecution's argument that in order for the third element of the crime of hostage-taking to be fulfilled (intent to compel a State [or other actor] to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person), no threat needs to be communicated to a third party.[182]

4.47 It is therefore surprising that the Gbao Defence then goes on to argue that the Lambert Commentary, cited by the Prosecution,[183] actually supports the Trial Chamber's perspective on this issue in stating that "the compulsion must be directed towards a third party".[184] The Prosecution submits in reply that the word "compulsion" as used in the Commentary can refer to the intended compulsion, which, read in the light of the paragraphs of the Lambert Commentary cited in paragraph 4.31 of the Prosecution Appeal Brief, does not need to be communicated.

4.48 This slightly confused reasoning of the Gbao Defence does not actually explain how they came to the couclusion that the Trial Chamher did not err in law. Further, the Prosecution relies on the submissions in the Prosecution Appeal Brief and in paragraph 4.19 above.

(v) Gbao's contention that the Trial Chamber did not err in fact

4.49 The Prosecution's position is that on the basis of the evidence and the Trial Chamher's findings, the only conclusion open to any reasonable trier of fact is that the RUF did detain the peacekeepers with the intention to compel the Sierra Leonean Government and/or UN to stop the disarmament process and/or with the intention to utilize their detention as leverage for the release of Foday Sankoh, who was arrested on 6 May 2000.[185] The Gbao Defence states simply that it "recalls the arguments in made in Ground 15 of its Appellant Brief and incorporates these arguments by reference that Gbao demonstrated the necessary *actus reus* to be found individually criminally

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182 Gbao Response Brief, para. 160. "The Defence submit in response that there is no legal element that requires a threat be communicated to a third party because such communication is inherent in the taking of hostages."

183 Prosecution Appeal Brief, paras 4.31 and 4.32.

184 Gbao Response Brief, para. 161, referring to Prosecution Appeal Brief, para. 4.32, citing J.J. Lambert, *Terrorism and Hostages in International Law, A Commentary on the Hostages Convention 1979*, Cambridge University Press, 1990, p. 85.

185 Gbao Response Brief, para. 162.

responsible under Count 18."[186] Although the meaning of this sentence is not entirely clear, it appears to argue that the *actus reus* elements of the crime of hostage taking was not established in relation to Gbao, and to state that in support of this argument the Gbao Defence relies on the submissions in the Gbao Appeal Brief in respect of Gbao's Ground 15. However, Ground 15 of the Gbao Defence's Appeal Brief was dropped "[d]ue to page limitations".[187] If the Gbao Defence meant to refer to Ground 16 of its Appeal Brief, the Prosecution refers in reply to its own submissions in the Prosecution Response Brief in response to Gbao's Ground 16.[188] Further, the Prosecution relies on the submissions in the Prosecution Appeal Brief.

(vi) Gbao's contention that the Prosecution did not sufficiently demonstrate that Gbao possessed the requisite *mens rea* for Count 18

4.50 The Gbao Defence further alleges inappropriate standards and use of evidence by the Prosecution.[189] The Gbao Defence argues that "[m]any of the findings relied upon by the Prosecution in its argument do not meet the standard required to reverse factual findings on prosecutorial appeals" and lists five statements from the Prosecution Appeal Brief[190] which argue that certain "inferences" can be drawn from the findings in the case. The Gbao Defence argues that the inferences drawn and conclusions made by the Prosecution do not meet the standard stated in paragraph 1.10 of the Prosecution Appeal Brief to reverse factual findings made by the Trial Chamber.[191] In reply, the Prosecution submits that in order for the Appeals Chamber to reverse the Trial Chamber's ultimate conclusion (that Gbao was not guilty on Count 18), the Appeals Chamber must be satisfied that this ultimate conclusion was one that could have been reached by no reasonable trier of fact on the evidence. This standard need not necessarily be met in relation to every step in the Trial Chamber's reasoning in reaching that ultimate conclusion. Individual findings of the Trial Chamber, or individual items of evidence, may in themselves not suffice to establish that no reasonable trier of fact could have reached the conclusion that the Trial Chamber did. However, when all of

186 Gbao Response Brief, para. 163.
187 Gbao Appeal Brief, para. 312.
188 Prosecution Appeal Brief, paras 7.213 to 7.229.
189 Gbao Response Brief, paras. 167-170.
190 Gbao Response Brief, para. 167 i-v.
191 Gbao Response Brief, para. 168.

the findings of the Trial Chamber, and all of the evidence, is considered as a whole, the Appeals Chamber may well reach this conclusion.

4.51 The Prosecution submits that taken as a whole, the findings referred to in paragraphs 4.56 to 4.75 of the Prosecution Appeal Brief establish that, when account is taken of the errors of fact committed by the Trial Chamber, the only conclusion open to any reasonable trier of fact on the evidence in the case and the findings of the Trial Chamber is that Gbao was guilty on Count 18.

(vii) Gbao's contention that the Prosecution cannot rely on Exhibit 190

4.52 The Gbao Defence argues that the Prosecution's reliance on Exhibit 190 in paragraphs 4.62 and 4.66 of the Prosecution Appeal Brief "infringes upon the rights of the Accused" since "it was originally introduced into the trial record for the sole reason of providing context to the cross-examination of Jaganathan Ganase by counsel for the Third Accused and nothing more."[192]

4.53 In reply, the Prosecution submits that by citing Exhibit 190 the Prosecution did not intend "to show that Gbao was opposed to disarmament, thereby demonstrating his *mens rea* under Count 18".[193] Rather, this document was intended to give some contextual evideuce to other evidence used. The wording of paragraphs 4.62 and 4.66 of the Prosecution Appeal Brief clearly shows that. For instance, paragraph 4.62 reads: "In addition, the Report of the UNAMSIL Headquarters Board of Inquiry also reflects how the build up of tension was perceived hy UNAMSIL". The reference to this exhibit in paragraph 4.66 of the Prosecution Appeal Brief is simply intended to show that UNAMSIL Headquarters perceived the events in May 2000 as "hostage taking" as many of the witnesses did as well. The reference to this contested document was thus not used to "prove the acts and conduct charged against the Accused" as alleged by Gbao's Defence.[194]

(viii) Gbao's contention that he was not opposed to RUF disarmament

4.54 Paragraphs 175 to 178 of the Gbao Response Brief list a number of transcripts which are said to show that Gbao was not opposed to disarmament. Gbao's Defence mainly relies on the "conversation that Gbao and Ngondi had which illustrated Gbao's true

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192 Gbao Response Brief, para. 171.
193 Gbao Response Brief, para. 174.
194 Gbao Response Brief, para. 173.

attitude towards disarmament".[195] It is submitted that the Prosecution took into account the conversations Gbao and the other Accused had with UNAMSIL commanders *before* the abductions took place. It is however submitted that these conversations, which had had given a false confidence to UNAMSIL personnel, stood opposed to the *later* behaviour of Gbao and the other Accused once they started the attacks on UNAMSIL personnel and the abductions. It is therefore submitted that little weight can be given to these conversations.

4.55 As to Gbao's allegation that the Trial Chamber erred in fact by relying upon the testimony of TF1-071, since he "was not a reliable witness in relation to his testimony regarding UNAMSIL", the Prosecution refers to its submissions and arguments in Section 4 of the Prosecution Response Brief regarding the evaluation of evidence by the Trial Chamber.

4.56 Further, as submitted above, the issue in this case is whether on the evidence in the case as a whole, it was open to a reasonable trier of fact to conclude that the *mens rea* was not established. The Prosecution submits that it was not open to a reasonable trier of fact to so conclude.

4.57 Paragraphs 182 to 184 of the Gbao Response Brief argue that Gbao cannot have had the intent of using detained peacekeepers as leverage to secure the release of Sankoh in relation to the arrest of Jaganathan, since Sankoh was only arrested five days later. The Gbao Defence argues that as the arrest of Jaganathan was the only incident in respect of which Gbao was convicted on Count 15, the Prosecution argument concerning the intent related to Sankoh's arrest cannot apply to Gbao. The Prosecution confirms that it does not rely, in relation to *Gbao*, on a contention that he had the intent that detained UNAMSIL peacekeepers would be used as leverage to secure the release as Sankoh. The Prosecution does however rely on its contention that Gbao had the intent to compel a third party to act or refrain from acting in relation to the disarmament process. As the Prosecution stated in paragraph 4.108 of the Prosecution Appeal Brief:

> The only reasonable inference is that due to his role and position in the RUF hierarchy he must have known about the intent of the main perpetrators to take UNAMSIL personnel as hostages to compel the UN, the Sierra Leonean Government as well as the international community to refrain to continue the disarmament, if the RUF demands were not met.

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[195] Gbao Response Brief, para. 176.

4.58 Paragraphs 185 to 191 of the Gbao Response Brief make certain observations on the Kallon Response Brief. The Gbao Response Brief states that the Kallon Defence is seeking to implicate Gbao in an attempt to exonerate Kallon. However, it goes on to say that "there is nothing wrong with this approach" but that it is "deeply ironic".[196] The Gbao Response Brief therefore does not appear to raise any specific objection to the Kallon Response Brief, and no submission on these paragraphs of the Gbao Response Brief appears to be required from the Prosecution by way of reply.

4.59 Paragraphs 192 to 197 of the Gbao Response Brief challenge certain evidence relied upon in the Kallon Response Brief. To the extent that these paragraphs are material to the Prosecution appeal or the Prosecution response to the Gbao appeal, the Prosecution relies in reply on its submissions in the Prosecution Appeal Brief, the Prosecution Response Brief, and the present Reply Brief.

5. Submissions regarding sentences

5.1 In paragraph 11 of the Gbao Response Brief the Gbao Defence suggests that if the Appeals Chamber were to uphold any of the Prosecution's grounds of appeal, and were to increase the sentence as a result, the Appeals Chamber should impose a lower sentence than would otherwise be warranted to take account of the fact that the sentence was increased on appeal.

5.2 The Prosecution submits that where a sentence is increased on appeal, there is no general principle that the final sentence should be lower than would otherwise be warranted, merely because the sentence is increased on appeal.

5.3 The only authority cited by the Gbao Defence is the *Aleksovski* Appeal Judgement. However, the circumstances of the *Aleksovski* case were unusual. The Trial Chamber in that case had convicted the accused on a single count,[197] and had sentenced him to two and a half years' imprisonment.[198] Since he had already been in detention for longer than this period, the Trial Chamber ordered his immediate release when the trial judgement was given.[199] In the subsequent prosecution appeal, the Appeals Chamber found that additional criminal conduct should have been included within the

196 Gbao Response Brief, para. 191.

197 *Prosecutor v. Aleksovski*, IT-95-14/1-T, "Judgement", Trial Chamber, 25 June 1999 ("***Aleksovski* Trial Judgement**"), para. 230 (outrages upon personal dignity, a violation of the laws or customs of war).

198 *Aleksovski* Trial Judgement, para. 244.

199 *Aleksovski* Trial Judgement, para. 245.

conviction for the count on which he was convicted,[200] but that this finding in and of itself did not warrant any heavier sentence.[201] However, the Appeals Chamber found that the sentence imposed by the Trial Chamber was manifestly inadequate, and a revised sentence of seven years was substituted by the Appeals Chamber.[202] The accused was accordingly taken back into the custody of the Tribunal to serve the remainder of his revised sentence.

5.4 The unusual feature of the *Aleksovski* case was thus that the accused had been at liberty for a period after the trial verdict was given, on the basis that his sentence had been fully served, and was then taken back into custody as a result of the increased sentenced pronounced by the Appeals Chamher. The Prosecution finds it important to note that the quoted portion of the *Aleksovski* Appeal Judgment that is referred to by the Gbao Defence omits a crucial consideration of the Appeals Chamber, namely that "[the accused] has been *detained* a second time after a period of release of nine months."[203] This takes into account the extraordiuary double detention of the accused. Therefore the Prosecution submits that the *Aleksovski* case can clearly be distinguished from the case at hand.

5.5 The Gbao Defence cites no other case in which the Appeals Chamber suggested that sentences should be lower than otherwise warranted merely because they have been increased by the Appeals Chamher on appeal. The Prosecution is aware of none. It is submitted that the approach taken in the *Aleksovski* Appeal Judgement must be understood as unique to the extraordinary facts of that case.

5.6 Circumstances such as those pertaining to the *Aleksovski* case are not present in the present case. It is therefore submitted that the Gbao argument in this respect should be rejected.

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200 See *Prosecutor v. Aleksovski*, IT-95-14/1-A, "Judgement", Appeals Chamber, 24 March 2000 ("***Aleksovski* Appeal Judgement**"), paras 172-173.

201 *Aleksovski* Appeal Judgement, paras 172 and 189.

202 See *Aleksovski* Appeal Judgement, paras 187, 191.

203 *Aleksovski* Appeal Judgement, para. 192 (emphasis added).

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Filed in Freetown,

29 June 2009

For the Prosecution,

Christopher Staker

Vincent Wagona

APPENDIX A

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(Copy attached in Appendix B)

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APPENDIX B

COPY OF AUTHORITY

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Criminal Law Forum (2009) 20:263–287
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HECTOR OLASOLO*

JOINT CRIMINAL ENTERPRISE AND ITS EXTENDED FORM: A THEORY OF CO-PERPETRATION GIVING RISE TO PRINCIPAL LIABILITY, A NOTION OF ACCESSORIAL LIABILITY, OR A FORM OF PARTNERSHIP IN CRIME?

I INTRODUCTION

On 23 and 25 September 2008, the Pre-Trial Chamber ('PTC') of the Extraordinary Chambers of the Courts of Cambodia ('ECCC') invited Prof. Cassese, Prof. Ambos and the Center for Human Rights and Legal Pluralism of McGill University to submit, as *amici curiae*, written briefs in the case against Kaing Guek Eav, *alias* DUCH[1] (alleged chairman of the headquarters of a special branch of the Kampuchean Republic secret police known as S-21 from March 1976 to January 1979).[2] The following two issues were posed to the *amici curiae*: (a) the development of the theory of joint criminal enterprise and the development of the definition of this mode of liability, with

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[1] *Duch* Case (Pre-Trial Chamber Decision on Appeal against Closing Order indicting Kaing Guek Eav, alias 'Duch') 001/18-07-2007-ECCC/OCIJ (PTC 02)—D99-3-42 (5 December 08) paras 14–15 [hereinafter *Duch Case* Appeal Decision].

[2] *Duch* Case (Co-Investigating Magistrates Closing Order against Kaing Guek Eav, alias 'Duch') 001/18-07-2007-ECCC/OCIJ—D-99 (8 August 2008) Sections 20–22 [hereinafter *Duch Case* Closing Order].

particular reference to the time period 1975–1979; and (b) whether joint criminal enterprise can be applied before the ECCC taking into account the fact that the crimes were committed in the period 1975–1979.[3]

The *amici curiae* written briefs were submitted on 27 October 2008. On 5 December 2008, the ECCC PTC rejected the Co-Prosecutors' requests to amend the 8 August 2008 Co-Investigating Magistrates Closing Order (Indictment) in order to include Duch's alleged criminal liability pursuant to the notion of joint criminal enterprise.[4] Although the ECCC PTC found it unnecessary to address the questions posed to the *amici curiae*,[5] the proceedings before the ECCC PTC have shown that those issues relating to the nature and customary status of the notion of joint criminal enterprise continue to be the subject of a great deal of controversy today.

In this regard, the International Criminal Court ('ICC') PTC I dismissal of the Defence's claim that the concept of co-perpetration in article 25(3)(a) of the ICC Statute is based on the notion of joint criminal enterprise, as opposed to the notion of control of the crime, constitutes further evidence of this situation.[6]

The present article does not intend to make a comprehensive analysis of the numerous issues raised by the notion of joint criminal enterprise,[7] also known as 'common purpose doctrine'.[8] On the

[3] *Duch Case* Appeal Decision (*supra* note 1), at para 14.

[4] According to *Duch Case* Appeal Decision (*Ibid*), at para 125 and 141, the Co-Prosecutors had not requested the Co-investigating Magistrates to investigate the material facts underlying the alleged existence of a joint criminal enterprise to set up and run the S-21 Center in order to systematically unlawfully arrest, torture and murder individuals perceived as contrary to the Kampuchea Republic regime.

[5] The ECCC PTC found it unnecessary to address the questions posed to the *amici curiae* because of the Co-Prosecutors' lack of timely request to investigate the materials facts underlying the alleged JCE responsibility. See, *Duch Case* Appeal Decision (*Ibid*), at para 142.

[6] *Katanga and Ngudjolo Case* (Pre-Trial Chamber I Decision on the Confirmation of Charges) ICC-01/04-01/07 (1 October 2008) para 485 *et seq* [hereinafter *Katanga and Ngudjolo Case* Confirmation of Charges].

[7] The author has undertaken such a comprehensive analysis in H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (London, Hart Publishing, 2009) (in print) [hereinafter Olásolo *Criminal Responsibility*].

[8] *The Prosecutor v Milan Milutinovic* et al. (Appeals Chamber Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise) ICTY-99-37-AR72 (21 May 2003) para 36 [hereinafter 21 May 2003 ICTY Appeals Chamber Decision on Joint Criminal Enterprise].

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contrary, it aims only to shed some light on two aspects. First, the nature of the overall notion of joint criminal enterprise; is it a theory of co-perpetration giving rise to principal liability, a notion of accessorial liability or a form of partnership in crime? Second, the problems posed in recent years by the application of the third or extended category of joint criminal enterprise will also be addressed. Furthermore, in order to fully address these issues, it is necessary to first briefly discuss the related notion of control over the crime.

II THE NOTION OF CONTROL OVER THE CRIME

International crimes have a number of distinctive features. They usually take place in situations of large scale or widespread criminality. They are also generally carried out by "groups of individuals, military details, paramilitary units or governmental officials acting in unison or in pursuance to a policy".[9] Furthermore, individuals who plan and set into motion international crimes are often geographically remote from the scene of the crimes when they take place and have no contact with those low level members of their organisations who physically carry out the crimes.[10]

As a result, according to some authors:

> "When such crimes are committed, it is extremely difficult to point out the specific contribution made by each individual participant in the collective criminal enterprise, because (i) not all participants acted in the same manner, but rather each of them may have played a different role in planning, organizing, instigating, coordinating, executing, or otherwise contributing to the criminal conduct, and (ii) the evidence related to each individual's conduct may prove difficult if not impossible to find [...] To obscure responsibility in the fog of collective criminality and let the crimes go unpunished would be immoral and contrary to the general purpose of criminal law of

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[9] *Duch Case* (*Amicus Curiae* Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine) 001/18-07-2007-ECCC/OCIJ (PTC 02)--D99-3-24 (27 October 08) in this volume, at 5.1.2 [hereinafter Cassese *Amicus Curiae* Brief].

[10] Those individuals who physically carry out the objective elements of the crimes have been referred to with different expressions such as 'direct perpetrators', 'principal perpetrators', 'material perpetrators', 'physical perpetrators', 'relevant physical perpetrators' or 'perpetrators behind the direct perpetrators/actors'. See *The Prosecutor v Radoslav Brdanin* (Appeals Chamber Judgment) ICTY-99-36-A (3 April 2007) para 362 [hereinafter *Brdanin Case* Appeals Judgment].

protecting the community from deviant behavior that causes serious damage to the general interest. This damage is all the more severe in the context of collective criminality".[11]

Nevertheless, the legality and fair trial principles—which are cornerstones of international criminal law[12]—prohibit the expansion of any theory of criminal liability in order to circumvent the lack of evidence on the specific role played by those individuals somehow involved in the planning, preparation and execution of large scale or widespread campaigns of criminality. As a result, in the view of the author, the main problem posed by the specific features of international crimes resides in the consideration of senior political and military leaders who plan and set into motion large-scale or systematic campaigns of criminality as mere accessories (as opposed to principals) to the crimes physically committed by their subordinates. This does not reflect the central role that senior political and military leaders usually play in the commission of international crimes, and often results in a punishment which is inappropriately low considering the wrongdoing of their actions and omissions.[13]

As a result, international criminal law has put a particular emphasis on the development of notions, such as 'control over the crime' and 'joint criminal enterprise,' which aim at better reflecting the central role played by senior political and military leaders in campaigns of large scale and systematic criminality.

The notion of control over the crime—which was first applied by the International Criminal Tribunal for the former Yugoslavia ('ICTY') in the *Stakic Case* Trial Judgment[14] and has been subsequently elaborated on by the ICC—reflects a material-objective approach to the notion of perpetration, and therefore to the distinction between principal (perpetration) and accessorial or derivative

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[11] Cassese *Amicus Curiae* Brief, *supra* note 9, at 5.1.2.

[12] R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *International Criminal Law and Procedure* (Cambridge, Cambridge University Press, 2007), at 301.

[13] *The Prosecutor v Dusko Tadic* (Appeals Chamber Judgment) ICTY-94-1-A (15 July 1999) para 192 [hereinafter *Tadic Case* Appeals Judgment].

[14] *The Prosecutor v Milomir Stakic* (Judgment) ICTY-97-24-T (31 July 2003) paras 439 *et seq* [hereinafter *Stakic Case* Trial Jndgment]. See also H. Olásolo and A Pérez Cepeda, *The Notion of Control of the Crime in the Jurisprudence of the ICTY: The Stakic Case*, 4 International Criminal Law Review 476 (2004) [hereinafter Olásolo and Pérez Cepeda].

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liability (participation).[15] As ICC PTC I has held, according to this notion, perpetrators or principals to the crime are those who dominate the commission of the crime in the sense that they decide whether the crime will be carried out and how it will be performed.[16]

The notion of control over the crime combines an objective element consisting of the factual circumstances that led to control over the crime, and a subjective element consisting of the awareness of the factual circumstances that lead to such control.[17] As a result, according to ICC PTC I, this notion 'represents a synthesis of, and 'reconciles', the formal-objective and the subjective approaches to the notion of perpetration and to the distinction between principal and accessorial liability.[18]

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[15] According to the material-objective approach, perpetration and participation are distinguished on the basis of the level and intensity of the contribution to the execution of the objective elements of the crime. Perpetration requires that the contribution be essential for the completion of the crime in the sense that without it the crime would not have been committed. Those who support this approach justify it by the higher danger emanating from principals to the crime in comparison to accessories due to the different level and intensity of their respective contributions to the commission of the crime. See for all C. Roxin, *Autoria y Dominio del Hecho en Derecho Penal* (6th edn, Madrid, Marcial Pons, 1998), p. 58 [hereinafter Roxin *Autoria*]; A. Gimbernat Ordeig, *Autor y Cómplice en Derecho Penal* (Madrid, Universidad de Madrid, 1966), pp. 115–117 [hereinafter Gimbernat Ordeig]; F. Muñoz Conde and M. García Aran, *Derecho Penal: Parte General* (*Derecho Penal: Parte General* (5th edn, Valencia, Tirant lo Blanch, 2002), pp. 448–449; and J.M. Zugaldia Espinar (ed), *Derecho Penal: Parte General* (Valencia, Tirant lo Blanch, 2002), pp. 734–735 [hereinafter Zugaldia Espinar]. See also H. Olásolo, *Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakic Appeal Judgement*, 7 International Criminal Law Review 143 (2007).

[16] *Lubanga Case* (Pre-Trial Chamber I Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 Jan 2007) para 320 [hereinafter *Lubanga Case* Confirmation of Charges]; and *Katanga and Ngudjolo Case* Confirmation of Charges (*supra* note 6), at para 485.

[17] *Katanga and Ngudjolo Case* Confirmation of Charges (*Ibid*), at para 484.

[18] According to the formal-objective approach, perpetrators or principals to the crime are only those persons who carry out one or more objective elements of the crime, whereas participants or accessories to the crime are those others who contribute in any other way to the commission of the crime. The subjective approach looks at the distinction between perpetration and participation in the personal attitude vis-à-vis the crime of each person involved in its commission. As a result, regardless of the nature and scope of the contribution to the commission of the crime, principals to the crime are only those who make their contribution with the intent to have the crime as their own deed. Those persons who contribute to the commission of the crime with the intent not to have the crime as their own deed and subordinating their will to that of the perpetrator(s) are to be considered accessories

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Furthermore, the notion of control of the crime has three main manifestations[19]:

(i) direct perpetration, according to which, those persons, who physically carry out the objective elements of the crime with the subjective elements required by the crime in question, have the control over the crime (also known as 'control of the action');
(ii) indirect perpetration, according to which, those persons, who do not physically carry out the objective elements of the crime, can also have the control over the crime if they indirectly commit the crime by using the physical perpetrators as an 'instrument' or a 'tool' who is controlled by their dominant will (also known as 'control of the will'); and
(iii) co-perpetration based on functional control, according to which, when the objective elements of a crime are completed as a result of the sum of individual contributions of several persons on the basis of the principle of divisions of tasks, those persons who can frustrate the implementation of the common plan by withholding their essential contributions have also control over the crime.

As ICC PTC I has highlighted, 'indirect co-perpetration' based on a combined application of indirect perpetration and co-perpetration based on joint control, constitutes a fourth manifestation of the notion of control over the crime, which is mainly applicable to two types of scenarios[20]:

Footnote 18 continued
to the crime. See E. Mezger, *Tratado de Derecho Penal*, Vol II (Madrid, Editorial Revista de Derecho Privado, 1957), pp. 339–340; Roxin *Autoria*, *supra* note 15, at 71; Gimbernat Ordeig, *supra* note 15, at 19–22 and 42–44; Zngaldia Espinar, *supra* note 15, at 732–734; P. Gillies, *Criminal Law* (4th ed, North Ryde, LBC Information Services, 1997), pp. 157–158 [hereinafter Gillies]; J.C. Smith and B. Hogan, *Criminal Law* (11th ed, London, Butterworths, 2005), pp. 166–168 [hereinafter Smith & Hogan].

[19] *Lubanga Case* Confirmation of Charges, *supra* note 16, at para 332; and *Katanga and Ngudjolo Case* Confirmation of Charges, *supra* note 6, at para 488. See also *supra* note 15.

[20] One could even imagine an additional scenario in which this fourth manifestation of the notion of control over the crime could be applicable. This would take place when not all co-perpetrators control one organization (or a part thereof). In this scenario, those co-perpetrators who do not control any organization would co-ordinate the implementation of the common criminal plan by those other co-perpetrators who use their organisations to have the crimes committed.

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(i) When several political and military leaders who have joint control over one hierarchical organisation (or a part thereof), such as the military, the police, large paramilitary groups or certain organised armed groups, use it to secure the commission of the crimes[21];
(ii) When several political and military leaders, who are each of them in control of a different hierarchical organisation (or a part thereof) direct their different organisations to implement in a coordinated manner a common criminal plan.[22]

III THE NATURE OF THE NOTION OF JOINT CRIMINAL ENTERPRISE

3.1 *First Approach to the Notion of Joint Criminal Enterprise*

The notion of 'joint criminal enterprise', or the 'common purpose' doctrine, as interpreted by the *ad hoc* Tribunals, provides that where a crime is committed by a plurality of persons acting together in pursuance of a common criminal purpose, every member of the group is criminally liable, no matter the importance of his contribution.[23] In order to become a participant in a joint criminal enterprise, it is

[21] This is the factual situation in the *German Border* case, where the East Germany National Defence Council, which was the organ responsible for defence and security matters in East Germany, was comprised of several members who jointly issued those decisions in execution of which crimes were committed at the border between East and West Germany. Nevertheless, the German Federal Supreme Court failed to address the horizontal relationship between the members of the Council, and only applied the notion of indirect perpetration. See Entscheidungen des Bundesgerichtshofs in Strafsachen 40, p. 218.

[22] This is the factual scenario in the *Katanga and Ngudjolo* and *Bemba* cases before the ICC, and in the *Stakic* case before the ICTY. See *Katanga and Ngudjolo Case Confirmation of Charges* (*supra* note 6), at paras 540–582; *and Bemba Case* (Pre-Trial Chamber III Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-14-TEn (10 June 2008) paras 69–84. See also *Stakic Case* Trial Judgment (*supra* note 14), at paras 738–744, 774, 818, 822 and 826. In this last case, ICTY Trial Chamber II used the expression 'co-perpetratorship' to refer to the combined application of the notions of indirect perpetration in its variant of Organised Structure of Power and co-perpetration based on joint control. See the explanation by Olásolo and Pérez Cepeda, *supra* note 14, at paras 512–514.

[23] See *infra* note 26. On the importance of the notion of Joint Criminal Enterprise, see N. Piacente, *Importance of the JCE Doctrine for the ICTY Prosecutorial Policy*, 2 Journal of International Criminal Justice 448 (2004); M. Osiel, *The Banality of the Good: Aligning Incentives against Mass Atrocity*, 105 *Columbia Law Review* 1783 (2005).

not sufficient to agree with the common criminal purpose; it is also necessary to make a contribution to its implementation with a view to commit the crimes that are either the ultimate goal of the enterprise or the means through which the goal of the enterprise is to be achieved.[24] This intent must be shared by all participants in a joint criminal enterprise, no matter whether they are physical perpetrators or senior political and military leaders.[25]

The level of contribution of those participating in a joint criminal enterprise is secondary.[26] What really matters is that they make their

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[24] *Tadic Case* Appeals Judgment, *supra* note 13, at para 227. See also *The Prosecutor v Milorad Krnojelac* (Appeals Chamber Judgment) ICTY-97-25-A (17 Sep 2003) para 31 [hereinafter *Krnojelac Case* Appeals Judgment]; *The Prosecutor v Mitar Vasiljevic* (Appeals Chamber Judgment) ICTY-98-32-A (25 Feb 2004) para 100 [hereinafter *Vasiljevic Case* Appeals Judgment]; *The Prosecutor v Kvocka* et al. (Appeals Chamber Judgment) ICTY-98-30/1-A (28 Feb 2005) para 96 [hereinafter *Kvocka Case* Appeals Judgment]; *The Prosecutor v Stakic* (Appeals Chamber Judgment) ICTY-97-24-A (22 Mar 2006) para 64 [hereinafter *Stakic Case* Appeals Judgment]; *The Prosecutor v Krajisnik* (Judgment) ICTY-00-39-T (27 Sep 2006) para 883 [hereinafter *Krajisnik Case* Trial Judgment]; *Brdanin Case* Appeals Judgment (Above n 10) para 364; and *The Prosecutor v Milan Martic* (Appeals Chamber Judgment) ICTY-95-11-A (8 Oct 2008) para 82 [hereinafter *Martic Case* Appeals Judgment].

[25] *Tadic Case* Appeals Judgment (*Ibid*), at para 228; *Krnajelac Case* Appeals Judgment (*Ibid*), at paras 32–33; *Vasiljevic Case* Appeals Judgment (*Ibid*), at para 101; *Kvocka Case* Appeals Judgment (*Ibid*), at paras 82, 83, 89; *Stakic Case* Appeals Judgment (*Ibid*), at para 65; *Brdanin Case* Appeals Judgment (Above n 10), at para 365; *The Prosecutor v Blagoje Simic* et al. (Judgment) ICTY-95-9-T (17 Oct 2003) para 158 [hereinafter *Simic Case* Trial Judgment]; and *Krajisnik Case* Trial Judgment (*Ibid*) at paras 879, 883.

[26] See *Tadic Case* Appeals Judgment (*Ibid*) at paras 227, 229. The *Kvocka* Case Appeals Judgment (*Ibid*), at paras 97–98, 104, rejected the *Kvocka Case* Trial Judgment's conclusion that the contribution to the implementation of the common criminal plan must be 'significant' or 'substantial'. The *Vasiljevic Case* Appeals Judgment (*Ibid*), at para 100; The *Prosecutor v Radoslav Brdanin* (Judgment) ICTY-99-36-T (1 September 2004) para 263 [*Brdanin Case* Trial Judgment]; and the *Krajisnik Case* Trial Judgment (*Ibid*), at para 883, took the same approach that the *Kvocka Case* Appeals Judgement. The *Brdanin Case* Appeals Judgment referred again to the 'significant contribution' requirement. Nevertheless, such a reference was accompanied by a quote from paragraph 97 of the *Kvocka Case* Appeals Judgment. As a result, the author considers that (i) the conclusion of the ICTY Appeals Chamber in the *Brdanin* case is an evidentiary one, according to which, when the intent of the defendant is to be inferred from his level of contribution, this must be 'significant': and (ii) that the requisite level of contribution in the implementation of the common criminal plan remains, as a matter of law, fairly low. This has not been altered by the reference to the *Brdanin Case* Appeals Judgment made in the recent *Martic Case* Appeals Judgment (*supra* note 24), at para 84.

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contributions with the aim of furthering the common criminal purpose.[27] Hence, minor contributions, including further planning and preparation of the actual commission of the crimes, may suffice as long as the common criminal purpose is shared.[28] Likewise, major contributions with knowledge of the common criminal purpose, but without sharing it, will not suffice for criminal liability to arise under the notion of joint criminal enterprise.[29]

Accordingly, for the notion of joint criminal enterprise or the common purpose doctrine, the essence of the wrongdoing lies in the shared intent by all the participants in the enterprise to commit the crimes encompassed by the common criminal purpose.[30] When the crimes are eommitted within a system of ill treatment (systematic form of joint criminal enterprise), the shared intent to commit the core crimes carried out through sueh a system is inherent to the

[27] *Tadic Case* Appeals Judgment (*Ibid*), at para 228; *Krnojelac Case* Appeals Judgment (*supra* note 24), at para 84; *Kvocka Case* Appeals Judgment (*Ibid*), at para 82; *Vasiljevic Case* Appeals Judgment (*Ibid*), at para 97; *Stakic Case* Appeals Judgment (Above n 24), at para 65; *Brdanin Case* Appeals Judgmeut (*supra* note 10) at para 365; *Simic Case* Trial Judgment (*Ibid*), at para 157; *Krajisnik Case* Trial Judgment (*Ibid*), at para 79; See also A. Bogdan, *Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the Ad hoc International Tribunal for the Former Yugoslavia*, 6 International Criminal Law Review 63–120, 82 (2006).

[28] See *supra* note 26. Concurring K Gnstafson, *The Requirements of an "Express Agreement" for Joint Criminal Enterprise Liability: A Critique of Brdanin*, 5 Journal of International Criminal Jnstice 141 (2007). However, A.M. Danner and J.S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 California Law Review 150–151 (2005) emphasize the need for the interpretation of the notion of joint criminal enterprise as requiring a signifieant level of contribution to the implementation of the common criminal plan. Likewise, J.D. Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 Journal of International Criminal Justice 89 (2007) [hereinafter Ohlin] proposes to require a 'substantial and indispensable contribntion' before criminal liability is invoked for participation in a joint criminal enterprise under art. 25 (3)(d) RS.

[29] This has been made particularly clear in the context of the distinction between the notions of joint criminal enterprise and aiding and abetting. See *Tadic Case* Appeals Judgment (*supra* note 13), at para 229; *Vasiljevic Case* Appeals Judgment (*supra* note 24), at para 102; 21 May 2003 ICTY Appeals Chamber Decisiou on Joiut Criminal Enterprise (*supra* note 8), at para 20; and *Krajisnik Case* Trial Judgment (*supra* note 24), at para 885.

[30] 21 May 2003 ICTY Appeals Chamber Deeision on Joint Criminal Enterprise (*Ibid*), at para 20.

awareness of its nature and the intent to further it.[31] Criminal responsibility for the commission by other members of the criminal enterprise of foreseeable crimes, which are not part of the common criminal plan, only arises as long as there is a shared intent by all participants in the enterprise to have the core crimes of the enterprise committed.[32]

3.2 *The Notion of Joint Criminal Enterprise since the 21 May 2003 Decision of the ICTY Appeals Chamber: Turning a Notion of Partnership in Crime or Accomplice Liability into a Notion of Co-perpetration*

The Charters and case law of the International Military Tribunal and the International Military Tribunal for the Far East embraced a unitary ('monistic') model, which did not distinguish between the perpetration of a crime (which gives rise to principal liability) and participation in a crime committed by a third person (which gives rise to accessorial or derivative liability).[33] Furthermore, although article II(2) of Allied Control Council Law No. 10 introduced, for the first time, the distinction between principal and accessorial liability in international criminal law,[34] military tribunals acting under Allied Control Council Law No. 10 embraced also the unitary model.[35]

As a result, the application of any notion of criminal liability, somewhat akin to joint criminal enterprise in World War II related

[31] *Tadic Case* Appeals Judgment (Above n 13), at para 228; *Krnojelac Case* Appeals Judgment (Above n 24), at paras 93–94; *Kvocka Case* Appeals Judgment (Above n 24), at para 82; and *Brdanin Case* Appeals Judgment (*supra* note 10), at para 365. See also E. van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 Journal of International Criminal Justice 186 (2007) [hereinafter van Sliedregt].

[32] *Tadic Case* Appeals Judgment (*Ibid*), at para 228; *Vasiljevic Case* Appeals Judgment (Above n 24), at para 101; and *The Prosecutor v Tihomir Blaskic* (Appeals Chamber Judgment) ICTY-95-14-A (29 July 2004) para 33 [hereinafter *Blaskic Case* Appeals Judgment]. See also H. van der Wilt, Joint Criminal Enterprise: Possibilities and Limitations, 5 *Journal of International Criminal Justice* 96 (2007) [hereinafter van der Wilt]; and van Sliedregt (*Ibid*), at 186.

[33] Cassese *Amicus Curiae* Brief (*supra* note 9), at 5.2.1. See also G. Werle, *Tratado de Derecho Penal Internacional* (Valencia, Tirant lo Blanch, 2005), p. 211, n 636 [hereinafter Werle]; and K Ambos, *La Parte General del Derecho Penal Internacional: Bases para una Elaboración Dogmática* (Uruguay, Kourad-Adenauer-Stiftung, 2005), p. 75 [hereinafter Ambos].

[34] Art II(2) of Allied Control Council Law No. 10.

[35] Werle, *supra* note 33, at 211, n 636; and Ambos, *supra* note 33, at 75.

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cases was made under the following premise: such notion constituted a theory of partnership in crime which gave rise to criminal liability that was not *per se* qualified as principal or accessorial. This approach is consistent with the fact that in those common law jurisdictions where the notion of joint criminal enterprise originated, participation in a joint criminal enterprise gives rise to principal liability if the accused physically commits the crime, and to accessorial liability if this is not the case—and this is applicable to both the foundational crimes of the enterprise and any foreseeable incidental crime committed in the execution of the common criminal plan.[36]

In 1999, the *Tadic Case* Appeals Judgment, after stating that the notion of joint criminal enterprise was implicitly included in article 7(1) of the ICTY Statute, addressed the following issue: Whether joint criminal enterprise was part of any of the five modes of criminal liability explicitly referred to in article 7(1) of the ICTY Statute (planning, instigating, ordering, committing or aiding and abetting); or whether it constituted an additional mode of liability falling within the general scope of application of article 7(1) of the ICTY Statute.[37] As a result, the question arose as to the exact nature of the notion of joint criminal enterprise. In particular, whether it constituted a theory of (i) co-perpetration giving rise to principal liability (and thus falling under the heading "committing" in article 7(1) of the ICTY Statute); (ii) accessorial or derivative liability; or (iii) partnership in crime or accomplice liability in a common law sense (which could give rise to principal or accessorial liability depending on the defendant's contribution and state of mind).

As van Sliedregt has pointed out, the *Tadic Case* Appeals Judgment did not provide a clear answer to this question, as it used simultaneously the expressions 'accomplice liability'[38] and 'co-perpetration'[39] to refer to the notion of joint criminal enterprise.[40] Only if the ICTY Appeals Chamber understood at the time it issued the *Tadic Case* Appeals Judgment that the notion of joint criminal

[36] Gillies, *supra* note 18, at 173; and Smith and Hogan, *supra* note 18, at 169. See also K. Hamdorf, *The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law*, 1 Journal of International Criminal Justice 208 (2007), at 221–223; and van Sliedregt, *supra* note 31, at 197.

[37] *Tadic Case* Appeals Judgment (*supra* note 13), at para 220.

[38] *Ibid*, at para 220.

[39] *Ibid*, at para 192.

[40] van Sliedregt, *supra* note 31, at 189.

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enterprise constituted a theory of partnership in crime (or accomplice liability in a common law sense), would the simultaneous use of both expressions be consistent.[41] Such an interpretation would also be consistent with (i) the application of any notion of criminal liability somewhat akin to joint criminal euterprise in World War II related cases; and (ii) the nature of joint criminal enterprise in those common law jurisdictions where it originated. Moreover, one should keep in mind that, at the time the *Tadic Case* Appeals Judgment was issued, the ICTY case law had not clearly adopted yet a dualist system of criminal liability based on the distinction between principal and accessorial liability.

As a consequence, the 21 May 2003 ICTY Appeals Chamber Decision on Joint Criminal Enterprise would constitute the first ICTY Appeals Chamber's decision stating unambiguously that under customary international law (as well as under article 7 of the ICTY Statute): (i) there is a distinction between principal and accessorial liability; and (ii) the notion of joint criminal enterprise is not a notion of partnership in erime (accomplice liability in a common law sense) insofar as it constitutes a notiou of co-perpetration (principal liability) which falls under the heading 'committing' in article 7 (1) of the ICTY Statute.[42]

Subsequently, this approach has been followed by the ICTY Appeals Chamber in the *Krnojelac*,[43] *Vasiljevic*,[44] *Blaskic*,[45] *Krstic*,[46]

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[41] The conclnsions on the fonndation of the notion of joint criminal enterprise reached nnder 5.2.2 of the Cassese *Amicus Curiae* Brief (*supra* note 9) appear to also support this interpretation. Indeed, even if the notion of joint criminal enterprise is understood as a general theory of partnership in crime, one has problems to understand how its existence is supported by notions as diverse as: (i) the doctrine of 'joint nnlawful euterprise' and 'joint enterprise liability'; (ii) the doctrines on conspiracy and complicity in the United States; (iii) the notions of criminal association and complicity in countries such as Franee, Italy, Korea, Switzerland and the former Socialist Federal Republic of Yugoslavia; and (iv) the notions of eo-perpetration and eomplicity in eountries snch as Belgium and Germany.

[42] 21 May 2003 ICTY Appeals Chamber Decisiou on Joint Criminal Enterprise (*supra* note 8), at paras 20, 31.

[43] *Krnojelac Case* Appeals Judgment (*supra* note 24), at paras 30, 73.

[44] *Vasiljevic Case* Appeals Judgment (*supra* note 24), at paras 95, 102.

[45] *Blaskic Case* Appeals Judgment (*supra* note 32), at para 33.

[46] *The Prosecutor v Radislav Krstic* (Appeals Chamber Judgment) ICTY-98-33-A (19 April 2004) paras 134, 137, 266–269.

Kvocka,[47] *Simic*,[48] and *Brdanin*[49] Cases Appeal Judgments. Likewise, the ICTR Appeals Chamber has also embraced this approach, in particular, in the *Ntakirutimana*[50] and *Gacumbitsi*[51] cases. As a result, after the 21 May 2003 ICTY Appeals Chamber Decision on Joint Criminal Enterprise, *ad hoc* Tribunals Appeals Chambers case law has embraced a subjective approach to the distinction between principal and accessorial liability based on the notion of joint criminal enterprise.

According to this approach, where crimes are committed by a plurality of persons acting together, the distinction between principals and accessories to the crimes is grounded in a subjective criterion consisting of the sharing of the common criminal purpose of the enterprise. Those who make their contributions with the aim to have the core crimes of the enterprise committed are principals to the crimes, regardless of the importance of their contribution.[52] Those others who carry out major contributions with knowledge of the common criminal purpose but without sharing it are not members of the joint criminal enterprise, and therefore can only be accessories to the crimes pursuant to other modes of liability provided for in articles 6 and 7 of the ICTR and ICTY Statutes (in particular aiding and abetting).[53]

The 21 May 2003 ICTY Appeals Chamber Decision on Joint Criminal Enterprise, and the subsequent *ad hoc* Tribunals Appeals Chambers case law, have also upheld the customary status of (i) the above-mentioned subjective criterion to distinguish between principal and accessorial liability; and (ii) the configuration of the notion of joint criminal enterprise as a theory of co-perpetration.[54]

47 *Kvocka Case* Appeals Judgment (*supra* note 24), at para 79.

48 Implicitly in *Prosecutor v Simic* et al. (Appeals Chamber Judgment) ICTY-95-9-A (28 November 2006) para 243, n 265.

49 Implicitly in the *Brdanin Case* Appeals Judgment (*supra* note 10), at paras 431, 434, 444–450.

50 *The Prosecutor v Gerard Ntakirutimana and Elizaphan Ntakirutimana* (Appeals Chamber Judgment) ICTR-96-10-A (13 December 2004) para 462.

51 *Sylvestre Gacumbitsi v The Prosecutor* (Appeals Chamber Judgment) ICTR-2001-64-A (7 July 2006) para 158.

52 21 May 2003 ICTY Appeals Chamber Decisiou on Joint Criminal Enterprise (*supra* note 8), at para 20.

53 *Ibid.*

54 See *supra* n. 41–51.

The author has explained in detail elsewhere why he cannot share this conclusion.[55] For the purpose of this article, it suffices to highlight that, since 2003, the *ad hoc* Tribunals Appeals Chambers case law has exclusively relied in support of the said conclusion on the analysis made by the *Tadic Case* Appeals Judgment in 1999. In this regard, the latest ICTY Appeals Judgment on the matter has highlighted:

> "With regard to the contention that JCE had no basis in international customary law at the time relevant to Martić's case, the Appeals Chamber recalls that it is well established in the Tribunal's jurisprudence that JCE existed in customary international law at the time relevant to the charges against Martić. In *Tadić*, the Appeals Chamber conducted a thorough analysis of pre-1991 international criminal case-law and concluded that "the notion of common design as a form of accomplice liability is firmly established in customary international law".[56]

However, little support can be provided by this analysis in light of the fact that it was carried out at a time in which the *ad hoc* Tribunals' case law (i) had not clearly adopted yet the distinction between principal and accessorial liability; and (ii) understood the notion of joint criminal enterprise as a theory of partnership in crime or accomplice liability in a common law sense. In this regard, the author is of the view that article 25(3) of the ICC Statute is more in line with the treatment of the notion of joint criminal enterprise in WW II related case law and in the *Tadic Case* Appeals Judgment, than the 21 May 2003 ICTY Appeals Chamber Decision on Joint Criminal Enterprise and the subsequent *ad hoc* Tribunals Appeals Chambers case law.

Article 25(3) of the ICC Statute affirms the distinction between principal and accessorial liability[57] (just as the 21 May 2003 ICTY Appeals Chamber Decision on Joint Criminal Enterprise does). However, instead of altering the nature of the notion of joint criminal enterprise so as to portray it as a theory of co-perpetration and affirming the customary status of this new concept, the drafters of the ICC Statute:

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[55] Olásolo, *supra* note 7, Ch 2.vii.

[56] *Martic Case* Appeals Judgment (*supra* note 24), at para 80, citing the *Tadic Case* Appeals Judgment (Above n 13), at paras 194–220.

[57] *Lubanga Case* (Pre-Trial Chamber I Decision on Prosecution's Application for Warrant of Arrest) ICC-01/04-01/06 (10 Feb 2006) para 78; *Lubanga Case* Confirmation of Charges (*supra* note 16), at para 320; and *Katanga and Ngudjolo Case* Confirmation of the Charges (*supra* note 6), at paras 466 and 467.

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(i) provided in paragraph 3(a) of article 25 of the ICC Statute for a material-objective criterion (the notion of control over the crime) to distinguish between principals and accessories to the crime[58]; and
(ii) included in paragraph 3(d) of article 25 of the ICC Statute a notion somewhat akin to that of joint criminal enterprise, with full respect for its traditional nature as a theory of partnership in crime or accomplice liability.[59]

As a result, whenever a crime is committed by a plurality of persons acting together in pursuance of a common criminal purpose, one will analyze whether the defendant is a principal to the crime in light of the different manifestations of the notion of control over the crime (direct perpetration, indirect perpetration, co-perpetration based on joint control or indirect co-perpetration).[60] In this regard, Ambos has underscored in his Amicus *Curiae Brief* that:

> 'If one construes JCE I as containing objective and subjective elements, in the sense of the functional control concept, it can be considered as a form of co-perpetration within the meaning of Art. 25 (3) (a) alt. 2 ICC Statute and as such as a form of commission pursuant to Art. 7 (1) ICTY/Art. 6 (1) ICTR Statutes'.[61]

If the defendant cannot be regarded as a principal to the crime pursuant to article 25(3)(a) of the ICC Statute, one will analyze whether he can be considered an accessory pursuant to (i) the traditional notions of accessorial liability provided for in article 25(3)(b) and (c) of the ICC Statute (ordering, soliciting, inducing and aiding

[58] *Lubanga Case* Confirmation of Charges (*supra* note 16), at paras 333–341; and *Katanga and Ngudjolo Case* Confirmation of Charges (*supra* note 6), at para 488(a), 520 and 521. See also *inter alia* J.M. Gómez Benítez, *Elementos Comunes de los Crímenes contra la Humanidad en el Estatuto de la Corte Penal Internacional* 42 Actualidad Penal 1121–1138 (2002); K. Ambos, Article 25: Individual Criminal Responsibility in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, Nomos, 1999), p. 479 [hereinafter Ambos, *Article 25*]; and A. Eser, Individual Criminal Responsibility, in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002), p. 791.

[59] *Lubanga Case* Confirmation of Charges (*supra* note 16), at para 337; and *Katanga and Ngudjolo Case* Confirmation of Charges (*supra* note 6), at para 483.

[60] See *supra* Section (2).

[61] *Duch Case* (*Amicus Curiae* Concerning Criminal Case File No 001/18-07-2007-ECCC/OCIJ (PTC 02)) 001/18-07-2007-ECCC/OCIJ (PTC 02)-D99-3-27 (27 Oct 08) in this volume, at para 2 [hereinafter Ambos *Amicus Curiae* Brief].

and abetting); or (ii) the theory of partnership in crime somewhat akin to the notion of joint criminal enterprise provided for in article 25(3)(d) of the ICC Statute.[62]

Hence, the main difference between article 25(3) of the ICC Statute on the one hand, and the analysis made in WW II related case law and the *Tadic Case* Appeals Judgment on the other hand, appears to be the exclusion of the extended category of joint criminal enterprise.[63]

IV EXTENDED FORM OF JOINT CRIMINAL ENTERPRISE

The case law of the *ad hoc* Tribunals has distinguished three variants of the notion of joint criminal enterprise, usually referred to as 'the basic form of JCE, the systemic form of JCE and the extended form of JCE'.[64] The basic and systemic forms of joint criminal enterprise are applicable to the so-called 'core crimes' of the enterprise, which are those that are an integral part of the common criminal plan because their commission is its ultimate goal or the means to achieve it.[65] The systemic form of joint criminal enterprise is a subcategory of the basic form, and is only applicable when the common criminal plan consists of setting up and/or furthering an organized system of

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[62] *Lubanga Case* Confirmation of Charges (*supra* note 16), at para 337; and *Katanga and Ngudjolo Case* Confirmation of Charges (*supra* note 6), at para 483. See also Werle (*supra* note 33), at 212–213; and Ambos, *Article 25* (*supra* note 58), at 478–480.

[63] G.P. Fletcher and J.D. Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 Journal of International Criminal Justice 549 (2005) [hereinafter Fletcher and Ohlin].

[64] *Tadic Case* Appeals Judgment (*supra* note 13), at paras 227–228; *Kvocka Case* Appeals Judgment (*supra* note 24), at paras 79–83; *Krnojelac Case* Appeals Judgment (*supra* note 24), at paras 83–84; *Vasiljevic Case* Appeals Judgment (*supra* note 24), at para 96; *Stakic Case* Appeals Judgment (*supra* note 24), at para 64; *Brdanin Case* Appeals Judgment (*supra* note 10), at para 364; and *Martic Case* Appeals Judgment (*supra* note 24) at paras 80–84. See also *Dach Case* (*Amicus Curiae* Brief Submitted by the Center for Human Rights and Legal Pluralism, McGill University Montreal (Quebec) Canada), 001/18-07-2007-ECCC/OCIJ (PTC 02)-D99-3-25 (27 October 2008) in this volume, at paras 15–24 [hereinafter McGill *Amicus Curiae* Brief]; Cassese *Amicus Curiae* Brief (*supra* note 9), at 5.1.1; Ambos *Amicus Curiae* Brief (*supra* note 61), at 3.1 See also V. Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 International Criminal Law Review 170 (2005) [hereinafter Haan].

[65] *Krajisnik Case* Trial Judgment (*supra* note 24), at para 1096.

ill-treatment (such as a concentration camp or a detention camp) to commit the crimes.[66]

The extended form of joint criminal enterprise is only applicable to the so-called 'foreseeable' crimes, that is to say, those crimes (i) committed beyond the scope of the common criminal plan because they are not an integral part of it; but (ii) are, nevertheless, a natural and foreseeable consequence of its implementation.[67] There is no extended form of joint criminal enterprise without the existence of a basic or systemic form of joint criminal enterprise in which the defendant participates.[68] As a result, only if the defendant is found to be a co-perpetrator of the core crimes of a basic or systemic enterprise, can one proceed to analyze whether the defendant might also be a co-perpetrator of those other crimes which, despite falling outside the common criminal plan, are natural and foreseeable consequences of its implementation.

From a subjective perspective, the extended form of joint criminal enterprise requires the defendant (i) to be aware that the commission of the foreseeable crimes is a possible consequence of the implementation of the common criminal plan, and (ii) to take the risk voluntarily by

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[66] *Prosecutor v Krnojelac* (Judgment) ICTY-97-25-T (15 March 2002) at para 78. See also *Tadic Case* Appeals Judgment (*supra* note 13), at paras 202, 203, 228; *Krnojelac Case* Appeals Judgment (*supra* note 24), at para 89; *Vasiljevic Case* Appeals Judgment (*supra* note 24), at para 98; *Kvocka Case* Appeals Judgment (*supra* note 24), at para 82; and *Krajisnik Case* Trial Judgment (*supra* note 24), at para 80. See also Haan, *supra* note 64.

[67] Its application has been considered particularly apposite to cases in which the common criminal plan is to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect 'ethnic cleansing') with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common plan, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint could very well result in the deaths of one or more of those civilians. See in particular *Tadic Case* Appeals Judgment (*Ibid*), at paras 204, 228; and *Vasiljevic Case* Appeals Judgment (*Ibid*), at para 99. See also *Krnojelac Case* Appeals Judgment (*supra* note 24), at para 32; *Blaskic Case* Appeals Judgment (*supra* note 32), at para 66; *Kvocka Case* Appeals Judgment (*supra* note 24), at para 83; *Stakic Case* Appeals Judgment (*supra* note 24), at para 65; *Martic Case* Appeals Judgment (*supra* note 24) at paras 83–84; and *Krajisnik Case* Trial Judgment (*supra* note 24), at para 81; See also Haan, *supra* note 64, at 191–192.

[68] *Tadic Case* Appeals Judgment (*Ibid*), at paras 204, 228; *Vasiljevic Case* Appeals Judgment (*Ibid*), at para 99; *Krnojelac Case* Appeals Judgment (*Ibid*), at para 32; *Blaskic Case* Appeals Judgment (Ibid); *Kvocka Case* Appeals Judgment (*Ibid*), at para 83; *Stakic Case* Appeals Judgment (*Ibid*), at para 65; *Martic Case* Appeals Judgment (*Ibid*) at paras 83–84; and *Krajisnik Case* Trial Judgment (*Ibid*), at para 81. See also Haan, *supra* note 64, at 191–192.

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joining or continuing to participate in the enterprise.[69] As a result, it embraces an advertent recklessness standard because the defendant need not be aware that there is a 'likelihood' or a 'substantial likelihood' (high level of risk) that the foreseeable crimes will be committed as a result of implementing the common criminal plan. He needs only to be aware that the commission of the foreseeable crimes is just a 'possible consequence' (low level of risk) of effecting the common criminal plan.[70] Moreover, in spite of the fact that the defendant only needs to be aware of the existence of a low level of risk, he is not required to 'clearly or expressly' accept the commission of the foreseeable crimes. On the contrary, it is sufficient that he takes the risk by joining or continuing to participate in the joint criminal enterprise.[71] This marks a critical distinction with the notion of *dolus eventualis* which, according to ICC PTC I, constitutes the lowest level of intention.[72]

[69] *Ibid.*

[70] *Ibid.*

[71] *Blaskic Case* Appeals Judgment (*supra* note 32), at para 33. See also *The Prosecutor v Ramush* Haradinaj et al. (Judgment) ICTY-04-84-T (3 April 2008) para 139. This interpretation is supported by a number of authors, such as S. Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 Journal of International Criminal Justice 609 (2004); van der Wilt, *supra* note 32, at 96; and Ambos *Amicus Curiae* Brief (*supra* note 61), at 18.

[72] According to ICC PTC I, the cumulative reference to 'intent' and 'knowledge' in article 30 of the ICC Statute requires the existence of a volitional element on the part of the suspect. This would *inter alia* include 'situations in which the suspect (a) is aware of the risk that the objective elements of the crime may result from his actions or omissions, and (b) accepts such an outcome by reconciling himself or herself with it or consenting to it (also know as *dolus eventualis*).' Moreover, according to ICC PTC I, in situations of *dolus eventualis* one can distinguish two types of scenarios: 'First, if the risk of bringing about the objective elements of the crime is substantial (that is, there is a risk of the substantial likelihood that "it will occur in the ordinary course of events") the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from: (i) the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and (ii) the decision by the suspect to carry out his or her actions or omissions despite such awareness. Secondly, if the risk of bringing about the objective elements of the crime is low, the suspect must have clearly or expressly accepted the idea that such objective elements may results from his or her actions or omissions.' See *Lubanga Case* Confirmation of Charges (*supra* note 16), at paras 350–353. See also the concurring definition of *dolus eventualis* provided for in the *Stakic Case* Trial Judgment (*supra* note 14), at para 587. ICC PTC I has also underscored in the *Lubanga* case that *dolus eventualis* and advertent recklessness are different notions insofar as (advertent) recklessness 'is not part of the concept of intention.' See *Lubanga Case* Confirmation of Charges (*supra* note 16), at para 355, n 438. See also G. P. Fletcher *Rethinking Criminal Law* (2nd ed, Oxford, Oxford University Press, 2000) 443.

Nevertheless, for some authors, the extended form of joint criminal enterprise could also be applied in situations in which the defendant is not aware that the commission of the foreseeable crimes is a possible consequence of the implementation of the common criminal plan.[73] As long as the defendant is, objectively, in a position to foresee that possibility, it is irrelevant whether he actually foresees it.[74] Accordingly, the extended form of joint criminal enterprise would be applicable as long as it can be shown that a "man of reasonable prudence" in the same position as the defendant would predict that the commission of the foreseeable crimes is a possible consequence of the implementation of the common criminal plan.[75]

In the view of the author, the adoption of this approach would amount to introducing a negligence standard insofar as the defendant would be convicted for breaching his duty to conduct himself with due diligence in analysing the possible consequences of the implementation of the common criminal plan prior to joining it.[76] Although its supporters justify it in light of the need to require particular care from those who enter into common criminal plans,[77] the case law of the *ad hoc* Tribunals has consistently rejected the introduction of any negligence standard.[78]

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73 Cassese *Amicus Curiae* Brief (*supra* note 9), at paras 26–27.

74 *Ibid.*

75 *Ibid.*

76 The standard proposed by the Cassese *Amicus Curiae* Brief (*supra* note 9), at 5.1.1, does not even reach the level of inadvertent recklessness, which resembles to the civil law category of 'gross negligence', insofar as it is based on a 'man of reasonable prudence' or 'average man' standard. See the distinction between inadvertent recklessness (gross negligence) and mere negligence in *Lubanga Case* Confirmation of Charges (*supra* note 16), at para 358.

77 Cassese *Amicus Curiae* Brief (*supra* note 9), at para 82.

78 See *inter alia Stakic Case* Trial Judgment (*supra* note 14), at para 587; *The Prosecutor v Stanislav Galic* (Judgment) ICTY-98-29-T (5 December 2003), paras 54–55; *Brdanin Case* Trial Judgment (*supra* note 26) para 386; *The Prosecutor v Nasser Oric* (Judgment) ICTY-03-68-T (30 June 2006) para 348; and *The Prosecutor v Milan Martic* (Judgment) ICTY-95-11-T (12 June 2007) para 60. Moreover, in the context of command responsibility, the "should have known" standard introduced by *The Prosecutor v Tihomir Blaskic* (Judgment) ICTY-95-14-T (3 March 2000) 332 has been systematically rejected by the Appeals Chambers of the *ad hoc* Tribunals because; according to them, articles 7(3) of the ICTY Statute and 6(3) of the ICTR Statute do not criminalise the superiors' mere lack of due diligence in complying with their duty to be informed of their subordinates' activities. See in this regard, *The Prosecutor v Ignace Bagilishema* (Appeals Chamber Judgment) ICTR-95-01A-A (3 July 2002) paras 35–42; *The Prosecutor v Zejnil Delalic* et al. (Appeals Chamber Judgment)

According to the ICTY Appeals Chamber, the extended form of joint criminal enterprise is applicable to crimes whose definition requires a more stringent general subjective element, such as *dolus directus* in the first degree (specifically aiming at causing the objective elements of the crime), *dolus directus* in the second degree (acceptance of the occurrence of the objective elements of the crime as a necessary consequence of the achievement of one's main purpose) or even *dolus eventualis*.[79] It is also applicable to crimes, such as genocide, which, in addition to the general subjective element, require an additional ulterior intent or *dolus specialis* (i.e., the intent to destroy in whole or in part a national, ethnical, racial or religious group).[80] As a result, a defendant can be convicted for genocide pursuant to the extended

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Footnote 78 continued
ICTY-96-21-A (20 February 2001) para 241; *Krnojelac Case* Appeals Judgment (Above n 24), at para 151; *Blaskic Case* Appeals Judgment (Above n 32), at para 62; *The Prosecutor v Stanislav Galic* (Appeals Chamber Judgment) ICTY-98-29-A (30 November 2006) para 184; *The Prosecutor v Enver Hadzihasanovic and Amir Kubura* (Appeals Chamber Judgment) ICTY-01-47-A (22 April 2008) paras 26–29; *The Prosecutor v Nasser Oric* (Appeals Chamber Judgment) ICTY-03-68-A (3 July 2008) 51; *The Prosecutor v Pavle Strugar* (Appeals Chamber Judgment) ICTY-01-42-A (17 July 2008) para 297.

[79] In the *Stakic* case, the Defence argued on appeal that the notion of joint criminal enterprise could not be used to 'impermissibly enlarge' the general subjective element provided for in the definition of such crimes and that would constitute a violation of the principle of legality. The *Stakic* Case Appeals Judgment (*supra* note 24), at paras 100–101, rejected the Defence claim by merely stating that, insofar as the notion of joint criminal enterprise does not violate the principle of legality because it has been found to be part of customary international law since 1992, its individual components (including the subjective element of the extended form of joint criminal enterprise) do not violate the legality principle either.

[80] See the explanation of the notion of ulterior intent given by Smith & Hogan (*supra* note 18), at 112–113. Particular attention must be paid not to confuse the common law notions of specific intent (which refers to the general subjective element and its equivalent to the civil law notion of *dolus directus* in the first degree) and ulterior intent (which refers to an additional subjective element consisting of a specific purpose that must motivate the commission of the crime and its equivalent to the civil law notion of *dolus specialis*).

form of joint criminal enterprise, even though he did not act with the requisite genocidal intent.[81]

The case law of the *ad hoc* Tribunals has made no distinction concerning the nature of the three forms of joint criminal enterprise. As a result, after the 21 May 2003 ICTY Appeals Chamber Decision on Joint Criminal Enterprise, all three forms of joint criminal enterprise have been consistently considered theories of co-perpetration that give rise to principal liability. Nevertheless, as the *Amicus Curiae* Briefs presented by Ambos and McGill University in the *Duch* case have pointed out, this presents unique problems in relation to the extended form of joint criminal enterprise.[82]

In this regard, it is important to highlight that, under the concept of co-perpetration, an individual can be held criminally liable as a principal to a crime despite the fact that he has not carried out all the objective elements of the crime. This is only possible because the actions or omissions of other individuals are attributed to him/her due to the fact that they all acted in a coordinated manner pursuant to a common plan and that they all shared the intention to have the relevant crime committed.[83]

The situation in an extended form of joint criminal enterprise is different because, in spite of the existence of a common criminal plan: (i) the foreseeable crimes are not part of such plan, as they are only natural and foreseeable consequences of its implementation; and (ii) there is no shared intention among the members of the joint criminal

[81] *Prosecutor v Brdanin* (Decision on Interlocutory Appeal) ICTY-99-36-A (19 March 2004) paras 5–10. See also *Andre Rwamakuba v The Prosecutor* (Appeals Chamber Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide) ICTR-98-44-AR72.4 (22 October 2004) paras 10, 14, 31 [hereinafter *Rwamakuba Case* Decision on the Application of Joint Criminal Enterprise to the Crime of Genocide].

[82] Ambos *Amicus Curiae* Brief (*supra* note 61), at 3.5 and 4.3.3; and McGill *Amicus Curiae* Brief (*supra* note 64), at paras 42 *et seq.* See also generally the problems identified by A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction* (Oxford, OUP, 2007), pp. 221–257; and M. Boot, *Genocide, Crimes against Humanity and War Crimes: Nullum Crimen Sine Lege and Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen, Intersentia, 2002), pp. 288–304; Ohlin, *supra* note 28, at 69 et seq; and van Sliedregt, *supra* note 31, at 184 et seq. This has prompted some strong supporters of the notion of joint criminal enterprise to caution against its overbroad application. See A. Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 Journal of International Criminal Justice 109 (2007).

[83] *Lubanga* Case Confirmation of Charges (*supra* note 16), at para 326; and *Katanga and Ngudjolo Case* Confirmation of Charges (*supra* note 6), at para 520.

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enterprise to have such crimes committed. All that is required is that the defendant himself (and nobody else) perceives the commission of the said crimes by one of the members of the joint criminal enterprise as a 'possible consequence' of implementing the common criminal plan. Whether the other members of the enterprise also foresee such possibility and jointly take the risk is irrelevant.

As a result, the defendant cannot be attributed the actions or omissions of those other members of the enterprise who complete the objective elements of the foreseeable crimes. In this regard, Ambos has explained in its *Amicus Curiae* Brief:

> 'The conflict of JCE III with the principle of culpability is obvious. If, according to JCE III, *all* members of a criminal enterprise incur criminal responsibility even for criminal acts by *some* members which have not been agreed upon by all members before the actual commission but are, nonetheless, attributed to all of them on the basis of foreseeability, the previous agreement or plan of the participants as the basis of reciprocal attribution and, thus, a general principle in the law of co-perpetration is abolished. The existence of causality between the initial agreement or plan and the criminal excess does not overcome the deficit of culpability'.[84]

Portraying the extended form of joint criminal enterprise as a theory of co-perpetration that gives rise to principal liability, as the case law of the *ad hoc* Tribunals has done since 2003, poses some additional problems if one intends to apply it to (i) crimes whose definition requires a more stringent general subjective element and (ii) crimes requiring an additional ulterior intent or *dolus specialis*.[85]

In particular, in relation to the crime of genocide, van Sliedregt has pointed out that, where the defendant does not act with a genocidal intent, but is aware of the possibility that some of the other participants in the enterprise may do it, he cannot be considered a principal (co-perpetrator) to the crime. As a result, only if the extended form of joint criminal enterprise is a theory of accessorial liability, can it be applicable to the crime of genocide.[86]

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[84] Ambos *Amicus Curiae* Brief (*supra* note 61), at 3.5.

[85] See McGill *Amicus Curiae* Brief (*supra* note 64), at para 49; and Ambos *Amicus Curiae* Brief (*Ibid*), at 3.5.

[86] van Sliedregt, *supra* note 31, at 281–285. In order to justify the application of the extended form of joint criminal enterprise to genocide, van Sliedregt has affirmed that it is a theory of accessorial liability to which the principles of derivative liability apply. She reaches her conclusion in light of the following two premises: (i) the notion of joint criminal enterprise as elaborated by the case law of the *ad hoc* Tribunals is rooted in the common purpose doctrine applied in common law jurisdictions and in post WW II cases; and (ii) common law jurisdictions and post WW II

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In response to these concerns, those authors who support the development of the extended form of joint criminal enterprise as a theory of co-perpetration that gives rise to principal liability, focus their discourse on 'policy arguments'. In this regard, Cassese has underscored in its *Amicus Curiae* Brief:

'As to the foundation as the very *raison d'etre* of JCE 3, it bears noting that this mode of responsibility is founded in considerations of public policy—the need to protect society against persons who band together to engage in criminal enterprises and who persist in their criminal conduct though they foresee that more serious crimes outside the common enterprise may be committed. [...] Finally, any fear of abuse in applying JCE liability is mitigated at the international level because (i) international trials are predicated on full respect of the rights of the accused; this entails that the defendant may bring elements to show that he could not possible foresee the extra crime (and he would thus not be culpable for it); (ii) international and hybrid tribunals, professional judges, capable of exercising care and prudence, determine whether the culpability of the offender is proved beyond a reasonable doubt'.[87]

However, in the author's view, these policy arguments do not address any of the above-mentioned concerns based on the legality and culpability principles. Indeed, the relevance of these concerns is such, that the drafters of the ICC Statute excluded any form of criminal liability somewhat akin to the extended form of joint criminal enterprise from the realm of article 25(3)(d). This is the result of requiring under this provision that the relevant contribution be carried out, at the very least, "in the knowledge of the intention of the group to commit the crime".[88] As a consequence, no criminal liability arises under article 25(3)(d) of the ICC Statute in relation to those crimes which are not intended by the group, and are only a possible consequence of effecting the group's common plan.[89] This exclusion was made despite the fact that article 25(3)(d) of the ICC Statute only

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Footnote 86 continued
cases have never regarded the common purpose doctrine as a theory of co-perpetration giving rise to principal liability; quite the contrary, they considered it as a theory of partnership in crime of accomplice liability. See van Sliedregt (*supra* note 31) 201 to 205. See also McGill *Amicus Curiae* Brief (*Ibid*), at paras 50–51; and Ambos *Amicus Curiae* Brief (*Ibid*), at 3.5.

[87] Cassese *Amicus Curiae* Brief (*supra* note 9), at 5.3.2.

[88] Concurring, Fletcher and Ohlin, *supra* note 63, at 549.

[89] *Ibid.*

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includes a 'residual form of accessorial liability' (as opposed to a theory of co-perpetration or principal liability).[90]

V CONCLUSION

The *amici curiae* written briefs recently submitted in the *Duch* case have shown that those issues relating to the nature and customary status of the notion of joint criminal enterprise are far from being settled. The attempt by the case law of the *ad hoc* Tribunals, after the 21 May 2003 ICTY Appeals Chamber Decision on Joint Criminal Enterprise, to alter the nature of the overall notion of joint criminal enterprise has, to a very important extent, contributed to this situation.

As discussed in section 3(b) above, such a notion, traditionally conceived as a notion of partnership in crime or accomplice liability in a common law sense, has been portrayed in the last 5 years by the said case law as a theory of co-perpetration giving rise to principal liability on the sole basis of the analysis made by the *Tadic Case* Appeals Judgment back in 1999, at a time in which the *ad hoc* Tribunals case law had not yet clearly adopted the distinction between principal and accessorial liability and still understood the notion of joint criminal enterprise according to its traditional definition.

Furthermore, as discussed in Sect. 4 above, the case law of the *ad hoc* Tribunals has made no distinction as to the nature of all three forms of joint criminal enterprise. As a result, since 2003, such case law has (i) portrayed the extended form of joint criminal enterprise as a theory of co-perpetration; and (ii) upheld its application to crimes whose definition requires a more stringent general subjective element, as well as to ulterior intent or *dolus specialis* crimes.

This attempt to alter the situation existing in 1998, when the ICC Statute was approved has led to the current manifest dichotomy between the case law of the ICC and that of the *ad hac* Tribunals on this matter, as well as to several insurmountable problems in the application of the extended form of joint criminal enterprise in the case law of the *ad hoc* Tribunals.

[90] *Lubanga Case* Confirmation of Charges (*supra* note 16), at para 337; and *Katanga and Ngudjolo Case* Confirmation of Charges (*supra* note 6), at para 483. See also Werle, *supra* note 33, at 212–213; and Ambos, *Article 25*, *supra* note 58, at 478–480.

In the author's view, this unsatisfactory scenario would be significantly ameliorated if the focus were shifted from the last 5 years' attempt to alter the nature of the notion of joint criminal enterprise to the application of such notion in accordance with its widely accepted traditional definition.